of "malice" or wanton misconduct. *See Carpentier v. Tuthill*, 86 A.3d 1006 (Vt. 2013).

B. TAKING A CLOSER LOOK AT "INTENT"

GARRATT V. DAILEY

279 P.2d 1091 (Wash. 1955)

HILL, JUSTICE. . . .

Brian 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. It is plaintiff's contention 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. The only one of the three persons present so testifying was Naomi Garratt. (Ruth Garratt, the plaintiff, did not testify as to how or why she fell.)

The trial court, unwilling to accept this testimony, adopted instead Brian Dailey's version of what happened, [concluding that Brian moved the chair without the purpose to affect the plaintiff, but rather to sit in it himself, and that when he saw the plaintiff about to sit where the chair had been, he tried unsuccessfully to move it back. Consequently, he had no purpose to cause contact.]

It is conceded that Ruth Garratt's fall resulted in a fractured hip and other painful and serious injuries. To obviate the necessity of a retrial in the event this court determines that she was entitled to a judgment against Brian Dailey, the amount of her damage was found to be $11,000. 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.

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

It is urged that Brian's action in moving the chair constituted a battery. . . . 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, there being no wrongful act, there would be no liability.

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 passed upon that issue; hence, the case should be remanded for clarifications 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 the necessary intent will be established and the plaintiff will be entitled to recover, even though there was no purpose to injure or embarrass the plaintiff. 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 will be noted that the law of battery as we have discussed it is the law applicable to adults, and no significance has been attached to the fact that Brian was a child less than six years of age when the alleged battery occurred. The only circumstance where Brian's age is of any consequence is in determining what he knew, and there his experience, capacity, and understanding are of course material. . . .

The cause 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. . . .

NOTES

1. **Subsequent history of the case.** On remand, the trial court found that the plaintiff was in the act of sitting down when Brian moved the chair, and that Brian knew this. On the basis of the substantial certainty test, the judge found for the plaintiff. This was affirmed on the second appeal, *Garratt v. Dailey*, 304 P.2d 681 (Wash. 1956).

2. **Defining intent.** What is the definition of intent accepted by the *Garratt* court? Imagine that defendant hates the plaintiff, sees him at a distance and hurls a stone, hoping to hit the plaintiff but believing that success is extremely unlikely. The stone does in fact hit the plaintiff, however. Is this a battery? Is the intent involved the same intent on which Brian Dailey was held liable? The Restatement Third of Torts defines intent to produce a consequence as either a "purpose of producing that consequence" or "knowing that the consequence is substantially certain to result." RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 1 (2010).