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## PART ONE. PHYSICAL AND EMOTIONAL HARMs

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SECTION A. INTRODUCTION

It is best to begin our study of tort law with intentional harms. At first blush, these torts are the easiest to comprehend, because no one believes that any society can survive if all of its individual members are free to harm strangers whenever they wish to do so. But even though most people think they understand a punch in the nose, it is only on reflection that most of us appreciate that punches in the nose come in all sizes and shapes. Intuitively, the need for legal redress is strongest for the deliberate injuries examined in this chapter. However, conceptual and practical complications immediately arise. First, the law often distinguishes between the intent to commit an act that causes harm and the intent to cause the harm itself. Why and how is this distinction important? How does the tort conception of intention differ from the concept of mens rea (the guilty mind) found in the criminal law? Second, once the plaintiff has established her prima facie case for liability, what excuses and justifications are available to the defendant, and what exceptions to them are available to the plaintiff?

The intentional infliction of harm has traditionally covered a curious range of interests. Most obviously, the law guards against physical harm to person or property. It also protects people against forcible dispossession of their land and against the taking, or conversion, of their personal property. Finally, it extends its protection against assaults, defined as threats to use force against the person, and (somewhat more haltingly) to affronts to personal dignity and emotional tranquility. The first half of the chapter discusses physical harms, which include the torts of battery (or trespass to the person) and trespass to real property. In addition, it examines the full range of defenses based on consent, insanity, defense of person and
property, and necessity. The second half of the chapter examines the torts designed to protect dignitary or emotional interests: assault and offensive battery, false imprisonment, and the intentional infliction of emotional distress, as well as the interplay between the plaintiff’s prima facie case and the available defenses.

SECTION B. PHYSICAL HARMS

1. Trespass to Person and Land

Vosburg v. Putney
50 N.W. 403 (Wis. 1891)

The action was brought to recover damages for an assault and battery, alleged to have been committed by the defendant upon the plaintiff on February 20, 1889. The answer is a general denial. At the date of the alleged assault the plaintiff was a little more than fourteen years of age, and the defendant a little less than twelve years of age.

The injury complained of was caused by a kick inflicted by defendant upon the leg of the plaintiff, a little below the knee. The transaction occurred in a schoolroom in Waukesha, during school hours, both parties being pupils in the school. A former trial of the cause resulted in a verdict and judgment for the plaintiff for $2,800. The defendant appealed from such judgment to this court, and the same was reversed for error, and a new trial awarded.

[A more complete statement of the facts is found in the opinion by Orton, J., 47 N.W. 99, 99 (Wis. 1890), on the initial appeal to the Wisconsin Supreme Court: “The plaintiff was about 14 years of age, and the defendant about 11 years of age. On the 20th day of February, 1889, they were sitting opposite to each other across an aisle in the high school of the village of Waukesha. The defendant reached across the aisle with his foot, and hit with his toe the shin of the right leg of the plaintiff. The touch was slight. The plaintiff did not feel it, either on account of its being so slight or of loss of sensation produced by the shock. In a few moments he felt a violent pain in that place, which caused him to cry out loudly. The next day he was sick, and had to be helped to school. On the fourth day he was vomiting, and Dr. Bacon was sent for, but could not come, and he sent medicine to stop the vomiting, and came to see him the next day, on the 25th. There was a slight discoloration of the skin entirely over the inner surface of theibia an inch below the bend of the knée. The doctor applied fomentations, and gave him anodynes to quiet the pain. This treatment was continued, and
the swelling so increased by the 5th day of March that counsel was called, and on the 8th of March an operation was performed on the limb by making an incision, and a moderate amount of pus escaped. A drainage tube was inserted, and an iodoform dressing put on. On the sixth day after this, another incision was made to the bone, and it was found that destruction was going on in the bone, and so it has continued exfoliating pieces of bone. He will never recover the use of his limb. There were black and blue spots on the shin bone, indicating that there had been a blow. On the 1st day of January before, the plaintiff received an injury just above the knee of the same leg by coating, which appeared to be healing up and drying down at the time of the last injury. The theory of at least one of the medical witnesses was that the limb was in a diseased condition when this touch or kick was given, caused by microbes entering in through the wound above the knee, and which were revivified by the touch, and that the touch was the exciting or remote cause of the destruction of the bone, or of the plaintiff's injury. It does not appear that there was any visible mark made or left by this touch or kick of the defendant's foot, or any appearance of injury until the black and blue spots were discovered by the physician several days afterwards, and then there were more spots than one. There was no proof of any other hurt, and the medical testimony seems to have been agreed that this touch or kick was the exciting cause of the injury to the plaintiff. The jury rendered a verdict for the plaintiff of $2,800. The learned circuit judge said to the jury: 'It is a peculiar case, an unfortunate case, a case, I think I am at liberty to say that ought not to have come into court. The parents of these children ought, in some way, if possible, to have adjusted it between themselves.' We have much of the same feeling about the case."

The case has been again tried in the circuit court, and the trial resulted in a verdict for plaintiff for $2,500...

On the last trial the jury found a special verdict, as follows: "(1) Had the plaintiff during the month of January, 1889, received an injury just above the knee, which became inflamed, and produced pus? Answer: Yes. (2) Had such injury on the 20th day of February, 1889, nearly healed at the point of the injury? A. Yes. (3) Was the plaintiff, before said 20th of February, lame, as the result of such injury? A. No. (4) Had the tibia in the plaintiff's right leg become inflamed or diseased to some extent before he received the blow or kick from the defendant? A. No. (5) What was the exciting cause of the injury to the plaintiff's leg? A. Kick. (6) Did the defendant, in touching the plaintiff with his foot, intend to do him any harm? A. No. (7) At what sum do you assess the damages of the plaintiff? A. $2,500."

The defendant moved for judgment in his favor on the verdict, and also for a new trial. The plaintiff moved for judgment on the verdict in his favor. The motions of defendant were overruled, and that of the plaintiff granted.
Thereupon judgment for plaintiff for $2,500 damages and costs of suit was duly entered. The defendant appeals from the judgment.

Lyon, J. The jury having found that the defendant, in touching the plaintiff with his foot, did not intend to do him any harm, counsel for defendant maintain that the plaintiff has no cause of action, and that defendant’s motion for judgment on the special verdict should have been granted. In support of this proposition counsel quote from 2 Greenl. Ev. §83, the rule that “the intention to do harm is of the essence of an assault.” Such is the rule, no doubt, in actions or prosecutions for mere assaults. But this is an action to recover damages for an alleged assault and battery. In such case the rule is correctly stated, in many of the authorities cited by counsel, that plaintiff must show either that the intention was unlawful, or that the defendant is in fault. If the intended act is unlawful, the intention to commit it must necessarily be unlawful. Hence, as applied to this case, if the kicking of the plaintiff by the defendant was an unlawful act, the intention of defendant to kick him was also unlawful.

Had the parties been upon the playgrounds of the school, engaged in the usual boyish sports, the defendant being free from malice, wantonness, or negligence, and intending no harm to plaintiff in what he did, we should hesitate to hold the act of the defendant unlawful, or that he could be held liable in this action. Some consideration is due to the implied license of the play-grounds. But it appears that the injury was inflicted in the school, after it had been called to order by the teacher, and after the regular exercises of the school had commenced. Under these circumstances, no implied license to do the act complained of existed, and such act was a violation of the order and decorum of the school, and necessarily unlawful. Hence we are of the opinion that, under the evidence and verdict, the action may be sustained.

Certain questions were proposed on behalf of defendant to be submitted to the jury, founded upon the theory that only such damages could be recovered as the defendant might reasonably be supposed to have contemplated as likely to result from his kicking the plaintiff. The court refused to submit such questions to the jury. The ruling was correct. The rule of damages in actions for torts was held [in a prior case] to be that the wrong-doer is liable for all injuries resulting directly from the wrongful act, whether they could or could not have been foreseen by him. The chief justice and the writer of this opinion dissented from the judgment in that case, chiefly because we were of the opinion that the complaint stated a cause of action ex contractu [out of contract], and not ex delicto [out of tort], and hence that a different rule of damages—the rule here contended for—was applicable. We did not question that the rule in actions for tort was correctly stated. That case rules this on the question of damages.

[Judgment was reversed, and the case was remanded for a new trial because of error in a ruling on an objection to certain testimony.]
NOTES

1. Centennial celebrity. For well over 100 years, Vosburg has remained one of the most storied cases in American law. In Vosburg v. Putney: A Centennial Story, 1992 Wis. L. Rev. 877, Professor Zile probes every aspect of its social setting, legal proceedings, and aftermath. Zile relates the newspaper publicity, the spate of low-level criminal proceedings in justice court brought against the defendant, the possible medical malpractice action lurking in the background, and the political overtones under the incessant glare of newspaper publicity. The plaintiff, Andrew Vosburg, was a sickly boy from an ordinary farming background, whereas the defendant, George Putney, was the scion of a wealthy and prominent Wisconsin family whose ancestors arrived in Massachusetts in 1637. The Wisconsin Law Review volume also features shorter pieces by Henderson (at 853), Rabin (at 863), and Hurst (at 875).

2. Defendant’s intention and plaintiff’s conduct. Which, if any, of the jury’s answers to the first six questions may be incorrect in light of the medical evidence? Given the jury’s response to the sixth question, can the defendant’s act be treated as an intentional tort? Does it make a difference that the teacher had already called the class to order when the kick landed? If the pupils typically tapped each other on the leg under the desk to get each other’s attention after the class had been called to order, should defendant’s act be excused by the “implied license of the classroom”? Should a defendant’s actual malice, wantonness, or negligence be treated the same way for playground injuries? Should plaintiff have worn a shin guard to protect his leg from further injury? Should he have stayed home from school?

3. Whither “unlawful” intent? In Garratt v. Dailey, 279 P.2d 1091 (Wash. 1955), and 304 P.2d 681 (Wash. 1956), the plaintiff, an adult woman, brought a battery suit against Brian Dailey, a boy five years and nine months old, who caused her fractured hip when he was a guest in her backyard. Sharp-factual disputes required two trials and two appellate decisions to resolve. The defendant claimed that he had tried to help the plaintiff by placing a chair under her as she was about to fall, but that he was too small to move it into place. His version was accepted by the trial judge at the first trial. However, the plaintiff’s sister, who was present at the occasion, testified that the plaintiff, an “arthritis woman had begun the slow process of being seated when the defendant quickly removed the chair and seated himself upon it, and that he knew, with substantial certainty at the time, that she would attempt to sit in the place where the chair had been.”

On appeal from the first judgment, 279 P.2d 1091, 1093–1094, the Washington Supreme Court addressed the issue of intent in the tort of battery:
1. Intentional Harms: The Prima Facie Case and Defenses

It is urged that Brian's action in moving the chair constituted a battery. A definition (not all-inclusive but sufficient for our purpose) of a battery is the intentional infliction of a harmful bodily contact upon another...

We have here the conceded volitional act of Brian, i.e., the moving of a chair. Had the plaintiff proved to the satisfaction of the trial court that Brian moved the chair while she was in the act of sitting down, Brian's action would patently have been for the purpose or with the intent of causing the plaintiff's bodily contact with the ground, and she would be entitled to a judgment against him for the resulting damages. Vosburg v. Putney...

A battery would be established if, in addition to plaintiff's fall, it was proved that, when Brian moved the chair, he knew with substantial certainty that the plaintiff would attempt to sit down where the chair had been...

The mere absence of any intent to injure the plaintiff or to play a prank

...the trial court...remand the trial judge accepted the testimony of the plaintiff's sister, and awarded the plaintiff $11,000. That judgment was upheld on the second appeal. Is removing a chair tantamount to striking the plaintiff?

4. The Restatement account of battery intention. The common law of torts has been "codified" in the Restatement of Torts [RT]. The original version of this influential work was published in 1934 by the American Law Institute. It was prepared by a large and distinguished team of judges, practicing lawyers, and academics, with Professor Francis H. Böhlen as its chief reporter. The Restatement, as its name implies, emphasizes "restating" rather than "reforming" the law, but interstitial reform often occurs whenever the law is in flux or some conflict persists among the various states.

The Restatement (Second) of Torts [RST] appeared in four volumes, published between 1965 and 1979. The first 280 sections of the Second Restatement are devoted to every aspect of intentional torts. In contrast with the RST, the Restatement (Third) of Torts [RFT] has not been organized as a unified project. Instead, different volumes of the RFT dealing with discrete topics have been released at different times. At present, the major volume dealing with physical harms is the Restatement (Third) of Torts: Liability for Physical and Emotional Harm [RFT:PLEH]. The material on intentional harms addresses the definitions of both intention and its close cousin recklessness. At this point, the American Law Institute, which takes responsibility for the preparation of these volumes, has not yet decided to embark on a comprehensive reworking of the topic that covers the wide range of issues raised in the RST. For a discussion of the possibilities and pitfalls of a comprehensive RFT, see Sublick, A Restatement (Third) of Torts: Liability for Intentional Harm to Persons—Thoughts, 44 Wake Forest L. Rev. 1335 (2009).
For the present, it is instructive to compare the definitional provisions of the RST with those of the RTT. The RST account of battery reads as follows:

§13. BATTERY: HARMFUL CONTACT
An actor is subject to liability to another for battery if
(a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person; or an imminent apprehension of such a contact, and
(b) a harmful contact with the person of the other directly or indirectly results.

How does this definition square with the results in Vosburg and Garratt? The Second Restatement uses the term intention "to denote that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it." RST §8A.

The RTT: LPEH offers this alternative:

§1. INTENT
A person acts with the intent to produce a consequence if:
(a) the person acts with the purpose of producing that consequence; or,
(b) the person acts knowing that the consequence is substantially certain to result.

It is important to note the interaction between parts (a) and (b) of this definition. Illustration 2 provides:

Wendy throws a rock at Andrew, someone she dislikes, at a distance of 100 feet, wanting to hit Andrew. Given the distance, it is far from certain Wendy will succeed in this; rather, it is probable that the rock will miss its target. In fact, Wendy's aim is true, and Andrew is struck by the rock. Wendy has purposely, and hence intentionally, caused this harm.

What result if Wendy does not dislike or even know Andrew?

Note also that the Second Restatement approves of the result in Vosburg, which it describes as follows: "Intending an offensive contact, A lightly kicks B on the shin." RST §16, comment a, illus. 1. Did the court in Vosburg treat the case as one of offensive battery?

Although the Restatement provisions are powerful authority, sometimes courts reject them. In White v. University of Idaho, 797 P.2d 108 (Idaho 1990), the defendant Neher, a music professor, was a social guest in the house of the plaintiff, one of his piano students. While she was writing, "Professor Neher walked up behind her and touched her back with both of his hands in a movement later described as one a pianist would make in striking and lifting the fingers from a keyboard." The plaintiff claimed she
suffered a strong reaction, which necessitated the removal of a rib, and damage to her brachial plexus nerve that required the severing of her scalenus anterior muscles. The professor claimed he touched Mrs. White to show her the sensation of certain forms of playing, but meant no harm. She countered that the touching was nonconsensual. The court held that she stated a valid claim for battery even though the defendant had not meant to either harm or offend her. The court brushed aside any attempt to incorporate the requirement of offensive intent, noting curtly "we have not previously adopted the Restatement (Second) in Idaho and decline any invitation to do it now."

Another variation in the mental element in battery is found in Wagner v. Utah, 122 P.3d 599, 601–602 (Utah 2005), in which the court held that a mentally impaired man could commit battery when he attacked another person "without reason," because the only required mental state was the intention to make contact with the plaintiff, not the intention to cause harm. "A person need not intend to cause harm or appreciate that his contact will cause harm so long as he intends to make a contact, and that contact is harmful." The opposite view on that question was taken in White v. Muniz, 999 P.2d 814 (Colo. 2000), in which a mentally disabled Alzheimer’s patient was sued for assaulting and battering her caregiver. There the court held that Colorado law "requires the jury to conclude that the defendant both intended the contact and intended it to be harmful or offensive." See McGuire v. Almy, infra at 28.

5. Transferred intent. In Talmage v. Smith, 59 N.W. 656 (Mich. 1894), the plaintiff was struck in the eye by a stick that the defendant threw at two of the plaintiff’s companions while they were trespassing upon the defendant’s property. The defendant asserted that he did not see the plaintiff, much less intend to hurt him. The court held this contention immaterial: "The right of the plaintiff to recover was made to depend upon an intention on the part of the defendant to hit somebody, and to inflict an unwarranted injury upon someone. Under these circumstances, the fact that the injury resulted to another than was intended does not relieve the defendant from responsibility." Does it matter whether the injured plaintiff was trespassing on defendant’s property?

See generally Prosser, Transferred Intent, 45 Tex. L. Rev. 650 (1967).

6. Battery by smoke. The question of intention in battery took a novel form in Shaw v. Brown & Williamson Tobacco Corp., 973 F. Supp. 539, 548 (D. Md. 1997). The plaintiff truck driver, a non-smoker, shared his cab with a heavy Raleigh smoker, and developed lung cancer as a result. His claim for battery for secondhand smoke inhalation against the tobacco company was rejected for its failure to allege sufficient intent:

Williamson did not know with a substantial degree of certainty that secondhand smoke would touch any particular non-smoker. While it may have had
knowledge that second-hand smoke would reach some non-smokers, the Court finds that such generalized knowledge is insufficient to satisfy the intent requirement for battery. Indeed, as defendant points out, a finding that Brown & Williamson has committed a battery by manufacturing cigarettes would be tantamount to holding manufacturers of handguns liable in battery for exposing third parties to gunfire. Such a finding would expose the courts to a flood of farfetched and nebulous litigation concerning the tort of battery. It is unsurprising that neither plaintiffs nor the Court have been able to unearth any case where a manufacturer of cigarettes or handguns was found to have committed a battery against those allegedly injured by its products.

With Shaw, contrast Leichtman v. WLW Jacor Communications, Inc., 634 N.E.2d 697, 699 (Ohio App. 1994), which involved a radio host who intentionally blew smoke in the face of an anti-smoking Advocate whom he had on his radio program on the date of the Great American Smokeout (held annually by the American Cancer Society). A per curiam (unsigned) opinion held that the defendant intended to cause harmful contact, and thus was liable for battery. “No matter how trivial the incident, a battery is actionable, even if damages are only one dollar.” The court then limited its holding by adding, “We do not, however, adopt or lend credence to the theory of a ‘smoker’s battery,’ which imposes liability if there is substantial certainty that exhaled smoke will predictably contact a non-smoker.”

Dougherty v. Stepp
18 N.C. 371 (1835)

This was an action of trespass quare clausum fregit [wherefore he broke the close], tried at Buncombe on the last Circuit, before his Honor Judge MARTIN. The only proof introduced by the plaintiff to establish an act of trespass, was, that the defendant had entered on the unenclosed land of the plaintiff, with a surveyor and chain carriers, and actually surveyed a part of it, claiming it as his own, but without marking trees or cutting bushes. This, his Honor held not to be a trespass, and the jury, under his instructions, found a verdict for the defendant, and the plaintiff appealed.

RUFFIN, C.J. In the opinion of the Court, there is error in the instructions given to the jury. The amount of damages may depend on the acts done on the land, and the extent of injury to it therefrom. But it is an elementary principle, that every unauthorised, and therefore unlawful entry, into the close of another, is a trespass. From every such entry against the will of the possessor, the law infers some damage; if nothing more, the treading down the grass or the herbage or as here, the shrubbery. Had the locus in quo been under cultivation or enclosed, there would have been no doubt of the plaintiff’s right to recover. Now our Courts have for a long time past held, that if there be no adverse possession, the title makes the land the owner’s