

Please review and consider in preparation for class.

Assignment Memorandum

**TO:** Law Clerk  
**FROM:** Partner  
**Date:** August 12, 2019  
**Re:** Bob Smith/Dr. Charles Levi – Tortious Battery Case

Bob Smith has retained our firm as a result of a wrongful amputation of his leg by Dr. Charles Levi at Take Care Memorial Hospital.

About 12 hours after eating dinner on July 1, 2019, Mr. Smith suffered extreme abdominal pain and cramping. His wife, Ann Smith, rushed him to the emergency room of Take Care Memorial Hospital.

At Take Care Memorial, Mr. Smith was triaged and admitted for observation. Due to the severity of his condition, his physician at the time, Dr. Preston Brown, recommended an overnight stay at the hospital for more tests the next day. Apparently, Dr. Brown determined that Mr. Smith was suffering from food poisoning. Mr. Smith agreed to Dr. Brown's recommendation.

Tim Troll was the attending nurse and coincidentally, was Mr. Smith's high school classmate. Mr. Smith and his wife, however, did not recognize Nurse Troll.

Throughout high school, Nurse Troll was jealous of Mr. Smith and thought it would be funny to play a trick on his "old friend". Therefore, Nurse Troll changed Mr. Smith's medical record to read amputation of his right leg instead of treatment for food poisoning. Nurse Troll, however, only planned to allow the physician to prepare Mr. Smith for amputation and cause him great fear. Nurse Troll also planned to stop the procedure before anything happened to Mr. Smith's leg.

The next day, since Mr. Smith's medical record indicated amputation of his right leg, he was moved to the surgical unit of the hospital. Neither Dr. Brown nor Nurse Troll was aware that Mr. Smith had been moved to the surgical unit. Dr. Charles Levi, the surgeon on duty - saw Mr. Smith, read his medical record, and instructed another nurse to prepare Mr. Smith for amputation. After Mr. Smith heard this instruction, he screamed "NO" and tried to push the nurse away while she was quickly approaching him. The nurse held him down so that Dr. Levi could sedate him for the procedure. Because the nurse held Mr. Smith down, he had no way to get away from Dr. Levi or the nurse. Dr. Levi carried out the amputation of Mr. Smith's right leg. After hearing that her husband's leg had been amputated, Mrs. Smith charged at Dr. Levi with her purse and hit him several times on his head. Dr. Levi suffered a few bruises from the attack.

As a result of the amputation, Mr. Smith is now confined to a wheelchair and wants to know if he has a viable cause of action against Dr. Levi for his injury. We would like to send Mr. Smith a response via a client letter. I need your assistance with analyzing Mr. Smith's case with regard to the issue of battery. Other law clerks and attorneys are working on the various other legal issues in his case.

Using these facts and the provided case excerpt from Garratt v. Dailey on the next page, answer the questions that follow. Your answers will be incorporated into a legal memorandum (*a legal memo*) that you will complete at a later date and also at a later date, your responses to some of these questions may be included within a trial brief (*a legal brief*) should the firm decide to pursue litigation.

Thank you.

**Excerpt from Garratt v. Dailey, 279 P.2d 1091 (Wash. 1955)**

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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, and made the following findings:

III. \* \* \* that 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 therein, at which time he discovered the plaintiff, Ruth Garratt, 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.*

It is conceded that Ruth Garratt's fall resulted in a fractured hip and other painful and serious injuries.

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A definition (*not all-inclusive but sufficient for our purpose*) of a battery is the intentional infliction of a harmful bodily contact upon another. The rule that determines liability for battery is given in 1 Restatement, Torts, 29, § 13, 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 other's consent thereto is procured by fraud or duress, and

(c) the contact is not otherwise privileged.'

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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. In the comment on clause (a), the 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.' \*\*\* 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. \*\*\* 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. \*\*\*

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. \*\*\*

From what has been said, it is clear that we find no merit in plaintiff's contention that we can direct the entry of a judgment for \$11,000 in her favor on the record now before us. Nor do we find any error in the record that warrants a new trial. \*\*\*

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.

Costs on this appeal will abide the ultimate decision of the superior court. If a judgment is entered for the plaintiff, Ruth Garratt, appellant here, she shall be entitled to her costs on this appeal. If, however, the judgment of dismissal remains unchanged, the respondent will be entitled to recover his costs on this appeal.

Remanded for clarification.

*Questions to Consider for Drafting the Legal Memorandum*

- 1) Regarding our client, Mr. Smith, what legal issue will need to be analyzed?
- 2) Do you think Garratt v. Dailey will be helpful for analyzing Mr. Smith's problem? Why or why not?
- 3) In order to analyze Mr. Smith's legal issue, you first need to synthesize Garratt v. Dailey. How would you go about synthesizing Garratt v. Dailey?
- 4) Regarding Garratt v. Dailey,
  - a. What are the relevant facts from the case?
  - b. What legal issue did the court consider?
  - c. How did the court rule or what did it decide regarding the legal issue?
  - d. What reasons did the court provide for its decision?
  - e. What case facts are similar to Mr. Smith's situation?
  - f. What case facts are unlike Mr. Smith situation?
- 5) What are the strengths of Mr. Smith's case?
- 6) What are the weaknesses of Mr. Smith's Case?
- 7) Based on Garratt v. Dailey, do you think that Mr. Smith has a viable cause of action against Dr. Levi for battery? Why or why not?

*Questions to Consider for Drafting the Trial Brief*

- 1) Following from question #7 above, even if you determined that Mr. Smith does not have a viable cause of action against Dr. Levi for battery, what persuasive arguments could be made in his favor?
- 2) Considering your response in this section for question #1, what counter arguments, if any, could Dr. Levi make against Mr. Smith?
- 3) In your opinion, is Mrs. Smith's charging at Dr. Levi with her purse and hitting him several times on his head relevant and do these facts help or hurt your argument in favor of Mr. Smith? Why or why not?
- 4) In your opinion, is Nurse Troll's action of switching Mr. Smith's medical record relevant and does it help or hurt your argument in favor of Mr. Smith? Why or why not?
- 5) What additional information would you need to build a persuasive argument in favor of Mr. Smith?