CAMPUS ASSAULT SCENARIO: GENERAL ANALYSIS OF THE POSSIBLE CAUSES OF ACTION FOR ASSAULT & BATTERY, FALSE IMPRISONMENT AND THE INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

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Campus Assault Scenario
General Analysis of the Possible Causes of Action for Assault & Battery, False Imprisonment and the Intentional Infliction of Emotional Distress

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The instant scenario clearly raises possible causes of action for Assault, Battery, False Imprisonment, and the Intentional Infliction of Emotional Distress.[1] These causes of action will be discussed, seriatim, from the perspective of the victim. Following the outline of the victim's prima facie case, the affirmative defenses of consent and negligence will be raised and evaluated. The analysis will not cite a significant number of cases; instead, several carefully selected and popularly cited cases will be applied to the scenario to demonstrate alternative outcomes which are the product of differing interpretations of doctrine.

The victim's case for battery would likely be plead in bifurcated counts sounding in offensive battery and harmful battery. Though the elements of these tort theories are related, there are some important, distinct inquiries to be made in the analysis.

Harmful Battery

An actor is liable to a victim for harmful battery if "...he acts intending to cause a harmful or offensive contact with the victim...or an imminent apprehension of such a contact, and a harmful contact with the [victim] directly or indirectly results.[2] The dispositive elements of this tort appear to be the unconsented to intentional touching of the victim, and a resulting physical pain, injury or illness. Ghassemieh v. Schafer, 447 A.2d 84 (Md. App. 1982).

It is not necessary to the tort of harmful battery that the actor, here the boys, act with intent to injure, or with other malicious motive. The critical element in harmful battery is not a harmful intent on the part of the actor, but rather the absence of consent to the contact by the victim. Thus "...horseplay, pranks, or jokes can be a battery regardless of whether the intent

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[1] Initial capitalization is used to emphasize the terms used to describe the cause of action.

[2] See Restatement 2d TORTS, § 13 (American Law Institute Publishers, 1965), Vol. 1, Student Edition, p. 25 (Hereafter R.2d).

was to harm." See **Ghassemieh v. Schafer**; in accord, **Garratt v. Dailey**, 279 P.2d 1091 (Wash. 1955), aff'd 304 P.2d 681 (1956); and see **McDonald v. Ford**, 223 So.2d 553 (Fla. App. 1969).[3]

Garratt v. Dailey expands upon the definition of intent in a fact context which may be favorably compared to the instant scenario. In **Garratt**, a five year old boy (Dailey) pulled a lawn chair out from under the plaintiff (an adult) as she started to sit down. The plaintiff fell to the ground and was physically injured. On appeal from a bench finding for the defendant child, the appellate court cited section 13 of the Restatement of Torts and stated:

> "**Character of actor's intention**. In order that an act may be done with the intention of bringing about a harmful or offensive contact * * * to a particular person * * * the *act* must be done for the purpose of causing *the contact* * * * or with knowledge on the part of the actor that *such contact* * * * is substantially certain to be produced." (emphasis added)

Noting the minimum state of mind necessary for battery, the court explained (again from the Restatement) that, "...[it] is not enough that the act itself (the pulling away of the chair) is intentionally done, even though the actor realizes, or should realize that [such an act creates] 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 contact ... will result, the actor [lacks the requisite intent for battery]." Thus the court held, if it were proven that, at the time the Dailey child moved the chair, he knew with substantial certainty that the plaintiff would attempt to sit down where the chair had been, he would be subject to liability for battery.[4]

Recent cases expand upon the **Garratt** Court's holding that the element of intent requires purpose or substantial certainty only as to the fact of contact. In **White v. University of Idaho**, 797 P.2d 108 (Idaho,1990), the court held a piano instructor subject to liability for battery when he struck a student's back with his fingers, as she was seated at a piano, causing serious physical injury. Although the instructor's motive was merely to demonstrate the force with which he desired the student to strike the piano keys, his intentional contact was sufficient to impose liability on a theory of battery. The court specifically held that it was not necessary to battery that the instructor intend, or be substantially certain of the specific result of his actions. It was

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3 The gist of the action for battery is not the hostile intent of the defendant, but rather the absence of consent to the contact on the part of the plaintiff," citing Prosser, Law of Torts, 35 [3d Ed. 1964].

4 It is likely that the plaintiff claimed battery because a child of tender years was held at the time incapable of being negligent. Negligence law modifies the traditional "reasonable person standard" of behavior in the case of children, and holds the child to a standard of conduct which would be observed by a reasonable child of similar age, intelligence, and experience. On remand, judgement was entered in favor of plaintiff, and the State supreme court affirmed. 304 P.2d 681 (1956).

enough that he acted with a purpose to bring about the contact with the student's back; that the contact was without her consent; and that physical harm in fact resulted from the contact.

Reasoning by analogy, it would appear that the boys who picked Sophia Moore up and purposefully threw her into the fountain may be held subject to liability for battery. At most, it would appear that Sophia must prove that the boys were substantially certain when they threw her toward the fountain, that she would indeed come into contact with it or the ground. Under a **Garratt** or **White** analysis, it would not appear necessary that she prove that the boys were certain that she would hit the figure in the fountain; and White appears to clearly indicate that it is not necessary to battery that the boys were substantially certain that she would sustain a serious physical injury.

This conclusion is supported by the Restatement, section 16. There, it is stated that where an act is done with the intention of inflicting upon another an offensive contact (as contrasted with a harmful contact), and such act in fact causes physical injury, the actor is liable for harmful, as well as offensive battery. Thus, since Sophia can clearly show intent to throw her into the fountain (clearly inferred by the statements immediately prior to her being thrown), and since physical injury actually was caused by this act, a conclusion that there was intent to throw her into the fountain should support a claim for harmful battery. [5]

The certainty of this liability is however clouded by the decision of the Florida Supreme Court in **Spivey v. Battaglia**, 258 So.2d 815 (1972). In **Spivey**, the defendant and the plaintiff were employees of a fruit company. During a lunch hour, several employees, including plaintiff and defendant, were seated on a work table. Defendant, in an effort to tease plaintiff, whom he knew to be shy, intentionally put his arm around her and pulled her head toward him. Immediately upon experiencing this admittedly unsolicited (nonconsentual) "hug", plaintiff suffered a sharp pain in her neck and ear, and at the base of her skull, and became paralyzed on the left side of her face and mouth.

Plaintiff sued defendant for damages, and defendant admitted that he was guilty of battery, but sought dismissal of the civil action on the grounds that the statute of limitations for battery had run.[6] The trial court granted summary judgement for the defendant on this basis,

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[5] See R.2d TORTS, § 16. It is not necessary that the actor intend to bring about the harmful contact which results from his act. It is enough that he intends to bring about an offensive contact and that bodily harm results as a legal consequence from such offensive contact. By way of illustration, **Comment a** to § 16 (1) indicates:

Where a golfer aims a blow at his caddie with a golf club, intending to frighten him, but not injure him at all, swings the club, and where the club head comes loose and strikes the caddie causing physical injury, the golfer is subject to liability for battery.

[6] The applicable two year statute of limitations required that any claim for battery be filed in the appropriate court within two years from the date of the injury. Plaintiff did not file within this time

and plaintiff appealed. Recognizing that plaintiff had no viable cause of action for battery, the Florida Supreme Court fashioned a definition that supported a negligence claim, rather than a battery claim. In so doing, the Florida court promulgated a problematic definition of battery, arguably inconsistent with both the Restatement of Torts, and popular precedent, including **Garratt** and **White**.

The court reaffirmed that a hostile intent (desire to harm) is not required to support a claim of civil battery. However, the court held that, to subject one to liability for battery, it must be said that, "a reasonable man [sic] would believe that a particular result was substantially certain to follow [the act]." Borrowing negligence language, the court continued that "...knowledge and appreciation of a risk, short of substantial certainty, is not the equivalent of intent." The court concluded, without citation to precedent, that "...apparently the line has been drawn...at the point where the known danger ceases to be only a foreseeable risk which a reasonable man would avoid (negligence) and becomes a substantial certainty." Applying this definition of intent, the **Spivey** Court held that no reasonable man in defendant's position would believe that the "bizarre results" of the unsolicited hug were "substantially certain to follow ". Thus, the court held the defendant subject to liability for negligence, and not battery.

While the **Spivey** Court's reasoning appears facially consistent with **Garratt** in its emphasis of the term "substantial certainty", the law of the **Spivey** case is arguably inconsistent with the holdings in both **Garratt** and **White**. Each of the three courts would agree that the intent to do the act (the pulling of the chair; the striking by the piano instructor; or the intended hug) is not, per se, sufficient for a finding of battery. However, **Garratt** and **White** require substantial certainty in the actor's mind only as to the contact which is, in fact, harmful. Neither case requires a finding that the actor be substantially certain that a serious injury would result from that contact. Indeed, **White** specifically rejects such a requirement, holding that certainty of a particular result (serious physical injury) is not a precondition to battery. The **Spivey** Court appears clearly to require, contra to **White**, that to be subject to liability for battery, the actor must be substantially certain that serious physical injury will occur as a result of his intentional contact with the victim. Such a holding appears also to be patently contrary to **Restatement 2d, §§ 16 and 18.**[7]

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limit, but was within the time limit for the filing of a negligence action.

[7] To support its rationale, the Spivey Court found it necessary to distinguish McDonald v. Ford, 223 So.2d 553 (Fla. App. 1969). In McDonald, plaintiff and defendant were romantically involved. During a date at defendant's home, plaintiff was engaged in examining some phonograph records on the floor of defendant's living room. Defendant embraced plaintiff and despite plaintiff's resistance, "kissed her hard". Plaintiff continued to struggle in resistance, and defendant continued "...to laugh and pursue his lovemaking attempts." In the process of the struggle, plaintiff struck her face hard upon an object and injured her jaw. The court held defendant subject to liability for battery, emphasizing the failure of consent to the defendant's lovemaking activities (See text, supra).

The Spivey court distinguished McDonald by holding that the court there "...had to find that the

Applied to the instant scenario, the holdings in **Garratt** and **White** would support a finding of liability for battery because the boys were clearly certain that Sophia was being thrown through the air toward the ground or the fountain. Indeed that was the very purpose of the act. In contrast, **Spivey** would seem to allow the boys to escape liability for battery unless it could be proven that a reasonable person in their position would be certain, not only that Sophia would come into contact with the ground, water, or fountain, but that she would strike the fountain hard enough to produce the very particular result that actually occurred. My best speculation is that, in the majority of jurisdictions, Sophia would be able to prove a prima facie case of harmful battery. I would further argue that, even in a jurisdiction which follows **Spivey**, a cause of action in battery might be supported, since, unlike a paralysis resulting from a "friendly hug," the injury to Sophia Moore would not be characterized as bizarre.[8]

Assuming arguendo that Sophia is not able to prove intent, she nonetheless has a claim against the boys for negligence, and may seek actual (but not punitive) damages for her physical injuries. Certainly, having acted affirmatively to restrain or control Sophia, the boys had a duty to refrain from conduct which would expose Sophia to unreasonable risk of physical injury. The difference in theories of recovery is relevant to the extent of the damages she may recover, and in the defenses raised by the boys to avoid liability. As to battery, they will argue that Sophia consented to the contact which produced the injury; as to a negligence claim, they will argue either that she assumed the risk of injury by voluntarily engaging in an activity she knew to be dangerous, or that she was comparatively negligent in her own conduct.

Offensive Battery

The touching of Sophia Moore in an offensive manner should subject the boys to liability for offensive battery. The essence of this claim is the violation of the victim's dignity, when she is forcibly, and against her will, picked up, carried outside, swung back and forth, and thrown into the fountain. The popular case describing the tort of offensive battery is **Fisher v. Carrousel Motor Hotel, Inc.**, 424 S.W.2d 627 (Texas 1967). The plaintiff in Fisher, an African American man, worked as a mathematician with NASA's Manned Spacecraft Center near Houston. He was invited to a meeting, which included a luncheon at defendant's hotel. While in a buffet line at the luncheon, he was approached by an employee of defendant, who snatched the plate from Fisher's hand and shouted "in a loud and offensive manner" that he (Fisher) could not be served.[9]

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results of defendant's acts were intentional." Indeed no such finding is made in McDonald, and nothing in the McDonald opinion suggests that the defendant was certain that plaintiff would be physically injured as a result of his embracing and kissing her.

[8] It should also be noted that if it is found that the boys intended to physically restrict Sophia's freedom of movement against her will, and physical injury resulted, the boys will be subject to liability for battery. See R.2d TORTS, §§ 18, 21.

[9] These facts were found by the jury.

Fisher filed suit and the federal court found the defendant subject to liability for civil damages for offensive battery.[10] The court held that personal indignity is the basis for an action for offensive battery. Consequently, the defendant is liable not only for contact which causes physical harm, but also for intentional contact of the person of another which is insulting. The victim is entitled to actual damages for mental suffering, even in the absence of physical injury. This rule has an important limitation. The victim of an alleged offensive battery may not seek recovery merely because s/he is personally offended by the actor's conduct. Rather, the victim must prove that the defendant's actions and words offend a "community norm". The Restatement suggests that the contact must be "...unwarranted by the social uses prevalent at the time and place at which it is inflicted."[11]

The manner in which Sophia was "handled" by the boys may be argued as both subjectively and objectively offensive and insulting. Sophia may wish to make a direct comparison between the racial conduct in **Fisher** and the sexually demeaning conduct in the instant case. Moreover, she will argue that modern community norms do not sanction this treatment of a woman when she has clearly expressed that she is embarrassed and humiliated, and wishes the conduct to stop. The question is one for the jury, as in **Fisher**.[12]

Assault

Assault is essentially an intentional act which tends to excite an apprehension of battery. In order for there to be an assault, the alleged wrongdoer must offer to use force, and there must be an apparent ability and opportunity to carry out the threat of battery immediately. See **Vietnamese Fishermen's Association v. Knights of the Ku Klux Klan**, 518 F.Supp. 993 (S.D.Tex. 1981). Finally, the victim's apprehension of battery must be both subjectively apparent and objectively reasonable in light of defendant's conduct. In other words, the facts must support the victim's fear of battery. In the instant scenario, Sophia had fallen with Jason, and had expressed openly her concern that going further could cause injury. Thereafter, her screams as she was being carried toward the fountain could well be interpreted as a demonstration of her subjective fear that she might be hurt. As to opportunity and apparency of ability to consummate battery, it is observed that the boys were in close proximity to her and both they and the crowd made it clear that Sophia was to be subjected to further lifting, tossing, and other harmful or offensive contact. Having already shown that they could lift or toss Sophia, the boys appear to have little argument that they lacked the ability or opportunity to effectuate an immediate further physical contact with Sophia following her expression of fear of injury.

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10 The events leading to the lawsuit took place prior to the effective date of the Civil Rights Act, depriving the court of the opportunity to impose damages for deprivation of Fisher's federal statutory rights. The court was thus constrained to find a basis for relief under traditional tort law doctrine.

11 See R.2d, § 19, Comment a.

12 As to Sophia's mental injury, it is essential to liability that she prove offensive battery. This is so because the law does not generally recognize civil liability for unintended offensive contact.

False Imprisonment

The civil action for false imprisonment protects an individual's personal interest in freedom from restraint of her movement. False imprisonment is the intentional, unlawful, and unconsented restraint by one person of the physical liberty of another. See R.2d, § 35; see Noguchi v. Nakamura, 638 P.2d 1383 (Hawaii App. 1982). There must be actual restraint, within boundaries fixed by the defendant, and the victim must be aware of the confinement, or harmed by it.

False imprisonment may be brought about by physical force, threats of physical force, or other duress.[13] However, the victim's submission must be genuine, and where the victim could simply assert her right and go her own way, there is no false imprisonment. See **Herbst v. Wuennenberg**, 266 N.W.2d 391 (Wisc. 1978). In **Herbst**, plaintiffs were three adult men who were confronted by defendant, a woman, in the vestibule of her apartment building, as plaintiffs were comparing voter registration lists with names on mailboxes. After an interchange wherein plaintiffs refused to identify themselves, defendant stood in the doorway with her arms outstretched so as to block plaintiffs' exit. Plaintiffs subsequently sued for false imprisonment, but admitted at trial that they had never been threatened or intimidated, and that they had never asked to leave or made any attempt to get defendant to move from the doorway.

The court held the plaintiffs' alleged submission to be illegitimate and rejected the claims of false imprisonment. In its rationale, the court distinguished a precedent case finding false imprisonment of a woman who was restrained in a room by two others, who ordered her in a loud voice to remain seated, and otherwise berated and screamed at her.[14]

Sophia may well decide to plead a claim of false imprisonment. Admittedly, she consented to the invitation to come to the premises. However, after specifically asking that she be let alone and allowed to leave, she was apparently forcibly constrained, lifted and carried away by the boys. To be sure, tempers were not hostile, but it is beyond doubt that she was seriously outnumbered, and that physical constraint was effectuated over her protests, including her screams. Unlike the **Herbst** plaintiffs, she asked to be allowed to leave. Although the facts do not show that she exhibited any physical act toward leaving, she may argue that she had no time. The facts suggest in this regard that as she was composing herself from the fall with Jason, she was picked up by the boys. It seems that there was little time for her to act, and this fact is critical to her claim. The boys' best claim is that she made no attempt to leave, and that were she to have done so, they would have let her depart the premises.

Intentional Infliction of Emotional Distress

This "new" tort finds its popular origin in **State Rubbish Collectors Ass'n v. Siliznoff**, 240 P.2d 282 (Cal. 1952). The cause of action is comprised of outrageous conduct

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[13] See R.2d, §§ 39, 40, 40A.

[14] Dupler v. Seubert, 230 N.W.2d 626 (Wisc. 1975).

by the defendant, with the intention of causing, or in reckless disregard of the probability of causing emotional distress. The victim must actually suffer severe or extreme emotional distress. See **Eckenrode v. Life of America Insurance Company**, 470 F.2d 1 (7th Cir. 1972). Outrageous conduct has been differently defined among the jurisdictions. In some states, it is merely necessary to prove that defendants' conduct would be deemed extreme to a person of ordinary sensibilities; other jurisdictions require the more specific finding that defendants' conduct "...[goes] beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." [15]

This aspect of Sophia's tort claims would be an interesting jury study. It is somewhat speculative, and quite dependent upon the standard of behavior selected, whether a jury would find this conduct by college students to be outrageous. Sophia's counsel must certainly convince a jury that the conduct of college students at a fraternity party must be judged by a standard of civility which recognizes that Sophia was susceptible and vulnerable to physical and mental coercion. The "hardest" aspect of this claim is the convincing of the jury that the context of this behavior should not make it socially acceptable.

To recover, Sophia must also show that she actually suffered severe and extreme emotional distress, of a type that a reasonable person would not be expected to endure. The facts are inadequate as to this issue, and inquiry must be made of her health care providers as to this aspect of her injuries.

Consent

The prominent defense to the intentional tort liability claims is that Sophia consented to the contact which brought about her physical and mental injuries. Consent is a defense to each of Sophia's claims, and, if proven by defendants, justifies the acts of which she complains. Consent may be exhibited by words or actions, and silence may be reasonably interpreted to indicate consent.

Sophia may not argue lack of consent merely on the basis that, in her own mind, she did not want to be subject to the conduct in issue. Rather, if defendants are able to show that Sophia's words or conduct could be reasonably interpreted as consent, then defendants may avoid liability for the intentional torts. See **O'Brien v. Cunard S.S. Co.**, 28 N.E. 266 (1891).

In **O'Brien**, a woman passenger on a ship bringing emigrants to the United States was taken in a line with other women to the ship's doctor to receive a vaccination. Desiring not to be vaccinated, she told the doctor that she had been vaccinated before. When he indicated that he could not see the mark, she said nothing and held up her arm to be vaccinated. It was held that the doctor had reason to believe that she had consented to the vaccination.

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[15] R.2d TORTS, § 46, Comment d, cited in Chuy v. Philadelphia Eagles Football Club, 595 F.2d 1265 (3d Cir. 1979).

In the instant scenario, Sophia would certainly admit that she consented by express words and/or actions to come onto the premises, and more importantly, to participate in the "cheerleading" game. It was appropriate under the **O'Brien** rule for Stuart and Jason to assume that Sophia had initially consented to the contact inherent in the cheerleading game, even if she had some subjective, but unexpressed reservations. Witnesses will likely agree that Sophia voluntarily joined in the game, and that by outward appearances of her participation until she fell, her conduct indicated her willingness to "perform" with the boys.

The dispositive issue therefore is the scope of her consent. Under the rationale of **McDonald v. Ford**, supra, even if prior contact between Sophia and the boys was consensual, once she expressed by words and actions that she no longer consented to continued physical contact, that contact, if intentional, is wrongful. The **McDonald** court recognized, in this regard, that the plaintiff and defendant were romantically involved and that the initial embraces might have been consensual. However, the court held that the plaintiff could effectively terminate her consent when she deemed further contact harmful to her. See also **Overall v. Kadella**, 361 N.W.2d 352 (Mich. 1984) [Held: While hockey player consented to physical contact during game, he did not consent to being punched by opposing player as he (plaintiff) sat on the bench following the end of the game].

Under the rationale of **McDonald** and **Overall**, even if Sophia's consent to participate in the cheerleading game subsumed Jason's negligence in dropping her, or allowing her to fall to the floor, the intentional act of carrying Sophia outside and throwing her into the fountain is quite arguably beyond the scope of that consent. She had clearly expressed her fear of injury and had unquestionably asked that further contact cease, and that she be allowed to leave. When forcibly picked up and carried outside, she screamed, certainly a sign to defendants which, unlike the **O'Brien** scenario, put them on notice that they might better inquire as to her state of mind. Finally, the **Overall** court's rationale supports the argument that Sophia's participation in the cheerleading game did not encompass being thrown into the fountain, for that was beyond the scope of contact inherent in cheerleading exercises.

Negligence

As noted supra, if the boys are not held accountable for assault & battery, or the other intentional torts, they are unquestionably subject to liability for negligence, and therefore liable for Sophia's actual damages as a result of her physical injuries, including pain and suffering damages, sustained when she was thrown into the fountain. As to a negligence claim, the boys (and the fraternity insofar as it is also liable for these injuries) will undoubtedly claim that Sophia assumed the risk of injury by voluntarily participating in the cheerleading game, or that she was comparatively negligent in her own conduct. As a result of her conduct, they will argue, she should be denied recovery, or her damages should be reduced by the percentage of her own negligence.

To say that Sophia has assumed the risk of injury at the hands of the boys, it must be shown that she knew and appreciated the particular risk of physical injury when she agreed to

participate in the cheerleading activity, and that she voluntarily chose to accept this risk throughout her participation. See **Lambert v. Will Brothers Company**, 596 F.2d 799 (8th Cir. 1979); **McDonald v. Hickman**, 478 S.W.2d 528 (Ark. 1972)[16]. This defense has been applied in "sports" scenarios to deny recovery to an injured athlete who, by his participation in a contact sport, assumes the inherent risk of contact with his opponent, including his opponent's negligence. See **Kuehner v. Green**, 436 So.2d 78 (Fla.1983). However, in several jurisdictions, the defense has been limited to contact sports, and not to general recreational activities. See **Mazzeo v. City of Sebastian, Florida** 550 So.2d 1113 (Fla. 1989); cf. **Kavafian v. Seattle Baseball Club, Ass'n**, 181 P.2d 679 (Wash. 1919); **Ingersoll v. Onondaga Hockey Club**, 281 N.Y.S. 505 (1935); **Sunday v. Stratton Corp.**, 390 A.2d 398 (Vt. 1978)[17]

It is doubtful that such a defense will be sustained in the instant scenario. Certainly, it might be said that Sophia voluntarily chose to participate at the outset of the cheerleading game. However, it is not clear that she appreciated the risk of injury until she was thrown and fell with Jason. Moreover, once she did appreciate this risk, she arguably terminated her voluntary participation by her admonition to Jason. In any event, any subjective assumption of risk which might have been apparent at the outset cannot be said to include assumption of the risk of being thrown into the fountain. This act is clearly not an inherent part of cheerleading games; secondly, it cannot be said that Sophia had a free and voluntary choice as to her participation in this act.

In many jurisdictions, if Sophia acted unreasonably in participating in the cheerleading game, the notion of assumption of risk would be treated as a species of comparative negligence, and, to the extent that her own conduct contributed to her injuries, her recovery of damages would be reduced, but not barred. See **Blackburn v. Dorta**, 348 So.2d 287 (Fla. 1977); **Hoffman v. Jones**, 280 So.2d 431 (1973). Once again, it might be said that Sophia's participation in the game might be said to affect her recovery for any injuries sustained in the original fall. However, it is questionable whether it may be said that she acted at all to cause her ultimate injury. To characterize a person's conduct as negligent, it must be said that the person has acted affirmatively; this implies an outward manifestation of the actor's will. See **Restatement 2d, TORTS, § 2.** In the instant scenario, Sophia's participation in the result of the game, i.e., that she was carried into the yard and thrown into the fountain, was anything but volitional. See **R.2d, TORTS, § 2, Comment a.** (There cannot be an act without volition).

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16 Citing Arkansas Model Jury Instruction 612: To establish the defense of assumption of risk, defendant must show that:

"...A dangerous situation existed which was inconsistent with the safety of the plaintiff....[That] the plaintiff knew the dangerous situation existed and realized the risk (of injury) from it (whether the danger was open and obvious)....and [That] plaintiff voluntarily exposed (herself) to the dangerous situation which...caused (her) injuries..."

17 Cited in Prosser, Wade & Schwartz, TORTS: Cases & Materials, 8th Ed. (Univ. Casebook Series, 1988).

Conclusion

While the university, along with the fraternity corporation, may be subject to liability for negligence in failing to take steps to minimize the risks of this type of behavior, it is very unlikely that the university could be held vicariously accountable for the intentional torts. This analysis is offered, not to argue for an expansion of liability, but to the end that the university might better understand the serious tortious behavior exhibited in the scenario, and that the university might therefore better educate students as to the terribly harmful injuries that result when notions of civility are compromised in the name of fun and games.

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