

of an object from one's hand is as clearly an offensive invasion of his person as would be an actual contact with the body."

**LEICHTMAN v. WLW JACOR COMMUNICATIONS,  
INC.**

Court of Appeals of Ohio, 1994.  
92 Ohio App.3d 232, 634 N.E.2d 697.

... Leichtman claims to be "a nationally known" antismoking advocate. Leichtman alleges that, on the date of the Great American Smokeout, he was invited to appear on the WLW Bill Cunningham radio talk show to discuss the harmful effects of smoking and breathing secondary smoke. He also alleges that, while he was in the studio, Furman, another WLW talk-show host, lit a cigar and repeatedly blew smoke in Leichtman's face "for the purpose of causing physical discomfort, humiliation and distress." ...

Leichtman contends that Furman's intentional act constituted a battery....

In determining if a person is liable for a battery, the Supreme Court has adopted the rule that "[c]ontact which is offensive to a reasonable sense of personal dignity is offensive contact." It has defined "offensive" to mean "disagreeable or nauseating or painful because of outrage to taste and sensibilities or affronting insultfulness." Furthermore, tobacco smoke, as "particulate matter," has the physical properties capable of making contact.

As alleged in Leichtman's complaint, when Furman intentionally blew cigar smoke in Leichtman's face, under Ohio common law, he committed a battery. No matter how trivial the incident, a battery is actionable, even if damages are only one dollar. The rationale is explained by Roscoe Pound in his essay "Liability": "[I]n civilized society men must be able to assume that others will do them no intentional injury—that others will commit no intentioned aggressions upon them." Pound, *An Introduction to the Philosophy of Law* (1922) 169....

We do not ... adopt or lend credence to the theory of a "smoker's battery," which imposes liability if there is substantial certainty that exhaled smoke will predictably contact a nonsmoker....

... Concerning Cunningham, at common law, one who is present and encourages or incites commission of a battery by words can be equally liable as a principal....

With regard to WLW, an employer is not legally responsible for the intentional torts of its employees that do not facilitate or promote its business....

Arguably, trivial cases are responsible for an avalanche of lawsuits in the courts. They delay cases that are important to individuals and corporations and that involve important social issues. The result is justice denied to litigants and their counsel who must wait for their day

in court. However, absent circumstances that warrant sanctions for frivolous appeals . . . we refuse to limit one's right to sue. Section 16, Article I, Ohio Constitution states, "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay."

. . . [W]e reverse that portion of the trial court's order that dismissed the battery claim in the second count of the complaint. This cause is remanded for further proceedings consistent with law on that claim only.

### Notes

1. *Bodily contact.* If being touched by smoke is bodily contact that will support a battery claim, what about being touched by light waves or sound waves? Your noisy neighbor bombards you with loud music every night. Could this be a battery?

2. *Damages.* What kind of damages should the plaintiff recover, if any, when the contact is merely offensive and not harmful? Courts have traditionally permitted juries to award substantial damages even though the plaintiff has no pecuniary loss. The award is not limited to nominal damages, and it might reach hundreds and even thousands of dollars. See DAN DOBBS, *THE LAW OF REMEDIES* § 7.3 (2) (1993). In your considered opinion, is this a good idea? In addition to compensatory damages, courts may allow punitive damages against an intentional tortfeasor who is guilty of "malice" or wanton misconduct.