Supreme Court of Washington, Department 2.
Ruth GARRATT, Appellant,
v.
Brian DAILEY, a Minor, by George S. Dalley, his Guardian ad Litem, Respondent.

No. 32841.
Feb. 14, 1955.
Rehearing Denied May 3, 1955.

Action against five year old boy for injuries sustained when boy allegedly pulled chair from under plaintiff when she started to sit down. The Superior Court, Pierce County, Frank Hale, J., dismissed action, and plaintiff appealed. The Supreme Court, Hill, J., held that, where trial court had accepted boy's statement that he had moved chair and seated himself therein, but when he discovered that plaintiff was about to sit at place where chair had been, attempted to move chair toward plaintiff, and was unable to get it under plaintiff in time, case would be remanded to obtain finding whether boy, when he moved chair, knew, with substantial certainty, that plaintiff would attempt to sit down where chair had been.

Remanded for clarification.

West Headnotes

[1] Infants 211 ⇐98

211 Infants
211VII Actions
211k97 Evidence
211k98 k. In General. Most Cited Cases

In action against five year old boy for injuries sustained when boy allegedly pulled chair from under plaintiff when she started to sit down, evidence was sufficient to sustain trial court's finding that boy was a visitor and not a trespasser at time he moved chair.

[2] Assault and Battery 37 ⇐2

37 Assault and Battery
37I Civil Liability
37I(A) Acts Constituting Assault or Battery and Liability Therefor
37k1 Nature and Elements of Assault and Battery
37k2 k. In General. Most Cited Cases

Generally, a "battery" is the intentional infliction of a harmful bodily contact upon another.

[3] Assault and Battery 37 ⇐2

37 Assault and Battery
37I Civil Liability
37I(A) Acts Constituting Assault or Battery and Liability Therefor
37k1 Nature and Elements of Assault and Battery
37k2 k. In General. Most Cited Cases

Act which is legal cause of harmful contact with another's person makes actor liable if actor intended to bring about harmful or offensive contact or apprehension thereof, provided contact was not consented to . . . .

***198 **1092** Kennett, McCutcheon & Soderland, Seattle, James P. Healy, Tacoma, for appellant.

Frederick J. Orth, Rode, Cook, Watkins & Orth, Seattle, for respondent.

HILL, Justice.

The liability of an infant for an alleged battery is presented to this court for the first time. Brian ***199** Dailey (age five years, nine months) was visiting with Naomi Garratt, an adult and a sister of the plaintiff, Ruth Garratt, likewise an adult, in the back yard of the plaintiff's home, on July 16, 1951. The plaintiff's [version of the events was] that she came out into the back yard to talk with Naomi and that, as she started to sit down in a wood and canvas lawn chair, Brian deliberately pulled it out from under her. . . . . [But] Brian Dailey's version of what happened [was adopted by the court when it] made the following findings:

"III. * * * While Naomi Garratt and Brian Dailey were in the back yard the plaintiff, Ruth Garratt, came out of her house into the back yard. Some time subsequent thereto defendant, Brian Dailey, picked up a lightly built wood and canvas lawn chair which was then and there located in the back yard of the above described premises, moved it sideways a few feet and seated himself [but at the same time]. . . he discovered the plaintiff, Ruth Garrat, [was] about to sit down at the place where the lawn chair had formerly been, at which time he hurriedly got up from the chair and attempted to move it toward Ruth Garratt to aid her in sitting down in the chair; that due to the defendant's small size and lack of dexterity he was unable to get the lawn chair under the plaintiff in time to prevent her from falling to the ground. That plaintiff fell to the ground and sustained a fracture of her hip, and other injuries and damages as hereinafter set forth.

'IV. That the preponderance of the evidence in this case establishes that when the defendant, Brian Dailey, moved the chair in question *he did not have any wilful or unlawful purpose* in doing so; that *he did not have any intent to injure the plaintiff, or any intent to bring about any unauthorized or offensive contact with her person* or any objects appurtenant thereto; that the circumstances which immediately preceded the fall of the plaintiff established that the defendant, *Brian Dailey, did not have purpose, intent or design to perform a prank or to effect an assault and battery upon the person of the plaintiff.*" (Italics ours, for a purpose hereinafter indicated.)

. . . . Plaintiff appeals from a judgment dismissing the action and asks for the entry of a judgment in that amount or a new trial.

The authorities generally, but with certain notable exceptions, . . ., state that when a minor has committed a tort with force he is liable to be proceeded against as any other person would be. (citations omitted).

In our analysis of the applicable law, we start with the basis premise that Brian, whether five or fifty-five, must have committed some wrongful act before he could be liable for appellant's injuries.

. . . .

[2][3] It is urged that Brian's action in moving the chair constituted a battery. A definition . . . . of a battery is the intentional infliction of a harmful bodily contact upon

another. The . . . . Restatement, Torts, 29, § 13, [defines battery as]:

'An act which, directly or indirectly, is the legal cause of a harmful contact with another's person makes the actor liable to the other, **if**

'(a) the act is done with the intention of bringing about a harmful or offensive contact or an apprehension thereof to the other or a third person, **and**

'(b) the contact is not consented to by the other or the ***201** other's consent thereto is procured by fraud or duress, **and**

'(c) the contact is not otherwise privileged.'

We have in this case no question of consent or privilege. We therefore proceed to an immediate consideration of intent and its place in the law of battery. . . . [T]he Restatement says:

"*Character of actor's intention.* In order that an act may be done with the intention of bringing about a harmful or offensive contact or an apprehension thereof to a particular person, either the other or a third person, the act must be done for the purpose of causing the contact or apprehension or with knowledge on the part of the actor that such contact or apprehension is substantially certain to be produced." . . . .

We have here the [voluntary] act of Brian, *i. e.*, the moving of a chair. Had the plaintiff proved to the satisfaction of the trial court that Brian moved the chair while she was in the act of sitting down, Brian's action would . . . [obviously] have been for the purpose or with the intent of causing the plaintiff's bodily contact with the ground, and she would be entitled to a judgment against him for the resulting damages. Vosburg v. Putney, 1891, 80 Wis. 523, 50 N.W. 403, 14 L.R.A. 226; Briese v. Maechtle, supra.

The plaintiff based her case on that theory, and the trial court held that she failed in her proof and accepted Brian's version of the facts rather than that given by the eyewitness who testified for the plaintiff. After the trial court determined that the plaintiff had not established her theory of a battery (*i. e.*, that Brian had pulled the chair out from under the plaintiff while she was in the act of sitting down), it then became concerned with whether a battery was established under the facts as it found them to be.

In this connection, we quote another portion of the comment on the "Character of actor's intention," relating to clause (a) of the rule from the Restatement heretofore set forth:

"It is not enough that the act itself is intentionally done . . . . ****1094** [even if] the actor realizes or should realize ***202** that [the act] contains a very grave risk of bringing about the contact . . . . Such realization may make the actor's conduct negligent or even reckless but unless he realizes that to a substantial certainty, the . . . will result, the actor [does not have] that intention which is necessary to make him liable under the rule stated in this section."

A battery would be established if, in addition to plaintiff's fall, it was proved that, when Brian moved the chair, he knew with substantial certainty that the plaintiff would attempt to sit down where the chair had been. If Brian had any of the intents which the trial court found, in the italicized portions of the findings of fact quoted above,

that he did not have, he would of course have had the knowledge to which we have referred. The mere absence of any intent to injure the plaintiff or to play a prank on her or to embarrass her, or to commit an assault and battery on her would not absolve him from liability if in fact he had such knowledge. . . . . Without such knowledge, there would be nothing wrongful about Brian's act in moving the chair and, [without a] wrongful act, there would be no liability.

[4] While a finding that Brian had no such knowledge can be inferred from the findings made, we believe that before the plaintiff's action in such a case should be dismissed there should be no question but that the trial court had [decided] that issue; hence, the case should be remanded for clarification of the findings to specifically cover the question of Brian's knowledge, because intent could be inferred therefrom. If the court finds that he had such knowledge, [then] the necessary intent will be established and the plaintiff will be entitled to recover, even though there was no [intent] to injure . . . the plaintiff. Vosburg v. Putney. If Brian did not have such knowledge, there was no wrongful act by him and the basic premise of liability on the theory of a battery was not established.

. . . .

It is clear to us that there was no change in theory so far as the plaintiff's case was concerned. The trial court consistently from beginning to end recognized that if the plaintiff proved what she alleged and her eyewitness testified, namely, that Brian pulled the chair out from under the plaintiff while she was in the act of sitting down and she fell to the ground in consequence thereof, a battery was established. Had she proved that state of facts, [battery would have been found]. . . . But what must be recognized is that the trial court was trying in those comments and in the italicized findings to express the law applicable, not to the facts as the plaintiff contended they were, but to the facts as the trial court found them to be. The remand for clarification gives the plaintiff an opportunity to secure a judgment even though the trial court did not accept her version of the facts, if from all ****1095** the evidence, the trial court can find that Brian knew with substantial***204** certainty that the plaintiff intended to sit down where the chair had been before he moved it, . . . without reference to [his] motivation.

. . . .

The [case] is remanded for clarification, with instructions to make definite findings on the issue of whether Brian Dailey knew with substantial certainty that the plaintiff would attempt to sit down where the chair which he moved had been, and to change the judgment if the findings warrant it.

Remanded for clarification.

SCHWELLENBACH, DONWORTH, and WEAVER, JJ., concur.

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