

An ordinance in a small town required all restaurants to designate smoking and nonsmoking sections for their customers. A cigarette smoker and a nonsmoker were seated at adjoining tables in a small restaurant. The smoker's table was in the smoking section, and the nonsmoker's table was in the nonsmoking section. When the smoker lit a cigarette, the nonsmoker politely requested that he not smoke, explaining that she had a severe allergy to cigarette smoke. The smoker ignored the nonsmoker's request and continued to smoke. As a result, the nonsmoker was hospitalized with a severe allergic reaction to the smoke.

The nonsmoker brought a battery action against the smoker.

Which of the following questions will NOT be an issue in the battery action?

- A. Did the smoker intend to cause the nonsmoker's contact with the cigarette smoke?
- B. Does smoke have the physical properties necessary for making the kind of contact required for battery?
- C. Is contact with cigarette smoke from a lawful smoking section in a restaurant the kind of contact one must endure as a voluntary restaurant patron?
- D. Was the smoker's conduct unreasonable under the circumstances?

## Explanation:

**Battery** exists when a defendant **intends** to inflict **harmful or offensive contact** (or imminent apprehension thereof) and causes **harmful or offensive contact** with the plaintiff. **Consent** to contact is a defense to battery. Therefore, the issues here are:

whether the smoker *intended* to cause the nonsmoker's contact with the cigarette smoke  
**(Choice A)**

whether smoke possesses the physical properties necessary to create *contact* **(Choice B)**

whether contact with the cigarette smoke *harmed* or *offended* the nonsmoker

whether the nonsmoker *consented* to the contact by voluntarily sitting near the lawful smoking section in the restaurant **(Choice C)**

However, whether the smoker's conduct was *unreasonable* will not be an issue here. Intentional torts require proof that the defendant acted with *intent* (ie, the purpose or knowledge that one's act will cause a particular result). In contrast, negligence requires proof that the defendant failed to use *reasonable care* (ie, the level of care an ordinarily prudent person would have used under similar circumstances). Since battery is an intentional tort, it requires proof of *intentional* conduct. Proof of *unreasonable* conduct will not suffice.

## Educational objective:

Battery requires proof that the defendant intended to inflict harmful or offensive contact (or imminent apprehension thereof). Proof of unreasonable conduct by the defendant will not suffice.

## References

Restatement (Third) of Torts § 1 (Am. Law Inst. 2010) (definition of intent).

Restatement (Second) of Torts §§ 13, 18 (Am. Law Inst. 1965) (definition of battery).

Restatement (Third) of Torts § 3 (Am. Law Inst. 2010) (definition of negligence).

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## Hierarchy of tortious conduct

