CHAPTER 1
Overview of Tort Law

SUGGESTED DISCUSSION

Since your discussion of Chapter 1 will probably be your first, or at least one of your first, discussions in this class, you might want to do some kind of exercise beforehand that will serve to "break the ice." If you want your students to feel comfortable participating, you must create an atmosphere of trust and acceptance. Since most people's favorite topic is themselves, a good exercise is having them introduce themselves by telling about their career goals, their educational and work experiences, their hobbies and interests, and/or their motivation for becoming legal assistants. Alternatively, you can put them in pairs and have them introduce each other. Questions such as What do you like best about yourself? or What is your favorite animal (movie, song, cartoon character, etc.)? enliven the discussion. No matter what questions are asked, students will have an opportunity to break the "sound barrier" by expressing themselves at least once in class without any threat of censure.

Once you have made an effort to make the students feel comfortable, you might open your discussion of tort law with a consideration of some policy questions. Policy questions are some of the most intriguing questions that arise in tort law. A key question that has plagued practitioners and academicians is the question regarding the distribution of losses. Students need to identify their particular biases in answering this question. Do they think, for example, that anyone who injures another, whether intentionally, negligently, or without any fault, should be responsible for compensating the victim? Or do they believe that victims should have to bear their own losses if no one is morally responsible for the harm that occurred to them? Consideration of these questions will allow them to better understand their reactions to the courts' decisions that they read throughout the semester, as well as the lack of consensus among their peers, as to how disputes should be resolved. Therefore, time spent at the beginning of the semester (quarter) dealing with this basic philosophical premise is time well spent.

To give you some idea of students' perspective on this issue, as well as some insight into their writing abilities, you might have them write a one- or two-page paper addressing this question in the context of a hypothetical. Consider the following scenarios or the questions raised at the beginning of the chapter as possible contexts in which to raise this question.

- A twelve-year-old child whose parents are chronic smokers develops a severe case of asthma, which a medical doctor ascribes, in part, to his exposure to secondhand smoke. Medical studies are available to prove the deleterious effects of secondhand smoke. Should the cigarette manufacturer and/or the parents be held liable for the child's injuries?

- A psychotherapist interviews a young man who is exhibiting agitated and aberrant behavior and determines that this condition can be controlled by medication and declines to institutionalize the young man. The mother begs the psychotherapist to hospitalize her son because she fears he is potentially violent. A week later the young man kills his mother while suffering from delusional behavior. Should the psychotherapist be held liable for the woman's death?

- Two neighbors become involved in a shouting match. One neighbor is aware that the other has a heart condition but continues to argue even when the man with the heart condition becomes extremely agitated. The argument ends abruptly when the man with the heart condition succumbs to a heart attack, which, although not fatal, renders him incapacitated for the remainder of his life. Should the neighbor be held liable for his contribution to the victim's pain and suffering?

- A woman develops neurological symptoms including joint pain and loss of control of her jaw and tongue muscles after taking an antidepressant. The manufacturer of the antidepressant claims it was unaware of the possibility of such symptoms. Should the woman be able to sue the manufacturer for her damages?

  After having the students write about one or more of these scenarios, involve them in a class discussion. This will give them an opportunity to hear the reactions of their peers and to be exposed to ideas they might not have otherwise considered. Limit your role to that of a facilitator, serving only to keep the discussion on point and to raise questions no one else has considered.

QUESTIONS FOR STUDENTS

1. What are some purposes of tort law?
2. What is a tort?
3. How does the concept of reasonableness relate to tort law?
4. What place do public policy arguments and morality play in tort law?
5. What is a slippery-slope argument, and how does it affect court decisions?
6. How do each of the following relate to tort law?
   a. Case law
   b. Statutes
   c. *Restatement of the Law of Torts*
7. What are the primary differences between tort law and criminal law?
8. What are the primary differences between tort law and contract law?

ANSWERS TO REVIEW QUESTIONS

1. *What are some of the purposes of tort law?*

   The primary purpose of tort law is to provide compensation to those injured by civil wrongs. Tort law helps provide acceptable standards of civil conduct by providing remedies for infractions. Tort law provides an avenue to obtain a just result without the need for personal vendettas.

2. *What is a tort?*

   It is a civil wrong for which a victim receives compensation in the form of damages.

3. *How does the concept of reasonableness relate to tort law?*

   The common thread interweaving most torts is the notion that socially unreasonable conduct should be penalized and those who are its victims should be compensated.

4. *What place do public policy arguments and morality play in tort law?*

   Tort law often goes beyond compensating individuals and considers, more broadly, the interests and goals of society at large and the community in which we live. These interests are often referred to by the courts as public policy concerns.

5. *What is a slippery-slope argument, and how does it affect court decisions?*

   That use of an argument in one case will allow application of that same argument in innumerable other cases. The metaphor is used to show that once you take the first step, it is too easy to fall down the slippery slope to the bottom of the hill, presumably into a morass of undesirable outcomes. The slippery-slope argument is, in essence, an administrative concern. The courts fear that if it finds negligence on behalf of the sympathetic plaintiff before it, hundreds of thousands of similarly situated individuals or those whose situations are analogous to the case will also seek similar redress.

6. *How do each of the following relate to tort law?*

   a. case law—*Tort law is largely a product of case law, which involves case-by-case decision making by the state courts.*

   b. statutes—*The decision-making process of case law is affected, to some degree, by statutes, which the courts are mandated to follow unless statutory gaps exist that leave a court with unanswered questions.*

   c. Restatement of the Law of Torts—*A guideline that courts use in formulating their holdings. The Restatement was compiled by eminent legal scholars and practitioners in an attempt to provide lawyers and judges with black-letter principles (legal principles generally accepted by the legal community) of tort law.*

7. *What are the primary differences between tort law and criminal law?*

   Although the two share several similarities, they differ in terms of the interests affected, the remedy granted, and the standard of proof procedural mechanisms used. A crime is considered an offense against society, whereas a tort is an offense against another individual or group of individuals. The purpose of prosecuting someone who has committed a crime is to vindicate the interests of society by punishing the offender. The purpose of suing in tort, in contrast, is to compensate the victim.

8. *What are the primary differences between tort law and contract law?*

   Tort law differs from contract law in terms of the voluntariness of entering into an agreement. When two or more parties create a contract, they each agree to give up something in return for receiving some benefit. In a contract action, the parties have voluntarily and knowingly assumed duties or obligations to others. In tort law, by contrast, duties are imposed by the law without the express consent or awareness of those involved.

TORT TEASERS

Reasons for Holding Manufacturers Liable

The manufacturer can better afford to bear the losses caused by the child's injuries than can the family.

The manufacturer should bear the responsibility for any damages caused by a product it puts into the stream of commerce.

The manufacturer had an obligation to insure that the drug caused no untoward side effects before putting it on the market.

If certain side effects were possible, even though unlikely, the manufacturer had an obligation to warn consumers.

Reasons for Absolving Manufacturer of Liability

A manufacturer should not be expected to bear the responsibility for every conceivable loss suffered by consumers, irrespective of the likelihood of such a loss occurring.

Holding manufacturers responsible for all damages that stem from their products will result in the financial ruin of, or at the very least, financial instability of manufacturers.

Holding manufacturers responsible for all damages that stem from their products could deter technological advancement.

Unless a manufacturer acts negligently or recklessly, consumers should expect to bear the burden of the losses they suffer.

ANSWERS TO INTERNET INQUIRIES

The Cornell Law School Legal Information Institute is a major legal resource gateway. At this site you will find links to United States Court of Appeals' recent decisions, state courts' decisions and statutes, and a host of relevant resources. Be sure to bookmark this site; you will use it often.

To become familiar with what this site has to offer, do the following exercises:

a. Go to **http://www.law.cornell.edu** and search "Tort Law."

b. Find and select the link to "Appellate Decisions from Other States." Then go to "Listing by jurisdiction." Go to your state and make a list of the resources that are available online.

Answers will vary.

c. From "Tort," select "Recent Tort Law Decisions" for the U.S. Supreme Court. On the search page that comes up, put a check mark next to "liability," "Ginsberg," and "claim." In the cases that come up, look for a case involving El Al Israel Airlines. Read the synopsis at the beginning and write down the holding of the case.

Holding: The Warsaw Convention precludes a passenger from maintaining an action for personal injury damages under local law when her claim does not satisfy conditions for liability under the Convention.

ANSWERS TO PRACTICAL PONDERABLES

Much ado has been made in the media about the elderly woman who collected a substantial judgment from MacDonald's as a result of the injuries she sustained from hot coffee she spilled on her lap. To get more details about this case, enter the search term "The Actual Facts About the McDonald's Coffee Case." (Note that this article was written by the American Trial Lawyers Association [ATLA], whose primary members are plaintiffs' attorneys.)

After reading this article, write a short paper on your assessment of the appropriateness of the judgment. In your paper, consider some of the arguments raised in this chapter about the purpose of tort law. Answers will vary but students should consider whether this award would serve to protect consumers, whether McDonald's conduct justified such a substantial punitive damage award, and whether the plaintiff should have been held more accountable for her own contribution to her injuries. They should also contemplate the effect this award has and will continue to have on other businesses.

CHAPTER 2
Overview of a Tort Case

SUGGESTED DISCUSSION

Chapter 2 will probably be a review for most students. Even if they have already been exposed to these concepts, however, it would be wise at the least to direct the students' attention to the key terms at the end of the chapter and suggest they read about those terms they are unfamiliar with or have forgotten.

Since legal assisting students need maximum exposure to the practical aspects of their anticipated profession, they need ample opportunity to apply the concepts that have been presented to them. To promote such application, you might consider introducing an actual or hypothetical case they can use as a basis for practicing their procedural skills. Using this case as a foundation in each chapter you can then introduce or review one procedural aspect of litigation. In some chapters you will be able to interweave the procedural concepts presented in the Practice Pointers into the fabric of the text but, for the most part, such interweaving will be impractical or impossible. Nevertheless, try whenever possible to incorporate the practical exercises into the substantive principles being presented.

Chapter 2 is an appropriate chapter in which to present or review the elements of a complaint. You can use the complaint included in the study guide as either a sample around which to center your discussion or as a guideline from which students can draft their own complaints for a different set of facts.

Alternatively, you may want to use the facts of *Ruby v. Construction Wizards, Inc.* (as set forth below) to focus your discussion about the structuring and organizing of a tort claim. Without going into any detail at this point, ask the students to describe chronologically what steps need to be taken to pursue a tort claim up to and through litigation. Focus in particular on the discovery process since this is the primary area in which legal assistants become involved.

The facts that will be used throughout this manual as the basis for discussion are the following:

Ruby v. Construction Wizards, Inc.

Ruby is driving down a two-lane highway one evening at dusk when a sheet of plywood flies out of the bed of a truck coming toward her. The plywood penetrates the cab of Ruby's truck, shatters her windshield, and strikes Ruby. Ruby sustains severe, long-lasting injuries to her left arm and hand, requiring her to receive ongoing medical treatment and causing her to suffer a substantial wage loss. Ruby claims that the truck, driven by an employee of Construction Wizards, Inc., was improperly loaded at the time.

QUESTIONS FOR STUDENTS

1. What will an attorney generally do before initiating a complaint?
2. What are the four elements of a complaint?
3. What possible options does a defendant have in responding to a complaint?
4. What are the five basic discovery tools, and how are they used?
5. What is a disclosure statement, and how does it relate to the concept of mandatory disclosure?
6. Identify each of the following:
   a. motion to compel
   b. motion for a protective order
   c. motion for summary judgment
   d. motion *in limine*
7. What is the difference between a jury trial and a bench trial?
8. Describe the voir dire process, and distinguish between challenges for cause and peremptory challenges.
9. What is the purpose of each of the following?
   a. opening statements
   b. closing arguments
   c. direct examination
   d. cross-examination
   e. moving for a directed verdict
   f. charging the jury
10. What is the difference between a general and a special verdict?
11. What options do parties have after trial?

ANSWERS TO REVIEW QUESTIONS

1. *What will an attorney generally do before initiating a complaint?*

   Investigate to determine if the legal elements of a tort claim have been met. If a claim has been stated, a demand letter may be sent.

2. *What are the four elements of a complaint?*

   First, a complaint must state that the court has jurisdiction**,** i.e., the authority to hear the case. Second, the complaint must list the parties to the action. Third, the complaint must provide a brief summary of each of the elements of the case along with the basic facts that will be used to prove each element. Finally, the complaint must specify the relief being sought by the plaintiff.

3. *What possible options does a defendant have in responding to a plaintiff's complaint?*

   A defendant could choose to file an answer. At the same time, the defendant could raise any affirmative defenses it might have. The defendant may at this time also raise any counterclaims or cross-claims. It could also file a motion (FRCP 12). Motions can be filed alleging, among other things, a lack of jurisdiction over the person or subject matter, improper venue, insufficiency of process, or failure to state a claim upon which relief can be granted.

4. *What are the five basic discovery tools, and how are they used?*

   They are: (1) interrogatories, (2) depositions, (3) requests for admission, (4) requests for production of documents, and (5) requests for medical and psychological examinations. Interrogatories are written questions submitted to the opposing party, which that party must answer in writing and under oath (FRCP 33). A deposition is an oral examination of a witness (or a party to the lawsuit) under oath (FRCP 27-32). Requests for admissions are requests by one party asking that the other party admit certain facts (FRCP 36). Documents vital to a case that are in the possession of the opposing party can be obtained via a request for production of documents (FRCP 34). A request for medical or psychological examination (FRCP 35) allows a party to have the opposing party examined by an independent expert.

5. *What is a disclosure statement, and how does it relate to the concept of mandatory disclosure?*

   Disclosure statements are the foundation of mandatory disclosure. Under the federal rules, the body of the disclosure statement must address four areas of subject matter. These include the disclosure of the name, address, and telephone number of each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses; all documents in a party's possession, custody, or control and that the disclosing party may use to support its claims or defenses; the computation of damages and the documents and other evidentiary materials upon which such computations are based; any insurance policy covering the defendant for the liabilities claimed in the suit; the identity of expert witnesses who will be used at trial.

6. *Identify each of the following:*

   a. motion to compel—*A motion to compel is appropriate when the opposing party refuses to produce discoverable material (FRCP 37).*

   b. motion for a protective order—***A** motion for a protective order prevents discovery of information that is privileged and therefore not discoverable (FRCP 26[c]).*

c. motion for summary judgment—*During the discovery process a party may evaluate the dispute and determine that the other side has failed to prove one or more elements of its case. Consequently, if there is no material fact at issue for the jury to decide, the court could render a decision as a matter of law without a trial. In this event the party will file a motion for summary judgment requesting that the court enter a judgment on its behalf, thus dispensing with the need for a trial (FRCP 56). A party can also request a partial summary judgment, which, in effect, eliminates particular issues.*

d. motion in limine—*The purpose of a motion in limine is to resolve regarding whether the evidence should or should not be introduced to the jury because it is unduly prejudicial, irrelevant, or will confuse the jury or waste its time.*

7. *What is the difference between a jury trial and a bench trial?*

In a jury trial all factual issues are resolved by the jury, while all legal issues are resolved by the judge. In a bench trial the judge decides both factual and legal issues.

8. *Describe the voir dire process, and distinguish between challenges for cause and peremptory challenges.*

Jury selection is conducted through a process known as voir dire, which consists of a series of questions asked of potential jurors by the trial judge or the attorneys, depending on local practice (FRCP 47). A party who wants to excuse a particular juror and can show that the juror has already formed a judgment as to how the case should be decided or for some reason is unable to decide the case impartially, may use a challenge for cause (FRCP 47[b] and 28 U.S. Code § 1870). The party who wants to dismiss a particular juror but cannot allege bias may remove the juror using a peremptory challenge (FRCP 47[b]). No reason need be given for a peremptory challenge.

9. *What is the purpose of each of the following?*

a. opening statements—*Give an overview of the basic elements of the case, introduce the parties and witnesses that will be involved in the trial, and in general, set the tone and theme of the case. Opening statements are not considered part of the evidence, but they are extremely important, especially in light of research showing that the majority of jurors decide the outcome of the case during opening statements and do not change their minds after hearing the testimony.*

b. closing arguments—*The party's attorney will summarize the facts of the case, showing how the evidence established (or failed to establish) each of the legal elements. Using the theme established in their opening statements, counsel will use their most persuasive rhetoric to convince the jury that their client should prevail and that what damages should or should not be awarded.*

c. direct examination—*On direct examination questions are posed by the counsel calling the witness.*

d. cross-examination—*Is conducted by opposing counsel. The function of cross-examination is to impeach (discredit) testimony given by the witness during direct examination.*

e. moving for a directed verdict—*Argues that either side failed to meet the burden of proof on all the elements of their case (FRCP 50). Such motions, though frequently made, are commonly denied, but if a motion for a directed verdict is granted, the case is in essence dismissed.*

f. charging the jury—*The judge will instruct the jury on the rules of law to be applied (FRCP 51). In some states standard jury instructions are used. In others, attorneys draft proposed instructions for the judge's consideration and, in a conference conducted outside the earshot of the jury, argue which instructions should be adopted.*

10. What is the difference between a general and a special verdict?

A general verdict would require the jury to decide if the defendant was liable for the plaintiff's injuries and to determine what damages should be awarded. If a special verdict were requested, the jury would be required to answer special interrogatories, and the judge would have to determine the prevailing party after reviewing the jury's answers.

11. What options do parties have after trial?

If the jury decides against the plaintiff, he or she can make a motion for a new trial, arguing that errors were committed during the trial (FRCP 59). Or the plaintiff can move for a judgment notwithstanding the verdict (JNOV), arguing that the verdict reached was contrary to the evidence and law (FRCP 50[b]). Such motions are generally contingent on counsel making appropriate objections during the trial; if counsel fails to do so, these procedural remedies will be denied. The plaintiff could also appeal (see *Federal Rules of Appellate Procedure*) the decision to a higher court, and if the defendant was unhappy with part of the outcome at the trial level, the defendant can file a cross-appeal.

TORT TEASERS

Events Prior to Trial

Interviews

Investigations

Demand Letter

Filing Complaints, Answers, Counterclaims, Cross-claims, and Motions Discovery

Motion for Summary Judgment

Pretrial Conference

Motions *in Limine*

Events at Trial

Voir Dire

Opening Statements

Direct and Cross-Examination

Motion for Directed Verdict

Closing Arguments

Charging of Jury

General and Special Verdicts

Events After Trial

Motion for New Trial

Motion for Judgment Notwithstanding Verdict

Appeal and Cross-Appeal

Legal assistants will be most heavily involved in the discovery process. They will draft and answer interrogatories, prepare requests for admission and requests for production of documents, and summarize depositions. To a lesser degree, they may assist in the preparation of motions and in the drafting of complaints. Many will perform investigative activities and will participate in trial preparation by preparing trial notebooks, exhibits, and exhibit lists. In some cases, attorneys may request that their legal assistants accompany them to court to assist them in locating pertinent testimony and documents, to set up demonstrations and audiovisual materials, and to take notes.

ANSWERS TO INTERNET INQUIRIES

This assignment is designed to begin familiarizing you with the provisions of the Federal Rules of Civil Procedure. For each of the following questions, find the applicable rule number in the Federal Rules that provides an answer.

1. Within what time period must a summons be served after a complaint is filed?

   FRCP 4(m)

   Within 120 days of filing a complaint. Must be served with the complaint.

2. What basic elements must be included in any complaint?

   FRCP 7-11

   Names of the parties being sued, state and county of residence of parties being sued, main facts leading up to injury, place and date of occurrence of injury, and request for damages. Must be signed.

3. What are the possible bases for an affirmative defense?

   FRCP 8(c)

   Accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge of bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, and waiver, or any other matter constituting an affirmative defense.

4. What are the possible grounds for a motion to dismiss?

   FRCP 12(b)

   Lack of jurisdiction over subject matter or person, insufficiency of process or service of process, improper venue, failure to join an indispensable party, failure to state a claim upon which relief can be granted, or failure to join a party under **FRCP** Rule 19.

5. Who can serve a subpoena, and where can it be served?

   FRCP 45(b)

   Anyone not a party and over 18 can serve a subpoena. It can be served anyplace within the district of the court or anyplace outside of the district if it is within 100 miles of the place the trial, hearing, deposition, etc., is taking place. Fees and mileage must also be tendered.

6. How long must a person be given to respond to a subpoena?

   FRCP Rule 45(d)

   Fourteen days is a presumptive minimum.

7. When must a response to a motion be filed? When must a reply be served?

   FRCP Rule 6(d), Rule 12(c)–(g), Rule 37, Rule 56, Rule 59(c)

   Time periods vary according to type of motion and the court setting the hearing date. Generally, a reasonable time for a responsive pleading must be given.

8. What determines the time limits of oral arguments? Must a judge allow them?

   FRCP Rule 78

   The court's local rules set the time limits. A judge may not be required to give oral argument, especially to nondispositive motions.

9. What must a party that is filing a motion to compel do before the court will consider the motion?

   FRCP Rule 37

   The party making the motion must certify that the movant has in good faith conferred, or attempted to confer, with the opposing party to resolve the matter.

10. For what reasons can a judge issue a protective order?

    FRCP Rule 26(c)

    To protect a party or other person from annoyance, embarrassment, oppression, or undue burden or expense.

11. When must a response to a motion for summary judgment be filed? When must a reply be filed?

    This is not provided for in **FRCP**.

    Local rules may set the time frame; otherwise, it is called out in a court order, thereby setting a hearing on the motion.

12. Who can file a motion to set and a certificate of readiness?

    FRCP Rule 40

    Some courts set the trial date automatically, and no certificate is required. Where a certificate is required, either party may file it.

13. When must discovery be completed?

    FRCP Rule 16

    The scheduling order generally sets forth the end date for discovery.

14. What must a party show if it wants to postpone a trial?

    FRCP Rule 40 and local rule

    Generally the party must show good cause and that the continuance is not for the purpose of delay.

15. What must be included in a settlement conference memorandum, when must it be completed, and to whom must it be given?

    FRCP Rule 16(c) and local rule

    A settlement conference memorandum must be filed as required by the scheduling order. In some cases, they are not exchanged between the parties but are given only to the settlement conference judge.

16. Who conducts voir dire in the federal courts?

    FRCP Rule 47(a)

    The court may conduct voir dire or allow counsel to do so.

17. To how many peremptory challenges is a party entitled?

    FRCP Rule 47(b)

    As provided for in 28 U.S.C. §1870. That section provides:

    Sec. 1870. Challenges

In civil cases, each party shall be entitled to three peremptory challenges. Several defendants or several plaintiffs may be considered as a single party for the purposes of making challenges, or the court may allow additional peremptory challenges and permit them to be exercised separately or jointly.

All challenges for cause or favor, whether to the array or panel or to individual jurors, shall be determined by the court.

18. At what point must a party submit requests for jury instructions?

FRCP Rule 51

Generally, at the instruction of the trial judge.

19. When can a party apply for a default judgment?

FRCP Rule 55

After default has been entered against the party failing to appear or plead. But see also **FRCP** Rule 55(b)(2).

20. How are awards for attorneys' fees determined?

FRCP Rule 54(d)(2)

A request must be filed within 14 days of entry of judgment unless awarded as a matter of law. Usually the details of the application process are spelled out in local rule.

CHAPTER 3 Intentional Torts

SUGGESTED DISCUSSION

Consider enlarging upon the *Ruby v. Construction Wizards, Inc.* scenario to allow for a discussion of intentional torts and have the students imagine the following events. When Ruby and the truck driver get out of their vehicles, the truck driver, who is unnerved by what has transpired, begins, out of his nervousness, to laugh; and Ruby, who is very shaken by her trauma, becomes enraged. First, she reaches down and hurls a rock at the truck driver, but he ducks and it misses him. She is more accurate with her purse, however, and manages to land a few blows before he grabs her purse from her. He screams a few epithets at her before leaving the scene, taking her purse with him. She runs back to her car, pulls out a rifle, and takes a shot at his tires but misses and he gets away. She then is forced to walk several miles to find a telephone. She finally cuts across a pasture on her way to a ranch house, unintentionally spooking some of the horses in the pasture, causing one of them to be injured in the ensuing stampede.

- What intentional torts were committed by Ruby?
- What intentional torts were committed by the truck driver?
- What defenses could each of them raise?
- Would it matter if the truck driver had had his back turned when Ruby threw the rock at him?
- Suppose the truck driver had never taken Ruby's purse from her but that their discussion became so heated that the truck driver tried to leave. If Ruby pulled her car in front of his and then jumped out of her vehicle, aiming her rifle directly at him, what tort would she have committed? Could she raise any legitimate defense?
- Suppose that Ruby fired a shot when the truck driver started up his truck but that the bullet actually hit a vehicle passing by. Because Ruby had no intention of hitting that vehicle, could she be held liable for any intentional tort?
- Can Ruby be held liable for the injuries sustained by the horse?
- Suppose that Ruby goes to the emergency room to be treated for her injuries and the attending physician gives her a cortisone shot but neglects to tell her about the potential side effects of cortisone. Can she hold him liable if she later suffers some of these side effects?

QUESTIONS FOR STUDENTS

1. What must a tortfeasor intend in order to be held liable for an intentional tort?
2. What is the transferred-intent doctrine?
3. What is a battery?
4. How does a battery differ from an assault?
5. How does the tort of false imprisonment arise in law enforcement and in shoplifting cases?
6. Why is it so difficult to hold a defendant liable for the infliction of emotional distress?
7. What are some of the ways a tortfeasor can commit trespass?
8. What is the difference between trespass to chattels and conversion, and what does a court consider when distinguishing between these two torts?
9. What must be shown to prove that a plaintiff consented?
10. Under what conditions is a defendant entitled to use self-defense?
11. When is a defendant justified in using force to defend his or her property?
12. Under what conditions might a defendant *not* be justified in defending a third person?
13. Why are homeowners not allowed to use spring guns to defend their homes?
14. Under what conditions can a property owner use force to regain possession of chattels?
15. Can a landlord use force to evict a holdover tenant?
16. What are the differences between public and private necessity?

ANSWERS TO REVIEW QUESTIONS

1. *What must a tortfeasor intend in order to be held liable for an intentional tort?*

   The tortfeasor must intend or have a desire to bring about a particular consequence. The tortfeasor need not desire or plan to harm a person, but the person must be aware that certain consequences are substantially certain to result from his or her acts.

2. *What is the transferred-intent doctrine?*

   The defendant's intent toward one person is transferred to the person who is actually injured as a result of the defendant's conduct. Therefore, in such cases the tortfeasor is deemed to have committed an intentional tort.

3. *What is a battery?*

   It is defined as the intentional infliction of a harmful or offensive contact upon a person.

4. *How does a battery differ from an assault?*

   Assault is defined as the intentional causing of an apprehension of harmful or offensive contact. Apprehension does not mean fear but does require the plaintiff to be aware of the impending contact. Unlike battery, a plaintiff alleging assault must be aware of the threatened contact.

5. *How does the tort of false imprisonment arise in law enforcement and in shoplifting cases?*

   A valid defense to the allegation of false imprisonment is the police officer's assertion of the legal right to make an arrest. An officer can claim such a defense even if the arrest or detention later turns out to be unlawful. He is required only to act reasonably and in good faith in carrying out the arrest. A merchant who reasonably believes that a customer has stolen property has a right to detain the suspected individual for a short period of time for the purpose of investigation. The right to detain is very restricted, however, and will be lost if the detention is unreasonably long, if the plaintiff is bullied or insulted, if the plaintiff is publicly accused of shoplifting, or if the detention is used to coerce payment or the signing of a confession. In most states the right to detain is limited to detention on the defendant's premises and is lost when the plaintiff leaves the premises. The pivotal question is whether the merchant had reasonable grounds for the detention.

6. *Why is it so difficult to hold a defendant liable for the infliction of emotional distress?*

   A plaintiff must prove that he or she actually suffered severe emotional distress and must, at the very least, have sought medical attention. Some courts require that the plaintiff suffer some kind of physical harm, although most modern courts have no such requirement. A plaintiff who suffers harm only because of a peculiar vulnerability or sensitivity will not be allowed to recover if the defendant is not aware of these vulnerabilities or sensitivities.

7. *What are some of the ways a tortfeasor can commit trespass?*

   A person who enters or wrongfully remains on another's land has committed the tort of trespass to land. By the same token, trespass occurs if an individual fails to remove an object from another's land if she or he is under a duty to remove it.

8. *What is the difference between trespass to chattels and conversion, and what does a court consider when distinguishing between these two torts?*

   If the defendant's interference with the plaintiff's property is so substantial that justice demands that the defendant pay the plaintiff the full value of the property, the defendant has committed the tort of conversion. Trespass to chattels is committed by the intentional interference with the plaintiff's use or possession of chattel (personal property).

9. *What must be shown to prove that a plaintiff consented?*

   The question is whether a reasonable person in the defendant's shoes would have believed that the plaintiff has consented to an invasion of his or her interest. Consent is not a defense if the plaintiff is incapable of or incompetent to give consent.

10. *Under what conditions is a defendant entitled to use self-defense?*

    Was the defendant privileged to use force to defend his- or herself, and was the degree of force used reasonable?

11. *When is a defendant justified in using force to defend his or her property?*

    A property owner may use only that degree of force that is reasonably necessary to protect the property (some states, such as Texas, allow deadly force to be used to protect property). Furthermore, the owner must verbally insist that an intruder stop before the property owner is justified in using force. An exception to this general rule is allowed if the defendant reasonably perceives that the request to stop will be useless or that the harm will occur immediately (*Restatement [Second] of Torts* § 77[c]).

12. *Under what conditions might a defendant* not *be justified in defending a third person?*

    Most courts reason that the intervener (defendant) "steps into the shoes of the person he has sought to champion (the third person)." If it turns out that the person being rescued is not privileged to act in self-defense, the intervener is precluded from claiming such a privilege.

13. *Why are homeowners not allowed to use spring guns to defend their homes?*

    As a general rule, property owners are entitled to use such a device only if they could use a similar degree of force if they themselves were present when the intruder entered. Because such devices are usually considered deadly force, they may be used only to prevent death or serious bodily harm or the commission of certain felonies. A homeowner will be liable, therefore, if a trespasser is seriously injured by an electric fence erected by the homeowner. Because the owner would not be justified in using deadly force against the trespasser if he or she confronted the trespasser in person, the homeowner would not be justified in using a mechanical device that constituted deadly force.

14. *Under what conditions can a property owner use force to regain possession of chattels?*

    Under limited circumstances, a property owner may use force to regain possession of chattels taken from him or her by someone else. Because the owner becomes an aggressor by the use of force, he or she is not given the same latitude by the courts as a person who is taking a less aggressive stance in defending his or her possession of chattels. To claim this defense, the owner must first show that he or she used reasonable force in securing the chattels. Deadly force is never allowable unless justified under the doctrine of self-defense.

15. *Can a landlord use force to evict a holdover tenant?*

    The majority of American courts do not permit the use of force by landlords.

16. *What are the differences between public and private necessity?*

    The conduct of a defendant protecting only his or her own interests or those of a few private citizens falls into the realm of private necessity. By contrast, if the class of persons being protected is the public as a whole or a substantial number of persons, the privilege is referred to as public necessity. The only reason for distinguishing between these two kinds of necessities is that the defendant does not have to pay for damages caused in cases of public necessity but is required to do so in cases involving private necessity.

PRACTICE POINTERS

Have the students prepare a trial notebook for the case of *Ruby v. Construction Wizards, Inc.* For those documents or materials they have not prepared in other chapters, have them simply insert a divider in the notebook indicating what materials would be enclosed if they were available.

TORT TEASERS

1. The son committed the following intentional torts: assault (in almost running over the father and in shooting at the man with the gun); false imprisonment (in holding the little brother captive in the car); trespass to land (in going on another's property); conversion (in destroying the sign); trespass to chattels (in "borrowing" the car and the gun). Infliction of mental distress might be claimed on the basis of his trying to intimidate the father and scare the little brother, but it is doubtful that such conduct would be considered extreme and outrageous enough to constitute a tort claim. It might be alleged that the father committed false imprisonment by standing in front of the car, but since he did not confine the young man, it is unlikely that the father would be found liable. The man who brandished the gun committed assault and could not claim defense of property since he was using deadly and, therefore, unreasonable force. The son cannot claim self-defense, or defense of another, when he fired shots at the man with the gun and destroyed the sign. Even though the man fired a shot in the air, the son was not justified in using force unless it was reasonably necessary to do so to defend himself and his girlfriend. Retreat was probably the best alternative, unless he thought retreat was impractical or impossible and that their lives were in imminent danger. His use of force in destroying the sign was totally unjustified since such an act did nothing to thwart the man's threatened attack and, in fact, probably escalated the man's anger and potential dangerousness.

2. In Re JAMES WARNER EICHORN on HABEUS CORPUS

81 Cal.Rptr.2d 535

Court of Appeal, Fourth District,
Division 3, California. Dec. 30, 1998.

CROSBY, J.

James Eichorn was convicted of a misdemeanor violation of a City of Santa Ana ordinance banning sleeping in designated public areas. The appellate department affirmed his conviction and denied his request to transfer the cause. Eichorn thereafter petitioned for writ of habeas corpus in this court. We conclude his conviction must be set aside.

I.

James Eichorn was cited for violation of the city's anticamping ordinance (Santa Ana Mun.Code, ch. 10, art. VIII, § 10-402) on the evening of January 25, 1993.[FN1] Following a detour to the Supreme Court that established the ordinance was facially constitutional (cite omitted), Eichorn's case eventually went to trial.

> **FN1.** Section 10-402 reads as follows: "Unlawful Camping. [¶] It shall be unlawful for any person to camp, occupy camp facilities or

> use camp paraphernalia in the following areas, except as otherwise provided: [¶] (a) any street; [¶] (b) any public parking lot or public area, improved or unimproved." Camp paraphernalia included a sleeping bag.

In a significant pretrial ruling, the court (Judge Brooks) determined Eichorn could not present a necessity defense (see CALJIC No. 4.43) to a jury. Eichorn had offered to prove that on the night of the violation every shelter bed within the city that was available to a homeless single man with no children was occupied, and that he was involuntarily homeless, i.e., he had done everything he could to alleviate his condition. Due to circumstances beyond his control, defendant, a 14-year resident of Santa Ana, had been unable to find work as a manual laborer that paid enough to allow him to find an alternative place to sleep.

The court determined defendant had not made a sufficient showing to allow a jury to consider his necessity defense: "It appears that the defense of necessity is not supported by the offer of proof. The first element wasn't satisfied, in the court's view, no significant, imminent evil for this defendant or any other person."[FN2] Defendant objected that the court's ruling "not only goes against what we understand to have been the statements and admissions by the People and by [Judge Margines, who had previously handled the case] but undermines the whole reason why we were going forward at trial ... it's clearly eviscerated our entire defense."

> **FN2.** The court's questions and comments suggested it was not impressed with defendant's claim lack of sleep was a significant evil ("what do you mean 'bodily harm?' Like tired eyelids or blood?"; [I]f he didn't sleep here, he'd lose sleep and this would be a horrible physical thing to impose on him?").

In light of Judge Brooks's ruling on the necessity defense, and noting there was no dispute Eichorn was in a sleeping bag in the civic center on the night in question, Eichorn's lawyer agreed to go forward without a jury on the constitutional issue whether the ordinance was unconstitutional as applied to him based on his alleged involuntary homelessness.

Trial commenced without a jury in May 1996. Officer Carol Craig testified defendant was in a sleeping bag on the ground at about 10:30 p.m. outside a county office building in the civic center. He was using his clothes as a pillow. Craig asked (as she always did) why Eichorn wasn't at the National Guard Armory (a homeless shelter several miles away). A bus from the civic center to the armory usually picked up people between 5:00 and 6:00 p.m. According to Craig's police report, defendant replied he had tried "a while back." It was full, so he never returned. The court judicially noticed that the walk between the civic center and the armory was "through very dangerous areas of town." Police photographed and cited Eichorn, then asked him to move on. He complied.

James Meeker, a professor at the University of California, Irvine in the Department of Criminology, Law and Society, testified he had conducted a study on homelessness in January and February 1993. There were more than 3000 homeless individuals in Orange County during this period. Most homeless were longtime residents of Orange County (average 14 years) who had lost jobs and could not afford housing. The County had relatively little affordable housing, and had been decreasing. Single men had a particularly difficult time because they were less

likely to receive the support from family, friends, or governmental agencies. Most were sleeping outdoors because they had no other choice. Homeless individuals were 10 times likely to be victimized by crime than the average population. Many homeless stayed in urban areas because of proximity to assistance providers (food, clothing, and shelter), day jobs (just eight percent were unemployed and not looking for jobs), public facilities (restrooms, etc.) and the need for transportation.

Timothy Shaw was the executive director of the Orange County Homeless Issues Task Force. He pegged the number of homeless in Santa Ana at about 1500 persons in 1993. There were about 118 shelter beds available for single men like Eichorn, most available on a first-come, first-served basis. In addition, the armory could accommodate 125 persons during the winter (although it frequently exceeded its capacity). As was routine, these shelters were full on the night Eichorn was cited.

Maria Mendoza was the county's homeless coordinator and oversaw the use of the armory as a shelter. The armory was available only on cold winter nights. She explained how the bus to the armory would leave from the civic center in the late afternoon. Those on the bus had priority at the armory. Eichorn had spent some 20 nights there in December and January. On January 25, the armory was 13 persons over capacity, which was not uncommon. That the armory would accept excess capacity was not a given. Usually, only those "at risk" (e.g., women and children) would be admitted after the maximum was reached, and generally only when it was raining.

Eichorn, 49 years old, testified he had moved to Costa Mesa in 1972, a few years after his discharge from the Marine Corps. The Vietnam veteran lost his job in a machine shop in 1980, and subsequently ended up without a place to live. He moved to Santa Ana because a friend told him about a job driving an ice cream truck. He sold ice cream for about a year and was able to afford a motel room. When he lost that job, he frequented the casual labor office in Santa Ana until it closed. When he worked and could save enough, he would live in a motel. He also relied on general relief and food stamps. However, general relief was no longer enough to secure affordable housing because most of the less expensive motels had been torn down. If he could not get into a shelter, Eichorn would sleep in the civic center, where he was close to services (including restrooms) and where there was "safety in numbers" (i.e., where it was less likely someone would steal or attack him while he slept). He loved to work and did so every chance he got. He did not like living outside. He had been turned away from the armory in the past and had a "nervous walk" back to the civic center. On January 25, he did not recall whether he had tried to find a spot at a shelter or whether he heard that the shelters were full. He recalled eating around 7:00 p.m. He was in his sleeping bag listening to his radio when Craig arrived around 10:30 p.m. Eichorn's mother and stepfather lived in Long Beach, but staying with them was not an option because he was "an adult responsible for" himself. Defendant denied a problem with alcohol or drugs.

June Marcott, program manager for food stamps and general relief of the County of Orange, testified Eichorn received food stamps on a regular basis from 1989 through 1993, except when he was employed in parts of 1991 and 1992. He was eligible for $307 monthly in general relief if he participated in a work program (working nine days a month) and looked for work (four job applications per day). He last received general relief in November 1990 and was terminated because he did not submit a job search report. He applied for relief in March and June 1992, but was denied.

The court found Eichorn had violated the camping ordinance and was not involuntarily homeless on the night in question, finding he chose not to go to the armory. He also suggested defendant should have sought out familial assistance and should have applied for general relief. The court ordered him to perform 40 hours of community service. By a 2-to-1 margin, the appellate department of the superior court affirmed the conviction without opinion and declined to certify the case to this court for direct review. (Cal. Rules of Court, rule 63.) Eichorn filed this petition for habeas corpus and seeks to set aside his conviction. [footnote omitted]

II.

Eichorn makes a multipronged attack on his conviction. One of his contentions is that he was induced to waive his right to a jury trial by the court's pretrial ruling that he could not present a necessity defense. As noted above, the court ruled the defense's offer of proof was inadequate, i.e., defendant had not presented enough evidence to get to a jury on the issue of whether he violated the law to prevent a significant evil. This ruling was in error, and we vacate the judgment accordingly.

California appellate courts have recognized the necessity defense "despite the absence of any statutory articulation of this defense and rulings from the California Supreme Court that the common law is not a part of the criminal law in California." (cite omitted)

In Tobe v. City of Santa Ana, supra, 9 Cal.4th at p. 1088, 40 Cal.Rptr.2d 402, 892 P.2d 1145, the Supreme Court, while holding the camping ordinance was facially valid, declined to decide whether or how it might be unconstitutionally applied. The court refused to assume that the ordinance would be enforced "against persons who have no alternative to 'camping' or placing camp paraphernalia' on public property." … Indeed, the Tobe court was given assurances by the People "that a necessity defense might be available to 'truly homeless' persons and that prosecutorial discretion would be exercised."…

As the prosecutor recognized at one of the hearings held before trial, "because [defendant has] that necessity defense at trial, [the law] is never applied unconstitutionally. Because of the nature of that defense that we're incorporating into our definition, there will never be an unconstitutional application." The court (Judge Margines) reasoned similarly: "I think … the statute will not be applied unconstitutionally to these people; because if they are truly in the class that [defense counsel says] renders the application unconstitutional, then they will be found not guilty by virtue of the necessity defense. [The defense has] the burden of demonstrating that they fall within the class. It's the same burden you have at trial if you present a necessity defense."

An instruction on the defense of necessity is required where there is evidence "sufficient to establish that defendant violated the law (1) to prevent a significant evil, (2) with no adequate alternative, (3) without creating a greater danger than the one avoided, (4) with a good faith belief in the necessity, (5) with such belief being objectively reasonable, and (6) under circumstances in which he did not substantially contribute to the emergency." …

The defense of necessity is "founded upon public policy and provides a justification distinct from the elements required to prove the crime. [Citation.] The situation presented to the defendant must be of an emergency nature, threatening physical harm, and lacking an alternative, legal course of action. [Citation.] The defense involves a determination that the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law

defining the offense charged. [Citation.] Necessity does not negate any element of the crime, but represents a public policy decision not to punish such an individual despite proof of the crime. [¶] An important factor of the necessity defense involves the balancing of the harm to be avoided as opposed to the costs of the criminal conduct. [Citation.] Unlike duress, the threatened harm is in the immediate future, which contemplates the defendant having time to balance alternative courses of conduct. [Citation.] The defendant has the time, however limited, to form the general intent required for the crime, although under some outside pressure. [Citation.] Thus, the defense does not negate the intent element, and the defendant has the burden of proving the defense by a preponderance of the evidence." … Whether necessity exists is generally a question of fact. …

At a minimum, reasonable minds could differ whether defendant acted to prevent a "significant evil." Sleep is a physiological need, not an option for humans. It is common knowledge that loss of sleep produces a host of physical and mental problems (mood irritability, energy drain and low motivation, slow reaction time, inability to concentrate and process information). Certainly, no one would suggest that a groggy truck driver who stops his rig on the side of a road rather than risk falling asleep at the wheel does not act to prevent a significant evil, i.e., harm to himself and others. Indeed, Judge Margines had denied Eichorn's request for funds to hire an expert to testify about the harmful effects of sleep loss: "I mean it doesn't take an expert to tell us that, to convince a person, that there are ill effects that arise from sleep [deprivation]."

The court must instruct if the evidence could result in a finding defendant's criminal act was justified by necessity. … Eichorn's offer of proof was sufficient. There was substantial if not uncontradicted evidence that defendant slept in the civic center because his alternatives were inadequate [footnote omitted] and economic forces were primarily to blame for his predicament. Thus, whether denominated a denial of his right to jury trial [footnote omitted] or of his due process right to present a defense …, the court's error was clear, fundamental, and struck at the heart of the trial process.

Finally, because Eichorn is entitled to raise a necessity defense to charges he violated the camping ordinance, we find no other constitutional violations under the circumstances of this case. …

The writ is granted and the cause remanded to the former municipal court with directions to set aside the judgment of conviction and to proceed in conformity with this opinion.

SILLS, P.J., and WALLIN, J., concur.

3. MONTGOMERY and MONTGOMERY, *v.* BAZAZ-SEHGAL, M.D.,

Executrix of the Estate of Kuldeep Sehgal, M.D., Deceased,[FN1]

Greater Pittsburgh Impotence Center and
Aliquippa Hospital, Appellees. 742 A.2d 1125

FN1. Dr. Sehgal, originally an appellee, died while this appeal was pending. On October 12, 1999, we granted Dr. Bazaz-Sehgal's Application for Substitution of Personal Representative.

Superior Court of Pennsylvania.

Argued April 6, 1999.

Filed Dec. 9, 1999.

CIRILLO, President Judge Emeritus:

¶1 John and Marsha Montgomery appeal from a judgment entered in favor of Sehgal, Greater Pittsburgh Impotence Center, and Aliquippa Hospital following a directed verdict in a medical battery [FN2] case. The court removed the case from the jury and entered a directed verdict at the close of the evidence after it found that because the Montgomerys had failed to present expert testimony, they could not, as a matter of law, prove entitlement to any but nominal damages. We reverse and remand.

> FN2. Although sometimes termed "medical assault," such claims are usually grounded in battery.

[1][2][3] ¶2 It is well settled that "[o]nly in a case where the facts are all clear, and there is no room for doubt, should the case be removed from the jury's consideration, and a motion for directed verdict … be granted." (cite omitted) "[O]n a motion for a directed verdict, the court must accept as true all facts and proper inferences which tend to support the contention of the party against whom the motion has been made and must reject all testimony and [in]ferences to the contrary." Id. Likewise, when this court reviews a trial court's decision to direct a verdict in favor of a defendant, "we must view the evidence presented in the light most favorable to plaintiff and determine whether plaintiff failed to prove his case as a matter of law." (cite omitted)

¶3 Viewed in this light, the testimony shows that John Montgomery had difficulties with premature ejaculation and partial loss of erection prior to visiting Dr. Sehgal. However, he and his wife had sexual intercourse regularly and repeatedly on weekends when he was home from his job, long-distance truck driving; his erections were such that he was still capable of penetration. His primary difficulty was with premature ejaculation. After investigation and several injections which were of only temporary assistance, Dr. Sehgal determined surgery was necessary. The Montgomerys understood the operation would be on an outpatient basis and would involve clearing out a plaque blockage inside the penis. During the surgery, however, Marsha Montgomery was told that her husband would need to remain in the hospital as an inpatient. She was not told the reason, and she was initially puzzled and concerned. However, she was reassured that everything was fine and that this was not unusual.

¶4 When Montgomery woke up from anesthesia some time later in a hospital room, a nurse placed before him a card. After some time, he picked it up and read it. It was a warranty card for a prosthesis. Montgomery asked the nurse whether this was an error, and she told him the prosthesis was inside his penis. He was incredulous. After contacting his wife, Montgomery telephoned Dr. Sehgal but was unable to reach him. The Montgomerys continued to call Dr. Sehgal for two days, but their efforts to speak with him met with no success until, on the third day, Dr. Sehgal appeared in John's hospital room. In the words of John Montgomery:

> I looked at him, I said where have you been, what did you put inside me, why. And he says to save you from a second operation. I told him, I said this ain't up to you, it is up to me to determine whether I want it in me or not and I don't even know what the hell he put in me.

Montgomery claims he now feels more "like a machine than a man," that he is encumbered and embarrassed by the device, and that the emotional quality of his lovemaking with his wife has suffered.

¶5 The Montgomerys' two claims at trial were lack of informed consent grounded in battery and grounded in negligence. [footnote omitted] At the close of evidence, and after a discussion in chambers, the trial court granted a directed verdict for Appellees on the grounds that the Montgomerys' failure to present a medical expert precluded the jury from considering any evidence on the Montgomerys' battery claim. The court denied the Montgomerys' subsequent motion for a new trial; hence this appeal.

¶6 The Montgomerys present two questions for our consideration, framed as follows:

Whether [Appellants'] testimony can go to the jury without expert medical testimony that the unwanted surgery performed by [Appellee Sehgal] (the insertion of the inflatable penile prosthesis) caused the physical and mental symptoms of which [Appellants] complain[.]

Where [Appellant] suffers an objective, measurable, observable physical injury, are [Appellants] competent to testify as to the resulting physical, mental and emotional pain and suffering arising from the injury?

¶7 The Montgomerys were precluded by order of the court from presenting "liability expert witnesses" because they had earlier failed to file a timely pre-trial witness list. Due to this, they properly concede, they were unable to make out a case of informed consent based on negligence, for such a claim requires expert testimony during the liability phase. [footnote omitted] (cite omitted)

¶8 As the trial court has stated to us, however, it was their choice not to present medical expert testimony as to the damages allegedly resulting from the battery. Specifically, plaintiffs offered no medical expert testimony which would establish a causal link between the battery and plaintiffs' harm.

The trial court concluded that an expert was necessary to establish both causation and damages, and it entered a directed verdict for this reason.

¶9 The Montgomerys present for our consideration only their medical battery claim, arguing that their choice not to call an expert to prove causation and/or damages should not, as a matter of law, have precluded the jury from considering the evidence they had presented as to both liability and damages for battery.

[4] ¶10 The differences between a medical malpractice informed consent case grounded in negligence (commonly referred to as an "informed consent" case) and one based on battery are at the heart of this case and must be kept clearly in mind. Whether John Montgomery granted Dr. Sehgal permission to insert the prosthesis as well as to eliminate the penile blockage is the

essence of both a negligence and a battery claim, but for different reasons. In an informed consent claim grounded in negligence, the matter of permission goes to the scope of the contract between physician and patient, and the primary inquiry is whether the injury suffered was within the known risks of which the patient was informed, or whether the information, particularly as to alternative procedures, was complete. (cite omitted)

[5] ¶11 In contrast, in a battery claim such as that at hand, there need be no physical injury, but only some contact; the matter of permission goes to the quality of the contact, and consent to being so touched is a defense. (cite omitted) The Restatement (Second) of Torts specifies:

> (1) 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) an offensive contact with the person of the other directly or indirectly results. Restatement (Second) of Torts § 18(1)(a), (b) (1965). We have explained:
>
> Implicit in the tort of battery is the recognition that an individual has a right to be free from unwanted and offensive or harmful intrusions upon his own body. The tort of battery has traditionally been employed to redress this precise grievance. The essence of the tort "consists in the offense to the dignity involved in the unpermitted and intentional invasion of the inviolability of [the plaintiff's] person. …" Thus, the Restatement recognizes that an intrusion upon the plaintiff's physical or personal dignity does occur where the defendant "throws a substance, such as water, upon the [plaintiff] or if [the defendant] sets a dog upon him" even though the defendant and plaintiff have not physically touched each other.

Herr *v.* Booten, 398 Pa.Super. 166, 580 A.2d 1115, 1117 (1990) (citations omitted) (emphasis in original).

[6][7] ¶12 Another difference is that while an informed consent negligence claim requires the presentation of expert testimony in order to establish the physician's duty, Sagala, supra, a medical battery claim does not:

> Unlike an informed consent case where it must be shown that " 'as a result of the recommended treatment, the patient actually suffers an injury the risk of which was undisclosed, or the patient actually suffers an injury that would not have occurred had the patient opted for one of the undisclosed methods of treatment[,]' " (cite omitted), it is not necessary for a plaintiff to prove such specific medical findings under a theory of battery. Therefore, while the need for [sic] expert medical testimony is necessary in an informed consent case, it is not where the case involves battery. (cites omitted)

[8] ¶13 Before us is a battery case grounded on the lack of consent to the procedure itself, not a negligence case grounded on the act of inadequately advising the patient of the risks of or alternatives to the procedure (an "informed consent" case). Cases such as Hamil v. Bashline, 481 Pa. 256, 392 A.2d 1280 (1978) and Maliszewski v. Rendon, 374 Pa.Super. 109, 542 A.2d 170 (1988), which consider only negligence-based malpractice claims, are not applicable.

[9] ¶14 The primary issue in the medical battery claim at trial was whether Dr. Sehgal's implantation of an inflatable pump penile prosthesis into Montgomery's body constituted an unpermitted, intentional contact. (cites omitted) It is irrelevant to such a claim whether the surgery was performed perfectly or imperfectly; in fact, the Montgomerys conceded it was performed well. Even where an operation benefits a patient, however, it may still constitute a battery if permission was not given and there was no emergency. (cites omitted)

[10][11] ¶15 The unpermitted touching itself gives rise to a civil battery action. (cites omitted) There is no need to show actual physical injury, but only unpermitted and, therefore, offensive contact, in order to establish liability for battery. (cite omitted)

¶16 There is no dispute that Dr. Sehgal implanted an inflatable prosthesis into Montgomery's penis, thereby touching him. There is at least credible evidence that, additionally, he did so without permission. We have previously held that summary judgment is inappropriate where the record contains substantial, credible evidence to support a battery claim based on lack of permission to perform a surgical procedure. (cite omitted) The same would normally hold true of a directed verdict and would require our reversal. However, this case is somewhat more complex.

¶17 The trial court essentially agrees with the foregoing, stating in its opinion: "It is clear that there is evidence in this record from which a trier of fact could conclude that Dr. Sehgal perpetrated a battery upon John ..." even without an expert witness. The court, however, did not allow the jury to deliberate upon this primary issue because it found that the Montgomerys' failure to call an expert to testify that their injuries had been caused by the battery precluded the claim. The dissent, too, acknowledges that the absence of an expert would not necessarily have been fatal to the Montgomerys' battery claim:

> While expert testimony may not have been necessary to establish that a battery occurred, I am convinced that it was necessary for appellants to prove that the battery directly, obviously and foreseeably caused appellants' physical and emotional damages.

[12] ¶18 Certainly, as with any tort, in order for the Montgomerys to recover damages, they must show that the battery caused the injuries of which they complain. (cite omitted) At issue is whether an expert was required to prove such causation in this particular case.

¶19 The injuries the Montgomerys claim to have suffered are partially in the nature of mental anguish, a form of actual or compensatory damages. Montgomery testified that he felt "more like a machine than a man" after the surprise insertion of the inflatable pump into his scrotum and the prosthesis into his penis, and that the device was cumbersome and humiliating. This, he stated, has had a negative impact upon his emotional and physical state during sexual relations with his wife.

[13][14][15][16] ¶20 Mental anguish damages may be assessed in appropriate medical battery cases:

> The plaintiff may further recover for all injuries proximately caused by the mere performance of the operation, whether the result of negligence or not. If an operation is properly performed, albeit by a surgeon operating without the consent of the patient, and the patient suffers no injuries except those which foreseeably follow from the operation, then a jury could find that the substitution of surgeons did not cause any compensable injury. Even there, however, a jury could award damages for mental anguish resulting from the belated knowledge that the operation was performed by a doctor to whom the patient had not given consent. Furthermore, because battery connotes an intentional invasion of another's rights, punitive damages may be assessed in an appropriate case.

(cite omitted) [footnote omitted]

If this be true when a patient belatedly discovers that the operation he expected was performed by a different surgeon, it must also be true when what he discovers upon waking up is that a different operation was performed by the expected surgeon. Most people would likely find the second even more emotionally distressing than the first. [footnote omitted] It is clear that mental anguish damages are available in such a situation.

¶21 At the close of the plaintiffs' case, counsel for Dr. Sehgal presented a motion for a compulsory nonsuit on the basis that the connection between the battery and the requested damages could not be proved without an expert. During an extensive discussion in chambers between the trial court and counsel, the trial court correctly stated, after reviewing the law:

> Mr. Montgomery's protestations to the presence of the prosthesis do[ ] not require an expert for him to say that it is cumbersome and he never expected it to be there. I don't think that would require an expert. … [E]xpert medical testimony is necessary to establish the causal nexus of the injury to the tortious conduct in those cases where the connection is not obvious. Clearly, as to the things of which Mr. Pietrandrea [attorney for the Montgomerys] complained, the connection is obvious.

The motion was denied.

¶22 At the close of the evidence, the defense moved for a directed verdict on the same basis. The trial court again discussed the issue in an on-the-record chambers conference. First, it examined John Montgomery's claim that he had a reduced or different physical sensation in his penis, was no longer able to feel the physical pleasures of intercourse, and was unable to sustain an erection without inflating the device via the pump. As to this sort of physical injury, the court ruled, an expert would have been required in order to prove that the claimed injuries were caused by the insertion of the prosthesis. The court granted a directed verdict as to those damages.

¶23 Second, the court examined the mental anguish and loss of consortium components of the Montgomerys' injuries: that the device was cumbersome, embarrassing, made John feel like a machine, and had a negative emotional impact on the couple's marital relations. Initially, the court denied the directed verdict as to these injuries, finding, as it had before, that the connection between the battery and these injuries was obvious and direct and, thus, that damages could be awarded for them without expert testimony. However, after further discussion, the court decided that any damages based upon these injuries could not be sustained without expert testimony. The court explained that, as to such psychological effects, it could not determine where the dividing line was between medical testimony, which would require an expert witness, and nonmedical testimony, as to which an expert would not be required.

[17][18][19] ¶24 The dividing line is clear in the law, however. As the court had earlier correctly stated, compensatory damages, including mental anguish damages, may be awarded even in the absence of expert testimony, for direct, obvious, and foreseeable results of an injury in a nonnegligence case, and this is true even when the bodily injury is minor or trivial in character. (cites omitted) In order for proof of such damages to go forward without an expert, the causal connection must be obvious, direct, and proximate. If the connection is such, then no expert is required. If the connection is not obvious, an expert is required:

> Expert testimony is not required "where the matter under investigation is so simple, and the lack of skill or want of care so obvious, as to be within the range of the ordinary experience and comprehension of even nonprofessional persons." (cites omitted)

[20] ¶25 The distinction earlier drawn by the trial court was correct. In this particular case, any injury involving physical sensation would require the testimony of a medical expert to establish a causal nexus. Such causation is not simple, obvious, and direct, in light of Montgomery's difficulties with premature ejaculation and soft erections prior to the surgery. However, the causal connection between the battery and his psychological injuries is clear and direct, as the trial court had earlier recognized.

¶26 It is obvious, and within the range of comprehension of non-professionals, that the surprise and unpermitted insertion of an inflatable pumping prosthesis into Montgomery's scrotum and penis would make him feel embarrassed and machinelike, and that it would have a negative emotional impact upon his marital relations. It is a direct and foreseeable result and is not a complex matter requiring expert testimony. The fact that he might possibly have felt embarrassed by his problems prior to the insertion of the prosthesis is not a factor requiring expert testimony, but is rather a matter to be taken into account by the jury.

[21] ¶27 Our supreme court has stated:

> It is the plaintiff's burden to prove that the harm suffered was due to the conduct of the defendant. As in many other areas of the law, that burden must be sustained by a preponderance of the evidence. (cite omitted) Whether in a particular case that standard has been met with respect to the element of causation is normally a question of fact for the jury; the question is to be removed from the jury's consideration only where it is clear that reasonable minds could not differ on the issue.

(cite omitted)

Reasonable minds can and do differ in this case. Therefore, the Montgomerys' medical battery claim should have been presented to the jury. Even in the absence of expert testimony, this case is sufficiently straightforward that the law permits a jury to consider whether the mental distress damages the Montgomerys claim were proximately caused by the medical battery.

¶28 Thus, the trial court erred by granting Appellees' motion for a directed verdict and by denying the Montgomerys' motion for a new trial. The case is remanded to afford the Montgomerys the opportunity to prove their battery claim and related damages without the benefit of an expert witness.

¶29 Order reversed. Case remanded for proceedings consistent with this opinion. Jurisdiction relinquished.

¶30 POPOVICH, J., files a Dissenting Opinion.

POPOVICH, J., dissenting opinion:

¶1 Upon review, I generally agree with the Majority's statement of the applicable law. I also agree with the Majority's conclusion that expert testimony was necessary in this case to establish the causal nexus between the operation performed by Dr. Kuldeep Sehgal and any injury involving physical sensation to John Montgomery's penis and scrotum. However, I respectfully disagree with the Majority's determination that "the causal connection between the battery and [John Montgomery's] psychological injuries is clear and direct. …" Rather, I am not convinced that the evidence of causation of appellants' psychological injuries is sufficiently simple, obvious, clear and direct to allow recovery in the absence of expert testimony.

¶2 In the present case, I believe that the causal connection between the tortious conduct and appellants' psychological injuries is far from obvious, and it is for this reason that expert testimony was necessary to establish causation. As noted in their brief, appellants' testimony regarding damages centered upon the negative effect the device had upon their relationship and the fact that John Montgomery "felt more like a machine and less like a man" once Dr. Sehgal implanted the device. In addition, John Montgomery testified that because of the implant, he is unable to derive feeling or satisfaction from sexual intercourse and will never be able to achieve an erection without the penile prosthesis or a similar device. Other than their own unsubstantiated averments as to the possible *1135 cause of their psychological injuries, appellants presented no evidence of causation.[FN7]

> FN7. Although he continued to have sexual relations with his wife at the onset of his impotence problem, John Montgomery's ability to maintain an erection steadily deteriorated for at least a year and a half before consulting Dr. Sehgal, and as it did, he grew increasingly reluctant to engage in sexual activity. For instance, Marsha Montgomery testified as follows:
>
> Q: … Now, his problem with premature ejaculation, that was beginning to occur in '88 and into '89, did that affect your sexual relationship with your marriage at all?

A: It was a little bit frustrating but we loved each other and we tried and we did it and we did it but he started to back away a little bit because it was more frustrating to him, you know, he ejaculated so fast. N.T., 1/12/98, at 82.

Q: How often during this first three month period before surgery would you have your sexual relations?

A: Well like I say, he shied away from me quite a bit sometimes and he was frustrated and we'd start all over again and he couldn't understand why it was releasing. But we did have an idea why, because of the blood clot. N.T., 1/12/98, at 91.

Q: … Did … you or your husband tell Dr. Sehgal at [the initial] visit, that he came in with problems of impotence for the last year and a half, is that accurate?

A: We told him he came in with pre-ejaculation. That he could get an erection but he would ejaculate. If that is called impotency. I didn't consider my husband impotent.

Q: Did your husband tell Dr. Sehgal in the last six months that he had poor erections, was able to penetrate but was getting frustrated about it, is that accurate?

A: Because of the ejaculations, yes.

Q: [Were] there words stated to Dr. Sehgal to the effect that he, meaning your husband, had always had a strong desire in the past but since he is unable to get any decent erection, his desire has also started to go down and he has started to shy away from sexual activity?

A: Part of that statement is correct. It was that he shied away from, started to shy away because of his ejaculation problems.

Q: Did you report to Dr. Sehgal that this erection problem, by you I mean you and your husband, that this erection problem had come up slowly and has gotten worse, gradually?

A: Yes, it was causing some emotional problems for us. N.T., 1/12/98, at 135-136.

Similarly, John Montgomery testified:

Q: … When you started experiencing this premature ejaculation condition, did that affect your sexual relationship with your wife?

A: No, I was getting frustrated because I didn't know what was happening but it didn't stop us from having love sessions on weekends whenever I was home. N.T., 1/12/98, at 160.

> Q: … It states here your wife is getting frustrated and angry about it, is that an accurate statement?
>
> A: No, I was the one getting frustrated and aggravated because I couldn't keep an erection long enough to get her satisfied.
>
> N.T. at 163-164.
>
> Parenthetically, I note that although appellants testified that the physical and mental injuries allegedly suffered were experienced subsequent to the time the surgery in question was performed, they never testified that such injuries were actually caused by the implant surgery. Further, Dr. Sehgal, the only medical expert to testify, opined that many of the injuries complained of, such as the decreased pleasure John Montgomery felt upon ejaculation, could not have been caused by the implantation of the prosthesis.

¶3 The record reveals that John Montgomery suffered from premature ejaculation and the inability to maintain an erection before Dr. Sehgal treated him. Also, prior to the surgery, appellant attempted an alternative course of treatment for his impotence problem. Specifically, he received two injections of Papaverine and Regitine, which were injected directly into his penis. Appellants failed to eliminate John Montgomery's preexisting impotence or the injections that he received as possible causes of his physical injuries. I agree with the Majority that it is difficult—if not impossible—to determine, based on appellants' testimony, whether their injuries were caused by the implantation of the penile prosthesis, John Montgomery's preexisting impotence problem or the injections of Papaverine and Regitine. For example, John Montgomery testified that it is now impossible to maintain an erection without the device once it was implanted. Meanwhile, it is evident from the record that John Montgomery could not maintain an erection before the prosthetic device was implanted.

¶4 However, unlike the Majority, I am unable to conclude from the record whether the mental distress appellants complain of was the direct, obvious and foreseeable result of the implantation of the prosthesis or the continuation of the emotional distress caused by John Montgomery's preexisting impotence problem. While expert testimony may not have been necessary to establish that a battery occurred, I am convinced that it was necessary for appellants to prove by that the battery directly, obviously and foreseeably caused appellants' physical and emotional damages. (cites omitted)

¶5 I do not believe that appellants' testimony regarding their mental anguish met the quantum of proof necessary to survive Dr. Sehgal's motion for a directed verdict because it failed to demonstrate that their mental anguish was a direct and necessary consequence of the allegedly unauthorized surgery. Accordingly, I would affirm the judgment of the trial court.

4. BRAY *v.* ISABELL

458 So.2d 594

Court of Appeal of Louisiana, Third Circuit.

Oct. 10, 1984.

Rehearing Denied Nov. 26, 1984.

Before FORET, STOKER and KNOLL, JJ.

KNOLL, Judge.

Plaintiffs, Lynn Richard Bray, his mother, Nina Sue Landry, and his stepfather, Robert R. Landry, appeal from a judgment dismissing their claim for damages against T. H. Isabell, owner of the Sunset Motor Inn, and John Dan Wells, the inn's general maintenance man. Plaintiffs seek damages for injuries Bray suffered when Wells shot him after Bray broke into a vending machine on the premises of the Sunset Inn. The trial court concluded that Bray was 100 percent at fault and his injuries were damnum absque injuria.

On appeal, Bray urges two errors. Since we are affirming, and find that the record supports that Wells used reasonable force under the circumstances, we will address only that assignment of error.

On March 25, 1981, Bray and two companions, Roland Morvant and Terry Fontenot, drove to the Sunset Inn at approximately 11:30 p.m. They parked their car on the service road in front of the inn and, while Fontenot slept in the car, Bray walked to the vending machines at the inn as Morvant waited nearby. Bray broke into a vending machine and stole the coin box. Mrs. Gastineau, the inn's manager, saw Bray and immediately alerted her son, Wells, who was asleep on the couch in her apartment. Wells went to the back door of the apartment and saw Bray breaking into the machine with a tire tool, which prompted Wells to obtain his mother's .22 pistol. When he shouted at the intruders, Bray and Morvant ran toward their parked car carrying the money box, a tire tool, and a lug wrench. As Bray and Morvant reached the car, Wells, who was about 20 feet away, asked them to drop their weapons, put their hands up, and go inside the inn so he could call the police. Instead, Bray and Morvant ran past their car, away from Wells. When they were approximately 70 to 75 yards away, Wells fired three warning shots, one of which struck Bray in the lower back and exited through his stomach. Bray has undergone four surgeries.

[1][2][3] Plaintiffs contend that Wells's use of force against Bray was unreasonable under the circumstances. The law is well settled that a plaintiff cannot recover damages for a battery if he is at fault in provoking the difficulty in which he is injured. (cites omitted) However, even where a person is the aggressor, the person retaliating may use only so much force as is reasonably necessary to repel the attack, and if he goes beyond this, he is liable for damages. (cite omitted) Where a person reasonably believes he is threatened with bodily harm, he may use whatever force appears reasonably necessary to protect against the threatened injury. … (cites omitted)

[4][5][6] Resort to dangerous weapons to repel an attack may be justifiable in cases when the fear of personal danger is genuine and founded on facts likely to produce similar emotions in reasonable men. (cites omitted) It is only necessary that a person have grounds which lead a reasonable man to believe force is necessary, and that he actually so believes. Although all facts and circumstances must be taken into account to determine the reasonableness of his belief, detached reflection or a pause for consideration cannot be demanded under circumstances which require split second decisions. (cite omitted)

[7] … In its reasons for judgment, the trial court stated in part: "… this Court believes the use of force in this matter was reasonable. If the Defendant shot to run these people off so they wouldn't come back, and steal, and/or harm him or his mother; or, if he shot, as the Court believes he did, thinking he was threatened (see evidence about the lugwrench [sic] one was still carrying) by the object in the perpetrator's hand, the Defendant used what the Court believes was reasonable force. This Court still believes and finds that taking all the facts and circumstances together, as they exist in this case, the 'reasonable' man would have done what Defendant did in the situation. It is difficult [not] to believe that in hot pursuit of a criminal in near proximity to the crime scene; with a parked car; with one armed with an object in his hand which could be a weapon; and with a pause for consultation, as the perpetrators acted; … this Defendant was justified in shooting."

[8] We find that the record supports the trial judge's determination that Wells used reasonable force under the circumstances. (cites omitted)

For the foregoing reasons, the judgment of the trial court is affirmed. Costs of this appeal are assessed to the plaintiffs-appellants.

AFFIRMED.

STOKER, J., dissents.

5. HOOD *v.* WALDRUM

434 S.W.2d 94, 58 Tenn. App. 512

Court of Appeals of Tennessee, Middle Section.

March 29, 1968.

OPINION

TODD, Judge.

In these consolidated cases, Malcolm Hood, Jr. and Christine Hood, defendants, have appealed in error from separate verdicts and judgments in favor of plaintiffs, R. C. Waldrum and Mrs. Lula Waldrum, for damages resulting from an alleged attack upon Mrs. Waldrum by defendants' dog.

The salient facts are uncontroverted. The defendants are husband and wife. They reside in a semi-rural situation in which three homes are grouped in close proximity with no other houses in 'hollering distance'. For about nine years, the defendants have owned a large dog, which is kept as a pet and, to some degree, for protection. About 1962, he allegedly 'snapped' at the ankle of a neighbor's child. In 1973, he allegedly bit an electric meter reader on the hand. There is no other evidence of violent or mischievous conduct on the part of the dog; in fact, he is pictured by defendants as a harmless pet. Defendants did maintain two 'bad dog' signs in their yard, but they insist that it was to keep salesman away. Defendants did customarily keep the dog tied, but they insist that this was because he had 'run off ' and had been shot on a previous occasion.

The plaintiff, Mrs. Waldrum, is a dealer in cosmetics and walks from door to door selling her wares. Once previously, she called upon Mrs. Hood who responded that she was not interested in

plaintiff's cosmetics. Plaintiff had seen the 'bad dog' signs several times and had previously seen the dog, himself, a large heavy animal, tied up. Plaintiff had been warned by Mrs. Hood's mother who lived next door that defendants had a 'bad dog.'

On the day of the injury, plaintiff knocked on defendant's front door without response. She then went to a side door and knocked without response. As she left the side door, she saw Mrs. Hood in the backyard washing a trash can with a garden hose and called to her. Defendant's dog then came from behind the house and leapt towards her. She either fell or was knocked to the ground. The dog made no attempt to bite or otherwise injure her. She suffered a broken leg, resulting in the pain, disability, and expenses for which the two plaintiffs brought their respective suits.

As originally filed, the declarations alleged negligence in allowing an animal with known vicious propensities to *517 run loose and in allowing said animal to attack plaintiff. To this declaration, a general issue plea was filed.

On the first day of the trial after the jury had been selected and sworn, and over objection of defendants, the plaintiffs were permitted to amend their respective declarations by adding second counts identical in substance. The pertinent portion of Mr. Waldrum's amendment is: 'That at the time and place aforesaid, the defendants were the owners of said dog, had knowledge that said dog was of vicious propensities, and yet allowed said dog to be loose and not restrained, and therefore, said defendants are liable to the plaintiff for the damages which he received resulting from the injuries to his wife caused by the attack described in this declaration.'

At the conclusion of the trial, the jury announced verdicts in favor of the plaintiffs 'on the second count only' and further reported, 'we decided that the Hoods were not guilty of negligence and therefore we should disregard the First Count.' Pursuant to said verdicts, judgments were entered in favor of plaintiffs upon the second counts of their declarations, and in both cases, the first counts were dismissed.

The first assignment of error is: 'The Trial Court erred in charging the jury that under the factual situation presented in these cases, the doctrine of assumption of risk, as a matter of law, did not apply, because in giving such instruction, the Judge invaded the fact-finding province of the jury since there was material evidence from which the jury could find that the Plaintiff, Mrs. Waldrum, deliberately exposed herself to the danger and thereby assumed the risks incident thereto.'

The portion of the charge complained of is as follows: 'Now there has been something said about this doctrine of assumption of risk as it might apply to the Second Count of the declaration and you could visualize a factual situation where the doctrine of assumption of risk would apply, that is, if the injured person had full knowledge of the dangerous propensities of the animal or the injured person intentionally, or on purpose or unnecessarily, put himself in the way of the animal or the dog, then there would be an assumption of risk so as to bar a recovery, can't be absurd about these things if a person knew of the dangerous situation, had personal knowledge of it, or aggravated the animal, or put his hand in a cage where a snake was, or went in a cage with a vicious dog or something of that kind, certainly there would be an assumption of risk though as would bar a recovery even under the Second Count of the declaration, but I'm instructing the Jury in this case, that under the factual situation as presented here to us, that this doctrine of the

assumption of the risk on the part of the plaintiff and the plaintiffs in these cases does not apply. The proof does not show or justify an inference that this lady knowingly placed herself in a position of danger, the theory, the insistence of the defendants, one theory is that this animal was not dangerous, so I'm instructing the Jury as a matter of law that this doctrine of the assumption of the risk does not apply to the factual situation of this case, that is under the Second Count of the declaration.'

Superficially, the first assignment presents only the question of whether there was evidence upon which reasonable minds might agree that plaintiff 'voluntarily assumed the risk of injury.' This question will be first considered in the light of the physical situation, information received by the plaintiff, and her actions on the day of her injury.

Pictures included in the record portray a modest home situated on a hillside above the road so that it was necessary for visitors to walk uphill along a driveway to reach the house. At the entrance to the driveway was a sign bearing the words 'bad dog.' The drive approached and passed the house on the lower side of the lot, so that in leaving the drive and approaching the house, it was necessary for a visitor to walk uphill across the lawn. The uphill grade continued to the opposite end of the house where another 'bad dog' sign was placed for the benefit of visitors who might enter the premises from an adjoining neighbor's premises. There were four entrances to the house, one on each end and one front and back.

Having been warned by a neighbor that defendants had a 'bad dog,' and having seen one of the 'bad dog' signs on the day of injury and previous occasions, plaintiff proceeded to the front door of defendant's home. Receiving no response at this door, she proceeded to the door on the upper, or west end of the house, farthest from the drive, and there knocked again without response. Plaintiff insists that she did not go any nearer the backyard than this latter door, however, the physical facts would tend to corroborate defendant's testimony that plaintiff came around the back corner of the house. The latter 'side' door is near the front corner of the house, so that a person at or near said door would be able to see very little of the backyard. It would be necessary for a person to proceed from the side door to, or almost to, the rear corner of the house in order to see most of the backyard.

From the foregoing evidence, the jury could reasonably have found that the plaintiff voluntarily assumed the risk of the injury she received.

Contributory negligence and assumption of risk are generally issues of fact for the jury. (cites omitted) Where the evidence is in conflict or where different conclusions might reasonably be drawn therefrom, questions of negligence, ordinary care, and proximate cause are for the jury. (cite omitted) Only where but one conclusion can reasonably be reached from the evidence and inferences is it proper for the trial court to direct a verdict. Ibid.

The first assignment of error is sustained.

Inasmuch as a further trial will be necessary, it is deemed proper to examine in depth the proper rules applicable to cases of this type. A review of the myriad decisions on injury by dogs reveals the wide diversity and uncertainty of authority and the need for a clear statement of the proper rules applicable to the liability of dog owners.

It is hornbook tort law that all behavior of parties to a lawsuit falls into one of three general categories. The actions of a defendant or a plaintiff may be classified according to the circumstances as (1) no negligence, (2) ordinary negligence, or (3) gross negligence. Some authorities recognize further classifications designated as 'willful or wanton conduct,' 'intentional injury,' or 'maintenance of an absolute nuisance'; and some liability is created by statute; but each of these special classifications may be grouped with one or more of the three fundamental classes for the purposes of this discussion.

It is equally accepted, in this jurisdiction at least, that (pretermitting degree of casual effect) the three classifications of a party's actions have the following effect in the ordinarily tort case:

(1) A defendant guilty of no negligence cannot be held liable.

(2) A defendant guilty of ordinary negligence can be held liable, unless

(3) The plaintiff is also guilty of ordinary negligence, which will prevent recovery for defendant's ordinary negligence, but

(4) A defendant guilty of gross negligence may be held liable in spite of ordinary negligence of the plaintiff, (cite omitted), however:

(5) Ordinary negligence of plaintiff will mitigate damages for defendant's gross negligence, (cite omitted), and

(6) If plaintiff's negligence was also gross, defendant is not liable for even gross negligence. (cite omitted)

Before undertaking to analyze the liability of dog owners in the light of the foregoing fundamentals, it is well to recognize that the courts are at great variance regarding the gravamen of actions against dog owners. In 66 A.L.R.2d at page 919 is found a very enlightening introduction to the article on this subject, which contains the following: 'The principle that contributory negligence is not available as a defense except to an action grounded on negligence has also been applied in suits brought under the theory of liability based on scienter. However, in this area, some difficulty has been encountered in determining the nature of the action (whether, for example, the gist of the action is negligence, willful negligence, nuisance, or absolute liability), and the problem is complicated by the reluctance of some courts to deprive the harborer of a dog of this important defense.' (cite omitted)

In Corpus Juris Secundum, an analysis of the theories of liability of dog owners concludes with the following: 'In any event, whether or not the action may, strictly speaking, be said to be founded on negligence, it partakes of many of the characteristics of a negligence action.' (cite omitted)

There is no reason why the above mentioned fundamentals of tort law should not apply to dog owners and those injured by dogs as effectively as they apply to any other area of life. Indeed, all of the well-reasoned opinions, if rationally analyzed and interpreted, fit naturally into the framework of the fundamentals of tort law. Under these fundamentals, (pretermitting degree of *523 casual effect) the following principles should apply to the common law liability of dog owners:

(1) A dog owner who has no reason whatever to expect any mischief from his dog ordinarily, is not negligent and not liable for the first mischief which occurs.

(2) The occurrence of mischief, or any other pertinent circumstance, creates a duty upon the owner to exercise ordinary care in keeping with the events or circumstances which have occurred. His failure to exercise ordinary care in this situation is ordinary negligence, for which he may be held liable, unless

(3) The injured party failed to exercise ordinary care under the circumstances, in which event the injured party is guilty of ordinary negligence and cannot recover for ordinary negligence of the dog owner, but

(4) If the dog has exhibited such a fixed or customary or characteristic disposition as to be classified as a dangerous or ferocious dog, then the owner may be guilty of gross or willful negligence by the mere act of harboring such a dangerous animal upon his premises without adequate safeguards. In such event, the owner could be held liable for injury notwithstanding the ordinary negligence of the injured party, however,

(5) Ordinary negligence of the injured party will mitigate damages for the owner's gross negligence, and

(6) If the injured party's negligence was gross or willful, such as voluntary assumption of a known risk, then the dog owner may not be liable even for gross negligence.

We find no conflict between the foregoing principles and the Tennessee cases.

In the early case of Sherfey v. Bartley, 36 Tenn. 58, the Trial Court instructed the jury as follows: 'In order to recover in this case, the plaintiff must prove the injury complained of; that defendant's dog was of vicious habits, accustomed to bite, and that defendant had knowledge of this fact before the injury complained of, and, with such knowledge, permitted his dog to run at large. That if, at the time the injury complained of, the plaintiff Phoebe Bartley was in the field of the defendant gathering berries, she would in law be a trespasser; and, upon a suit being instituted, the defendant would be entitled to recover damage for such trespass; but the fact that the plaintiff was in the field of the defendant at the time she was bitten by the dog would be no defense to the present suit, if the proof showed that the defendant's dog was vicious—accustomed to bite or attack people—and that defendant had knowledge of this fact before the injury in this case occurred, and, with such knowledge, permitted his dog to run at large.' (cite omitted) (emphasis supplied) It is noteworthy that the charge depriving defendant of the defense of ordinary contributory negligence (trespass) was conditioned upon a finding that the dog was 'vicious—accustomed to bite or attack people—', and that the sole act of contributory negligence was trespass—without previous knowledge or warning of a dangerous dog at large.

In Missio v. Williams, (cite omitted), two bull dogs were known by *525 defendants to be dangerous and were kept for that reason. The dogs rushed out of the yard and attacked plaintiff on the public street. There was no question of contributory negligence at all, hence, no occasion to distinguish between ordinary or gross negligence on the part of the defendants. The trial court found defendants liable on the facts, and the Supreme Court affirmed.

In Goens v. Jones, (cite omitted), the only questions before the Court on appeal were whether the plaintiff was a trespasser and whether defendant had knowledge of a vicious disposition. The Court held that there was evidence in the record to support a verdict for plaintiff on both questions. This opinion contains a most entertaining and edifying discussion of the problems of dogs and their owners which is recommended for light as well as studious reading.

In Brown v. Barber, 26 Tenn.App. 534, 174 S.W.2d 298 (1943), a jury verdict for the defendant was affirmed. The error of the trial judge in ruling plaintiff to be an invitee was therefore harmless. It was insisted in the Brown case that the keeping of a vicious dog was an absolute nuisance, subjecting the owner to responsibility of an insurer. In rejecting this contention, the Court said: 'The law does recognize the distinction between the maintenance of a condition which is unlawful and inherently dangerous to others, however much care may be exercised, and a condition rendered wrongful and dangerous only by reason of negligence. In the latter class of cases, contributory negligence bars a recovery, whereas, generally, to be available as a good defense in the former, the conduct of the injured person must have been tantamount to an indifference to consequences. This, upon the principle of violenti non fit injuria. The distinction is discussed at length in an opinion by CARDOZO, C. J., in the case of McFarlane v. Niagara Falls, (cite omitted), 'But the rule imposing liability for the maintenance of an 'absolute nuisance' there elucidated does not go as far as the plaintiff seems to think. In holding that the nuisance involved in that case arose by reason of negligence of the defendant and hence was not absolute, the court said: 'In thus limiting our ruling, we are not to be understood as holding by implication that where the nuisance is absolute, the negligence of the traveler is a fact of no account.' 'After supporting this view by a reference to a leading English case, and saying that the breadth of its pronouncement should likely be restricted, as indicated by certain New York cases defining liability for a particular kind of nuisance, the harboring of vicious animals, the court continues: 'In nuisance of that order, the fault that bars recovery is fault so extreme as to be equivalent to invitation of injury or, at least, indifference to consequences. Here is a borderland where the concept of contributory negligence merges almost imperceptibly into that of acceptance of a risk. (cites omitted) Very often the difference is chiefly one of terminology. In strictness, however, to make out acceptance of the risk, there must be foresight of the consequences. (cites omitted) Behavior so reckless as to indicate indifference to peril on the part of a person of normal understanding may turn out in a given instance to be only contributory negligence, as where a drunken man, unable to measure the risk, drives madly through a crowded street. We have never yet held that fault so extreme can coexist with a right of action for damages, however absolute the nuisance.' (cite omitted) 'Though it may be that theoretically, somewhat different concepts are involved, the rationale of this conclusion is the same as that supporting the rule in this jurisdiction that, while mere ordinary contributory negligence will not operate to bar a recovery in an action founded on gross negligence, yet where the contributory negligence also is gross instead of ordinary, there is no liability. (cites omitted)

All relevant Tennessee cases on the subject having been surveyed, it is deemed unnecessary to review any of the many cases from other jurisdictions. Suffice it is to say that, when examined in the light of the general principles enunciated supra, the facts peculiar to each case, and the results reached, none are grossly inconsistent with the holding herein.

The said general principles leave adequate flexibility for an intelligent jury to evaluate the conduct of both parties in the light of all surrounding circumstances, including the habits and customs of the community in regard to dogs and the nature of the community, whether urban or rural, crowded or spacious, residential, industrial, commercial, or other. After all, a jury of twelve citizens, drawn from the general public of the court's jurisdiction and instructed in the applicable law, is the best judge of the conduct of the parties.

From an examination of that portion of the charge heretofore quoted, and the entire charge, we are of the opinion that the jury rendered its verdict for the plaintiffs upon an erroneous understanding of law, to wit, that evidence of one or two bites in nine years conclusively shows a dog to be so vicious and ferocious that his owner is thereafter unconditionally liable for his dog's conduct unless the victim is as reckless as one who thrusts his hand into a snake pit, and that they were not at liberty under the evidence to find the plaintiff guilty of such voluntary exposure to peril (gross negligence) as would bar her recovery.

The jury should have been left free to find that the dog was or was not of such a ferocious character or disposition that the mere keeping of him rendered his matter liable in spite of contributory negligence. The jury should further have been left free to evaluate the conduct of plaintiff as being (a) no negligence at all, (b) ordinary negligence, or (c) gross negligence (voluntary assumption of risk) . . .

It is hoped that the research incident to the preparation of briefs, and the principles pointed out in this opinion, will be helpful to counsel and the court upon retrial of the cause. Costs of this appeal are taxed against the plaintiffs.

Reversed and remanded.

SHRIVER, P. J., and PURYEAR, J., concurs.

6 (a). *Judkins v. Sadler-MacNeil,* 376 P.2d 837 (Wash. 1962).

HILL, Justice.

This is an appeal by the defendants from that portion of the judgment, in an action for damages for the

Page 2

conversion of personal property, which relates to a cash item of $1,400 for which the plaintiff has been permitted a recovery.

Omitting many psychologically interesting and important (and probably decisive, jury-wise), but legally irrelevant, details the substance of the matter is that the plaintiff traded in his 1951 Ford pickup to the defendants as part of a transaction whereby the plaintiff acquired from the

defendants a 1957 Cadillac. In the pickup, when the defendants took possession, were a number of personal items belonging to the plaintiff.

At some time in the early afternoon of the Sunday on which this transaction occurred, and after the papers transferring title had been signed, the plaintiff left the pickup in front of the defendants' place of business, retaining the keys in his possession. The plaintiff testified that at some time later that afternoon, it is not clear just when,

'* * * They [the defendants' employees] would not let me take my stuff home and unload it. That is what I wanted to do.' [376 P.2d 838] The plaintiff thereafter attempted to take the pickup to his home, and the defendants' employees refused to let him do so. The plaintiff then left and returned with a policeman some time after 6:00 p. m. In the meantime the pickup had been moved into the defendants' shop or garage. The officer asked if the plaintiff could get his personal belongings out of the truck, and the defendants' employees refused the plaintiff access to the pickup.

On Tuesday, accompanied by his attorney, the plaintiff went to see one of the defendants about the return of his personal property in the pickup. For the first time, the defendants were told that included in the personal property was a large sum of money, a diamond ring, and a watch. The defendants then informed plaintiff that all the personal property in the pickup had been placed in the trunk of the Cadillac, which had been left at his home.

The plaintiff, after examining the personal property in the Cadillac, claimed that four items were missing: $1,400 in

Page 3

cash, a diamond ring worth $1,000, a watch worth $100, and a trailer hitch and electric braking equipment worth $90, and brought an action for the conversion of those items.

The jury found that there had been a conversion of the $1,400 cash and of the electric brake and trailer hitch, but not of the diamond ring and the watch. (That the defendants removed the brake and hitch is conceded.)

The defendants' appeal is only on the cash item.

They urge that if the $1,400 was in the pickup (and there is no evidence that it was except the testimony of the plaintiff [1]) when they took possession of it, the legal relationship was that of bailor and bailee and that the trial court erred in refusing to give an instruction on bailment.

They further urge that an essential element of conversion was missing: an intent to deprive the owner of his property, and that the trail court erred in instructing that intent is not an essential element of conversion.

We shall consider the latter contention first. Plaintiff's cause of action is founded upon the unwarranted interference with his right to the possession of his property.

It is said in Salmond on the Law of Torts (9th ed. 1936), § 78, p. 310:

'A conversion is the act of wifully interferring with any chattel, without lawful justification, whereby any person entitled thereto is deprived of the possession of it.'

This is quoted in Wilson v. Wilson (1958), 53 Wash.2d 13, 16, 330 P.2d 178, 179; and Martin v. Sikes (1951), 38 Wash.2d 274, 278, 229 P.2d 546, 549.

Proof of the defendants' knowledge or intent are not essential in establishing a conversion. An excellent statement on this proposition, typifying a long line of authority, is found in Poggi v. Scott (1914), 167 Cal. 372, 375, 139 P. 815, 816, 51 L.R.A.,N.S., 925:

Page 4

'* * * The foundation for the action of conversion rests neither in the knowledge nor the intent of the defendant. It rests upon the unwarranted interference by defendant with the dominion over the property of the plaintiff from which injury to the latter results. Therefore neither good nor bad faith, neither care nor negligence, neither knowledge nor ignorance, are of the gist of the action. 'The plaintiff's right of redress no longer depends upon his showing, in any way, that the defendant did the act in question from wrongful motives, or, generally speaking, even intentionally; and hence the want of such motives, or of intention, is no defense. Nor, indeed, is negligence [376 P.2d 839] any necessary part of the case. Here, then, is a class of cases in which the tort consists in the breach of what may be called an absolute duty; the act itself (in some cases it must have caused damage) is unlawful and redressible dressible as a tort.' * * *'

(quoted approvingly in Fisher v. Pickwick Hotel, Inc. (1940), 42 Cal.App.2d 823, 826, 108 P.2d 1001, 1002, 1003.)

The trial court made it very clear that the defendants had the right to take possession of the pickup and that the basis of recovery, if any, was the defendants' refusal to deliver to the plaintiff his personal belongings after demand therefor. The trial court did not err in instructing that the intent of the defendants was not an essential element of conversion.

Turning now to the claim of the defendants that they were bailees; if they can get the label of bailment on the transaction, then they rely on Theobald v. Satterthwaite (1948), 30 Wash.2d 92, 190 P.2d 714, 1 A.L.R.2d 799, to relieve them of any liability on the theory that they did not have knowledge of the valuable nature of the items of personal property alleged to have been left in the pickup. What that case held was that the proprietors of a beauty shop did not become bailees of a fur coat which a customer left in the reception room without the knowledge of the proprietors, since there was no change of possession of the coat sufficient to constitute a delivery. None of the elements of conversion was present in that case.

Page 5

We are not concerned with the label placed on the legal relationship between the plaintiff and defendants, when the defendants took possession of the plaintiff's personal property. It is clear that when they refused to surrender its possession to the plaintiff, who was entitled to its immediate possession, there was a conversion.

The rule is stated succinctly in Restatement, Torts (1934), § 237:

'One in possession of a chattel as bailee or otherwise, who on demand, refuses to surrender its possession to another entitled to the immediate possession thereof, is liable for its conversion. * * *'

See also our statement to the same effect in Walling v. S. Birch Construction Co. (1950), 35 Wash.2d 435, 438, 213 P.2d 478, 480.

However much we may marvel at the jury's ability to distinguish between fact and fantasy in determining which, if any, of the three articles in issue were in the pickup when the defendants took possession of it, we must concur in the trial court's comment, 'the matter was a question of fact for the jury to determine'; and we find no prejudicial error in the record.

FINLEY C. J., and WEAVER and ROSELLINI, JJ., concur.

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1 There is claimed corroboration in that there was evidence that the plaintiff had drawn $1,400 out of a bank in Chandler, Arizona in April, 1960. The testimony was that it had been in his possession during the intervening five months, until the claimed conversion in September.

6(b) Jamgotchian v. Slender, 170 Cal. App. 4th 1384 (2009).

KRIEGLER, J.

Plaintiff and appellant Jerry Jamgotchian appeals from a judgment following an order granting summary judgment in favor of defendant and respondent George D. Slender. Jamgotchian, the owner of a horse named John's Kinda Girl (JKG), contends a triable issue of fact exists as to whether Slender, a racing steward, is liable for trespass to chattels based on his actions preventing Jamgotchian from retrieving JKG from the Del Mar Race Track grounds and requiring that the horse be raced against Jamgotchian's wishes. We reverse, holding that triable issues of fact exist and no immunity applies to Slender's actions.

FACTS AND PROCEDURAL BACKGROUND

Slender's Summary Judgment Motion

On December 21, 2005, Jamgotchian filed a complaint against Slender and Mark Glatt, JKG's trainer, for trespass to chattels and injunctive relief based

[170 Cal.App.4th 1388]

on allegations that they raced JKG against his express instructions. An amended complaint was filed on January 30, 2006. On September 14, 2006, Slender filed a motion for summary judgment on the grounds that Jamgotchian could not establish the elements of trespass to chattels and Slender had immunity under Government Code section 820.2. On November 14, 2006, Jamgotchian filed an opposition to the motion for summary judgment on the grounds that Slender acted outside his authority, intentionally interfered with Jamgotchian's possession of JKG, and no immunity applied.

The undisputed evidence submitted in connection with the summary judgment pleadings showed the following facts. Slender has been a racing steward appointed by the California Horse Racing Board (CHRB) for more than 33 years. Jamgotchian is licensed by the CHRB and owns more than 100 thoroughbred race horses, including JKG.

In August 2005, Jamgotchian and Glatt discussed potential races for JKG. They preferred a race scheduled to be held at Del Mar on August 17, 2005. Their second choice was a stakes race in Seattle, Washington on August 21, 2005, for which JKG had been nominated. Their third choice was a stakes race at Del Mar on September 1, 2005. Their fourth choice was a race scheduled to be held at Del Mar on August 14, 2005.

On August 12, 2005, Glatt went to the racing secretary's office and spoke with Assistant Racing Secretary Rick Hammerle. Glatt explained that he wanted to enter JKG in the August 17 race, but the race did not yet have enough horses entered to go forward. He asked about conditionally entering JKG in the August 14 race.

The deadline to request to withdraw a horse from a race is called the "scratch time." The scratch time for the August 14 race was 9:30 a.m. on August 13, 2005. In general, after the scratch time has passed, a horse may not be entered in another race unless the horse is excused from the first race by the stewards. However, a horse may be scratched from a race and entered into a stakes race without obtaining the permission of the stewards. Glatt would not know whether the August 17 race was going forward before the scratch time for the August 14 race.

In order to get race cards filled and generate additional revenue for the racetrack and the horsemen, it is a long-standing practice of the racing secretary's office to solicit and accept "provisional" entries that allow the licensee to scratch a horse from the race. The racing secretary is a Del Mar track official and not a CHRB employee. The racing secretary's office does not represent the CHRB. However, when the racing secretary's office has accepted a provisional entry, the stewards routinely permit the licensee to scratch the horse.

[170 Cal.App.4th 1389]

Hammerle told Glatt that the racing secretary's office would contact the stewards and make arrangements for a provisional entry. If the August 17 race did not fill, then JKG would stay in the August 14 race. Hammerle did not contact the stewards, because he did not think the August 17, 2005 race had any chance of going forward. If it did fill, Hammerle felt confident that he could explain the situation to the stewards and persuade them to scratch JKG on the entry day in favor of the later race. Therefore, the conditional entry was not discussed with or approved by any of the stewards.

On August 14, 2005, Slender was one of three stewards on the board of stewards which supervised the horse racing meeting at the track. He was the duty steward, which meant he reported early and was responsible for handling entries and scratches before the other stewards arrived.

At 9:30 a.m., Jamgotchian told Glatt that he wanted JKG withdrawn from the August 14 race in order to enter JKG in the stakes race in Seattle. Glatt called and spoke to Slender to request a scratch of JKG from the race. Glatt said JKG had no physical infirmities and was sound and fit to race.

Slender stated: "We are not going to allow any horse owner to control our multi-million-dollar business. You're obligated to run. If you do not race the horse, you are . . . being threatened with a 60-day suspension of your license." Glatt responded with disbelief and tried to explain the situation Slender was putting him in, but Slender was steadfast in his decision.

At 10:30 a.m., Jamgotchian spoke to Racing Secretary Tom Robbins. Another horse had already scratched from the August 14 race and Robbins wanted to keep the race intact as best he could, but Robbins found Jamgotchian's reasons for withdrawing JKG compelling. Robbins agreed to tell the stewards that the racing office would find the scratch acceptable, but he warned Jamgotchian that it was the stewards' decision whether to scratch the horse.

At 10:45 a.m., Robbins called Slender. Robbins explained the arrangement discussed between Glatt and Hammerle. He also explained that although the August 17, 2005 race had failed to fill, Jamgotchian and Glatt still wanted to scratch JKG in order to run in a race the following weekend in Seattle. He told Slender that the racing department would find it acceptable if the stewards withdrew JKG. Slender responded that JKG would be running in the August 14 race. Robbins told Jamgotchian that Slender would not permit a scratch.

Jamgotchian and Glatt called Slender again. Based on information from Glatt, Jamgotchian told Slender that JKG had an injured heel that would be

[170 Cal.App.4th 1390]

better with a few more days of rest. JKG was coming off the veterinarian's list for a similar injury. Slender responded that the horse was obligated to race, he would not permit a veterinarian's scratch because Glatt had told him earlier that the horse was fine, the horse was ready to run, and Slender had ordered her to run. Jamgotchian explained the myriad reasons why he believed the posted scratch time did not apply, insisted that the horse was not going to race at Del Mar that day, and stated that he would remove JKG from the Del Mar grounds before the race.

Slender told Glatt that if he did not saddle and race JKG that day, he would be immediately fined and immediately have his trainer's license suspended for a period of 30 to 60 days. Glatt told Slender that any suspension would effectively put him out of business. Slender said that he would immediately fine Jamgotchian and suspend his owner's racing license, as well as bar all of his horses from racing anywhere in California, which would effectively put Jamgotchian's racehorse operation out of business in California. As a long-time licensee, Jamgotchian was aware that a steward acting alone may not lawfully impose punishment. Even acting as a board, the board of stewards may not impose a fine or suspension on a licensee without first conducting a full and impartial hearing with a court reporter, providing the licensee with notice of the hearing and an opportunity to be heard. Jamgotchian told Slender that he was being unfair to Glatt and asked that Slender not fine or suspend Glatt, because Jamgotchian had made the determination to scratch the horse. Slender repeated his threats. Slender told Glatt that racetrack security would not permit the horse to leave the grounds.

Slender told the other stewards on the board that Jamgotchian wanted to run JKG in a stakes race in Seattle. He did not tell them that the horse had been conditionally entered in a race later in the week at Del Mar. He did not tell them that the racing secretary had called him and said the racing department would find it acceptable if the stewards scratched the horse because of the provisional entry. He told them that he said there would possibly be a penalty imposed if Glatt did not run the horse. The stewards discussed the request, found no valid reason to scratch JKG, and unanimously voted that the horse was obligated to race under California Code of Regulations, title 4, section 1602.[1]

About 11:00 a.m., Slender called CHRB investigator Douglas Aschenbrenner and asked him to prevent Jamgotchian from taking JKG off the Del Mar grounds. Slender told Aschenbrenner that Jamgotchian wanted to scratch JKG and run the horse somewhere else, but he did not want that. Slender said to

[170 Cal.App.4th 1391]

go to the barn to make sure the horse did not leave the grounds. Aschenbrenner asked, "How far [do] you want me to go with this?" Slender paused and said, "We want the horse to race." Aschenbrenner asked, "George, why don't you just let him scratch and fine him the $300?" $300 was the typical fine imposed by the stewards for a late scratch. Slender replied, "No. I'm going to suspend him for 30 days." Aschenbrenner told Slender that the investigators "don't normally get involved with that," but he would go to the barn. Slender instructed him to make sure that the horse was raced.

Aschenbrenner went to the barn to confirm that the horse was still stabled at Del Mar. After Aschenbrenner left the barn, he contacted the security guard at the gate to ensure that the horse did not leave the Del Mar grounds, in accordance with Slender's instructions. He also asked the racetrack staff to post a security guard at Glatt's barn.

Jamgotchian and Glatt decided that in order to protect Glatt from a potentially devastating suspension, Jamgotchian would terminate Glatt, effective immediately. Jamgotchian called trainer Peter Miller. Miller has the use of a trailer and occasionally hauls his own horses. Jamgotchian asked Miller to pick up JKG, take her to San Luis Rey Downs, and train her.

At noon, Jamgotchian called Glatt and said, "I'm officially terminating you, and I'm going to be having a van company come and pick my horse up." He faxed Glatt a notice of termination, effective immediately, which stated that he was making arrangements to have JKG shipped out of Del Mar immediately. Jamgotchian faxed a copy of Glatt's termination notice to the stewards. Glatt accepted the termination and agreed to prepare JKG for departure from the Del Mar grounds. Once a trainer is terminated, the trainer's insurance no longer covers the jockey or other employees of the trainer. However, the stewards refused to recognize the termination and transfer JKG from Glatt to another trainer.

Miller spoke to Jamgotchian and said he could not pick up JKG until the following day. Jamgotchian explained that he needed Miller to pick up JKG because he had fired Glatt.

At 1:45 p.m., Jamgotchian sent a fax to several people, including CHRB Assistant Executive Director Roy Minami, the stewards, and Glatt, informing them that JKG would not run in the race that day and threatening to commence litigation if the horse was raced against his authority. He stated that he was going to remove JKG, as well as all of his other horses, from the property. No one responded to Jamgotchian's faxes and telephone calls.

Two CHRB investigators were posted at the barn at 2:00 p.m. to make sure the horse did not leave the barn. A race security person was also posted at the

[170 Cal.App.4th 1392]

barn. Glatt believed racetrack security was not going to allow the horse to be shipped off the grounds and would not have allowed the horse out of the gate if an attempt had been made.

At 2:43 p.m., Glatt told Jamgotchian that Slender had placed a CHRB investigator and a security guard in front of JKG's stall to prevent Jamgotchian from removing the horse. Glatt also told him that the guard would not allow anyone into the stall. Glatt said he had decided to cooperate with Slender and would not remove JKG from the stall or deliver her to the van that Jamgotchian had hired to retrieve the horse.

At 4:00 p.m., Jamgotchian faxed a letter to the stewards stating that he had learned from Glatt that JKG would not be allowed to leave Del Mar. He asked to make arrangements to have the horse removed within the hour. At 4:15 p.m., Jamgotchian faxed a letter to the stewards again requesting permission to scratch JKG from the race and to remove her from Del Mar. He received no response to the faxes or to telephone messages.

When a horse that Glatt trains is racing, his employees are told which race the horse is in and they take it upon themselves to prepare the horse. Around 4:20 p.m., in the ordinary course of business, a groom employed by Glatt removed JKG from her stall and took her to the "receiving barn" where the horses are identified, and then to the paddock to be prepared to race.

Miller arranged for a commercial van company to pick up the horse. Jamgotchian called Glatt at 4:30 p.m. and said he had arranged for a shipping company to pick up the horse. At 4:33 p.m., he sent a fax to the stewards stating that he had a shipping company waiting to pick up JKG and remove her from the Del Mar grounds, but no one had contacted him and authorized her to leave. He pleaded for someone to contact him so that he could get his horse immediately.

At 4:40 p.m., Glatt saddled JKG in the paddock. At 5:00 p.m., JKG raced. Miller saw JKG run the race. Afterward, Miller saw JKG get on the van, which took the horse to Miller's barn at San Luis Rey Downs. Running in the race injured JKG's front foot and caused her to be lame.

The trial court denied Slender's motion for summary judgment on the grounds that he had no authority to take control and run the horse, and no immunity applied, because Slender had acted outside the powers entrusted to his discretion.

Additional Proceedings

On November 13, 2006, Slender filed a motion for judgment on the pleadings on the ground that Jamgotchian failed to comply with the claim

[170 Cal.App.4th 1393]

presentation requirement of the Government Claims Act (Gov. Code, § 810 et seq.). Jamgotchian filed an opposition to the motion for judgment on the pleadings on the grounds that Slender was an independent contractor, and the claim presentation requirements therefore did not apply. Slender filed an amended motion for judgment on the pleadings adding an argument that Jamgotchian had failed to allege exhaustion of administrative remedies. The trial court granted the amended motion for judgment on the pleadings and granted Jamgotchian leave to amend the complaint to allege compliance with the available administrative remedy. Jamgotchian filed a second amended complaint, which included allegations that he had exhausted his administrative remedies.

On May 14, 2007, Jamgotchian filed a motion for summary adjudication on the issue of liability based on facts that the trial court found to be undisputed in ruling on Slender's motion for summary judgment. On June 12, 2007, Slender filed a second motion for summary judgment on the ground that Jamgotchian failed to exhaust his administrative remedies and failed to present a claim.

Slender opposed Jamgotchian's motion for summary adjudication on the grounds that the trial court could not grant summary adjudication without ruling on Slender's motion for summary judgment based on affirmative defenses to liability and triable issues of fact existed as to whether Slender intentionally interfered with Jamgotchian's use or possession of his horse.

Jamgotchian opposed Slender's motion for summary judgment on the grounds that he exhausted his administrative remedies and Slender was an independent contractor not subject to the Government Claims Act.

The following additional evidence was submitted in connection with Jamgotchian's summary adjudication motion and Slender's second motion for summary judgment.

Slender submitted his declaration stating in pertinent part that he never ordered Glatt to race the horse and never threatened Glatt with immediate discipline without a hearing, because he was aware that he did not have the legal authority to do so. When the stewards received the notification of Glatt's termination, they unanimously agreed not to grant a transfer of JKG. Instead, Glatt would remain as the official trainer of record for JKG and shared the legal obligation to race the horse. In the early afternoon, Glatt told Slender that Jamgotchian intended to send a crew to remove JKG from the premises. Slender had the impression that Glatt was worried about a confrontation. To prevent a confrontation and ensure the orderly conduct of the race meeting, Slender requested a CHRB investigator stand watch outside JKG's [170 Cal.App.4th 1394]

barn. However, he never instructed the investigator or anyone else to prevent Jamgotchian from removing his horse from the racetrack. Slender did not learn until after the race that Jamgotchian claimed to have an agreement with the racing secretary for a conditional entry that allowed him to scratch his horse after the deadline had passed. He never threatened to fine or suspend Jamgotchian.

After Glatt's termination, he consulted with his attorney, Steve Sobel. Sobel called Fermin, Slender and others to intercede on Glatt's behalf between noon and 1:00 p.m. Slender submitted Glatt's declaration in opposition to Jamgotchian's motion for summary adjudication stating that Glatt called Jamgotchian in the morning on August 14, 2005, to tell him that the race they wanted was not going to go forward. Jamgotchian wanted JKG scratched from the August 14 race. Glatt said he would have to get a veterinarian's scratch, which Jamgotchian did not want. Jamgotchian said he would call the stewards and obtain a scratch. However, Jamgotchian called Glatt back and said that the stewards would not let him scratch JKG without a valid reason. Glatt called Slender to facilitate a compromise. Jamgotchian was a new client for Glatt who owned many horses and Glatt's goal was to foster a long-term relationship with Jamgotchian. He learned for the first time that Jamgotchian had previously nominated JKG to run in a stakes race in Washington. At the time that Jamgotchian sought to scratch JKG, the horse had not been entered to race in the stakes race in Washington. Slender denied the request to scratch JKG, said

Glatt was obligated to run JKG and if he did not, he would be suspended for 30 to 60 days. Glatt called Jamgotchian, but they could not think of a solution. Jamgotchian called back and engaged Glatt and Slender in a telephone conference call. Slender remained firm in his decision. Glatt, Hammerle, and Jamgotchian also had a telephone conference call. Hammerle refused to intercede on Jamgotchian's behalf. Robbins was intermittently on the call. Robbins never agreed that a scratch of JKG was appropriate. When Jamgotchian called Glatt to terminate his services, he told Glatt that he would have JKG shipped back to his care in a week. Based on the threat of suspension, the directive of the stewards to race JKG and the advice of Sobel, Glatt had his staff prepare JKG for the August 14, 2005 race. He never personally removed JKG from her stall and never delivered JKG to Slender at the receiving barn on August 14, 2005. Glatt did not receive the written termination notice or any of Jamgotchian's faxes until after the race.

After a hearing on August 30, 2007, the trial court denied Jamgotchian's motion for summary adjudication. The court found there was no evidence that Slender personally took JKG from her stable, prepared her for the race and delivered her to the racing barn, or that anyone did so under Slender's control and authority. The court found ample evidence to doubt the efficacy of Glatt's termination, and therefore, could not find that Glatt was no longer Jamgotchian's agent when he delivered JKG to the racing barn. Even if the

[170 Cal.App.4th 1395]

termination were effective, there was no undisputed evidence from which to conclude that Glatt was Slender's agent. The court also found that "the posting of guards by Slender with instructions to stop Jamgotchian or Jamgotchian's agents from taking JKG from the inclosure was arguably wrong, assuming for purposes of argument that he did so. But it did not result in any actionable harm because (a) no attempt was made to remove JKG from the inclosure before the race, and (b) neither Jamgotchian nor any employee was physically restrained from removing JKG by any of the posted guards." The trial court concluded that Jamgotchian had failed to show that there was no substantial controversy as to the cause of action for trespass to chattels.

The trial court denied Slender's motion for summary judgment. The court found that Jamgotchian had appealed the stewards' decision and exhausted administrative remedies. Moreover, Slender was an independent contractor and not an employee to whom the claims presentation requirement attached.

The trial court addressed the immunity issue raised in the parties' briefs: "While the court continues to hold that the statutes and rules do not authorize a steward to take physical possession of a race horse, the court is now prepared to find that Slender did not take possession of JKG, and, in addition, is further disposed to find (a) that Glatt was not acting as Slender's agent at any time, (b) that Glatt's actions are not imputable to Slender on some theory of duress or compulsion, and (c) that Slender, by posting guards at the stable, did not prevent Jamgotchian from taking JKG out of the inclosure before the race. [¶] Instead, on this record, the court funds that Slender did no more than he was authorized to do: (a) he denied Jamgotchian's request to declare JKG, and (b) he threatened both Jamgotchian and Glatt with fines and suspensions if JKG did not run in the seventh race. [¶] On its own motion, then, the court reconsiders the question of Slender's immunity under Business and Professions Code section 19518, subdivision (b)." The court put the issue on calendar for a hearing and allowed the parties to brief the issue of whether Slender's actions were within his delegated powers.

In response to the trial court's request for briefing, Glatt submitted a supplemental declaration stating that when he told Slender that Jamgotchian had fired him as JKG's trainer, Slender ordered and directed him to saddle and race Jamgotchian's horse. Glatt also submitted Sobel's declaration. Sobel declared that after he spoke to Glatt, he spoke to Slender on Glatt's behalf. He explained that Glatt was caught in the middle of the dispute and Jamgotchian had threatened to sue him if he saddled the horse for the race and the horse raced. Sobel reiterated to Slender that Jamgotchian had fired Glatt as his trainer. Slender responded with words to the effect of "Tell Mark to lead the horse over and we'll take care of him." Sobel told Glatt that Slender had said to lead the horse over and he would be taken care of by the stewards.

[170 Cal.App.4th 1396]

On October 15, 2007, the trial court found that Glatt, not Slender, took possession of the horse, and therefore, Slender could not be liable for trespass to chattels. The court granted the motion for summary judgment on this ground and expressly denied the motion on all other grounds. The court entered judgment in favor of Slender on December 21, 2007. Jamgotchian filed a timely notice of appeal.

DISCUSSION

I. *Standard of Review*

"A trial court properly grants summary judgment where no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law. [Citation.] We review the trial court's decision de novo, considering all of the evidence the parties offered in connection with the motion (except that which the court properly excluded) and the uncontradicted inferences the evidence reasonably supports. [Citation.] In the trial court, once a moving defendant has 'shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established,' the burden shifts to the plaintiff to show the existence of a triable issue; to meet that burden, the plaintiff 'may not rely upon the mere allegations or denials of its pleadings . . . but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action . . . .'" (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476-477 [110 Cal.Rptr.2d 370, 28 P.3d 116].)

II. *Immunity*

Slender contends he has immunity for his actions, because they were an exercise of his authority under the horse racing regulations. We disagree, because there is a disputed issue of fact as to whether Slender's actions were within his discretionary authority under the California Code of Regulations, title 4.

A. *Immunity Under the Government Claims Act*

The Government Claims Act restates a public employee's traditional immunity for discretionary acts in Government Code section 820.2, which provides that "[e]xcept as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused."

(1) "Because of the special needs of government and public service, the [Government] Claims Act expressly allows public employees to engage in

[170 Cal.App.4th 1397]

certain acts and omissions free of suit, even when they might otherwise be liable for causing injury or violating individual rights. Among the statutory protections afforded is the immunity for discretionary acts, which leaves public officials free of unseemly judicial interference against them personally when they debate and render those basic policy and personnel decisions entrusted to their independent judgment. [Citations.]" (*Caldwell v. Montoya* (1995) 10 Cal.4th 972, 988 [42 Cal.Rptr.2d 842, 897 P.2d 1320] (*Caldwell*).)

(2) Because most acts by public employees involve a choice among alternative courses of action, "the statutory immunity thus cannot depend upon a literal or semantic parsing of the word 'discretion.'" (*Caldwell, supra,* 10 Cal.4th at p. 981, citing *Johnson v. State of California* (1968) 69 Cal.2d 782, 787-790 [73 Cal.Rptr. 240, 447 P.2d 352].) As a result, the court had adopted a "'workable definition'" of immune discretionary acts that draws a distinction between "'planning'" and "'operational'" functions of government. (*Caldwell, supra,* at p. 981.) Immunity is granted for "'basic policy decisions [which have] . . . been [expressly] committed to coordinate branches of government,' and as to which judicial interference would thus be 'unseemly.' [Citation.] Such 'areas of quasi-legislative policy-making . . . are sufficiently sensitive' [citation] to call for judicial abstention from interference that 'might even in the first instance affect the coordinate body's decision-making process' [citation]." (*Ibid.,* italics omitted.)

Ministerial acts "that merely implement a basic policy already formulated" are not entitled to immunity. (*Caldwell, supra,* 10 Cal.4th at p. 981.) Immunity only applies "to*deliberate and considered* policy decisions" involving a conscious balancing of risks and advantages. (*Ibid.*) It is irrelevant that an employee normally engages in discretionary activity "'if, in a given case, the employee did not render a considered decision.'" (*Ibid.*) For example, "the actions of a deputy public defender in representing an assigned client in a criminal action generally do not involve the type of basic policy decisions that our past decisions have held are within the scope of the immunity afforded by [Government Code] section 820.2. Although such legal representation entails difficult choices among complex alternatives and the exercise of professional skill, for purposes of [Government Code] section 820.2 the attorney's actions ordinarily involve operational judgments that implement the initial decision to provide representation to the client. Holding deputy public defenders accountable at law for legal malpractice in this context does not result in unwarranted judicial interference in the affairs of the other branches of government, but rather simply subjects these public employees to the same principles of tort law applicable to private attorneys performing identical professional services in the same type of proceedings." (*Barner v. Leeds* (2000) 24 Cal.4th 676, 691-692 [102 Cal.Rptr.2d 97, 13 P.3d 704].)

[170 Cal.App.4th 1398]

The California Supreme Court has considered the distinction between policy and operational judgments in numerous contexts. "Thus, we have rejected claims of immunity for a bus driver's decision not to intervene in one passenger's violent assault against another (*Lopez v. Southern Cal. Rapid Transit Dist.* (1985) 40 Cal.3d 780, 793-795 [221 Cal.Rptr. 840, 710 P.2d 907]), a

college district's failure to warn of known crime dangers in a student parking lot (*Peterson v. San Francisco Community College Dist.* (1984) 36 Cal.3d 799, 815 [205 Cal.Rptr. 842, 685 P.2d 1193]), a county clerk's libelous statements during a newspaper interview about official matters (*Sanborn v. Chronicle Pub. Co.* (1976) 18 Cal.3d 406, 415-416 [134 Cal.Rptr. 402, 556 P.2d 764]), university therapists' failure to warn a patient's homicide victim of the patient's prior threats to kill her (*Tarasoff v. Regents of University of California* (1976) 17 Cal.3d 425, 444-447 [131 Cal.Rptr. 14, 551 P.2d 334]), and a police officer's negligent conduct of a traffic investigation once undertaken (*McCorkle v. City of Los Angeles* (1969) 70 Cal.2d 252, 261-262 [74 Cal.Rptr. 389, 449 P.2d 453]).

"On the other hand, we have concluded that the discretionary act statute does immunize officials and agencies against claims that they unreasonably delayed regulations under which a murdered security guard might have qualified himself to carry a defensive firearm (*Nunn v. State of California* (1984) 35 Cal.3d 616, 622-623 [200 Cal.Rptr. 440, 677 P.2d 846]), or negligently released a violent juvenile offender into his mother's custody (*Thompson v. County of Alameda* (1980) 27 Cal.3d 741, 747-749 [167 Cal.Rptr. 70, 614 P.2d 728])." (*Caldwell, supra,* 10 Cal.4th at pp. 981-982.)

B. *The Stewards' Authority*

(3) Jurisdiction over horse racing operations in California is vested in the seven-member CHRB. (Bus. & Prof. Code, §§ 19420, 19421.) The CHRB may delegate to duly appointed stewards "any of its powers and duties that are necessary to carry out fully and effectuate the purposes of this chapter." (*Id.,* § 19440, subd. (b).) The CHRB "may prescribe rules [and] regulations . . . under which all horse races with wagering on their results shall be conducted in this State." (*Id.,* § 19562.)

The authority and powers of stewards are set forth in the California Code of Regulations, title 4. Regulations section 1527 provides general authority to the stewards over licensees and the inclosure: "[t]he stewards have general authority and supervision over all licensees and other persons attendant on horses, and also over the inclosures of any recognized meeting. The stewards are strictly responsible to the [CHRB] for the conduct of the race meeting in every particular." Under Regulations section 1542, "For good cause, the stewards may refuse the entry to any race, or declare ineligible to race and

[170 Cal.App.4th 1399]

order removed from the premises, any horse." The stewards' authority to impose disciplinary measures is prescribed by Regulations section 1528: "The stewards may suspend the license of anyone whom they have the authority to supervise or they may impose a fine or they may exclude from all enclosures in this State or they may suspend, exclude and fine. All such suspensions, fines or exclusions shall be reported immediately to the [CHRB]." Regulations section 1530 states, "Should any case occur which may not be covered by the Rules and Regulations of the Board or by other accepted rules of racing, it shall be determined by the stewards in conformity with justice and in the interest of racing."

An owner's late withdrawal of a horse from a race is a case that is expressly covered in the rules and regulations. "Any owner, his authorized agent, or trainer of a horse which has been entered for a purse race and has been drawn in to the race and entitled to a post position or is also

eligible, who does not wish such horse to start in the race, shall file a request for a declaration not later than the 'scratch time' designated for such race by the stewards. Any horse so declared pursuant to such request shall lose all preferences it has accumulated." (Regs., § 1602.) The stewards' may penalize an owner for a late declaration as follows: "No person other than the stewards may declare a horse out of any overnight race after the 'scratch time' designated for such race by the stewards, and the starting of such horse is obligatory. Any person responsible for the failure of any horse to start in a race when the starting of such horse is obligatory may be disciplined by the stewards." (Regs., § 1629.)

C. *Application of Immunity Under Government Code Section 820.2 to Slender*

(4) It is clear that under the regulations, the starting of a horse entered in an overnight race is obligatory after the scratch time, unless the stewards declare the horse out of the race. The regulatory scheme allows the stewards to discipline any person responsible for the failure of any horse to start in a race when the starting was obligatory. The stewards may take disciplinary actions after the failure to run occurs, limited to fines, suspension or exclusion of the person responsible. But the regulations do not authorize any preemptive action by the stewards to prevent the failure of a horse to start. There is no discretion vested in the stewards to bar an owner from retrieving his or her horse before a race is run.

As discussed more fully below, Jamgotchian presented evidence that Slender acted beyond his authority in ordering JKG to race and taking steps to prohibit removal of the horse from the premises. If the trier of fact finds that Slender dispossessed Jamgotchian of his horse, an act beyond his

[170 Cal.App.4th 1400]

authority under the regulations, Slender is not entitled to immunity under provisions of the Government Claims Act based on a proper exercise of discretion.

D. *Quasi-judicial Immunity*

Slender cannot claim quasi-judicial immunity in this case based on the role of a steward in adjudicating and enforcing horse racing laws and regulations.

(5) "'[T]he factors determining whether an act by a judge is a "judicial" one relate to the nature of the act itself, i.e., whether it is a function normally performed by a judge, and to the expectations of the parties, i.e., whether they dealt with the judge in his judicial capacity.' [Citation.] A judge is not deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather, a judge will be subject to liability only when he has acted in the clear absence of all jurisdiction. [Citations.]" (*Greene v. Zank* (1984) 158 Cal.App.3d 497, 507-508 [204 Cal.Rptr. 770].)

The horse racing regulations provide stewards with authority over licensees and the enclosure, but not the authority to prohibit the removal of a horse from the facility. If Slender prevented Jamgotchian from maintaining possession and control of JKG, such conduct would have been outside the scope of Slender's authority and in the clear absence of jurisdiction. The undisputed facts do not establish that Slender was entitled to the protection of quasi-judicial immunity if he committed a trespass to chattels.

III. *Trespass to Chattels*

Jamgotchian contends that a triable issue of fact exists as to whether Slender committed trespass to chattels. We agree.

(6) "Dubbed by Prosser the 'little brother of conversion,' the tort of trespass to chattels allows recovery for interferences with possession of personal property 'not sufficiently important to be classed as conversion, and so to compel the defendant to pay the full value of the thing with which he has interfered.' (Prosser & Keeton, Torts (5th ed. 1984) § 14, pp. 85-86.)

"Though not amounting to conversion, the defendant's interference must, to be actionable, have caused some injury to the chattel or to the plaintiff's rights in it. Under California law, trespass to chattels 'lies where an intentional interference with the possession of personal property *has proximately caused injury.'* (*Thrifty-Tel, Inc. v. Bezenek*(1996) 46 Cal.App.4th 1559, 1566 [54 Cal.Rptr.2d 468], italics added.) In cases of interference with possession

[170 Cal.App.4th 1401]

of personal property not amounting to conversion, 'the owner has a cause of action for trespass or case, *and may recover only the actual damages suffered by reason of the impairment of the property or the loss of its use.*' (*Zaslow v. Kroenert* [(1946)] 29 Cal.2d [541,] 551 [176 P.2d 1], italics added; accord, *Jordan v. Talbot* (1961) 55 Cal.2d 597, 610 [12 Cal.Rptr. 488, 361 P.2d 20].) In modern American law generally, '[t]respass remains as an occasional remedy for minor interferences, *resulting in some damage,* but not sufficiently serious or sufficiently important to amount to the greater tort' of conversion. (Prosser & Keeton, Torts, *supra,* § 15, p. 90, italics added.)

(7) "The Restatement, too, makes clear that some actual injury must have occurred in order for a trespass to chattels to be actionable. Under section 218 of the Restatement Second of Torts, dispossession alone, without further damages, is actionable (see *id.,* par. (a) & com. d, pp. 420-421), but other forms of interference require some additional harm to the personal property or the possessor's interests in it. (*Id.,* pars. (b)-(d).) 'The interest of a possessor of a chattel in its inviolability, unlike the similar interest of a possessor of land, is not given legal protection by an action for nominal damages for harmless intermeddlings with the chattel. In order that an actor who interferes with another's chattel may be liable, his conduct must affect some other and more important interest of the possessor. *Therefore, one who intentionally intermeddles with another's chattel is subject to liability only if his intermeddling is harmful to the possessor's materially valuable interest in the physical condition, quality, or value of the chattel, or if the possessor is deprived of the use of the chattel for a substantial time, or some other legally protected interest of the possessor is affected as stated in Clause (c).* Sufficient legal protection of the possessor's interest in the mere inviolability of his chattel is afforded by his privilege to use reasonable force to protect his possession against even harmless interference.' (*Id.,* com. e, pp. 421-422, italics added.)" (*Intel Corp. v. Hamidi* (2003) 30 Cal.4th 1342, 1350-1351 [1 Cal.Rptr.3d 32, 71 P.3d 296].)

(8) The Restatement Second of Torts, section 217 provides, "A trespass to a chattel may be committed by intentionally [¶] (a) dispossessing another of the chattel, or [¶] (b) using or intermeddling with a chattel in the possession of another." The Restatement Second of Torts,

section 221 provides that "A dispossession may be committed by intentionally [¶] ... [¶] ... barring the possessor's access to a chattel...."

(9) A triable issue of fact exists as to whether Slender's conduct in ordering CHRB investigators and race security staff to prevent Jamgotchian from retrieving his horse was a substantial factor in causing Jamgotchian's harm. Had Jamgotchian been permitted to retrieve JKG, the horse would not have been raced and injured. In addition, Slender's threat to suspend Glatt for

[170 Cal.App.4th 1402]

failing to race the horse would have been easier to challenge had the horse been retrieved by Jamgotchian prior to the race. It is for the trier of fact to determine whether Slender intentionally interfered with Jamgotchian's right to possession of JKG in light of Jamgotchian's arrangements for a van and an alternate trainer to pick up the horse; knowledge that Slender had ordered the security officers at the racetrack gate to prevent any attempt to remove JKG; and increasingly frantic attempts to secure approval from race officials to remove the horse from the grounds. A reasonable trier of fact could conclude that Jamgotchian was not required to provoke a confrontation to be dispossessed of the horse under the circumstances of the case.

DISPOSITION

The judgment is reversed. Appellant Jerry Jamgotchian is awarded his costs on appeal.

Turner, P.J., and Mosk, J., concurred.

Notes:

1. All further references to California Code of Regulations, title 4, are indicated as Regulations followed by the section number.

6(c). EDWARDS *v.* SIMS, 24 S.W.2d 619 (Ky. 1929)

This case presents a novel question.

In the recent case of Edwards v. Lee, 230 Ky. 375, 19 S.W.(2d) 992, an appeal was dismissed which sought a review and reversal of an order of the Edmonson circuit court directing surveyors to enter upon and under the lands of Edwards and others and survey the Great Onyx Cave for the purpose of securing evidence on an issue as to whether or not a part of the cave being exploited and shown by the appellants runs under the ground of Lee. The nature of the litigation is stated in the opinion and the order set forth in full. It was held that the order was interlocutory and consequently one from which no appeal would lie.

Following that decision, this original proceeding was filed in this court by the appellants in that case (who were defendants below) against Hon. N. P. Sims, judge of the Edmonson circuit court, seeking a writ of prohibition to prevent him enforcing the order and punishing the petitioners for contempt for any disobedience of it. It is alleged by the petitioners that the lower court was without jurisdiction or authority to make the order, and that their cave property and their right of possession and privacy will be wrongfully and illegally invaded, and that they will be greatly and irreparably injured and damaged without having an adequate remedy, since the damage will have been suffered before there can be an adjudication of their rights on a final appeal. It will thus be seen that there are submitted the two grounds upon which this court will prohibit inferior courts from proceeding, under the provisions of section 110 of the Constitution, namely: (1) Where it is a matter in which it has no jurisdiction and there is no remedy through appeal, and (2) where the court possesses jurisdiction but *620 it exercising or about to exercise its power erroneously, and which would result in great injustice and irreparable injury to the applicant, and there is no adequate remedy by appeal or otherwise. Duffin v. Field, Judge, 208 Ky. 543, 271 S. W. 596; Potter v. Gardner, 222 Ky. 487, 1 S.W.(2d) 537; Litteral v. Woods, 223 Ky. 582, 4 S.W. (2d) 395.

1. There is no question as to the jurisdiction of the parties and the subject-matter. It is only whether the court is proceeding erroneously within its jurisdiction in entering and enforcing the order directing the survey of the subterranean premises of the petitioners. There is but little authority of particular and special application to caves and cave rights. In few places, if any, can be found similar works of nature of such grandeur and of such unique and marvelous character as to give to caves a commercial value sufficient to cause litigation as those peculiar to Edmonson and other counties in Kentucky. The reader will find of interest the address on "The Legal Story of Mammoth Cave" by Hon. John B. Rodes, of Bowling Green, before the 1929 Session of the Kentucky State Bar Association, published in its proceedings. In Cox v. Colossal Cavern Co., 210 Ky. 612, 276 S. W. 540, the subject of cave rights was considered, and this court held there may be a severance of the estate in the property, that is, that one may own the surface and another the cave rights, the conditions being quite similar to but not exactly like those of mineral lands. But there is no such severance involved in this case, as it appears that the defendants are the owners of the land and have in it an absolute right.

Cujus est solum, ejus est usque ad coelum ad infernos (to whomsoever the soil belongs, he owns also to the sky and to the depths), is an old maxim and rule. It is that the owner of realty, unless there has been a division of the estate, is entitled to the free and unfettered control of his own land above, upon, and beneath the surface. So whatever is in a direct line between the surface of the land and the center of the earth belongs to the owner of the surface. Ordinarily that ownership cannot be interfered with or infringed by third persons. 17 C. J. 391; 22 R. C. L. 56; Langhorne v. Turman, 141 Ky. 809, 133 S. W. 1008, 34 L. R. A. (N. S.) 211. There are, however, certain limitations on the right of enjoyment of possession of all property, such as its use to the detriment or interference with a neighbor and burdens which it must bear in common with property of a like kind. 22 R. C. L. 77.

With this doctrine of ownership in mind, we approach the question as to whether a court of equity has a transcendent power to invade that right through its agents for the purpose of ascertaining the truth of a matter before it, which fact thus disclosed will determine certainly whether or not the owner is trespassing upon his neighbor's property. Our attention has not been

called to any domestic case, nor have we found one, in which the question was determined either directly or by analogy. It seems to the court, however, that there can be little differentiation, so far as the matter now before us is concerned, between caves and mines. And as declared in 40 C. J. 947: "A court of equity, however, has the inherent power, independent of statute, to compel a mine owner to permit an inspection of his works at the suit of a party who can show reasonable ground for suspicion that his lands are being trespassed upon through them, and may issue an injunction to permit such inspection."

There is some limitation upon this inherent power, such as that the person applying for such an inspection must show a bona fide claim and allege facts showing a necessity for the inspection and examination of the adverse party's property; and, of course, the party whose property is to be inspected must have had an opportunity to be heard in relation thereto. In the instant case it appears that these conditions were met. The respondent cites several cases from other jurisdictions in which this power has been recognized and exercised. A leading case very much in point is that of Montana Co. v. St. Louis Mining & Milling Co., 152 U. S. 160, 14 S. Ct. 506, 508, 38 L. Ed. 398. In that case there was involved the validity of a Missouri statute authorizing the inspection, examination, and surveying of mining property of another, when necessary to protect, ascertain, or enforce the right or interest of any person owning a mining claim.

Reasoning the question as to whether the statute deprived the owner of his property without due process of law, it is said by Mr. Justice Brewer in the opinion:

"On the other hand, while not decisive of the question, the frequency with which these orders of inspection have of late years been made, and the fact that the right to make them has never been denied by the courts, is suggestive that there is no inherent vice in them; and if the courts of equity, by virtue of their general powers, may rightfully order such an inspection in a case pending before them, surely it is within the power of a state, by statute, to provide the manner and conditions of such an inspection in advance of the suit. To 'establish justice' is one of the objects of all social organizations, as well as one of the declared purposes of the federal Constitution; and if, to determine the exact measure of the rights of parties, it is necessary that a temporary invasion of the possession of either for purposes of inspection be had, surely the lesser evil of a temporary invasion of one's possession should yield to the higher good of establishing justice; and any measures or proceedings which, having the sanction of law, provide for such temporary *621 invasion with the least injury and inconvenience, should not be obnoxious to the charge of not being due process of law.

Passing from these general suggestions to some of a more special character, it must be remembered that inspection does not deprive the owner of the title to any portion of his property, nor does it deprive him permanently of the use. The property, therefore, is not taken in the sense that he no longer remains the owner, nor in the sense that the permanent use of the property has been appropriated. In Pumpelly v. Canal Co., Green Bay Company, 13 Wall. 166 [20 L. Ed. 557], it was held that, if a party is deprived of the entire use of his property, it is a taking, within the scope of the fifth amendment, although the mere title is not disturbed; but by an inspection neither the title nor the general use is taken, and all that can be said is that there is a temporary and limited interruption of the exclusive use; and it is in that light that the question of the validity of this statute is to be determined."

Further considering the issue, and of pertinence to criticism of the order involved in the case now before us, the opinion continues:

"In conclusion, it may be observed that courts of equity have, in the exercise of their inherent powers, been in the habit of ordering inspections of property, as of requiring the production of books and papers; that this power on the part of such courts has never been denied, and, if it exists, a fortiori the state has power to provide a statutory proceeding to accomplish the same result; that the proceeding provided by this statute requires notice to the defendant, of a hearing and an adjudication before the court or judge; that it permits no removal or appropriation of any property, nor any permanent dispossession of its use, but is limited to such temporary and partial occupation as is necessary for a mere inspection; that there is a necessity for such proceeding, in order that justice may be exactly administered; that this statute provides all reasonable protection to the party against whom the inspection is ordered; that the failure to require a bond, or to provide an appeal, or to have the question of title settled before a jury, is not the omission of matters essential to due process of law."

The Supreme Court of Kansas, in Culbertson v. Iola Portland Cement Co., etc., 87 Kan. 529, 125 P. 81, 82, Ann. Cas. 1914A, 610, sustained a similar order even though there was no specific statutory authority to do so; the court saying:

"It is contended that there was no authority for ordering or making such an inspection, and that those acting under it would, in fact, be committing a trespass. There is no specific statutory authority for the order; but such orders have been made by courts of equity from the beginning. It may be done where there is a real necessity for inspection, or where the facts to be determined cannot well be determined by the ordinary methods. ***

Inspection is frequently ordered in mining cases; but the power is exercised to assist in determining the value of buildings, and to ascertain other essential facts."

We can see no difference in principle between the invasion of a mine on adjoining property to ascertain whether or not the minerals are being extracted from under the applicant's property and an inspection of this respondent's property through his cave to ascertain whether or not he is trespassing under this applicant's property.

It appears that before making this order the court had before him surveys of the surface of both properties and the conflicting opinions of witnesses as to whether or not the Great Onyx Cave extended under the surface of the plaintiff's land. This opinion evidence was of comparatively little value, and as the chancellor (now respondent) suggested, the controversy can be quickly and accurately settled by surveying the cave; and "if defendants are correct in their contention this survey will establish it beyond all doubt and their title to this cave will be forever quieted. If the survey shows the Great Onyx Cave extends under the lands of plaintiffs, defendants should be glad to know this fact and should be just as glad to cease trespassing upon plaintiff's lands, if they are in fact doing so." The peculiar nature of these conditions, it seems to us, makes it imperative and necessary in the administration of justice that the survey should have been ordered and should be made.

It appearing that the circuit court is not exceeding its jurisdiction or proceeding erroneously, the claim of irreparable injury need not be given consideration. It is only when the inferior court is acting erroneously, and great or irreparable damage will result, and there is no adequate

remedy by appeal, that a writ of prohibition will issue restraining the other tribunal, as held by authorities cited above.

The writ of prohibition is therefore denied.

Whole court sitting.

LOGAN, J. (dissenting).

The majority opinion allows that to be done which will prove of incalculable injury to Edwards without benefiting Lee, who is asking that this injury be done. I must dissent from the majority opinion, confessing that I may not be able to show, by any legal precedent, that the opinion is wrong, yet having an abiding faith in my own judgment that it is wrong.

It deprives Edwards of rights which are valuable, and perhaps destroys the value of his property, upon the motion of one who may have no interest in that which it takes away, *622 and who could not subject it to his dominion or make any use of it, if he should establish that which he seeks to establish in the new suit wherein the survey is sought.

It sounds well in the majority opinion to tritely say that he who owns the surface of real estate, without reservation, owns from the center of the earth to the outmost sentinel of the solar system. The age-old statement, adhered to in the majority opinion as the law, in truth and fact, is not true now and never has been. I can subscribe to no doctrine which makes the owner of the surface also the owner of the atmosphere filling illimitable space. Neither can I subscribe to the doctrine that he who owns the surface is also the owner of the vacant spaces in the bowels of the earth.

The rule should be that he who owns the surface is the owner of everything that may be taken from the earth and used for his profit or happiness. Anything which he may take is thereby subjected to his dominion, and it may be well said that it belongs to him. I concede the soundness of that rule, which is supported by the cases cited in the majority opinion; but they have no application to the question before the court in this case. They relate mainly to mining rights; that is, to substances under the surface which the owner may subject to his dominion. But no man can bring up from the depths of the earth the Stygian darkness and make it serve his purposes; neither can he subject to his dominion the bottom of the ways in the caves on which visitors tread, and for these reasons the owner of the surface has no right in such a cave which the law should, or can, protect because he has nothing of value therein, unless, perchance, he owns an entrance into it and has subjected the subterranean passages to his dominion.

A cave or cavern should belong absolutely to him who owns its entrance, and this ownership should extend even to its utmost reaches if he has explored and connected these reaches with the entrance. When the surface owner has discovered a cave and prepared it for purposes of exhibition, no one ought to be allowed to disturb him in his dominion over that which he has conquered and subjected to his uses.

It is well enough to hang to our theories and ideas, but when there is an effort to apply old principles to present-day conditions, and they will not fit, then it becomes necessary for a readjustment, and principles and facts as they exist in this age must be made conformable. For these reasons the old sophistry that the owner of the surface of land is the owner of everything

from zenith to nadir must be reformed, and the reason why a reformation is necessary is because the theory was never true in the past, but no occasion arose that required the testing of it. Man had no dominion over the air until recently, and, prior to his conquering the air, no one had any occasion to question the claim of the surface owner that the air above him was subject to his dominion. Naturally the air above him should be subject to his dominion in so far as the use of the space is necessary for his proper enjoyment of the surface, but further than that he has no right in it separate from that of the public at large. The true principle should be announced to the effect that a man who owns the surface, without reservation, owns not only the land itself, but everything upon, above, or under it which he may use for his profit or pleasure, and which he may subject to his dominion and control. But further than this his ownership cannot extend. It should not be held that he owns that which he cannot use and which is of no benefit to him, and which may be of benefit to others.

Shall a man be allowed to stop airplanes flying above his land because he owns the surface? He cannot subject the atmosphere through which they fly to his profit or pleasure; therefore, so long as airplanes do not injure him, or interfere with the use of his property, he should be helpless to prevent their flying above his dominion. Should the waves that transmit intelligible sound through the atmosphere be allowed to pass over the lands of surface-owners? If they take nothing from him and in no way interfere with his profit or pleasure, he should be powerless to prevent their passage?

If it be a trespass to enter on the premises of the landowner, ownership meaning what the majority opinion holds that it means, the aviator who flies over the land of one who owns the surface, without his consent, is guilty of a trespass as defined by the common law and is subject to fine or imprisonment, or both, in the discretion of a jury.

If he who owns the surface does not own and control the atmosphere above him, he does not own and control vacuity beneath the surface. He owns everything beneath the surface that he can subject to his profit or pleasure, but he owns nothing more. Therefore, let it be written that a man who owns land does, in truth and in fact, own everything from zenith to nadir, but only for the use that he can make of it for his profit or pleasure. He owns nothing which he cannot subject to his dominion.

In the light of these unannounced principles which ought to be the law in this modern age, let us give thought to the petitioner Edwards, his rights and his predicament, if that is done to him which the circuit judge has directed to be done. Edwards owns this cave through right of discovery, exploration, development, advertising, exhibition, and conquest. Men fought their way through the eternal darkness, into the mysterious and abysmal depths of the bowels of a groaning world to discover the theretofore unseen splendors of *623 unknown natural scenic wonders. They were conquerors of fear, although now and then one of them, as did Floyd Collins, paid with his life, for his hardihood in adventuring into the regions where Charon with his boat had never before seen any but the spirits of the departed. They let themselves down by flimsy ropes into pits that seemed bottomless; they clung to scanty handholds as they skirted the brinks of precipices while the flickering flare of their flaming flambeaux disclosed no bottom to the yawning gulf beneath them; they waded through rushing torrents, not knowing what awaited them on the farther side; they climbed slippery steeps to find other levels; they wounded their bodies on stalagmites and stalactites and other curious and weird formations; they found chambers, star-studded and filled with scintillating light reflected by a phantasmagoria revealing

fancied phantoms, and tapestry woven by the toiling gods in the dominion of Erebus; hunger and thirst, danger and deprivation could not stop them. Through days, weeks, months, and years-ever linking chamber with chamber, disclosing an underground land of enchantment, they continued their explorations; through the years they toiled connecting these wonders with the outside world through the entrance on the land of Edwards which he had discovered; through the years they toiled finding safe ways for those who might come to view what they had found and placed their seal upon. They knew nothing, and cared less, of who owned the surface above; they were in another world where no law forbade their footsteps. They created an underground kingdom where Gulliver's people may have lived or where Ayesha may have found the revolving column of fire in which to bathe meant eternal youth.

When the wonders were unfolded and the ways were made safe, then Edwards patiently, and again through the years, commenced the advertisement of his cave. First came one to see, then another, then two together, then small groups, then small crowds, then large crowds, and then the multitudes. Edwards had seen his faith justified. The cave was his because he had made it what it was, and without what he had done it was nothing of value. The value is not in the black vacuum that the uninitiated call a cave. That which Edwards owns is something intangible and indefinable. It is his vision translated into a reality.

Then came the horse leach's daughters crying: “Give me,” “give me.” Then came the “surface men” crying, “I think this cave may run under my lands.” They do not know they only “guess,” but they seek to discover the secrets of Edwards so that they may harass him and take from him that which he has made his own. They have come to a court of equity and have asked that Edwards be forced to open his doors and his ways to them so that they may go in and despoil him; that they may lay his secrets bare so that others may follow their example and dig into the wonders which Edwards has made his own. What may be the result if they stop his ways? They destroy the cave, because those who visit it are they who give it value, and none will visit it when the ways are barred so that it may not be exhibited as a whole.

It may be that the law is as stated in the majority opinion of the court, but equity, according to my judgment, should not destroy that which belongs to one man when he at whose behest the destruction is visited, although with some legal right, is not benefited thereby. Any ruling by a court which brings great and irreparable injury to a party is erroneous.

For these reasons I dissent from the majority opinion.

6 (d). SKOUSEN *v.* NIDY

90 Ariz. 215, 367 P.2d 248

Nov. 29, 1961.

Rehearing Denied Jan. 3, 1962.

BERNSTEIN, Vice Chief Justice.

This was an action to recover damages for personal injuries received by Mariam Nidy (hereinafter called ‘plaintiff) as a result of alleged indecent assaults inflicted upon her by D. P. Skousen (hereinafter called ‘defendant’). A trial before a jury resulted in a verdict giving the plaintiff judgment for compensatory and punitive damages. The motions for judgment non obstante veredicto and new trial were denied and this appeal followed.

The facts in the light most favorable to sustaining the judgment are: The plaintiff, a woman about sixty-five years of age, was employed by the defendant in September 1955 in the capacity of caretaker of defendant's Kourt Karem Trailer Park in Phoenix. During the course of such employment, the defendant at various times made, with force and violence, indecent assaults upon the plaintiff. Such assaults consisted of the defendant placing his hand upon the private parts of the plaintiff and attempting to seduce her. The plaintiff resisted all such assaults. The defendant admitted that on one occasion he physically pushed the plaintiff. This conduct continued until shortly before the plaintiff was discharged from her employment on March 22, 1957.

[5] The defendant urges that the court erred in refusing to apply the one year Statute of Limitations in A.R.S. § 12-541 (1956) for the reason that the plaintiff's complaint is couched in seduction. We cannot agree with this contention. The complaint, inter alia, alleged: 'That on or about the 1st day of February, 1957, and on other occasions within one year last past, the defendant, D. P. Skousen, with force and violence, made indecent assaults upon the plaintiff, and then and there, with the use of force and violence, placed his hands upon the private parts of the plaintiff herein, and made efforts to seduce and offend the dignity of the plaintiff herein.' It is not alleged in the complaint that the defendant had intercourse with the plaintiff, on the contrary, it is only alleged that he 'made efforts to seduce.' The mere attempt does not constitute the offense of seduction. 'The generally accepted definition of 'seduction' is that it is the act of a man in enticing a woman to have unlawful intercourse with him by means of persuasion, solicitation, promises, bribes, or other means without the employment of force.' (cite omitted) (Emphasis supplied.)

The complaint states a good cause of action for assault and battery. The trial court was correct in applying the two year statute of limitations in A.R.S. § 12-542 (1956) 'for injuries done to the person of another.'

[7] The defendant asserts that the damages were excessive for the reason that there was no evidence of any dam-age to the plaintiff. It is the general rule, that in actions for personal injuries due to an intentional tort, physical injury need not be sustained. Mental suffering, including shame from the indignities of the acts, is usually considered an injury for which damages may be given. (cite omitted) The jury made an award of $3,500 actual damages and $1,500 punitive damages for the plaintiff. We have held that we will declare an award of damages excessive exists only when from the facts the amount at first blush suggests passion or prejudice on the part of the jury. (cite omitted) After a careful review of the record, we do not find that the facts suggest such passion and prejudice.

Judgment affirmed.

STRUCKMEYER, C. J., and UDALL, JENNINGS, and LOCKWOOD, JJ., concurring.

6 (e). ALLEN *v.* HANNAFORD

244 P. 700, 138 Wash. 423

No. 19729.

Supreme Court of Washington.

April 2, 1926.

Department 2.

Appeal from Superior Court, King County; Jurey, Judge pro tem.

Action by Marie Allen against Anna Hannaford. Judgment for plaintiff, and defendant appeals. Affirmed.

MAIN, J.

By this action the recovery of damages is sought for assault. The cause was tried to the court and a jury, and resulted in a verdict in favor of the plaintiff in the sum of $750. Motions for judgment notwithstanding the verdict and a new trial being made and overruled, judgment was entered upon the verdict, from which the defendant appeals.

The appellant was the owner and operator of the Argonne Apartments in the city of Seattle. Respondent, for approximately a year prior to April 29, 1924, had been a tenant *701 in one of the apartments. On this day, the respondent had made arrangements to move to another apartment house. When the transfer men came after her furniture, the appellant appeared on the scene with a pistol in hand, and threatened to shoot them full of holes if they moved a single article belonging to the respondent. Soon thereafter, standing only a few feet from the respondent, she pointed the pistol at her face, and threatened to shoot her. The appellant admitted that she had a pistol in her hand, but denied that she pointed it at the respondent and threatened to shoot. Subsequently, the present action was begun.

The appellant claims that she had a lien for the rent, which was then due from the respondent and unpaid, and therefore had a right to prevent the removal of the property from the premises. In this connection, reliance appears to be made upon section 1203-1, Rem. Comp. Stat., which covers generally the matter of liens for rent. The concluding sentence of the section, however, is: 'The provisions of this act shall not apply to, nor shall it be enforced against, the property of tenants in dwelling houses or apartments or any other place that is used exclusively as a home or residence of the tenant and his family.'

In what manner a landlord having a lien might prevent the removal of property, if he has such right, is not involved in this case, and no opinion is expressed thereon.

[1] It is further contended that there is no showing that the pistol which the appellant had in her hand when the assault was made was loaded, and from this it is argued that without such showing, a cause of action sufficient to go to the jury is not made out. From the evidence as above indicated, the jury had a right to find that the appellant pointed the pistol at the respondent and threatened to shoot. So far as the respondent was concerned, the appellant had the apparent ability to make her threat good. In Beach v. Hancock, (cite omitted), it was said: 'One of the most important objects to be attained by the enactment of laws and the institutions of civilized society is, each of us shall feel secure against unlawful assaults. Without such security, society loses most of its value. Peace and order and domestic happiness, inexpressibly more precious than mere forms of government, cannot be enjoyed without the sense of perfect security. We have a right to live in society without being put in fear of personal harm. But it must be a reasonable fear of which we complain. And it surely is not unreasonable for a person to entertain

a fear of personal injury, when a pistol is pointed at him in a threatening manner, when, for aught he knows, it may be loaded, and may occasion his immediate death. The business of the world could not be carried on with comfort, if such things could be done with impunity.'

Whether there is an assault in a given case depends more upon the apprehensions created in the mind of the person assaulted than upon what may be the secret intentions of the person committing the assault. In Howell v. Winters, (cite omitted), it was said: 'The presence or absence of an assault depends more upon the apprehension created in the mind of the person assaulted than upon the undisclosed intentions of the person committing the assault.'

[2] If the appellant pointed the pistol at the respondent and threatened to shoot, this would constitute an assault, even though the respondent may not have known whether it was loaded.

[3] Lastly, it is contended that the verdict is excessive, but this contention cannot be sustained. In Winston v. Terrace, (cite omitted), a verdict of $2,000 was upheld, where the defendant, at the point of a pistol, drove the plaintiff out of her home. The assault in that case may have been more aggravated than in the present one but the verdict also was very much larger. In Burger v. Covert, (cite omitted), it was said: 'Manifestly, the injury received by a person assaulted by another is not necessarily all physical. The mental distress of the assaulted person may be, and often is, a very material portion of the injury flowing from such a wrong. That this portion of the injury is more or less aggravated by the accompanying words and demeanor of the one making the assault, must be apparent to all. To measure his damage by such a standard is not allowing him punitive or exemplary damage, but only allowing him compensation for injury actually received.'

In the case now before us there was evidence as to the immediate effect upon the respondent of the pointing of the pistol at her with the threat to shoot and her nervous condition thereafter as a result thereof.

The judgment will be affirmed.

TOLMAN, C. J., and MITCHELL, PARKER, and MACKINTOSH, JJ., concur.

6 (f). SNEAD *v.* METROPOLITAN PROPERTY AND CASUALTY INSURANCE COMPANY

909 F.Supp. 775 United States District Court,

D. Oregon.

Civ.No. 951576FR.

Jan. 4, 1996.

FRYE, District Judge:

The matter before the court is the motion of the defendant, Metropolitan Property and Casualty Insurance Company (Metropolitan), to dismiss for failure to state a claim upon which relief can be granted pursuant to Rule 12 (b)(6) of the Federal Rules of Civil Procedure (#5). The plaintiff, Emily Snead, alleges claims for the intentional infliction of severe emotional distress and, in the alternative, for the reckless infliction of severe emotional distress.

Allegations of the Complaint

In October of 1993, Emily Snead terminated the employment of a male employee because he had threatened another employee with a handgun. In the spring of 1994, the employee who had been terminated began to stalk Snead, and Snead received "hang-up" telephone calls at work and also unsolicited mail and merchandise at home.

In May of 1994, Snead was warned by a disability representative of another company that he was concerned for Snead's personal safety because of statements made to him by another employee of Metropolitan. Snead called the home office of Metropolitan in Warwick, Rhode Island, to report to its human resources staff what the disability representative of another company had told her. She was advised that she was in no danger.

The telephone calls and the unsolicited mail and merchandise continued on almost a daily basis through the summer of 1994. Then Snead received a death threat. She called the vice president of human resources of Metropolitan to report the death threat and to ask for help. He told her that he did not know what to do, but that she should call the police. She reiterated that she needed help. He repeated that he did not know what to do, but that she should call the police.

On August 23, 1994, Snead spoke with the human resources staff of Metropolitan again to ask for assistance. She was told that the company could not be of assistance because it had no security department.

The stalking and harassment continued. On October 13, 1994, she received a third death threat. She called the human resources department, this time to report that she suspected a former employee whom she had terminated of making the threats. She was told by a representative of the legal department of Metropolitan that her suspicions were doubtful. The only advice that Snead received from the home office of Metropolitan was to call the police and not to stand in front of a window.

While she was attending a meeting at the home office of Metropolitan in Rhode Island, a representative of Metropolitan's legal department said "Bang! Bang!" to Snead as she entered the room.

In December of 1994, the former employee whom Snead had suspected of stalking her was arrested and booked for the crimes of stalking and criminal harassment.

Snead alleges that Metropolitan knew that this conduct was occurring, but did not take immediate and appropriate action in response to this conduct so as to maintain a safe work environment for Snead, and thereby ratified the conduct of the former employee.

Contentions of the Parties

Metropolitan moves to dismiss the action on the following grounds: (1) the claim of Snead for the reckless infliction of severe emotional distress fails to state a cognizable claim under the laws of the State of Oregon; (2) the claim of Snead for the intentional infliction of severe emotional distress fails to contain facts sufficient to state a claim; and (3) both claims of Snead are barred by the exclusivity provision of the workers' compensation laws of the State of Oregon.

Snead contends that the motion to dismiss is without merit. …

Analysis and Ruling

1. The Reckless Infliction of Severe Emotional Distress

[2] A claim for the intentional infliction of severe emotional distress under the laws of the State of Oregon must contain the following elements: "(1) the defendant intended to inflict severe emotional distress on the plaintiff, (2) the defendant's acts were the cause of the plaintiff's severe emotional distress, and (3) the defendant's acts constituted an extraordinary transgression of the bounds of socially tolerable conduct." (cite omitted) In order to satisfy the element of intent, a plaintiff must allege that the defendant acted with the purpose of inflicting severe emotional or mental distress on the plaintiff. (cite omitted)

In McGanty, the Oregon Supreme Court stated that a misreading of precedent had led to a line of cases which sanctioned a reduced level of intent if a "special relationship" existed between the plaintiff and the defendant. (cite omitted)

The misreading of precedent acknowledged by the Oregon Supreme Court began with that court's decision in Brewer v. Erwin, in which the Court stated that:

> [the tort's] essence is that the infliction of actual mental suffering on the plaintiff is the deliberate purpose of defendant's conduct, although that conduct may of course have an ulterior objective. … Such a purpose is itself wrongful in the absence of some privilege or justification. … When the wrongful purpose is lacking, on the other hand, the tortious element can be found in the breach of some obligation, statutory or otherwise, that attaches to defendant's relationship toward plaintiff, as in Rockhill v. Pollard, [259 Or. 54, 485 P.2d 28 (1971)], and as has long been imposed on innkeepers, public carriers, and the like. This court has not had occasion to consider whether in the absence of such a relationship a recovery for solely emotional distress can be based on a defendant's conduct, not otherwise tortious, that a jury may find to be beyond the limits of social toleration, though the conduct is not deliberately aimed at causing such distress but only reckless of the predictable effect.

(cite omitted)

The Oregon Court of Appeals read this language from Brewer to mean that "the court effectively added a purpose requirement to the intent element of the tort, except when a 'special relationship' existed between the parties." (cite omitted) In Bodewig v. K-Mart, Inc., 54 Or.App. 480, 635 P.2d 657 (1981), the court read Brewer as opening the door to the creation of the tort of the reckless infliction of severe emotional distress where there existed a "special relationship," such as an employer-employee relationship. In Bodewig, the court held that an employer-employee relationship qualified as a "special relationship," and therefore K-Mart could be held liable for the infliction of severe emotional distress even though it had not purposefully acted to do so.

The Oregon Supreme Court in McGanty overturned Brewer, explaining that the "special relationship" discussion applied only to the conduct element of the tort, not to the intent element. (cite omitted) The court determined that the holdings in cases such as Brewer and Bodewig were based upon a misreading of precedent.

[3][4] Upon reexamination of the common law rule concerning the intent required to establish the tort of the intentional infliction of emotional distress, the McGanty court ruled that the element of intent is satisfied where the actor desires to bring about the consequences of the act or where the actor knows that the consequences are certain or substantially certain to result from his act. (cite omitted) Accordingly, there is no cognizable claim for the reckless infliction of emotional distress under the laws of the State of Oregon.

. The Intentional Infliction of Severe Emotional Distress

[5] The tort of the intentional infliction of severe emotional distress requires that (1) the defendant intended to inflict severe emotional distress on the plaintiff; (2) the defendant's acts were the cause of the plaintiff's severe emotional distress; and (3) the defendant's acts constituted an extraordinary transgression of the bounds of socially tolerable conduct.

Snead has not alleged facts sufficient to support a claim for the intentional infliction of emotional distress….

Conclusion

The motion of Metropolitan to dismiss (#5) is granted. The court will allow twenty days from the date of this opinion for Snead to replead her claims.

6 (g). ENRIGHT *v.* GROVES and THE CITY OF FORT COLLINS, COLORADO and RUSSEL BUCK

Colorado Court of Appeals, Div. III.

Feb. 17, 1977. Selected for Official Publication.

SMITH, Judge.

Defendants Groves and City of Fort Collins appeal from judgments entered against them upon jury verdicts awarding plaintiff $500 actual damages and $1,000 exemplary damages on her claim of false imprisonment, $1,500 actual damages and $3,000 exemplary damages on her claim of intentional infliction of mental distress, also referred to as outrageous conduct, and $500 actual damages and $1,000 exemplary damages on her claim of battery. The jury returned a verdict in favor of defendant Buck on plaintiff's separate claim against him arising out of an occurrence at the police station. No appeal has been taken relative to that verdict. Defendants contend that:

(1) there was a lawful arrest; (2) the conduct of defendant Groves did not constitute the tort of outrageous conduct; and (3) the damages were excessive. They reject each contention and affirm.

The evidence at trial disclosed that on August 25, 1974, Officer Groves, while on duty as a uniformed police officer of the City of Fort Collins, observed a dog running loose in violation of the city's 'dog leash' ordinance. He observed the animal approaching what was later identified as the residence of Mrs. Enright, the plaintiff. As Groves approached the house, he encountered Mrs. Enright's eleven-year-old son, and asked him if the dog belonged to him. The boy replied that it was his dog, and told Groves that his mother was sitting in the car parked at the curb by the *41 house. Groves then ordered the boy to put the dog inside the house, and turned and started walking toward the Enright vehicle.

Groves testified that he was met by Mrs. Enright with whom he was not acquainted. She asked if she could help him. Groves responded by demanding her driver's license. She replied by giving him her name and address. He again demanded her driver's license, which she declined to produce. Groves thereupon advised her that she could either produce her driver's license or go to jail. Mrs. Enright responded by asking, 'Isn't this ridiculous?' Groves thereupon grabbed one of her arms, stating, 'Let's go!'

One eyewitness testified that Mrs. Enright cried out that Groves was hurting her. Her son, who was just a few feet away at the time of the incident, testified that his mother also screamed and tried to explain that her arm dislocated easily. Groves refused to release her arm, and Mrs. Enright struck him in the stomach with her free hand. Groves then seized both arms and threw her to the ground. With her lying on her stomach, he brought one of her arms behind her in order to handcuff her. She continued to scream in pain and asked him to stop hurting her. Groves pulled her up and propelled her to his patrol car where, for the first time, he advised her that she was under arrest.

She was taken to the police station where a complaint was signed charging her with violation of the 'dog leash' ordinance and bail was set. Mrs. Enright was released only after a friend posted bail. She was later convicted of the ordinance violation.

Unrebutted testimony by her physician at trial disclosed that she had a long history of shoulder dislocations in both arms prior to this incident, and that she had undergone surgery on both shoulders for this condition. The surgery on the left shoulder resulted in some restriction of movement and, if the arm was forced back, it was extremely painful. The surgery done on the right shoulder did not correct the dislocation problem and the evidence presented to the jury showed that if the arm was pushed back beyond a certain point, a painful dislocation would in fact then take place.

I.

Appellants contend that Groves had probable cause to arrest Mrs. Enright, and that she was in fact arrested for, and convicted of, violation of the dog-at-large ordinance. They assert, therefore, that her claim for false imprisonment or false arrest cannot lie, and that Groves use of force in arresting Mrs. Enright was permissible. We disagree.

False arrest arises when one is taken into custody by a person who claims, but does not have, proper legal authority. W. Prosser, Torts § 11 (4th ed.). Accordingly, a claim for false arrest will not lie if an officer has a valid warrant or probable cause to believe that an offense has been committed and that the person who was arrested committed it. Conviction of the crime for which one is specifically arrested is a complete defense to a subsequent claim of false arrest. (cite omitted)

Here, however, the evidence is clear that Groves arrested Mrs. Enright, not for violation of the dog leash ordinance, but rather for refusing to produce her driver's license. This basis for the arrest is exemplified by the fact that he specifically advised her that she would either produce the license or go to jail. We find no statute or case law in this jurisdiction which requires a citizen to show her driver's license upon demand, unless, for example, she is a driver of an automobile and such demand is made in that connection. (cite omitted)

Defendants rely on Stone v. People, (cite omitted), in support of their position that a lawful demand was made. We do not read that case as approving any requirement that an individual must produce a driver's license when such individual is not the driver of a vehicle.

In Stone, the precise issue was whether a narcotics agent violated the defendant's Fourth Amendment rights by stopping him and asking to examine his driver's license after he had been observed driving a vehicle. Whether an agent could affirmatively demand a driver's license was not specifically at issue, because the facts in Stone indicate that after the agent had asked for defendant's license, but before there could be any response thereto, the agent noticed fresh needle marks on his arm. Defendant was then put under arrest. The court emphasized that it did not intend by its decision to 'grant free license to law enforcement officers to stop an individual to obtain identification or address.' (emphasis added)

Here, there was no testimony that Groves ever even attempted to explain why he was demanding plaintiff's driver's license, and it is clear that she had already volunteered her name and address. Groves admitted that he did not ask Mrs. Enright if she had any means of identification on her person, instead he simply demanded that she give him her driver's license.

We conclude that Groves' demand for Mrs. Enright's driver's license was not a lawful order and that refusal to comply therewith was not therefore an offense in and of itself. Groves was not therefore entitled to use force in arresting Mrs. Enright. Thus Groves' defense based upon an arrest for, and conviction of, a specific offense must, as a matter of law, fail.

II.

Appellants next allege that Groves' conduct does not give rise to a cause of action for intentional infliction of mental suffering or outrageous conduct. Again, we disagree.

One commits this tort if, by extreme and outrageous conduct, he intentionally or recklessly causes severe emotional distress to another. The conduct must be so extreme in degree as to go beyond the bounds of decency and be such as would be regarded as atrocious and intolerable in a civilized community. (cite omitted) Whether Groves' conduct was sufficient to constitute outrageous conduct was a matter to be resolved by the trier of facts. (cite omitted)

The jury found against Groves on this issue. Since there was substantial evidence before the jury to support such a finding, we may not overturn that finding on appeal. (cite omitted) …

Judgment affirmed.

RULAND and BERMAN, JJ., concur.

ANSWERS TO INTERNET INQUIRIES

Answers will vary.

ANSWERS TO PRACTICAL PONDERABLES

1. The torts of battery (throwing in the pool and touching to take glasses), conversion (breaking glasses), false imprisonment (confining him in the circle), intentional infliction of emotional distress (taunting, pushing him in the pool, and letting him almost drown), and possibly assault (threatening to harm him if he files suit) are all potential torts.

2. Before filing a complaint, you will need to find:

   a. names and places of residence of partygoers;

   b. details about what each man did;

   c. full name, telephone number, and address of Willard in order to interview him;

   d. Steve's address and date of incident;

   e. hospital report;

   f. psychiatrist's report;

   g. requirements for assault in your jurisdiction (are words alone sufficient?);

   h. whether anyone knew about Murray's great fear of water before throwing him in the pool;

   i. wage records and other employment records documenting the effects of incident on Murray's performance at work;

   j. effect of incident on his personal and social life (interviews with wife and others close to him); and

   k. cost of replacing glasses.

CHAPTER 4
Negligence: Duty

SUGGESTED DISCUSSION

Using the facts of the scenario involving *Ruby v. Construction Wizards, Inc.* as your basis, you could ask the following questions to give the students an opportunity to apply the concepts in this chapter. Those facts are reiterated from Chapter 2 of this manual.

Ruby v. Construction Wizards, Inc.

Ruby is driving down a two-lane highway one evening at dusk when a sheet of plywood flies out of the bed of a truck coming toward her. The plywood penetrates the cab of Ruby's truck, shatters her windshield, and strikes Ruby. Ruby sustains severe, long-lasting injuries to her left arm and hand, requiring her to receive ongoing medical treatment and causing her to suffer a substantial wage loss. Ruby claims that the truck, driven by an employee of Construction Wizards, Inc., was improperly loaded at the time.

- What duty did Construction Wizards have to Ruby?
- Suppose the driver of the truck administered medical aid to Ruby. What duty of care would he owe her?
- Suppose the truck driver did not stop and Ruby, incapacitated by her injuries, was unable to drive. If a passerby stopped to aid Ruby and was himself injured by a motorist who ran into his car, would the truck driver be found to have a duty of care to the motorist who intended to help Ruby?
- Suppose Ruby, instead of being injured while on the road, was injured when she tripped over a piece of plywood as she was walking across the construction yard at Construction Wizards, which is a retail operation open to the public. Her only reason for being in the yard was to use the telephone because her car had become disabled and she needed assistance. What duty would Construction Wizards owe her under those circumstances? Would it matter if the telephone was a public or private telephone? Suppose the fetus she was carrying was damaged by her fall. Would Construction Wizards owe the child any duty of care?
- Suppose that Ruby's five-year-old child wandered into the construction yard while Ruby was trying to flag someone down to help her and was unaware of her child's departure. The child picked up some pieces of scrap metal and began staging an imaginary sword fight. If the child injured himself, would Construction Wizards be found to have a duty to protect the child from such harm? If Construction Wizards was leasing the property, would the landlord owe any duty of care to the child?

QUESTIONS FOR STUDENTS

1. What duty of care is owed a trespasser?
   a. What are the four exceptions to this general rule?
2. What conditions must be met to have an attractive nuisance?
   a. What characteristics of a child are taken into consideration when deciding whether the attractive-nuisance doctrine applies?
3. What is the rescue doctrine?
4. What duty is owed a known trespasser?
   a. What duty is owed to someone who trespasses on a limited area of a possessor's land?
5. Who is considered a licensee, and what duty of care is owed a licensee?
6. Who is considered an invitee, and what duty of care is owed an invitee?
   a. How can one lose one's invitee status?
7. What duty of care does a possessor owe to those outside his or her property?
   a. What distinction is made between artificial and natural conditions?
8. What are the duties of a tenant?
9. What are the duties of a landlord?
10. To what extent is a seller of land liable to a plaintiff injured by a defect the seller does not disclose to the buyer?
    a. What if the seller intentionally conceals the defect?
11. Is there a common law duty to rescue someone in distress?
    a. Under what conditions does such a duty exist? Give an example.
12. What duty of care does a person have once that person has begun to render emergency aid?
13. What is the voluntary undertaking doctrine?
14. How does the duty of a public entity compare to that of a private individual?
15. Can a fetus recover for injuries sustained in utero as a result of a defendant's actions?
16. What is the doctrine of respondeat superior?
17. What is the family-purpose doctrine?

ANSWERS TO REVIEW QUESTIONS

1. *What duty of care is owed a trespasser?*

   In general, a possessor owes no duty of care to a trespasser to make the land safe or to protect the trespasser in any way. Possessors of land must refrain from willfully or intentionally injuring trespassers.

   a. What are the four exceptions to this general rule?

   There are four exceptions, however, to this general rule (see Exhibit 4–2). Some duty of care is owed when the plaintiffs are (1) trespassing children, (2) individuals known to be trespassers, (3) rescuing someone in danger as a result of the defendant possessor's negligence, or (4) trespassing on a very limited portion of the possessor's land. We will discuss each of these exceptions in more depth in the following sections.

2. *What conditions must be met to have an attractive nuisance?*

   Under the *Restatement*, a possessor can be found liable to a trespassing child if the following conditions are met (*Restatement [Second] of Torts* § 339):

   - The possessor has reason to know that the condition is on a place on the land where children are likely to trespass.
   - The possessor must have a reason to know of the condition and to know that it poses an unreasonable risk of serious injury or death to trespassing children.
   - Because of their youth, the children must not have discovered the condition or realized the danger posed by coming into the area made dangerous by the condition.
   - The benefit to the possessor in maintaining the condition in its dangerous form must be slight in comparison to the risk posed to the children.
   - The possessor must fail to use reasonable care to eliminate the danger or to protect the children.

   a. What characteristics of a child are taken into consideration when deciding whether the attractive-nuisance doctrine applies?

   The age, experience, and intelligence of the child may determine whether the attractive-nuisance doctrine applies.

3. *What is the rescue doctrine?*

   Under the rescue doctrine**,** anyone who negligently causes harm to a person or property may be liable to one who is injured in an effort to rescue the imperiled person or property.