CHAPTER 1

INTENTIONAL HARMS: THE PRIMA FACIE CASE AND DEFENSES

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 society can survive the war of all against all that would necessarily arise if all of its individual members were free to deliberately kill and maim each other whenever they chose. Intuitively, then, controlling deliberate injuries is the first order of business for any viable society. However, conceptual and practical complications immediately arise about how this is best done, given the wide number of different mental states that can accompany a punch in the nose. 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 that distinction important? How does the tort conception of intent differ from the criminal conception of *mens rea* (the guilty mind)? Second, once the plaintiff has established her prima facie case, what excuses and justifications are available to the defendant to defeat or diminish liability, and to what qualifications are they subject?

Intentional torts have traditionally covered a wide 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, even if not acted on, of the use of force against the person) and (somewhat more haltingly) to affronts to personal dignity and emotional tranquility. The first part of this 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, mental disability, defense of person and property, and necessity. The second part 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 earlier 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 the tibia an inch below the bend of the knee. 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 coasting, 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 Greenleaf Evidence §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 play-grounds 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 [prior] 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. Vosburg v. Putney: The backstory and aftermath. For over 125 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 the legal proceedings and their social setting. 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 had arrived in Massachusetts in 1637. Zile further describes the newspaper publicity surrounding the case, its political overtones, the low-level criminal proceedings in justice court brought against the defendant, and the possible medical malpractice action lurking in the background.

And what happened to Andrew Vosburg and George Putney after that fateful encounter at the schoolhouse? Putney finished his education at Union School, graduated from high school, enrolled at University of Wisconsin, but left during sophomore year. He returned to Waukesha, clerked at his family's general store, got married, moved to Milwaukee, and eventually became a salesman, first of clothing, then of cars. He died on June 13, 1940. Andrew Vosburg, in 1900, was hired by the Milwaukee Electric Railroad, rose to foreman, married, had three children, and, along with his wife, made a living buying, refurbishing, and selling homes. Although a laced leather brace limited his activities, he otherwise led a satisfying life and died on October 4, 1938, at 64.

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 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, and negligence all be treated the same way for either playground or classroom 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 to fracture her 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 properly 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 "arthritic 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:

> 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 on her or to embarrass her, or to commit an assault and battery on her would not absolve him from liability if in fact he had such knowledge. Without such knowledge, there would be nothing wrongful about Brian's act in moving the chair and, there being no wrongful act, there would be no liability.

On 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 intention in battery cases. The common law of torts was first "codified" in the Restatement of Torts [RT], which was published in 1934 by the American Law Institute [ALI], an organization founded in 1923. The Restatement of Torts was prepared by a large and distinguished team of judges, practicing lawyers, and academics. Professor Francis H. Bohlen served 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. Its first 280 sections scrutinize every aspect of intentional torts.

In contrast, the Restatement (Third) of Torts [RTT] has not been organized as a unified project. Instead, different volumes of the RTT 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 [RTT: LPEH] (2010 and 2012). The other finished volumes, to date, include Apportionment of Liability (2000) (Reporters William Powers, Jr. and Michael Green) and Products Liability (Reporters James Henderson and Aaron Twerski). A further volume, Liability for Economic Harm (Reporter Ward Farnsworth), was approved for publication by the ALI in 2018. Portions of the draft of a fifth volume, Intentional Torts to Persons (Reporter Kenneth Simons), were approved at the 2015 Annual Meeting of the ALI.

It is instructive to compare the definitional provisions of the RST with those of the RTT. How does the RST square with the results in *Vosburg* and *Garratt*? The Restatement uses the term "intent" "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; RTT: LPEH §1. Note also that both the Second and Third Restatements approve of the result in *Vosburg*, which the former 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? Compare the analysis of the RST and RTT on the definition of battery.

Restatement of the Law (Second) of Torts

§13. BATTERY: HARMFUL CONDUCT

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.

Restatement of the Law (Third) of Torts: Intentional Torts to Persons

§1. BATTERY: GENERAL DEFINITION

An actor is subject to liability to another for battery if:

(a) The actor intends to cause a contact with the person of the other, as provided in §2, or the actor's intent is sufficient under §11 (transferred intent);

(b) The actor's affirmative conduct causes such a contact;

(c) The contact (i) causes bodily harm to the other or (ii) is offensive, as provided in §3; and

(d) the other does not effectively consent to the otherwise tortious conduct of the actor, as provided in §12.

Restatement of the Law (Third) of Torts: Intentional Torts to Persons (Tentative Draft No. 3, Apr. 6, 2018)

§2. BATTERY: REQUIRED INTENT

The intent required for battery is the intent to cause a contact with the person of another. The actor need not intend to cause harm or offense to the other.

Comment b. Single intent v. dual intent: . . . The single-intent approach affords greater protection to the plaintiff's interest in bodily integrity, and can be understood as imposing a modest degree of strict liability, insofar as the actor is liable although he might have genuinely and even reasonably believed

that the contact he caused would not cause harm or offense. By contrast, the dual-intent approach is more consistent with the view that liability for battery should exist only when the actor is especially culpable—and in particular, more culpable than a negligent or strictly liable actor. . . .

Illustration 2: Stephanie approaches Carol, a new coworker in her office, from behind. "You look tense!" Stephanie declares, and immediately begins giving Carol a vigorous neck massage. When Carol objects, Stephanie promptly ends the massage. The massage injures Carol's neck and requires her to miss several weeks of work. Stephanie is subject to liability to Carol for battery.

Restatement of the Law (Third) of Torts: Liability for Physical and Emotional Harm

§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.

Illustration 2: 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.

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 adverse 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 either to harm or to offend her. The court brushed aside any attempt to incorporate the requirement of offensive intent, noting curtly that

"we have not previously adopted the Restatement (Second) in Idaho and decline any invitation to do it now." Given that the University had immunity from suits arising out of intentional torts committed by its employees, the court's battery holding amounted to a finding of no liability on the part of the University. The Restatement (Third) of Torts: Intentional Torts has embraced *White*'s "single intent" standard. See RTT: IT §102.

5. Transferred intent. In Talmage v. Smith, 59 N.W. 656, 657 (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? This doctrine is now incorporated in RTT: Intentional Torts, §11(a), which holds that intent "is satisfied if the actor intends to cause the relevant tortious consequence to a third party, rather than the plaintiff." Prosser, Transferred Intent, 45 Tex. L. Rev. 650 (1967), claimed that transferred intent was part of the tort law from as early as 1869, a conclusion rejected in Kutner, The Prosser Myth of Transferred Intent, 91 Ind. L.J. 1105, 1106 (2016). Professor Kutner claimed that Prosser "advanced a mythical doctrine of transferred intent" that, as an odd and undesirable consequence, would allow a person who sought to commit one of the following five torts: "battery, assault, false imprisonment, trespass to chattels, or trespass to land[,] if the person's intent was to cause any one of these five torts." Why is that result undesirable?

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