CHAPTER II

INTENTIONAL TORTS—PERSON

OBJECTIVE: Given law practice settings involving various personal injury claims, sort those injuries caused intentionally from those not intentional, also stating the effects of that determination, consistent with the following text.

Case Study: A crazed stranger attacked and beat a hotel guest in his room, after the hotel clerk carelessly gave the stranger a programmed key card to the guest's room. ***Distinguish and explain for the guest whether his claims against the stranger and hotel are for intentional or unintentional torts, and identify the probable procedural and substantive effects of that determination.***

Differentiation. Tort practice involves examining conduct to identify, pursue, defend, and settle or try claims. Intentional torts—harms that a person in some sense desires to bring about, as opposed to harms that may result from carelessness—are the first class of claims within tort law. Tort law divides itself up into intentional torts, torts of negligence, and strict-liability torts. Because of liability insurance, negligence law rather than the law of intentional torts is the heart of modern tort-law practice. Insurers generally do not underwrite intentional wrongs. For public-policy reasons, law may not enforce agreements to insure against a person's intentional torts and crimes. Tort lawyers deal primarily with negligence, not intentional torts. Yet studying intentional torts makes good tort-law training. Malfeasance—the malicious desire to harm—is often more easy to recognize than the carelessness that identifies negligence claims. Law also more clearly defines intentional-tort claims and elements. Begin your studies, then, with intentional torts, even while recognizing that tort practice primarily involves negligence claims.

Intentional Torts. This text presents seven intentional torts: assault, battery, false imprisonment, intentional infliction of emotional distress, trespass to land, trespass to chattels, and conversion. This chapter addresses the four intentional torts, assault, battery, false imprisonment, and intentional infliction of emotional distress, that involve injury to persons—what some call the "dignitary" torts. The next chapter addresses the three remaining intentional torts, trespass to land, trespass to chattels, and conversion, that involve damage to or deprivation of property. The first three of the personal intentional torts, assault, battery, and false imprisonment, involve traditional common law. The last of one, intentional infliction of emotional distress, is a newer intentional tort not necessarily recognized, or recognized by different name or in different form, from state to state.

Knowledge

In tort practice, lawyers must be able to identify legal claims out of client interviews, witness statements, medical records, police reports, and other case materials. Tort lawyers must have a mental list of claims (including their elements) to which to resort while actively sorting that data. Tort law defines most claims by their elements. By *element,* law means a necessary condition to finding that the tort was committed and the liability claim exists. The facts must satisfy all elements of a tort, or the claim does not exist. The skill of spotting claims becomes difficult when the facts only approximate the elements of various tort claims. The lawyer must generalize facts, hoping to match (or if representing a defendant, hoping not to match) the elements of the various torts. For example, when a lawyer hears that one person "shoved" another, the lawyer generalizes "shoved" to alert the lawyer to the possibility that the conduct satisfies the *contact* element of battery. Likewise, a lawyer may generalize "pointed the gun" into the *imminent-apprehension* element of assault or "displayed the carcass" into the *outrageous-conduct* element of the intentional infliction of emotional distress.

Intent. Intentional torts begin with the consideration of intent. *Intent* is an element of each of the intentional torts. The Restatement (Third) of Torts: Liability for Physical and Emotional Harm §5 states, "An actor who intentionally causes physical harm is subject to liability for that harm." States, though, require more than intent, to hold a person liable for harm. The person harmed must also prove the other elements of one of the intentional torts, like the *contact* element of battery or the *restraint* element of false imprisonment. As the following cases suggest, a lawyer can satisfy the intent element of the intentional torts by showing that the defendant desired to bring about the plaintiff's harm. The Restatement (Third) of Torts: Liability for Physical and Emotional Harm §1, defines *intent* by stating, "A person acts with 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." The defendant's motive to harm the plaintiff may have been ill will, malice, vengeance, or the like. Evidence of malicious motive can go a long way toward proving intent, although strictly speaking, motive is not an element of these torts, and the plaintiff need not prove motive. Proof (direct or circumstantial) of the defendant's desire to harm is enough to establish intent. Consider as an example the following case.

Williams v. Kearbey

Kansas Court of Appeals
13 Kan. App.2d 564, 775 P.2d 670 (1989)

DAVIS, J. … Defendant Alan Kearbey, a minor, shot and wounded plaintiff Don Harris and plaintiff Daniel Williams, also a minor. Plaintiffs brought this action against Kearbey for battery. The jury found for plaintiffs. It also found, in answer to a special question, that Kearbey was insane at the time. The trial court entered judgment for plaintiffs and Kearbey appeals, arguing: (1) that an insane person should not be held civilly liable for his torts; and (2) that an insane person cannot commit a battery because he is incapable of forming the necessary intent.

…. On January 21, 1985, Alan Kearbey, who was then 14 years old, shot several people at Goddard Junior High School. The principal was killed and three other people were wounded. Among the wounded were plaintiff Don Harris, a teacher at the school, and plaintiff Daniel Williams, a student at the school. Both were shot in the leg.

Harris and Williams brought this action against Kearbey, his parents, and the Goddard School District (U.S.D. No. 265). The trial court held that Harris' claim against the school district was barred by the Kansas Workers' Compensation Act and, at the close of plaintiffs' case, granted the school district's motion for a directed verdict against plaintiff Williams based on governmental immunity. These rulings were not appealed. The jury was allowed, however, to apportion fault to the school district. The court denied Alan Kearbey's motion for a directed verdict on the grounds of insanity. …

In 1927, the Kansas Supreme Court held that "[a]n insane person who shoots and kills another is civilly liable in damages to those injured by his tort." S*eals v. Snow*, 123 Kan. 88, Syl. ¶1, 254 P. 348 (1927). In 1940, the Supreme Court reaffirmed this holding in dicta, saying: "It is definitely settled in this state that the defendant, Toepffer, if in fact insane, would have been civilly liable in damages for his torts." *Toepffer v. Toepffer*, 151 Kan. 924, 929, 101 P.2d 904 (1940). The appellate courts of this state have not spoken on this subject since 1940.

The tort liability of insane persons presents a policy question. In resolving this question, American courts have unanimously chosen to impose liability on an insane person rather than leaving the loss on the innocent victim. *Seals v. Snow* is a leading case in support of this view.

In *Seals v. Snow*, Martin Snow shot and killed Arthur Seals. …

On appeal, Snow argued that he should not be held liable for his torts since he was insane. The court responded: "It is conceded that the great weight of authority is that an insane person is civilly liable for his torts. This liability has been based on a number of grounds, one that where one of two innocent persons must suffer a loss, it should be borne by the one who occasioned it. Another, that public policy requires the enforcement of such liability in order that relatives of the insane person shall be led to restrain him and that

tort-feasors shall not simulate or pretend insanity to defend their wrongful acts causing damage to others, and that if he was not liable there would be no redress for injuries, and we might have the anomaly of an insane person having abundant wealth depriving another of his rights without compensation." 123 Kan. at 90, 254 P. 348.

Kearbey argues (1) the loss should fall upon plaintiffs rather than himself since he was not capable of avoiding his conduct and, hence, was not at fault; (2) it no longer makes sense to impose liability on an insane person in order to encourage his relatives to confine him since public policy no longer favors confinement of the mentally ill unless the insane person presents a danger to other people, in which case liability should be imposed directly on the insane person's relatives for failing to confine him, rather than on the insane person himself; and (3) concern over feigned insanity is no longer warranted since psychiatrists and psychologists now have improved methods of proving or disproving insanity.

Taking up Kearbey's arguments in reverse order, it is obvious that Kearbey's confidence in modern psychiatry is not widely shared. Comments to the Restatement (Second) of Torts list several valid reasons why liability is still imposed on insane persons. These reasons include: "the unsatisfactory character of the evidence of mental deficiency in many cases, together with the ease with which it can be feigned, the difficulty of estimating its existence, nature and extent; and some fear of introducing into the law of torts the confusion that has surrounded the defense of insanity in the criminal law." Restatement (Second) of Torts § 895J comment a (1977).

Next, Kearbey argues that liability should not be imposed on an insane person in order to encourage his relatives to confine him since public policy no longer favors confinement of the mentally ill. We agree that this is not a particularly strong reason for imposing liability. It is also clear, however, that removing this rationale would not have changed the court's decision in *Seals v. Snow*.

The main rationale of *Seals v. Snow* and the one which keys our affirmance of the trial court in this case is that, as between an insane person who injures another and an innocent person, it is more just for the insane person to bear the loss he caused than to visit the loss on the injured person. As stated in *Seals v. Snow*:

> "Undoubtedly, there is some appearance of hardship, even of injustice, in compelling one to respond for that which, for want of the control of reason, he was unable to avoid; that it is imposing upon a person already visited with the inexpressible calamity of mental obscurity an obligation to observe the same care and precaution respecting the rights of others that the law demands of one in the full possession of his faculties. But the question of liability in these cases, as well as in others, is a question of policy; and it is to be disposed of as would be the question whether the incompetent person should be supported at the expense of the public, or of his neighbors, or at the expense of his own estate. If his mental disorder makes him dependent, and at the same time prompts him to commit injuries, there seems to be no greater reason for imposing upon the neighbors or the public one set of these consequences, rather than the other; no more propriety or justice in making others bear the losses resulting from his unreasoning fury, when it is spent upon them or their property, than there would be in calling upon them to pay the expense of his confinement in an asylum, when his own estate is ample for the purpose." 123 Kan. at 90-91, 254 P. 348 (quoting 1 Cooley on Torts 172 [3d ed.1906]).

Although the above language is somewhat dated, the reasoning is still well grounded in sound public policy. Someone must bear the loss and, as between the tortfeasor, the injured party, and the general public, sound public policy favors placing the loss on the person who caused it, whether sane or not.

With one exception, it appears that every American court dealing with the question has reached this same result. A leading case is *McGuire v. Almy,* 297 Mass. 323, 8 N.E.2d 760 (1937), in which the court affirmed a verdict against an insane person for tortious assault and battery. ….

Kearbey argues that he did not commit the tort of battery because his insanity prevented him from forming the intent necessary for that tort. The prevailing American view as set forth above is that a finding of insanity does not preclude a finding that a defendant acted intentionally. A jury may find that an insane person acted intentionally if he intended to do what he did, even though his reasons and motives were

entirely irrational. Restatement (Second of Torts § 895J comment c (1977); Prosser & Keeton on Torts § 135, p. 1074 (5th ed.1984).

The requirements of the prevailing American view for imposing liability for an intentional tort are satisfied in this case. In finding for the plaintiffs, the jury necessarily found that Alan Kearbey touched or struck the plaintiffs "with the intent of bringing about either a contact or an apprehension of contact, that is harmful or offensive." The fact that Kearbey did not "understand the nature of his acts" or did not "understand that what he was doing was prohibited by law" does not preclude the jury from finding that Kearbey acted intentionally in discharging a weapon in Goddard Junior High School.

Affirmed.

Practice

The two lawyers finally found the tumbledown house on the nameless streets—thieves having stolen the street signs long ago. They knocked loudly when it appeared no one inside could hear. Finally, they heard a resident unbolt the door's several locks. A shy and smiling young woman invited them in. The lawyers sat at a kitchen table with the woman and a muscled, older man she described as her boyfriend, reviewing a contingency-fee agreement for her tort claim. Other loud knocks came from the door. Each time, the boyfriend would make his way to the door, peer through its peephole, undo its several locks, and talk in hushed tones with the person on the outside. He would then lock the door again, make his way to a room at the back of the house, emerge with a hand in his pocket, make his way back to the door, undo its several locks, talk in hushed tones with the person on the outside, and lock the door again before returning to the kitchen table. Four of these mysterious transactions occurred during the lawyers' half-hour-long consultation, leaving the lawyers wondering about the challenges of representing a drug dealer's girlfriend.

INQUIRY

Voluntariness. Other jurisdictions follow the rule of *Williams v. Kearbey*. The critical consideration is the voluntariness of the defendant's actions, not the rationality of or motive for those actions. Consider the tort claims upheld in Delahanty v. Hinckley, 799 F. Supp. 184 (D. D.C. 1992), by persons who were struck by bullets aimed at President Reagan, even though the assailant John Hinckley's insanity resulted in his acquittal on the criminal charges. Consider also Colman v. Notre Dame Convalescent Home, 968 F. Supp. 809 (D. Conn. 1997), in which a demented nursing home patient was subject to intentional-tort liability for hitting an entertainer at the nursing home with the entertainer's own guitar. Still, the difference between intent to contact and intent to harm can be important for insurance-coverage purposes. Liability-insurance policies typically exclude coverage for intended harms. On the other hand, the intentional-acts exclusions of insurance policies leave open the possibility that insurance will cover harm resulting from intentional contact not meant to cause harm. *See* Baldinger v. Consolidated Mut. Ins. Co., 222 N.Y.S.2d 736 (N.Y. App. Div. 1961), *affd.*, 183 N.E.2d 908 (N.Y. 1962) (coverage for injury to girl intentionally pushed by five-year-old boy who did not mean to hurt the girl). As to insurance coverage, the insurance-policy language will control. Even though the tort rule is different, insurance cases have held that the defendant must have intended not only the contact but also intended harm or offense. *See* White v. Muniz, 999 P.2d 814 (Colo. 2000) (plaintiff maintaining claim against defendant Alzheimer's sufferer must prove that defendant intended not only the contact but that the plaintiff be harmed or offended).

Substantial Certainty. Law extends intent's definition to deal with other circumstances. Persons sometimes act knowing the substantial certainty of another's harm, without necessarily desiring the harm. A despairing motorist intentionally crosses the centerline into oncoming traffic in a botched suicide attempt that unintentionally kills an innocent motorist. A frustrated worker sprays gunfire into a company cafeteria, unintentionally wounding co-worker friends. A protestor ignites a suitcase of explosives at a national event, unintentionally killing innocent spectators. The actors may not have intended to bring about the harm of others, but when they do, law has good reason to hold them liable for an intentional tort. When the actor knows to a substantial certainty that the harm will result, tort law considers the intent element satisfied. The best-known case is Garratt v. Dailey, 279 P.2d 1091 (Wash. 1955), *after remand*, 304 P.2d 681 (1956),

in which a five-year-old boy pulled a chair out from under his aunt, not intending to hurt her but knowing that she was just about to sit. But consider the following more-recent case involving a well-known defendant.

Doe v. Johnson

United States District Court
817 F.Supp. 1382 (W.D. Mich. 1993)

ENSLEN, D.J. This case is before the Court on defendant's motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), or in the alternative, for a more definite statement under Rule 12(e). …

Facts

This case raises unique legal and ***policy*** issues, but has fairly straight forward facts. Plaintiff, Jane Doe, alleges that defendant, Earvin Johnson, Jr., wrongfully transmitted the human immunodeficiency virus ("HIV virus") to her through consensual sexual contact. Ms. Doe alleges that the wrongful transmission of the HIV virus occurred on or about the evening of June 22, 1990, or the morning of June 23, 1990, or both, at her home in Ingham County, Michigan. Plaintiffs' Complaint at 3-4. Ms. Doe and Mr. Johnson had "sexual contact" which allegedly led to the transmission of the HIV virus. Ms. Doe alleges that immediately prior to the encounter, she asked Mr. Johnson to use a condom. Mr. Johnson allegedly refused to do so. Nonetheless, Ms. Doe engaged in consensual sexual contact with Mr. Johnson. *Id.* at 4.

Prior to the evening of June 22, 1990 or morning of June 23, 1990, Ms. Doe claims that Mr. Johnson "was sexually active, having sexual contact and engaging in sexual intercourse with multiple partners." *Id.* at 3. Thus, Ms. Doe claims that Mr. Johnson "knew or should have known" that he had a high risk of becoming infected with the HIV virus because of his "sexually active, promiscuous lifestyle." *Id.* Accordingly, Ms. Doe argues that Mr. Johnson should have (1) warned her about his past lifestyle; (2) informed her that he "may have HIV"; (3) informed her that he did in fact "have HIV"; (4) not engaged in sexual contact with her; or (5) used a condom or other method to protect her from the HIV virus.

As a result of this wrongful transmission, Ms. Doe states that she suffers, and will continue to suffer, many consequences including physical illness, severe emotional distress, loss of enjoyment of life, extreme embarrassment, humiliation, shame, medical expenses, and lost wages and benefits. *Id.* at 5. Moreover, Ms. Doe notes that she will eventually develop acquired immunodeficiency syndrome ("AIDS") and "suffer a slow, certain, and painful death." *Id.* ….

Battery (Count III)

Defendant argues that count III of plaintiffs' Complaint should be dismissed because plaintiffs have failed to state a claim for battery. Specifically, defendant argues that plaintiffs did not allege that he "intended to transmit the virus" to Ms. Doe, or believed that such transmission was "substantially certain" to occur. Defendant's Brief at 16. Defendant also raises a statute of limitations argument.

Battery is the willful and harmful or offensive touching of another person against their will. *Tinkler v. Richter,* 295 Mich. 396, 401, 295 N.W. 201 (1940); *see also* Restatement (Second) of Torts §§ 13, 18 (1985) (battery is defined as the "intentional, harmful, or offensive, and unprivileged contact with the person of another.") (hereinafter "Restatement" or "Restatement of Torts"). The Restatement of Torts states that where "[X] consents to sexual intercourse with [Y], who knows that [X] is ignorant of the fact that [Y] has a venereal disease, [Y] is subject to liability for battery." Restatement of Torts § 892B, illustration 5; *see also Kathleen K. v. Robert B.,* 150 Cal.App.3d 992, 198 Cal.Rptr. 273 (1984).

Sexual activity between two individuals satisfies the contact requirement for battery. *See, e.g.,* Douglas W. Baruch, *AIDS in the Courts: Tort Liability for the Sexual Transmission of Acquired Immune Deficiency Syndrome,* 22 Tort & Ins.L.J. 165, 176 (1987). The intent required for a showing of battery does not require a desire to harm someone. Instead, it only requires the intent to make contact and encompasses not only "those consequences which are desired, but also ... those which the actor believes are substantially certain to follow from what the actor does." W. Prosser & W. Keeton, Prosser and Keeton on the Law of Torts §§

8, 11 (5th ed. 1984); *see also Schroeder v. Auto Driveaway Co.*, 11 Cal.3d 908, 114 Cal.Rptr. 622, 631, 523 P.2d 662, 671 (1975); *State v. Lankford*, 29 Del. 594, 102 A. 63 (1917).

Defendant argues that plaintiffs have failed to state a claim because they did not state that defendants "intended to transmit," or knew with "substantial certainty" that he could transmit, the HIV virus to Ms. Doe. I disagree. Under Rule 12(b)(6) I must accept all allegations in the Complaint as true and construe these allegations "in the light most favorable to plaintiff[s]." *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90 (1974). In so doing, I find that plaintiffs have alleged a cause of action for the wrongful transmission of an infectious disease under a battery theory. Specifically, under the liberal Rule 12(b)(6) standard, I find that plaintiffs have alleged that defendant knew with "substantial certainty" that he could transmit the HIV virus to Ms. Doe.

INQUIRY

Variations. Law may permit a lesser *recklessness* form of intent to satisfy the intent element of the intentional-infliction-of-emotional-distress (IIED) tort. While the other intentional torts require the desire to harm or knowledge of substantial certainty of harm, IIED's *recklessness* definition of intent holds the element satisfied on knowledge of high probability of harm. Recklessness is acting with knowledge of high probability of harm. The Restatement (Third) of Torts: Liability for Physical and Emotional Harm §2 has a more elaborate and sensitive definition, stating, "A person acts recklessly in engaging in conduct if: (a) the person knows 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." Good policy reasons exist for modifying the intent element for the IIED tort, as you will see later from your study of that tort.

Figure

Trial lawyer Kathleen Flynn Peterson, a president and executive-committee member of the American Association of Justice (formerly the Association of Trial Lawyers of America), has been representing injured individuals for over 25 years. She was a registered nurse before beginning her tort-law career and has put her medical education and experience to good use litigating medical-malpractice and personal-injury cases from her Minneapolis law firm, Robins, Kaplan, Miller & Ciresi, for which she has also been the personal-injury section chair. She is a director of her law firm's foundation promoting public health, social justice, and education, and a tireless speaker on those topics before hundreds of organizations. Ms. Peterson has been recognized as an influential lawyer and woman by a host of local, regional, and national organizations.