# *PART IV*

# INTENTIONAL TORTS

# Chapter 12
# Intentional Torts:
# The Prima Facie Case

## Introduction

Intentional torts are among the oldest causes of action recognized in tort law. Although the negligence principle has come to dominate tort law, this is a relatively recent development, attributable in part to the importance of insurance as a compensation mechanism,[1] and in part to the utility of the negligence test as a means of balancing competing social interests. Relatively little of the personal injury practice of modern lawyers is taken up by intentional torts. However, for a variety of reasons they figure prominently in most law school torts courses.[2] Thus, most students' education would be incomplete without an understanding of intentional torts, despite the fact that they may never see one again, except (possibly) on a bar exam.

The unique thing about intentional torts is the emphasis upon the defendant's state of mind. Whereas in the negligence case the jury is instructed to judge the defendant's conduct by an objective standard, *i.e.*, the hypothetical reasonably prudent person, in intentional torts cases the jury must ordinarily find that the defendant subjectively intended to inflict a certain consequence upon the plaintiff. It must be borne in mind that the plaintiff can rarely provide tangible proof of the defendant's state of mind other than by showing what the defendant did, and asking the jury to infer his intent. The defendant can usually claim that the injury to the plaintiff was accidental rather than intentional, and the plaintiff cannot offer an X-ray of the defendant's brain as proof. Nonetheless, the jury must find as a fact (based upon their experience in the world and their common sense) that the defendant's conduct was intentional (or in some cases highly reckless) rather than merely careless before the legal requirements of the intentional tort are met.

Once the plaintiff has met his burden of proof, the defendant can always claim that his conduct was "privileged" or justified, and thereby escape liability.

The "rules" governing intentional torts are relatively well settled; they are set forth in the RESTATEMENT (2D) OF TORTS. Their application, however, is often quite complex, as the succeeding cases demonstrate.

### RESTATEMENT (2D) OF TORTS

#### § 8A. Intent

The word "intent" is used throughout the RESTATEMENT of this Subject to denote that the actor desires to cause consequences of his act, or

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1 Insurance is important in part because it usually provides coverage only for "accidental" harms. Intentional torts are frequently excluded from coverage because they do not meet the requirement that the loss arise from an "occurrence," which is typically defined as "an accident or a happening ... which unexpectedly and unintentionally results in personal injury...."

2 One commonly cited reason is that the rules for intentional torts are relatively clear, and thus easier for the beginning student to understand and apply. Relative to product liability law, this statement is certainly true.

that he believes that the consequences are substantially certain to result from it.

### § 13. Battery: Harmful Contact

An actor is subject to liability to another for battery if

(a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and

(b) a harmful contact with the person of the other directly or indirectly results

### § 15. What Constitutes Bodily Harm

Bodily harm is any physical impairment of the condition of another's body, or physical pain or illness.

### § 18. Battery: Offensive Contact

(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.

(2) An act which is not done with the intention stated in Subsection (1,a) does not make the actor liable to the other for a mere offensive contact with the other's person although the act involves an unreasonable risk of inflicting it and, therefore, would be negligent or reckless if the risk threatened bodily harm.

### § 21. Assault

(1) An actor is subject to liability to another for assault 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) the other is thereby put in such imminent apprehension.

(2) An act which is not done with the intention stated in Subsection (1, a) does not make the actor liable to the other for an apprehension caused thereby although the act involves an unreasonable risk of causing it and, therefore, would be negligent or reckless if the risk threatened bodily harm.

### § 35. False Imprisonment

(1) An actor is subject to liability to another for false imprisonment if

(a) he acts intending to confine the other or a third person within boundaries fixed by the actor, and

(b) his act directly or indirectly results in such a confinement of the other, and

(c) the other is conscious of the confinement or is harmed by it.

(2) An act which is not done with the intention stated in Subsection (1, a) does not make the actor liable to the other for a merely transitory or otherwise harmless confinement, although the act involves an unreasonable risk of imposing it and therefore would be negligent or reckless if the risk threatened bodily harm.

### § 36. What Constitutes Confinement

(1) To make the actor liable for false imprisonment, the other's confinement within the boundaries fixed by the actor must be complete.

(2) The confinement is complete although there is a reasonable means of escape, unless the other knows of it.

(3) The actor does not become liable for false imprisonment by intentionally preventing another from going in a particular direction in which he has a right or privilege to go.

### § 46. Outrageous Conduct Causing Severe Emotional Distress

(1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

(2) Where such conduct is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress

(a) to a member of such person's immediate family who is present at the time, whether or not such distress results in bodily harm, or

(b) to any other person who is present at the time, if such distress results in bodily harm.

**§ 63. Self-Defense by Force not Threatening Death or Serious Bodily Harm**

(1) An actor is privileged to use reasonable force, not intended or likely to cause death or serious bodily harm, to defend himself against unprivileged harmful or offensive contact or other bodily harm which he reasonably believes that another is about to inflict intentionally upon him.

(2) Self-defense is privileged under the conditions stated in Subsection (1), although the actor correctly or reasonably believes that he can avoid the necessity of so defending himself,

(a) by retreating or otherwise giving up a right or privilege, or

(b) by complying with a command with which the actor is under no duty to comply or which the other is not privileged to enforce by the means threatened.

**§ 65. Self-Defense by Force Threatening Death or Serious Bodily Harm**

(1) Subject to the statement in Subsection (3), an actor is privileged to defend himself against another by force intended or likely to cause death or serious bodily harm, when he reasonably believes that

(a) the other is about to inflict upon him an intentional contact or other bodily harm, and that

(b) he is thereby put in peril of death or serious bodily harm or ravishment, which can be safely be prevented only by the immediate use of such force.

(2) The privilege stated in Subsection (1) exists although the actor correctly or reasonably believes that he can safely avoid the necessity of so defending himself by

(a) retreating if he is attacked within his dwelling place, which is not also the dwelling place of the other, or

(b) permitting the other to intrude upon or dispossess him of his dwelling place, or

(c) abandoning an attempt to effect a lawful arrest.

(3) The privilege stated in Subsection (1) does not exist if the actor correctly or reasonably believes that he can with complete safety avoid the necessity of so defending himself by

(a) retreating if attacked in any place other than his dwelling place, or in a place which is also the dwelling of the other, or

(b) relinquishing the exercise of any right or privilege other than his privilege to prevent intrusion upon or dispossession of his dwelling place or to effect a lawful arrest.

## § A. Battery and Assault

**Introductory Note**. In *Dickens v. Puryear*, already considered in Chapter Seven, there is a good introduction to the general requirements of battery and assault.

### ROGERS v. LOEWS L'ENFANT PLAZA HOTEL

526 F. Supp. 523 (D.C. D.C. 1981)

Joyce Hens GREEN, District Judge

Plaintiff, Norma Rogers, alleges in her complaint that while employed by the defendant Loews L'Enfant Plaza Hotel (Hotel) she was subjected to physical and emotional harassment by her superiors. Claiming that defendants' conduct has deprived her of rights guaranteed under the

Constitution and federal, local and common law, she seeks monetary, declaratory and injunctive relief. Motions to dismiss are presently before the court. A recitation of the allegations is germane to the rulings on those motions.

In September, 1979, plaintiff was hired by the defendant Hotel as Assistant Manager of the Greenhouse Restaurant. Defendant James Deavers, Manager of that restaurant, was plaintiff's immediate supervisor with whom she was required to work closely in order to assure the smooth operation of the restaurant. Plaintiff alleges that after being employed a few weeks, Deavers began to make sexually oriented advances toward her, verbally and in writing, which extended over a period of two months. The defendant would write her notes and letters, pressing them into her hand when she was busy attending to her duties in the restaurant, or placing them inside menus that plaintiff distributed to patrons of the restaurant, or even slipping them into plaintiff's purse without her knowledge.

Plaintiff further claims that defendant would also telephone her at home or while she was on duty at the restaurant, which conversations included sarcastic, leering comments about her personal and sexual life. Plaintiff was frightened and embarrassed by this defendant's actions and uncertain as to how she could protect herself. She contends that she continually rejected his suggestions and rebuffed his advances by telling defendant that she was not interested in him personally, and that his suggestions and advances were distressful and unwanted.

During this period, plaintiff received what she considered to be an abusive and violent telephone call from defendant Deavers' wife, who had apparently discovered a letter written by her husband to the plaintiff. Ms. Deavers warned Rogers not to become involved with her husband. Extremely disturbed by this call, plaintiff urged defendant to tell his wife that there was no relationship, other than a working one.

Plaintiff avers that for a short time after the telephone incident between herself and Ms. Deavers, the advances ceased, but soon they resumed again. This time in addition to leaving more notes, Deavers would pull at plaintiff's hair, touch her and try to convince her to spend a night or take a trip with him. The complaint states that he offered her gifts and favors and at times used abusive crude language, stating that he found her attractive and would never leave her alone.

The explicit sexual advances ceased at the end of November, but then the employment atmosphere and working conditions at the Greenhouse became difficult and very uncomfortable according to plaintiff. Defendant Deavers would sometimes exclude her from meetings of the Greenhouse staff; he suggested to the staff that plaintiff was unhappy with her job and might not stay; he used abusive language, belittling plaintiff in the presence of the staff; he refused to cooperate with her or share necessary information on occasion. Plaintiff claims he generally made it difficult for her to perform her job.

Plaintiff attempted to arrange a meeting with defendant Randy Gantenbein, the Hotel's Food and Beverage Manager, who had authority to resolve staff problems in the Greenhouse, in order to discuss defendant Deavers' conduct. She asserts Gantenbein avoided her and for three weeks declined to meet her. Near the end of this period, Deavers advised Rogers that defendant Gantenbein intended to discharge both Deavers and Rogers. After pursuing the matter, plaintiff was able to meet with Gantenbein in January, 1980, but only after the Hotel Manager suggested he do so. At that time, plaintiff states she explained the atmosphere and working conditions in the restaurant beginning with defendant Deavers' past sexual advances. Defendant Gantenbein denied he had any intention of discharging plaintiff as Deavers had warned, but acknowledged that he had known, prior to their meeting, about Ms. Deavers' telephone call to plaintiff in mid-October.[1] Gantenbein, according to plaintiff, advised her to be patient and to wait and see if the situation would improve.

Plaintiff's allegations continue that by the end of February, 1980, defendant Deavers notified her that he would do everything in his power to have her fired. Plaintiff contacted her attorney and requested Gantenbein to meet with him, which Gantenbein refused to do. The next day Gantenbein asked plaintiff to take an evening position with the

[1] Plaintiff alleges that other supervisory personnel at the Hotel also knew of defendant Deavers' conduct toward plaintiff, but had taken no action to prevent it. Plaintiff further argues that defendant Deavers had engaged in sexually harassing conduct in the past with other female employees of the Greenhouse.

Hotel, noting that it was obvious that things would not work out between plaintiff and defendant Deavers. She refused, again requesting that the Hotel management or its attorney promptly meet with her attorney, but the request was denied.

Plaintiff and her counsel eventually met with Hotel management on March 14, 1980. By a letter dated March 17, attorneys for the Hotel advised plaintiff that they had "admonished and reprimanded" Deavers. Hotel management, however, saw no reason to separate the two employees, and insisted that plaintiff report back to work with defendant Deavers. They advised Rogers that the company would "monitor" the relationship through weekly meetings. Plaintiff rejected this solution.

As an alternative, the Hotel offered to separate the two by transferring plaintiff to a higher paying position as night Room Service Manager with the Hotel. Plaintiff rejected this offer also. The Hotel refused to transfer defendant Deavers to a night position. Plaintiff thereafter filed a complaint against defendants with the Equal Employment Opportunity Commission (EEOC) on March 28, 1980.[2]

Essentially then, the complaint before the Court alleges that defendant Deavers with knowledge of defendant Gantenbein and other supervisory employees at the Hotel willfully and with premeditation forced himself on plaintiff and attempted to force her either to submit to his importunings or lose her employment. She asserts that she has been severely damaged both mentally and physically by the conduct described above in violation of rights guaranteed her by 42 U.S.C. §§ 1981 and 1983 and by the District of Columbia Human Rights Act, D.C. CODE ANN. § 1-2501 *et seq*. (formerly § 6-2201 *et seq.*). Plaintiff further claims that defendants engaged in tortious conduct, specifically 1) invasion of plaintiff's right to privacy at her home, in her place of employment, and in her personal life; 2) infliction of extreme emotional distress; 3) assault and battery. The corporate defendants, it is charged, failed to exercise proper supervision and control over their employees, thereby causing plaintiff injury and making defendants jointly and severally liable to plaintiff.

Defendants have presented motions to dismiss pursuant to the FEDERAL RULES OF CIVIL PROCEDURE 12(b)(6), 12(b)(1), and for partial summary judgment pursuant to Rule 56, as well as a motion to strike or dismiss. Each motion will be considered separately.

**I**

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, defendants have moved to dismiss on the following grounds: (a) the complaint fails to state a claim upon which relief can be granted under Section 2000e-2(a) of Title 42 of the United States Code and Section 1-2512(1) (formerly § 6- 2221(a) (1)) of the District of Columbia Human Rights Act; and (b) the complaint fails to state a claim upon which relief can be granted under District of Columbia common-law principles of tort.

> For the purposes of a motion to dismiss, the material allegations of the complaint are taken as admitted. And, the complaint is to be liberally construed in favor of plaintiff."[3] A complaint "should not be dismissed for insufficiency unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim. Mere vagueness or lack of detail is not ground for a motion to dismiss....[4]

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**(b) Common-Law Tort Claims**

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*Assault & Battery*: It is elemental that assault is a tort which protects a plaintiff's "interest in freedom from apprehension of a harmful or offensive contact with the person"[12] and battery is the "interest in freedom from intentional and unpermitted contacts with the plaintiff's

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2 EEOC has twice issued and twice withdrawn a Notice of Right to Sue. The case is still pending before the EEOC.

3 *Jenkins v. McKeithen*, 395 U.S. 411, 421, 89 S. Ct. 1843, 1848, 23 L. Ed. 2d 404, *reh. denied* 396 U.S. 869, 90 S. Ct. 35, 24 L. Ed. 2d 123 (1969).

4 2A J. MOORE, FEDERAL PRACTICE P 12.08 (2d ed. 1981).

12 W. PROSSER, *supra* note 7, § 10, at 37.

person...."[13] One can be subject to liability to another for assault 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
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> (b) the other is thereby put in such imminent apprehension.[14]

A defendant can be liable for battery if the requirements of (a) are met and

> (b) an offensive contact with the person of the other directly or indirectly results.[15]

To constitute the tort of assault, the apprehension must be one which would normally be aroused in the mind of a reasonable person and apparent ability and opportunity to carry out the threat immediately must be present. The mental injury which results could include, for example, fright or humiliation. [16]Here, plaintiff Rogers has asserted that she was frightened and embarrassed by defendant Deavers' actions, complaint ¶ 17, and was put in imminent apprehension of an offensive contact even though, or especially because, they were in a public restaurant, and she was attempting to perform her duties of employment.

"To be held liable for assault, the defendant must have intended to interfere with the plaintiff's personal integrity...."[17] Plaintiff alleges that although she expressed to defendant Deavers that his suggestions and advances were distressful and unwanted, he continued to engage in that conduct. Complaint ¶ ¶ 17 & 30. In construing plaintiff's pleadings as required in a motion to dismiss, plaintiff has made adequate claims to defeat a motion to dismiss her assault cause of action.

To constitute the tort of battery, a defendant can be found liable for any physical contact with the plaintiff which is offensive or insulting, as well as physically harmful. Of primary importance in such a cause of action is the absence of consent to the contact on the part of the plaintiff, rather than the hostile intent of the defendant, although intent is required. The intent, however, is only the intent "to bring about such a contact."[18]

Here, clearly, an absence of consent has been asserted, since plaintiff specifically told Deavers that his advances were unwanted. Plaintiff also recites a touching, which included pulling her hair, and that Deavers intended to bring about this conduct. Complaint ¶ ¶ 17, 19 & 30. These allegations are sufficient to survive the motion to dismiss as to the battery claim.

*Infliction of Emotional Distress*: Plaintiff's third and final tort claim, infliction of emotional distress, can result from either intentional or negligent conduct. Negligent infliction of emotional distress, recognized in the District of Columbia,[19] requires a physical injury,[20] whereas intentional infliction of emotional distress,[21] also recognized in the District of Columbia,[22] allows recovery in the absence of physical impact.[23] Since plaintiff has alleged only intentional tortious acts in her complaint, only intentional infliction of emotional distress will be considered.

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13 *Id.* at 34.

14 RESTATEMENT OF (SECOND) TORTS § 21 (1979). *See also Madden v. D.C. Transit System, Inc.*, D.C. App., 307 A.2d 756 (1973).

15 RESTATEMENT OF TORTS (SECOND) § 18 (1979). *See also Jackson v. District of Columbia*, D.C. App., 412 A.2d 948 (1980).

16 W. PROSSER, *supra* note 7, § 10, at 38-39.

17 *Id.* at 40-41.

18 *Id.* at 35-37. *See also Madden v. D.C. Transit System, Inc.*, D.C. App., 307 A.2d 756, 757 (1973).

19 *Waldon v. Covington*, D.C. App., 415 A.2d 1070, 1076 (1980), citing *Perry v. Capital Traction Co.*, 59 App. D.C. 42, 32 F.2d 938, *cert. denied*, 280 U.S. 577, 50 S. Ct. 31, 74 L. Ed. 627 (1929).

20 *Gilper v. Kiamesha Concord, Inc.*, D.C. App., 302 A.2d 740, 745 (1973).

21 Intentional infliction of emotional distress is a "comparatively recent development in state law." *Farmer v. United Brotherhood of Carpenters & Joiners*, 430 U.S. 290, 97 S. Ct. 1056, 51 L. Ed. 2d 338 (1977).

22 *Waldon v. Covington*, 415 A.2d at 1070; *Shewmaker v. Minchew*, 504 F. Supp. 156 (D.D.C. 1980); *Clark v. Associated Retail Credit Men*, 105 F.2d 62 (D.C.Cir.1939).

23 *Waldon v. Covington*, 415 A.2d at 1076; *Shewmaker v. Minchew*, 504 F. Supp. at 163.

*Clark v. Associated Retail Credit Men*, 105 F.2d 62 (D.C. Cir. 1939), the "landmark case in this jurisdiction"[24] states that:

> The law does not, and doubtless should not, impose a general duty of care to avoid causing mental distress. *Id.* at 64. (However) one who, without just cause or excuse, and beyond all the bounds of decency, purposely causes a disturbance of another's mental and emotional tranquility of so acute a nature that harmful physical consequences might be not unlikely to result, is subject to liability in damages for such mental and emotional disturbance even though no demonstrable physical consequences actually ensue. *Id.* at 65.

For a prima facie case to be made out, the tortfeasor's conduct must be "wanton, outrageous in the extreme, or especially calculated to cause serious mental distress." *Shewmaker v. Minchew*, 504 F. Supp. at 163.

> This liability "clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities;" it is imposed only when the conduct goes "beyond all possible bounds of decency and (is) regarded as atrocious and utterly intolerable in a civilized community." *Waldon v. Covington*, 415 A.2d at 1076.

Severe emotional distress must have occurred and the conduct must have been intentional.

> Of course, subjective intent can rarely be proven directly; therefore, the requisite intent must be inferred, either from the very outrageousness of the defendant's acts or, for example, when the circumstances are such that "any reasonable person would have known that (emotional distress and physical harm) would result...." *Id.* at 1077.

The court in *Doyle v. Continental Air Lines*, No. 75 C 2407 (N.D. Ill. Oct. 29, 1979), a sexual harassment case brought under Title VII and various common law claims, including infliction of emotional distress, discussed the tort in the context of an advertising campaign the plaintiff airline attendants felt had sexual overtones which encouraged sexual harassment on the job, as well as in their personal lives. Plaintiffs were frequently exposed to comments which, it was asserted, the advertising campaign and slogan, "We move our tail for you" had prompted. Defendants' motion for summary judgment was granted with the holding that the insulting demeaning and harassing remarks provoked by Continental's advertising campaign were insufficient to establish that defendant's conduct was extreme and outrageous. In that case, however, only insulting demeaning and harassing remarks were alleged, whereas in this case, Rogers claims she has been subjected not only to that type of remark, but also to abusive language and physical advances from her direct supervisor which have resulted in harmful emotional, as well as physical, consequences.[25] Additionally, plaintiff alleges essentially that she left her employment as a result of defendant Deavers' conduct.

In a case somewhat similar to the instant one, but not concerning sexual harassment specifically, *Beidler v. W. R. Grace, Inc.*, 461 F. Supp. 1013 (E.D. Pa. 1978), *aff'd mem.*, 609 F.2d 500 (3d Cir. 1979), a male plaintiff failed to state a cause of action for intentional infliction of emotional distress when he alleged harassment by, inter alia, exclusion from meetings necessary to the performance of his job, failure to receive communications concerning his work performance, and intimations that his new assistant would replace him. This case is clearly distinguishable because the extreme conduct alleged by Rogers deals not only with interference with her personal as well as professional life, but adds the dimension of sexual harassment.

The plaintiff further states that she suffered infliction of emotional distress as a result of intentional conduct by the defendants. Complaint ¶ ¶ 41 & 30. Her assertion of fright and embarrassment resulting from defendant Deavers' actions are added to her notification to Deavers that his suggestions and advances were distressful and unwanted; yet, she says he persisted even when it

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[24] *Waldon v. Covington*, 415 A.2d at 1077.

[25] It should also be noted that the Court is considering a motion to dismiss and not a summary judgment motion as in *Doyle v. Continental Air Lines*.

appeared the Hotel management knew of the problem. *Id.* ¶ ¶ 17, 19, 23 & 24. He excluded her from meetings of the staff, suggested that she was unhappy with her job and might not stay, used abusive language and belittled her in the presence of the staff, and did not share necessary information with her. *Id.* ¶ 20. Further, Deavers advised her he would do everything in his power to have her fired from her position. *Id.* ¶ 25. Alleging not only difficulty in discussing her problems with Hotel management, but also in arranging meetings between the two parties and their attorneys, *Id.* ¶ 32, and in attempting to resolve the problem over a period of months, plaintiff contends that at no time did the employer offer to remove defendant Deavers from his position as manager of the Greenhouse. *Id.* ¶ 35. This conduct, she claims, precipitated the filing of her complaint with EEOC and necessitated her refusal to return to working conditions she found unacceptable at the Greenhouse.

In her complaint, the plaintiff has clearly alleged conditions and circumstances which are beyond mere insults, indignities and petty oppressions and which, if proved, could be construed as outrageous. Emotional distress and physical harm could reasonably result from the conduct of Deavers, as stated, as well as from the conduct of the Hotel management in response to plaintiff's plight. A cause of action for intentional infliction of emotional distress does, therefore, lie.

## NEWMAN v. CHRISTENSEN

149 Neb. 471, 31 N.W.2d 417 (1948)

PAINE, Justice

This is an action for personal injuries suffered by the plaintiff by reason of his foot being suddenly jerked up by defendant, throwing him backward out of his chair, by which act he was injured. An the close of the plaintiff's evidence, the defendant moved to dismiss plaintiff's cause of action on the ground that it was barred by the statute of limitations. The court thereupon instructed the jury that it had become a legal question, which the court had determined, and instructed the jury to return a verdict for the defendant. Plaintiff appealed.

The evidence in the bill of exceptions discloses that the plaintiff was at the time of trial 54 years old. He was a traveling salesman for a Minneapolis firm, covering western Iowa, southern Minnesota, and a part of Nebraska, and had followed that occupation for 19 years.

At about 8:30 on the evening of March 18, 1945, the plaintiff, defendant, and two other friends were playing pitch in the Elks Club at Fremont. At the completion of a game two one-dollar bills were left lying on the corner of the table, which the plaintiff in a playful spirit said if the defendant did not want to get them off the table, and plaintiff thereupon pushed the money off the table. The plaintiff was sitting in a bentwood chair, with gliders under the legs, the linoleum on the floor being highly waxed. The defendant stooped down to get the money, grabbed plaintiff's right foot, and gave it a sharp jerk upward. The chair spun away and plaintiff fell over backward, with his feet in the air, striking the middle of his back. However, while he continued the game that evening, yet from the fall he allegedly suffered serious injuries to his back and spine. He charged in his petition that he was unable to do any work for a period of approximately 38 weeks thereafter and will hereafter be partially disabled, decreasing his earning capacity at least 50 percent, the injury to his eighth dorsal vertebra causing great pain, and that the injuries are permanent.

The answer admitted the occurrence, which it claimed was "horse play," and charged that the cause of action, if any, was barred by the statute of limitations.

The two assignments of error are that the trial court erred in sustaining the defendant's motion to dismiss at the conclusion of the plaintiff's evidence, and erred in overruling the plaintiff's motion for a new trial.

The sole question involved is whether the action was governed by section 25-208, R.S. 1943, which provides that actions for assault and battery must be brought within one year, or by section 25-207, which provides that actions for tort can be brought within four years. The petition in this case was filed over a year and a half after the action arose.

If the act of the defendant was a battery, the Nebraska law requires that it should be filed within one year, and on that point alone the trial judge dismissed plaintiff's action.

We will examine several definitions of a battery by various authorities.

> A battery is defined as an actual infliction of violence on the person, or an unlawful, that is, an angry, rude, insolent, or revengeful touching of the person. HILLIARD ON TORTS (3d Ed.) 181, Secs. 8 and 9." *Razor v. Kinsey*, 55 Ill. App. 605.
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> The intention to do harm is of the essence of an assault;... 2 GREENLEAF, EVIDENCE, § 83, p. 70.
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> An assault and battery is not negligence. The former is intentional; the latter is unintentional. 6 C.J.S., *Assault and Battery*, § 11.
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> Bishop, in his work on CRIMINAL LAW, (volume 2, § 72,) says that to constitute a battery ` there must be some sort of evil in the intent.' We are therefore prepared to say that to constitute an assault and battery under the foregoing definitions the act complained of must be done with a hostile intent.... Under the petition as drawn, the plaintiff is entitled to recover upon showing any degree of negligence, whether ordinary or gross, and we do not think that mere acts of negligence in any of its degrees are assaults and batteries in the meaning of the statute. *Perkins v. Stein & Co.*, 94 Ky. 433, 22 S.W. 649, 650, 20 L.R.A. 861.

The limit for bringing actions in Minnesota and Wisconsin for battery is two years, and we cite a case from each court.

> The action for a battery, which must be brought within two years, is therefore held to be an intentionally administered injury to the person. *Donner v. Graap*, 134 Wis. 523, 115 N.W. 125, 127.
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> The action for a battery which, under the provisions of section 8, subd. 1, *supra*, must be brought within two years, is an action founded upon an intentionally administered injury to the person, —such an injury as could be made the basis of a criminal prosecution. *Ott v. Great Northern Ry. Co.*, 70 Minn. 50, 72 N.W. 833.
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> This court has said that "Assault and battery consists in an injury actually done to the person of another in any angry, revengeful, or insolent manner." *Miller v. Olander*, 133 Neb. 762, 277 N.W. 72, 73.

After this discussion of battery, we will now examine the negligence rule as applicable to the case at bar. Although it may be true that every personal injury committed through negligence is, strictly speaking, a "battery," within the common-law definition, it does not follow that the word "battery," as used in section 25-208, R.S. 1943, is to be construed to include all personal injury actions. The action for a battery, brought within the one-year limitation, is proper if founded upon an intentionally administered injury to the person. But there is another class of cases in which the personal injury occurred through the negligent act of one person, and such negligent acts do not come within the definitions of assault and battery heretofore set out, for the intention to inflict the injury is entirely lacking. 4 AM. JUR., *Assault and Battery*, § 3, p. 126. *See, also, Baltimore City Pass. Ry. Co. v. Tanner*, 90 Md. 315, 45 A. 188; *Johnston v. Pittard*, 62 Ga. App. 550, 8 S.E.2d 717.

> The fact that a practical joke is the cause of an injury to a person does not excuse the perpetrator from liability in damages for the injury sustained." 52 AM. JUR., *Torts*, § 90, p. 436.

In the case of *Great Atlantic & Pacific Tea Co. v. Roch*, 160 Md. 189, 153 A. 22, where a dead rat was substituted for a loaf of bread in a package, which caused plaintiff such fright when she opened the package that she became a nervous wreck, the verdict for plaintiff was sustained. It was held that damages may be recovered for physical injuries caused by shock or fright.

Another illustration of the rule is shown in a case which occurred in 1891, where the defendant took away the lines so a horse could not be driven. The plaintiff brought suit for damages. The trial court said that if the defendant would return the lines he would dismiss the jury from further consideration of the case. Upon appeal, the Supreme Court reversed this dismissal, and said that the question could not be legally taken from the jury and settled by the court. *Wartman v. Swindell*, 54 N.J.L. 589, 25 A. 356, 18 L.R.A. 44.

> It is reasonable to suppose that the lawmakers had in mind an action vi et armis against the person when they used the words, 'an action to recover damages for assault and battery,' and meant to exclude an action for injury to the person by negligence, which at common law was an action on the case. *Rieger v. Fahys Watch-Case Co.*, 20 N.Y. CIV. PROC. R. 204, 13 N.Y.S. 788, 789.

It is a general rule that, when one does an act which proves injurious to another, civil liability usually follows from the existence of a right in the injured person. Although the act was done without malice, and no mischief was intended, he may be held answerable for the injuries which follow. *See* 26 R.C.L., *Torts*, § 6, p. 759; 22 AM. JUR., *Explosions and Explosives*, § 11, p. 131.

In the case at bar, we have reached the conclusion that, while actions for assault and battery, under section 25-208, R.S. 1943, must be brought within one year, this action is one for negligence, being an act which an ordinarily prudent man would not have done, and therefore, being in tort, may be brought within four years, as provided in section 25-207, R.S. 1943.

Having reached this conclusion, it follows that the trial court erroneously directed a verdict for the defendant. The judgment is hereby reversed and the cause is remanded for a new trial.

Reversed and remanded.

## § B. False Imprisonment

**tGORTAREZ v. SMITTY'S SUPER VALUE, INC.**

140 Ariz. 97, 680 P.2d 807 (1984)

FELDMAN, Justice

Petitioner, Ernest Gortarez, Jr., and his parents (plaintiffs) bring this petition for review to contest the trial court's disposition of their claims against respondents, Smitty's Super Value, Inc., and its security officer, Daniel Gibson (defendants). Plaintiffs brought suit against defendants for false arrest, false imprisonment, and assault and battery after Gortarez and his cousin, Albert Hernandez, were detained in the parking lot of Smitty's.

Finding that the circumstances in the case gave reasonable cause for detention, the trial court directed a verdict on the count of false imprisonment and false arrest. The assault and battery count went to the jury, which returned a verdict for defendant Gibson. The court of appeals affirmed by memorandum decision. We accepted review to examine the extent and application of the "shopkeeper's privilege" and because the facts of this case indicate an improper and, we believe, dangerous tendency to extend the statutory grant of the privilege in question. We have jurisdiction under ARIZ. CONST. art. 6, § 5(3) and Rule 23, ARIZ. R. CIV. APP. P., 17A A.R.S.

**Facts**

We view the facts in a light most favorable to the party against whom the verdict was directed. *Rocky Mountain Fire and Casualty Co. v. Biddulph Oldsmobile*, 131 Ariz. 289, 640 P.2d 851 (1982); *Jackson v. H.H. Robertson Co., Inc.*, 118 Ariz. 29, 574 P.2d 822 (1978).

Ernest Gortarez, age 16, and his cousin, Albert Hernandez, age 18, went to Smitty's store on January 2, 1979, around 8:00 p.m. They visited the automotive department, where Hernandez selected a power booster which cost $22.00. While Hernandez was paying for the power booster, Gortarez picked up a 59-cent vaporizer used to freshen the air in cars. Gortarez asked if he could pay for it in the front of the store when he finished shopping. The clerk said yes, but decided that the request was suspicious and had a "hunch" that Gortarez would try to leave the store without paying for the item.

The two cousins wandered through the store, looking at other merchandise, and finally left the store through an unattended check-out aisle. The clerk, Robert Sjulestad, had followed the two through the store, in aisles parallel to where the young men were walking, so that there were

occasions when he could not observe Gortarez below shoulder level. Since Sjulestad did not see them dispose of or pay for the vaporizer, he concluded that Gortarez or Hernandez took the item without paying for it.

Sjulestad then told the assistant manager and the security guard, Daniel Gibson, that "[t]hose two guys just ripped us off." According to Gibson's testimony, Sjulestad explained that "they had picked up a vaporizer and asked to pay for it in the front, and then didn't pay for it, as I watched them walk through, and they obviously did not pay for anything at that time."

Gibson and Scott Miller, the assistant manager, along with two other store employees, then ran out of the store to catch the two young men as they were about to get inside their car in the parking lot. Miller went to the passenger side to intercept Gortarez, while Gibson went for Hernandez, who was about to open the car door on the driver's side. Gibson said that he identified himself "as an officer" by showing his badge as he ran up to Hernandez. (Gibson was an off-duty police officer working as a security guard for Smitty's.)[1] Gibson told Hernandez: "I believe you have something you did not pay for." He then seized Hernandez, put his arms on the car and began searching him. Hernandez offered no resistance even though Gibson did not ask for the vaporizer, nor say what he was looking for. In cross-examination, Gibson admitted that Hernandez did nothing to resist him, and, as Gibson searched him, Hernandez kept repeating that he did not have anything that he had not paid for.

Meanwhile, on the other side of the car, flanked by Miller, Gortarez saw Gibson grab Hernandez, push him up against the car, and search him. Gortarez was outraged at this behavior and used strong language to protest the detention and the search —yelling at Gibson to leave his cousin alone. According to Gortarez, he thought the men were looking for the vaporizer because he heard Gibson tell the others to watch out for the bottle, and to look under the car for the bottle. Gortarez testified that he told the men that Hernandez did not have the vaporizer —it was in the store. No one had stopped to check at the counter through which the two exited, where the vaporizer was eventually found in one of the catch-all baskets at the unattended check-out stand.

Seeing Gibson "rousting" Hernandez, Gortarez came to the defense of his cousin,[2] ran around the front of the car and pushed Gibson away. Gibson then grabbed Gortarez and put a choke hold around Gortarez' neck until he stopped struggling. Both Hernandez and Gortarez testified that the first time that Gibson identified himself to them was after he had restrained Gortarez in a choke hold. There was testimony that Gortarez was held in the choke hold for a period of time even after Gortarez had advised the store employees that he had left the vaporizer in the store. When a carry-out boy told the store employees that he had found the vaporizer in a basket at the check-out stand, the two cousins were released.

Gortarez later required medical treatment for injuries suffered from the choke hold. Plaintiffs sued Smitty's and Gibson for false arrest, false imprisonment, and assault and battery. The case was tried before a jury. At the close of all the evidence, the court directed a verdict for the defendants on the false imprisonment and false arrest count. The assault and battery claim went to the jury, with an instruction on self-defense; the

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[1] This opinion does not deal with the issues which might arise under A.R.S. § 13-3883, *Arrest by Officer Without Warrant*. Subsection 4 of that statute would give a "peace officer" the right to arrest upon probable cause to believe that a misdemeanor has been committed and that the person to be arrested committed the offenses. As indicated above, Gibson was an off-duty police officer, employed and paid by Smitty's at the time of the incident. Defendants did not contend at trial that Gibson was "a peace officer" under the provisions of § 13-3883 at the time of the incident, nor that he had attempted, as such an officer, to make an arrest under § 13-3883. Accordingly, we do not reach such issues as the question of whether an "off-duty" police officer is a "peace officer" under the arrest statute or whether he can act as a "peace officer" when he is employed by and purporting to act for a private employer.

[2] There is a privilege to come to the defense of another where such action is "called for, or sanctioned, by recognized social usage, or commonly accepted standards of decent conduct." The privilege permits use of "all force reasonably necessary for such defense.... " W. PROSSER, LAW OF TORTS § 20, at 112-113 (4th edition 1971). Thus, although Hernandez was the one physically seized, Gortarez was entitled to defend Hernandez —and himself —to the same extent as if Gortarez had been physically seized. *Id.* Further, false arrest or imprisonment does not require physical detention —the tort may be committed by intimidation. *Id.*, § 11, at 42-43. None of these issues were raised at trial.

court refused plaintiffs' instruction on withdrawal. The jury returned a verdict for defendant Gibson. The court of appeals affirmed, and plaintiffs petition this court for review.

**False Imprisonment and False Arrest**

**Historical Perspective**

At common law, a private person' s privilege to arrest another for a misdemeanor was very limited. The RESTATEMENT (SECOND) OF TORTS describes the circumstances under which a private person may arrest another without a warrant:

> a) if the other has committed the felony for which he is arrested, or
>
> b) if an act or omission constituting a felony has been committed and the actor reasonably suspects that the other has committed such act or omission, or
>
> c) if the other, in the presence of the actor, is committing a breach of the peace or, having so committed a breach of the peace, he is reasonably believed by the actor to be about to renew it, or
>
> d) if the actor has attempted to commit a felony in the actor's presence and the arrest is made at once or upon fresh pursuit, or
>
> e) if the other knowingly causes the actor to believe that facts existed which would create in him a privilege to arrest under the statement in Clauses (a) to (d). *Id.*, § 119.

Arizona has codified the common law. So far as relevant here, the statute provides that a private person may make an arrest for a misdemeanor when the person to be arrested has committed a misdemeanor amounting to a breach of the peace in the presence of the person making the arrest. § 13-3884, 5A A.R.S. Thus, at common law and by statute, the privilege to arrest for misdemeanors without a warrant is limited to those misdemeanors which constitute a breach of the peace.[3] In the case of misdemeanors such as shoplifting, there is no breach of the peace, and no common law privilege to arrest. Therefore any common law privilege would exist only for recapture of chattel. There is a limited privilege for an owner whose property has been wrongfully taken, while in fresh pursuit, to use reasonable force to recapture a chattel. PROSSER, *supra*, § 22 at 117. An important caveat to this privilege is that the actor must be correct as to the facts which he believes grant him the privilege, and faces liability for damages resulting from any mistake, however reasonable. *Id.* The force privileged must be reasonable under the circumstances, and not calculated to inflict serious bodily harm. Ordinarily, the use of any force at all will not be justified until there has been a demand made for the return of the property. *Id.*

Thus, privileges for misdemeanor arrest traditionally available at common law recognize no privilege to arrest for ordinary "shoplifting." Under this rule a shopkeeper who believed that a customer was shoplifting was placed in an untenable position. Either the shopkeeper allowed the suspect to leave the premises, risking the loss of merchandise, or took the risk of attempting to recapture the chattel by detaining the customer, facing liability for the wrongful detention if the person had not stolen merchandise. *Id.* § 22 at 121.

As Prosser noted, shoplifting is a major problem, causing losses that range into millions of dollars each year. *Id.*; *see also Kon v. Skaggs Drug Centers, Inc.*, 115 Ariz. 121, 563 P.2d 920 (App. 1977). There have been a number of decisions which permit a business person for reasonable cause, to detain a customer for investigation. PROSSER, *supra* at 122. This privilege, however, is narrow; it is

> confined to what is reasonably necessary for its limited purpose, of enabling the defendant to do what is possible on the spot to discover the facts. There will be liability if the detention is for a length of time beyond that which is reasonably necessary for such a short investigation, or if the plaintiff is assaulted, insulted or bullied, or public accusation is made against him, or the privilege is exercised

[3] A mistaken belief that a breach of the peace has been committed does not confer a privilege under Clause (c). RESTATEMENT (SECOND) OF TORTS, § 119 Comment (o). (A peace officer is privileged under § 121(c) where the (continued...)

[3](...continued) one arrested is a participant in an affray.)

in an unreasonable manner.... *Id.*

The developing, common law "shopkeeper's privilege" described by Prosser was incorporated into the second RESTATEMENT OF TORTS with the addition of section 120A —*Temporary Detention for Investigation*:

> One who reasonably believes that another has tortiously taken a chattel upon his premises, or has failed to make cash payment for a chattel purchased or services rendered there, is privileged, without arresting the other, to detain him on the premises for the time necessary for a reasonable investigation of the facts.

Comment (a) states that this section is necessary to protect shopkeepers from the dilemma we have just described. Comment (d) explains that the privilege differs from the privilege to use reasonable force to recapture a chattel, because it protects the shopkeeper who has made a reasonable mistake regarding the guilt of the suspect. As noted in Comment (g), the privilege is one of detention only.

We have not had occasion to pass upon the applicability of the RESTATEMENT rule. Instead Arizona has adopted the shopkeeper's privilege by statute, which provides in pertinent part:

> C. A merchant, or his agent or employee, *with reasonable cause, may detain* on the premises *in a reasonable manner and for a reasonable time* any person suspected of shoplifting ... *for questioning or summoning a law enforcement officer.*
>
> D. Reasonable cause is a defense to a civil or criminal action against a peace officer, merchant or an agent or employee of such merchant for false arrest, false or unlawful imprisonment or wrongful detention. A.R.S. § 13-1805 (emphasis supplied).

The trial court was evidently of the view that by the terms of subsection D, reasonable cause, alone, was a defense. We disagree; we believe that the statutory shopkeeper's privilege, like that described in the RESTATEMENT, involves all of the elements noted in subsection C. Subsections C and D of § 13-1805 must be read together. Applying subsection (D) by recognizing the privilege defense upon a showing of "reasonable cause" without the limitations contained in subsection (C), would render the latter meaningless. Where the language of the statute is susceptible of several interpretations, the court will adopt one which is reasonable and avoids contradictions or absurdities. *Schilling v. Embree*, 118 Ariz. 236, 575 P.2d 1262 (App. 1977); *State Board of Dispensing Opticians v. Schwab*, 93 Ariz. 328, 380 P.2d 784 (1963). Also, we must construe a statute as a whole and give effect to all its provisions. *Adams Tree Service, Inc. v. Transamerica Title Insurance Co.*, 20 Ariz. App. 214, 511 P.2d 658 (1973); *City of Phoenix v. Kelly*, 90 Ariz. 116, 366 P.2d 470 (1961).

To invoke the privilege, therefore, "reasonable cause" is only the threshold requirement. Once reasonable cause is established, there are two further questions regarding the application of the privilege. We must ask whether the purpose of the shopkeeper's action was proper (*i.e.*, detention for questioning or summoning a law enforcement officer).[4] The last question is whether the detention was carried out in a reasonable manner and for a reasonable length of time. If the answer to any of the three questions is negative, then the privilege granted by statute is inapplicable and the actions of the shopkeeper are taken at his peril. If the shopkeeper is mistaken and the common law recapture privilege is therefore also inapplicable, the seizure is tortious.

**Reasonable Cause**

Under statutes permitting the detention of suspected shoplifters, "reasonable cause" generally has the same meaning as "probable cause." *See* Annot., 47 A.L.R. 3D 998, at 1005-1006 n.15 (1973). Our court of appeals has held that reasonable cause under this statute is the "reasonable cause standard of arrest." *Kon v. Skaggs Drug Centers, Inc.*, 115 Ariz. at 123, 563 P.2d at 922. We agree that for the purposes of this privilege, reasonable cause and probable cause seem equivalent.

Reasonable cause is not dependent on the guilt or innocence of the person, or whether the crime was actually committed. *Tota v. Alexander's*, 63 Misc. 2d 908, 314 N.Y.S.2d 93, 95 (1968). In

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[4] As indicated above, the Restatement rule allows for detention for "investigation of the facts," while the Arizona statute allows for detention "for questioning or summoning...." Of course, we adopt the statutory test.

*Tota*, the court stated that one may act on what proves to be an incorrect belief provided the facts show that the belief was reasonable. *Id*. As our court of appeals properly stated in *Kon*, the "reasonable cause" clause is inserted in the statute generally to cover those situations where no one actually sees the theft. 115 Ariz. at 123, 563 P.2d at 922.

Reasonable cause is generally held to be a question of law to be determined by the court. Annot. *supra* § 2(b). In *Kon*, the court of appeals held that the issue of reasonable cause to detain a shoplifter is a matter of law for the court to decide. 115 Ariz. at 123, 563 P.2d at 922. It would be more correct to say that reasonable cause is a question of law for the court where the facts or inferences from them are not in dispute. When there is a dispute, then the issue of reasonable cause becomes a mixed question of law and fact, and it is for the jury to determine the disputed facts, Annot. *supra* § 2(b); *see also Wisniski v. Ong*, 84 Ariz. 372, 329 P.2d 1097 (1958).

In the case at bench, the facts supporting reasonable cause are as follows: the clerk saw Gortarez with the item when he asked if he could pay for it at the front. The clerk followed the two young men through the store, and did not see them either deposit the item or pay for it as they left. Although the question of reasonable cause in the instant case may have been close[5] we defer to the trial court's better opportunity to see and judge the credibility of witnesses and uphold it on the specific finding that conflicting inferences could not be drawn from the facts and that reasonable cause existed as a matter of law.

**Purpose of the Detention**

The statute provides this privilege for the express and limited purpose of detention for investigation by questioning or summoning a law enforcement officer. A finding of detention for the proper purpose could not have been made as a matter of law on the state of the evidence before the trial judge, since there was no evidence of either questioning or summoning of officers. At best, this was a question for the jury, because although there was no questioning, it is possible that the intent of the employee was to question or call officers.

**Reasonableness of the Detention**

Assuming there was reasonable cause for the detention, and that the detention was for a proper purpose, the privilege still may not attach if the merchant does not detain in a reasonable manner and for a reasonable time. As with the question of reasonable cause, the issue of reasonableness of the detention is one for the court to decide as a matter of law where there is no conflict in the evidence as to the length of time or the circumstances under which the plaintiff was held. Where the facts are in dispute or where different inferences may be drawn from undisputed facts, it is for the jury, under proper instructions from the court, to determine the reasonableness of the detention. *J.S. Dillon & Sons Stores, Co. v. Carrington*, 169 Colo. 242, 455 P.2d 201, 205 (1969); *see also Delp v. Zapp's Drug and Variety Stores*, 238 Or. 538, 395 P.2d 137, 140 (1964).

Comment (h) to § 120A of the RESTATEMENT (SECOND) OF TORTS states that the use of force is never privileged unless the resistance of the suspected thief makes the use of such force necessary for the actor's self-defense.

> Reasonable force may be used to detain the person; but … the use of force intended or likely to cause serious bodily harm is never privileged for the sole purpose of detention to investigate, and it becomes privileged only where the resistance of the other makes it necessary for the actor to use such force in self-defense. In the ordinary case, the use of any force at all will not be privileged until the other has been requested to remain;

[5] The clerk testified that he was not able to observe the young men below their shoulders at least twice during the time he followed them. He was unable to see Gortarez deposit the vaporizer at the unattended checkout stand through which the two exited. Some courts have found that although the statutes creating the qualified shopkeeper's privilege do not create a specific duty to investigate, failure of store employees to investigate is relevant to the determination of whether there was reasonable cause to detain. *Weissman v. K-Mart Corporation*, 396 So. 2d 1164 (App. Fla. 1981); *see also J.S. Dillon & Sons Stores Co. v. Carrington*, 169 Colo. 242, 455 P.2d 201 (1969); *Lukas v. J.C. Penney Company*, 233 Or. 345, 378 P.2d 717 (1963). We agree that the nature and extent of investigation is part of the determination of reasonable cause. Actual verification by seeing the customer leave the store with merchandise without paying for it is not a necessary element to establish reasonable cause under this statutory privilege.

> and it is only where there is not time for such a request, or it would obviously be futile, that force is justified. *Id*.

The Arizona statute is essentially a codification of the common law shopkeeper's privilege. The limitations on the use of force are obviously wise. We hold that the principle quoted is applicable to our statutory requirement that the detention be carried out in a "reasonable manner."

Under the restrictions given above, there was a question whether the use of force in the search of Hernandez, and, more importantly, in the restraint of Gortarez, was reasonable. There was no request that the two young men remain. No inquiry was made with regard to whether Hernandez had the vaporizer. Gibson testified that Hernandez gave no indication of resistance and made no attempt to escape. The possible theft of a 59 cent item hardly warrants apprehension that the two were armed or dangerous. There was, arguably, time to make a request to remain before Gibson seized Hernandez and began searching him.[6] Also, there is no indication that such a request would obviously have been futile. The evidence adduced probably would have supported a finding that the manner of detention was unreasonable as a matter of law. At best, there was a question of fact; there was no support for the court's presumptive finding that as a matter of law the detention was performed reasonably.

The court directed a verdict for defendants on the false arrest and imprisonment counts. In so doing, it necessarily found as a matter of law that there was reasonable cause, and that the seizure and detention were undertaken for a proper purpose and in a reasonable manner. We hold that the court erred in its findings with respect to both the purpose and manner of detention. This requires reversal and retrial. At the new trial evidence on the three issues should be measured against the principles set forth in this opinion.

**Assault and Battery**

[6] Again, we note that only Hernandez was physically seized. However, a jury could find Gortarez, the passenger, was prevented from leaving both because the driver of the car was seized and because the store manager was at Gortarez's elbow and presumably would have restrained him if he had tried to leave. Defendants have not argued that the lack of direct physical force to Gortarez obviated a false arrest or false imprisonment claim.

At the close of the evidence, the trial court suggested that a motion by defendant Gibson to amend his answer to conform with the evidence presented at trial would be appropriate to include the affirmative defense of self-defense. Rule 15(b), ARIZ. R. CIV. P. The trial court granted that motion, and gave the jury an instruction on self-defense. Plaintiffs requested that the judge give a more complete instruction on self-defense to include a justification instruction on withdrawal. The instruction given at trial was:

> Defendant has offered evidence that he acted in self-defense. Self-defense requires you to find the defendant not liable if the following three conditions are met.
>
> (1) The defendant reasonably believed that he was in immediate physical danger; and
>
> (2) The defendant acted solely because of this belief; and
>
> (3) The defendant used no more force than appeared reasonably necessary under the circumstances.
>
> Self-defense justifies the use of force only while the apparent danger continues. The right to use force in self-defense ends when the apparent danger ends.
>
> Actual danger is not necessary to justify the use of force in self-defense. It is enough if the defendant reasonably believed he was in physical danger.

Plaintiffs assert that the trial court's refusal to instruct based on provisions of A.R.S. § 13-404 was error. That section provides that the threat of physical force against another is not justified:

> If the person provoked the other's use or attempted use of unlawful physical force, unless the person withdraws from the encounter or clearly communicates to the other his intent to do so reasonably believing he cannot safely withdraw from the encounter. § 13-404(B)(3).

Plaintiffs claim the evidence supported the request to instruct on the necessity for the aggressor to withdraw in order to justify the use of reasonable force in self-defense. The trial court's refusal of the modified instruction was based on the

view that the false imprisonment and false arrest claims basically were unfounded at the time Gortarez came around the front of the car. This is the point, the judge ruled, when the second count — assault and battery — began. Viewed in this light, Gibson could not have been the aggressor because, by directing a verdict on false arrest and false imprisonment, the judge had ruled as a matter of law that Gibson's actions against Hernandez were justified. Thus, Gortarez would have been the aggressor when he rounded the front of the car and pushed Gibson away from his cousin and the denial of plaintiff's requested instruction would have been warranted.

However, since we have held that the jury could find that Gibson's actions exceeded the privilege, the evidence would support a finding that Gibson was the aggressor, and Gortarez acted in response to that aggression.[7] Thus an instruction on the necessity of withdrawal based on A.R.S. § 13-404(B)(3) was warranted by the evidence, and appropriate to complete the self-defense instructions and enable the jury to decide whether, under the facts, Gibson properly acted in self-defense when he put Gortarez in a choke hold. The trial court erred in denying that instruction.

We therefore reverse and remand for new trial on all counts.

GORDON, V.C.J., and HAYS and CAMERON, JJ., concur.

HOLOHAN, Chief Justice, dissenting

If the case at issue had involved a claim by Albert Hernandez, the cousin of the plaintiff, much of what is written in the majority opinion would be acceptable. The vital factor is that Hernandez is not the plaintiff, but the majority opinion ignores this fact by setting forth legal principles which have no application to the facts as applied to the plaintiff Gortarez.

The law applicable to the issues of false arrest and false imprisonment is purely statutory. A.R.S. § 13-1805, the applicable statute, is broader in scope than the rule advanced by the RESTATEMENT, a fact which is acknowledged by the majority but relegated to a footnote. Page 813 footnote 4. The provisions of the statute material to this case and in effect at the time provided:

> C. A merchant, or his agent or employee, with reasonable cause, may detain on the premises in a reasonable manner and for a reasonable time any person suspected of shoplifting as defined in subsection A for questioning or summoning a law enforcement officer.
>
> D. Reasonable cause is a defense to a civil or criminal action against a peace officer, merchant or an agent or employee of such merchant for false arrest, false or unlawful imprisonment or wrongful detention.

Focusing on the action taken by the defendant security guard against the non plaintiff Hernandez, the majority holds that unreasonable force against Hernandez resulted in his false arrest and imprisonment, which in turn also resulted in the false arrest and imprisonment of the plaintiff. It is conceded by the majority that plaintiff Gortarez was initially not touched by the defendant's agent. Page 815 footnote 6. Apparently by some theory of transferred intent or otherwise any unreasonable restraint of the non plaintiff became unreasonable as to the plaintiff.

The agents of the defendant had reasonable cause to detain the plaintiff and his cousin, a position which the majority concedes. Since the defendant's agents had reasonable cause to detain the plaintiff, this must of necessity include the authority to keep him from leaving the parking lot; thus any action against the plaintiff's driver adds nothing to the issue of the right to detain the plaintiff. He was subject to detention irrespective of any action taken to detain or release his cousin.

The individual who had picked up the items thought to have been stolen was the plaintiff. Under A.R.S. § 13-1805(C) the defendant's employees were entitled to detain the plaintiff in a reasonable manner and for a reasonable time for questioning or summoning a law enforcement officer. There is absolutely no evidence in the record that any unreasonable action was directed against the plaintiff. He was not touched or restrained in any manner. This is borne out by the record which shows that no agent of the defendant

[7] *See* n.2, *ante*, at 811. If Gortarez was coming to his cousin's defense, he was entitled to use whatever force Hernandez was entitled to use. If Hernandez was being wrongfully arrested or imprisoned, he was entitled to use such force as was reasonable to resist Gibson's physical search.

company sought to stop the plaintiff from leaving the passenger's side of the automobile to approach and challenge the security guard who was searching his cousin. Any restraint of the plaintiff, actual or by implication, was accomplished in a reasonable manner.

The directed verdict on the claim for false arrest and false imprisonment should be affirmed.

The case which the majority presents on the assault and battery issue is of course different from that presented at trial. The defense of others was not the issue tried in the superior court, but it is the defense suggested in the majority opinion. Page 816 footnote 7. To avail himself of that privilege the plaintiff is required, among other things, to show that there was a necessity for the violent action to protect the third person. RESTATEMENT, SECOND, TORTS # 76 and comment d. I am not persuaded that the plaintiff demonstrated any necessity for his violent action particularly in light of the fact that his cousin did not ask for help or seem to need any assistance. In any event I believe any issue about the defense of others should not be considered as decided in this appeal. Since the matter was not developed in the superior court I believe that it should remain open for decision by the trier of fact in the retrial.

As the case was tried in the superior court and based on the issues presented to the Court of Appeals, I believe that the Court of Appeals was correct in affirming the judgment of the superior court. I dissent from the opinion of the court.

## MOORE v. PAY'N SAVE CORPORATION

20 Wash. App. 482, 581 P.2d 159 (1978)

DORE, Judge

Patricia Moore commenced this action against Pay'N Save Corporation and an unknown employee alleging false imprisonment. Whatcom Security Agency was later joined as a third party defendant by Pay'N Save. Moore appeals from the granting of summary judgment in favor of defendants.

### Issues

**ISSUE 1:** Are there material issues of fact as to whether Moore was falsely imprisoned?

**ISSUE 2:** Does the record indicate as a matter of law that the security guard had reasonable grounds under R.C.W. 4.24.220 to detain Moore for investigation or questioning?

### Decision

**ISSUE 1:**

Summary judgment should be granted only if, after considering all the pleadings, affidavits, depositions, and all reasonable inferences therefrom in favor of the nonmoving party, a trial court determines that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *LaPlante v. State*, 85 Wash. 2d 154, 531 P.2d 299 (1975); *Wilber Dev. Corp. v. Les Rowland Constr., Inc.*, 83 Wash. 2d 871, 523 P.2d 186 (1974); *Balise v. Underwood*, 62 Wash. 2d 195, 381 P.2d 966 (1963). Summary judgment should not be used as a means to "cut litigants off from their right to a trial...." *Bernal v. American Honda Motor Co.*, 87 Wash. 2d 406, 416, 553 P.2d 107 (1976). However, when a moving party demonstrates that there is no material issue of fact, the nonmoving party may not rest on the allegations in the pleadings but must set forth specific facts demonstrating that there is a material issue of fact. *LaPlante v. State*, *supra*; *Matthies v. Knodel*, 19 Wash. App. 1, 573 P.2d 1332 (1977).

The pleadings, affidavits, and the deposition of Patricia Moore establish that while in a Pay'N Save store in Bellingham, Washington, Moore took a can of hairspray to the checkout counter. She stood in line for several minutes, but later decided to leave. She put the hairspray on a counter inside the store and left the premises. In her deposition, she testified as to what transpired after she exited from the store:

> **Q**. Well now, after you stepped outside the store, then what happened?
>
> **A**. Well, then I walked around to get in the car.
>
> **Q**. And then what?
>
> **A**. And this girl came up and tapped me on the back.
>
> **Q**. Were you already in the car when she tapped you?
>
> **A**. No.
>
> **Q**. Were you just getting in?
>
> **A**. Just at the end of the car.
>
> **Q**. So then what did you do?

**A**. I turned around.

**Q**. What did she say or what did you say?

**A**. She had a wallet or a badge with a wallet in her hand.

**Q**. Yes.

**A**. And she asked me where the hairspray was.

**Q**. What did you say?

**A**. I said, "What hairspray?"

**Q**. Then the girl who accosted you accosted you how soon after you had put it down?

**A**. Oh, as soon as I walked out the door and walked out of the building and up to the car and I got around to the end of the car.

**Q**. How long did all this take?

**A**. I don't think any more than about five seconds, maybe.

**Q**. Now, what you are telling me is that you had already dismissed this incident involving the spray from your mind in five seconds?

**A**. Yes, because I wasn't thinking about that.

**Q**. Then what did you say?

**A**. And then she flipped my coat and she said, "The hairspray you took out of the store."

**Q**. Then what did you say?

**A**. I said, "I never took any hairspray out of the store."

**Q**. Then what after that?

**A**. Then she said, "Would you mind coming back in and showing me where you put the hairspray?"

**Q**. Do you say alright?

**A**. I said, "Yes, certainly."

I went back and showed her where I had put the hairspray down.

**Q**. Now, you said

**A**. By this time we had about a dozen people standing there on the street.

**Q**. You said you had left the hairspray in the store?

**A**. Yes.

**Q**. Then she said, "Would you mind coming back in to show me where you put it?"

**A**. Yes.

**Q**. Did you mind going back in?

**A**. No, I didn't mind.

**Q**. Did you show her where you had put it?

**A**. Yes.

**Q**. Was it still there?

**A**. Yes.

**Q**. Then what did she say or do?

**A**. Then she just walked away from me. This is what I didn't mind.

**Q**. Beg pardon?

**A**. Then she just walked away from me which that I didn't like. [*sic]* I don't mind going back and showing her where the hairspray was.

Moore contends that these facts demonstrate a material issue of fact as to whether she was falsely imprisoned. We agree.

In an action for false imprisonment, the plaintiff must prove that the liberty of his or her person was restrained. *See* W. PROSSER, LAW OF TORTS § 11 (4th ed. 1971).

> A person is restrained or imprisoned when he is deprived of either liberty of movement or freedom to remain in the place of his lawful choice; and such restraint or imprisonment may be accomplished by physical force alone, or by threat of force, or by conduct reasonably implying that force will be used. One acting under the apparent authority or color of authority as it is sometimes described or ostensibly having and claiming to have the authority and powers of a police officer, acts under promise of force in making an arrest and effecting an imprisonment.
>
> If the words and conduct are such as to induce a reasonable apprehension of force and the means of coercion are at hand, a person may be as effectually restrained and deprived of liberty as by prison bars. *Kilcup v. McManus*, 64 Wash. 2d 771, 777-78, 394 P.2d 375, 379 (1964).

If the undisputed facts indicate that the person voluntarily accompanied a policeman or detective back to the store, the person is not restrained or

imprisoned as a matter of law. *James v. MacDougall & Southwick Co.*, 134 Wash. 314, 235 P. 812 (1925). Likewise, the undisputed facts may indicate that the person was restrained by a threat of force, actual or implied. *Kilcup v. McManus*, *supra*. However, whether a person has a reasonable basis for believing he or she is restrained or imprisoned is generally a question of fact for the jury. *Harris v. Stanioch*, 150 Wash. 380, 273 P. 198 (1928). *See* 32 AM. JUR. 2D *False Imprisonment* § 10 (1967).

> It is essential ... that the restraint be against the plaintiff's will; and if he agrees of his own free choice to surrender his freedom of motion, as by remaining in a room or accompanying the defendant voluntarily, to clear himself of suspicion or to accommodate the desires of another, rather than yielding to the constraint of a threat, then there is no imprisonment. This gives rise, in borderline cases, to questions of fact, turning upon the details of the testimony, as to what was reasonably to be understood and implied from the defendant's conduct, tone of voice and the like, which seldom can be reflected accurately in an appellate record, and normally are for the jury. (Footnotes omitted). W. PROSSER, LAW OF TORTS § 11 (4th ed. 1971).

Here, the record indicates that after Moore left the store, she was approached by a security guard who identified herself by displaying a badge. The guard asked Moore where the hairspray was, and following Moore's response, "What hairspray?" the security guard flipped open Moore's coat and said, "The hairspray you took out of the store." From these facts, we cannot say that as a matter of law Moore's freedom was not restrained. The security officer was acting under apparent authority, *i.e.*, claiming to have the authority and power of a police officer. Although the security officer subsequently "requested" Moore to accompany her back into the store, the "request" was implicitly coercive. *Cf. State v. Buyers*, 88 Wash. 2d 1, 559 P.2d 1334 (1977). The question of whether Moore reasonably believed that her liberty was restrained was a question for the jury. Accordingly, the trial court erred in granting summary judgment on the ground that Moore was not imprisoned.

**ISSUE 2:**

The defendants contend that even if there is a material issue of fact as to whether Moore was imprisoned, the security officer, as a matter of law, had a privilege pursuant to R.C.W. 4.24.220 to detain Moore for purposes of investigation. We disagree. R.C.W. 4.24.220 provides:

> In any civil action brought by reason of any person having been detained on or in the immediate vicinity of the premises of a mercantile establishment for the purpose of investigation or questioning as to the ownership of any merchandise, it shall be a defense of such action that the person was detained in a reasonable manner and for not more than a reasonable time to permit such investigation or questioning by a peace officer or by the owner of the mercantile establishment, his authorized employee or agent, and that such peace officer, owner, employee or agent had reasonable grounds to believe that the person so detained was committing or attempting to commit larceny or shoplifting on such premises of such merchandise. As used in this section, "reasonable grounds" shall include, but not be limited to, knowledge that a person has concealed possession of unpurchased merchandise of a mercantile establishment, and a "reasonable time" shall mean the time necessary to permit the person detained to make a statement or to refuse to make a statement, and the time necessary to examine employees and records of the mercantile establishment relative to the ownership of the merchandise.

Under this statute, the security officer had a qualified privilege to detain Moore if the officer had "reasonable grounds" to believe that Moore was committing, or attempting to commit, larceny or shoplifting. The question of whether the security officer had reasonable grounds under this statute can be analogized to the question of probable cause. Generally, whether probable cause exists to justify an arrest or detention is a factual issue to be resolved by the jury. *Smith v. Drew*, 175 Wash.

11, 26 P.2d 1040 (1933); *Coles v. McNamara*, 131 Wash. 377, 230 P. 430 (1924). The record is devoid of any evidence, such as an affidavit of the security guard, which would enable the trial court to determine whether the security guard "had reasonable grounds to believe that [Moore] was committing or attempting to commit larceny or shoplifting." R.C.W. 4.24.220.

Consequently, the record does not support the defendants' contention that any detention was privileged under R.C.W. 4.24.220, *i.e.*, that as a matter of law, the security guard had reasonable grounds to believe that Moore was shoplifting. This issue must be resolved by testimony at trial. *See generally* Annot., 47 A.L.R. 3D 998 (1973).

Reversed.

FARRIS, C.J., and WILLIAMS, J., concur.

## Questions and Notes

1. In the 1970s there were many publicized cases dealing with "deprogramming" of members of "cults." Civil claims against the deprogrammers were often based on the tort of false imprisonment. The courts struggled with the clash between freedom of religion and false imprisonment on the one hand and charges of psychological imprisonment and mind control on the other. *See* Shapiro, *Of Robots, Persons, and the Protection of Religious Beliefs*, 56 S. CAL. L. REV. 1277 (1983), and Aronin, *Cults, Deprogramming, and Guardianship: A Model Legislative Proposal*, 17 COLUM. J. L. AND SOC. PROBS. 163 (1982).

# § C. Intentional Infliction of Emotional Distress (Outrage)

## CORRIGAL v. BALL AND DODD FUNERAL HOME, INC.

89 Wash. 2d 959, 577 P.2d 580 (1975)

STAFFORD, Associate Justice

Appellant Mary Jane Corrigal appeals the trial court's dismissal of her complaint for failure to state a claim upon which relief can be granted. We reverse and remand for trial.

Appellant's son, David Brannan, drowned in the Spokane River. Prior to recovery of his body, appellant contacted respondent Ball and Dodd Funeral Home concerning cremation of the body. Respondent informed appellant that a suitable container would be needed for interment of the remains after cremation and provided appellant with a catalog from which to select a burial urn. Appellant selected an urn and paid respondent for it and the cost of cremation.

David Brannan's body was subsequently recovered and sent to respondent for cremation. Later, when appellant claimed her son's remains, she was given a sealed cardboard box. Appellant took the box home where she opened it fully expecting to find the burial urn within which the ashes should have been placed. Upon opening the box appellant discovered a plastic sack. Believing the sack to contain packing material protecting the burial urn, appellant placed her hands into the material to locate the urn. When she found no urn, appellant suddenly realized that what she had mistakenly believed to be packing material was in fact the cremated bones and residue of her son's body.

Appellant filed this action against respondent alleging outrage, negligence and breach of contract. While denying most of appellant's allegations, respondent admitted agreeing to perform funeral services, including cremation of the body and delivery of the son's ashes to appellant. Respondent also admitted returning the decedent's ashes in a plastic bag encased within a sealed cardboard box. Thereafter, respondent moved for a "summary judgment" dismissing appellant's complaint. Although the motion was denominated "summary judgment", respondent's supporting memorandum makes it abundantly clear that respondent actually sought "to test the plaintiff's allegations within the meaning of CR 12(b)(6)."

During argument on the motion, respondent's counsel appears to have conceded his client's failure to provide the burial urn. Following argument, the trial court entered a written memorandum decision which granted respondent's motion to dismiss the complaint after treating it essentially as a CR 12(b)(6) motion on the pleadings. Later, the court entered judgment dismissing the complaint after noting respondent had tendered the $64.00 already paid by appellant for the missing urn. Appellant appealed the judgment to the Court of Appeals which certified the matter to this court.

Initially respondent moves to dismiss the appeal as untimely. Although appellant's notice of appeal was filed more than 30 days after entry of the memorandum decision, our rules require only that the notice be filed within 30 days of the entry of judgment. *See* RAP 2.1(a)(2); 5.2(a), (c); CR 58. Appellant's notice of appeal was filed within 14 days of the entry of judgment. Thus, the appeal is timely and respondent's motion is denied.

The only substantive issue before us is whether the trial court erred in dismissing the complaint for failure to state a claim under CR.[1] We have repeatedly said that a motion made pursuant to CR 12(b)(6) must be denied unless it appears beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief. *Halverson v. Dahl*, 89 Wash. 2d 673, 674, 574 P.2d 1190 (1978); *Berge v. Gorton*, 88 Wash. 2d 756, 759, 567 P.2d 187 (1977). Factual allegations of the complaint must be accepted as true for purposes of the CR 12(b)(6)

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[1] Although the relief sought was originally called a "summary judgment" (which would be under CR 56), the court properly treated the motion as one made pursuant to CR 12(b)(6). Although the judgment was erroneously denominated a "summary judgment", the memorandum decision makes it clear the dismissal was pursuant to CR 12(b)(6) insofar as genuine issues of material fact were present. Thus, we review the action as a judgment of dismissal under CR 12(b)(6). *See* 6 MOORE'S FEDERAL PRACTICE P 56.02(3) at 56-33 (2d ed. 1976).

motion. *Berge v. Gorton*, *supra* at 759, 567 P.2d 187; *Stanard v. Bolin*, 88 Wash. 2d 614, 615, 565 P.2d 94 (1977); *see also Contreras v. Crown Zellerbach Corp.*, 88 Wash. 2d 735, 742, 565 P.2d 1173 (1977).

Appellant has stated a cause of action for negligent infliction of mental distress under *Hunsley v. Giard*, 87 Wash. 2d 424, 553 P.2d 1096 (1976). In *Hunsley* we said that a plaintiff who undergoes mental suffering has a cause of action; that is, the defendant has a duty to avoid the negligent infliction of such distress. Physical impact or threat of an immediate invasion of the plaintiff's personal security is no longer required to be alleged or proven. *Hunsley v. Giard*, *supra* at 435, 553 P.2d 1096. Rather, the confines of a defendant's liability are now measured by the strictures imposed by negligence theory, *i.e.*, foreseeable risk, threatened danger, and unreasonable conduct measured in light of the danger. *Hunsley v. Giard*, *supra* at 435, 553 P.2d 1096. Mental suffering, to be compensable, however, must at least be manifested by objective symptoms. *Hunsley v. Giard*, *supra* at 436, 553 P.2d 1096.

Here appellant alleged respondent agreed to cremate the body of her son, place his remains in an urn, and deliver the urn to her. She also alleged respondent failed to provide the urn and failed to disclose the absence of the urn when appellant claimed her son's remains. These derelictions are alleged to have caused appellant to handsift through what appellant thought was "packing material", resulting in her mental suffering when she discovered that the material was in fact the cremated remains of her son. She also alleged the following objective physical manifestations which accompanied her mental suffering: loss of weight, loss of sleep, and general deterioration of her physical well being.

Based upon the foregoing, we cannot say beyond doubt appellant will be unable to prove any set of facts which would entitle her to relief for defendant's alleged negligent infliction of mental distress. Having concluded appellant's complaint states a cause of action for negligent infliction of mental distress, the trial court's judgment of dismissal under CR 12(b)(6) must be reversed and the action remanded for trial. It is so ordered.

WRIGHT, C.J., and ROSELLINI, HAMILTON, UTTER, BRACHTENBACH, HOROWITZ, DOLLIVER and HICKS, JJ., concur.