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 to both the person and property. 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 everyone were free to deliberately kill and maim everyone else whenever they chose. Intuitively, then, controlling deliberate injuries—stopping a Hobbesian war of all against all—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, say, punching someone in the nose. First, the law often distinguishes between the intent to commit an act that inadvertently causes harm and the intent to cause the harm itself. Why is that distinction important? How does the tort conception of intent differ, if at all, 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 his liability, and to what further qualifications are they subject?

Intentional torts have traditionally covered a wide range of interests. Most obviously, the law guards against physical harm to one's person. It also protects people against forcible dispossession, destruction, or damage to their land and against the taking, or conversion, of their personal property by another. Finally, the law extends its protection to imminent threats of the use of force against the person, known as assault, and to affronts to personal dignity and emotional tranquility, the latter more haltingly.

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.

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 [$93,343 in 2023 dollars]. 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. [After further difficult surgeries it became clear that] 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 . . . [$83,342 in 2023 dollars].

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 is reversed, and the case is remanded for a new trial because of a separate error in a ruling on an objection to certain testimony.]

NOTES

1. ***Vosburg v. Putney: The Backstory and Aftermath.*** For over 130 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 Zigurds 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 the 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. 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 led a satisfying life and died on October 4, 1938, at age 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 the 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 the 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, 1093–94 (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. 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 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."

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. . . .
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> 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 [$124,520 in 2023 dollars]. 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], 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. The major volume dealing with physical harms is the Restatement (Third) of Torts: Liability for Physical and Emotional Harm [RTT: LPEH] (2010 and 2012). Additional finished volumes, to date, include Apportionment of Liability (2000) (Reporters William Powers, Jr. and Michael Green); Products Liability (1998) (Reporters James Henderson and Aaron Twerski); and Liability for Economic Harm (2018) (Reporter Ward Farnsworth). Portions of the draft of a fifth volume, Intentional Torts to Persons [RTT: IT] (Tentative Draft 2021) (Reporter Kenneth Simons) have been released. Projects on Remedies (Reporter Douglas Laycock) and Miscellaneous Provisions (Reporters Nora Engstrom and Michael Green) are underway.

It is instructive to compare the definitional provisions of the Second Restatement with those of the Third Restatement. How does the RST square with *Vosburg* and *Garratt?* Both Restatements embrace a "dual definition" of "intent" that includes where "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.

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.

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 incident as one of

offensive battery in light of special verdict number six? Compare the analysis of the RST and RTT on the definition of battery and the distinction between "single" and "dual intent."

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 (TENTATIVE DRAFT, APPROVED 2021)

§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; and

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

§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.

However influential, the Second Restatement position is rejected by some courts. In White v. University of Idaho, 797 P.2d 108 (Idaho 1990), the defendant Neher, a music professor, was a social guest in the home of the plaintiff, one of his piano students. While the plaintiff 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 accepted her battery claim even though the defendant had not meant either to harm or to offend her. The court brushed aside any attempt to require offensive intent, noting curtly that "we have not previously adopted the Restatement (Second) in Idaho and decline any invitation to do it now." Does the Second Restatement test necessarily entail "dual intent"? How does *White* comport with the Third Restatement?

Dual intent fared better in McElhaney v. Thomas, 405 P.3d 1214, 1216, 1221 (Kan. 2017), where a high school student was injured when another student drove his truck over her feet, momentarily trapping her. In response to her suit for battery, the defendant claimed that he only wanted to come close to the plaintiff to park. A third-party witness said he heard the defendant say that "he only meant to bump into Emma [McElhaney] with his truck." On appeal, Stegall, J., followed the dual intent standard and left it on remand for the jury to decide whether "an intent to bump" was an intent to harm. What should be done with "the nebulous concept of horseplay" in the background in this case?

5. ***Battery on the Internet.*** The law of battery has been extended to online actions that model forms of physical attacks. In Eichenwald v. Rivello, 318 F. Supp. 3d 766, 775 (D. Md. 2018), the plaintiff, who suffered from chronic epilepsy, was a well-known journalist with anti-Trump views. He received a tweet from the defendant, which "included (and immediately displayed) a Graphic Interchange Format ('GIF')" that contained "an animated strobe image flashing at a rapid speed." In addition to the flashing images, the GIF contained the message "YOU DESERVE A SEIZURE FOR YOUR POSTS." Upon seeing the rapidly flashing GIF, the "[p]laintiff suffered a severe seizure." The defendant was first subject to criminal prosecution, after which the plaintiff brought a suit for battery under Texas law, which adopts the dual definition of intent. Bredar, C.J., concluded:

> Defendant here allegedly chose to use the electronic capabilities of a computer as a weapon—as a means of causing physical harm. Defendant's tweet, activating certain harmful capabilities of the transmitting computer, converted the computer into a weapon to inflict physical injury. The computer and the tweet were no longer merely a mode of communication. Something more, and separate, from mere communication occurred[:] . . . an offensive touching.

6. ***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 the plaintiff's two 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 RTT: IT §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 tort law by 1869, a conclusion disputed in Kutner, The Prosser Myth of Transferred Intent, 91 Ind. L.J. 1105, 1106 (2016).

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

The term "occurrence" is broader than simple accidents because it includes not just car crashes but also diseases like asbestos and pollution emissions. The term "intended" is meant to cover deliberate releases and those releases that were "expected" by the insured. That last term tends to be construed narrowly because otherwise insurers could say that all harms, including latent ones like those stemming from asbestos or pollutants, were "expected from the standpoint of the insured." Billions of dollars turn on the choice between a broad and narrow reading of this clause.

6. ***Intention and Governmental Liability.*** The doctrine of sovereign immunity traditionally bars claims of liability against governments. The Federal Tort Claims Act, 28 U.S.C. §2674, starts with a general declaration that removes this total bar with respect to the federal government.

> **§2674. Liability of United States**
>
> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, . . .

But this rule contains a large number of exceptions, including "(h) Any claim arising out of assault, battery, false imprisonment, false arrest, . . ." 28 U.S.C. §2680.

In Sheridan v. United States, 487 U.S. 392, 403 (1988), an obviously intoxicated off-duty serviceman fired several rifle shots that injured the plaintiffs, who were riding in their automobiles. Both sides agreed that the assault and battery exception protected the government for the wrongs committed by the serviceman, given the deliberate nature of the attack. But as is often the case in modern law, the negligence of other government employees who allowed a foreseeable assault and battery to occur may furnish a basis for government liability that is entirely independent of the serviceman's employment status. Thus the Court allowed the plaintiff's further claim that three naval corpsmen were negligent when, having discovered the serviceman "lying face down in a drunken stupor" with a loaded weapon, they failed to take him into custody or to alert the appropriate officials that he was on the prowl, even for malicious wrongdoers. In this case, the government's duty to prevent this foreseeable assault and battery was seemingly defined without regard to whether the drunken serviceman was within or beyond the scope of his employment. See *Ira S. Bushey & Sons, Inc., infra* Chapter 7, at 531.

2. Defenses to Intentional Torts

a. Consensual Defenses

Mohr v. Williams

104 N.W. 12 (Minn. 1905)

Brown, J. Defendant is a physician and surgeon of standing and character, making disorders of the ear a specialty, and having an extensive practice in the city of St. Paul. He was consulted by plaintiff, who complained to him of trouble with her right ear, and, at her request, made an examination of that organ for the purpose of ascertaining its condition. He also at the same time examined her left ear, but, owing to foreign substances therein, was unable to make a full and complete diagnosis at that time. The examination of her right ear disclosed a large perforation in the lower portion of the drum membrane, and a large polyp in the middle ear, which indicated that some of the small bones of the middle ear (ossicles) were probably diseased. He informed plaintiff of the result of his examination, and advised an operation for the purpose of removing the polyp and diseased ossicles. After consultation with her family

physician, and one or two further consultations with defendant, plaintiff decided to submit to the proposed operation. She was not informed that her left ear was in any way diseased, and understood that the necessity for an operation applied to her right ear only. She repaired to the hospital, and was placed under the influence of anaesthetics; and, after being made unconscious, defendant made a thorough examination of her left ear, and found it in a more serious condition than her right one. A small perforation was discovered high up in the drum membrane, hooded, and with granulated edges, and the bone of the inner wall of the middle ear was diseased and dead. He called this discovery to the attention of Dr. Davis—plaintiff's family physician, who attended the operation at her request—who also examined the ear and confirmed defendant in his diagnosis. Defendant also further examined the right ear, and found its condition less serious than expected, and finally concluded that the left, instead of the right, should be operated upon; devoting to the right ear other treatment. He then performed the operation of ossiculectomy on plaintiff's left ear; removing a portion of the drum membrane, and scraping away the diseased portion of the inner wall of the ear. The operation was in every way successful and skillfully performed. It is claimed by plaintiff that the operation greatly impaired her hearing, seriously injured her person, and, not having been consented to by her, was wrongful and unlawful, constituting an assault and battery; and she brought this action to recover damages therefor.

The trial in the court below resulted in a verdict for plaintiff for $14,322.50. [The trial judge set aside the verdict as excessive and ordered a new trial. Both parties appealed from those orders. On appeal Brown, J., first refuses to overturn the jury's finding of no emergency. He then holds that plaintiff's consent to the operation could not be implied, and says in part:]

The last contention of defendant is that the act complained of did not amount to an assault and battery. This is based upon the theory that, as plaintiff's left ear was in fact diseased, in a condition dangerous and threatening to her health, the operation was necessary, and, having been skillfully performed at a time when plaintiff had requested a like operation on the other ear, the charge of assault and battery cannot be sustained; that, in view of these conditions, and the claim that there was no negligence on the part of defendant, and an entire absence of any evidence tending to show an evil intent, the court should say, as a matter of law, that no assault and battery was committed, even though she did not consent to the operation. In other words, that the absence of a showing that defendant was actuated by a wrongful intent, or guilty of negligence, relieves the act of defendant from the charge of an unlawful assault and battery.

We are unable to reach that conclusion, though the contention is not without merit. It would seem to follow from what has been said on the other features of the case that the act of defendant amounted at least to a technical assault and battery. If the operation was performed without plaintiff's consent, and the circumstances were not such as to justify its performance without, it was wrongful; and, if it was wrongful, it was unlawful. As remarked in 1 Jaggard, Torts, 437, every person has a right to complete immunity of his person from physical interference of others, except in so far as contact may be necessary under the general doctrine of privilege; and any unlawful or unauthorized touching of the person of another, except it be in the spirit of pleasantry, constitutes an assault and battery. In the case at bar, as we have already seen, the question whether defendant's act in performing the operation upon plaintiff was authorized was a question for the jury to determine. If it was unauthorized, then it was, within what we have said, unlawful. It was a violent assault, not a mere pleasantry; and, even though no negligence is shown, it was wrongful and unlawful. The case is unlike a criminal prosecution for assault and battery, for there an unlawful intent must be shown. But that rule does not apply to a civil action, to maintain which it is sufficient to show that the assault complained of was wrongful and unlawful or the result of negligence. . . . Vosburg v. Putney, 80 Wis. 523, 50 N.W. 403.

The amount of plaintiff's recovery, if she is entitled to recover at all, must depend upon the character and extent of the injury inflicted upon her, in determining which the nature of the malady intended to be healed and the beneficial nature of the operation should be taken into consideration, as well as the good faith of the defendant.

Orders affirmed.

NOTES

1. ***The Varieties of Consent.*** The chapter of Restatement (Third) of Torts: Intentional Torts to Persons that deals with consent identifies four potential categories of consent: (a) actual consent, (b) apparent consent, (c) presumed consent, and (d) the emergency doctrine.

RESTATEMENT OF THE LAW (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS (TENTATIVE DRAFT, APPROVED 2019)

§13. Actual Consent: Definition and Conditions

A person actually consents to an actor's otherwise tortious intentional conduct if:

(a) the person is willing for that conduct to occur, and such willingness may be express or may be inferred from the facts;

(b) the actor's conduct is within the scope of the person's consent, as provided in §14;

(c) the person has the capacity to consent, as provided in §15(a); and

(d) the consent is not given under duress or under substantial mistake, as provided in §15(b) and (c).

§16. Apparent and Presumed Consent

An actor is not liable for otherwise tortious intentional conduct if either apparent or presumed consent exists.

(a) Apparent consent exists if the actor reasonably believes that the other person actually consents to the conduct, without regard to whether the person does actually consent.

(b) Presumed consent exists if:

(1) under prevailing social norms, the actor is justified in engaging in the conduct in the absence of the other person's actual or apparent consent, and

(2) the actor has no reason to believe that the person would not have actually consented to the conduct if the actor had requested the person's consent.

How do these variations play out in the cases?

2. ***Determining the Scope of Consent.*** Did the physician in Mohr v. Williams violently attack or batter his patient solely because he did not obtain the requisite consent to perform the operation? Why didn't the physician face an emergency situation? Should Dr. Davis be treated as the plaintiff's agent? Why did the trial judge conclude that the jury awarded excessive damages? On remand, the jury awarded only nominal damages.

Some modern cases take a less rigid view of the consent requirement. In Kennedy v. Parrott, 90 S.E.2d 754, 759 (N.C. 1956), the defendant surgeon, while performing an appendectomy on the plaintiff, discovered several large cysts on the plaintiff's left ovary. Exercising his best medical judgment, he intentionally punctured the cysts, without negligence. Unfortunately, the puncture cut one of plaintiff's blood vessels, from which she developed a painful

A.M.
Date________________ Time__________P.M.

1. I authorize the performance upon ______________________
(myself or name of patient)

of the following operation __________________________
(state nature and extent of operation)

to be performed by or under the direction of Dr.________________.

2. I consent to the performance of operations and procedures in addition to or different from those now contemplated, whether or not arising from presently unforeseen conditions, which the above-named doctor or his associates or assistants may consider necessary or advisable in the course of the operation.

3. I consent to the administration of such anesthetics as may be considered necessary or advisable by the physician responsible

for this service, with the exception of ______________________
(state "none," "spinal anesthesia," etc.)

4. The nature and purpose of the operation, possible alternative methods of treatment, the risks involved, the possible consequences, and the possibility of complications have been explained to me by Dr.______________ and by ________________.

5. I acknowledge that no guarantee or assurance has been given by anyone as to the results that may be obtained.

6. I consent to the photogaphing or televising of the operations or procedures to be performed, including appropriate portions of my body, for medical, scientific or educational purposes, provided my identity is not revealed by the pictures or by descriptive texts accompanying them.

7. For the purpose of advancing medical education, I consent to the admittance of observers to the operating room.

8. I consent to the disposal by hospital authorities of any tissues or body parts which may be removed.

9. I am aware that sterility may rsult from this operation. I know that a sterile person is incapable of becoming a parent.

10. I acknowledge that all blank spaces on this document have been either completed or crossed off prior to my signing.

(Cross Out Any Paragraphs Above Which Do Not Apply)

Witness________________ Signed________________
(Patient or person authorized to consent for patient)

Cooper, J., in dissent, protested the excessive reliance on the consent form relative to the entire "process" that preceded and followed the signing. On the majority view, can anything override the "presumption" that attaches to the form? Compare with the materials on informed consent, *infra* Chapter 3, Section D, at 166.

4. ***Emergency Situations as Presumed Consent.*** Normally a patient has the right to accept or reject the proffered medical treatment, making an unauthorized operation a technical assault and battery even if no damage ensues. See generally RTT: IT §17, comment *b*. Schloendorff v. Society of New York Hospital, 105 N.E. 92, 93 (N.Y. 1914), stated the general rule:

> Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent, commits an assault, for which he is liable in damages. This is true except in cases of emergency where the patient is unconscious and where it is necessary to operate before consent can be obtained.

It follows that a conscious patient can refuse consent even in an emergency situation. For example, in Cooper v. Lankenau Hospital, 51 A.3d 183, 186 (Pa. 2012), the plaintiff mother, herself a pediatric cardiology anesthesiologist, fell while 27 weeks pregnant. When taken to the hospital, her treating physicians thought that the fetus was suffering from a low heart rate that could lead to fatal consequences. The plaintiff mother testified that she had explicitly refused consent, a fact which was disputed at trial. The jury found that the defendants had not committed a battery. Baer, J., upheld the verdict after approving the following instructions:

> A physician's performance of surgery in a nonemergency without consent, or the performance of surgery in an emergency when the patient has refused consent is considered a battery under the law. A battery is an act done with the intent to cause a harmful or offensive contact with the body of another, and directly results in the harmful or offensive contact with the body of another.
>
> If you find [the defendant] operated on the plaintiff in a nonemergency without consent, or in an emergency where the plaintiff refused consent, then you must find that [the defendant] committed a battery; otherwise no battery occurred.

Is there any need to include the phrase "harmful or offensive contact with the body of another" in the instruction? Whenever actual consent cannot be given, however, "medical treatment also will be lawful under the doctrine of implied consent when a medical emergency requires immediate action to preserve the health or life of the patient." Allore v. Flower Hospital, 699 N.E.2d 560, 564 (Ohio Ct. App. 1997). This implied consent, termed "presumed consent" in the Third Restatement, is a legal fiction, justified by the assumption that the plaintiff, as a rational agent, would have consented to the operation if she could have been asked. This rule thus protects otherwise helpless patients by encouraging others to assist them in times of need. Should the bystander whose quick intervention saves the plaintiff's life receive compensation? What about the surgeon who operates, even if unsuccessful? See Cotnam v. Wisdom, 104 S.W. 164 (Ark. 1907), allowing the action, but only for a successful outcome, while barring higher fees based on the physician's special knowledge of the decedent's wealth. Why are these two conditions attached to the compensation right?

The emergency doctrine is recognized in RTT: IT §17, which applies when the rescuer believes that the gains to life and health outweigh the risk that the rescued party will suffer tortious injury. Note that the privilege is lost if the rescuer thinks that the rescued party would not have consented to the risk. In general, the burden of proving the emergency lies on the provider of the service, "who will normally have greater access to the relevant evidence than will the plaintiff." RTT: IT §17, comment *i*.

RESTATEMENT OF THE LAW (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS (TENTATIVE DRAFT APPROVED 2021)

§17. Emergency Doctrine

If an actor engages in otherwise tortious intentional conduct for the purpose of preventing or reducing a risk to the life or health of another, the actor is not liable to the other, provided that:

(a) the actor reasonably believes that:

(i) his or her conduct is necessary in order to prevent or reduce a risk to the life or health of the other that substantially outweighs the other's interest in avoiding the otherwise tortious conduct; and

(ii) it is necessary to act immediately, before it is practicable for the actor to obtain actual consent from the other or from a person empowered to consent for the other, in order to prevent or reduce the risk to life or health; and

(b) the actor has no reason to believe that the other would not have actually consented to the conduct if there had been the opportunity to do so.

5. ***Substitute Consent and Judgment for the Benefit of Others.*** How should physicians treat minors and incompetents who are unable to give consent? The standard rule requires physicians to obtain, except in emergencies, the consent of a guardian. See Bonner v. Moran, 126 F.2d 121, 122 (D.C. Cir. 1941).

Substituted consent is also needed for adult incompetents who lack any capacity to make medical decisions on their own behalf. Generally the law protects the guardian's good-faith decision from any judicial challenge or review. For example, in Brophy v. New England Sinai Hospital, Inc., 497 N.E.2d 626 (Mass. 1986), the court allowed the wife and family of a man left in a permanent vegetative state to cut off all nutrition and hydration over the objections of his treating physicians, when everyone agreed that he would have requested termination if he had been competent. Similarly, in In re Guardianship of Tschumy, 853 N.W.2d 728, 752 (Minn. 2014), Gildea, J., held that a statutory guardian "may consent to remove the ward from life-sustaining treatment when all the interested parties agree that such removal is in the ward's best interests" without first obtaining a court order. Court intervention, however, would be required when interested family members are not in agreement as to what that best interest is. In dissent, Anderson, J., insisted that the statutory powers of a guardian "to enable the ward to receive necessary or medical or other professional care" did not include the power to terminate treatment.

Frequently, someone designates either a family member, religious official, or a close friend to take the role of guardian in these cases. How then should that person proceed? The Substitute Consent form used in the District of Columbia sets out the list of relevant considerations as follows:

> I am willing to provide substituted consent for health care decisions for this individual. . . . I believe that I have had sufficient contact with this individual to be familiar with his/her activities, health care personal beliefs, and that I am thus qualified to make decisions on his/her behalf. I understand that, in making decisions on behalf of this individual, I will consider: the individual's current diagnosis and prognosis with and without the treatment at issue; expressed preferences regarding the type of treatment at issue; relevant religious and moral beliefs and personal values; behavior, attitudes, and past conduct with respect to the treatment at issue and medical treatment generally; reactions to the provision, or withholding or withdrawal of similar treatment to another individual; and expressed concerns about the effect on family or intimate friends of the individual if treatment were provided, withheld or withdrawn.

Available at https://dds.dc.gov/sites/default/files/dc/sites/dds/publication/attachments/New%20Sub%20Decision%20Making%20for%20Non%20Emergency%20Care%20Needs%206%20-%20Consent%20Form.pdf.

What forms of administrative or judicial review, if any, may be used to oversee these decisions?

Substituted judgment becomes more delicate when the proposed treatment or operation is for the benefit of another. In Lausier v. Pescinski, 226 N.W.2d 180, 183 (Wis. 1975), the court held that it did not have the power to permit the removal of one of the incompetent's kidneys, which was needed to save the life of his brother, even though the risk of harm to the incompetent was slight. The incompetent's guardian, his sister, opposed the operation because it "brought back memories of the Dachau concentration camp in Nazi Germany and of medical experiments on unwilling subjects." Similarly, in Curran v. Bosze, 566 N.E.2d 1319, 1326 (Ill. 1990), the court upheld the right of a mother of two 3½-year-old twins to refuse to have her children tested to see if they could make bone marrow transplants to their twelve-year-old half-brother who was dying of leukemia. The court stated that "it is not possible to determine the intent of a 3½-year-old child with regard to consenting to a bone marrow harvesting procedure by examining the child's personal value system." Should the consent of the incompetent's guardian make a difference? How persuasive is the argument that the incompetent will benefit by the survival of his brother?

6. *Constitutional Claims Over Consent to Medical Treatment.* The autonomy principle at work in the medical consent cases does not today compel the constitutional acceptance of the right to voluntary euthanasia. In Cruzan v. Director, Missouri Department of Health, 497 U.S. 261, 281 (1990), Rehnquist, C.J., noted that the sacredness of life under the law of homicide justified using "heightened evidentiary requirements" before cutting off life-sustaining treatment.

At the opposite extreme, how should courts respond to claims that individuals have a right to accept risky treatment, not to end, but to save their lives? In Abigail Alliance for Better Access to Developmental Drugs v. Eschenbach, 495 F.3d 695, 703–07 (D.C. Cir. 2007), Griffith, J., held that claims of personal autonomy did not support a constitutional right to compel the FDA to allow terminally ill cancer patients to use new therapies that had passed Phase I clinical trials—those which establish only that the drugs were not toxic in large doses—but which the FDA had not yet licensed as "safe" and "effective." The dissent of Rogers, J., relied on *Schloendorff, supra* Note 4, to support the conclusion that if every individual has an absolute autonomy right to refuse treatment, every person should have the absolute right knowingly to accept risky treatments.

The decedent Abigail Burroughs, a teenager, was treated by physicians from Johns Hopkins Medical Center, who had recommended the use of either ImClone's Erbitux or AstraZeneca's Iressa, both of which were eventually approved by the FDA. She died before either drug could be obtained. The issue in the case was whether a drug that had gone through Phase I clinical trials but has not received the far more extensive Phase II and Phase III clinical trials, may be used as of right by a person in cases of terminal illness. The right to individual autonomy allows people to refuse drugs for good reason, bad reason, or no reason at all. Should people have the same right to take drugs? Under current law, the answer to that question is no. See United States v. Rutherford, 442 U.S. 544 (1979). Should any such expanded right be dependent on whether other therapies are available? On whether the patient was eligible for participation in ongoing clinical trials?

For a defense of the outcome in *Abigail Alliance*, see Annas, Cancer and the Constitution—Choice at Life's End, 357 New Eng. J. Med. 408 (2007).

7. *Consent Implied in Fact.* Although consent is normally expressed in words, it may also be inferred from conduct. In O'Brien v. Cunard Steamship Co., 28 N.E. 266, 273–75 (Mass. 1891), the plaintiff was an immigrant to the United States whose entry into this

country required her to be vaccinated against smallpox. She stood in line with many other female passengers, and held out her arm to the defendant's surgeon, who inspected it and noted the lack of the typical mark found after smallpox vaccinations. Thereafter he told her that she had to be vaccinated, to which she replied that her previous vaccination had left no mark. The physician did not respond further, and the plaintiff held up her arm and allowed the vaccination to take place, after which she received her entry ticket. The alternative to vaccination was detainment and quarantine. The court held that her consent barred her cause of action:

> If the plaintiff's behavior was such as to indicate consent on her part, the surgeon was justified in his act, whatever her unexpressed feelings may have been. In determining whether she consented, he could be guided only by her overt acts and the manifestations of her feelings. . . . [Plaintiff] was one of a large number of women who were vaccinated on that occasion, without, so far as appears, a word of objection from any of them. They all indicated by their conduct that they desired to avail themselves of the provisions made for their benefit. There was nothing in the conduct of the plaintiff to indicate to the surgeon that she did not wish to obtain a card which would save her from detention at quarantine, and to be vaccinated, if necessary, for that purpose.

Would it have been rational for her to refuse treatment? How should we take into account these additional facts found in the record:

> The plaintiff, an Irish immigrant in steerage, was seventeen years old at the time of the vaccination. Signs announcing the vaccinations were posted around the ship, but contained language the plaintiff did not understand. The passengers in steerage were rounded up, divided into lines by gender, and herded down the steps to the doctor. No one was allowed to leave without the doctor's permission.

Vogel, Cases in Context: Lake Champlain Wars, Gentrification and Ploof v. Putnam, 45 St. Louis U. L.J. 791, 796 (2001).

Canterbury v. Spence
464 F.2d 772 (D.C. Cir. 1972)

[The text of the opinion and notes thereto are found *infra* at 166.]

Hudson v. Craft
204 P.2d 1 (Cal. 1949)

Carter, J. [The plaintiff, an 18-year-old boy, was solicited by the defendant promoter to participate in an illegal prize fight for which he received a $5 fee. The fight was neither sanctioned by the State Athletic Commission nor conducted in accordance with its rules. During the fight, the plaintiff sustained personal injuries from a blow by his opponent. Plaintiff sued both his opponent and the promoter but did not serve process on his opponent. The trial court dismissed his complaint against the promoter.]

The basis and theory of liability, if any, in mutual combat cases has been the subject of considerable controversy. Proceeding from the premise that, as between the combatants, the tort involved is that of assault and battery, many courts have held that, inasmuch as each contestant has committed a battery on the other, each may hold the other liable for any injury inflicted although both consented to the contest. [The court cited many cases, including Teeters v. Frost, 292 P. 356 (Okla. 1930).] Being contrary to the maxim volenti non fit injuria

[the willing suffer no injury], the courts have endeavored to rationalize the rule by reasoning that the state is a party where there is a breach of the peace, such as occurs in a combat, and that no one may consent to such breach. There are cases expressing a minority view [of no liability] and severe criticism has been leveled at the majority rule, such as, that it ignores the principle of pari delicto [equal wrong] and encourages rather than deters mutual combat. See Hart v. Geysel, 159 Wash. 632[, 294 P. 570]; Bohlen, Consent as Affecting Civil Liability for Breaches of the Peace, 24 Colum. L. Rev. 819 [1924]; . . . The Restatement adopts the minority view. An assent which satisfies the rules stated "prevents an invasion from being tortious and, therefore, actionable, although the invasion assented to constitutes a crime." (Rest., Torts, §60.) An example given thereunder is a boxing match where no license was had as required by law. The only case discovered involving the liability of a third-party promoter of the combat such as we have in the case at bar, is Teeters v. Frost, *supra*, where the court, following the majority position as to the liability of the participants as between themselves, was not confronted with any difficulty in deciding that the instigator was liable as an aider and abettor.

There is an exception to the rule stated in the Restatements, reading: "Where it is a crime to inflict a particular invasion of an interest of personality upon a particular class of persons, irrespective of their assent, and the policy of the law is primarily to protect the interests of such a class of persons from their inability to appreciate the consequences of such an invasion, and it is not solely to protect the interests of the public, the assent of such a person to such an invasion is not a consent thereto." (Rest., Torts, §61.) . . . If liability is predicated on the tort of battery, it might seem to follow that in order to hold the promoter liable, it would be necessary to impose responsibility upon the combatants as to each other on the theory that they are the principals while the instigator is only the aider and abettor. In view of the public policy of this state as expressed by initiative, legislation, rules of the Athletic Commission, and the Constitution, the promoter must be held liable as a principal regardless of what the rule may be as between the combatants.

From the beginning, this state has taken an uncompromising stand against uncontrolled prize fights and boxing matches.

[The court then reviews the extensive history of boxing regulation in California from 1850 through 1942. When this fight took place, the law forbade any person under 18 from participating in a fight; it required all fighters to undergo physical examinations before fighting; it prescribed a maximum number of rounds and a minimum weight for gloves; it required a physician to be in attendance at the fight; and it required that a referee supervise the match and stop the fight if there were "too great a disparity between the boxers." The statute also authorized the boxing commission to adopt rules to set weight classes for fighters, define fouls in the ring, and provide for inspection and physical examination of the premises. Many, if not all, of these requirements were violated in the instant case.]

The foregoing declarations by the people, the Legislature, and the commission evince an unusually strong policy, obviously resting upon a detailed study of the problems relative to boxing matches. While there are other purposes underlying that policy, it is manifest that one of the chief goals is to provide safeguards for the protection of persons engaging in the activity. It may be that the actual participants, as well as the promoter, are liable criminally for a violation of the provisions, but insofar as the purpose is protection from physical harm, the chief offender would be the promoter—the activating force in procuring the occurrence of such exhibitions. It is from his uncontrolled conduct that the combatants are protected. Secondarily, the contestants are protected against their own ill-advised participation in an unregulated match. This is especially true in the case at bar where plaintiff is a lad of 18 years.

The foregoing policy compels the conclusion that the promoter is liable where he conducts boxing matches or prize fights without a license and in violation of the statutory provisions

above discussed, regardless of the rights as between the contestants, and that the consent of the combatants does not relieve him of that liability. Manifestly, the doctrine of pari delicto is not pertinent inasmuch as one of the main purposes of the statutes is to protect a class (combatants) of which plaintiff is a member. . . .

It is not necessary in the instant case to state a general rule inasmuch as each situation must have individual consideration. The nature and scope of the legislation here involved and above shown requires liability, especially when we consider that it calls for continuous and "on the spot" supervision of boxing matches.

For the foregoing reasons, the judgment is reversed.

NOTES

1. ***Minority View on Consent to Illegal Acts.*** Why is the fight promoter in *Hudson* responsible for blows inflicted by a third party if the other combatant is entitled to a defense of consent? Should violations of the legislative scheme be sufficient to impose liability per se on the promoter? See *infra* Chapter 3, Section E, at 176.

In Hart v. Geysel, 294 P. 570, 572 (Wash. 1930), the plaintiff's husband was killed by a blow struck in an illegal prizefight in which he consented to participate. A divided court found no liability under the minority view of the (First) Restatement. It first noted that both fighters had violated the criminal statute, and therefore "it is not necessary to reward the one that got the worst of the encounter at the expense of his more fortunate opponent." The *Hart* court relied on two basic legal doctrines that the majority view implicitly rejected: (1) *volenti non fit injuria*, and (2) *ex turpi causa non oritur actio*, or no action shall arise out of an improper or immoral cause. Is the private action for damages a sensible aid to criminal enforcement? Does the denial of a private action encourage or discourage participation in illegal prizefights? Does the action against the promoter discourage prize fighting? Reduce the size of the purses? Both? For an excellent defense of the Restatement's adoption of the minority rule, see Bohlen, Consent as Affecting Civil Liability for Breaches of the Peace, 24 Colum. L. Rev. 819 (1924), reprinted in Studies in the Law of Torts at 577 (1926).

2. ***Private Rights of Action for Statutory Rape.*** In Barton v. Bee Line, Inc., 265 N.Y.S. 284, 285 (App. Div. 1933), an underage plaintiff, age fifteen—where eighteen was the legal age of consent—brought an action for damages even though she had fully consented to sexual intercourse with the defendant's chauffeur, for which he was guilty of statutory rape, a crime then punishable by up to ten years of imprisonment. The court refused to allow her to sue:

> Should a consenting female under the age of eighteen have a cause of action if she has full understanding of the nature of her act? It is one thing to say that society will protect itself by punishing those who consort with females under the age of consent; it is another to hold that knowing the nature of her act, such female shall be rewarded for her indiscretion. Surely public policy—to serve which the statute was adopted—will not be vindicated by recompensing her for willing participation in that against which the law sought to protect her.

Barton was repudiated in Christensen v. Royal School District, 124 P.3d 283, 288 (Wash. 2005), where a thirteen-year-old girl sued both the teacher with whom she had sexual relations and the school district that employed him. A divided court allowed the action on the ground that the girl was "too immature to rationally or legally consent." The majority of courts today follow *Christensen*. Are the statutory rape cases distinguishable from the illegal boxing cases? Note that the RTT: IT §18 takes the position that once

> a person, by word or conduct, expresses to the actor his or her unwillingness to permit any sexual contact, or sexual contact of a specified type, yet the actor proceeds to cause such conduct,

> then as a matter of law, the criteria of actual, apparent, or presumed consent are not satisfied and the actor is subject to liability for battery.

How should risk of miscommunication be handled in these cases? On the general reticence of the Third Restatement to address the role of affirmative consent in sex cases, see Chamallas, The Elephant in the Room: Sidestepping the Affirmative Consent Debate in the Restatement (Third) of Intentional Torts to Persons, 10 J. Tort L. 281 (2017), which states that "affirmative consent" requires explicit verbal consent "to initiate moving to a higher level of sexual intimacy in an interaction."

3. ***Athletic Injuries: Formal Settings.*** The legal remedy for persons deliberately or recklessly injured in professional athletic contests has been frequently litigated. In most sports it is generally held that plaintiffs consent to injury from blows administered in accordance with the rules of the game, but not when the blows are deliberately illegal. In Hackbart v. Cincinnati Bengals, Inc., 601 F.2d 516, 520–21 (10th Cir. 1979), Dale Hackbart, a defensive back for the Denver Broncos, was injured by a blow struck by Charles "Booby" Clark, an offensive halfback for the Bengals. After the Broncos intercepted a pass, Clark, "acting out of anger and frustration, but without a specific intent to injure . . . stepped forward and struck a blow with his right forearm to the back of the kneeling plaintiff's head and neck with sufficient force to cause both players to fall forward to the ground." Although Hackbart suffered no immediate ill effects from the blow, he shortly thereafter experienced severe pains that, after two more brief game appearances, forced him to retire, ending a successful thirteen-year career. The trial court dismissed the action, chiefly on the ground that without legislation it was inappropriate to impose upon one professional football player a duty to care for the safety of another. Doyle, J., reversed:

> Contrary to the position of the court then, there are no principles of law which allow a court to rule out certain tortious conduct by reason of general roughness of the game or difficulty of administering it.
>
> Indeed, the evidence shows that there are rules of the game which prohibit the intentional striking of blows. Thus, Article 1, Item 1, Subsection C, provides that: "All players are prohibited from striking on the head, face or neck with the heel, back or side of the hand, wrist, forearm, elbow or clasped hands." Thus the very conduct which was present here is expressly prohibited by the rule which is quoted above. . . . Therefore, the notion is not correct that all reason has been abandoned, whereby the only possible remedy for the person who has been the victim of an unlawful blow is retaliation.

What would be the result in the absence of a specific rule regulating game conduct? What if the owners of all teams agree that no tort actions should be brought for injuries suffered on the playing field? What about an agreement among the players to the same effect?

Courts have applied similar principles to high school and college athletic contests. In Nabozny v. Barnhill, 334 N.E.2d 258, 261 (Ill. App. Ct. 1975), the plaintiff soccer goalie sustained severe and permanent injuries when kicked in the head inside the penalty area even though the defendant could have easily avoided any contact. The game was played under soccer association rules, under which any contact with the goalkeeper and any attempt to kick a ball in his possession while in the penalty area count as infractions, even if actual contact is unintentional. The court, while concerned about the negative impact of tort liability on legitimate athletic activities, held that

> a player is liable for injury in a tort action if his conduct is such that it is either deliberate, wilful or with a reckless disregard for the safety of the other player so as to cause injury to that player, the same being a question of fact to be decided by a jury.

Today *Nabozny* has spawned the so-called contact sports exception, precluding liability for ordinary negligence. See Karas v. Strevell, 884 N.E.2d 122, 134 (Ill. 2008), arising out of a

hard hockey body check from behind, holding that "a participant breaches a duty of care to a coparticipant only if the participant intentionally injures the coparticipant or engages in conduct totally outside the range of the ordinary activity involved in the sport." *Karas* was limited in Pickel v. Springfield Stallions, 926 N.E.2d 877 (Ill. App. 2010), such that a spectator at an indoor football game could maintain an ordinary negligence against the operators of the facility when injured by a player who ran over the wall that separated spectators from participant. No action was brought against the player. Why?

In Avila v. Citrus Community College District, 131 P.3d 383, 392–93 (Cal. 2006), the defendant's pitcher hit the plaintiff, a varsity baseball player, in the head with a pitch, cracking his helmet and causing serious injuries. The plaintiff alleged that "the pitch was an intentional 'beanball' thrown in retaliation for [a] previous hit batter or, at a minimum, was thrown negligently." Werdegar, J., rejected both allegations, holding that the defendant school had a duty "to, at a minimum, not increase the risks inherent in the sport." Even so, the home team was not liable because intentional beanballs were an "inherent risk of the sport." Is throwing beanballs caught by the Third Restatement's definition of recklessness?

RESTATEMENT OF THE LAW (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM

§2. Recklessness

A person acts recklessly in engaging in conduct if:

(a) the person knows of the risk of harm created by the conduct or knows facts that make the risk obvious to another in the person's situation, and

(b) the precaution that would eliminate or reduce the risk involves burdens that are so slight relative to the magnitude of the risk as to render the person's failure to adopt the precaution a demonstration of the person's indifference to the risk.

Comment a. Terminology and Scope: . . . Taken at face value, [gross negligence] simply means negligence that is especially bad. Given this literal interpretation, gross negligence carries a meaning that is less than recklessness.

In Turcotte v. Fell, 502 N.E.2d 964, 969–70 (N.Y. 1986), the plaintiff, a professional jockey, sued for negligence when injured in a race by the defendant, a fellow jockey, who had violated track rules. The court refused to allow the action, contrasting this case with *Hackbart* and *Nabozny* as follows:

> Although the foul riding rule is a safety measure, it is not by its terms absolute for it establishes a spectrum of conduct and penalties, depending on whether the violation is careless or willful and whether the contact was the result of mutual fault. As the rule recognizes, bumping and jostling are normal incidents of the sport. They are not, as were the blows in *Nabozny* and *Hackbart*, flagrant infractions unrelated to the normal method of playing the game and done without any competitive purpose. Plaintiff does not claim that Fell intentionally or recklessly bumped him; he claims only that as a result of carelessness, Fell failed to control his mount as the horses raced for the lead and a preferred position on the track. While a participant's "consent" to join in a sporting activity is not a waiver of all rules infractions, nonetheless a professional clearly understands the usual incidents of competition resulting from carelessness, particularly those which result from the customarily accepted method of playing the sport, and accepts them.

4. ***Athletic Injuries: Informal Settings.*** In Marchetti v. Kalish, 559 N.E.2d 699, 701–03 (Ohio 1990), the plaintiff and defendant were playing a backyard game called "kick the can" in which players attempt to reach the home base, or can, before they are spotted by the

player designated as "it." Once "it" sees another player, he places his foot on the can, and calls out the player's name, yelling "kick the can—one, two, three." (The rules of the game were sufficiently well articulated that the parties set them out in a joint appendix to the opinion.) On this occasion the plaintiff, a thirteen-year-old girl, placed her foot on the ball, used in place of a can, and announced that the defendant, a fifteen-year-old boy, was "it." The defendant continued to run straight at the plaintiff, and collided with her as he was kicking the ball out from under her foot. The plaintiff staggered to the ground and found that she had broken her right leg in two places.

The plaintiff conceded that her injuries were neither intentionally nor recklessly inflicted. The Ohio Supreme Court entered a summary judgment for defendant, relying on both *Nabozny* and *Hackbart.* "[Plaintiff] argues that these cases from other jurisdictions are distinguishable from the present case because we are dealing with children involved in a simple neighborhood game rather than an organized contact sport." But the court held the distinction immaterial so long as the children were "engaging in some type of recreational or sports activity. Whether the activity is organized, unorganized, supervised or unsupervised, is immaterial to the standard of liability. . . . [B]efore a party may proceed with a cause of action involving injury resulted from a recreational or sports activity, reckless or intentional conduct must exist." And in Gentry v. Craycraft, 802 N.E.2d 1116, 1118 (Ohio 2004), the recklessness standard was applied to spectators so long as they were old enough to appreciate the inherent risk in the activity. "To hold otherwise would be to open the floodgates to a myriad of lawsuits involving the backyard games of children." Any liability for the parents for negligent supervision?

b. Mental Disability

McGuire v. Almy

8 N.E.2d 760 (Mass. 1937)

QUA, J. This is an action of tort for assault and battery. The only question of law reported is whether the judge should have directed a verdict for the defendant.

The following facts are established by the plaintiff's own evidence: In August, 1930, the plaintiff was employed to take care of the defendant. The plaintiff was a registered nurse and was a graduate of a training school for nurses. The defendant was an insane person. Before the plaintiff was hired she learned that the defendant was a "mental case and was in good physical condition," and that for some time two nurses had been taking care of her. The plaintiff was on "twenty-four hour duty." The plaintiff slept in the room next to the defendant's room. Except when the plaintiff was with the defendant, the plaintiff kept the defendant locked in the defendant's room. There was a wire grating over the outside of the window of that room. During the period of "fourteen months or so" while the plaintiff cared for the defendant, the defendant "had a few odd spells," when she showed some hostility to the plaintiff and said that "she would like to try and do something to her." The defendant had been violent at times and had broken dishes "and things like that," and on one or two occasions the plaintiff had to have help to subdue the defendant.

On April 19, 1932, the defendant, while locked in her room, had a violent attack. The plaintiff heard a crashing of furniture and then knew that the defendant was ugly, violent and dangerous. The defendant told the plaintiff and a Miss Maroney, "the maid," who was with the plaintiff in the adjoining room, that if they came into the defendant's room, she would kill them. The plaintiff and Miss Maroney looked into the defendant's room, "saw what the