

IN THE SUPREME COURT OF FLORIDA

Case Number SC22-910

**GUARDIANSHIP OF JACQUELYN
ANNE FAIRCLOTH,**

Petitioner,

vs.

**MAIN STREET ENTERTAINMENT,
INC., d/b/a POTBELLYS,**

Respondent.

On Discretionary Review from the
First District Court of Appeal
Case Number 1D19-4058

PETITIONER'S APPENDIX

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TABLE OF CONTENTS

Decision of the District Court, dated February 9, 2022.....	PA.5
Order of the District Court Certifying a Question of Great Public Importance, dated June 22, 2022	PA.33
Black’s Law Dictionary (5th ed. 1979) (excerpts).....	PA.35
Prosser & Keeton on the Law of Torts (5th ed. 1984) (excerpts)	PA.42
Random House Dictionary of the English Language (2d unabridged ed. 1987) (excerpts).....	PA.53

CERTIFICATE OF SERVICE

I CERTIFY that a true copy of the foregoing has been sent by electronic mail to Clerk of Court and to all counsel on the attached list this 4th day of January, 2023.

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FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D19-4058

MAIN STREET ENTERTAINMENT,
INC., d/b/a Potbelly's,

Appellant,

v.

GUARDIANSHIP OF JACQUELYN
ANNE FAIRCLOTH,

Appellee.

On appeal from the Circuit Court for Leon County.
Kevin J. Carroll, Judge.

February 9, 2022

WINOKUR, J.

This case involves apportionment of liability following a tragic incident where a driver struck a pedestrian. The driver had been served alcohol at a bar, in spite of the fact that he was underage. The pedestrian had also been served alcohol at a different bar, in spite of the fact that she too was underage. The pedestrian sued both bars involved to recover her damages. Because one of the defendants in this suit should have been allowed to assert a comparative fault defense as well as the so-called “alcohol defense” to this suit, we reverse the judgment entered below.

A

The Guardianship of Jacquelyn Anne Faircloth (“Guardianship”) brought action against Main Street Entertainment, Inc., d/b/a Potbelly’s (“Potbelly’s”) and various entities that owned and operated Cantina 101, for each bar willfully and unlawfully serving alcohol to the two underage persons, causing intoxication, which resulted in injury. Evidence showed that Faircloth, an 18-year-old pedestrian, was catastrophically injured when a pickup truck driven by 20-year-old Devon Dwyer struck her at 55 miles per hour in a 30-mile-per-hour zone while she was crossing the street around 2:00 a.m. Both Faircloth and Dwyer were intoxicated; Faircloth had been drinking at Cantina 101, and Dwyer had been drinking at Potbelly’s, where he was an employee and received a 50-percent discount.

The trial court entered a default judgment against Cantina 101 for failing to respond, reserving the amount of damages for trial. After the jury found that Dwyer was intoxicated and his intoxication contributed to Faircloth’s injuries, the trial court entered a final judgment for approximately \$28.6 million jointly and severally against Potbelly’s and Cantina 101 for the injuries Faircloth sustained.

Potbelly’s appealed, arguing that it should have been allowed to assert a comparative fault defense under section 768.81, Florida Statutes, and an “alcohol defense” under section 768.36(2), Florida Statutes. We agree, and address each defense below.¹

¹ Potbelly’s raises two other issues, one regarding the causation question on the verdict form and one regarding an order denying a motion for directed verdict. Because we reverse the judgment, we do not consider these issues.

B

1. Comparative fault

The comparative fault statute provides that in a negligence action, contributory fault chargeable to the claimant diminishes proportionately the amount awarded as damages for an injury attributable to the claimant's contributory fault. § 768.81(2), Fla. Stat. The court must enter judgment against each party liable on the basis of such party's percentage of fault. § 768.81(3), Fla. Stat. A negligence action is broadly defined:

“Negligence action” means, without limitation, a civil action for damages based upon a theory of negligence, strict liability, products liability, professional malpractice whether couched in terms of contract or tort, or breach of warranty and like theories.

§ 768.81(1)(c), Fla. Stat. The statute specifically notes that “[t]he substance of an action, not conclusory terms used by a party, determines whether an action is a negligence action.” *Id.* However, the statute does not apply to “any action based upon an intentional tort.” § 768.81(4), Fla. Stat. The Guardianship moved for partial summary judgment, claiming that its complaint against Potbelly's alleged an intentional tort and as such, Potbelly's could not reduce its liability under the comparative fault statute. The trial court agreed, reasoning that an action based on a bar “willfully and unlawfully” selling alcohol to an underage patron is an intentional tort so that the jury could not apportion fault.

Section 768.125 is known as the dram shop statute and provides as follows:

A person who sells or furnishes alcoholic beverages to a person of lawful drinking age shall not thereby become liable for injury or damage caused by or resulting from the intoxication of such person, except that a person who willfully and unlawfully sells or furnishes alcoholic beverages to a person who is not of lawful drinking age or who knowingly serves a person habitually addicted to the use of any or all alcoholic beverages may become liable

for injury or damage caused by or resulting from the intoxication of such minor or person.

§ 768.125, Fla. Stat.

While the statute primarily excludes liability, it contains two exceptions, the first of which is relevant here. A history of the dram shop act is useful to explain why the “dram-shop exception” does not create an intentional tort. Prior to 1963, a seller of alcohol was generally not liable to one injured by reason of intoxication of the buyer. See *Davis v. Shiappacosse*, 145 So. 2d 758, 760 (Fla. 2d DCA 1962), *quashed*, 155 So. 2d 365 (Fla. 1963). But in 1963, the Florida Supreme Court modified the common law rule barring vendor liability and held that “violation of the statute prohibiting the sale of alcohol to minors (see section 562.11) could give rise to civil liability’ through a negligence per se theory.” *Luque v. Ale House Mgmt., Inc.*, 962 So. 2d 1062, 1064 (Fla. 5th DCA 2007) (citing *Shiappacosse*, 155 So. 2d at 365). “As a judicial trend developed extending liability towards vendors of alcoholic beverages, the Florida Legislature intervened in 1980 and enacted section 562.51, [which is] now codified as section 768.125, effectively reviving the original common law rule absolving vendors from liability for sales.” *Publix Supermarkets v. Austin*, 658 So. 2d 1064, 1066 (Fla. 5th DCA 1995). While section 768.125 revived the common-law dram-shop rule, it recognized the exception set forth in *Davis*, noting that one who sells alcohol to an underage person “may become liable” for damage caused by the intoxication of the underage person.

The question arose whether the dram-shop exception created a new cause of action, or simply acknowledged an existing one. In *Migliore v. Crown Liquors of Broward, Inc.*, 448 So. 2d 978, 979 (Fla. 1984), the supreme court acknowledged that violations of section 562.11, Florida Statutes—the statute criminalizing the sale of alcohol to minors—constitute negligence per se and gives rise to a cause of action in negligence. *Migliore* held that section 768.125, Florida Statutes, is a limitation on vendor liability and does not create a cause of action. *Id.* at 980. The Florida Supreme Court reaffirmed that section 768.125 does not create a cause of action and operates as “a limitation on the already existing liability of vendors of intoxicating beverages” in *Armstrong v.*

Munford, Inc., 451 So. 2d 480, 481 (Fla. 1984). Following the statute’s enactment, selling or furnishing alcohol to a minor must be done willfully for the vendor to be liable, but the vendor is liable in negligence, not an intentional tort. *Id*; see also *Ellis v. N.G.N. of Tampa, Inc.*, 586 So. 2d 1042, 1048 (Fla. 1991) (holding a “plaintiff must establish each of the elements of the criminal offense in section 562.11(1)(a) to prevail in a civil action” and that “[o]nce these elements have been proven, the plaintiff has established negligence per se”). In short, the Florida Supreme Court has clearly held that an action for liability on the ground that the defendant has sold alcoholic beverages to an underage person alleges negligence. Because the dram shop statute does not create a cause of action, it does not transform the existing action into an intentional tort. The fact that a seller of alcohol is not liable unless the seller “willfully and unlawfully” provides alcohol to an underage person does not alter this conclusion.

This conclusion is supported by the fact that liability under the dram-shop exception is derivative.² In this regard, we agree with the analysis of the Fourth District in determining that a dram-shop exception action is derivative:

Examining section 768.125, Florida Statutes, we see that the legislature explicitly intended to protect providers from liability except in cases where the provider serves an underage person or a known habitual alcoholic and “the intoxication of such . . . person” “cause[s] or result[s]” in “injury or damage.” § 768.125, Fla. Stat. The negligence of a provider results in liability only when there is a “subsequent wrongful act or omission” by the

² Derivative liability is distinguished from vicarious liability in that “[a] vicariously liable party has engaged in no wrongful conduct,” but derivative liability “involve[s] wrongful conduct both by the person who is derivatively liable and the actor whose wrongful conduct was the direct cause of injury to another.” *Grobman v. Posey*, 863 So. 2d 1230, 1235–1236 (Fla. 4th DCA 2003) (citations omitted); see also *Beck Auto Sales, Inc. v. Asbury Jax Ford, LLC*, 249 So. 3d 765, 769 (Fla. 1st DCA 2018).

person who is intoxicated. Liability in this case was therefore derivative.

Okeechobee Aerie 4137, Fraternal Ord. of Eagles, Inc. v. Wilde, 199 So. 3d 333, 341–42 (Fla. 4th DCA 2016). In cases of derivative liability “(1) there is no cause of action unless the directly liable tortfeasor commits a tort and (2) the derivatively liable party is liable for *all* of the harm that such a tortfeasor has caused.” *Grobman v. Posey*, 863 So. 2d 1230, 1236 (Fla. 4th DCA 2003). In short, the cause of action against Potbelly’s would not exist without Dwyer’s negligent conduct. While Potbelly’s may be liable for the harm to Faircloth caused by Dwyer, this harm was the result of Dwyer’s negligence.

We add that a derivatively liable party “is liable for *all* of the harm that [the directly liable actor] has caused.” *Beck Auto Sales*, 249 So. 3d at 769 (citing *Peltz v. Tr. Hosp. Int’l, LLC*, 242 So. 3d 518, 520 n.6 (Fla. 3d DCA 2018)). Thus, while the court erred in failing to permit Potbelly’s to reduce its liability by proving comparative fault, “section 768.81 does not require the apportionment of responsibility between a defendant whose liability is derivative and the directly liable negligent tortfeasor.” *Grobman*, 863 So. 2d at 1236. While Potbelly’s could reduce its liability due to the fault of other parties, it cannot require the apportionment of liability between itself and Dwyer. Under this record, Potbelly’s is liable for *all* of Dwyer’s fault.³

We reject the trial court’s reliance on *Wal-Mart Stores, Inc. v. McDonald*, 676 So. 2d 12 (Fla. 1st DCA 1996), *approved sub nom. Merrill Crossings Assocs. v. McDonald*, 705 So. 2d 560 (Fla. 1997) and *Austin*, 658 So. 2d at 1064, to reach an opposite conclusion. These cases stand for the proposition that comparative fault cannot be used to balance the wrongdoing of an intentional actor

³ In making this observation, we do not address the possibility that injury or damage from an underage person who had been furnished alcohol was caused by or resulted from something *other than* the underage person’s intoxication, for which the furnisher would *not* be liable under the dram-shop exception. Either way, the factfinder cannot apportion responsibility between the furnisher and the underage person.

and a negligent one in a dram-shop exception suit. But we agree that such balancing is not permitted. Again, because Potbelly's is derivatively liable for Dwyer's wrongdoing, the factfinder does not balance fault between a willful actor and a negligent one. Potbelly's was entitled to have the jury compare its fault (derived from Dwyer) to Cantina 101's (whose fault was derived from Faircloth), or if circumstances permitted, to Faircloth's itself.

The dissent's discussion of derivative liability misses the mark because it presumes that we are comparing the fault of Potbelly's to the fault of Dwyer or Faircloth, or both. This may explain why the dissent concludes that *Booth v. Abbey Road Beef & Booze, Inc.*, 532 So. 2d 1288 (Fla. 4th DCA 1988), supports the ruling below. In fact, it does not.

Booth involved only one bar—the bar that served alcohol to both the underage driver and the driver's underage passenger, who was impaired at the time of the crash and sued the bar following a crash. This is not, as the dissent contends, a “meaningless distinction.” Dissenting op. at 26. It involves the very question of whose fault is being compared, the crux of the issue here. The comparative negligence question here arises between the two derivatively liable bars that served the two different underage patrons, whereas in *Booth* the comparative negligence issue arose between the bar and one of its underage patrons—the passenger who was in the collision and suffered injuries.

The bar in *Booth* argued that it was not 100% liable for the passenger's injuries because she contributed to her own injuries by choosing to ride with the impaired underage driver. *Booth*, 531 So. 2d at 1290. The Fourth District disagreed and held that the dram-shop exception applies to and protects all underage patrons to whom the bar illegally served alcohol; thus, the bar was 100% liable for the impaired passenger's injuries as well.

Unlike *Booth*, in this case different bars each served alcohol to one of the underage patrons involved in this case. Neither Dwyer nor Faircloth are responsible for the “deleterious consequences” of underage drinking. Dissenting op. at 24. Instead, Potbelly's and Cantina 101 are responsible. We hold that Potbelly's may raise a comparative negligence defense between itself and, ultimately,

Cantina 101 as derivatively liable entities; not between Potbelly's and its underage patron; and not between Potbelly's and Cantina 101's underage patron.

Accordingly, for purposes of the application of the comparative fault statute, an action under the "dram-shop exception" is not an intentional tort. The trial court erred in finding otherwise, and in granting the Guardianship's motion to exclude the comparative negligence defense.

2. The "alcohol defense"

The so-called "alcohol defense," section 768.36(2), Florida Statutes, reads as follows:

In any civil action, a plaintiff may not recover any damages for loss or injury to his or her person or property if the trier of fact finds that, at the time the plaintiff was injured:

(a) The plaintiff was under the influence of any alcoholic beverage or drug to the extent that the plaintiff's normal faculties were impaired or the plaintiff had a blood or breath alcohol level of 0.08 percent or higher; and

(b) As a result of the influence of such alcoholic beverage or drug the plaintiff was more than 50 percent at fault for his or her own harm.

Potbelly's sought a jury instruction that would permit the jury to apply the alcohol defense in determining its liability to the Guardianship. At the charge conference, the Guardianship argued that the alcohol defense only applies where fault is apportioned under comparative fault principles. Because the trial court had previously ruled that comparative fault did not apply to Potbelly's liability, the Guardianship argued that the alcohol defense likewise could not apply. Potbelly's disagreed, noting that the statute disallows recovery "in any civil action" if the plaintiff's intoxication was more than 50 percent at fault for the harm, and did not exclude torts for which comparative fault did not apply (that is, intentional torts). The trial court agreed with the

Guardianship, ruling that the “context” of the statute “deals with percentages of fault.” Because this implicates comparative fault, the court ruled that Potbelly’s was not entitled to assert the alcohol defense either.

It does not appear obvious that the alcohol defense necessarily relies on the comparative fault statute. The Guardianship fails to explain why a jury could not determine that a plaintiff’s intoxication was more than 50 percent at fault for the harm, even if it was not required to apportion fault under the comparative fault statute. Nonetheless, the Guardianship’s point is that the alcohol defense cannot logically apply to an intentional tort, which is explicitly excluded from application of comparative fault and by implication, is excluded from application of the alcohol defense.

Potbelly’s response is simple. The comparative fault statute predated the alcohol-defense statute.⁴ The Legislature was aware of the comparative fault statute and its express inapplicability to intentional torts, and yet chose not to limit the alcohol defense to “negligence actions,” as comparative fault is. Instead, the statute states that it applies to “any civil action.”

We need not address whether the alcohol defense applies to intentional torts, because we have ruled that a “dram-shop exception” action is a negligence action for purposes of the comparative fault statute. Because the identification of the cause of action as an intentional tort was the basis for the refusal to permit the alcohol defense, we reverse this ruling as well.

Nonetheless, it is unclear to us that Potbelly’s would have actually benefitted from the alcohol defense, regardless of the trial court’s incorrect reason for denying it. The statute disallows liability if the plaintiff, due to intoxication, was “more than 50 percent *at fault* for his or her own harm.” To the extent that the harm to Faircloth was the result of her own intoxication caused by Cantina 101 serving her alcohol, she was not “at fault” for such

⁴ The comparative fault statute was enacted in 1986; the alcohol-defense statute was enacted in 1999. Ch. 86-160, § 60, Ch. 99-225, § 20, Laws of Fla.

harm. Cantina 101 was. Again, in this situation her fault would be attributed to Cantina 101 because they are derivatively liable for it. Under this scenario, the alcohol defense would not disallow recovery even if Faircloth's intoxication was more than 50 percent the reason for her harm.

We do not suggest that Potbelly's was necessarily not entitled to an instruction on the alcohol defense. If fault attributable to Faircloth was caused by anything other than intoxication resulting from being furnished alcohol by Cantina 101, the alcohol defense could possibly limit Potbelly's liability. Whether such a possibility could entitle Potbelly's to such an instruction depends on what the evidence shows.

C

By willfully and unlawfully serving underage patrons, both Potbelly's and Cantina 101 subjected themselves to derivative liability for the percentage of harm caused by those patrons, to the extent that harm was caused by their intoxication. Where a vendor is found liable under the dram-shop exception, it is liable for all of the harm attributed to the intoxication of the underage consumer. *Austin*, 658 So. 2d at 1066. Because the substance of this claim is negligence, Potbelly's should have been allowed to present a comparative fault defense. Potbelly's should have been allowed to assert an alcohol defense, but only if Faircloth's intoxication was caused by something other than being served alcohol at Cantina 101. Neither defense would reduce or bar the Guardianship's recovery where Cantina 101 is found liable for Faircloth's contribution, but it may reduce Potbelly's. On remand the jury should consider whether and by what percentage Faircloth's negligence contributed to the accident, whether such negligence was the result of intoxication, and whether such fault is chargeable to Cantina 101 because of its willful and unlawful conduct.

REVERSED and REMANDED.

OSTERHAUS, J., concurs; MAKAR, J., dissents with opinion.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

MAKAR, J., dissenting.

Dreadful things can happen when bars intentionally serve excessive alcohol to underaged patrons and employees, which is why Florida has long-standing criminal laws against doing so, dating back to the dismantling of Prohibition. *Migliore v. Crown Liquors of Broward, Inc.*, 448 So. 2d 978, 979 (Fla. 1984) (noting that the “Florida Legislature, within two years after the twenty-first amendment repealing prohibition was ratified, enacted [what is] now section 562.11, making it a crime to sell intoxicants to minors[]”); § 562.11(1)(a) & (b), Fla. Stat. (prohibiting sale or service of alcoholic beverages to persons under twenty-one years of age for consumption on licensed premises; prohibiting same as to underaged employees of licensees).

As a bookend to criminal penalties, Florida law also specifically allows civil tort actions against vendors who “willfully and unlawfully” serve alcoholic beverages to minors under a so-called Dram Shop Act.¹ § 768.125, Fla. Stat. (adopted in 1980 and unchanged since). The issue in this tort case is whether a vendor who willfully and unlawfully serves alcohol to a minor—who becomes intoxicated and injures another intoxicated minor—is entitled to rely upon a comparative negligence or intoxication

¹ “Dram shop” is an archaic phrase from the eighteenth century used to describe a “place where alcoholic beverages are sold; a bar or saloon.” *Dram Shop*, *Black’s Law Dictionary* (11th ed. 2019). A dram is an “apothecary measurement of fluid equal to an eighth of an ounce.” *Dram*, *id.*

defense to reduce its liability. This question is purely a legal one, but the facts provide context for what's at stake.²

I.

The Friday night before the FSU-UF football game in November 2014, two Tallahassee bars—Potbelly's and Cantina 101—willfully and unlawfully served alcohol to Devon Dwyer (age 20) and Jacquelyn Anne Faircloth (age 18), respectively. Both became intoxicated and left the respective bars near 2am, Dwyer driving his pickup truck home from his job at Potbelly's and Faircloth walking to the dorm where she was visiting friends. Faircloth didn't make it. Driving fifty-five miles-per-hour in a thirty miles-per-hour zone, an inebriated Dwyer struck Faircloth as she attempted to cross West Pensacola Street, a main thoroughfare that bisects the FSU campus, resulting in catastrophic injuries to her. Dwyer—who had bought eighteen Bud Lights and six bourbons that evening with his fifty percent Potbelly's employee discount—fled the scene because he wanted to get away and hide his truck.³

Faircloth's guardianship sued both bars on her behalf, alleging that each bar had "willfully and unlawfully" served alcohol to a minor resulting in each minor's intoxication and the calamitous crash. Potbelly's stipulated that it "knew that Devon

² FSU's amicus brief explains the university's efforts to address underage drinking, which is an obvious problem that leads to great harm to and criminal conduct against students and campus visitors. *See, e.g., Schluck v. State*, 1D19-3724, 2021 WL 5103745, at *1 (Fla. 1st DCA Nov. 3, 2021) (drunk underage student was served alcohol at local bar and subsequently targeted for sexual assault); *Thomas v. State*, 127 So. 3d 658, 659 (Fla. 1st DCA 2013) (same).

³ FSU's amicus brief also notes that "each of the students who witnessed or experienced the subject events and testified at trial were underage patrons of Potbelly's or Cantina 101," as well as a passenger in Dwyer's car, who was a nineteen-year-old Potbelly's bartender partially compensated with a reduced bar tab.

Dwyer was a minor and not of legal drinking age” yet it nonetheless “willfully and unlawfully furnished alcoholic beverages to him” at its bar where Dwyer “consumed alcoholic beverages” during the evening hours of Friday, November 28th, through “the morning” of Saturday, November 29th, leaving the bar just a few minutes before the crash. The parties agreed that Faircloth was intoxicated and not in a crosswalk at the time of the crash, though the guardianship objected to the former as legally irrelevant. Potbelly’s denied that Dwyer was intoxicated, but a jury held otherwise and awarded \$28.7 million against Potbelly’s and Cantina 101 (who had earlier defaulted in the proceedings), jointly and severally, which means that both are legally responsible for paying all the damages arising from their willful and unlawful conduct in serving and intoxicating minors.

II.

On appeal, Potbelly’s claims the trial court erred in disallowing its use of (a) a statutory comparative fault defense, section 768.81(4), Florida Statutes, and (b) a statutory alcohol defense, section 768.36(2), Florida Statutes. The gist of Potbelly’s argument is that the guardianship’s tort claim on Faircloth’s behalf—one grounded in the “*willful and unlawful*” serving of alcohol to and intoxicating a minor—is a claim of *negligence* and not an *intentional tort*. Adjudging this legal dispute requires reading each of the relevant statutes together, rather than in isolation. In doing so, the most reasonable interpretation is that a claim of “willful and unlawful conduct” is an “action based on an intentional tort” that cannot be subject to comparative fault under either section 768.81(4) or 768.36(2), Florida Statutes.

A.

In 1973, Florida adopted the doctrine of comparative negligence in a landmark decision, *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973). This concept required juries to apportion fault on a percentage basis thereby allowing for meaningful comparison of analogous types of negligent conduct. The legislature has since refined the contours of the doctrine including the limits of the types of claims to which it applies.

In doing so, the legislature has made it abundantly clear that the use of comparative fault applies *only* to negligence-type claims, excluding all others. The comparative fault statute specifically limits itself to only a “negligence action,” which it defines as “a civil action for damages based upon a theory of negligence, strict liability, products liability, professional malpractice whether couched in terms of contract or tort, or breach of warranty *and like theories.*” § 768.81(1)(c), Fla. Stat. (2021) (emphasis added). By limiting itself to negligence and like theories, the statute thereby excludes extreme forms of negligence, such as “gross negligence” or “willful negligence,” as well as intentional torts. Indeed, the statute specifically says that the concept of comparative negligence “*does not apply to . . . any action based on an intentional tort[.]*” *Id.* § 768.81(4) (emphasis added). This statutory line is necessary to allow a meaningful side-by-side comparison of *negligent-like* acts alone; acts that are unlike negligence are excluded. To safeguard comparison of negligence-like claims, the legislature said that the “substance of an action, not conclusory terms used by a party, determines whether an action is a negligence action.” *Id.* § 768.81(1)(c). This rule of interpretation is important because it prevents intentional tortfeasors from trying to characterize their misconduct as a form of negligence to shift responsibility to others and thereby reduce their liability.

With these statutory guidelines in mind, it is obvious that the guardianship’s complaint against Potbelly’s does not assert a “negligence action” within the meaning of the comparative fault statute. Instead, the claim asserted is that “Potbelly’s *willfully and unlawfully* furnished alcoholic beverages to Devon Dwyer, knowing him to be a minor, resulting in his intoxication” and causing the crash and injuries to Faircloth. Succinctly put, the claim is *not* that Potbelly’s *negligently* furnished alcoholic beverages, but that it did so “*willfully and unlawfully.*” The complaint was thereby grounded in specific language most closely understood to be intentionally tortious misconduct rather than a species of negligence as defined in the plain language of the comparative negligence statute. In short, the “substance” of the claim is intentional misconduct and not mere negligence. *Id.*

This conclusion is bolstered by precedent and lexicographical guideposts. As to the latter, although dictionaries are merely “word

museums” to be used judiciously, *Country Mut. Ins. Co. v. Am. Farm Bureau Fed’n*, 876 F.2d 599, 600 (7th Cir. 1989), essentially every dictionary establishes that an action that is willful or willfully done is an intentional action and not the product of some form of negligence. The profession’s leading legal dictionary defines willful as “[v]oluntary and intentional, but not necessarily malicious.” *Willful*, *Black’s Law Dictionary* (8th ed. 2004). In addition, the term willful, when used to describe an action, means “done on purpose; deliberate; intentional.” *Willful*, *The New Shorter Oxford English Dictionary* (1999); *see also Willfully*, *id.* (“On purpose, intentionally; deliberately[.]”). Likewise, synonyms for willful and willfully include intentional and intentionally. *Willful*, *Legal Thesaurus* (1st ed. 1980); *Willful*, Merriam-Webster, <https://www.merriam-webster.com/thesaurus/-willful> (last visited Dec. 8, 2021). The lists go on and on.

Lexicographically, willful conduct is synonymous with intentional conduct; and conduct that is both willful and unlawful is not only intentional, but criminal in nature. *See Unlawful*, *id.* As the guardianship points out, the legislature uses the phrase “willfully and unlawfully” only in statutory contexts involving serious, intentional criminal misconduct. Due to this uniformity of lexicographical meaning, it is unsurprising that the definition of negligence *excludes* willful conduct. *See Negligence*, *Black’s Law Dictionary* (“The failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation; any conduct that falls below the legal standard established to protect others against unreasonable risk of harm, *except for conduct that is intentionally, wantonly, or willfully* disregarding of others’ rights.” (Emphases added)).

As to precedent, our supreme court has consistently maintained a clear statutory line drawn between negligence and intentional conduct, disallowing attempts to reduce the culpability of defendants who engaged in an intentional tort. *See, e.g., Stellas v. Alamo Rent-A-Car, Inc.*, 702 So. 2d 232, 234 (Fla. 1997) (holding that the comparative fault statute does not allow a jury to apportion fault between a defendant, Alamo, and a nonparty intentional tortfeasor, who attacked plaintiff in a rental car). Similarly, the court has disallowed attempts by defendants to characterize their conduct as negligence when it results in an

intentional tort. *Merrill Crossings Assocs. v. McDonald*, 705 So. 2d 560, 563 (Fla. 1997) (holding that the comparative negligence statute does not apply to actions “founded or constructed on an intentional tort[]”). Courts addressing whether comparative negligence can be used to reduce fault for intentional torts agree. See, e.g., *Schoeff v. R.J. Reynolds Tobacco Co.*, 232 So. 3d 294, 305 (Fla. 2017) (A jury finding in favor of a plaintiff on an intentional tort claim requires that the “plaintiff’s award may not be reduced by comparative fault.”); *Publix Supermarkets, Inc. v. Austin*, 658 So. 2d 1064, 1068 (Fla. 5th DCA 1995) (“There is no logical way for a jury to balance the wrongdoing of the willful vendor and the intoxicated tortfeasor.”).

B.

Despite the statute’s language and caselaw saying otherwise, Potbelly’s wants to reduce or eliminate its liability for its intentional tortious misconduct by allowing the jury to take account of Dwyer’s and Faircloth’s inebriation and their missteps by (somehow) comparing their degree of fault with Potbelly’s willful and unlawful misconduct. Both this Court and the Florida Supreme Court, however, have consistently held that the comparative negligence statute does not allow such comparisons because “negligent acts are fundamentally different from intentional acts.” *Merrill Crossings Assocs.*, 705 So. 2d at 562 (quoting *Wal-Mart Stores, Inc. v. McDonald*, 676 So. 2d 12, 20 (Fla. 1st DCA 1996, *approved sub nom*, *Merrill Crossings Assocs.*, 705 So. 2d at 563)).

Such side-by-side comparisons aren’t permitted because of the inherently dissimilar and incomparable species of conduct. A man who negligently trips over a dog can’t be compared to a man who willfully kicks the dog; even the dog knows the difference! Oliver Wendell Holmes, *The Common Law* 3 (1881) (“[E]ven a dog distinguishes between being stumbled over and being kicked.”); W. Prosser & P. Keeton, *Prosser and Keeton on the Law of Torts* § 65, at 462 (5th ed. 1984) (discussing difference between negligence and intent). Plus, no guidelines exist for such an inapt comparison. What percentage of fault is a jury to place on a willful/intentional act? If a pedestrian is simultaneously hit by two cars, one driven intentionally into him and the other negligently, how is fault to be

compared? Answer: the Florida Legislature flatly disallows such comparisons, allowing only negligent acts to be compared with other negligent acts.

The guardianship convincingly argues that because the substance of the harm to Faircloth arose from the willful and unlawful conduct of Potbelly's, the ensuing litigation involves an "action based on an intentional tort" under the statutory framework. *Wal-Mart Stores, Inc.*, 676 So. 2d at 17 ("McDonald argues convincingly that because 'the substance of the action' arose from his being intentionally shot, the ensuing litigation constituted an 'action based on an intentional tort' for statutory purposes."); *see also id.* at 25 (Webster, J., concurring in result) ("I agree that the statute should be read as intended to limit apportionment of damages to those individuals or entities found to have been negligent—those whose conduct was more than negligent were not intended to figure into the equation."); *Hetherly v. Sawgrass Tavern Inc.*, 975 So. 2d 1266, 1267 (Fla. 4th DCA 2008) ("[The Dram Shop Act] alters the common law rule favoring taverns but only for *willfully* serving the minor. . . . The statute sounds more like an intentional tort."). This would be a different case if Dwyer and Faircloth had both acted negligently due solely to their own misjudgments, and not due to a vendor's willful and unlawful misconduct in serving each of them alcohol. Their claims against each other would be decided on the basis of comparative negligence (including the so-called alcohol defense discussed below). No intentional tort would be in play, making section 768.81(4) inapplicable; their respective negligence could be compared, apples to apples. But the guardianship's case, which involves intentional tortious misconduct by Potbelly's, is fundamentally different and thereby excluded from the comparative negligence statute, disallowing apples to oranges comparisons.

Exclusion of intentional torts from the comparative negligence statute was intended to prevent intentional wrongdoers from shifting or reducing their liability to others who may have contributed to the harm.⁴ *Merrill Crossings Associates*, 705 So. 2d

⁴ FSU's amicus brief expresses this point succinctly: "Allowing Potbelly's and Cantina 101 to willfully and unlawfully serve

at 562. Here, it is Potbelly's initial willful and unlawful conduct in serving and intoxicating minors that caused harm that controls the question of liability under the statutory framework given the type of claim alleged. *Austin*, 658 So. 2d at 1068 (the "culpable vendor [Publix] becomes vicariously liable for the damages caused by the intoxicated tortfeasor" who was a minor to whom Publix sold alcohol resulting in the minor's negligent driving). It doesn't matter that Dwyer and Faircloth—having become inebriated due to Potbelly's and Cantina 101's willful and unlawful misconduct—subsequently acted negligently by driving drunk and walking outside a crosswalk, respectively. Beyond the plain meaning of the comparative negligence statute, social opprobrium attaches to intentional and willful misconduct, which is why courts and leading tort gurus note that "intentional wrongdoing differs from simple negligence 'not merely in degree but in the kind of fault . . . and in the social condemnation attached to it.'" *Wal-Mart Stores, Inc.*, 676 So. 2d at 21 (quoting Prosser & Keeton, *supra*, at 462).

Potbelly's misses the mark by claiming that Florida's Dram Shop Act only permits negligence-based claims. The Act precludes tort liability against vendors of alcohol who sell to persons of lawful age; but it expressly permits claims against a vendor who "*willfully and unlawfully* sells or furnishes alcoholic beverages to a person who is not of lawful drinking age[.]" such that the vendor "may become liable for injury or damage caused by or resulting from the intoxication of such minor[.]" § 768.125, Fla. Stat. (emphasis added).⁵ Despite the highlighted language, Potbelly's claims that

alcohol to minors, and then reduce the scope of their liability based on the alleged negligence of the intoxicated minors, would reward them for their willful and unlawful conduct."

⁵ The placement of the Dram Shop Act in Chapter 768, entitled "Negligence," was contrary to legislative intent. The "legislature clearly intended this act to be included within chapter 562, Beverage Law: Enforcement. *Without any legislative direction*, [chapter] 80–37[, Laws of Florida,] was subsequently codified by the Joint Legislative Management Committee as section 768.125 in the chapter dealing with Negligence." *Bankston v. Brennan*, 507 So. 2d 1385, 1386 (Fla. 1987) (emphasis added). The supreme court

the Act “*permits* a negligence claim against an alcohol vendor that willfully and unlawfully serves a minor, but it does not transform that negligence into an intentional act.” In other words, Potbelly’s position is that a vendor who “willfully and unlawfully” provides alcohol to minors is merely engaged in negligence.

Potbelly’s argument derives from language in a smattering of easily distinguishable cases that imply or state in dicta that claims under section 768.125 relate to “negligence” actions. Notably, none of these cases directly address the specific type of claim of willful *and* unlawful misconduct alleged and proven in this case.

One case is *Ellis v. N.G.N. of Tampa, Inc.*, 586 So. 2d 1042, 1048 (Fla. 1991), which involved application of the *habitual drunkard* exception in section 768.125. To provide context, the court in *Ellis* surveyed the “legal history” of the duty placed on vendors of alcoholic beverages. Its detailed historical discussion concluded that “*although limited by the provisions of section 768.125*, there is a cause of action against a vendor for the *negligent* sale of alcoholic beverages to a minor that results in the injury to or death of the minor or a third party.” *Id.* at 1047 (emphases added). Stated differently, a negligence-based claim historically existed, but such a claim is now *limited* by the language of section 768.125, which sets a higher standard by requiring *willful and unlawful misconduct* for claims based on the underage exception.

justifiably rejected as vacuous the argument that the placement of section 768.125 had any legal meaning, saying:

. . . to attach legal significance to the placement of 80–37 in the Negligence chapter, instead of its placement in the chapter on Beverage Law Enforcement as directed by the legislature which enacted 80–37, would in effect allow the Joint Legislative Management Committee, authorized by section 11.242(5)(e) to transfer acts, to alter the substance of a statute. This we refuse to do.

Id. at 1387. For like reasons, the administrative placement of the Dram Shop Act in Chapter 768 in no way alters the substance and interpretation of the language of section 768.125 in this case.

Emphasizing this point, the Fifth District in *Austin* has characterized this use of the word “negligence” in *Ellis* as dicta, stating that:

The above statement is dictum because *Ellis* did not concern the sale of alcohol to a minor. In the context of the entire opinion, and in light of the express provisions of the applicable statute, it is quite clear that the adjective “negligent” was inadvertently used in the quoted sentence. *Its presence there, of course, renders the sentence nonsensical since the statutory limitation referred to earlier in the sentence expressly limits a vendor’s liability, in regard to sale to a minor, to a “willful and unlawful” sale and not merely a negligent one.*

Austin, 658 So. 2d at 1066 (emphasis added). The highlighted language punctuates that “negligence” is not an element of the minor exception; that would be “nonsensical” because section 768.125 requires “a ‘willful and unlawful’ sale and not merely a negligent one.” *Id.* For this reason, the Fifth District held it was a “misreading of *Ellis*” for legal counsel to have “seized on the erroneous *Ellis* dictum as a basis to claim that a negligence cause of action still exists in Florida under section 768.125.” *Id.*

Dicta aside, the central point in *Ellis* is that the two statutory exceptions use *very different* language: the minor/underage exception requires a vendor to “willfully and unlawfully” sell or furnish alcohol, but the habitual drunkard exception only requires a vendor to “knowingly” do so. Because the legislature “did not repeat the phrase *willfully and unlawfully* used in the [minor] exception,” the supreme court said a plaintiff in a habitual drunkard case “need show only that the vendor *knowingly* sold alcoholic beverages to a person who is a habitual drunkard.” *Ellis*, 586 So. 2d at 1048. Stated differently, a plaintiff in a habitual drunkard action bears a *lesser* burden; he need only prove knowledge but not willfulness or unlawfulness, the latter applying only under the minor exception.

In this regard, the supreme court in passing discussed the use of the word “unlawfully” in the minor exception, explaining that it

means that a plaintiff in a civil case “must establish each of the elements of the criminal offense in section 562.11(1)(a) to prevail in a civil action.” *Id.* It characterized the breach of the criminal statute as establishing “negligence per se.” *Id.* (“Once these elements have been proven, the plaintiff has established negligence per se.”); see *Negligence per se*, *Black’s Legal Dictionary* (“Negligence established as a matter of law, so that breach of duty is not a jury question[.]”).

Proving a violation of the criminal statute, and thereby establishing unlawfulness and negligence per se, is just the first step in the minor exception; the exception also requires proof of *willfully* selling or furnishing alcohol. The minor exception requires that plaintiffs prove unlawfulness (i.e., negligence per se) *plus* willfulness, thereby differentiating it from a purely negligence-based claim such as that under the habitual drunkard exception. Notably, the supreme court characterized that exception as “*ordinary negligence*,” which sharply contrasts with the minor exception, which requires proof of both an unlawful violation of a criminal statute *and* willful misconduct. *Ellis*, 586 So. 2d at 1049 (emphasis added); see also *Okeechobee Aerie 4137, Fraternal Order of Eagles, Inc. v. Wilde*, 199 So. 3d 333, 337 (Fla. 4th DCA 2016) (stating that the “cause of action, when the habitual-alcoholic exception to the statute applies, ‘is ordinary negligence[]’” (quoting *Ellis*, 586 So. 2d at 1049)).

C.

Potbelly’s—in a single paragraph of its initial brief—attempts to characterize its liability as merely “derivative,” meaning its liability is derived solely from Dwyer’s misconduct and thereby limited to only Dwyer’s negligence. It cites to just one case, the Fourth District’s decision in *Fraternal Order of Eagles*, as support for its view, which is mistaken for a number of reasons.

First of all, *Fraternal Order of Eagles* involved the habitual drunkard exception, whose statutory language—as discussed previously—is markedly different from the minor exception, which requires a showing of willful/unlawful misconduct by a vendor. In, *Fraternal Order of Eagles*, the fraternal organization, which served a habitual drunkard named Leroy Felt, was liable for

negligently doing so and held responsible for Felt's subsequent motorcycle accident that injured the plaintiffs. The cause of action at issue in *Fraternal Order of Eagles* was "negligence" because no showing of intentional misconduct was statutorily required as is the case here.

More important, though, is the discussion of principles of derivative liability in *Fraternal Order of Eagles* and its precursor, *Grobman v. Posey*, 863 So. 2d 1230, 1236 (Fla. 4th DCA 2003), which cut deeply into Potbelly's argument. The Fourth District in *Fraternal Order of Eagles* concluded that because the fraternal organization had "derivative" liability for Felt's accident, it was legally proper to *exclude* Felt from the verdict form. 199 So. 3d at 341–42. In other words, the jury was *not* allowed to apportion fault between Felt and the fraternal organization that negligently served him alcohol. That's because it would make no sense to put Felt on the verdict form because the "'risk of [Felt's] tortious . . . conduct is the very risk that made the [fraternal organization's] conduct negligent in the first place,' and his foreseeable conduct therefore cannot be used to reduce the [fraternal organization's] responsibility." *Id.* at 342 (quoting *Grobman*, 863 So. 2d at 1236).

Put differently, the fraternal organization could not dodge liability by enabling the jury to apportion fault to the habitual drunkard when the fraternal organization itself had created the risk that the habitual drunk might foreseeably injure others while driving his motorcycle. A law review article, cited in *Grobman*, makes this point:

If a person whose conduct creates a foreseeable risk of misconduct by another (*in other words, a person whose liability is derivative*) can largely escape responsibility simply because the very event which made his own conduct wrongful in the first place actually occurs, then the incentive to take precautions against the risk is substantially reduced.

William D. Underwood & Michael D. Morrison, *Apportioning Responsibility in Cases Involving Claims of Vicarious, Derivative, or Statutory Liability for Harm Directly Caused by the Conduct of Another*, 55 Baylor L. Rev. 617, 624 (2003) (emphasis added).

Grobman—upon which *Fraternal Order of Eagles* relied—made crystal clear that neither vicarious nor derivative liability support the apportionment of damages under Florida law. The court explained that vicarious liability is imputed to a *faultless* party (such as an employer) based on the imputed wrongful conduct of its subordinate (such as an employee). *Grobman*, 863 So. 2d at 1235. The apportionment of fault makes no sense in this context:

Vicarious liability does not mesh with the concept of liability that can be apportioned among joint tortfeasors. The vicariously liable party is responsible to the plaintiff to the same extent as the primary actor; both are jointly liable for *all* of the harm that the primary actor has caused. In such a situation, fault cannot be divided into the percentages contemplated by section 768.81.

Id. Plus, because a “vicariously liable party has engaged in no wrongful conduct” it has no fault that can be apportioned; the basis for imposing vicarious liability is solely the “party’s relationship with the negligent tortfeasor.” *Id.*

Derivative liability is similar to vicarious liability except that a derivatively liable party also engages in wrongful conduct, which is the situation here: Potbelly’s committed an intentional tort that caused the intoxication and wrongful conduct of Dwyer. The court in *Grobman* explained that although derivative liability “is not vicarious (because the derivatively liable person has engaged in tortious conduct), the liability is derivative because it depends upon a subsequent wrongful act or omission by another.” *Id.* at 1236 (quoting *Underwood & Morrison, supra*, at 642). Thus, derivative liability “is similar to vicarious liability in that (1) there is no cause of action unless the directly liable tortfeasor [Dwyer] commits a tort and (2) the derivatively liable party [Potbelly’s] is liable for *all* of the harm that such a tortfeasor has caused.” *Grobman*, 863 So. 2d at 1236.

Given the closeness of the two legal concepts, the court in *Grobman* concluded that no reason existed to allow apportionment of fault where derivative liability was at issue. It specifically held

that “[g]iven the similarity between derivative and vicarious liability, we hold that section 768.81 does not require the apportionment of responsibility between a defendant whose liability is derivative and the directly liable negligent tortfeasor.” *Id.* Thus, no arguable basis exists for allowing a derivatively liable defendant such as Potbelly’s off the hook for its own misconduct by allowing apportionment of the fault of the person for whom the derivatively liable defendant is legally responsible.⁶

D.

As a final coffin nail in Potbelly’s arguments, it bears noting that the Dram Shop Act is not intended in any way to reduce the liability of a vendor who willfully and unlawfully serves alcohol to underage patrons (or negligently serve alcohol to habitual drunkards). It “is meant to protect a class of persons, primarily juveniles who would buy alcoholic drinks” from the deleterious consequences of unscrupulous vendors intentionally and unlawfully allowing underage drinking. *See, e.g., Booth v. Abbey Rd. Beef & Booze, Inc.*, 532 So. 2d 1288, 1290 (Fla. 4th DCA 1988);⁷

⁶ The majority says the discussion in this section “misses the mark” but fails to explain why other than to say that this section presumes “that [the majority is] comparing the fault of Potbelly’s to the fault of Dwyer or Faircloth, or both.” But that is precisely what the majority orders on remand by requiring that “the jury should consider whether and by what percentage Faircloth’s negligence contributed to the accident” due to her intoxication by Cantina 101. Plus, a remand for the jury to assess “whether such fault is chargeable to Cantina 101” is unnecessary because Cantina 101’s fault was pre-determined below (and not contested on appeal) via a specific jury instruction stating that: Cantina 101 “willfully and unlawfully sold or furnished alcoholic beverages” to Faircloth; “causation is not in dispute”; and “the only issue for you to determine regarding Cantina is the amount of damages suffered by” Faircloth.”

⁷ *Booth* also addressed a seatbelt defense issue that was disapproved in *Bulldog Leasing Co., Inc. v. Curtis*, 630 So. 2d 1060 (Fla. 1994), but *Booth*’s holding as to the disallowance of a

see also Hetherly, 975 So. 2d at 1267 (“But we find nothing about the Dram Shop Act protecting minors who, fortified by drink, break and enter to beat someone with a beer bottle. At common law serving alcohol was not the cause of injury, only its consumption. The purpose of the Dram Shop Act was thus not to create liability so much as to abolish the common law rule that had favored taverns serving alcohol to minors.” (internal citation omitted)).

In *Booth*, a bar illegally sold alcohol to a minor resulting in the minor’s impairment while driving his car and causing an accident with another alcohol-impaired driver. A passenger in the minor’s car—who was underage and had consumed alcohol, too—was injured and sued the bar. The bar convinced the trial judge to allow a comparative negligence jury instruction, which enabled the bar to reduce its fault to 43% and shift the remainder to the injured minors despite having acted willfully and unlawfully. The Fourth District reversed, concluding that the act was intended to protect the “minor passenger of the alcohol-impaired minor” who “is a member of the class to be protected by the statute.” *Booth*, 532 So. 2d at 1290 (citing *Chausse v. Southland Corp.*, 400 So. 2d 1199, 1203 (La. App. 1st Cir. 1981). For this reason, the passenger—a minor who had consumed alcohol—could not “be deemed guilty of comparative negligence” and the *entire verdict* was required to be entered against the bar “without reduction for comparative negligence.” *Id.* (emphasis added).

Here, as in *Booth* and the precedent previously discussed, nothing in Florida law or the Dram Shop Act allows a comparative negligence defense in this case; instead, a vendor who willfully and unlawfully serves alcohol to minors must bear the liability itself without deflecting fault to those persons the act was designed to protect, whether it be a minor-passenger—or as here, a minor-pedestrian—who consumed alcohol. That this case involves *two bars*—rather than one as in *Booth*—is a meaningless distinction; both bars engaged in willful and unlawful conduct by serving and intoxicating minors resulting in enormous harm for which they are liable. No “two bars acted badly” exception exists under Florida

comparative negligence defense under the Dram Shop Act remains valid.

law that alters the conclusion that apportionment of fault is impermissible where both bars acted willfully/unlawfully.

In summary, unequivocal language of Florida’s comparative negligence statute applies only to “negligence actions” and not to intentional torts such as a vendor “willfully and unlawfully” giving alcohol to a minor. The legislature intended that only “negligence actions” be used as comparators for determining fault due to the impossibility of comparing negligent acts with intentional ones. Because the substance of the claim against Potbelly’s is based on intentional tortious misconduct, the trial court correctly ruled that Florida’s comparative negligence statute—by its own terms—is inapplicable. It would be a “perverse and irreconcilable anomaly” to allow the willful and unlawful misconduct of a vendor of alcohol to a minor to “diminish or defeat” its responsibility by comparing and thereby apportioning its fault contrary to the legislature’s will. *Slawson v. Fast Food Enters.*, 671 So. 2d 255, 258 (Fla. 4th DCA 1996).

III.

For like reasons, the so-called statutory alcohol defense—which requires use of comparative negligence—is inapplicable in this case. Section 768.36, Florida Statutes, entitled “Alcohol or drug defense,” states in relevant part:

(2) *In any civil action*, a plaintiff may not recover any damages for loss or injury to his or her person or property if the trier of fact finds that, at the time the plaintiff was injured:

(a) The plaintiff was under the influence of any alcoholic beverage or drug to the extent that the plaintiff’s normal faculties were impaired or the plaintiff had a blood or breath alcohol level of 0.08 percent or higher; and

(b) As a result of the influence of such alcoholic beverage or drug the plaintiff was more than 50 percent at fault for his or her own harm.

§ 768.36(2), Fla. Stat. (2021) (emphases added). Potbelly’s reads the two highlighted portions to require that the jury should have been instructed to apportion fault between itself and Faircloth if subsection (a) and (b) are met; the former requires a showing of impairment due to alcohol and the latter requires use of comparative negligence to assess fault.

This reading is faulty because it would nullify the long-standing and clearly expressed statutory prohibition in section 768.81(4)—just discussed—that unequivocally disallows comparative fault where an action is based on or involves intentional misconduct. Statutes are to be construed *in pari materia*, meaning they should be interpreted to work together in harmony rather than be at war with one another. *Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So. 2d 452, 455 (Fla. 1992) (“Where possible, courts must give full effect to *all* statutory provisions and construe related statutory provisions in harmony with one another.”).

A fair and congruent reading of the two tort statutes is that (a) comparative fault doesn’t apply to intentional misconduct; and (b) the alcohol defense applies only to civil negligence actions involving comparative negligence. Though section 768.36(2) says it applies to “any civil action” it also makes clear in subsection (2)(b) that comparative negligence is necessarily required because the trier of fact must determine whether a plaintiff “was more than 50 percent at fault for his or her own harm.” Subsection (2)(b)’s inquiry is quintessentially a comparative negligence analysis, which the comparative negligence statute prohibits as to intentional torts. If section 768.36(2) was intended to be an exception to the universal prohibition on the use of comparative negligence in cases involving intentional torts, the legislature could have made that clear and said so, but it did not. The most reasonable interpretation is that legislature did not intend that the alcohol defense transform all intentional torts into negligence claims by forcing the use of comparative fault.

IV.

The trial judge acted properly in denying Potbelly's attempts to lessen its fault, and thereby liability, for its willful and unlawful provision of alcohol to its underage employee who became drunk and caused catastrophic harm. The legislature did not intend its comparative negligence statutes to treat negligent actions and intentional, criminal acts—such as Potbelly's—in the same way; instead, it made clear that comparative negligence has no role when intentional conduct is alleged and proven. Willfully serving alcohol to minors is intentional misconduct that deservedly precludes culpable vendors, like Potbelly's, from shirking their legal responsibility for the life-altering consequences of their intentional misjudgments. The verdict in favor of the guardianship of Jacquelyn Anne Faircloth should stand.

Raoul G. Cantero and David P. Draigh of White & Case LLP, Miami; Angela C. Flowers of Kubicki Draper P.A., Ocala, for Appellant.

Donald Hinkle of Hinkle & Foran, Tallahassee; Mark Avera of Avera & Smith, LLP, Gainesville; David J. Sales and Daniel R. Hoffman of David J. Sales, P.A., Sarasota, for Appellee.

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FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D19-4058

MAIN STREET ENTERTAINMENT,
INC., d/b/a Potbelly's,

Appellant,

v.

GUARDIANSHIP OF JACQUELYN
ANNE FAIRCLOTH,

Appellee.

On appeal from the Circuit Court for Leon County.
Kevin J. Carroll, Judge.

June 22, 2022

ON MOTIONS FOR REHEARING EN BANC,
REHEARING, AND CERTIFICATION

PER CURIAM.

We deny Appellee's motion for rehearing en banc, rehearing, and certification of conflict. We grant Appellee's motion for certification of a question of great public importance. We rephrase the question proposed by Appellee and certify the following question:

WHETHER THE COMPARATIVE FAULT STATUTE, SECTION 768.81, FLORIDA STATUTES, APPLIES TO TORT ACTIONS INVOLVING THE DRAM-SHOP EXCEPTION CONTAINED IN SECTION 768.125, FLORIDA STATUTES, AGAINST A VENDOR WHO WILLFULLY AND UNLAWFULLY SOLD ALCOHOL TO AN UNDERAGE PATRON, RESULTING IN THE PATRON'S INTOXICATION AND RELATED INJURY?

MAKAR, OSTERHAUS, and WINOKUR, JJ., concur.

Raoul G. Cantero and David P. Draigh of White & Case LLP, Miami; Angela C. Flowers of Kubicki Draper P.A., Ocala, for Appellant.

Donald Hinkle of Hinkle.Law, Tallahassee; Mark Avera of Avera & Smith, LLP, Gainesville; David J. Sales and Daniel R. Hoffman of David J. Sales, P.A., Sarasota, for Appellee.

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Bankruptcy, Mortgages, Constitutional Law, Interpretation
of Laws, Rescission and Cancellation of Contracts, Etc.

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Subscribing witness. He who witnesses or attests the signature of a party to an instrument, and in testimony thereof subscribes his own name to the document. One who sees a writing executed, or hears it acknowledged, and at the request of the party thereupon signs his name as a witness. See *Attestation*.

Subscriptio /səbskrɪpʃ(i)əw/. Lat. In the civil law, a writing under, or under-writing; a writing of the name under or at the bottom of an instrument by way of attestation or ratification; subscription.

Subscription. The act of writing one's name under a written instrument; the affixing one's signature to any document, whether for the purpose of authenticating or attesting it, of adopting its terms as one's own expressions, or of binding one's self by an engagement which it contains.

A written contract by which one engages to take and pay for capital stock of a corporation, or to contribute a sum of money for a designated purpose, either gratuitously, as in the case of subscribing to a charity, or in consideration of an equivalent to be rendered, as a subscription to a periodical, a forthcoming book, a series of entertainments, or the like. See also *Subscribed stock*; *Subscriber*, and compound terms below.

Subscription contract. In general, any contract by which one becomes bound to buy. In particular, a contract for the purchase of securities. See *Subscription*.

Subscription list. A list of subscribers to some agreement with each other or a third person. A list of subscribers to a periodical or series of publications or to some type of service.

Subscription rights. Rights of existing stockholders to purchase additional stock, generally at a price under market and in an amount proportionate to their existing holdings. Also, the certificates evidencing such rights. See also *Stock (rights)*.

Subsellia /səbsɛl(i)ə/. Lat. In Roman law, lower seats or benches, occupied by the *judices* and by inferior magistrates when they sat in judgment, as distinguished from the *tribunal* of the *prætor*.

Subsequens matrimonium tollit peccatum præcedens /səbsɪkwən(d)z mətrəmówn(i)yəm tólat pəkéydəm priysɪdən(d)z/. A subsequent marriage [of the parties] removes a previous fault, i.e., previous illicit intercourse, and legitimates the offspring. A rule of Roman law.

Subsequent. Following in time; coming or being later than something else; succeeding.

Subsequent condition. See *Condition*.

Subsequent creditor. One who becomes a creditor after a transfer sought to be impeached as fraudulent is made. *Edwards v. Monning*, 63 Ohio App. 449, 27 N.E.2d 156, 158, 17 O.O. 174.

Subservant. In law of agency, the servant or agent of another servant or agent. Generally, such agent or servant is principal as to the subservant. See also *Subagent*.

Subsidiary. Under another's control. Term is often short for "subsidiary corporation"; i.e. one that is run and owned by another company which is called the "parent." See *Subsidiary corporation*.

Of secondary importance.

Subsidiary corporation. One in which another corporation (i.e. parent) owns at least a majority of the shares, and thus has control. Said of a company more than 50 percent of whose voting stock is owned by another.

Subsidy. A grant of money made by government in aid of the promoters of any enterprise, work, or improvement in which the government desires to participate, or which is considered a proper subject for government aid, because such purpose is likely to be of benefit to the public.

Sub silentio /səb səlénsh(i)əw/. Under silence; without any notice being taken. Passing a thing *sub silentio* may be evidence of consent.

Subsistence. Support. Means of support, provisions, or that which procures provisions or livelihood. See *Necessaries*; *Support*.

Sub spe reconciliationis /səb spɪy rekən(t)sɪliyə-shiyównəs/. Under the hope of reconciliation.

Substance. Essence; the material or essential part of a thing, as distinguished from "form." That which is essential.

Substantial. Of real worth and importance; of considerable value; valuable. Belonging to substance; actually existing; real; not seeming or imaginary; not illusive; solid; true; veritable. *Seglem v. Skelly Oil Co.*, 145 Kan. 216, 65 P.2d 553, 554. Something worthwhile as distinguished from something without value or merely nominal. In *re Krause's Estate*, 173 Wash. 1, 21 P.2d 268. Synonymous with material. *Lewandoski v. Finkel*, 129 Conn. 526, 29 A.2d 762, 764.

Substantial capacity. Term used in the definition of legal insanity proposed by the Model Penal Code (§ 4.01) to the effect that a person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirements of law. See also *Insanity*.

Substantial compliance rule. Compliance with the essential requirements, whether of a contract or of a statute. *Wentworth v. Medellin*, Tex.Civ.App., 529 S.W.2d 125, 128. In life insurance law is that where insured has done substantially all he is required to do under policy to effect change in beneficiary and mere ministerial acts of insurer's officers and agents only remain to be done, change will take effect. *Inter-Southern Life Ins. Co. v. Cochran*, 259 Ky. 677, 83 S.W.2d 11, 14.

Substantial damages. See *Damages*.

Substantial equivalent of patented device. Same as thing itself, so that if two devices do same work in substantially same way, and accomplish substantially same results, they are equivalent, even though differ-

In French law, a species of association or partnership formed among persons who are in receipt of perpetual or life annuities, with the agreement that the shares or annuities of those who die shall accrue to the survivors. This plan is said to be thus named from Tonti, an Italian, who invented it in the seventeenth century. The principle is used in some forms of life insurance.

Took and carried away. In criminal pleading, technical words necessary in an indictment for simple larceny.

Top lease. A subsequent oil and gas lease which covers one or more mineral interests that are subject to a valid, subsisting prior lease.

Torpedo doctrine. Attractive nuisance doctrine. *Schock v. Ringling Bros. and Barnum & Bailey Combined Shows*, 5 Wash.2d 599, 105 P.2d 838, 843. See **Attractive nuisance doctrine**.

Torrens title system /tórhrn(d)z táyda sistəm/. A system for registration of land under which, upon the landowner's application, the court may, after appropriate proceedings, direct the issuance of a certificate of title. With exceptions, this certificate is conclusive as to applicant's estate in land. System of registration of land title as distinguished from registration or recording of evidence of such title. The originator of the system was Sir Richard Torrens, 1814-1884, reformer of Australian Land Laws.

Tort (from Lat. torquere, to twist, tortus, twisted, wrested aside). A private or civil wrong or injury, other than breach of contract, for which the court will provide a remedy in the form of an action for damages. A violation of a duty imposed by general law or otherwise upon all persons occupying the relation to each other which is involved in a given transaction. *Coleman v. California Yearly Meeting of Friends Church*, 27 Cal.App.2d 579, 81 P.2d 469, 470. There must always be a violation of some duty owing to plaintiff, and generally such duty must arise by operation of law and not by mere agreement of the parties.

Three elements of every tort action are: Existence of legal duty from defendant to plaintiff, breach of duty, and damage as proximate result. *Joseph v. Hustad Corp.*, 454 P.2d 916, 918.

A legal wrong committed upon the person or property independent of contract. It may be either (1) a direct invasion of some legal right of the individual; (2) the infraction of some public duty by which special damage accrues to the individual; (3) the violation of some private obligation by which like damage accrues to the individual.

See also Government tort; Husband-wife tort actions; Joint tort-feasors; Liability; Negligence; Palsgraph doctrine; Parental liability; Privilege; Privity; Privity of contract; Product liability; Strict liability; Warranty.

Children. See **Parental liability**.

Constitutional tort. Every person who under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities

secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. 42 U.S.C.A. § 1983. See also **Color of law**.

Intentional tort. Tort or wrong perpetrated by one who intends to do that which the law has declared wrong as contrasted with negligence in which the tortfeasor fails to exercise that degree of care in doing what is otherwise permissible. See also **Willful tort**.

Maritime tort. See **Jone's Act**; **Longshoremen's and Harbor Workers' Compensation Act**; **Maritime**.

Personal tort. One involving or consisting in an injury to the person or to the reputation or feelings, as distinguished from an injury or damage to real or personal property, called a "property tort." *Gray v. Blight*, C.C.A.Colo., 112 F.2d 696, 699.

Prenatal injuries. See **Child**.

Quasi tort. Though not a recognized term of English law, may be conveniently used in those cases where a man who has not committed a tort is liable as if he had. Thus a master is liable for wrongful acts done by his servant in the course of his employment.

Strict tort liability. See **Strict liability**.

Willful tort. See **Intentional tort**, *supra*.

Tort claims acts. See **Federal Tort Claims Act**; **Governmental immunity**.

Tort-feasor. A wrong-doer; one who commits or is guilty of a tort. See also **Joint tort-feasors**.

Tortious /tórshəs/. Wrongful; of the nature of a tort. The word "tortious" is used throughout the Restatement, Second, Torts, to denote the fact that conduct whether of act or omission is of such a character as to subject the actor to liability, under the principles of the law of torts. (§ 6). To establish "tortious act" plaintiff must prove not only existence of actionable wrong, but also that damages resulted therefrom. *James v. Public Finance Corp.*, 47 C.A.3d 995, 121 Cal.Rptr. 670, 675.

Formerly certain modes of conveyance (e.g., feoffments, fines, etc.) had the effect of passing not merely the estate of the person making the conveyance, but the whole fee-simple, to the injury of the person really entitled to the fee; and they were hence called "tortious conveyances."

Tortura legum pessima /tort(y)úra líygəm pésəma/. The torture or wresting of laws is the worst [kind of torture].

Torture. To inflict intense pain to body or mind for purposes of punishment, or to extract a confession or information, or for sadistic pleasure. In old criminal law, the infliction of violent bodily pain upon a person, by means of the rack, wheel, or other engine, under judicial sanction and superintendence, in connection with the interrogation or examination of the person, as a means of extorting a confession of guilt, or of compelling him to disclose his accomplices.

Tory. Originally a nickname for the Irish in Ulster. Afterwards given to, and adopted by, one of the two great parliamentary parties which alternately governed Great Britain after the Revolution in 1688.

faciat /yùwnavársætæs vèl kòrpəréysh(ly)ow nòn dísədər əlakwíd fəsəriy náysay id sít kəlyjijéylədər dalbərəýdam, əshiyəmsay méýjar párz id féysh(ly)ət/. A university or corporation is not said to do anything unless it be deliberated upon as a body, although the majority should do it.

University. An institution of higher learning, consisting of an assemblage of colleges united under one corporate organization and government, affording instruction in the arts and sciences and the learned professions, and conferring degrees.

Uníversus /yùwnavársəs/. Lat. The whole; all together.

Unjust. Contrary to right and justice, or to the enjoyment of his rights by another, or to the standards of conduct furnished by the laws.

Unjust enrichment, doctrine of. General principle that one person should not be permitted unjustly to enrich himself at expense of another, but should be required to make restitution of or for property or benefits received, retained or appropriated, where it is just and equitable that such restitution be made, and where such action involves no violation or frustration of law or opposition to public policy, either directly or indirectly. *Tulalip Shores, Inc. v. Mortland*, 9 Wash. App. 271, 511 P.2d 1402, 1404. Unjust enrichment of a person occurs when he has and retains money or benefits which in justice and equity belong to another. *Hummel v. Hummel*, 133 Ohio St. 520, 14 N.E.2d 923, 927. Thus one who has conferred a benefit upon another solely because of a basic mistake of fact induced by a nondisclosure is entitled to restitution on above doctrine. *Conkling's Estate v. Champlin*, 193 Okl. 79, 141 P.2d 569, 570. See also *Quantum meruit*.

Unknown persons. Persons whose identities cannot be ascertained.

Unkouth /ənkúwə/. Unknown. The law French form of the Saxon "uncouth."

Unlage. Sax. An unjust law.

Unlawful. That which is contrary to, prohibited, or unauthorized by law. That which is not lawful. The acting contrary to, or in defiance of the law; disobeying or disregarding the law. While necessarily not implying the element of criminality, it is broad enough to include it.

Unlawful act. Act contrary to law, and presupposes that there must be an existing law. A violation of some prohibitory law and includes all willful, actionable violations of civil rights, and is not confined to criminal acts. *State v. Halley*, 350 Mo. 300, 165 S.W.2d 422, 427. The "unlawful acts" within manslaughter statutes consist of reckless conduct or conduct evincing marked disregard for safety of others. *State v. Newton*, 105 Utah 561, 144 P.2d 290, 293; *State v. Thatcher*, 108 Utah 63, 157 P.2d 258, 261.

Unlawful assembly. At common law, the meeting together of three or more persons, to the disturbance of the public peace, and with the intention of co-operat-

ing in the forcible and violent execution of some unlawful private enterprise. If they take steps towards the performance of their purpose, it becomes a *riot*; and, if they put their design into actual execution, it is a *riot*. 4 Bl.Comm. 146. An unlawful assembly is a meeting of three or more persons with a common plan in mind which, if carried out, will result in a riot. In other words, it is such a meeting with intent to (a) commit a crime by open force, or (b) execute a common design lawful or unlawful, in an unauthorized manner likely to cause courageous persons to apprehend a breach of the peace.

Unlawful assembly is the meeting or coming together of not less than five (5) persons for the purpose of engaging in conduct constituting either disorderly conduct, or a riot, or when in a lawful assembly of not less than five (5) persons, agreeing to engage in such conduct. Kansas Criminal Code.

See also *Riot*.

Unlawful belligerents. Enemies passing the boundaries of the United States for purpose of destroying war industries and supplies without a uniform or other emblem signifying their belligerent status or discarding that means of identification after entry. *Ex parte Quirin*, App.D.C., 317 U.S. 1, 63 S.Ct. 2, 15, 87 L.Ed. 3.

Unlawful detainer. The unjustifiable retention of the possession of lands by one whose original entry was lawful and of right, but whose right to the possession has terminated and who refuses to quit, as in the case of a tenant holding over after the termination of the lease and in spite of a demand for possession by the landlord. *Brandley v. Lewis*, 97 Utah 217, 92 P.2d 338, 339. Actions of "unlawful detainer" concern only right of possession of realty, and differ from ejectment in that no ultimate question of title or estate can be determined. *McCracken v. Wright*, 159 Kan. 615, 157 P.2d 814, 817. See also *Detainer*; *Forcible detainer*.

Unlawful entry. An entry upon lands effected peaceably and without force, but which is without color of title and is accomplished by means of fraud or some other willful wrong.

Unlawfully. Illegally; wrongfully. See *Unlawful*; *Unlawful act*.

This word is frequently used in indictments in the description of the offence; it was formerly necessary when the crime did not exist at common law, and when a statute, in describing an offence which it created, used the word; but was unnecessary whenever the crime existed at common law and was manifestly illegal.

Unlawful picketing. Picketing which is not honest or truthful. *Park & Tilford Import Corporation v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, Local No. 848, A. F. of L., Cal.App., 139 P.2d 963, 971; *Magill Bros. v. Building Service Employees' International Union*, 20 Cal.2d 506, 127 P.2d 542, 543. Picketing which involves false statements or misrepresentations of facts. *Wiest v. Dirks*, 215 Ind. 568, 20 N.E.2d 969, 971. Picketing when it ceases to serve the purpose it seeks to accomplish. *E.M. Loew's Enterprises v. International Alliance of Theatrical Stage Em-*

intention, for the purpose of disposing of their several interests in property owned by them in common, or of their separate property treated as a common fund, to a third person or persons.

Living will. A living will is a short document that basically states: "If the situation should arise in which there is not reasonable expectation of my recovery from physical or mental disability, I request that I be allowed to die and not be kept alive by artificial means or heroic measures." A living will is not considered a legal document in the majority of states.

Mutual and reciprocal will. See *Joint and mutual will, supra*; also *Mutual will, infra*.

Mutual will. One in which two or more persons make mutual or reciprocal provisions in favor of each other. "Mutual wills" are the separate wills of two persons which are reciprocal in their provisions, and such a will may be both joint and mutual. Sometimes called a "reciprocal," "double," or "counter" will. See also *Joint and mutual will, above*.

Mystic will. See *Testament*.

Non-intervention will. In some jurisdictions, one authorizing the executor to act without bond and to manage, control, and settle the estate without the intervention of any court whatsoever.

Nuncupative will. See that title.

Reciprocal will. One in which two or more persons make mutual or reciprocal provisions in favor of each other. Also known as a "mutual," "double," or "counter" will. See *Joint and mutual will; Mutual will, supra*.

Renunciation of will. See *Renunciation*.

Self-proved wills. A will which eliminates some of the formalities of proof by execution in compliance with statute. It is made self-proved by affidavit of attesting witnesses in the form prescribed by statute. Most statutes provide that, unless contested, such a will may be admitted to probate without testimony of subscribing witnesses. See e.g. Uniform Probate Code, § 2-504.

Statute of will. See *Wills Act, infra*.

Unofficial will. In the civil law, *testamentum inofficium*. One made in disregard of natural obligations as to inheritance. 2 Bl.Comm. 502. It has no place in the common law.

Criminal Law

The power of the mind which directs the action of a man. See *Intent; Motive; Willful and wanton act*.

Willa /wila/. In Hindu law, the relation between a master or patron and his freedman, and the relation between two persons who had made a reciprocal testamentary contract.

Will contest. A proceeding sui generis, a suit in rem, having for its purpose determination of questions of construction of will or whether there is or is not a will. *McCrary v. Michael*, 233 Mo.App. 797, 109 S.W.2d 50, 51. Any kind of litigated controversy concerning the eligibility of an instrument to probate as distinguished from validity of the contents of the

will. In *re Hesse's Estate*, 62 Ariz. 273, 157 P.2d 347, 349. Will contests are commonly governed by state statutes; e.g. Uniform Probate Code § 3-407, burden of proof.

Willful. Proceeding from a conscious motion of the will; voluntary. Intending the result which actually comes to pass; designed; intentional; not accidental or involuntary.

An act or omission is "willfully" done, if done voluntarily and intentionally and with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or to disregard the law.

Willful is a word of many meanings, its construction often influenced by its context. *Screws v. United States*, 325 U.S. 91, 101, 65 S.Ct. 1031, 1035, 89 L.Ed. 1495.

The word [willfully] often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental. But when used in a criminal context it generally means an act done with a bad purpose; without justifiable excuse; stubbornly, obstinately, perversely. The word is also employed to characterize a thing done without ground for believing it is lawful or conduct marked by a careless disregard whether or not one has the right so to act. *United States v. Murdock*, 290 U.S. 389, 394, 395, 54 S.Ct. 223, 225, 78 L.Ed. 381.

Whatever the grade of the offense the presence of the word "willful" in the definition will carry with it the implication that for guilt the act must have been done willingly rather than under compulsion and, if something is required to be done by statute, the implication that a punishable omission must be by one having the ability and means to perform. In *re Trombley*, 31 Cal.2d 801, 807, 193 P.2d 734, 739.

A willful act may be described as one done intentionally, knowingly, and purposely, without justifiable excuse, as distinguished from an act done carelessly, thoughtlessly, heedlessly, or inadvertently. A willful act differs essentially from a negligent act. The one is positive and the other negative.

Premeditated; malicious; done with evil intent, or with a bad motive or purpose, or with indifference to the natural consequences; unlawful; without legal justification.

Willful and malicious injury. For such to exist there must be an intent to commit a wrong either through actual malice or from which malice will be implied. Such an injury does not necessarily involve hatred or ill will, as a state of mind, but arises from intentional wrong committed without just cause or excuse. In *re Wernecke*, D.C.N.Y., 1 F.Supp. 127, 168. It may involve merely a willful disregard of what one knows to be his duty, an act which is against good morals and wrongful in and of itself, and which necessarily causes injury and is done intentionally.

Willful and wanton act. In order to constitute "willful and wanton" misconduct, act or omission must be not only negligent, but exhibit conscious disregard for safety of others. *Turner v. Commonwealth Edison Co.*, 35 Ill.App.3d 331, 341 N.E.2d 488, 493.

Willful and wanton injury. To constitute such injury, act producing injury must have been knowingly and intentionally committed, or committed under circumstances evincing reckless disregard of safety of person injured.

Willful indifference to the safety of others. Imports an intentional lack of regard concerning the safety of others, or an intentional doing of something with knowledge that serious injury is a probable result. *People v. Murray*, 58 Cal.App.2d 239, 136 P.2d 389, 391.

Willfully and knowingly. An act is done willfully and knowingly when the actor intends to do it and knows the nature of the act. Deliberately. See **Willful**.

Willful misconduct of employee. Under Workers' Compensation Acts, precluding compensation, means more than mere negligence, and contemplates the intentional doing of something with knowledge that it is likely to result in serious injuries, or with reckless disregard of its probable consequences. "Willful misconduct" disqualifying claimant for unemployment compensation involves: (1) wanton and willful disregard of employer's interest, (2) deliberate violation of rules, (3) disregard of standards of behavior which an employer can rightfully expect from his employee, or (4) negligence which manifests culpability, wrongful intent, evil design, or intentional and substantial disregard for employer's interests or the employee's duties and obligations. *Wilson v. Com. Unemployment Compensation Bd. of Review*, 15 Pa.Cmwlth. 314, 325 A.2d 500, 501.

Willful murder. The unlawful and intentional killing of another without excuse or mitigating circumstances. See also **Murder**; **Premeditation**.

Willful neglect. The intentional disregard of a plain or manifest duty, in the performance of which the public or the person injured has an interest.

Willful neglect suggests intentional, conscious, or known negligence—a knowing or intentional mistake. *Puget Sound Painters v. State*, 45 Wash.2d 819, 278 P.2d 302, 303. Within adoption statutes, is neglect that is intentional, deliberate, and without just cause or excuse. In re *Adoption of P. J. K.*, Mo.App., 359 S.W.2d 360, 363.

Willful negligence. See **Negligence**.

Willfulness. See **Willful**.

Willful or wanton misconduct. Failure to exercise ordinary care to prevent injury to a person who is actually known to be or reasonably expected to be within the range of a dangerous act being done. *Georgia Power Co. v. Deese*, 78 Ga.App. 704, 51 S.E.2d 724, 728. Conduct which is either intentional or committed under circumstances exhibiting a reckless disregard for the safety of others, such as a failure, after knowledge of an impending danger, to exercise ordinary care to prevent it or a failure to discover the dangers through recklessness or carelessness when it could have been discovered by the exercise of ordinary care. *Lewandowski v. Bakey*, 32 Ill.App.3d 26, 335 N.E.2d 572, 574. An aggravated form of negligence, differing in quality rather than degree from ordinary lack of care. *Morgan v. Southern Pac.*

Transp. Co., 37 Cal.App.3d 1006, 112 Cal.Rptr. 695, 698.

Willful or wanton negligence. Failure to exercise ordinary care to prevent injury to a person who is actually known to be, or reasonably is expected to be, within range of a known danger. *Barall Food Stores v. Bennett*, 194 Okl. 508, 153 P.2d 106, 109, 110. See also **Negligence**.

Willful tort. Term implies intent or purpose to injure. It involves elements of intent or purpose and malice or ill will, but malice or ill will may be shown by indifference to safety of others, with knowledge of their danger, or failure to use ordinary care to avoid injury after acquiring such knowledge. *Hillard v. Western & Southern Life Ins. Co.*, 68 Ohio App. 426, 34 N.E.2d 75, 77, 23 O.O. 133.

Williams Act. See **Tender offer**.

Willingly. Voluntarily; unreluctantly; without reluctance, and of one's own free choice. See **Willful**.

As used in an instruction that one cannot invoke the doctrine of self-defense if he enters a fight willingly, it means voluntarily, aggressively, and without legal excuse.

Wills Act. In England, the statute 32 Hen. VIII, c. 1, passed in 1540, by which persons seized in fee-simple of lands holden in socage tenure were enabled to devise the same at their will and pleasure, except to bodies corporate; and those who held estates by the tenure of chivalry were enabled to devise two-third parts thereof.

Also, the statute 7 Wm. IV & 1 Vict., c. 26, passed in 1837, and also called "Lord Langdale's Act." This act permits of the disposition by will of every kind of interest in real and personal estate, and provides that all wills, whether of real or of personal estate, shall be attested by two witnesses, and that such attestation shall be sufficient. Other important alterations are effected by this statute in the law of wills.

Will substitutes. Documents which purportedly accomplish what a will is designed to accomplish, e.g. trusts, life insurance, joint ownership of property.

Winchester measure. The standard measure of England, originally kept at Winchester. 1 Bl.Comm. 274.

Winchester, Statute of. A statute passed in the thirteenth year of the reign of Edward I, by which the old Saxon law of police was enforced, with many additional provisions. It required every man to provide himself with armor to aid in keeping the peace; and if it did not create the offices of high and petty constables, it recognized and regulated them, and charged them with duties answering somewhat to those of our militia officers. The statute took its name from the ancient capital of the kingdom. It was repealed by the Statute of 7 & 8 Geo. IV, c. 27.

Winding-up acts. In English law, general acts of parliament, regulating settlement of corporate affairs on dissolution.

Window. An opening made in the wall of a building to admit light and air, and to furnish a view or prospect. The use of this word in law is chiefly in connection with the doctrine of ancient lights and other rights of adjacent owners.

PROSSER AND KEETON ON THE LAW OF TORTS

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Chapter 2

INTENTIONAL INTERFERENCE WITH THE PERSON

Table of Sections

Sec.

- 8. Meaning of Intent.
- 9. Battery.
- 10. Assault.
- 11. False Imprisonment.
- 12. Infliction of Mental Distress.

§ 8. Meaning of Intent

In a loose and general sense, the meaning of "intent" is easy to grasp. As Holmes observed, even a dog knows the difference between being tripped over and being kicked.¹ This is also the key distinction between two major divisions of legal liability—negligence and intentional torts—and it plays a key role in criminal law,² and elsewhere.³ It is one of the most basic, organizing concepts of legal thinking.

"Intent" is also one of the most often misunderstood legal concepts. The distinction

between intentional and unintentional invasions draws a bright line of separation among shadings of almost infinitely varied human experiences. As might be expected, authoritative definitions that purport to specify exactly where this bright line is to be drawn are not entirely in accord. There is even some conflict between the two major pronouncements on the subject by the American Law Institute—one in the Restatement—now the Second Restatement—of Torts⁴ and the other in the Model Penal

§ 8

1. Of course, a cunning tripper might fool the dog—once, at least.

2. See, e.g., ALI Model Penal Code, 1962, § 2.02(2) (a), (b), defining "purposely" and "knowingly." The contrasting meanings of "recklessly" and "negligently" are defined, *id.* at (c), (d).

See also *Sandstrom v. Montana*, 1979, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39, condemning an instruction to the jury in a criminal case that "the law presumes that a person intends the ordinary consequences of his voluntary acts." Clearly distinguishable, however, is

an instruction that "it is ordinarily reasonable [for the factfinder] to infer that a person intends the natural and probable consequences of acts." *Hardy v. United States*, 1st Cir. 1982, 691 F.2d 39. For further development of this distinction, see *infra* this section.

3. See *infra*, §§ 107, 113. See also, e.g., R. Keeton *Insurance Law Basic Text*, 1971, §§ 5.2-5.4, 7.6, 7.7; ALI *Federal Securities Code*, 1980, § 202(61)(C).

4. See §§ 8A, 13, 16, 18, 20. For an analysis of the Second Restatement's provisions on intent, with identification of some variations, in form at least, from the

Code.⁵ Still more variations appear in the great mass of statutory and judicial usages, sometimes in explicit definitions and more often among the meanings discovered as implicit when one closely examines the contexts in which statements about intent are made.

The Restatement aims at applying a single, consistent concept of intent throughout. Since the drafters were attempting to "restate" the law of torts, they were aiming for a concept consistent with the most common usage in judicial opinions in tort cases, and it seems a fair assessment that they achieved this aim. Thus, in examining the Restatement concept, we are also examining the most common, though not the only, sense in which courts use "intent" in tort cases.

The three most basic elements of this most common usage of "intent" are that (1) it is a *state of mind* (2) about *consequences* of an act (or omission)⁶ and not about the act itself, and (3) it extends not only to having in the mind a purpose (or desire) to bring about given consequences but also to having in mind a belief (or knowledge) that given

consequences are substantially certain⁷ to result from the act. It is also essential that the state of mind of intent exist when the act occurs. Additional elements of the concept concern the extent to which the intent may relate to different persons⁸ or different consequences from those at issue.⁹

Much of the confusion surrounding application of the legal requirement of intent arises from lack of a clear understanding of the relationship among act, intent, and motive.¹⁰

One prerequisite of liability is that the defendant act (or fail to act when there is a legal duty to act). An involuntary muscular movement of a sleeping or otherwise incapacitated person will not support liability.¹¹ But an "act," as that term is ordinarily used, is a voluntary contraction of the muscles, and nothing more.¹² An act is to be distinguished from its consequences.

"Thus, if the actor, having pointed a pistol at another, pulls the trigger, the act is the pulling of the trigger and not the impingement of the bullet upon the other's person."¹³

first Restatement, see R. Keeton, Computer-Aided and Workbook Exercises in Tort Law, 1976, 1.14-1.23.

5. See § 2.02. Note, for example, that in the usage of the Model Penal Code a person "acts knowingly" with respect to a result of his conduct if "he is aware that it is practically certain that his conduct will cause such a result," § 2.02(2)(b), and that a requirement of knowledge is satisfied "if a person is aware of a high probability of its existence, unless he actually believes that it does not exist." § 2.02(7).

6. The Restatement speaks only of an act (not of an omission) in defining intent, in § 8A, and requires an act, as distinguished from inaction, for battery, in § 14 and comment c thereto. Also, the Restatement takes the position that purposely failing to act when there is a legal duty to act is negligence. Scope Note preceding § 13, at 24 ("failure to perform [a duty to act for the protection of others against bodily harm] constitutes negligence * * *, irrespective of whether his failure is or is not deliberate and done for the very purpose of causing the other to suffer the bodily harm from which it was the actor's duty to protect him"). This curious usage is confounding, since there is as clear a distinction (1) between purposely failing to act, in order to produce a desired consequence, and failing to act without advertent to that consequence, as (2) between purposely acting to produce a desired consequence and acting without advertent to that consequence. The confusion is aggravated by the assertion

that an act is required for false imprisonment (§ 35) and that "refusal" to provide a means of escape when there is a duty to do so is a sufficient "act of confinement" (§ 45).

7. The Model Penal Code uses the phrase "practically certain," § 2.02(2)(b), in contrast with the Restatement's "substantially certain," § 8A. It seems doubtful, however, that any substantive difference was intended by the drafters or by the American Law Institute. See also *supra*, n. 5, as to differences that are more likely to be substantive.

8. See the discussion of "transferred intent," *infra*, this section.

9. For example, one who intends only to cause a harmful physical contact but succeeds only in causing apprehension that such a contact is imminent is subject to liability for assault; see *infra*, § 10.

10. See also *supra* § 5, concerning motive.

11. *Slattery v. Haley*, [1923] 3 Dom.L.Rep. 156, 25 Ont.L.Rep. 95; *Stokes v. Carlson*, 1951, 362 Mo. 93, 240 S.W.2d 132; *Wishone v. Yellow Cab Co.*, 1936, 20 Tenn. App. 229, 97 S.W.2d 452.

12. Holmes, *The Common Law*, 1881, 91; Cook, *Act, Intention and Motive in the Criminal Law*, 1917, 26 Yale L.J. 644; Second Restatement of Torts, § 2.

13. Second Restatement of Torts, § 2, Comment c.

When "act" is used in this sense, it is tautological to speak of a "voluntary act," and self-contradictory to speak of an "involuntary act," since every act is voluntary. Nevertheless, the phrases "voluntary act" and "involuntary act" do appear in legal prose.¹⁴ Moreover, differences may be deeper than merely a choice of terminology; one who uses the phrase "voluntary act" may be using "act" to mean something different from a mere voluntary contraction of the muscles; sometimes the phrase "voluntary act" is used to mean something closer to the concept of intent (as defined in the Restatement and in common usage), which focuses not upon the mere "act" (in the narrower sense, defined in the Restatement and in common usage) but upon volition in relation to consequences as well as volition in relation to the muscular contraction. The movement of the finger which fires a gun is the same, whether it takes place in a crowded city, or in the solitude of the Mojave Desert, and regardless of the actor's state of mind about the consequences. But the legal outcome will depend on the actor's surroundings and the actor's state of mind. The actor may move the muscles of the finger for the purpose of pulling the trigger, for the purpose of causing the bullet to strike another, for the purpose of killing the other, for the purpose of revenge, of defense of country, or of self-protection against attack. "Intent" is the word commonly used to describe the purpose to bring about *stated physical conse-*

quences; ¹⁵ the more remote objective which inspires the act and the intent is called "motive." ¹⁶ Both intent and motive are steps removed from volition to move the muscles of the finger. Intent is concerned with consequences of that movement; motive, with reasons for desiring certain consequences. Intent is thus less removed from act than is motive. Each has its own importance in the law of torts, and a justifiable motive, such as that of self-defense, may avoid liability for the intent to kill.

Both intent and motive are states of mind. Act is a combination of muscular movement and the state of mind of volition to make that movement.

As already noted, however, intent is broader than a desire or purpose to bring about physical results. It extends not only to those consequences which are desired, but also to those which the actor believes are substantially certain to follow from what the actor does. The actor who fires a bullet into a dense crowd may fervently pray that the bullet will hit no one, but if the actor knows that it is unavoidable that the bullet will hit someone, the actor intends that consequence.

Another source of great confusion is failure to distinguish between (1) the factual elements essential to a finding of intent and (2) the elements of proof and argument that advocates and factfinders may bring to bear in addressing the question whether those

14. Even courts citing and following the Restatement definition of "act" have sometimes lapsed, in other passages, into using phrases such as "voluntary act" and "conscious act." See, e.g., *Stokes v. Carlson*, 1951, 362 Mo. 93, 240 S.W.2d 132.

Moreover, other courts and writers simply do not accept the Restatement of Torts usage. An example is the ALI Model Penal Code, § 2.01, which uses "voluntary act" and defines it in a way that appears to be very nearly if not precisely identical in meaning with "act" as defined in the Restatement of Torts.

15. See Second Restatement of Torts, § 8A, comment a. For a more detailed explanation of this concept, and for discussion of the failure to apply it correctly as a source of error in application of the concept of intent, see R. Keeton, *Computer-Aided and Workbook Exercises in Tort Law*, 1976, 1.1-1.23. One common source of confusion is failure to focus precisely on

what consequence must be intended to meet the requirements of the legal theory at issue. In *Garratt v. Dailey*, 1955, 46 Wn.2d 197, 279 P.2d 1091, second appeal, 1956, 49 Wn.2d 499, 304 P.2d 681, a boy who pulled away a chair just as plaintiff was about to sit down was held liable for battery because he knew that she was substantially certain "to sit in the place where the chair had been," which, without satisfactory explanation, the court treated as the equivalent of knowing that she was substantially certain to suffer a harmful or offensive bodily contact with the ground. Might the boy not believe that she would not be hurt and that she would think it was all good fun?

16. *Cook, Act, Intention and Motive in the Criminal Law*, 1917, 26 Yale L.J. 644; *Walton, Motive as an Element in Torts in the Common and in the Civil Law*, 1909, 22 Harv.L.Rev. 501.

factual elements are present in a given case. The factfinder need not credit the actor's assertion that the actor did not intend the result in question. One of the common lines of argument against crediting the actor's assertion is (1) that, given the circumstances disclosed in the evidence, a reasonable person in the actor's position would have known that the consequence in question was substantially certain to follow the act, (2) that the evidence shows that the actor was even brighter and shrewder than most others, and (3) that the inference is therefore compelling that the actor knew even though testifying otherwise. If the factfinder credits inference (1) but not inferences (2) and (3), the finding is negligence. But if the factfinder credits all three inferences, the finding is intent to produce the consequence in question. Expressed another way the point is this: Since intent is a state of mind, it is plainly incorrect for a court to instruct a jury that an actor is presumed to intend the natural and probable consequences of the actor's conduct; but it is correct to tell the jury that, relying on circumstantial evidence, they may infer that the actor's state of mind was the same as a reasonable person's state of mind would have been.¹⁷ Thus, when the driver who whips up horses with a loud yell while passing a neighbor's team denies intent to cause a runaway, the factfinder may discredit the driver's testimony;¹⁸ and the

defendant on a bicycle who rides down a person in full view on a sidewalk where there is ample room to pass may learn that the factfinder (judge or jury) is unwilling to credit the statement, "I didn't mean to do it."¹⁹

On the other hand, the mere knowledge and appreciation of a risk—something short of substantial certainty—is not intent. The defendant who acts in the belief or consciousness that the act is causing an appreciable risk of harm to another may be negligent, and if the risk is great the conduct may be characterized as reckless or wanton,²⁰ but it is not an intentional wrong. In such cases the distinction between intent and negligence obviously is a matter of degree. The line has been drawn by the courts at the point where the known danger ceases to be only a foreseeable risk which a reasonable person would avoid, and becomes in the mind of the actor a substantial certainty.²¹

The intent with which tort liability is concerned is not necessarily a hostile intent, or a desire to do any harm.²² Rather it is an intent to bring about a result which will invade the interests of another in a way that the law forbids. The defendant may be liable although intending nothing more than a good-natured practical joke,²³ or honestly believing that the act would not injure the

17. *Sandstrom v. Montana*, 1979, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39; *Hardy v. United States*, 1st Cir. 1982, 691 F.2d 39.

18. *Lambrecht v. Schreyer*, 1915, 129 Minn. 271, 152 N.W. 645. See also *Land v. Bachman*, 1921, 223 Ill. App. 473.

19. *Mercer v. Corbin*, 1889, 117 Ind. 450, 20 N.E. 132. Cf. *Commonwealth v. Raspa*, 1939, 138 Pa.Super. 26, 9 A.2d 925.

20. See *infra*, § 34.

21. *Hackenberger v. Travelers Mutual Casualty Co.*, 1936, 144 Kan. 607, 62 P.2d 545; *Cook v. Kinzua Pine Mills Co.*, 1956, 207 Or. 34, 293 P.2d 717. See Second Restatement of Torts, § 13, Comment d; Note, 1962, 34 Rock Mt.L.Rev. 268; De Muth, A Comparison of the Conduct Required in Trespass to Chattels and Negligence, 1961, 33 Rocky Mt.L.Rev. 323.

Compare the following statement, which is somewhat at odds with the Restatement definition of "intent":

"If the manifest probability of harm is very great, and the harm follows, we say that it is done maliciously or intentionally; if not so great, but still considerable, we say that the harm is done negligently; if there is no apparent danger, we call it mischance." Holmes, Privilege, Malice and Intent, 1894, 8 Harv.L. Rev. 1.

22. *Baldinger v. Banks*, 1960, 26 Misc.2d 1086, 201 N.Y.S.2d 629; Restatement of Torts, § 13, Comment e.

23. *Reynolds v. Pierson*, 1902, 29 Ind.App. 273, 64 N.E. 484; *State v. Monroe*, 1897, 121 N.C. 677, 28 S.E. 547.

plaintiff,²⁴ or even though seeking the plaintiff's own good.²⁵

More Extensive Liability for Intent

There is a definite tendency to impose greater responsibility upon a defendant whose conduct was intended to do harm, or was morally wrong.²⁶ More liberal rules are applied as to the consequences for which the defendant will be held liable,²⁷ the certainty of proof required,²⁸ and the type of damage for which recovery is to be permitted,²⁹ as well as the measure of compensation.³⁰ The defendant's interests have been accorded substantially less weight in opposition to the plaintiff's claim to protection when moral iniquity is thrown into the balance. Apparently the courts have more or less unconsciously worked out an irregular and poorly defined sliding scale, by which the defendant's liability is least where the conduct is merely inadvertent, greater for acts in disregard of consequences increasingly likely to follow, greater still for intentionally invading the rights of another under a mistaken

belief of committing no wrong, and greatest of all where the motive is a malevolent desire to do harm.

"Transferred" Intent

One definite area in which there is more extensive liability for intent than for negligence is that covered by the curious surviving fiction of "transferred intent." The defendant who shoots or strikes at A, intending to wound or kill A, and unforeseeably hits B instead, is held liable to B for an intentional tort.³¹ The intent to commit a battery upon A is pieced together with the resulting injury to B; it is "transferred" from A to B. "The intention follows the bullet."³²

This peculiar idea appeared first in criminal cases³³ at a time when tort and crime were still merged in the old trespass form of action. It represents an established rule of the criminal law, in cases in which shooting, striking, throwing a missile or poisoning has resulted in unexpected injury to the wrong person.³⁴ The criminal cases have been un-

24. *Vosburg v. Putney*, 1891, 80 Wis. 523, 50 N.W. 403; *Craker v. Chicago & Northwestern Railway Co.*, 1875, 36 Wis. 657.

25. *Clayton v. New Dreamland Roller Skating Rink*, 1951, 14 N.J.Super. 390, 82 A.2d 458 (plaintiff fell and broke her arm; over her protest defendant proceeded to manipulate the arm in order to set it); *Johnson v. McConnel*, N.Y. 1878, 15 Hun 293 (defendant intervened in a scuffle to protect plaintiff and broke plaintiff's leg); *Maxwell v. Maxwell*, 1920, 189 Iowa 7, 177 N.W. 541, (arrest of insane person for his own protection).

26. *Bauer, The Degree of Moral Fault as Affecting Defendant's Liability*, 1933, 81 U.Pa.L.Rev. 586; *Note*, 1962, 14 Stan.L.Rev. 362.

27. "For an intended injury the law is astute to discover even very remote causation. For one which the defendant merely ought to have anticipated it has often stopped at an earlier stage of the investigation of causal connection. And as to those where there was neither knowledge nor duty to foresee, it has usually limited accountability to direct and immediate results. This is not because the defendant's act was a more immediate cause in one case than in the others, but because it has been felt to be just and reasonable that liability should extend to results further removed when certain elements of fault are present." *Derosier v. New England Telephone & Telegraph Co.*, 1925, 81 N.H. 451, 463, 130 A. 145, 152. See *infra*, § 43.

See *Green, Rationale of Proximate Cause*, 1925, 170 ff.

28. Cases are collected in *Bauer, The Degree of Moral Fault as Affecting Defendant's Liability*, 1933, 81 U.Pa.L.Rev. 586, 592-596.

29. Thus damages for mental disturbance, whether or not it results in physical injury, are more readily held to be recoverable where the wrong is intentional. See *infra*, §§ 12, 54.

30. Cases are collected in *Bauer, The Degree of Defendant's Fault as Affecting the Administration of the Law of Excessive Compensatory Damages*, 1934, 82 U.Pa.L.Rev. 583. See for example the rules applied to innocent and wilful trespassers who remove timber or minerals from land, as to the value of the property converted "in place" or after removal. *McCormick, Damages*, 1935, 492-496.

31. *Prosser, Transferred Intent*, 1967, 45 Tex.L. Rev. 650.

32. *State v. Batson*, 1936, 339 Mo. 298, 305, 96 S.W.2d 384, 389.

33. *Regina v. Salisbury*, 1553, 1 Plowd. 100, 75 Eng. Rep. 158; *Queen v. Saunders and Archer*, 1576, 2 Plowd. 473, 75 Eng.Rep. 706.

34. *Dunaway v. People*, 1884, 110 Ill. 333; *State v. Williams*, 1904, 122 Iowa 115, 97 N.W. 992; *State v. Ochoa*, 1956, 61 N.M. 225, 297 P.2d 1053; *People v. Aranda*, 1938, 12 Cal.2d 307, 83 P.2d 928; *Coston v. State*, 1939, 139 Fla. 250, 190 So. 520.

derstandably preoccupied with moral guilt, and the obvious fact that if the defendant is not convicted there is no one to hold liable for the crime. But the same rule was applied to tort cases arising in trespass.³⁵ This may possibly have been due to a considered feeling that the defendant could not sustain a burden of proof of freedom from fault when the defendant had at least intended to injure another person.³⁶ But a better explanation may lie in nothing more than the mere proximity of the criminal law to the trespass action, with its criminal tradition and the similarity of the fact situations. It is quite probable, however, that the persistence of the principle has been due to a definite feeling that the defendant is at fault, and should make good the damage. The defendant's act is characterized as "wrongful," and the fault is regarded as absolute toward all the world, rather than relative to any one person. Having departed from the social standard of conduct, the defendant is liable for the harm which follows from the act, although this harm was not intended.

The rule has been applied in a considerable number of American cases that have held the defendant liable for accidental battery to an unintended person by shooting,³⁷ striking,³⁸ or throwing,³⁹ where the intent

was to commit a battery upon a third person. It is not, however, limited to cases of intended or resulting battery. The principle extends at least to liability for battery on one person by an act intended to cause an assault on another, and liability for assault on one person by an act intended to cause a battery on another.⁴⁰ Thus one who intended an assault, by shooting to frighten another, was held liable for battery when the bullet unexpectedly hit a stranger.⁴¹ Possibly the principle is applicable even more broadly. The action of trespass was the progenitor not only of battery, but also of assault and false imprisonment; although the Restatement does not so state, one might reasonably argue that when the defendant intends any one of the three, the intent will be "transferred" to make the defendant liable for any of the three, at least if the harm is direct and immediate, as was required for the writ of trespass. On the other hand, where the case does not fit within the scope of the old writ of trespass, there is a lack of precedent for the "transfer" of intent. This is true where the injury is not direct and immediate, but consequential;⁴² and where the plaintiff's interest which is invaded, as for example by causing pecuniary loss,⁴³ was one not protected by the old trespass writ.

35. *Scott v. Shepherd*, 1773, 2 Wm.Bl. 892, 96 Eng. Rep. 525; *James v. Campbell*, 1832, 5 C. & P. 372, 172 Eng.Rep. 1015.

36. "Originally a defendant whose act had caused bodily harm to another was prima facie liable as a trespasser unless he could exculpate himself by showing that the harm resulted from inevitable accident. To do this, he was required to show that he was innocent of fault, and it would be natural to regard it as impossible for him to do this if his conduct was intended to inflict upon even a third party an injury the same as or closely similar to that which the plaintiff had suffered." Restatement of Torts, Tentative Draft 1935, Commentary to § 10(1).

37. *Lopez v. Surchia*, 1952, 112 Cal.App.2d 314, 246 P.2d 111; *Smith v. Moran*, 1963, 43 Ill.App.2d 373, 193 N.E.2d 466; *Anderson v. Arnold's Executor*, 1881, 79 Ky. 370; *Morrow v. Flores*, Tex.Civ.App.1948, 225 S.W.2d 621, refused n.r.e.; *Davis v. McKey*, La.App. 1964, 167 So.2d 416, writ refused 246 La. 910, 914, 168 So.2d 822, 823.

38. *Carnes v. Thompson*, Mo.1932, 48 S.W.2d 903; *Davis v. Collins*, 1904, 69 S.C. 460, 48 S.E. 469; *Bannister v. Mitchell*, 1920, 127 Va. 578, 104 S.E. 800.

39. *Singer v. Marx*, 1956, 144 Cal.App.2d 637, 301 P.2d 440; *Peterson v. Haffner*, 1877, 59 Ind. 130; *Talmage v. Smith*, 1894, 101 Mich. 370, 59 N.W. 656; *Keel v. Hainline*, Okl.1958, 331 P.2d 397.

40. See Second Restatement of Torts, §§ 13, 18; *Manning v. Grimsley*, 1st Cir. 1981, 643 F.2d 20 (baseball thrown by warm-up pitcher in the direction of heckling fans protected by a screen broke through screen and hit plaintiff).

41. *Randall v. Ridgley*, La.App.1939, 185 So. 632; *Brown v. Martinez*, 1961, 68 N.M. 271, 361 P.2d 152; *Weisbart v. Flohr*, 1968, 260 Cal.App.2d 281, 67 Cal. Rptr. 114; *Daingerfield v. Thompson*, 1880, 74 Va. (33 Gratt.) 136.

See also *Jeppsen v. Jensen*, 1916, 47 Utah 536, 155 P. 429. As to damage to chattel, *Vandenburgh v. Truax*, N.Y.1847, 4 Denio 464.

42. *Oklahoma Gas & Electric Co. v. Hofrichter*, 1938, 196 Ark. 1, 116 S.W.2d 599; *Commonwealth v. Campbell*, 1863, 89 Mass. (7 Allen) 541; *People v. Rockwell*, 1878, 39 Mich. 503.

43. See, as to misrepresentation, *infra*, § 107. Also *Mobile Life Insurance Co. v. Brame*, 1877, 95 U.S. 754,

Since mental disturbance was protected only to the extent of allowing recovery for an assault, it has followed that where that tort cannot be made out, intent is not "transferred" to allow recovery for such consequences.⁴⁴

As will be seen hereafter,⁴⁵ where the defendant's conduct is merely negligent, many courts refuse to hold the defendant liable unless the negligence can be found to be relative to the particular plaintiff, in the sense that the foreseeable risk of harm created extends to the plaintiff. The broader liability in the case of an intentional invasion of another's rights is an illustration of the general attitude of the courts as to the imposition of greater responsibility upon an intentional wrongdoer.



WESTLAW REFERENCES

distinction difference /s negligence /s intent! /s tort*

tort* harm invasion* /p intent! /p unintent! /p difference* distinction* define* definition*

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More Extensive Liability for Intent

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"Transferred" Intent

"transferred intent" & topic(379) & court(ny)

§ 9. Battery

A harmful or offensive contact with a person, resulting from an act intended to cause the plaintiff or a third person to suffer such a contact, or apprehension that such a contact is imminent, is a battery.¹ With respect to the consequence for which it provides a

remedy, battery thus stands in contrast with "assault," a term ordinarily used to refer to apprehension of imminent contact rather than contact itself.²

Although a contact of this specified type is also essential, the intent element of the cause of action is satisfied not only if the defendant intends³ a harmful contact, or an offensive contact, upon the plaintiff, or upon a third person (all of which are battery-type consequences) but also if the defendant intends only to cause apprehension that such a contact is imminent (an assault-type consequence).⁴ In this respect the intent element of the cause of action for battery is identical with the intent element of the cause of action for assault. Although the Restatement apparently limits the definition of the intent element to intending either the battery-type or assault-type consequence, there is other authority supporting an extension of the cause of action for battery somewhat more broadly—at least to cases in which the defendant's act produced a harmful or offensive contact and the defendant intended neither contact nor apprehension of contact but some other consequence, such as confinement, for which the historical writ of trespass would have provided a remedy.⁵

Protection of the interest in freedom from intentional and unpermitted contacts with the plaintiff's person extends to any part of the body,⁶ or to anything which is attached to it and practically identified with it.⁷ Thus, if all other requisites of a battery against the plaintiff are satisfied, contact with the plaintiff's clothing,⁸ or with a

24 L.Ed. 580; Rockingham Mutual Fire Insurance Co. v. Boshier, 1855, 39 Me. 253; Anthony v. Slaid, 1846, 52 Mass. (11 Metc.) 290; Clark v. Gay, 1901, 112 Ga. 777, 38 S.E. 81.

44. See *infra*, § 12.

45. See *infra*, § 43.

§ 9

1. Second Restatement of Torts, § 13.

2. See *infra*, § 10.

3. See *supra*, § 8, regarding the meaning of intent.

4. *Manning v. Grimsley*, 1st Cir. 1981, 643 F.2d 20.

5. See *Transferred Intent*, *supra*, § 8.

6. *Cole v. Turner*, 1704, 6 Mod.Rep. 149, 90 Eng. Rep. 958; *Mailand v. Mailand*, 1901, 83 Minn. 453, 86 N.W. 445.

7. " * * * anything so closely attached thereto that it is customarily regarded as a part thereof." Second Restatement of Torts, § 18.

8. *United States v. Ortega*, 3d Cir., 1825, Fed.Cas. No. 15,971, 4 Wash.C.C. 531; *Geraty v. Stern*, N.Y. 1883, 30 Hun 426; *Piggly-Wiggly Alabama Co. v. Rickles*, 1925, 212 Ala. 585, 103 So. 860 (attempted search of pockets).

cane,⁹ a paper,¹⁰ or any other object held in the plaintiff's hand,¹¹ will be sufficient; and the same is true of the chair in which the plaintiff sits,¹² the horse¹³ or the car the plaintiff rides or occupies,¹⁴ or the person against whom the plaintiff is leaning.¹⁵ The interest in the integrity of person includes all those things which are in contact or connected with the person.

Since the disappearance of the distinction between trespass and case, it is no longer important that the contact is not brought about by a direct application of force such as a blow, and (if other elements of the cause of action, including intent, are satisfied) it is enough that the defendant sets a force in motion which ultimately produces the result,¹⁶ as by setting out food for the plaintiff to eat which contains a poison,¹⁷ or digging a pitfall in the path on which the plaintiff is to walk. It is not essential that the plaintiff should be conscious of the contact at the time it occurs. Interest in personal integrity

still is entitled to protection, although the plaintiff is asleep or under an anaesthetic,¹⁸ or otherwise unaware of what is going on.¹⁹ Proof of the technical invasion of the integrity of the plaintiff's person by even an entirely harmless, but offensive, contact entitles the plaintiff to vindication of the legal right by an award of nominal damages,²⁰ and the establishment of the tort cause of action entitles the plaintiff also to compensation for the resulting mental disturbance, such as fright, revulsion or humiliation.²¹ The defendant's liability for the resulting harm extends, as in most other cases of intentional torts, to consequences which the defendant did not intend, and could not reasonably have foreseen,²² upon the obvious basis that it is better for unexpected losses to fall upon the intentional wrongdoer than upon the innocent victim. Since battery usually is a matter of the worst kind of intentions, it is a tort which frequently justifies punitive dam-

9. *Respublica v. De Longchamps*, Pa.1784, 1 Dall. 111, 1 L.Ed. 59.

10. *Dyk v. De Young*, 1889, 35 Ill.App. 138, affirmed, 1890, 433 Ill. 82, 24 N.E. 520; *S. H. Kress & Co. v. Brashier*, Tex.Civ.App.1932, 50 S.W.2d 922.

11. *Fisher v. Carrousel Motor Hotel, Inc.*, Tex.1967, 424 S.W.2d 627 (plate held in hand); *Morgan v. Loyacombo*, 1941, 190 Miss. 656, 1 So.2d 510 (package); *Brodsky v. Rieser*, 1921, 195 App.Div. 557, 186 N.Y.S. 841 (starting automobile of which plaintiff had hold); *Wilson v. Orr*, 1923, 210 Ala. 93, 97 So. 133 (opening and putting hand in box held by plaintiff); *Kirkpatrick v. Crutchfield*, 1919, 178 N.C. 348, 100 S.E. 602.

12. *Hopper v. Reeve*, 1817, 7 Taunt. 698, 129 Eng. Rep. 278. Cf. *Interstate Life & Accident Insurance Co. v. Brewer*, 1937, 56 Ga.App. 599, 193 S.E. 458 (bed); *Singer Sewing Machine Co. v. Phipps*, 1911, 49 Ind. App. 116, 94 N.E. 793 (sewing machine).

13. *Riding: Dodwell v. Burford*, 1669, 1 Mod.Rep. 24, 86 Eng.Rep. 703. Attached to carriage in which plaintiff riding: *Clark v. Downing*, 1882, 55 Vt. 259; *Bull v. Culton*, N.Y.1856, 22 Barb. 94.

14. *Crossman v. Thurlow*, 1957, 336 Mass. 252, 143 N.E.2d 814; *United States v. Anderson*, D.C.Md.1961, 190 F.Supp. 589; *Farm Bureau Mutual Auto Insurance Co. v. Hammer*, 4th Cir. 1949, 177 F.2d 793, certiorari denied 339 U.S. 914, 70 S.Ct. 575, 94 L.Ed. 1339.

15. *Reynolds v. Pierson*, 1902, 29 Ind.App. 273, 64 N.E. 484. Cf. *State v. Davis*, S.C.1833, 1 Hill 46 (slave roped to plaintiff).

16. *Mooney v. Carter*, 1945, 114 Colo. 267, 160 P.2d 390 (operating car so as to throw plaintiff from run-

ning board); *Schmitt v. Kurrus*, 1908, 234 Ill. 578, 85 N.E. 261 (striking glass door, plaintiff hit with fragments); *Thomas v. Dunne*, 1955, 131 Colo. 20, 279 P.2d 427 (seating plaintiff on electrified bench); *Garratt v. Dailey*, 1955, 46 Wn.2d 197, 279 P.2d 1091, second appeal, 1956, 49 Wn.2d 499, 304 P.2d 681 (removing chair in which plaintiff was about to sit down). Cf. Second Restatement of Torts, § 18, Comment c (daubing filth on towel plaintiff expected to use, or pulling away the chair in which he is about to sit).

17. *Commonwealth v. Stratton*, 1873, 114 Mass. 303 (cantharides); *State v. Monroe*, 1897, 121 N.C. 677, 28 S.E. 547 (croton oil).

18. *Mohr v. Williams*, 1905, 95 Minn. 261, 104 N.W. 12; *Hively v. Higgs*, 1927, 120 Or. 588, 253 P. 363. See *infra*, § 18.

19. *Vosburg v. Putney*, 1891, 80 Wis. 523, 50 N.W. 403.

20. *Mason v. Wrightson*, 1954, 205 Md. 481, 109 A.2d 128; *Bumgart v. Bailey*, 1963, 247 Miss. 604, 156 So.2d 823; *Rullis v. Jacobi*, 1963, 79 N.J.Super. 525, 192 A.2d 186; *Marble v. Jensen*, 1919, 53 Utah 226, 178 P. 66.

21. *Smith v. Hubbard*, 1958, 253 Minn. 215, 91 N.W.2d 756; *Mecham v. Foley*, 1951, 120 Utah 416, 235 P.2d 497; *Glickstein v. Setzer*, Fla.1955, 78 So.2d 374; *Lamb v. Woodry*, 1936, 154 Or. 30, 58 P.2d 1257.

22. *Vosburg v. Putney*, 1891, 80 Wis. 523, 50 N.W. 403; *Watson v. Rheinderknecht*, 1901, 82 Minn. 235, 84 N.W. 798; *Trousil v. Bayer*, 1909, 85 Neb. 431, 123 N.W. 445; *Harris v. Hindman*, 1929, 130 Or. 15, 278 P. 954; *Ware v. Garvey*, D.C.Mass.1956, 139 F.Supp. 71.

ages;²³ but in the comparatively infrequent case where the defendant has acted in good faith under a mistake of fact, but still has committed the tort, punitive damages are not allowed.²⁴

Character of Defendant's Act

According to classic tort law, likely to be followed in most courts even today, in order to be liable for battery, the defendant must have done some positive and affirmative act; mere passive obstruction of the plaintiff's passage, although it may constitute another tort,²⁵ does not amount to a battery.²⁶

The act must cause, and must be intended to cause, an unpermitted contact. Mere negligence, or even recklessness, which creates only a risk that the contact will result, may afford a distinct cause of action in itself, but under modern usage of the term it is not enough for battery.²⁷

The original purpose of the courts in providing the action for battery undoubtedly

was to keep the peace by affording a substitute for private retribution.²⁸ The element of personal indignity involved always has been given considerable weight. Consequently, the defendant is liable not only for contacts which do actual physical harm, but also for those relatively trivial ones which are merely offensive and insulting.²⁹ Spitting in the face is a battery,³⁰ as is forcibly removing the plaintiff's hat,³¹ or any other contact brought about in a rude and insolent manner.³² "The least touching of another in anger," said Chief Justice Holt, "is a battery;"³³ and no harm or actual damage of any kind is required.³⁴ The plaintiff is entitled to demand that the defendant refrain from the offensive touching, although the contact results in no visible injury.

The defendant may be liable when intending only a joke,³⁵ or even a compliment, as where an unappreciated kiss is bestowed

23. See for example *Rodgers v. Bryan*, 1957, 82 Ariz. 143, 309 P.2d 773; *Deevy v. Tassi*, 1942, 21 Cal.2d 109, 130 P.2d 389; *May v. Baron*, 1938, 329 Pa. 65, 196 A. 866; *Vaughn v. Mesch*, 1939, 107 Mont. 498, 87 P.2d 177; *Schlessman v. Brainard*, 1939, 104 Colo. 514, 92 P.2d 749. See *supra*, § 2.

24. See for example *Heinze v. Murphy*, 1942, 180 Md. 423, 24 A.2d 917.

25. *Cullen v. Dickinson*, 1913, 33 S.D. 27, 144 N.W. 656; and see *infra*, § 11.

26. *Innes v. Wylie*, 1844, 1 Car. & K. 257, 174 Eng. Rep. 800.

27. *Cook v. Kinzua Pine Mills Co.*, 1956, 207 Or. 34, 293 P.2d 717; *Hackenberger v. Travelers Mutual Casualty Co.*, 1936, 144 Kan. 607, 62 P.2d 545. As to the persistence, in one or two states, of reference to a negligent "battery," even in criminal cases, see Note, 1942, 30 Ky.L.J. 418; *supra*, § 8.

28. "As to the assault, this is, perhaps, one of the kind in which the insult is more to be considered than the actual damage; for, though no great bodily pain is suffered by a blow on the palm of the hand, or the skirt of the coat, yet these are clearly within the legal definition of assault and battery, and among gentlemen too often induce duelling and terminate in murder." *McKean, C.J.*, in *Respublica v. De Longchamps*, Pa. 1784, 1 Dall. 111, 114, 1 L.Ed. 59.

29. *Harrigan v. Rosich*, La.App.1965, 173 So.2d 880 (pushing with finger, "Go home, old man"); *People v. Martinez*, 1970, 3 Cal.App.3d 886, 83 Cal.Rptr. 914 (barefooted defendant kicked police officer protected by motorcycle boots); *Wilson v. Orr*, 1923, 210 Ala. 93,

97 So. 133; *Masters v. Becker*, 1964, 22 A.D.2d 118, 254 N.Y.S.2d 633.

30. *Alcorn v. Mitchell*, 1872, 63 Ill. 553; *Draper v. Baker*, 1884, 61 Wis. 450, 21 N.W. 527.

31. *Seigel v. Long*, 1910, 169 Ala. 79, 53 So. 753; *Hull v. Bartlett*, 1887, 49 Conn. 64. Cf. *Piggly-Wiggly Alabama Co. v. Rickles*, 1925, 212 Ala. 585, 103 So. 860 (attempted search of pockets); *Forde v. Skinner*, 1830, 4 C. & P. 239, 172 Eng.Rep. 687 (cutting plaintiff's hair).

32. *United States v. Ortega*, 3d Cir. 1825, Fed.Cas. No. 15,971, 4 Wash.C.C. 531; *Crosswhite v. Barnes*, 1924, 139 Va. 471, 124 S.E. 242; *Singer Sewing Machine Co. v. Methvin*, 1913, 184 Ala. 554, 63 So. 997; *Baldinger v. Banks*, 1960, 26 Misc.2d 1086, 201 N.Y.S.2d 629; *Rullis v. Jacobi*, 1963, 79 N.J.Super. 525, 192 A.2d 186.

33. *Cole v. Turner*, 1704, 6 Mod.Rep. 149, 90 Eng. 958. Cf. *Mailand v. Mailand*, 1901, 83 Minn. 453, 86 N.W. 445; *Interstate Life & Accident Co. v. Brewer*, 1937, 56 Ga.App. 599, 193 S.E. 458; *Fort Wayne & Northern Indiana Traction Co. v. Ridenour*, 1919, 71 Ind.App. 263, 123 N.E. 720.

34. "If Gibbs kicked plaintiff with his foot, it cannot be said as a matter of law, that there was no physical injury to him. In a legal sense, it was a physical injury, though it may have caused no physical suffering, and though the sensation resulting therefrom may have lasted but for a moment." *South Brilliant Coal Co. v. Williams*, 1921, 206 Ala. 637, 638, 91 So. 589, 590.

35. *Newman v. Christensen*, 1948, 149 Neb. 471, 31 N.W.2d 417; *Moore v. El Paso Chamber of Commerce*,

without consent,³⁶ or a misguided effort is made to render assistance.³⁷ The plaintiff is entitled to protection according to the usages of decent society, and offensive contacts, or those which are contrary to all good manners, need not be tolerated. At the same time, in a crowded world, a certain amount of personal contact is inevitable, and must be accepted. Absent expression to the contrary, consent is assumed to all those ordinary contacts which are customary and reasonably necessary to the common intercourse of life, such as a tap on the shoulder to attract attention,³⁸ a friendly grasp of the arm,³⁹ or a casual jostling to make a passage.⁴⁰ There is as yet no very satisfactory authority⁴¹ as to whether even such innocuous and generally permitted contacts can become tortious if they are inflicted with knowledge that the individual plaintiff objects to them and refuses to permit them.

Tex.Civ.App.1929, 220 S.W.2d 327 (rodeo day horseplay); Markley v. Whitman, 1893, 95 Mich. 236, 54 N.W. 763; Reynolds v. Pierson, 1902, 29 Ind.App. 273, 64 N.E. 484; Keel v. Hainline, Okl.1958, 331 P.2d 397.

36. Ragsdale v. Ezell, 1899, 49 S.W. 775, 20 Ky.L. Rep. 1567; Liljegren v. United Railways Co. of St. Louis, Mo.App.1921, 227 S.W. 925; Craker v. Chicago & Northwestern Railway Co., 1875, 36 Wis. 657, 17 Am. Rep. 504.

Taking indecent liberties with a person without consent is of course a battery. Hatchett v. Blacketer, 1915, 162 Ky. 266, 172 S.W. 533; Hough v. Iderhoff, 1914, 69 Or. 568, 139 P. 931; Martin v. Jansen, 1920, 113 Wash. 290, 193 P. 674, affirmed 1921, 113 Wash. 290, 198 P. 393; Skousen v. Nidy, 1961, 90 Ariz. 215, 367 P.2d 248. Cf. Gates v. State, 1964, 110 Ga.App. 303, 138 S.E.2d 473 (slapping on buttocks).

37. Clayton v. New Dreamland Roller Skating Rink, 1951, 14 N.J.Super. 390, 82 A.2d 458 (attempt to manipulate broken arm to set it); Johnson v. McConnel, N.Y. 1878, 15 Hnn 293 (intervening in scuffle to protect plaintiff).

38. Wiffin v. Kincard, 1807, 2 Bos. & P.N.R. 471, 126 Eng.Rep. 1391; Coward v. Baddeley, 1859, 4 H. & N. 478, 157 Eng.Rep. 927.

39. See United States v. Ortega, 3d Cir. 1825, Fed. Cas.No.15,971, 4 Wash.C.C. 531; Courtney v. Kneib, 1908, 131 Mo.App. 204, 110 S.W. 665. Cf. Steinman v. Baltimore Antiseptic Steam Laundry Co., 1908, 109 Md. 62, 71 A. 517 (accidental contact); State v. Hemphill, 1913, 162 N.C. 632, 78 S.E. 167 (taking hold of child to persuade); Hoffman v. Eppers, 1866, 41 Wis. 251 (assistance to an intoxicated person); Noble v. Louisville

The time and place,⁴² and the circumstances under which the act is done,⁴³ will necessarily affect its unpermitted character, and so will the relations between the parties. A stranger is not to be expected to tolerate liberties which would be allowed by an intimate friend.⁴⁴ But unless the defendant has special reason to believe that more or less will be permitted by the individual plaintiff, the test is what would be offensive to an ordinary person not unduly sensitive as to personal dignity.⁴⁵ The intent required is only the intent to bring about such a contact (or to cause apprehension that such a contact is imminent); given that intent, liability will depend upon whether there is a privilege, because of the plaintiff's individual consent, or otherwise.⁴⁶



WESTLAW REFERENCES

battery /p harmful offensive /p touching contact & topic(37 379)

Taxicab & Transfer Co., Ky.1952, 255 S.W.2d 493 (taking hold of sick child to help).

40. Cole v. Turner, 1704, 6 Mod.Rep. 149, 90 Eng. Rep. 958.

41. The Second Restatement of Torts, § 19, leaves the question open in a Caveat. The only case approaching the matter is Richmond v. Fiske, 1893, 160 Mass. 34, 35 N.E. 103, where defendant, in violation of express instructions, entered plaintiff's room, touched him, and woke him up to present a milk bill. This was held to be a battery. It would appear, however, that this might be classified as offensive to a reasonable person, even in the absence of the instructions. See Carpenter, Intentional Invasion of Interest of Personality, 1934, 13 Or.L.Rev. 227, 231.

42. Thus horseplay which would be permissible upon the playground is out of order in the schoolroom. Vosburg v. Pntney, 1891, 80 Wis. 523, 50 N.W. 403.

43. In Crawford v. Bergen, 1894, 91 Iowa 675, 60 N.W. 205, defendant, suspecting that plaintiff had set fire to a granary, touched him on the shoulder, and said, "Did you feel better after you set the fire?" It was held a question for the jury whether this was a battery. Cf. McDonald v. Franchere, 1897, 102 Iowa 496, 71 N.W. 427.

44. Reynolds v. Pierson, 1902, 29 Ind.App. 273, 64 N.E. 484. Cf. Nicholls v. Colwell, 1903, 113 Ill.App. 219.

45. Second Restatement of Torts, § 19.

46. See the discussion of consent, *infra*, § 18, and mistake, *infra*, § 17.

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with a subspecialty of portrait photography. [1925-30; SUB- + SPECIALTY]

sub-spe-cies (sub/spē/shez, sub spē/-), *n.*, *pl.* -cies. a subdivision of a species, esp. a geographical or ecological subdivision. [1690-1700; SUB- + SPECIES]

sub-spe-cif-ic (sub/spē sif'ik), *adj.* 1. of, pertaining to, or of the nature of a subspecies. 2. less than specific. [1865-70; SUB- + SPECIFIC] —**sub-spe-cif/i-cal-ly**, *adv.*

subst., 1. substantive. 2. substantively. 3. substitute.

sub-stage (sub/stāj/), *n.* the component part of a microscope below the stage, for supporting a condenser, mirror, or other accessories. [1855-60; SUB- + STAGE]

sub-stance (sub/stəns), *n.* 1. that of which a thing consists; physical matter or material form and substance. 2. a species of matter of definite chemical composition: a chalky substance. 3. See **controlled substance**. 4. the subject matter of thought, discourse, study, etc. 5. the actual matter of a thing, as opposed to the appearance or shadow; reality. 6. substantial or solid character or quality: claims lacking in substance. 7. consistency; body: soup without much substance. 8. the meaning or gist, as of speech or writing. 9. something that has separate or independent existence. 10. *Philos.* a. something that exists by itself and in which accidents or attributes inhere; that which receives modifications and is not itself a mode; something that is causally active; something that is more than an event. b. the essential part of a thing; essence. c. a thing considered as a continuing whole. 11. possessions, means, or wealth: to squander one's substance. 12. *Ling.* the articulatory or acoustic reality or the perceptual manifestation of a word or other construction (distinguished from form). 13. a standard of weights for paper. 14. **in substance**, a. concerning the essentials; substantially. b. actually; really: That is in substance how it appeared to me. [1250-1300; ME < L *substantia* substance, essence (lit., that which stands under, i.e., underlies), equiv. to sub- SUB- + -stant- (s. of stāns, prp. of stāre to STAND) + -ia -IA (see -ANCE)] —**sub/stance-less**, *adj.*

—**Syn.** 1. See **matter**. 4. theme, subject. 4, 5, 8. essence. 8. significance, import, pith.

sub/stance abuse, long-term, pathological use of alcohol or drugs, characterized by daily intoxication, inability to reduce consumption, and impairment in social or occupational functioning; broadly, alcohol or drug addiction.

substance P, a small peptide released upon stimulation in the nervous system and involved in regulation of the pain threshold. [earlier standard preparation P (1931); the initial is unexplained by the substance's discoverers]

sub-stand-ard (sub stan'dərd), *adj.* 1. below standard or less than adequate: substandard housing conditions. 2. not true or pertaining to a dialect or variety of a

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ing, *adj.*
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of a circus, representing scenes and events from the early history of the western U.S. and displaying feats of marksmanship, horseback riding, rope twirling, and the like. (1880-85)

wild-wood (wīld'wud), *n.* a wood growing in the wild or natural state; forest. [bef. 1150; ME *wilde wode*, OE *wilde wudu*. See *wild*, *wood*]

wild-yam (wīld'yam), *n.* any of several uncultivated yams, esp. *Dioscorea villosa*, of the U.S., having a woody, tuberous root. (1835-45)

wile (wīl), *v.* *n.* *wiled, wiling.* —*v.* 1. *n.* a trick, artifice, or stratagem meant to fool, trap, or entice; device. 2. *wiles, artful or beguiling behavior.* 3. *deceitful cunning; trickery.* —*adj.* 4. *to beguile, entice, or lure (usually fol. by away, from, into, etc.).* The mouse wiled him from his lair. 5. *wile away*, to spend or pass time, esp. in a leisurely or pleasurable fashion; to wile away the long ON wile artifice, earlier *wilt-*. —*Syn.* 1. 2. *deception, contrivance, maneuver.* See *trick*. 3. *chicanery, fraud.*

Wilfred (wīl'frīd), *n.* a male given name from Old English words meaning "will" and "peace." Also, *Wilfrid*.

wil-ful (wīl'fūl), *adj.* wilful. —*wil'fully, adv.* —*wil'fulness, *n.**

Wilhelm (wīl'helm; Gcr. wīl'helm), *n.* a male given name. German form of William.

Wilhelm I. See William I (def. 3).

Wilhelm II. See William II (def. 2).

Wilhelmina (wīl'hel'mīnə), *n.* 1. Mount, former name of Wilkes. 2. A female given name derived from William.

Wilhelmina I. (wīl'hel'mīnə poul'z), *n.* Marie of Orange-Nassau, 1850-1962, queen of the Netherlands 1890-1948 (mother of Juliana).

Wilhelm Meis-ter (wīl'helm mī'stər), *n.* a novel (1795-1829) by Goethe.

Wilhelms-haven (wīl'helms hā'fən), *n.* a seaport in NW Germany, on the North Sea, 102,800.

Wilhelmstrasse (wīl'helms'ʃtra'se), *n.* 1. a street in Berlin, Germany, location of the German foreign office and other government buildings until 1948. 2. (formerly) the foreign office and policies of the German government.

Wilkes (wīl'kəs), *n.* 1. Charles, 1797-1877, U.S. rear admiral and explorer. 2. John, 1797-97, English political leader and journalist.

Wilkes-Barre (wīl'kəs bār'ē, bār'ē), *n.* a city in E Pennsylvania, on the Susquehanna River, 51,551.

Wilkes' Land, *n.* a coastal region of Antarctica, S of Australia.

Wilkins (wīl'kīnz), *n.* 1. Sir George Hubert, 1858-1958, Australian Antarctic explorer, aviator, and aerial navigator. 2. Mary Eleanor, see Freeman, Mary Eleanor. 3. Maurice Hugh Frederick, Nobel prize for medicine 1962. 4. Roy, 1901-81, U.S. journalist and civil rights leader; executive secretary of the NAACP, 1953-77.

Wilkinsburg (wīl'kīnz bŭrg'), *n.* a borough in SW Pennsylvania, near Pittsburgh, 23,663.

Wilkinson (wīl'kīn'sən), *n.* 1. Geoffrey, born 1921, British chemist; Nobel prize 1957. 2. James, 1757-1825, U.S. military officer, politician, and adventurer.

will (wīl), *auxiliary v.* and *v.* *pres. sing.* 1st pers. *will*, 2nd *will* or (*archaic*) *wilt*, 3rd *will*, *pres. pl.* *will*; *past sing.* 1st pers. *would*, 2nd *would* or (*archaic*) *wouldst*, 3rd *would*, *past pl.* *would*; *past part.* (*Obs.*) *would* or *would*; *imperative, infinitive, and pres. participle lacking.* —*auxiliary verb.* 1. *am* (is, are, etc.) about or going to: I will be there tomorrow. She will see you at dinner. 2. *am* (is, are, etc.) disposed or willing to: People will do right. 3. *am* (is, are, etc.) expected or required to: You will report to the principal at once. 4. *may* be expected or supposed to: You will not have forgotten him. This will be right. 5. *am* (is, are, etc.) determined or sure to (used emphatically): You would do it. People will tell. 6. *am* (is, are, etc.) accustomed to, or do usually or often: You will see her sitting there. He would write for hours at a time. 7. *am* (is, are, etc.) habitually disposed or inclined to: Boys will be boys. After dinner they would read aloud. 8. *am* (is, are, etc.) capable of: Can this tree will live without water for three months? 9. *am* (is, are, etc.) going to: I will bid you "Good night." —*aux.* 1. *to wish, desire, like; to go where you will.* Ask of you will, who the owner is. [bef. 900; ME *willen*, OE *wilian*; c. D *willen*; G *wollen*; ON *willa*; Goth *wiljan*; akin to L *velle* to wish] —*Usage.* See *shall*.

will' (wīl'), *n.* *n.* *willed, willing.* —*n.* 1. the faculty of conscious and especially of deliberate action; the power of control the mind has over its own actions: the freedom of the will. 2. power of choosing the's own actions: to have a strong or a weak will. 3. the act or process of using or asserting one's choice; volition: My hands are obedient to my will. 4. wish or desire: to submit against one's will. 5. purpose or determination, often hearty or stubborn determination: willingness to have the will to succeed. 6. the wish or purpose as carried out or to be carried out: to work one's will. 7. disposition, whether of a person's wishes as to the disposition of his or her property or estate after death, usually written and signed by the testator and attested by witnesses. 8. the document containing such a declaration. 9. at will, a. at one's discretion or pleasure; as one desires to wander at will through the countryside. b. at one's disposal or command. —*vt.* 10. to decide, bring about, or attempt to effect or bring about by an act of the will: He can walk if he wills it. 11. to purpose, determine on, or elect, by an act of will: If he wills success, he can find it. 12. to give or dispose of (property) by a will or testament; bequeath or devise. 13. to influence by exerting his

power. She was willed to walk the tightrope by the hypnotist. —*vt.* 14. to exercise the will to will is not enough, one must do. 15. to decide or determine: Others debate but the king wills. [bef. 900; c. ME *wille*, OE *willa*; c. D *wille*, G *Wille*, ON *willa*, Goth *willa*; (v.) ME *willen*, OE *willa*; to wish, desire, deriv. of the *ut* skin —*Syn.* 3. *choice*. 4. *pleasure, disposition, inclination*. 5. *resolution, decision*. Will's various refer to conscious choice as to action or thought. Will denotes fixed and a way. Voluntas is the power of forming an intention or the incentive for using the will to exercise one's volition in making a decision. 10. *determine*. 12. *leave*.

Will (wīl), *n.* a male given name, form of William.

Will-a (wīl'ə), *n.* a female given name, form of Wilhelmina.

will-a-ble (wīl'ə bəl), *adj.* capable of being willed or fixed by will. (1400-50; late ME; see *will*, *-able*).

Will-aert (wīl'ārt, wīl'ə), *n.* Adrian (ā'driən, ʔ'dri-ən'), c.1480-1562, Flemish composer.

Willamette (wīl'jə-mēt), *n.* a river flowing N through NW Oregon into the Columbia River at Portland, ab. 290 mi. (465 km) long.

Willard (wīl'pərd), *n.* 1. Emma (Hart), 1787-1870, U.S. educator and poet. 2. Frances Elizabeth Caroling, 1839-98, U.S. educator, reformer, and author. 3. Jess, 1883-1965, U.S. boxer world heavyweight champion 1915-19. 4. a male given name from Germanic words meaning "hardy" and "will."

will-call (wīl'kɔl), *adj.* wīl'kɔl', *n.* 1. an item of merchandise that is reserved for a customer, who takes possession of it when payments have been completed. 2. a department in a store where such merchandise is held. 3. See *layaway plan*. —*adj.* 4. of or pertaining to merchandise held in will-call or on the layaway plan.

will' con-test, legal proceedings to contest the authenticity or validity of a will.

willed (wīld), *adj.* having a will (usually used in combination): strong-willed; weak-willed. (1350-1400; ME; see *will*, *-ed*)

Willam I (wīl'am; Du. wīl'om). See William I (def. 2).

will-em-ite (wīl'əm'īt), *n.* a mineral, a zinc silicate, Zn₂SiO₄, sometimes containing manganese, occurring in prismatic crystals or granular masses, usually greenish, sometimes white, brown, or red; a minor ore of zinc. (1835-45; named after King William I; see *-ite*)

Willenstad (wīl'əm'stād'), *n.* a seaport on the island of Curaçao, in the S West Indies; capital of the Netherlands Antilles, 152,000.

Willen-dorf (wīl'əm'dɔrf'), *n.* a village in NE Austria, near Krems; site of an Avarian settlement where a 4½ in. (11 cm) limestone statuette (*Venus of Willendorf*) was found.

Willen-don (wīl'əm'dɔn), *n.* a former borough, now part of Brent, in SE England, near London.

will-et (wīl'it), *n.* pl. *et-tes*, (esp. collectively) *et-tes*, a large, eastern North American shorebird, *Catoptrophorus semipalmatus*, having a striking black and white wing pattern. (1700-10, Amer.; short for *will-et-will-et*, conventional hint of its cry)

will-ey (wīl'ē), *n.* *pl.* *will-ies*.

will-ful (wīl'fūl), *adj.* 1. deliberate, voluntary, or intentional: The coroner ruled the death will-ful murder. 2. unreasonably stubborn or headstrong: self-willed. Also, *wilful*. (1150-1200, ME; OE *wilful* *willig*. See *will*, *-ful*.) —*wil'fully, adv.* —*wil'fulness, *n.**

—*Syn.* 1. *volitional*. 2. *intransigent, contrary, refractory, pigheaded, inflexible, adamant, adamant*. *Will-ful*, *HEADSTRONG, PERSEVERE, WAYWARD* refer to one who stubbornly insists upon doing as he or she pleases. *Will-ful* suggests a stubborn persistence in doing what one wishes, esp. in opposition to those whose wishes or commands ought to be respected or obeyed: that will-ful child who disregarded his parents' advice. One who is *HEADSTRONG* is often foolishly, and sometimes violently, self-willed: *reckless and headstrong youth*. The *PERSEVERE* person is unreasonably or obstinately intractable or contrary, often with the express intention of being disagreeable: *perverse but of sheer spite*. *Wayward* in this sense has the connotation of rash wheedledness that gets one into trouble: *a reform school for wayward girls*. —*Ant.* 2. *obedient, tractable*.

William (wīl'yam), *n.* 1. a word formerly used in communications to represent the letter W. 2. a male given name from Germanic words meaning "will" and "helmet."

William I. 1. ("the Conqueror") 1027-87, duke of Normandy 1035-87; king of England 1066-87 (son of Robert I, duke of Normandy). 2. Also, *William I.* (William I of Orange) ("the Silent") 1533-84, Dutch leader, statesman, and revolutionary leader born in Germany; prince of Orange 1544-84; count of Nassau 1569-84; 1st stadtholder of the United Provinces of the Netherlands 1578-84. 3. Also, *Wilhelm I.* (Wilhelm Friedrich Ludwig) 1797-1860, King of Prussia 1861-88; emperor of Germany 1871-88 (brother of Frederike William IV).

William II. 1. (William Rufus) ("the Red") 1067-1100, King of England 1087-1100 (son of William I, duke of Normandy). 2. Also, *Wilhelm II.* (Frederik Wilhelm Viktor Albert) 1859-1941, King of Prussia and emperor of Germany 1888-1918.

William III. (William III of Orange) 1650-1702, stadtholder of the United Provinces of the Netherlands 1672-1702; king of England 1689-1702, joint ruler with his wife, Mary II.

William IV. ("the Sailor-King") 1765-1837, king of Great Britain and Ireland 1830-37 (brother of George IV).

William of Malmesbury (mālm'sber'ē, -bā rē-brē), c.1090-1143?, English historian.

Williams (wīl'yamz), *n.* 1. Ben Ames (Amz), 1869-

1953, U.S. novelist and short-story writer. 2. Bert (Egbert Austin Williams), 1876-1922, U.S. comedian and songwriter. 3. Betty (Gmyth) (Smith), born 1943, Northern Irish peace activist; Nobel peace prize 1976. 4. Daniel Hale, 1858-1931, U.S. surgeon and educator; performed first successful heart surgery 1893. 5. Emlyn Men-nen (men'an), born 1911, U.S. politician and diplomat. 7. Hank, 1923-53, U.S. country and western singer, musician, and composer. 8. Ralph Vaughan, See Vaughan Williams, Ralph. 9. Roger, 1803-83, English clergyman in America; founder of Rhode Island colony 1838. 10. Tommaso (Thomas Lanier Williams), 1914-83, U.S. dramatist. 11. Theodore Samuel (Ted), born 1918, U.S. baseball player. 12. William, 1731-1811, U.S. merchant and revolutionary statesman. 13. William Carlos (Car-los), 1893-1968, U.S. poet and novelist.

Williams-burg (wīl'yəmz bŭrg'), *n.* a city in SE Virginia; colonial capital of Virginia; now restored to its original pre-Revolutionary style, 9870.

Williams-port (wīl'yəmz pɔrt', -pɔrt'), *n.* a city in central Pennsylvania, on the Susquehanna River, 33,401.

William Tell, a legendary Swiss patriot forced by the Austrian governor to shoot an apple off his son's head with bow and arrow, German, *Wilhelm Tell*.

William the Conqueror. See William I (def. 1).

Willie (wīl'ē), *n.* 1. a male given name, form of William. 2. a female given name.

will-ies (wīl'ēz), *n.* (used with a plural v.) Informal, nervousness or fright; fidgets; creeps (usually prec. by *the*): That horror movie gave me the willies. (1895-1900, Amer.; orig. obscure; cf. *-ies*)

Willi-man-ick (wīl'ə mən'ik), *n.* a city in NE Connecticut, 14,652.

willing (wīl'ing), *adj.* 1. disposed or consenting; inclined; willing to go along. 2. cheerfully consenting or ready: a willing worker. 3. done, given, borne, used, etc., with cheerful readiness. (1250-1300, ME; see *will*, *-ing*) —*wil'ingly, adv.* —*wil'lingness, *n.** —*Syn.* 1. *mindful*.

Will-ing-don (wīl'ing dɔn), *n.* Freeman Free-man-Thom-as (frē'mən tom'əs), 1st Marquis of, 1801-1941, British colonial official; governor general of Canada 1925-31; viceroy and governor general of India 1931-36.

Will-is (wīl'is), *n.* a male given name, form of William.

Willis-ton (wīl'is tən), *n.* a city in NW North Dakota, on the Missouri River, 13,336.

Will-waw (wīl'ə wə'), *n.* a violent squall that blows in near-polar latitudes, as in the Strait of Magellan, Alaska, and the Aleutian Islands. (1835-45; orig. uncert.)

Will-kie (wīl'kē), *n.* Wendell Lewis, 1862-1944, U.S. executive, lawyer, and political leader.

will-less (wīl'lis), *adj.* 1. having set exerting no will: a timid, will-less little man. 2. done or occurring without the will; involuntary: a will-less compliance. 3. lacking no will; intemperate: to die will-less. (1740-50) —*wil'lessly, adv.* —*wil'lessness, *n.**

Will-mar-City (wīl'mār, -mər), *n.* a city in SW Minnesota, 15,885.

will-o-the-wisp (wīl'ə wīsp'), *n.* 1. See *Ignis fatuus* (def. 1). 2. anything that eludes or misleads by luring on. (1600-10; orig. *Will-o-the-Wisp*, with the *isp*; see *wisp*). —*wil'o-the-wisp'ish, *adj.** —*wil'o-the-wisp'y, *adj.**

Will-lough-by (wīl'ə ləb'), *n.* 1. a city in NE Ohio, near Cleveland, 19,329. 2. a male given name.

willow (wīl'ə), *n.* 1. any tree or shrub of the genus *Salix*, characterized by narrow, lance-shaped leaves and dense catkins bearing small flowers, many species having tough, pliable twigs or branches used for wickerwork, etc. Cf. *willow family*. 2. the wood of any of these trees. 3. Informal, something, esp. a cricket bat, made of willow wood. 4. Also called *willowher*, *will-y*, a machine consisting essentially of a cylinder armed with spikes revolving within a spiked casing, for opening and cleaning cotton or other fiber. —*adj.* 5. to treat (textile fibers) with a willow. [bef. 900; ME *willow*, var. of *willige*, OE *wiliga*, c. OS *wiliga*, D *wilig*, LG *wiliga*] —*wil'low-like, *adj.** —*wil'lowish, *adj.**

Willow-brook (wīl'ə brōk'), *n.* a city in SW California, 30,845.

willow-er (wīl'ə ər), *n.* 1. a person or a thing that willows. 2. willow (def. 4). (1880-85; after *willow*; see *willow*, *-er*)

willow family, the plant family Salicaceae, characterized by deciduous trees and shrubs having simple, alternate leaves, hairy catkins of male and female flowers on separate plants, and capular fruit, including the aspen, cottonwood, poplar, and willow.

willow fly-catcher. See under *alder flycatcher*.

willow herb, any of numerous plants belonging to the genus *Spilobolus*, of the evening primrose family, having terminal clusters of purple or white flowers. Cf. *fireweed*. (1570-80)

Will-o-wick (wīl'ə wīk), *n.* a city in NE Ohio, near Cleveland, 17,834.

willow-leaved jessamine (wīl'ə lēv'd), *n.* a Chilean shrub, *Centrum parqui*, of the nightshade family, having willowlike leaves and clusters of whitish or yellowish flowers that are very fragrant at night.

willow oak, an oak, *Quercus phellos*, of the south-western U.S.; having entire, narrow leaves, yielding a

CONCISE PRONUNCIATION KEY: act, cap, fair, part, set, equal; if, ice, or, deer, brother, oil, book, boot; out, up, large, child; ang, show; thin, that; th as in treasure; o as in about; e as in system; i as in easily; o as in gather; u as in circus; ' as in fire (fīr), hour (hŭr), and h as in serve; s as in possible; n as in crane (krān), and button (bŭt'n). See the full key inside the front cover.

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wil-lem-ite (wil'ə mit'), *n.* a mineral, a zinc silicate, Zn_2SiO_4 , sometimes containing manganese, occurring in prismatic crystals or granular masses, usually greenish, sometimes white, brown, or red: a minor ore of zinc. [1835-45; named after King WILLEM I; see -ITE']

Wil-lem-stad (vil'am stät'), *n.* a seaport on the island of Curaçao, in the S West Indies: capital of the Netherlands Antilles. 152,000.

Wil-len-dorf (vil'an dôrf'), *n.* a village in NE Austria, near Krems: site of an Aurignacian settlement where a 4½ in. (11 cm) limestone statuette (**Venus of Willendorf**) was found.

Willes-den (wilz'dən), *n.* a former borough, now part of Brent, in SE England, near London.

wil-let (wil'it), *n.*, *pl.* **-lets**, (*esp. collectively*) **-let**. a large, eastern North American shorebird, *Catoptrophorus semipalmatus*, having a striking black and white wing pattern. [1700-10, Amer.; short for *pill-will-willet*, conventional imit. of its cry]

wil-ley (wil'e), *n.*, *v.t.* willy.

will-ful (wil'fəl), *adj.* 1. deliberate, voluntary, or intentional: *The coroner ruled the death willful murder.* 2. unreasonably stubborn or headstrong; self-willed. Also, **wilful**. [1150-1200; ME; OE *wilful* willing. See WILL², -FUL] —**wil/ful-ly**, *adv.* —**wil/ful-ness**, *n.*

—**Syn.** 1. volitional. 2. intransigent; contrary, refractory, pigheaded, inflexible, obdurate, adamant. WILLFUL, HEADSTRONG, PERVERSE, WAYWARD refer to one who stubbornly insists upon doing as he or she pleases. WILLFUL suggests a stubborn persistence in doing what one wishes, esp. in opposition to those whose wishes or commands ought to be respected or obeyed: *that willful child who disregarded his parents' advice.* One who is HEADSTRONG is often foolishly, and sometimes violently, self-willed: *reckless and headstrong youths.* The PERVERSE person is unreasonably or obstinately intractable or contrary, often with the express intention of being disagreeable: *perverse out of sheer spite.* WAYWARD in this sense has the connotation of rash wrongheadedness that gets one into trouble: *a reform school for wayward girls.* —**Ant.** 2. obedient, tractable.

Wil-liam (wil'yəm), *n.* 1. a word formerly used in communications to represent the letter W. 2. a male given name: from Germanic words meaning "will" and "helmet."

William I, 1. ("the Conqueror") 1027-87, duke of Normandy 1035-87; king of England 1066-87 (son of Robert I, duke of Normandy). 2. Also, **Willem I**. (*William I of Orange*) ("the Silent") 1533-84, Dutch leader, statesman, and revolutionary leader born in Germany: prince of Orange 1544-84; count of Nassau 1559-84; 1st stadholder of the United Provinces of the Netherlands 1578-84. 3. Also, **Wilhelm I**. (*Wilhelm Friedrich Ludwig*) 1797-1888, King of Prussia 1861-88; emperor of Germany 1871-88 (brother of Frederick William IV).

William II, 1. (*William Rufus*) ("the Red") 1056?-1100,

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