Intent and Consent in the Law of Battery: Confusion and Controversy

Nancy J Moore, Boston University School of Law

Available at: https://works.bepress.com/nancy_moore/3/
INTENT AND CONSENT IN THE TORT OF BATTERY:
CONFUSION AND CONTROVERSY

By

Nancy J. Moore
Professor of Law and Nancy Barton Scholar
Boston University School of Law

© 2012
Abstract

“Intent and Consent in the Tort of Battery: Confusion and Controversy”

Much of contemporary torts scholarship has been devoted to determining who should bear the costs of unintended injury, that is, whether and when defendants should be strictly liable for the harm caused by their activities, as opposed to limiting plaintiffs to recovery when they can prove that the defendant’s conduct was negligent. Comparatively little scholarship has explored the appropriate distinction between the intentional torts and the non-intentional torts, such as negligence or strict liability. Recently, torts scholars have begun to explore some interesting and unresolved questions surrounding the intentional torts, particularly battery, stemming in part from the completion of various stages of the Restatement (Third) of Torts and the current position of the ALI that it will not attempt a restatement of the non-economic intentional torts that were addressed in great detail in the Restatement (Second) on the grounds that intentional tort doctrine is clear and that the Restatement (Second) provisions have been widely adopted.

This article joins the work of several torts scholars who have recently questioned the clarity of intentional tort law doctrine. These scholars have focused on the ambiguity of the Restatement’s provisions with respect to the intent to cause a harmful or offensive bodily contact, that is, whether these provisions require both intent to cause bodily contact and intent to cause harm or offense (dual intent) or whether it is sufficient that the defendant intends a bodily contact that turns out to be either harmful or offensive (single intent). Some of these scholars have also suggested that the essence of battery is not the intent to cause a harmful or offensive contact, but rather the intent to cause an unpermitted contact.

This article demonstrates that the current confusion and controversy over battery law doctrine is far more extensive than even these recent torts scholars have demonstrated. It extends beyond the element of intent and includes uncertainty concerning the role of the plaintiff’s lack of actual or apparent consent—that is, whether consent is an affirmative defense or whether lack of consent is an element of the plaintiff’s prima facie case—and the relationship between intent and lack of consent. Moreover, this confusion and controversy is reflected not only in modern battery court opinions, but also in the cursory and contradictory treatment given to battery law in most torts casebooks and treatises. Finally, despite the ALI’s assumption that the Restatement provisions have been widely adopted, there are many jurisdictions where courts are formulating battery doctrine using terminology that departs significantly from the Restatement provisions.

Part I of this article gives a detailed account of the current confusion and controversy in battery doctrine. Part II provides a brief account of the historical development of the modern tort of battery, which is necessary to understanding why it is that so many courts do not follow the Restatement’s formulations and how it is that they came to adopt a variety of different and sometimes contradictory formulations. Part III analyzes the ambiguity of the relevant Restatement provisions, rejecting the argument of some tort scholars that only the single intent rule can explain the apparently uniform results in certain kinds of cases, such as those involving
practical jokers and those involving physicians and other persons whose purpose is to help, not to harm or offend. This part argues that these cases are better explained by acknowledging that certain medical procedures, such as operations, necessarily involve harmful contacts (even when ultimately beneficial) and that physicians and others often know that, in the absence of consent, certain bodily touchings will be offensive. By clearly separating the elements of intent and absence of consent, satisfaction of the intent element of battery is easily explained under both single and dual intent rules, thereby leaving resolution of these cases to a determination whether the defendant will be relieved of liability on the ground of actual or apparent consent. Part IV of the article confronts the relevant policy considerations in choosing between single and dual intent, considerations that necessarily involve the appropriate distinctions between intentional and non-intentional torts. It concludes that there is no justification for preferring the single intent rule and thereby departing from the moral fault principle that underlies much of modern tort law. It also rejects the argument from some recent tort scholars that the principle of “bodily integrity” demands fuller protection than that afforded under the dual intent rule. Part V addresses the special problem of consent in medical cases where the physician honestly but mistakenly believes that the patient has consented to the treatment provided. It agrees that physicians should not be liable in battery (as opposed to negligence) unless they knowingly depart from the patient’s wishes, but then argues that this result is a clear departure from traditional consent doctrine and should, for the most part, be limited to medical cases. Part V concludes by proposing, at least in concept, how the Restatement (Third) might best reformulate intentional tort doctrine in cases involving either harmful or offensive battery.
“Intent and Consent in the Tort of Battery: Confusion and Controversy”

Introduction

Much of contemporary torts law scholarship has been devoted to determining who should bear the costs of unintended injury, that is, whether and when defendants should be strictly liable for the harm caused by their activities, as opposed to limiting plaintiffs to recovery when they can prove that the defendant’s conduct was negligent. Comparatively little scholarship has explored the appropriate distinction between the intentional torts, such as battery, assault and false imprisonment, and the non-intentional torts, such as the negligent infliction of physical or emotional harm and strict liability for defective products and abnormally dangerous activities. Recently, however, torts scholars have begun to explore some interesting and unresolved questions surrounding the intentional torts, particularly battery. These inquiries stem, at least in part, from the completion of various stages of the Restatement (Third) of Torts (“Third Restatement”), and the current position of the American Law Institute (“ALI”) that it will not attempt a restatement of the non-economic intentional torts that were addressed in great detail in the Restatement (Second) of Torts (“Second Restatement”) on the ground that the Second Restatement “remains largely authoritative in explaining the details of the specific [intentional] torts…and in specifying the elements of the various affirmative defenses that might be available.” 1 Several torts scholars have criticized or questioned this decision, noting the extent to which intentional tort doctrine is far less clear than the ALI apparently believes it is, 2 as well as the potential benefits of extending the Third Restatement’s search for broader principles, as opposed to detailed rules, to intentional tort law doctrine. 3

In particular, several torts scholars have recently debated the question of whether battery does (and should) require intent to cause a bodily contact that the defendant intends to cause either harm or offense (“dual intent”) or whether it is sufficient that the defendant intends a

---

1 Restatement (Third) of Torts: Liab. For Physical & Emotional Harm § 1, cmt. a (2010). See also id. at ___ (“[T]here is a scarcity of judicial opinions that have seriously called into question any of those doctrines.”


bodily contact that turns out to be either harmful or offensive ("single intent"). In addition, some have argued that the essence of battery is not the intent to cause a harmful or offensive contact, but rather the intent to cause an unpermitted contact, thereby raising questions concerning the precise nature of the relationship between the defendant’s intent and the plaintiff’s lack of consent. Finally, they have debated the question of whether a physician should be held liable in battery, as opposed to negligence, for medical treatment that the physician honestly but mistakenly believes has been authorized by the patient. These currently unresolved issues present fundamental questions concerning the nature of intentional torts and their relationship to other forms of tort liability.

Current torts law casebooks devote considerably less space to intentional torts than to non-intentional torts. This is certainly understandable, given both the greater frequency with which claims are made under either negligence or strict liability and the general lack of interest among contemporary torts law scholars concerning the intentional torts. What is less understandable, however, is the extent to which the treatment of intentional torts such as battery in most of these casebooks fails to accurately convey either the existence of unresolved issues concerning basic doctrine (such as the debate between single and dual intent and the unclear relationship between intent and consent) or the extent to which many modern torts opinions do not follow the Second Restatement’s formulation of the prima facie case, but rather formulate the doctrine in a variety of ways, each of which raises its own questions concerning the application of the stated doctrine to particular cases. Similarly, standard secondary sources such as hornbooks and treatises typically fail to accurately convey the current confusion and controversy in tort law doctrine with respect to such intentional torts as battery.

Consider how some of the leading torts casebooks treat the question of intent in the law of battery. Two popular casebooks offer only minimal treatment of the intentional trespassory torts, including battery; as a result, it is not surprising that they make no attempt to alert students to the complexities of the concept of intent or to the disagreement among courts and commentators concerning the object of the required element of intent. Another casebook begins

---

6 See, e.g., King, supra note ___ at 638-641; Lawson, supra note ___ at 368, 369-370; cf. Simons, supra note ___ at 1071-1076.
7 Harry Shulman et al, Law of Torts: Cases and Materials Ch. 13 (5th ed. 2010); Marc A. Franklin et et, Tort Law and Alternatives: Cases and Materials Ch. XII (9th ed. 2011). Both casebooks devote a single chapter to the traditional intentional torts (excluding defamation, privacy and the economic torts), including defenses and privileges, and that chapter appears toward the end of the casebook, rather than at the beginning.
8 The Shulman casebook contains only two cases on the prima facie case in battery, neither of which clearly raises the question whether battery requires an intent to harm or offend. Shulman et al, supra note ___ at 763-769. The relevant black-letter provisions of the Second Restatement are provided, without any indication that they may be ambiguous in application. Id. at 766-767, n. 1. Moreover, the notes prominently quote the Third Restatement’s explanation for its decision not to consider intentional torts in depth that on the ground that litigation concerning these torts is uncommon and “there is a scarcity of judicial opinions that have seriously called into question any of
with the intentional torts, devotes considerable attention to them, but then fails to clearly address the distinction between single or dual intent. Several casebooks expressly acknowledge that there are diverging views with respect to dual and single intent, however, they then either fail to provide any meaningful information as to how the issue is addressed by the Second Restatement or leave the misleading impression either that the Second Restatement clearly requires dual intent or that it clearly requires only single intent. I have found only one

those doctrines [concerning intentionally caused physical harm].” Id. The Franklin casebook contains three cases on the prima facie case in battery, one of which focuses more on assault than battery, and another of which focuses primarily on the result requirement rather than the intent requirement. Franklin et al., supra note __ at 898-911. The notes ask what precisely the defendant must have intended, but without giving any guidance that suggests the recognized distinction in some cases between single and dual intent. Id. at 901, n. 1.

9 See Victor E. Schwartz, et al, Prosser, Wade and Schwartz’s Torts Ch. 2-3 (12th ed. 2010). There are seven principle cases on the prima facie case in battery, with extensive notes. One of the principle cases, Spivey v. Battaglia, requires intent to harm, id. at 21, which is a dual intent standard. Among the many notes that follow Spivey is one that describes the opinion in Wagner v. State as holding that “battery require[s] only acting with intent to cause contact that [i]s harmful or offensive, not acting with intent to cause harm,” id. at 23, n. 3, which is a single intent standard. The note, however, fails either to acknowledge or comment on the different intent standards adopted in the principle and the note cases; nor does it raise any questions concerning possible reasons underlying the different standards. Indeed, several pages later, the casebook authors include as another principle case the opinion in McGuire v. Almy, which held both that “[m]entally disabled persons may be held responsible for their intentional torts as long as the plaintiff can prove that they formed the requisite intent” and that “the jury could find that the defendant was capable of entertaining and that she did entertain an intent to strike and to injure the plaintiff and that she acted on that intent,” id. at 26-27, thereby adopting what appears to be a dual intent standard. The notes following McGuire do not mention the previously noted contrary holding in Wagner, which was also a case involving a mental patient.

10 See Richard Epstein, Cases and Materials on Torts 8-9 (9th ed. 2008); John C. Goldberg, et al, Tort Law: Responsibilities and Redress 577, n.4 (2d ed. 2008); Aaron D. Twerski and James A. Henderson, Jr. Torts: Cases and Materials 12-13 (2003). Two other casebooks raise the issue only indirectly. See Ward Farnsworth and Mark F. Grady, Torts: Cases and Questions 4-5(2d ed. 2009) (asking whether the Second Restatement’s provisions on intent are consistent with the cases described, including the well-known 1891 opinion in Vosburg v. Putney, in which the defendant was held liable for unforeseeable bodily harm, despite a lack of intent to injure, because he intended “an unlawful act”); James A. Henderson, et al, The Torts Process 13-15 (7th ed. 2007) (presenting the opinion in Vosburg and acknowledging that the concept of intent can present difficulties); id. at 34 (after introducing the Second Restatement provisions, revisiting Vosburg, suggesting that it might be explained by the defendant’s intent to cause offensive contact, and asking whether the Second Restatement requires such an intent to offend, but failing to mention modern cases addressing that very question with contrary results).

11 See Twerski and Henderson, supra note ___ at ___ (citing the contrary decisions in White v. Muniz and White v. University of Idaho, and engaging the co-authors in a brief debate that at least touches upon possible reasons to prefer one position over the other but fails to consider which position is adopted by the Second Restatement).

12 See Epstein, supra note ___ at ___. The Goldberg casebook reproduces the opinion in Wagner v. State, in which the court interpreted the Second Restatement as clearly requiring only single intent, without further indicating that there are both cases and commentators that interpret the Second Restatement as requiring dual intent and without acknowledging that the Second Restatement’s provisions may be ambiguous. The authors do at least note that there is another opinion, White v. Muniz, that rejects single intent, although the authors do not further explain that the court there interpreted the Second Restatement’s provisions differently from the court in Wagner. See also Arthur Best and David W. Barnes, Basic Tort Law: Cases, Statutes, and Problems 31-36(2d ed. 2007) (acknowledging the conflicting approaches taken in White v. Muniz and White v. University of Idaho, but failing to raise ambiguity of Second Restatement provisions); cf. David W. Robertson, et al, Cases and Materials on Torts 17 (4th ed. 2011)
casebook---Dobbs, Hayden and Bublick’s Torts and Compensation: Personal Accountability and Social Responsibility for Injury---that prominently includes modern decisions on both sides of the issue, acknowledges the ambiguity of the Second Restatement provisions, and provides more than a passing allusion to the competing policy concerns raised by the debate.\textsuperscript{14} Not surprisingly, Professor Dobbs appears to be the only treatise author who provides a similarly complete picture of the debate over single versus dual intent.\textsuperscript{15}

The casebook authors agree that the intent to make some sort of bodily contact is an element of the plaintiff’s prima facie case. But what about the plaintiff’s lack of actual or apparent consent to such contact? Many of the casebooks present consent as an affirmative defense that must be pleaded and proved by the defendant.\textsuperscript{16} Other casebooks observe that some courts treat consent as an affirmative defense whereas other courts treat absence of consent as an element of the plaintiff’s prima facie case.\textsuperscript{17} A few casebooks note the possibility that the plaintiff’s consent might negate the offensiveness of a touching, thereby having an effect on the plaintiff’s prima facie case even when consent is otherwise viewed as an affirmative defense,\textsuperscript{18} and at least one casebook observes that some courts go so far as to define the prima facie case for some intentional torts, including battery, as a nonconsensual invasion of the particular interest at stake.\textsuperscript{19} Casebooks that both adopt the dual intent rule and treat consent as an affirmative defense fail to explain how there can be intent to cause an offensive contact if the defendant believes the plaintiff is consenting.\textsuperscript{20} And casebooks that note the absence of consent as a possible element of the plaintiff’s prima facie case (or even the gist of the prima facie case) fail to address the question of whether the defendant must knowingly deviate from the plaintiff’s actual or apparent

\begin{itemize}
\item \textsuperscript{16} See, e.g., Robertson, supra note ___ at ___; Epstein, supra note ___; Franklin, et al, supra note ___ at ___; cf. Henderson, et al, at 41, 65 (treating consent as an affirmative defense but later suggesting that whether a contact is offensive may depend on whether the plaintiff has apparently consented to it); Best and Barnes, supra note ___ at ___ (treating consent as a defense along with self-defense and defense of property, but also including edited version of an opinion that describes battery as “the unpermitted application of trauma by one person upon the body of another person”) (emphasis added).
\item \textsuperscript{17} See, e.g., Best and Barnes, supra note ___ at 52; Goldberg, et al, supra note ___ at ___.
\item \textsuperscript{18} See, e.g., Robertson, et al, at 50; cf. Farnsworth and Grady at 16 (“Sometimes a defendant will offer a plaintiff’s consent as an affirmative defense, or a "privilege"….We discuss consent in this section [on the prima facie case] because it is closely connected to the question of whether a touching is harmful or offensive in the first place.”); Henderson, et al, at 65 (whether a contact is offensive may depend on whether the plaintiff has apparently consented to it); Dobbs, et al, supra note ___ at 88 (discussing the “‘defense’ of consent” and asking “Is consent really a ‘defense’?”).
\item \textsuperscript{19} See Robertson, et al, supra note ___ at 47; see also Goldberg et al (“given that torts such as battery concern at their core the subjection of another to unwanted touching, it is perhaps not surprising that the issue of consent is sometimes singled out for this special treatment [of treating absence of consent as part of the prima facie case]”)
\item \textsuperscript{20} See, e.g., Epstein, supra note ___. For Epstein’s view that the dual intent standard is dominant, see supra note ___. For his view that consent is an affirmative defense, see supra note ___.
\end{itemize}
consent or whether it is sufficient that the defendant has an honest but unreasonable belief in the plaintiff’s consent.\textsuperscript{21} Hornbooks and treatises are not much more illuminating on the subject.\textsuperscript{22}

What is at stake here with respect to the appropriate formulation of an action in battery? After all, there are many situations in which conduct that does not constitute a battery may nevertheless subject the defendant to liability in negligence. But that is not always the case; for example, when the intended contact is merely offensive and the resulting physical harm is entirely unforeseeable, there is probably no action available in negligence,\textsuperscript{23} although there may be liability for an offensive battery. Even when there is liability in negligence, there are numerous practical consequences of determining that the defendant acted negligently rather than intentionally; for example, insurance coverage,\textsuperscript{24} governmental immunities,\textsuperscript{25} and workers’ compensation\textsuperscript{26} often turn on the question of whether the victim’s injury was the result of intentional conduct. Aside from such ancillary questions---the answers to which need not necessarily dovetail with the precise details of battery doctrine\textsuperscript{27}---labeling conduct as a battery currently entails other practical consequences that significantly differentiate battery from negligence, such as the inapplicability of the defense of comparative negligence.\textsuperscript{28} As a result, the doctrinal label is an important one for both plaintiff and defendant.

Even so, it might be the case, as some recent commentators have acknowledged, that except for a handful of cases involving young children or adult defendants with seriously diminished mental capacity, courts may reach pretty much the same results in terms of what conduct constitutes a battery, regardless of whether they purport to apply the single intent rule or the dual intent rule.\textsuperscript{29} Similarly, there may be only a few battery cases in which it matters who

\textsuperscript{21} See supra authorities cited at note ___ supra. This issue is squarely raised in some medical battery cases, in which some courts hold that only intentional deviations from authorized treatment can be considered batteries. See infra Part V.

\textsuperscript{22} For example, Professor Dobbs believes that “the gist of battery is that the plaintiff has been touched, intentionally, in a way that she has not even apparently consented to,” Dobbs, supra note ___ at 52, but he does not explain how courts would analyze a case involving a defendant who honestly but mistakenly believes that the plaintiff consented, other than to state that “the plaintiff’s apparent consent shows that the defendant is not intending to touch in an offensive way,” id. at 56. But that statement appears to be inconsistent with the dual intent rule, which Professor Dobbs both prefers and believes to be the rule adopted by most courts. [cross reference to later discussion]

\textsuperscript{23} Cf., Second Restatement, supra note ___ at § 18(2) (“An act which is not done with the intention stated in Subsection (1)(a) does not make the actor liable to the other for a mere offensive contact with the other’s person although the act involves an unreasonable risk of inflicting it and, therefore, would be negligent or reckless if the risk threatened bodily harm”).


\textsuperscript{25} See, e.g., Wagner v. State, 122 P.3d 599 (Utah 2005) (affirming dismissal of negligence action on ground attack constituted a battery and state was immune from lawsuit in battery).

\textsuperscript{26} [provide case cite]

\textsuperscript{27} See, e.g., Simonds, supra note ___ at 1096-1097.

\textsuperscript{28} See Restatement (Third) of Torts: Apportionment of Liability § 1, cmt c (2000).

\textsuperscript{29} See, e.g., Lawson, supra note ___, at 375. See also Simons, supra note ___ at .
bears the burden of proving consent or lack of consent. Of course, it is difficult to tell if a case would have turned out differently---either at the trial or the appellate level---depending on the precise formulation of both the elements of the prima facie case and the identification of who has the burden of proof on consent. And in cases involving medical batteries, it could make a great deal of difference whether battery is limited to intentional unauthorized treatment or whether it includes an honest but unreasonable belief in the plaintiff’s consent.

Even if there is not a great deal at stake from a practical standpoint, it is my own view that doctrine matters and that, whenever possible, both courts and commentators should attempt to understand and explain as clearly as possible why courts reach the results that they do in deciding battery and other intentional tort cases. Indeed, one of the primary purposes of Restatements is to clarify and simplify the law when it is otherwise confusing and overly complex. In any event, neither beginning law students nor experienced lawyers should be misled into thinking that modern intentional torts such as battery are relatively simple and straightforward or that the Second Restatement clearly articulates the doctrine as it has been applied by a majority of courts.

In this article, I join the efforts of others to focus more attention on the special problems posed by intentional torts, particularly battery. I address not only the debate between single and dual intent (as well as some competing formulations of the intent requirement), but also the difficulty of determining the proper relationship between the element of intent and the requirement that there be a lack of consent on the part of the plaintiff. Part I gives a more detailed account of the current confusion and controversy concerning the identification of the elements of a prima facie case in battery. Part II provides a brief account of the historical development of the modern tort of battery, which is necessary, I believe, to understanding why it is that so many courts do not follow the Second Restatement’s formulation of the elements of a prima facie case in battery and how these courts came to adopt a variety of different and sometimes contradictory formulations. Part III analyzes the ambiguity of the relevant Second Restatement provisions, rejecting the argument of some torts scholars that only the single intent rule can explain the apparently uniform results in certain kinds of cases, such as those involving practical jokers and those involving physicians and other persons whose purpose is to help, not to harm or offend. This part argues that these cases are better explained by acknowledging that certain medical procedures, such as operations, necessarily involve harmful contacts (even when ultimately beneficial) and that physicians and others often know that, in the absence of consent,

---

30 See Arthur Best and David W. Barnes, Basic Tort Law: Cases, Statutes, and Problems 52 (2007) (discussing dispute over whether consent is a defense or lack of consent is an element of the prima facie case and stating that “[t]here have not been enough reported cases where the evidence of consent is in equipoise for the law of all the state to be clear and in agreement on this point”)

31 Cf. Kenneth S. Abraham, The Forms and Functions of Tort Law 35 (3d ed. 2007) (difference in alternative formulations of defense of consent will be reflected primarily in jury instructions).

32 See Part V infra.

33 [mention Beyond Candor article].

34 See, e.g., King, supra note ___ at 650-653.
certain bodily touchings will be offensive. By clearly separating the elements of intent and absence of consent, satisfaction of the intent element of battery is easily explained under both single and dual intent rules, thereby leaving resolution of these cases to a determination whether the defendant should be relieved of liability on the ground of actual or apparent consent. Part IV addresses the relevant policy considerations in choosing between single and dual intent, considerations that necessarily require a discussion of the appropriate distinctions between intentional and non-intentional torts. It concludes that there is no justification for preferring the single intent rule and thereby departing from the moral fault principle that underlies much of modern tort law. It also rejects the argument from some recent tort scholars that the principle of “bodily integrity” demands fuller protection than that afforded under the dual intent rule. Part V addresses the special problem of consent in medical cases in which the physician honestly but mistakenly believes that the patient has consented to the treatment provided. It agrees that physicians should not be liable in battery (as opposed to negligence) unless they knowingly depart from the patient’s wishes, but then argues that this result is a clear departure from traditional consent doctrine and should, for the most part, be limited to medical cases. Part VI concludes by proposing, at least in concept, how a Third Restatement might best formulate intentional tort doctrine in cases involving either harmful or offensive battery.

Part I: Elements of a prima facie case in battery

In order to prevail on a tort theory, the plaintiff must plead and prove the elements of a prima facie case, which are different for each individual tort, such as battery, assault, negligence, strict liability for defective products or strict liability for abnormally dangerous activities. The defendant may prevail either by challenging the plaintiff’s ability to establish a prima facie case or by pleading and proving one of a number of affirmative defenses (or privileges), which differ according to which individual tort the plaintiff is pursuing. For example, contributory or comparative negligence is a defense to negligence, but not to the intentional torts of assault or battery, for which the defendant might claim self-defense or defense of others.

According to the Second Restatement, there are two forms of battery: one that results in a harmful bodily contact and another that results in an offensive bodily contact. Although different with respect to the result, they are defined identically with respect to the other elements of the prima facie case. For example, battery involving harmful bodily contact is defined in Section 13 as follows:

“An actor is subject to liability to another for battery if

(a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and

35 See supra note ___ & accompanying text.
36 See generally Dobbs, supra note ___ at Ch. 5.
Battery involving offensive bodily contact is defined identically in Section 18 except that paragraph (b) substitutes “offensive” for “harmful” with respect to the resulting contact. In other words, combining the two forms, battery requires that the defendant: 1) act; 2) with the intent “to cause a harmful or offensive [bodily] contact” (or the imminent apprehension of such a contact); 3) causing directly or indirectly; 4) a harmful or offensive bodily contact. Intent is defined in Section 8A “to denote that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it.”

As noted above, there are a few courts and commentators that have recently debated the question whether the Second Restatement’s definition of intent is properly interpreted to require both intent to make a bodily contact and, in addition, intent to harm or offend (dual intent) or whether it is sufficient that the defendant intends to make a bodily contact that turns out to be harmful or offensive (single intent). In 1990, in White v. University of Idaho, the Supreme Court of Idaho clearly held that under that state’s law, battery does not require the intent to harm or offend, but the court refused to determine which position the Second Restatement had adopted because Idaho does not follow the Restatement. In 1995, in Brozka v. Olson, the Supreme Court of Delaware interpreted the Second Restatement’s definition of battery to require only “the intent to make contact with the person, not the intent to cause harm,” thereby implying, although not expressly stating, that the plaintiff also need not prove an intent to cause even offensive contact, if the intended contact turns out to be either harmful or offensive. It was not until 2000 that a court squarely addressed the question whether the Second Restatement definitions of battery require dual or single intent. In White v. Muniz, the Supreme Court of Colorado

---

37 Second Restatement, supra note ___ at § 13.
38 Id. at § 18(1):
   An actor is subject to liability to another for battery if
   (a) He acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and
   (b) An offensive contact with the person of the other directly or indirectly results.
39 Except in referring to the doctrine of transferred intent, see infra note ___ & accompanying text. I will ignore, for the remainder of this article, the intent to cause “imminent apprehension” of a harmful or offensive bodily contact as satisfying the intent element of either harmful or offensive battery. It is cumbersome and, in any event, the same issue of single versus dual intent arises in the interpretation of what it means to intend apprehension of a harmful or offensive bodily contact.
40 The use of identical intent requirements, thereby treating as equivalent the intent to cause either a harmful contact or an offensive contact or merely apprehension of an imminent harmful or offensive contact, reflects one aspect of the doctrine of “transferred intent,” under which courts extend liability in trespassory torts for unintended consequences: liability is extended when offense is intended with resulting harm “or vice versa” and when the tortious conduct is directed at one person but unexpectedly affect another person. See Dobbs, supra note ___ at 75.
41 Second Restatement, supra note ___ at § 8A.
42 See supra notes ___ & accompanying text.
44 668 A.2d 1355, ___ (Del. 1995).
45 999 P.2d 814, ___ (Colo. 2000).
interpreted Section 18 of the Restatement Second to require dual intent, claiming that “[h]istorically, the intentional tort of battery required a subjective desire on the part of the tortfeasor to inflict a harmful or offensive contact on another.” By contrast, in the 2005 decision in Wagner v. State of Utah, the Utah Supreme Court interpreted the Second Restatement’s definition to require only that the defendant intend to touch the person of another and that the touch is a harmful or offensive one at law.

Although in Muniz, the court believed that dual intent was historically required, it appears that the question had not previously been raised in precisely those terms, except in University of Idaho. In that case, the Idaho Supreme Court squarely adopted the single intent rule, but only on the basis of a prior Idaho decision, and that prior decision itself held only that the civil action in battery does not require that the defendant have intended the precise injury that resulted. Indeed, subsequent to Muniz and in direct contrast to that court’s view of the history of intent in the law of battery, the Utah Supreme Court in Wagner claimed that it was the single intent rule that had been adopted in the majority of cases in both federal and state courts.

A close examination of the case law reveals many opinions that appear to have adopted either the dual or single intent rule, but not clearly so and often in the context of addressing a somewhat different question. For example, in Andrews v. Peters, the defendant tapped the back of the plaintiff co-worker’s knee with his own knee, resulting in the plaintiff’s fall and dislocation of her right kneecap. The defendant testified that he did not intend to be rude or offensive, and that the same thing had just been done to him by another co-worker and it had “struck him as fun.” The court upheld a verdict for the plaintiff, stating that the contact was clearly offensive and that the jury had found that the defendant intended to cause a harmful or offensive contact. The opinion is possibly ambiguous, but it appears to endorse a dual intent requirement, implying that the jury had rejected the defendant’s testimony that he intended no harm or offense. Similarly, in Labadie v. Semler, the court found that the defendant 17-year old committed a battery when he picked up a snowball and threw it at the plaintiff’s car, after the plaintiff had pulled up in front of the defendant’s house and yelled obscenities at the defendant’s mother. Relying on the Second Restatement’s definition of battery, the court appeared to endorse the dual intent requirement, stating that the defendant intended “at least to put [the plaintiff] in

---

46 122 P.3d 599, ___ (Utah 2005).
47 See supra note ___ & accompanying text.
48 See supra note ___ & accompanying text.
50 [discuss Rajspic]
51 122 P.3d at ___.
53 Id. at ___.
54 Id. at ___
apprehension of either a harmful or offensive bodily contact.”

Given the circumstances, it seemed clear that the defendant intended to either harm or offend the plaintiff, although the court was perhaps more focused on the possibility that the defendant had intended only to scare the plaintiff rather than to hit her with the snowball.

Other opinions appear to have endorsed the single intent rule, although the circumstances were such that the dual intent rule was probably satisfied, and the court may have been addressing an entirely different issue. For example, in Mink v. University of Chicago, the plaintiffs were administered the drug DES while pregnant without being told either that they were being given the drug or that they were part of a medical experiment. The court said that the plaintiffs need show only “intent to bring about the contact,” but the focus of the opinion was the rejection of any requirement that the plaintiff prove intent to harm. The court concluded that the administration of a drug without the patient’s knowledge was clearly an offensive contact, something that the defendants certainly must have known. Similarly, in Masters v. Becker, the nine-year old defendant pried the plaintiff’s fingers off the tailgate of a truck in order to get her turn to get on the ledge, causing the plaintiff to fall to the ground and sustain severe injuries. The court said that the plaintiff must prove only that there was bodily contact, that such contact was offensive, and that the defendant intended to make the contact, thereby suggesting the adoption of the single intent rule. The circumstances, however, were such that the defendant must have known that the contact would be offensive, and the court was primarily concerned, as was the Mink court, with explaining that the plaintiff did not need to prove that the defendant intended either to cause the specific injuries that occurred or to cause any injury at all.

Still other opinions contain language in one part of the opinion that appears to endorse one position, along with language in another part of the opinion that appears to endorse the opposite position. For example, in Villa v. Derouen, the defendant intentionally pointed a welding cutting torch in the plaintiff-co-worker’s direction and intentionally released oxygen or acetylene gas, unintentionally causing second degree burns to Villa’s groin. At one point, the

---

56 Id. at ___.
57 Id. at ___. See also Snyder v. Turk, 627 N.E.2d 1053 (Ohio Ct.App. 1993), in which the defendant surgeon, who had become frustrated during an operation when the plaintiff scrub nurse handed him the wrong instrument, grabbed the plaintiff by her shoulder and pulled her face down toward the surgical opening. There the court said that reasonable minds could conclude that the defendant intended to commit an offensive contact, implying that the jury could find that he had the intent to offend, as well as to cause the contact itself. Id. at ___.
59 Id. at ___.
61 Id. at ___.
62 Id. at ___. Just a few years prior to the decision in Masters, another New York court appeared to adopt the dual intent rule when it held that a six-year old boy who pushed a four-year old girl was liable for a battery, stating: “The defendant’s intent to inflict upon the plaintiff an offensive bodily contact, known to him to be offensive, has been established by the fair weight of the evidence.” Baldinger v. Banks, 201 N.Y.S.2d 269 (Sup. Ct. 1960) (emphasis added).
63 614 So.2d 714, ___ (La.App.3d Cir. 1993).
court says that “[t]o constitute a battery, the defendant need only intend that the oxygen he sprayed toward the plaintiff come into contact with Villa, or have the knowledge that this contact was substantially certain to occur”\(^64\) (sounds like single intent), but then it says that “the harmful or offensive contact, and not the resulting injury is the physical result which must be intended”\(^65\) (sounds more like dual intent). Similarly, in Brenneman v. Famous Dave’s of America., Inc.\(^66\) the court upheld a jury instruction requiring the plaintiff to prove that the defendant intended an act resulting in bodily contact which a reasonable person would deem insulting or offensive (sounds like single intent), but then later says that intent is established “if the defendant knows the consequences (offensive contact) are substantially certain to followed”\(^67\) (sounds like dual intent).

The confusion evidenced by the loose language sometimes used by courts\(^68\) is compounded by the common use of terminology that differs from the Second Restatement’s formulation of “intent to cause harmful or offensive contact.”\(^69\) For example, in the 1891 opinion in Vosburg v. Putney,\(^70\) a casebook favorite, the Wisconsin Supreme Court described the necessary element of intent as the intent to commit “an unlawful act,” and indeed this type of language was common in the nineteenth century.\(^71\) In 1934, the first Restatement of Torts (“First Restatement”) rejected this language in favor of what appears to have been an entirely new formulation that the act be done “with the intention of bringing about a harmful or offensive contact or an apprehension thereof.”\(^72\) Since the First Restatement was published, Vosburg has been commonly interpreted as illustrating the intent to commit an offensive contact.\(^73\) Nevertheless, there are modern decisions that persist in requiring the intent to commit an “unlawful” or “wrongful” act. For example, in 1958, more than 20 years after the First Restatement was published, the Oklahoma Supreme Court held, on facts similar to Vosburg, that

\(^{64}\) Id. at ___.

\(^{65}\) Id. at ___.


\(^{67}\) Id. at ___.

\(^{68}\) See Dobbs, supra note ___ at ___.

\(^{69}\) See supra note ___ & accompanying text.

\(^{70}\) 50 N.W. 403 (Wis. 1891).

\(^{71}\) See Part II infra.

\(^{72}\) American Law Institute, Restatement of the Law of Torts §13 (1934) (“First Restatement”).

\(^{73}\) See, e.g., James A. Henderson, Jr., “Why Vosburg Comes First,” 1992 Wisc. L. Rev. 853 (1992) (“whatever substantive test the court adopted [in Vosburg], that test eventually developed into what today would be referred to as one defining ‘offensive contact’”); Mark A. Geistfeld, Tort Law: The Essentials 121 (2008 (concluding that the Second Restatement maintains that the defendant intended an offensive contact); cf. Dobbs, supra note ___ at 60 (facts of Vosburg are consistent with liability based on intent to make offensive bodily contact). But see Kenneth S. Abraham, Forms and Functions of Tort Law, supra note ___ at 23 (interpreting Vosburg as requiring only intent to make contact that is inappropriate, regardless of whether the defendant lacked the intent to harm or offend). Abraham appears to endorse the single intent rule when he interprets Vosburg to require only that the defendant intend a touching, not that the defendant intend the touching to be harmful or offensive. Id. at 23. Later, however, in distinguishing between battery and negligence, he appears to endorse the dual intent rule, saying that “when one does not desire harm or offense to occur, his conduct is merely risky until he knows that harm or offense is substantially certain to result from it.” Id. at 24.
students engaged in throwing erasers at each other in a classroom, before the teacher arrived, were liable for battery when an eraser hit the plaintiff, a student in the classroom who had not been participating in the activity.\textsuperscript{74} There the court said: “The willful and deliberate throwing of wooden blackboard erasers at other person in a classroom containing 35 to 40 students is [not] an innocent and lawful pastime, even though done in sport and without intent to injure. Such conduct is wrongful.”\textsuperscript{75} The court went on to say, with regard to the defendant’s intent, that “the intention with which the injury was done is immaterial so far as the maintenance of the action is concerned, provided the act of causing the injury was wrongful, for if the act was wrongful, the intent must necessarily have been wrongful.”\textsuperscript{76} This language is almost identical to that used in \textit{Vosburg}, which was one of several decisions cited in the opinion.\textsuperscript{77} Even more recently, in 2007, a California court explained that ordinarily the plaintiff must prove that the defendant intended to harm or offend the plaintiff, but then articulated an exception for cases where the defendant’s act is “unlawful,” in which case all that the defendant need intend is to do the act in question.\textsuperscript{78}

Yet another formulation of the intent requirement that departs from the text of Sections 13 and 18 is “an intent to bring about a result which will invade the interests of another in a way that the law forbids.”\textsuperscript{79} Still other courts state that the plaintiff need only allege and prove that the defendant intended to do the act that resulted in the plaintiff’s injury.\textsuperscript{80}

\begin{footnotesize}
\textsuperscript{74} Keel v. Hainline, 331 P.2d 397 (Okla. 1958). It did not matter that the defendant there did not direct his activity toward the plaintiff. Under the doctrine of transferred intent, a defendant who has a wrongful intent toward one person but unexpectedly affects another will be treated as if he or she intended to affect the interests of the actual victim. See supra note ____.

\textsuperscript{75} Id. at ____.

\textsuperscript{76} Id. at ____.

\textsuperscript{77} Id. at ____.

\textsuperscript{78} Austin B. v. Escondido Union Sch. Dist., 149 Cal.App.4th 860 (2007). See also Maines v. Cronomer Valley Fire Dept., Inc., 50 N.Y.2d 535 (1980) (describing battery as a lawsuit for “a deliberate and intentional wrongful act” requiring that plaintiffs need only allege “deliberate intent or conscious choice to do the act which results in the injury”).

\textsuperscript{79} W. Page Keeton et al, Prosser and Keeton on the Law of Torts 36 (5th ed. 1984)., cited in Lawson, supra note ____ at 365. For opinions adopting this or similar language, see, e.g., Wallace v. Rosen, 765 N.E.2d 192 (Ind. App. 2002); Caudle v. Betts, 512 So.2d 389, 390 (La. 1987); Andrews v. Peters, 330 S.E.2d 638 (N.C.Ct.App. 1985. This language departs from that used in the definitional sections of both the First and Second Restatements but is similar to language used in the Scope Note to the First Restatement, which states that, although the writ of trespass had been extended to harms which were not intentional, this particular topic of the Restatement “deals only with bodily harms which are caused directly or indirectly by acts which were intended to invade some interest of personality of the other or of a third person.” First Restatement, supra note ____ at ____ . That language does not appear to have been intended as a formulation of the intent necessary with respect to any particular intentional tort, since both Restatements provide that formulation in their definitional sections. Thus, for battery, the Restatements provide that the necessary intent is to make a “harmful or offensive [bodily] contact. See notes ____ & ____ supra & accompanying text. Of course, to the extent that such language is intended to provide a formulation of the necessary intent in battery, it is circular and not at all useful. See, e.g., Lawson, supra note ____ at ____. In addition, it is not helpful in discerning whether the Restatement adopts the single or dual intent rule.

\textsuperscript{80} See, e.g., Rajspic v. Nationwide Mut. Ins. Co., 718 P.2d 1167, 1171 (Idaho 1986) (approving a jury instruction that for purposes of a battery, “the intent referred to is the intent to do the act complained of”), cited in Lawson, supra note ____ at 362; cf. Maines v. Cronomer Valley Fire Dept., Inc., 50 N.Y.2d 535 (1980) (in context of determining whether the defendant’s conduct constituted a “willful or intentional act” within the meaning of the workers’ compensation act immunity, court described New York battery cases as requiring only the “deliberate
In some cases, courts have brought into the definition of a battery the requirement that the plaintiff prove the absence of consent, sometimes substituting lack of consent for the intent to commit a harmful or offensive contact. In White v. University of Idaho, 81 for example, the court adopted the single intent rule in its rejection of any required intent to harm or offend, but the court also defined battery as the “intent to cause an unpermitted contact.” That was also the case in Mink v. University of Chicago, 82 which similarly defined battery as “the unauthorized touching of the person of another.” Adding to the confusion, Mink, unlike University of Idaho, apparently required that the defendant know that the contact was unpermitted, 83 thereby incorporating a form of the dual intent rule that it had elsewhere appeared to reject when it said that the requisite element of intent is met when the plaintiff shows “an intent to bring about the contact.” 84 Such cases do not necessarily articulate a single definition of battery; rather, they sometimes appear to adopt slightly different formulations in different parts of the opinion.

The persistent emphasis on the plaintiff’s lack of consent may be puzzling, given the absence of any mention of consent in the Second Restatement’s definition of battery in the text of Sections 13 and 18. 85 In addition, the Comment to Section 13 provides a cross-reference to privileges to be defined in later sections that prevent liability, including consent, thereby suggesting that consent, like self-defense, is an affirmative defense and not an aspect of the prima facie case. 86 However, that same Comment contains the following very important clarification:

The absence of such consent is inherent in the very idea of those invasions of interests of personality which, at common law, were the subject of an action of trespass for battery, assault, or false imprisonment. Therefore, the absence of consent is a matter essential to the cause of action, and it is uniformly held that it must be proved by the plaintiff as a necessary part of his case. 87

---

81 797 P.2d at ___.
82 460 F. Supp. at ___.
83 Id. at ___.
84 Id. at ___.
85 See supra notes ___ & accompanying text.
86 Second Restatement §13, cmt. d.
87 Id. The Comment to Section 18 does not contain any comparable explanation. Comment f on the effect of “mistake” cross-references Sections 892-892D on consent, but does not address the question of whether the absence of consent is part of the plaintiff’s prima facie case or an affirmative defense. Id. at § 18, cmt. f.
Almost identical language appeared in the Comment to Section 13 in the First Restatement, although in the First Restatement, harmful battery was defined in the text itself to require not only “the intention of bringing about a harmful or offensive contact,” but also that “the contact is not consented to by the other or the other’s consent thereto is procured by fraud or duress” and that “the contact is not otherwise privileged.” Although the text itself did not clarify that the absence of consent (unlike the non-consensual privileges) is itself an element of the plaintiff’s prima facie case, the Comment contained virtually the same language quoted above, and the First Restatement’s inclusion of the absence of consent in the very definition of battery made it more likely that readers would look to the Comment to determine that the absence of consent is apparently part of the plaintiff’s prima facie case.

Unfortunately, discovering the pertinent language of both the First and Second Restatements concerning the absence of consent does not do much to clarify the evident confusion in existing court opinions, casebooks, and many commentaries. The pertinent language does suggest both that it is the plaintiff’s burden to prove absence of consent and that the absence of consent is intended as an additional requirement—not as a substitute for the intent to cause a harmful or offensive contact. What it doesn’t tell us, however, is whether or how there can be an intent to offend when the defendant honestly believes that the plaintiff has consented (or would consent) to the intended contact. When the defendant’s belief is reasonable, then the plaintiff may be found to have given apparent consent, and the defendant will not be liable regardless of intent. But what if the defendant’s belief that the plaintiff has consented is unreasonable? According to Section 892(2) of the Second Restatement, it is only when the defendant reasonably believes that the plaintiff has consented that apparent consent is established. May the plaintiff then prevail because of the lack of apparent consent or will the court require, with respect to the separate element of intent, that the defendant must have at least known that the contact was unpermitted, as the Mink court suggested? Are these questions relevant on the initial question of whether the Second Restatement adopts either dual or single intent? And what

88 First Restatement § 13, cmt. f (“Absence of consent is inherent in the very idea of those invasions of interest of personality which at common law were the subject of an action of trespass for assault, battery or false imprisonment. There, absence of consent is a matter necessary to constitute an actionable assault, battery, or false imprisonment.”
89 Id. at § 13(a).
90 Id. at § 13(b).
91 Id. at § 13(c).
92 See note supra.
93 The Comment does not say so explicitly, but that is clearly implied in the language of the Comment. See supra note 92.
94 See infra note [next].
95 Second Restatement § 892(2) (“if words or conduct are reasonably understood by another to be intended as consent, they constitute apparent consent and are as effect as consent in fact”). (Emphasis added.)
96 “Intent” is defined in the Second Restatement to denote either “that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it”). Second Restatement § 8A. See also Third Restatement, supra note 92 at §1.
97 See supra note 96 & accompanying text.
about jurisdictions that have apparently rejected the Restatement definitions in favor of a formulation in which battery is defined instead as the intent to cause an unpermitted contact? Is it necessary in these jurisdictions to prove that the defendant intended to cause a contact that the defendant knew was unpermitted (a version of dual intent) or is it sufficient that the defendant intend a contact that turns out to be unpermitted (a version of single intent)?

In summary, existing court opinions are even more confused than is suggested by the debate over whether the Second Restatement adopts dual versus single intent. Part II provides a brief account of the historical development of the tort of battery, which will be helpful in understanding why so many modern courts do not adhere to the Second Restatement formulation of the definition of a battery and what they might mean when they use a different formulation. Such an historical account may also be helpful in determining the proper interpretation of the relevant Second Restatement provisions.

Part II: A brief account of the historical development of the tort of battery

The action in battery originated in the early common law writ of trespass, which included not only battery, but also assault, false imprisonment, trespass to land, and trespass to chattels. In its earliest form, trespass had a quasi-criminal character, aiming at “serious and forcible breaches of the King’s peace.” Indeed, it was in connection with criminal proceedings that damages were assessed as an incidental matter in favor of the injured victim.

Although conceived originally as covering force and violence, at some point early on it became clear that the writ of trespass covered many of what we would now view as offensive bodily contacts, such as “spitting upon a person; pushing another against him; throwing a squib or any missile or water upon him.” The justification was that there are minimal levels of force and violence that may prompt a breach of the King’s peace and that the law cannot such ignore such levels. It was said that “[t]he least touching of another in anger is a battery” and that “[t]he law cannot draw the line between different degrees of violence, and therefore totally prohibits the first and lowest stages of it.” In other words, early courts and commentators did not distinguish between “harmful” and “offensive” batteries.

---

98 See supra notes ___ & accompanying text [Mink].
100 Id.
102 Francis Hilliard 1 The Law of Torts 191 (1859).
103 See 2 Greenleaf on Evidence at 71 (“The degree of violence is not regarded in the law.”).
104 Hilliard, supra note ___ at 191 (citing Cole v. Turner, 6 Mod. 149).
The writ of trespass was initially the remedy for all forcible, direct injuries to either person or property and did not necessarily require any form of fault. Subsequently, the writ of trespass on the case was developed, in order to provide a remedy for “obviously wrongful” conduct causing injuries that were either not forcible or not direct. From the beginning, the case writ required some form of fault. Ultimately, that writ came to be used for all cases alleging mere negligence, whereas trespass remained the appropriate remedy for intentional wrongs.

This shift to the current division between intentional torts and negligence was gradual. By the mid-19th century, there was growing recognition that there should be no liability for pure accident, but this recognition did not lead to any clear distinction between an action in battery and an action in negligence. Rather, it was commonly said that with respect to an action in battery (no separate tort of negligence then being recognized), “the plaintiff must come prepared with evidence to show, either that the intention was unlawful, or that the defendant was in fault; for if the injury was unavoidable and the conduct of the defendant was free from blame, he will not be liable.” Thus, in describing the various acts for which a defendant might be liable, treatise writer Greenleaf stated: “So if a defendant drives a horse too spirited, or pulls the wrong rein, or uses a defective harness, and the horse taking fright injures another, he is liable for battery.” On the other hand, “if the injury happened by unavoidable accident, in the course of an amicable wrestling-match or other lawful athletic sport, if it be not dangerous, it may be justified.”

In other words, there was such a thing as a “negligent battery.” For example, in an 1829 decision, the 12-year old defendant shot an arrow from a bow, striking the plaintiff and

---

105 See Prosser and Keeton, supra note ___ at 29. The threshold for “forcible” was low; “so long as the defendant applied some physical force to the victim or his property, trespass was in principle available.” John C. P. Goldberg, “A Brief History of Anglo-American Tort Doctrine, 1250-1850, in Goldberg, et al Tort Law: Responsibilities and Redress, supra note ___ at Appendix B, at B-7.

106 Goldberg, supra note ___ at ___.

107 Id.

108 Id. at _____.

109 See Prosser and Keeton, supra note ___ at 30.

110 See id. at 31.

111 2 Greenleaf on Evidence at ____ (1899). See also Prosser and Keeton, supra note ___ at 31 (growing recognition that “the defendant must be found to be at fault, in the sense of being chargeable with a wrongful intent, or with negligence”); 1 Jaggar, Torts 434-35 (1895) (battery requires both exerted force and either “fault or intention on the part of the wrongdoer”). The Greenleaf treatise has a section on assault and battery and no separate section on negligence; rather, negligence is discussed in a subsection within the assault and battery chapter. Id. at 72-73. See also Hilliard on Torts, supra note ___ at 194 (no separate chapter on negligence; chapter on assault and battery includes discussion of batteries in which even the bodily contact is negligent but not intentional). An earlier version of the Greenleaf treatise was cited by the court in Vosburg, the 1891 casebook favorite opinion relying on intent to commit an “unlawful act”. See supra note ___ & accompanying text.

112 2 Greenleaf, supra note ___ at ___.

113 Id.

putting out one of his eyes. 115 The plaintiff had been hiding from the defendant, who shot at a nearby basket. When the plaintiff unexpectedly raised his head, the arrow struck him. The court upheld a trespass judgment for the plaintiff on the ground that shooting an arrow in a school room where there were a number of boys assembled was “at the least, grossly negligent and unjustifiable.” 116 Similarly, in an 1822 decision, the defendant was found to be liable for trespass when he went up in a balloon and inadvertently came down in the plaintiff’s garden, on the ground it was foreseeable that a crowd would be drawn into the garden, thereby damaging the plaintiffs’ vegetables and crops. 117 It is notable that in these cases, and in other similar cases, 118 the courts failed to find not only that the defendant intended to injure the plaintiff, but also that the defendant intended to make or cause any contact with the plaintiff’s person or property.

Because battery included both intentional and unintentional (but direct) bodily contacts, the defense of contributory negligence was available not only in case, but also in trespass for battery, regardless of whether the defendant’s conduct was willful or merely negligent. In an 1854 decision, for example, the defendant was found to have committed a trespass when he assaulted, beat, and pushed the plaintiff into a running railroad car. 119 In its opinion, the court held that the plaintiff was not required to flee to avoid injury, but that “if the plaintiff use ordinary care to prevent injury and injury ensue from the wrongful act of the defendant, the plaintiff is entitled to recover,” 120 thereby indicating that contributory negligence on the part of the plaintiff would have precluded recovery. Similarly, in an 1877 decision, the court found that the 14-year old defendant had committed a clear assault and battery when he picked up a piece of mortar and threw it at one boy, hitting another and causing serious injury, there being “no question of contributory negligence or mutual consent to engage in play of a dangerous character.” 121

In insisting that the action in trespass required some degree of fault on the part of the defendant, courts often said that the plaintiff must show “either that the intention was unlawful, or that the defendant was in fault.” 122 Fault clearly referred to conduct that we now would

116 3 Wend. at ___.
118 For example, in an 1846 case, the plaintiff alleged that the defendant carelessly and negligently drove his horse, causing his sleigh to collide with plaintiff’s horse and killing it; the court held that the plaintiff had the option of bringing the action in either trespass or case. Claflin v. Wilcox, 18 Vt. 605 (1946). See also Honeycutt v. Louis Pizitiz Dry Good Co., 180 So. 91 (1938) (“it is settled in this jurisdiction that to maintain a civil action for assault and battery, it is not essential that the infliction of the injury upon the plaintiff should be intended…. [I]t can often be sustained by proof of a negligent act resulting in unintentional injury.”)
119 Heady v. Wood, 1854 WL 3298 (Ind. 1854).
120 Id. at ___.
121 Peterson v. Haffner, 59 Ind. 130, ___ (1877).
122 See supra note ___ & accompanying text.
describe as negligent.\textsuperscript{123} With respect to an unlawful intention, courts appeared to be placing the emphasis on \textit{unlawful} rather than on \textit{intent}. Thus, all that must have been intended is the act causing the harm, certainly not the harm, and at least initially, not even the bodily contact that caused the harm.\textsuperscript{124} A defendant’s conduct was unlawful if he did “an illegal or mischievous act, which is likely to prove injurious to others,” and even in the absence of such unlawful conduct, the defendant would be liable “when he [did] a legal act in such a careless and improper manner that injury to third persons may probably ensue.”\textsuperscript{125} In other words, although the modern conception of battery focuses on the intention of the actor, older law focused more on the relation of the act to the injury\textsuperscript{126} and the character of the act itself.

At some point courts began to distinguish between an action in negligence and an action in battery. When this occurred, assault and battery came to be viewed as requiring something more than mere negligence on the part of the defendant, that is, a bad intent or willfulness.\textsuperscript{127} Even then, however, courts struggled to determine what a bad intent might be. In an 1899 decision, for example, the defendant rode a bicycle into the plaintiff, who was standing on a broad public sidewalk.\textsuperscript{128} The court noted that the defendant was clearly guilty of negligence, but that the plaintiff had not sued for negligence, but rather for assault and battery.\textsuperscript{129} In determining whether the plaintiff had successfully proved a battery, the court stated that it was “not essential that there should be a direct or specific intention to commit an assault and battery at the time violence is done to the plaintiff.”\textsuperscript{130} Rather, “the facts may be such as to create an implied or constructive intention to do a wrongful act, although there is no direct or specific unlawful intention.”\textsuperscript{131} With regard to the facts of that case, the court held that the facts stated in the jury’s verdict “justified a finding that the act of the defendant was a rude and reckless one,” thereby “justifying the legal conclusion that there was such a reckless disregard of consequences as to imply an intention to assault the plaintiff.”\textsuperscript{132} Similarly, in a 1902 decision, the court also invoked the concept of a “constructive intent which makes a wrongful act willful.”\textsuperscript{133} There the court rejected the defendant’s claim that he had no intent to injure the plaintiff, because there

\textsuperscript{123} Cf. Prosser and Keeton, supra note \_\_\_ at 31 (“This transition was accompanied by a growing recognition that, regardless of the form of the action, there should be no liability for pure accident, and that the defendant must be found to be at fault, in the sense of being chargeable with a wrongful intent, or with negligence.”)
\textsuperscript{124} See supra notes \_\_\_ & accompanying text.
\textsuperscript{125} Hilliard, supra note \_\_\_ at 94.
\textsuperscript{126} Harper & James, supra note \_\_\_ at 316.
\textsuperscript{127} See, e.g., Mercer v. Cobin, 20 N.E. 132 (Ind. 1889).
\textsuperscript{128} Id.
\textsuperscript{129} Id. at \_\_\_.
\textsuperscript{130} Id. at \_\_\_.
\textsuperscript{131} Id.
\textsuperscript{132} Id. at \_\_\_.
\textsuperscript{133} Reynolds v. Pierson, 29 Ind. App. 273, \_\_\_ (1902).
was “such a reckless disregard of the consequences on the part of the defendant as to imply an intention to assault the plaintiff.”

The concept of unlawful or wrongful conduct was also invoked in cases in which the defendant may have intended to benefit the plaintiff, but court nevertheless found a battery because the bodily contact was against the will of the plaintiff. This was usually the case when surgeons operated without the consent of the patient in non-emergency situations. For example, in a 1905 decision, the court said, “If the operation was performed without the plaintiff’s consent and the circumstances were not such as to justify its performance without it, it was wrongful, and if it was wrongful, it was unlawful.” Citing a treatise to the effect that “any unlawful or unauthorized touching of the person of another, except it be in the spirit of pleasantry, constitutes an assault and battery,” the court concluded that the surgery was a “violent act and not a pleasantry.” Similarly, in an 1878 decision, a defendant was held liable in battery when he intervened in a scuffle between the intoxicated plaintiff and another person, inadvertently breaking the plaintiff’s leg. There, the court held that the defendant need not have acted in anger and that he could be liable even if his act was done in good nature and from good motives, so long as it was against the will of the plaintiff. Similarly, in a 1920 case involving a sexual touching of a young woman by the woman’s employer, the court held that it was not necessary to demonstrate that the assault was made in an angry or insolent manner, but that “an indecent assault [on a woman] consists in the act of taking indecent liberties without her consent and against her will.”

This was more or less the state of affairs when the First Restatement was adopted in 1934. In its definitional sections on battery, the First Restatement distinguished between harmful and offensive contacts, limited the action in battery to contacts that were intended (thereby relegating merely negligent or even reckless contacts to the action in negligence) and with respect to the required intent, apparently originated the phrase “intending to cause a harmful or offensive contact” as a substitute for the prior emphasis by courts and commentators on

---

134 Id. at ___. The concept of “constructive intent” has been picked up by Deanna Sacks in recent article on sexual batteries, in which she apparently assumes that battery requires intent to harm or offend, but then advocates an approach whereby a defendant who “exceeds the bounds of ordinary social usages and violates social norms…will be held to have done so with constructive intent to offend.” Deanna Pollard Sacks, “Intentional Sex Torts,” 77 Fordham L. Rev. 1051, 1077, n. 127 (2008-2009).
135 Mohr v. Williams, 104 N.W. 12, 16 (Minn. 1905). See also Rolater v. Strain, 137 P. 96, 98 (Okla. 1913) (“the removal of the sesamoid bone by the surgeon was without the consent of the patient, and was therefore unlawful and wrongful, and constituted a trespass on her person”).
136 Mohr v. Williams, supra note ___, 104 N.W. at 16.
138 Id. at ___.
139 Martin v. Jansen, 113 Wash. 290 (1920).
140 First Restatement, supra note ___ at §§ 13, 18.
141 Id. at Scope Note to Topic One.
142 See supra notes ___ & accompanying text. I have not been able to locate any cases or commentary using the phrase “intending to cause a harmful or offensive contact” prior to its usage in the First Restatement.
“unlawful,” “wrongful,” or “constructive” intent.\textsuperscript{143} The First Restatement recognized that absence of consent was an essential aspect of battery; it did not, however, clearly indicate whether the defendant must have intended harm or offense, nor did it explain the relationship between absence of consent and intent to cause a harmful or offensive contact.\textsuperscript{144}

Part III: The ambiguity of the Second Restatement provisions: competing interpretations

In \textit{Muniz}, the first case to squarely address the question, the Colorado Supreme Court found that the Second Restatement clearly requires dual intent and that this requirement was in accord with the general view of courts and commentators, including the popular and authoritative treatise, Prosser and Keeton on the Law of Torts.\textsuperscript{145} In \textit{Wagner}, the next case to squarely address the same question, the Utah Supreme Court found to the contrary that the Second Restatement clearly requires only single intent and that this requirement was in accord with the general view of courts and commentators, including the same Prosser and Keeton treatise.\textsuperscript{146} Putting aside prior case law, which I have addressed in Parts I and II, how is it that these two courts held such diametrically opposed views of both the Second Restatement provisions and the Prosser and Keeton treatise? As some recent commentators have correctly observed, the Second Restatement provisions are ambiguous, particularly with respect to various statements in the comments, including references to the types of cases for which defendants will be held to have the requisite intent.\textsuperscript{147} The same ambiguity can be found in the Prosser and Keeton treatise.

In its finding that the Second Restatement endorses the dual intent rule, the \textit{Muniz} court relied primarily on the plain language of the text, i.e., the requirement that a defendant must have acted “intending to cause a harmful or offensive contact.”\textsuperscript{148} Although the court did not explain its reasoning, it apparently believed that the most natural reading of this phrase was that there must be intent to harm or offend as well as to cause bodily contact and, conversely, that it would be unnatural to interpret this phrase to mean intent to cause a contact that turns out to be harmful or offensive.\textsuperscript{149} Similarly, the Prosser and Keeton treatise states that “‘intent’ is the word

\begin{itemize}
  \item \textsuperscript{143} See supra notes ___ and accompanying text.
  \item \textsuperscript{144} See supra notes ___ & accompanying text.
  \item \textsuperscript{145} White v. Muniz, 999 P.2d 814 (Colo. 2000).
  \item \textsuperscript{146} Wagner v. State, 122 P.2d 599 (Utah 2005)/
  \item \textsuperscript{147} See supra notes ___ & accompanying text.
  \item \textsuperscript{148} 999 P2d at ___. For modern version of this interpretive approach, see, e.g., Lawson, supra note ___ at 356 (“In the tort of battery, the actor must intend a harmful or offensive contact with another. Consequently, the actor’s intent must have two objects: contact with another, and a harm of offense resulting from that contact.”); Edward J. Kionka, Torts in a Nutshell 171 (acknowledging split between dual and single intent, but citing Section 13 of Restatement Second as support for dual intent requirement); Richard L. Hansen, The Glannon Guide to Torts 22-23 ((2009)(“Under the Restatement approach it is not enough for the defendant to intend contact. The defendant must intend to cause a harmful or offensive contact….Some jurisdictions reject the Restatement’s intent standard for battery in favor of proof of an intent to cause contact.”)
  \item \textsuperscript{149} In addition to citing to the text of Section 18, the Colorado Supreme Court cited to the following language in Comment e: “It is necessary that an act be done for the purpose of bringing about a harmful or offensive contact…to another or to a third person, or with knowledge that such a result will, to a substantial certainty, be produced by his act. It is not enough to make an act intentional that the actor realize that it involves any degree of
commonly used to describe the purpose to bring about *stated physical consequences*,"\textsuperscript{150} that intent also includes “those consequences which the actor believes are substantially certain to follow from what the actor does,”\textsuperscript{151} and that battery requires “[a] harmful or offensive contact with the person, resulting from an act intended to cause the plaintiff or a third person to suffer *such a contact* or apprehension that *such a contact* is imminent.”\textsuperscript{152} The Muniz court likely viewed the most natural reading of the phrase “such a contact” as referencing the earlier phrase “harmful or offensive contact.”

In finding that the Second Restatement endorses the single intent rule, the Wagner court began with a discussion of Section 8A, which as noted earlier, defines the term “intent” to “denote that the actor desires to cause the consequences of his act or that he believes that the consequences are substantially certain to result from it.”\textsuperscript{153} In its discussion, the court described an illustration in the Section 8A Comment that involves shooting a gun—-an illustration designed to clarify that the actor must intend not only the act of pulling the trigger, but also the consequence of hitting a person, thereby distinguishing between an accidental and an intentional shooting.\textsuperscript{154} The court then concluded that “[b]attery liability, rather than liability sounding in negligence, will attach only when the actor pulled the trigger in order to shoot another person, or knowing that it was substantially likely that pulling the trigger would lead to that result.”\textsuperscript{155} As for the question of whether the shooter must intend that the bodily contact would cause harm or offense, the court looked first “to the plain language of the law itself.”\textsuperscript{156} However, rather than probability of a harmful or offensive contact..., less than a substantial certainty that it will so result.” 999 P. 2d at 816. Once again, the only way that this language supports the dual intent rule is through the assumption that the most natural reading of the phrases “purpose of bringing about a harmful or offensive contact” and “such a result” is that there must either a purpose to harm or offend (as well as to contact) or knowledge that “such a result” will follow.

\textsuperscript{150} Prosser and Keeton, supra note ___, §8 at 35 (emphasis in original).

\textsuperscript{151} Id.

\textsuperscript{152} Id., §9 at 39 (emphasis added). The Muniz court cited only Section 8, not Section 9 that addresses the intent required in battery, whereas Section 8 contains only a more general discussion of the meaning of “intent.” In addition to citing the Prosser and Keeton treatise, the court cited Section 30 of Professor Dobbs’s 2000 treatise. That citation is curious because in that particular section, Dobbs clearly states that the Second Restatement formulation is ambiguous. Dobb, supra note ___ at 58 (“The question is whether the plaintiff shows intent by showing merely an intent to touch that turned out to be offensive or harmful, or whether she must show that the harm or offense was also intended. On this point the Restatement and some of the cases are ambiguous.” Elsewhere in that treatise Dobbs is himself ambiguous as to whether either single or dual intent is required. Compare, e.g., id. at §28 at 53 (“An intent to cause actual harm is a sufficient intent but not a necessary one. It is enough that the defendant intends bodily contact that is ‘offensive’”) with id at §29 at 57 (“in the case of battery, the plaintiff’s burden is to show that the defendant intended to and did cause either harm or ‘offense’”). See also infra notes ___ & accompanying text [cross-reference to subsequent policy discussion of Dobbs’s ambiguous discussion of intent in the case of the sexual boor].

\textsuperscript{153} See supra note ___ & accompanying text.

\textsuperscript{154} 122 P.2d at ___.

\textsuperscript{155} Id. Of course, it would also be sufficient if the defendant intended to cause the imminent apprehension of a harmful or offensive bodily contact. See supra note ___ & accompanying text.

\textsuperscript{156} 122 P.2d at ___.

\textsuperscript{150} Prosser and Keeton, supra note ___, §8 at 35 (emphasis in original).

\textsuperscript{151} Id.

\textsuperscript{152} Id., §9 at 39 (emphasis added). The Muniz court cited only Section 8, not Section 9 that addresses the intent required in battery, whereas Section 8 contains only a more general discussion of the meaning of “intent.” In addition to citing the Prosser and Keeton treatise, the court cited Section 30 of Professor Dobbs’s 2000 treatise. That citation is curious because in that particular section, Dobbs clearly states that the Second Restatement formulation is ambiguous. Dobb, supra note ___ at 58 (“The question is whether the plaintiff shows intent by showing merely an intent to touch that turned out to be offensive or harmful, or whether she must show that the harm or offense was also intended. On this point the Restatement and some of the cases are ambiguous.” Elsewhere in that treatise Dobbs is himself ambiguous as to whether either single or dual intent is required. Compare, e.g., id. at §28 at 53 (“An intent to cause actual harm is a sufficient intent but not a necessary one. It is enough that the defendant intends bodily contact that is ‘offensive’”) with id at §29 at 57 (“in the case of battery, the plaintiff’s burden is to show that the defendant intended to and did cause either harm or ‘offense’”). See also infra notes ___ & accompanying text [cross-reference to subsequent policy discussion of Dobbs’s ambiguous discussion of intent in the case of the sexual boor].

\textsuperscript{153} See supra note ___ & accompanying text.

\textsuperscript{154} 122 P.2d at ___.

\textsuperscript{155} Id. Of course, it would also be sufficient if the defendant intended to cause the imminent apprehension of a harmful or offensive bodily contact. See supra note ___ & accompanying text.

\textsuperscript{156} 122 P.2d at ___.

\textsuperscript{150} Prosser and Keeton, supra note ___, §8 at 35 (emphasis in original).

\textsuperscript{151} Id.

\textsuperscript{152} Id., §9 at 39 (emphasis added). The Muniz court cited only Section 8, not Section 9 that addresses the intent required in battery, whereas Section 8 contains only a more general discussion of the meaning of “intent.” In addition to citing the Prosser and Keeton treatise, the court cited Section 30 of Professor Dobbs’s 2000 treatise. That citation is curious because in that particular section, Dobbs clearly states that the Second Restatement formulation is ambiguous. Dobb, supra note ___ at 58 (“The question is whether the plaintiff shows intent by showing merely an intent to touch that turned out to be offensive or harmful, or whether she must show that the harm or offense was also intended. On this point the Restatement and some of the cases are ambiguous.” Elsewhere in that treatise Dobbs is himself ambiguous as to whether either single or dual intent is required. Compare, e.g., id. at §28 at 53 (“An intent to cause actual harm is a sufficient intent but not a necessary one. It is enough that the defendant intends bodily contact that is ‘offensive’”) with id at §29 at 57 (“in the case of battery, the plaintiff’s burden is to show that the defendant intended to and did cause either harm or ‘offense’”). See also infra notes ___ & accompanying text [cross-reference to subsequent policy discussion of Dobbs’s ambiguous discussion of intent in the case of the sexual boor].

\textsuperscript{153} See supra note ___ & accompanying text.

\textsuperscript{154} 122 P.2d at ___.

\textsuperscript{155} Id. Of course, it would also be sufficient if the defendant intended to cause the imminent apprehension of a harmful or offensive bodily contact. See supra note ___ & accompanying text.

\textsuperscript{156} 122 P.2d at ___.
looking to the text of Section 13, on which the Muniz court relied,\textsuperscript{157} the Wagner court looked to “the plain language of the comments,”\textsuperscript{158} citing the Comment to Section 13, which states that “‘it is immaterial that the actor is not inspired by any personal hostility to the other, or a desire to injure him’” and that “‘the actor will be liable for battery even if he honestly but ‘erroneously believed[d] that…the other has, in fact, consented to [the contact].’”\textsuperscript{159} The court then described two examples used in the comment to illustrate actionable battery: “an actor playing a good-natured practical joke, under the mistaken belief that he has his victim’s consent to make the contact” and “the healing contact of a physician, acting with helpful intent but against the patient’s wishes.”\textsuperscript{160}

As for the Prosser and Keeton treatise, the Wagner court referenced both that treatise’s “echo[ing]” of the Comment to Section 13 when it states that “[t]he intent with which tort liability is concerned is not necessarily a hostile intent, or a desire to do harm”\textsuperscript{161} and, in addition, a statement from the treatise that “[t]he intent with which tort liability is concerned is an intent to bring about a result which will invade the interests of another in a way that the law forbids.”\textsuperscript{162} Conceding that this latter statement is itself ambiguous, the court concluded that “all ambiguity on the point is eviscerated by Prosser’s next comment, in which he lists as one type of intentional tort the act of ‘intentionally invading the rights of another under a mistaken belief of committing no wrong.’”\textsuperscript{163}

As more recent commentators have observed, neither the text nor the comments to the Second Restatement provide definitive guidance with respect to dual or single intent.\textsuperscript{164} My own view is that the Muniz court got it right when it viewed the textual language as more naturally

\textsuperscript{157} See supra note ___ & accompanying text. Earlier in the opinion, the Wagner court had concluded “that the plain language of the Restatement, the comments to the Restatement, Prosser and Keeton’s exhaustive explanation of the meaning of intent in the Restatement, and the majority of case law on the subject in all jurisdictions…compels us to agree with the State that only intent to make contact is necessary.” 122 P.2d. at 603. However, the court never explained how the textual language itself supports the single intent rule.

\textsuperscript{158} 122 P.2d at ___. See also King, supra note ___ at 632 (“The key language, ‘intending to cause a harmful or offensive contact’ (or its apprehension) does not tell us whether a defendant must have merely intended a contact (or its apprehension) that turns out to be harmful or offensive, or must have also intended that its effect be harmful or offensive.”). [move this earlier---re recognition of ambiguity of Restatement?]

\textsuperscript{159} 122 P.2d at ___. This language is also cited by several commentators as supporting the single intent rule, although they concede that the language is not definitive on that point. See, e.g., King, supra note ___ at ___; Simons, supra note ___ at ___; Osborne, supra note ___ at ___. The Wagner court also cited as support for the single intent rule Section 283B of the Second Restatement, and its comment, which addresses the liability of the mentally ill actor for conduct that does not conform to the reasonable person standard. 122 P.2d at ___. However, this section addresses the liability of the mentally ill for negligence, not for intentional torts such as battery. In battery, mere departure from the reasonable person standard is clearly insufficient to establish liability; no one disagrees that the Second Restatement requires that a battery defendant must intend bodily contact (or the apprehension of an imminent bodily contact). See supra note ___ & accompanying text.

\textsuperscript{160} 122 P.2d at ___

\textsuperscript{161} Id. at ___

\textsuperscript{162} Id. at ___

\textsuperscript{163} Id.

\textsuperscript{164} See supra note ___ & accompanying text.
supporting the dual intent requirement,\textsuperscript{165} but that the Wagner court got it right when it viewed the comments as at least appearing to favor the single intent rule.\textsuperscript{166} Nevertheless, it is not out of the question to read the text as requiring an intent to make contact that turns out to be harmful or offensive, and it is possible to explain how the comments, as well as the statements in the Prosser and Keeton treatise, are consistent with the dual intent rule. For example, it should be obvious that, even under the dual intent rule, battery does not require either personal hostility or a desire to injure because it is sufficient if the defendant knows that either harm or offense is substantially certain.\textsuperscript{167} Moreover, even the desire to harm can exist without hostility. For example, the defendant who engages in a boxing match under the mistaken impression that the plaintiff has consented has the requisite intent to harm and will be liable if he is mistaken as to consent and his mistake is an unreasonable one.\textsuperscript{168} Indeed the boxing match example can also explain the Prosser and Keeton treatise’s inclusion among the intentional torts of a defendant who acts “intentionally invading the rights of another under a mistaken belief of committing no wrong,”\textsuperscript{169} because a defendant such as the one I have described mistakenly believes that he has the plaintiff’s consent and therefore that he is acting appropriately.

Even if the language of the Second Restatement text and comments is ambiguous, various commentators have found persuasive support for the single intent rule in the Second Restatement’s approval of the results in certain cases or types of cases. For example, facts similar to those in Vosburg appear in the Comment to Section 16, in the form of an illustration

\textsuperscript{165} See supra note ___ & accompanying text. To the contrary, Professors Henderson, Pearson and Siciliano believe that the text supports the single intent rule, arguing that the objectiveness of the definition of “offensive” in Section 19 (“A bodily contact is offensive if it offends a reasonable sense of personal dignity.”) appears to eliminate the requirement that the defendant subjectively desire to offend the plaintiff, although they do concede that “one could argue that the objective definition of ‘offensive’ does not necessarily eliminate the ‘intent to offend’ requirement”. Henderson, et al, supra note ____ at ___. See also Sacks, supra note ___ at ___ (similarly arguing that element of “intent to offend may turn on a community standard insofar as the defendant is bound by community standards about what is reasonable and in accordance with social norms”); cf. Best and Barnes, supra note ___ at ___ (asking whether dual intent is consistent with the fact that whether a contact is offensive depends on an objective test). But this argument apparently confuses intent to offend with the requirement that the resulting contact be offensive to a reasonable sense of personal dignity, which eliminates liability in the case of the unduly sensitive plaintiff. Although the Second Restatement purports to take no position on the liability of a defendant who acts with the purpose to offend an unduly sensitive plaintiff, i.e., knowing of the undue sensitivity, see Second Restatement, supra note ____, at ___, the text of Section 18, taken literally, would not permit such liability when the result is merely offensive contact, because the result element of “offensive contact” is clearly defined objectively in Section 19. [cross-reference to later policy discussion of this question]

\textsuperscript{166} See supra note ___ & accompanying text. Comment e to Section 18, however, appears to favor the dual intent rule, at least to the extent that the language repeats the language of the text in a way that makes the dual intent rule the more natural reading of such language. See Second Restatement, supra note ___ at § 18, cmt. e (“In order that the actor be liable under the rule stated in this section, it is necessary that an act be done for the purpose of bringing about a harmful or offensive contact, or an apprehension of such a contact to another or to a third person or with knowledge that such a result will, to a substantial certainty, be produced by his act. It is not enough to make the act intentional that the actor realize that it involves any degree of probability of a harmful or offensive contact….”).

\textsuperscript{167} See supra note ___ & accompanying text.

\textsuperscript{168} See infra notes ___ & accompanying text. [cross-reference to discussion of apparent consent’s requirement that the defendant reasonably believe that the plaintiff has consented to the contact].

\textsuperscript{169} See supra note ___ & accompanying text.
explaining the textual provision that “[i]f an act is done with the intention of inflicting upon another an offensive but not a harmful bodily contact…the actor is liable to the other for a battery although the act was not done with the intention of bringing about the resulting bodily harm.”

As a result, casebook authors and others often explain Vosburg as an example of the intent to make an offensive contact, which could mean either that the defendant had an intent to offend or that the intended contact turned out to be offensive. Some commentators, however, have remarked that it is implausible to suggest that the defendant in Vosburg intended to offend the plaintiff, and have therefore concluded that the Second Restatement’s approval of the result in that case represents an endorsement of the single intent rule. In my view, this is not necessarily the case; the Second Restatement drafters may simply have misread Vosburg as requiring intent to cause either a harmful or offensive contact (as opposed to requiring the intent to commit an “unlawful” act in an attempt to shoehorn the result in that case in line with the formulations of both the First and Second Restatements. But even if the Restatement drafters misread Vosburg, that may not matter because decisions as old as that case, including others that formulated the intent requirement as the intent to commit an “unlawful act”---as well as those recognizing a battery when the defendant was merely negligent or reckless with respect to the bodily contact itself---would not necessarily survive a court’s adoption of either the First or the Second Restatement. As a result, the inclusion of facts similar to those in Vosburg in an illustration to Section 16, does not shed much light on the question whether the Restatement provisions should be interpreted as adopting the dual or single intent rule.

---

170 Second Restatement, supra note ___ at § 16 & Illustration 1.
171 See supra note ___ & accompanying text.
172 The illustration begins with the statement that “intending an offensive contact, A lightly kicks B on the shin.” That language suggests to me that it was to be assumed that A intended offense, but it is possible that what was meant was that the contact A intended, the light kick on the shin, was in fact offensive. Indeed, the illustration goes on to state that the kick, “although offensive,” was unlikely to cause bodily harm; nevertheless, A is said to be liable for the bodily harm that occurred because of the diseased condition of the leg. In this respect, I concede that the illustration, along with other language in the Comments, is at least ambiguous.
173 E.g., Geistfeld, supra note ___ at ___.
174 See id. at ___. See also, Kenneth S. Abraham, Forms and Functions of Tort Law 23-24 (2d ed. 2002) (“[t]hat the defendant [in Vosburg] intended the touching was sufficient, even though the defendant did not necessarily intend the touching to be harmful or offensive”).
175 See supra notes ___ & accompanying text.
176 The reference to Vosburg appears in both the First and Second Restatements as an illustration to Section 13. In any event, what single intent proponents appear to ignore is that Vosburg clearly required something more than a mere intent to make a bodily contact that turned out to be harmful or offensive. The historical evolution of the “unlawful intent” standard in cases like Vosburg indicates that what the court required was some degree of actual wrongdoing---either an unlawful intent or some fault. See supra notes ___ & accompanying text. The defendant may well have been negligent in failing to understand that the plaintiff would find the contact to be offensive, but “unlawful intent” was supposed to reflect some wrongdoing that was greater than (or at least different from) mere negligence.
177 See supra notes ___ & accompanying text.
178 See supra notes ___ & accompanying text.
179 Indeed, the illustration itself states that A kicked B on the shin “[i]ntending an offensive contact,” perhaps adding the fact that was either missing or obscured in the actual Vosburg opinion.
A class of cases that commentators often view as problematic under the dual intent rule is that involving medical batteries, particularly when the physician mistakenly believes that the patient has consented. As described in the Second Restatement comment noted above, physicians are uniformly held liable for battery, even when they act “with helpful intent but against the patient’s wishes.” According to the commentators who view these cases as problematic under a dual intent rule, when physicians act in what they view as the best interests of the patient, under the sincere (but mistaken) belief that the patient has consented, the physician intends neither to harm nor to offend the patient. In my opinion, however, these cases are possibly explained, consistent with the dual intent rule, in either one of two ways.

First, the vast majority of these cases involve operations, and as one court long ago observed, an operation is a “violent act” and not a mere “pleasantry.” In fact, Section 15 of the Second Restatement defines “bodily harm” as “any physical impairment of the condition of another’s body, or physical pain or illness,” and the Comment elaborates that “[t]here is an impairment of the physical condition of another’s body if the structure or function of any part of the other’s body is altered to any extent even though the alteration causes no other harm.” The illustration to this Comment describes an operation in which the physician removes a wart on a patient’s neck. Although it is stated that “[t]he removal in no way affects [the patient’s] health, and is in fact beneficial,” the illustration concludes that the patient has suffered bodily harm. Thus, as another court recently concluded, operations clearly encompass the alteration of a structure or function of the body and are therefore necessarily harmful. As a result, in these cases it is unnecessary to find that the physician intended offense, as it can readily be concluded that the physician intended harm, as defined by the Restatement, although there was no intent to injure.

Second, even when there is no intent to harm, as when the physician conducts an invasive physical examination, such as a gynecological examination, the intent to offend may be found by separating the elements of intent and lack of consent. Thus, physicians inevitably will know that, in the absence of consent (including emergency circumstances, in which consent may be

---

180 See supra note ___ & accompanying text.
181 See, e.g., Simons, supra note at 1067-68; Lawson, supra note ___ at 360; cf. Reynolds, supra note ___ at 724 (concluding that “[t]he medical situations again illustrate that only intent to contact is required” because these are among the situations in which the trier of fact may agree that the defendant intended no harm or offense but the defendants are nevertheless held liable).
182 Mohr v. Williams, 95 Minn. 261 (1905).
183 See supra note ___ at § 15.
184 Restatement Second, supra note ___ at § 15, cmt. ___. The Third Restatement similarly defines “bodily harm” as “the physical impairment of the human body” as well as “physical injury, illness, disease, impairment of bodily function, and death.” Third Restatement, supra note ___ at § 4. The Comment, however, states that “A change in the physical condition of a person’s body or property must be detrimental for the change to count as harmful impairment.” Id. at Comment c. The Comment no longer includes the illustration of the beneficial wart removal, but that example is cited with approval in the Reporter’s Note as a tortious invasion of the patient’s “right to bodily integrity.” Id. at Reporter’s Note to Comment c. See also Henderson, et al, supra note ___ at 30.
185 See also Vitale v. Henchey, 24 S.W.3d 351 (Ky., 2000) (citing Section 15 and this illustration).
presumed), a patient will find either surgery or an invasive physical examination to be offensive.\textsuperscript{186}

It is important to keep in mind that even when the element of intent has been satisfied, a physician will not be liable for battery if the plaintiff consented or if there was at least apparent consent.\textsuperscript{187} The point is that the physician’s motive to benefit the plaintiff is irrelevant; if the physician knows that the intended treatment will be harmful, in the minimal Restatement sense, or the physician understands that, in the absence of consent, the treatment will be offensive, then the element of intent has been satisfied, and the consent or lack of consent is a factor that can be considered separate and apart from the element of intent.

The same explanation is also available in “helpful intent”\textsuperscript{188} cases that do not involve physicians. For example, in a frequently cited decision, the complaint alleged that the employees of a skating rink manipulated and pulled the plaintiff’s arm, over the protestations of both the plaintiff and her husband, after she fell and fractured her arm.\textsuperscript{189} Analogizing the situation to one involving skilled medical personnel, the court found that the facts alleged constituted a battery, defined as both “[t]he least manual touching of the body of another against his will” and as act “unlawful in its own nature,” without any discussion of intent other than the common refrain that “good intentions” are irrelevant to a finding of battery.\textsuperscript{190} Under the dual intent rule, the decision is easily explained because, despite the defendant’s good intentions, the defendant must have known either that the contact was harmful (given that it was clearly painful) or that, in the absence of consent, such manipulations would be offensive. Similarly, another court found a battery when two teachers lifted a minor student after she had been injured, pulling and shoving on her broken leg and hip, causing additional injuries.\textsuperscript{191} Here too, the defendants must have

\textsuperscript{186} Professor Simons argues that physicians who honestly (but mistakenly) believe that they are acting with the patient’s consent do not have the intent to harm or offend. See Simons, supra note ___ at ___. Professor Dobbs attempts to refute that argument by conflating the elements of intent and offense. Thus, he argues that in the absence of even apparent consent, the physician knows that the contact will be offensive. Dobbs, \textit{practitioner treatise}, supra note ___ at ___ (2010 Supplement ). But this argument does not really answer Professor Simons’s concern with respect to physicians who honestly believe the patient has consented, regardless of whether that mistake is reasonable or unreasonable. In my view, the answer to Professor Simons requires clearly separating the elements of intent and lack of consent. For Professor Simons’s response to this type of argument and my counter-response, see infra notes ___ & accompanying text. There is one example that remains hard to explain: the permanently comatose patient who has previously made it clear that life-sustaining treatment is unwanted. See Lawson, supra note ___ at ___. However, this case is problematic under both the dual and the single intent rule because even under the single intent rule, it is not obvious how the resulting intended contact is either harmful or offensive.

\textsuperscript{187} See infra notes ___ & accompanying text. Cross-reference to discussion of cases that disagree whether battery is limited to cases in which the physician knows that the patient does not consent to the treatment.

\textsuperscript{188} Lawson, supra note ___ at 359.


\textsuperscript{190} Id. at ___.

\textsuperscript{191} \textit{Bernesak v. Catholic Bishop}, 409 N.E.2d 287 (Ill. App. Ct. 1980). The court’s opinion was somewhat confusing in finding that the amended complaint, which alleged a “willful” battery did not plead either “a ‘malicious’ or an ‘intentional’ tort.” Id. at ___. The original complaint alleged ordinary negligence, and the defendant had objected to the amended complaint as radically changing the plaintiff’s theory, which should have been alleged in a separate count on which separate forms of verdict could be submitted. The court upheld a judgment for the plaintiff, rejecting
been aware that their actions were harmful (because the girl was shrieking in pain) and that, in the absence of consent, pulling and shoving on the girl’s leg and hip would clearly be offensive. In either case, whether the defendants would be liable in battery would depend on the separate question of whether the plaintiff had given actual or apparent consent or whether the defendants were otherwise authorized to act as they did.

Yet another class of cases sometimes thought to be difficult to explain under a dual intent rule involves practical jokes and one-sided rough horseplay. As some single-intent proponents concede, many of these cases can conform to the dual intent rule because, given the circumstances, the defendant must have understood that the contact would be offensive, at least initially. Indeed, in my view, it is difficult to imagine a case—except perhaps for one involving a young child or a mentally deficient adult—where the dual intent rule would not be

the defendant’s argument. What is unclear is how the court concluded that a claim of battery did not allege an intentional tort.

For an example of an older case to the same effect, see Johnson v. McConnel, 22 Hun. 293 (N.Y.Sup.Ct. 1878), in which the defendant intervened in an altercation between the intoxicated plaintiff and a third person. In the course of the ensuing scuffle between the defendant and the plaintiff, the plaintiff’s leg was broken. The plaintiff was clearly resisting the defendant’s efforts, and the contact was not a gentle one, suggesting that the defendant understood that the contact was both harmful (painful) and offensive (because unwanted). However, in Hoffman v. Eppers, 41 Wis. 251 (1876), the court held that it was not a battery when the defendant aroused the plaintiff from his drunken stupor and, in a “gentle and friendly manner,” assisted him to the court where he was required to testify as a witness. Regardless of the defendant’s intent in that case, the result can be explained under the Second Restatement as a failure to satisfy the result element of the plaintiff’s prima facie case; the contact resulted in no harm and the court apparently believed that it would not have offended a reasonable sense of personal dignity, given the particular circumstances.

See, e.g., Simons, supra note ___ at ___; Lawson, supra note ___ at 358; Reynolds, supra note ___ at ___.

For example, Professor Simons concedes that in cases like Garratt v. Dailey, the very purpose of the prank may have been to hurt (albeit only slightly) or offend the elderly woman who was about to sit down in the chair when he pulled it away from her. Simons, supra note ___ at ___. Professor Simons similarly concedes that “many other practical Joker cases involve a desire to offend or at least knowledge that offense is very likely to result, and thus could be explained by the dual intent approach.” Id. at 1068, n. 25. Rather, Professor Simons, who is clearly a proponent of the single intent rule, relies primarily on the language of some of the practical Joker opinions, as well as language in the Second Restatement Comments stating that neither “personal hostility” nor “desire to offend” is necessary for liability. Id. at ___. This reliance is misplaced. It is irrelevant under the dual intent rule that the defendant acts without “personal hostility.” See also supra notes ___ & accompanying text. As for the absence of a “desire to offend,” the Restatement drafters were surely aware that “intent” is broadly defined to include either “desire” or “knowledge with substantial certainty” that the relevant consequences will ensure. See supra note ___ & accompanying text. Practical Jokers typically desire offense, at least initially: physicians and other helpers usually do not typically desire either harm or offense but they will inevitably know that those results will occur when they perform operations or other invasive treatments or examinations without the consent of the plaintiff. Professor Reynolds also concedes that in many practical Joker cases, particularly those involving adults, the defendant at least knew with substantial certainty that the plaintiff would be harmed or offended. See Reynolds, supra note ___ at 719-720. He notes, however, that many of the Joker cases involve children and questions whether they were capable of realizing that harm or offense was substantially certain to occur. Id. at 720. The cases he cites, however, are ones in which the defendant’s very purpose was probably to cause at least offense, such as Garratt and Ghassmehieh v. Schafer, 447 A.2d 84 (Md.App. 1982), in which a thirteen-year old student pulled out the chair on which her teacher was about to sit.
satisfied. Certainly for practical jokes, the very purpose of the joke is to cause at least some initial offense, although the defendant may be hopeful that the victim of the joke will subsequently come to see humor in the situation. A number of these cases involve fairly extreme circumstances, such as the defendant who “suddenly and without warning” jumped onto the a co-worker’s back screaming “’boo,’” pulled the plaintiff’s wool stocking hat over his eyes, and rode him piggyback, accidentally causing the plaintiff to fall and strike his face on meat hooks hanging on a nearby wall. The parties agreed that the accident occurred as a result of “one-sided horseplay with no intention on [the defendant’s] part to injure plaintiff.” In an opinion strongly suggesting the single intent rule, the court found that the complaint stated a battery. Nevertheless, although the defendant intended no harm, it is inconceivable that he did not understand that the plaintiff would, at least initially, be offended by having someone suddenly jump on his back and ride him piggyback while he was at work. In my view, all of the practical joke decisions I have read can be similarly explained, including those involving children. Of course, it is possible that under jury instructions emphasizing that the plaintiff must prove that the defendant either desired or knew with substantial certainty that the plaintiff would be harmed or offended, a jury might return a verdict in favor of a defendant, particularly

---

195 If the plaintiff has previously given some indication of consent to this type of conduct, the defendant may rely on the apparent consent doctrine and will not be liable. If, however, the plaintiff has not previously given some indication of consent, than the defendant will be liable under either the single or dual intent rule.

196 See Second Restatement, § 13, cmt. c (intent element satisfied “although the actor erroneously believes that the other will regard it as a joke” because “[o]ne who plays dangerous practical jokes on others takes the risk that his victims may not appreciate the humor of his conduct and may not take it in good part”).

197 Lambertson v. United States, 528 F.2d 441, ___ (2d Cir. 1976).

198 Id. at ___.

199 Id. at ___.

200 For example, in Cole v. Hibbert, 1994 WL 424103 (Ohio App. 1994), the defendant, who had been drinking, playfully kicked the plaintiff, a friend or acquaintance, in the lower back. When the plaintiff complained that the kick hurt, the defendant and her husband began laughing. As in Lambertson, the court found that the defendant’s conduct constituted a battery despite the absence of any intent to harm, stating that reasonable minds could conclude only that the defendant intended to kick the plaintiff. Although strongly suggesting the application of the single intent rule, the decision is just as well explained under the dual intent rule, since the defendant must have desired or known that the plaintiff would be offended by the kick. See also, e.g., Fuerschbach v. Southwest Airlines (10th Cir. 2006) (plaintiff’s co-workers arranged for a mock arrest, in which police officers handcuffed plaintiff in public setting where she worked before informing her it was a joke); Villa v. Derouen, 614 So.2d 714 (La.App.3d Cir. 1993) (defendant pointed welding torch in plaintiff’s direction, intentionally releasing gas into the plaintiff’s groin area); Moore v. El Paso Chamber of Commerce, 220 S.W.2d 327 (Tex.Ct.Civ.App. 1949) (defendant’s agent chased the plaintiff, a young woman, for the purpose of roping her and imprisoning her while she was fleeing to avoid him); Maines v. Cronomer Valley Fire Dept. Inc., 50 N.Y.2d 535 (1980) (hazing incident in which volunteer firemen pulled a bedsheet over the plaintiff’s head, tied a leather belt to his waist, bound his feet with rope, held his arms to restrain him, carried him outside to a parking lot, and threw him in a garbage dumpster).

201 For example, in Ghassemieh v. Schafer, 447 A.2d 84, 85 (Md. Ct. Spec. App. 1982, a 13-year old student, “as a joke,” pulled a chair out as her teaching was sitting down. Like the defendant in Garrett, the defendant here must have desired or at least known with substantial certainty that the teacher would be offended when she unexpectedly hit the floor---otherwise, the “joke” would not be funny. Professor Reynolds concedes that the minor defendant was “perhaps capable of realizing that harm or offense was substantially certain to result to the plaintiff.” Professor Reynolds, supra note ___ at 720 (emphasis added). See also Markley v. Whitman, 54 N.W. 763 (Mich. 1893) (involving high school students playing a game of “rush,” in which the students formed a line and each pushed the student ahead until the last student hit an unsuspecting victim; here the hit to the victim was so hard that it fractured his neck).
when the defendant is a young child or a mentally deficient adult. Whether this is an undesirable result, however, is an open question and one to which I will return in the next section.

A more difficult situation involving practical jokes and rough horseplay concerns the defendant who mistakenly believes that the plaintiff has consented to this type of contact. Thus, some commentators believe that the dual intent rule poses problems for cases of mistaken identity; for example, a defendant who intends a joke on a friend with whom the defendant has a mutual pattern of engaging in such pranks, but who mistakes a stranger for his friend.\textsuperscript{202} It might be concluded that there is no intent to offend in such a case; however, it is unclear that either courts or the Second Restatement drafters would find a battery in such a situation as there are but few cases involving mistaken identity\textsuperscript{203} and the situation is typically presented as an acknowledged hypothetical. Moreover, it is unclear to me that courts should find a battery in cases involving mistaken identity, at least when the mistake is reasonable.\textsuperscript{204} However, assuming that there should be liability, at least for mistakes that are unreasonable, there is a way to reach that result without insisting on the single intent rule. This involves use of the methodology that I previously used to explain the medical and other “helpful intent” battery cases---separating the elements of intent and absence of consent. Thus, we would ask first whether this defendant knew that, in the absence of consent, this is the type of contact that would be offensive. The answer will typically be yes, given the nature of the contacts envisioned for these cases. We would then invoke the apparent consent rule, which, under the Second Restatement, must be considered with respect to the plaintiff’s prima facie case and not as an affirmative defense.\textsuperscript{205} If the defendant was unreasonable in believing that the plaintiff had consented, then the prima facie case is satisfied, and the defendant will be liable, just as he would be under the single intent rule. As for reasonable mistakes, regardless of whether courts adopt single or dual intent, the defendant can presumably invoke the doctrine of apparent consent.\textsuperscript{206} In any event, the result should be the same under either the single or the dual intent rule.\textsuperscript{207}

\textsuperscript{202} See, e.g., Reynolds, supra note ___ at ___ (citing and discussing a similar discussion in Carpenter, Intentional Invasion of Interest of Personality, 13 Or. L. Rev. 227, 235 (1934). [find place to cite Carpenter’s views on single v. dual intent]

\textsuperscript{203} The only battery case I have found involving mistaken identity is a medical battery case in which a physician performed a spinal test on the wrong patient, who had been mistakenly called in from the waiting room by a nurse who did not even inquire as to the patient’s identity. See Gill v. Selling, 267 P. 812 (Or. 1928). For a discussion of the possibility that courts are applying specialized rules for cases involving battery in the context of medical care, see infra Part V.

\textsuperscript{204} See infra notes ___ & accompanying text [cross-reference to policy discussion].

\textsuperscript{205} See supra notes ___ & accompanying text.

\textsuperscript{206} Commentators posing the mistaken identity hypothetical apparently assume that the defendant in that case is and should be liable, even if the mistake is reasonable. See, e.g., Reynolds, supra note ___ at ___. They do not explain why, but it may be because the Second Restatement provides in Section 892A that the actual or apparent consent must be given “by one who has the capacity to consent or by a person empowered to consent for him.” Second Restatement, supra note ___ at § 892A. I have found no cases squarely addressing this question and, for reasons set forth in Part V, I conclude that mistaken identity defendants should not be liable when they act reasonably under the circumstances. See infra notes ___ & accompanying text.

\textsuperscript{207} If the result is different in a case involving a reasonable mistake, it would be because the doctrine of apparent consent is limited to defendants who rely on conduct of the plaintiff and not someone else. See supra note
The methodology I am suggested for analyzing cases involving mistaken identity can also be used to explain the results in sexual touching cases where the defendant unreasonably believes that the plaintiff will welcome the contact or when the plaintiff expressly consents, but the consent is legally invalid, as in cases involving statutory rape. These cases are often understood to be difficult to explain under the dual intent rule. Once again, however, we can usually conclude that a competent adult defendant understands, as most people do, that sexual touchings will offend a person who has not indicated in some manner that such a contact would be welcome; we would then ask separately whether or not the circumstances were such that the defendant reasonably believes that the plaintiff has consented to the contact. In cases involving sincere but unreasonable mistakes as to consent, the plaintiff will still prevail, and the only question remaining is whether the rare (but presumably real) defendant who sincerely but unreasonably believes that this type of contact is not generally offensive should escape liability for lack of intent to offend—a question to which I will return in the next section. As for cases involving statutory rape, most defendants will acknowledge that, in the absence of consent, the sexual contact involved will be offensive. Having thereby found a dual intent requirement easily satisfied, at least in most cases, we would then analyze consent as an element separate and apart from intent.

The methodology I am suggesting to determine whether a defendant intends a contact to be offensive is also useful in clarifying the confusion that exists in the current case law and commentary concerning the relationship between the intent to make a harmful or offensive contact and the absence of consent on the part of the plaintiff. For example, Professor Simons argues that the apparent consent doctrine would be superfluous if the Restatement had adopted [preceding]. In my view, holding a defendant liable for battery in such a situation is problematic, given the defendant’s lack of any apparent fault. See infra notes ___ & accompanying text. In any event, I do not believe that hypotheticals involving cases of mistaken identity assist in determining whether the Second Restatement adopts either dual or single intent.

208 See, e.g., Lawson at 379 (arguing in favor of a formulation in which the intent required is to make an unauthorized bodily contact). See also Joseph W. Glannon, The Law of Torts 15-16 (4th ed. 2010) (arguing that, in the absence of a single intent rule, defendant may be held liable only if “the law will attribute to him an understanding of what the reasonable person finds offensive.” Even Professor Dobbs, a proponent of the dual intent rule, finds problematic cases involving sexual boors and thereby finds it necessary to modify the dual intent rule in such cases. See infra notes ___ & accompanying text.

209 See, e.g., Brenneman v. Famous Dave’s of Am., Inc., (S.D. Iowa 2006); Paul v. Holbrook, 696 So.2d 1311 (Fla. Dist. App. 1997) Wirig v. Kinney Shoe Corp., 461 N.W.2d 374 (Minn. 1990); Liljegren v. United Rys. Co. of St. Louis, 227 S.W. ___ (Mo.Ct.App. 1921). But see J.W. V. Utah (D. Utah 2006) (following the single intent rule previously adopted in Wagner and finding a battery despite the fact that the seven-year old mentally handicapped defendant was incapable of understanding the injurious or offensive nature of a violent sexual assault of the plaintiff). Whether mentally deficient children or adults should be found capable of committing a battery is a matter of policy as to which courts and commentators disagree. See infra notes ___ & accompanying text.

210 See supra notes ___ & accompanying text.

211 See infra notes ___ & accompanying text.

212 The exception will be in cases involving mentally deficient children and adults. See supra notes ___ & accompanying text. See also infra notes ___ & accompanying text.
the dual intent rule, but in my view he is mistaken. The doctrine is certainly not superfluous in cases where the defendant clearly has the intent to harm (as in a surgical operation as well as a boxing match), and the apparent consent doctrine is necessary for the defendant is to avoid liability in situations where the defendant mistakenly, but reasonably believes that the plaintiff has consented. It is also not superfluous in cases involving intended contacts that are merely offensive, at least when the defendant understands that, in the absence of consent, such contact would be offensive, in which case the doctrine of apparent consent also exonerates defendants who make reasonable mistakes but not those whose mistakes are unreasonable.

Professor Simons acknowledges the possibility of using what he calls “‘conditional’ intent”, but he argues that treating such consent “the same as actual intent is artificial and unjustifiable” and “pretty much dissolves the distinction between single and dual intent.” With respect to the “artificial” aspect of conditional consent, I assume that he is referring to the fact that the defendant may not, in fact, desire or know with substantial certainty that this particular plaintiff, in these particular circumstances, will be offended, given the defendant’s belief that the plaintiff has consented to the contact. I would argue, however, that it is not artificial to determine whether the defendant knew that, in the absence of consent, this type of contact would be offensive to persons in the plaintiff’s position. Moreover, this determination does not undermine the notion of dual intent because it is entirely possible---for example in the case of the insane and small children, as well as competent adults from an entirely different culture, and possibly even “sexual boors”---that the defendant in fact did not have such knowledge, in which case the test has not been satisfied. As for any possible injustice, Professor Simons is correct when he concludes that a defendant who has “conditional intent” is less culpable than one who acts with actual intent, but the implications of this conclusion are far from clear. After all, a defendant who shoots in the sincere but unreasonable belief that the plaintiff is threatening to do him harm is certainly less culpable than a defendant who shoots with no apparent justification, and yet the sincere but mistaken defendant in that situation will nevertheless be liable for committing a battery.

Professor Simons also argues that it is unjustifiable to treat the defendant with “conditional intent” more harshly than another defendant who “honestly (though unreasonably)
believes that he will not cause any contact at all.”\(^{218}\) Of course, if the defendant desires or knows that his conduct will cause even apprehension of an imminent harmful or offensive bodily contact, then he will have the requisite intent under the dual intent rule.\(^{219}\) As for the defendant who acts merely recklessly or negligently with respect to either contact or the apprehension of contact, I would argue that such a defendant is indeed less culpable than the defendant who intends bodily contact; in any event, the Second Restatement clearly distinguishes and treats differently those who intend bodily contact and those who are merely reckless or negligent with respect to such contact,\(^{220}\) and I do not believe that Professor Simons means to challenge this distinction. Moreover, by treating the elements of intent and lack of consent in different sections,\(^{221}\) the Second Restatement appears to require that the absence of consent be considered separately from the requisite intent to make a harmful or offensive contact, although courts and commentators sometimes view them as different ways of saying the same thing.

Before turning to the policy questions raised by the dual intent versus single intent debate, I want to conclude this section by observing that failure to recognize intent as an element separate from the absence of consent poses its own problems. For example, if “intent to make an unpermitted contact” is substituted for “intent to make a harmful or offensive contact,” as some commentators have suggested,\(^{222}\) then we would still need to decide whether the plaintiff must prove that the defendant knew that the contact was unpermitted or whether it is sufficient that the contact turned out to be unpermitted, which is simply another version of the dual intent versus single intent debate.\(^{223}\)

\(^{218}\) Id.

\(^{219}\) Thus, the hypothetical Professor Simons uses does not work well to illustrate his point because the defendant who “playfully lunges at his friend, pretending to try to tackle him, while believing that there is little chance of contacting him, but…accidentally knock[ing] his friend to the ground,” see id., will in fact satisfy the dual intent standard because such a defendant intends to cause “imminent apprehension” of a bodily contact, although not an actual contact.

\(^{220}\) See Second Restatement, supra note ___ at §18, cmt. g. See also supra notes ___ & accompanying text.

\(^{221}\) See supra notes ___ & accompanying text.

\(^{222}\) See, e.g., Lawson, supra note ___ at ___; cf. Dobbs, supra note ___ at 52-53 (“The defendant is subject to liability for a simple battery when he intentionally causes bodily contact to the plaintiff in a way not justified by the plaintiff’s apparent wishes or by a privilege, and the contact is in fact harmful or against the plaintiff’s will.”) (footnotes omitted). There is at least one case in which a court reached that result. See Cohen v. Smith, 648 N.E.2d 329 (Ill. App. 1995) (finding battery where male nurse participated in caesarian section despite patient’s previously informing the hospital that that her religion prohibited her being touched or observed naked by a male).

\(^{223}\) Compare, e.g., Dobbs, supra note ___, at 52-53 (stating that a defendant is liable for battery when he intentionally causes contact in a manner not justified “by the plaintiff’s apparent wishes”) (emphasis added) with id. at 58 (referencing “an intent to touch in a way the defendant understands is not consented to”) (emphasis added). In fact, there are four possibilities: 1) the defendant knows that the contact is unpermitted; 2) the defendant believes that the contact is permitted, but it is not, and the defendant’s mistake is unreasonable; 3) the defendant believes that the contact is permitted, but it is not, and the defendant’s mistake is reasonable; 4) the defendant has no belief as to whether the contact is or is not permitted. The last possibility should probably be considered to be the equivalent of the first, leaving three different possibilities for courts to consider in determining what type of consent is required to establish a battery. A version of this debate has occurred in the context of medical batteries, with most courts and commentators opting for requiring knowledge that the contact was unpermitted. See infra notes ___ & accompanying text.
In addition, formulating the rule in this way suggests that even unduly sensitive plaintiffs should recover whenever they have made their wishes known. Some commentators have approved this result in most cases, although the Second Restatement expressly declined to take a position on the question, and under the existing text of Sections 18 and 19, the unduly sensitive plaintiff apparently would not recover (regardless of the defendant’s intent) because the resulting contact would not offend a reasonable sense of personal dignity, as those sections require. Even those commentators who would generally permit recovery when a defendant intends to offend an unduly sensitive plaintiff agree that there are some circumstances in which plaintiffs ought not be able to insulate themselves from unwanted touchings, as when a defendant lightly pushes a passenger aside, over the passenger’s manifest objection, in order to enter or exit a crowded subway. The ability to eliminate liability in favor of such unduly sensitive plaintiffs requires either the clear separation of the elements of intent and the absence of consent (in which case the defendant does not have requisite intent because he understands that the unwanted touching would not offend a reasonable sense of personal dignity) or the express recognition of some privilege on the part of defendants to contact unduly sensitive plaintiffs, despite their manifest objection, under at least some circumstances, such as entering or exiting a crowded subway.

In the types of cases addressed in this section, it will not usually matter whether a court adopts the single intent or the dual intent rule. Physicians will still be liable for battery in the absence of at least apparent consent, and practical jokers will still be liable in most cases when their rough play is such that it offends a reasonable sense of personal dignity. There are, however, some recurring situations in which the choice between single and dual intent is likely to make a significant difference. These situations include the ‘sexual boor’ and those defendants, such as the insane or children, who may have the capacity to intend a bodily contact but who either lack the capacity or are unlikely to appreciate that the intended contact will be either

---

224 If not, then the defendant may be entitled to presume that the plaintiff has or will consent to contacts that would not offend a reasonable sense of personal dignity.
225 See, e.g., Dobbs, supra note ___ at 56 (“If adequately expressed, the plaintiff’s wishes usually count for everything; she has a right to reject unprivileged touchings that others would find reasonable.”)
226 See supra note ___ & accompanying text. The result may be different if the resulting contact turns out to be harmful, rather than offensive, as when the plaintiff suffers from a pre-existing injury or disease. Under the single intent rule, it would be sufficient that the intended contact turned out to be harmful, whereas under the dual intent rule, the defendant would be liable only if he intended to offend.
227 See, e.g., Dobbs, supra note ___ at 56.
228 See, e.g., id. at 56-57 (“The real point seems to be, not that the plaintiff’s wishes are to be evaluated by others, but that others are as entitled as she to ride subways.”) It is unclear what the result would be in such a case under the single intent rule if the contact involving the unduly sensitive plaintiff turns out to be harmful. It would appear that the defendant will be liable unless courts explicitly recognize a privilege on the part of the defendant. In such cases, cases like Cohen, see supra note _____ where a male nurse and a hospital were found liable when the nurse was involved in a caesarian section despite the patient’s previously expressed objection that her religion prevented her from being attended by male nurses---might be better explained by focusing on the fact that the hospital had agreed to honor her request. In the absence of such an agreement, perhaps the hospital should not have been liable for refusing to accommodate an unusually sensitive plaintiff.
harmful or offensive. It is in these cases that we must squarely face the policy considerations involved in the choice between single and dual intent, as well as the proposed alternatives.

Part IV: Policy considerations in choosing between single and dual intent

Courts and commentators have criticized the single intent rule on several grounds, including: 1) it causes perverse results in situations involving workers compensation, insurance coverage, and governmental immunity for intentional wrongs;\(^{229}\) 2) it is overbroad because it would make defendants liable in situations such as non-offensive contacts that unexpectedly cause harm,\(^{230}\) as well as cases involving adulterated drugs and defective products;\(^{231}\) and 3) it violates the fault principle underlying most of modern tort law.\(^{232}\)

As for ancillary questions concerning workers compensation, insurance coverage, and governmental immunity---which typically prevent plaintiffs from recovering on the basis of intentional torts---there is good reason to object to a defendant’s ability to avoid liability when the tortfeasor lacked any intent to harm or injure.\(^{234}\) However, rather than choosing between the single and dual intent rule on this basis, it would probably be better, as others have suggested, to separate questions of tort coverage from questions involving these ancillary issues.\(^{235}\) For example, workers compensation laws, insurance policies, and governmental immunity statutes

\(^{229}\) See, e.g., Simons, supra note ___ at 1090 (noting that the “perverse effect” is only from the point of view of one who “believes in the fault hierarchy” in distinguishing between the intentional and the non-intentional torts); cf. Reynolds, supra note ___ at 726-730 (describing opinions apparently supporting dual intent rule; opinions do not state rationale of avoiding unduly harsh results under shorter statute of limitations for battery, as opposed to negligence, but author believes that this was the true rationale for the decisions in these cases); Ward Farnsworth and Mark F. Grady, Teachers’ Manual to Torts: Cases and Questions 12 (2004) (questioning whether the application of the single intent rule in White v. University of Idaho, to defeat liability under a statute granting the university immunity for intentional torts such as battery, was consistent with the likely point of that statute).

\(^{230}\) See, e.g., Dobbs, supra note __ [2010 Supp. to practitioners’ treatise] (raising hypothetical in which “a wife hugs her husband with the unexpected result that, without fault, she causes a broken bone”). See infra notes ___ & accompanying text (discussing the problem with this hypothetical). See also Lawson, supra note ___ at 363 (“day-to-day life holds myriad intentional contacts made for benign purposes…[which] occasionally go awry, inadvertently either harming or offending others”).

\(^{231}\) See, e.g., Lawson, supra note ___ at 363-365; Geistfeld, supra note __, at __. See infra notes ___ & accompanying text (discussing the problems with these arguments).

\(^{232}\) See, e.g., White v. Muniz, 999 P.2d 814, ___ (Colo. 2000); Dobbs, supra note ___ at ___; King, supra note ___ at ___. Another criticism is that the single intent rule impairs the autonomy of potential defendants and the broader society to engage in activities. See Dobb, supra note ___ at ___; King, supra note ___ at ___. This criticism is not, in itself, very persuasive, since proponents of the single intent rule would likely respond that the rationale for single intent is to protect the autonomy of the plaintiff. See, e.g., Simons, supra note ___ at ___; Reynolds, supra note ___ at ___. Some ground other than autonomy is needed to determine whose autonomy---potential plaintiffs or potential defendants---is more worthy of protection in the relevant cases.

\(^{233}\) The defendant is not always the same person as the tortfeasor. See, e.g., Wagner v. State, 122 P.2d 599 (Utah 2005) (finding government not liable for battery committed by a mental patient who was allegedly negligently supervised by government employees because state statute gave government immunity for cases “arising out of” an intentional tort”).

\(^{234}\) See, e.g., Bublick, supra note ___ at ___ (discussing the need to identify a “core of culpable entitlement-effacing intentional harms”).

\(^{235}\) See, e.g., Henderson, et al, supra note ___ at 69; Simons, supra note ___ at ___.
might appropriately be interpreted to exclude only those cases involving an actual intent to injure. 236 Similarly, with respect to statutes of limitations, there may be some situations in which the plaintiff should have the option to plead either negligence or an intentional tort. 237

With respect to the claimed overbreadth of the single intent rule, many of the criticisms are probably unwarranted. For example, Professor Geistfeld suggests that, under the single intent rule, a drug manufacturer would be liable if a consumer suffered an unforeseeable adverse drug reaction, because the manufacturer intended bodily contact between the drug and the consumer and the contact was in fact harmful. 238 Similarly, Professor Lawson believes that cases involving adulterated drugs, defective products, medical malpractice, and even serving too hot coffee could be treated as batteries under the single intent rule. 239 But surely none of these cases are actionable batteries, even under the single intent rule, because the consumers will have been aware of and will have consented to the bodily contacts in question. 240 Professor Lawson argues that such consent would be ineffective in cases where the consumer did not understand “the probable impact which the contact [would] have on the plaintiff’s protected interests,” i.e., that the drug would cause an adverse reaction or that it, or some other product, was adulterated or otherwise defective. 241 Under current doctrine, however, consent will be ineffective only in situations where the defendant knew of the defect and failed to inform the plaintiff, in other words, when the defendant fraudulently obtained the plaintiff’s consent. 242 Admittedly, there will be some situations in which the defendant has at least statistical knowledge that some of its products will be defective and cause harm to at least some consumers, at some time in the future, but this type of statistical knowledge is probably insufficient to establish fraud in securing the

---

236 [cite to cases in which these questions have been treated separately]. See generally Bruce Chapman, 57 U. Toronto L.J. 315 (2007).
237 Cf. Reynolds (discussing the validity of treating some cases involving intentional conduct under the more flexible negligence principle and concluding that “the solution to problems raised by a short limitation period on battery, or by the rigidity of battery requirements, is not the redefining of ‘battery’ so as to exclude all cases except those in which harm or offense is intended…[because] the concepts of negligence and battery are not mutually exclusive”).
238 Geistfeld, supra note ___, at 120-121.
239 Lawson, supra note ___ at 362-365.
240 See id. at 365. Despite this acknowledgement, however, Professor Lawson claims that application of the single intent rule would result in “absolute liability” or “near-absolute liability” in all cases involving such defective products “save perhaps when injury stems from risks about which the [consumer] was informed, and to which she consented”. Id. at 364. Professor Geistfeld does not acknowledge the likelihood that many of the cases will not result in liability as a result of the plaintiff’s actual consent to the contact in question. See Geistfeld, supra note ___ at 120-121.
241 Lawson, supra note ___ at n. 5 (citing a case in which the plaintiff’s consent to an eye operation was ineffective because he had not been informed that the “new lens was still under experimental investigation and had not been approved by [the] FDA.” In the medical context, such informed consent is required when physicians are aware of a material risk but fail to inform the plaintiff: under modern law, these cases are not considered to be batteries but rather are treated as a form of negligence on the part of the physician. See infra Part V.
242 See Restatement Second § 892(B)(2) (“If the person consenting to the conduct of another is induced to consent by a substantial mistake concerning the nature of the invasion of his interests or the extent of the harm to be expected from it and the mistake is known to the other or is induced by the other’s misrepresentation, the consent is not effective for the unexpected invasion or harm.”) (Emphasis added.)
plaintiff’s consent to contact with a product. In any event, even if such statistical knowledge is sufficient to establish fraud, defendants will be liable under both the single and the dual intent rule because they will know with substantial certainty that harm will occur in at least some cases.

Professor Dobbs posits a different sort of hypothetical to illustrate the overbreadth of the single intent rule. In his hypothetical, a “wife hugs her husband with the unexpected result that, without fault, she causes a broken bone.” He acknowledges that the apparent consent doctrine should ultimately exonerate the defendant wife, but he is disturbed that battery could impose even prima facie liability or that the case might forced “into an over-elaborate and costly ‘defense.’” Of course, under the Second Restatement, as well as the vast majority of jurisdictions, the absence of consent is part of the plaintiff’s prima facie case, which should eliminate both of Professor Dobbs’s objections. In those few jurisdictions in which consent is a true affirmative defense, I share Professor Dobbs’s concern that the single intent rule would impose even prima facie liability, thereby placing the burden on the defendant to prove actual or apparent consent, but that will not be the usual case.

Professor Dobbs’s hypothetical is not a particularly good one for his intended purpose because he acknowledges that the wife should ultimately prevail under the apparent consent doctrine. A better hypothetical would be one in which there is neither intended offense nor apparent consent, and yet the result is an unexpectedly harmful contact. Consider, for example,

---

243 According to the Third Restatement, a defendant is liable for an intentional tort only when “the defendant has knowledge to a substantial certainty that the conduct will bring about harm to a particular victim, or to someone within a small class of potential victims.” See Restatement (Third) at § 1, cmt. e. See also Simons, supra note ____ at 1063 and n. 3; Anthony J. Sebok, “Purpose, Belief and Recklessness: Pruning the Restatement (Third)’s Definition of Intent,” 54 Vand. L. Rev. 1165, ____ (2010). See generally Kenneth Simons, Statistical Knowledge Deconstructed (Boston University School of Law Working Paper No. 10-26, 2010), available at http:www.bu.edu/law/faculty/scholarship/workingpapers/documents/SimonsK0907Rev3-1-11.pdf. These sources do not specifically address the question of the requisite knowledge with respect to a defendant’s fraud that renders a plaintiff’s consent ineffective; rather, they address the initial question of a defendant’s intent to cause particular consequences. Nevertheless, the same reasoning should apply in determining whether the defendant fraudulently obtained the plaintiff’s intent to a particular bodily contact. See Wadja v. R.J. Reynolds Tobacco Co., 103 F. Supp. 2d 29 (2000) (refusing to allow battery theory for plaintiff suing tobacco company for distributing cigarettes without revealing harmful tendencies; claim was essentially one for fraud and did not bear indicia of an intentional tort claim).

244 Dobbs, supra note ____ at ____.

245 Id. Professor Lawson similarly argues that even if the plaintiff’s consent relieves the defendant from liability, these cases should not be viewed “as batteries to which a plaintiff has consented.” Lawson, supra at 365. In response to both Professor Dobbs and Professor Lawson, I would argue there is a distinction between concluding that the plaintiff’s prima facie case has been met but the defendant has a successful defense and the conclusion that the defendant’s conduct constituted a battery regardless of whether the defendant is ultimately exonerated as a result of an affirmative defense. In my view, when the defendant prevails, the defendant has not committed a battery. The more important question is whether it is fair to shift the burden of proving actual or apparent consent to the defendant when the defendant did not intend any harm or offense, which appears to be Professor Dobb’s primary objection to the single intent rule.

246 Dobbs, supra note ____ at ____.

247 See supra notes ____ & accompanying text.
what might have been the facts in Vosburg. A young student lightly kicks a classmate after the class has been called to order. He neither desires to offend or even to annoy the classmate, nor does he know with substantial certainty that this will be the result; rather, he acts simply to get the classmate’s attention. Unknown to the student, however, the classmate has a pre-existing injury such that the light kick causes serious bodily injury. Under the single intent rule, the defendant presumably will be liable because he intends a bodily contact, that contact turns out to be harmful, and the classmate has done nothing to indicate even apparent consent to being kicked, lightly or not, in a classroom called to order (or at least the question of apparent consent would go to the jury, which could easily and justifiably return a verdict for the plaintiff). Under the dual intent rule, however, the defendant will not be liable because he neither desires nor knows with substantial certainty that the plaintiff would be either harmed or offended. Here I share what I assume would be Professor Dobb’s concern that the single intent rule would impose not only prima facie, but actual liability, without any moral fault on the part of the defendant.

Indeed, the most persuasive argument against the single intent rule is that it is inconsistent with the “fault principle,” that is, the principle of modern tort law that, except in unusual situations, which require justification, there will be “no legal liability for conduct that has no element of moral fault.” Recognized exceptions to this rule include strict liability for abnormally dangerous activities and defective products, as well as the adoption of the objective reasonableness standard for evaluating both defendants’ and the plaintiffs’ conduct in negligence actions.

Some defenders of the single intent rule have argued that the single intent rule is, in fact, consistent with the fault principle, at least with respect to intended contacts that offend a reasonable sense of personal dignity. This is because, just as in negligence law, the single intent rule holds the defendant to the standard of the reasonable member of the community, who is expected to know and abide by the community’s social norms. The social boor, for example, might be characterized as negligent and therefore at fault in failing to understand existing community standards. This argument, however, will not work in those cases like my version of Vosburg, in which the intended contact turns out to be unexpectedly harmful (rather than

---

248 For a description of the actual case, see supra notes ___ & accompanying text.
249 Dobbs, supra note ___ at ___. See also King, supra note ___ at 648 (citing Dobbs treatise).
250 Harper & James, supra note ___ at ___.
251 See, e.g., Restatement (Second) at §§ ___.
252 See, e.g., Restatement (Third) at ___.
253 See, e.g., Restatement (Third) at ___.
254 See, e.g., Henderson, et al, supra note ___ at ___; Sacks, supra note ___ at ___. These authors do not expressly adopt a negligence standard. Indeed, Professor Dobbs describes the single intent rule as one of strict liability, although he also suggests that a defendant with no intent to offend might be found negligent if the contact results in actual harm. See Dobbs, supra note ___ [Practitioner Treatise] at 59. The cases involving actual harm, however, tend to involve entirely unforeseeable physical harm, in which case the defendant would not be liable in an action in negligence. See infra notes ___ & accompanying text.
offensive), especially in situations where defendants cannot take advantage of the apparent consent doctrine to avoid liability.

More importantly, even if the defendant is to some extent at fault, at least with respect to offensive contacts, the potential liability of a defendant in battery is significantly greater than in it would be in negligence. For example, a social boor who is negligent only with respect to the indignity that would result from an intended but unwanted touching becomes liable in battery for any resulting harm, no matter how unforeseeable; whereas in negligence the plaintiff would recover neither for the indignity itself (because there is no general duty to avoid the merely negligent infliction of emotional distress, even severe emotional distress) nor for any resulting bodily harm (because such harm was unforeseeable). This concept of “transferred intent,” applicable in battery but not in negligence, includes not only liability for harmful bodily contacts when only offensive contacts were intended, but also liability for either harmful or offensive bodily contacts when only the apprehension of such a contact was intended. Even more significantly, in an action in battery, the plaintiff’s own negligence is no defense at all, whereas in an action in negligence, the plaintiff’s conduct could result in either non-liability or reduced liability, depending on which approach to comparative negligence the jurisdiction has adopted.

---

255 See supra note ___ & accompanying text [cross-reference to note regarding transferred intent—D who has intent to cause offensive contact is liable for harmful contact, even if unforeseeable]. See also, e.g., Caudle v. Betts, 512 So. 2d 389 (La. 1987) (“defendant’s” liability in battery for resulting harm extends to consequences which the defendant did not intend and could not reasonably have foreseen, upon the obvious basis that it is better for unexpected losses to fall upon the intentional wrongdoer than upon the innocent victim”); Mark Strasser, “A Jurisprudence in Disarray: On Battery, Wrongful Living, and the Right to Bodily Integrity, 36 San Diego L. Rev. 997, ___ (distinguishing battery from negligence on ground that in battery damages may be awarded even if not reasonably foreseeable; rationale is that “intentional torts are viewed with more disfavor by law than are merely negligent acts”, citing Restatement Second § 435B, cmt. a). See also Restatement (Third) § 33(b) (“An actor who intentionally or recklessly causes physical harm is subject to liability for a broader range of harms than the harms for which the actor would be liable if only acting negligently.”).

256 See Restatement (Third) § ___.

257 See Restatement (Third) § ___ [proximate cause section in which liability is limited to harm that is within the scope of the risk that made the defendant negligent in the first place]. Distinguish eggshell skull plaintiff, in which some physical harm was foreseeable, but the extent of the harm was not foreseeable. The foreseeability of at least some physical harm is what makes the defendant liable, and the unforeseeable extent of the harm is typically considered only with respect to the measure of damages. The eggshell skull doctrine is presumably justified by the administrative difficulty (and expense) of determining, in each case, what measure of damages was reasonably foreseeable. In addition, victims of intentional torts such as battery need not prove any actual damage but rather are entitled to recover nominal damages. See, e.g., Alan Calnan, The Fault(s) in Negligence Law, ___ Quinn. L. Rev. ___ (2007).

258 See supra note ___ & accompanying text.

259 Sees supra notes ___ & accompanying text [definition of both harmful battery and offensive battery]. See also [treatise references to this aspect of transferred intent].

260 See, e.g., Dobbs, supra note ___, at ___. Recently, however, some courts and legislatures have recognized that comparative fault can be a defense to the intentional torts, in at least some situations. Id. at 517-522. See also, e.g., Stephen D. Sugarman, “Rethinking Tort Doctrine: Visions of a Restatement (Fourth) of Torts, 50 UCLA L. Rev. 585, ___ (2002-2003) (urging radical reform of tort law in which intentional torts and negligence would be collapsed into a single principle based on fault).

261 See, e.g., Dobbs, supra note ___, at ___. 
According to Professor Simons, these inconsistencies between battery and negligence actions may be irrelevant because the interests at stake are incommensurable. In other words, whereas battery protects against intentional invasions of personal dignity (or bodily autonomy), negligence protects primarily against the unreasonable risk of physical harm. To some extent he is obviously correct, but the question remains whether the law should protect the interest in physical integrity to the extent that it would under the single intent rule. As we have seen, the contours of battery have evolved over time, in response to modern conceptions of the appropriate basis for liability. For example, it was once the case that battery included negligent as well as intentional bodily contacts, but no one involved in the single versus dual intent debate is arguing that we ought to restore liability in battery in such cases. Similarly, it was once the case that battery included cases in which the defendant intended neither harm nor offense, but there was nevertheless liability because of some other “unlawful” or “wrongful” aspect of the defendant’s conduct; however, it is doubtful that anyone wants to return to such a vague and potentially overbroad formulation of battery’s requisite intent. On what basis then is it fair to subject defendants to liability in battery absent any intent to offend or harm?

In partial response to this question, Professor Simons, as well as some other commentators, note that there are other intentional torts, including trespass to land and trespass to chattels, that constitute a form of strict liability (and not even negligence). This is because a defendant will be liable for at least nominal damages even when the defendant reasonably

---

262 Simons, supra note ___ at 1080-1083 (discussing “The ‘Apples and Oranges’ Problem”).
263 Id. at 1070. See also, e.g., [cite other secondary sources].
264 See, e.g., Lawson, supra note ___ at 368 (stating that the “dignitary interest behind the tort of battery” is “the plaintiff’s interest in personal autonomy”); cf. Dobbs, supra note ___ at 54 (“The central core of the battery rules is that the defendant must respect the plaintiff’s apparent wishes to avoid intentional bodily contact.”).
265 See Simons, supra note ___ at 1082 (comparing false imprisonment, which “most directly safeguards the interest in freedom from physical confinement, and only incidentally secures the more general interest in avoiding physical and emotional harm,” with negligence, which prohibits “causing physical harm by creating unreasonable risk”).
266 See id. at 1070 (“[a]t a deeper level, the dispute between single- and dual-intent approaches is a dispute about how strongly battery law protects the interest in physical integrity”).
267 See supra note ___ & accompanying text.
268 Outside of this debate, there are some commentators who would radically alter tort doctrine by collapsing intentional torts and negligence into a single tort that focuses upon the defendant’s fault. See, e.g., Sugarman, supra note ___ at ___. cf. Bublick---[Third Restatement article]
269 See supra notes ___ & accompanying text.
270 See, e.g., Lawson, supra note ___ at 366-368 (rejecting “‘unlawful’ intent” as an appropriate basis for articulating the intent requirement in battery); Henderson et al, supra note ___ at ___ (criticizing the circularity of that formulation of intent requirement in battery).
271 See Farnsworth and Grady, supra note ___ at [Teachers’ Manual].
believes that the land or chattels belong to the defendant. There may be justifications for strict rules governing trespass to property that are not present with battery; for example, the use of the trespass action as a means of litigating ownership of real and personal property. However, there may also be aspects of those property torts that are similarly unjust—such as the liability of a defendant for any harm caused by the defendant’s trespass to land or chattels, even when the defendant exercises reasonable or even the utmost care with respect to such harm—and might be altered by a Third Restatement treatment of the intentional torts. For example, Professor Bublick suggests that trespass to land and chattels might be better treated along with other property rules, rather than with the rules concerning intentional torts involving interests of personality; she also suggests that a new Restatement should distinguish between “core” cases in which the extended liability now available for intentional torts could apply and other “intentional torts” in which such extended liability (e.g., transferred intent and less strict causation standards) would not apply. Thus, the strict liability aspects of trespass to land and chattels could remain available for nominal damages actions to determine ownership, but the defendants would not necessarily be strictly liable for all the resulting harm, no matter how unforeseeable.

Professors Farnsworth and Grady posit three possible rationales for a single intent rule: administrative convenience, deterrence, and an intuition about fairness. The administrative convenience rationale involves the difficulty of proving the subjective intent of the defendant. This concern appears to be particularly strong in cases involving sexual boors, that is defendants who claim to believe that their sexual advances are welcome, when they are not. Professor Dobbs and others reject this argument on the ground that juries can be expected to reject

---

273 See Restatement Second, supra note ___ at § 158 (trespass to land based on intentional entry or refusal to leave land “in the possession of [another]”); id. at § 217 (trespass to chattel based on intentional dispossess, use, or intermeddling with a chattel “in the possession of another”).
274 See, e.g., Prosser & Keeton, supra at 68 (“Since in the usual case the important question was the disputed title, and any technical invasion would serve as the basis of litigation to settle it, the rules as to the character of the tort itself tended to become fixed, and to remain so.”) (Footnotes omitted.) Although it may make sense to describe the offensive battery action as one designed to protect personal boundaries, it does not make sense to describe the action as one designed to resolve disputed boundary issues, as in the actions of trespass to land and trespass to chattels.
275 See Restatement Second § 162 (trespass to land); § 218 (trespass to chattels). Coupled with the fact that the defendant may have reasonably believed that the land belonged to the defendant, see supra note ___ & accompanying text, this result seems unduly harsh.
277 Id. at 1347-1350.
278 See Farnsworth & Grady, supra note ___[Teachers’ Manual] at 12.
279 Id. (proving intent to touch is easier than proving intent to harm). See also, e.g., [supply cite].
280 For example, Professor Glannon concludes that the defendant in a sexual boor hypothetical is likely to be held liable, “even if he is too conceited to realize that this contact is offensive under the Restatement definition; the law will attribute to him an understanding of what the reasonable person finds offensive.” Joseph W. Glannon, The Law of Torts 15-16 (4th ed. 2010). According to Glannon, the reason for this is that “[o]therwise, he could avoid liability based on his testimony that he didn’t think it would be offensive,” and that “[s]uch a test would allow social boors to escape liability simply because they have poor judgment—or lie about what they understood—even though they inflict unwanted contact on others.” Id.
testimony that is not credible,\textsuperscript{281} which should eliminate this concern in all but a handful of cases, some of which will involve children and the mentally disabled.\textsuperscript{282} As for deterrence, Professors Farnsworth and Grady suggest that, although people who act deliberately are more likely to be deterred than those who act inadvertently, it is unlikely that most people subject to a single intent rule would be aware of the rule, that is, outside of institutional settings like hospitals.\textsuperscript{283}

The intuitive fairness rationale appears to be what motivates most defenders of the single intent rule. In the case of the sexual boor whom the jury believes honestly did not understand that his advances would be offensive, even Professor Dobbs, who otherwise supports the dual intent rule,\textsuperscript{284} appears to support liability. For example, Professor Dobbs assumes that a defendant might be found negligent when unwanted sexual contact results in harm,\textsuperscript{285} but he expresses apparent dismay that this “solution would leave the victim with no redress for merely offensive touching if the jury believed the defendant had no intent to offend.”\textsuperscript{286} He then concludes that “the best solution…may be to recognize that “the plaintiff”s lack of apparent consent must be judged objectively” and “[i]f the plaintiff says, in words or deeds, ‘Don’t touch me,’ and the defendant intentionally touches the plaintiff anyway, the defendant, not the plaintiff, must bear the cost of the defendant’s foolish belief that no means yes.”\textsuperscript{287} Although it is unclear why Professor Dobbs is relying here on the doctrine of apparent consent,\textsuperscript{288} his argument has been cited as supporting an interpretation of the element of intent that “may turn on a community

\textsuperscript{281} See Dobbs, supra note ___ at 59; King, supra note ___ at 649.

\textsuperscript{282} See, e.g., J.W. v. Utah, 2006 WL 1049112 (D. Utah 2006) (applying single intent rule under Wagner to immunize state of Utah against battery claim when 7-year old mentally handicapped child committed sexual assault, even if the child was incapable of understanding the injurious or offensive nature of the contact). See also infra notes ___ & accompanying text.

\textsuperscript{283} Farnsworth  & Grady, supra note ___[Teachers’ Manual] at 12.

\textsuperscript{284} In his student treatise, Professor Dobbs’s appeared to support the dual intent rule; that support has become clearer in the most recent supplement to his practitioner treatise, in which he references Professor Simons’s arguments in favor of the single intent rule and argues against them. Compare Dobbs, supra note ___ at 58-61 with Dobbs, [practitioner treatise; 2010 supplement] at 10-11.

\textsuperscript{285} See Dobbs, supra note ___ at 59. Unlike Professor Dobbs, I argue that even when sexual contact results in harm, the defendant will not necessarily be liable in negligence, particularly when the harm is unforeseeable. See infra notes ___ & accompanying text. [Although I have expressed reservations as to whether this will be the case, since the physical harm is often unforeseeable. Cf., White v. University of Idaho.]

\textsuperscript{286} Dobbs, supra note ___ at 59.

\textsuperscript{287} Id. Professor Dobbs does not explain how this approach can be squared with the dual intent rule. Under that rule, the lack of apparent consent would be irrelevant, since the defendant, if his testimony is to be believed, did not have the requisite intent to harm or offend, regardless of whether his belief was reasonable or unreasonable.

\textsuperscript{288} The answer may be that, according to Professor Dobbs, in the absence of apparent consent, the defendant would have the requisite intent to offend. See Dobbs, supra note ___ [Practitioner treatise] at 55-56. But this ignores the fact that intent is, by definition, subjective not objective. See, e.g., Dobbs at 49. Moreover, as I have already argued, it makes more sense to separate the elements of intent and consent, rather than defining one in terms of the other. See supra notes ___ & accompanying text. Under Professor Dobbs’s approach, the intent to offend becomes single intent in the case of the sexual boor. It is unclear if his argument here is limited to the case of the sexual boor or can be used in other instances as well.
standard insofar as the defendant is bound by community standards about what is reasonable and in accordance with social norms.\footnote{289}

The intuitive fairness rationale is most typically cited in connection with situations involving children and the mentally disabled, who are the defendants most likely to avoid liability under the dual intent rule.\footnote{290} For example, in Wagner,\footnote{291} the court adopted the single intent rule in a case involving a mentally ill patient who physically attacked a stranger, because the result of a refusal to do so “would be that the victims who were subjected to a harmful or offensive physical contact are at the mercy of those who deliberately come into contact with them, and must bear the costs of injuries inflicted thereby” and that “[t]he law would serve to insulate perpetrators of deliberate contact from the consequences their contact inflicts upon their victims.”\footnote{292} This would not have been the case in Wagner itself because the attack resulted in foreseeable physical harm; therefore, an action in negligence should have been available, in which case the mentally ill patient’s conduct would have been measured by the standard of the reasonable sane person.\footnote{293} The court does not acknowledge this, and so does not attempt to explain why an action in negligence would not suffice to compensate victims in similar cases involving foreseeable physical harm.\footnote{294}

Admittedly, however, an action in negligence probably will not be available when physical harm was unforeseeable or when the result was limited to an offensive rather than a harmful bodily contact.\footnote{295} Even so, children and the mentally disabled will not necessarily escape liability for battery in many, perhaps even most cases. All that is required is that the defendant have intended either harm or offense, and both children and the mentally ill are often

\footnote{289} Sacks, supra note \_, at 1077, n. 127. Professor Sacks interprets the Dobbs treatise to incorporate a notion of “constructive intent,” which according to her “is a concept that appears thorough our legal system and is based on the expectation that people in a society know or should know certain information in order to conform to legal requisites; it is no excusive if they are subjectively unaware of information of which they should be aware.” Id. Then, like Professors Henderson and Pearson, she says that “[s]ince the Restatement defines ‘offensive’ conduct by reference to objective, prevailing social usages, the defendant is bound by such even if she was unaware of the social usages or incorrectly subjectively believed that her conduct comported with social usages.” But as I have argued earlier, this argument confuses the separate elements of result and intent. See supra note \_[cross-reference to earlier similar discussion in Henderson and Pearson casebook].

\footnote{290} In addition, such defendants as governmental bodies and insurance companies will avoid liability under the single intent rule by taking advantage of the exclusion for intentional torts such as battery. See supra notes \_ & accompanying text. But this avoidance of liability seems to be directly contrary to the liability-extending rationale of many single-intent proponents. See infra notes \_ & accompanying text.

\footnote{291} See supra notes \_ & accompanying text.

\footnote{292} 122 P.2d at 608.

\footnote{293} See supra note \_ & accompanying text (describing Restatement Second’s adoption of an objective standard for determining whether an actor’s breached the requisite standard of care in a negligence action). [Wagner court cites relevant Restatement standards without indicating that they refer to an action in negligence, not an action in battery or any other intentional tort.]

\footnote{294} It is ironic, of course, that labeling the patient’s conduct a battery in that case resulted in the inability of the victim to be compensated, because the victim had sued the government, not the patient (who presumably had no assets), and the government was immune for liability based on an action arising in battery.

\footnote{295} See supra notes \_ & accompanying text.
capable of both kinds of intent. Indeed, most of the published decisions involving these types of defendants present circumstances in which a jury could readily have concluded that the defendant had the requisite intent. This is particularly true when the contact is of a type that foreseeably will cause physical bodily harm, as in Wagner itself, where the mentally ill plaintiff, who had a history of violent conduct, “became violent, took [Mrs. Wagner] by the head and hair, threw her to the ground, and otherwise acted in such a way as to cause serious bodily injury to her.” Given that the patient was apparently well enough at the time of the incident to participate in a public outing, a jury might well have concluded that he intended to harm Mrs. Wagner, although his reasons for doing so were likely to have been irrational.

Nevertheless, it must be conceded that there will be at least some situations when adopting the dual intent rule will result in a defendant “escaping” liability. As for these cases, Professor Reynolds appears to adopt an intuitive fairness approach when says that, although “the intent of the person causing unpermitted contact may not be so antisocial as to justify criminal liability, the contact surely violates the rules of society and of modern tort law that a person must keep his hands to himself.” He then concludes that “[t]he injured victim of violations of this rule deserves compensation.”

Or, as the Wagner court concluded, “[t]he policy behind the single intent rule is to allow plaintiffs to recover from individuals who have caused them legal harm or injury, and to lay at the feet of the perpetrators the expense of their own conduct.” But the mere fact that the defendant “caused” the plaintiff’s harm has never been accepted as the sole or even primary basis for imposing what amount to strict liability against a defendant, even though the result will be that some innocent victims will be unable to shift the cost of an accidental injury to someone else. For example, if the defendant suffers an epileptic seizure and involuntarily strikes the plaintiff, causing foreseeably severe physical injuries, then the defendant

296 122 P.2d at ___.
297 122 P.2d at ___.
298 See, e.g., McGuire v. Almy, 297 Mass. 323 (1937) (finding that evidence that defendant, who was insane, threatened to kill the plaintiff if she came into her room was sufficient for jury to find that the defendant intended to strike and injure the plaintiff, upholding a verdict for the plaintiff); cf. Miele v. United States, 800 F.2d 1986 (2d Cir. 1986) (upholding immunity for federal government under Federal Torts Claim Act in decision apparently adopting single intent rule; however, evidence that the mentally ill soldier had previously indicated hostility toward the plaintiff boy and his family, having previously thrown a brick and a Molotov cocktail toward their window, could easily have resulted in jury finding that defendant intended harmful bodily contact). In cases like Wagner and Miele, the significance of adopting the single intent rule is that the government is more likely to obtain a directed verdict, whereas adoption of the dual intent rule would make it more likely that the case would go to the jury, which might prefer to reject battery in order to provide the plaintiff with a remedy against the federal government. As with other ancillary doctrines, the question of governmental immunity should not drive the court’s adoption of basic rules for an action in battery. See supra note ___ & accompanying text.
299 Reynolds, supra note ___ at 731.
300 Id.
301 122 P.3d at ___. As previously noted, however, the use of the single intent rule in Wagner resulted in a finding of no liability because of the government’s immunity for conduct amounting to a battery. See supra note ___.
302 Strict liability for defective products and abnormally dangerous activities require facts other than mere causation and are justified by policy concerns specific to those particular situations.
will not be liable either in negligence or in battery. The question then is on what basis a plaintiff “deserves” to be compensated when the defendant deliberately touches the plaintiff, if the defendant intends neither harm nor offense. To permit the plaintiff to shift the cost of such accidents to the defendant is to elevate the plaintiff’s interest in “bodily integrity” and “bodily autonomy” to a higher level than perhaps it deserves in the 21st century.

It is at least arguable that the tort of offensive battery is itself merely a vestige of the historical inability to distinguish between the levels of violence that might prompt retaliation and therefore a breach of the king’s peace. True, modern commentators now locate the rationale for offensive battery in the desire to protect the victim’s autonomy—that is, her right to decide for herself whether and on what conditions to permit deliberate touchings of her body. But how far should we be willing to go to protect either “bodily integrity” or “bodily autonomy,” given that modern tort law now recognizes (as it did not at an earlier time) actions for intentional infliction of severe emotional distress, for negligent infliction of emotional distress (in at least some circumstances), and for sexual harassment in the workplace? Countervailing concerns include not only the defendant’s autonomy—that is, the freedom to engage in conduct, including deliberate touchings that are not intended to harm or offend—but also the societal resources necessary to adjudicate these claims. Given the existence of alternative forms of action that address the most egregious of the offensive battery cases, it may no longer be either necessary or desirable to permit recovery for merely offensive bodily contacts, particularly when the defendant intends neither harm nor offense. In any event, I question whether there is any continuing justification for subjecting such a defendant to liability for substantial physical harm in the absence of any wrongful intent.

---

303 This is because the action in battery requires a voluntary act. See Restatement Second § 13 (harmful battery requires that the defendant act with the requisite intent); §2 and cmt. (a) (explaining that act must be voluntary).
304 See, e.g., King, supra note ___ at 649 (“I believe that the mere intent to contact rule is an atavism of an outdated historical rationale for battery…The preservation of the peace rationale—whatever its original validity—has been obviated by criminal law and more developed social constraints.”) See also supra Part II (describing historical evolution of tort of battery).
305 See, e.g., Dobbs, supra at 54 (“Battery today vindicates the plaintiff’s rights of autonomy and self-determination, her right to decide for herself how her body will be treated by others, and to exclude these invasions as a matter of personal preference, whether physical harm is done or not.”)
306 See Restatement Second § 46 (including liability for either intentionally or recklessly causing severe emotional distress by “extreme and outrageous conduct”).
307 See Restatement of the Law Third, Torts: Liability for Physical and Emotional Harm §§ 45-48 (2000); Dobbs, supra note ___ at ___.
308 See, e.g., [Title VII].
309 See, e.g., King, supra note ___ at 649 (“A broader battery liability rule—one requiring only intent to cause a contact—could reciprocally impair the autonomy of not only potential defendants but of the broader society to engage in activities, without an equivalent enhancement of the autonomy of potential recipients of contacts.”)
310 It is true that most battery cases involve physical harm, including harm when the defendant intended merely an offensive touching, but there are in fact a number of cases, including recent cases, in which the plaintiff sues for a merely offensive battery, sometimes in settings in which a court might conclude that the offense to the plaintiff is insufficient to warrant the resources necessary to adjudicate the claim. Cf. Wishnatsky v. Huey, 584 N.W.2d 859, 897 (Ct. App. N.D. 1988) (concluding that defendant’s “rude and abrupt” conduct in pushing an office door closed, thereby pushing the plaintiff paralegal back into the hallway, did not rise to the level of battery because it was not “offensive to a reasonable sense of personal dignity”).
Part V: The Role of Consent in Medical Batteries

In most jurisdictions, a patient who did not consent to medical treatment has an action in battery against the physician, whereas a patient who consented, but whose consent was obtained without adequate information concerning the risks and benefits of the proposed treatment is limited to an action in negligence. The distinction is important because in an action in battery, the patient can recover for any harm caused by the treatment, even when the physician’s medical performance was itself exemplary; in negligence, however, the patient can recover only for harm caused by the physician’s substandard performance. What is unclear is whether the action in battery requires that the physician or other medical personnel have known that there was no consent or whether it is sufficient either that the patient did nothing to manifest consent or that the physician was unreasonable in believing that the patient had consented. The issue comes up in a variety of situations, including those where the patient consented to the proposed treatment, but only on some condition (such as there be no blood transfusions except from family donors or that only a particular surgeon perform the operation), where the patient consented to treatment and the physician deviated from the scope of the express authorization because the physician thought it was in the patient’s best interests to do so, and where the patient consented to the proposed treatment, but the physician mistakenly performed a different treatment, such as inadvertently operating on the wrong leg. In addition, there are cases where the physician mistakenly treated the wrong patient.

A majority of courts appear to require that the physician must have deliberately deviated from the patient’s wishes before the physician will be held liable in battery. Others hold that a

311 See Dobbs, supra note ___ at 242-243.
312 [cite] In addition, nominal damages, as well as damages for mental anguish, are available in an action in battery, see, e.g., Mink v. University of Chicago, 460 F. Supp. 713, 717 (N.D. Ill. 1978), and the patient does not need to introduce expert testimony as to the physician’s deviation from the expert standard of care, see, e.g., Cobbs v. Grant, 502 P.2d 1, 8 (Cal. 1972). In addition, as with cases outside the medical context, there are ancillary questions involving insurance coverage, statute of limitations and governmental immunity that will often turn on the distinction between the two actions. See supra notes ___ & accompanying text.
313 See infra notes ___ & accompanying text. It is uniformly agreed that physicians are entitled to act in emergency, life-threatening situations, where there is either a form of presumed consent or a privilege to act in the patient’s best interests. See, e.g., Dobbs, supra note ___ at ___. This exception will not apply where there is strong evidence that the patient would reject the proposed treatment, such as explicit instructions in a living will. [cite]
314 For an extensive discussion of the many contexts in which this question arises, see generally Allen McCoid, “A Reappraisal of Liability for Unauthorized Medical Treatment,” 41 Minn. L. Rev. 381 (1957).
317 See, e.g., Pizzalotto v. Wilson, 437 So.2d 859 (La. 1983) (patient consented to exploratory operation, and surgeon removed her reproductive organs).
319 See, e.g., Gill v. Selling, 267 P. 812 (Or. 1928).
320 See, e.g., Fay Rozovsky, Consent to Treatment: A Practical Guide 1-18 (4th ed. 2010) (citing numerous cases to that effect without indicating there are some decisions that hold to the contrary). See also American College of Legal Medicine, Legal Medicine 256 (7th ed. 2007) (same).
physician will be liable in battery whenever the patient has not, in fact, given either express or implied consent, as when a surgeon who performs an operation is unaware that the consent form names only a different surgeon.321 Still others hold that, in at least in some situations, medical personnel may reasonably rely on others in a position of authority who inform them that the patient has consented to treatment by the defendant.322

Many of these decisions do not give a reasoned explanation for their rulings, but merely rely on precedent in which specific rules have been developed for unauthorized medical treatment.323 Some of the decisions that require a deliberate deviation from the patient’s wishes apparently rest on the assumption that, in the absence of such a deliberation deviation, the physician lacks the requisite intent for battery, described either as an intent to commit a “harmful or offensive” contact324 or as an “intentional unauthorized touching.”325 Although these courts do not directly address the single versus dual intent debate, they appear to adopt a form of dual intent requirement, in which the court views the known absence of consent as inextricably linked to the intent to make a contact known to be offensive. Still other decisions reflect a policy perspective perhaps unique to the medical context, citing concerns that intentional torts might not be covered by the physician’s malpractice insurance, that punitive damages are more readily available in battery, and that absent an intentional deviation, the physician’s conduct essentially consists of an inadvertent deviation from the standard of conduct required of physicians and therefore should be addressed in a negligence action (where an expert testimony is required).326

321 See Perna v. Pirozzi, 457 A.2d 431 (N.J. 1983). See also Vitale v. Henchley, 24 S.W.3d 651, 658 (Ky. 2000) (defendant surgeon was shown writing in which patient’s general physician recorded receipt of telephone authorization from patient’s agent to defendant performing the surgery). 322 See Mullins v. Parkview Hospital, 865 N.E.2d 608 (Ind. 2007) (finding no battery because EMT student was entitled to rely on supervisor and anesthesiologist, who informed her that she had permission to perform intubation on unconscious patient); cf. Allore v. Flower Hospital, 699 N.E.2d 560 (Ohio App. 1997) (finding no battery where treating physician and hospital were unaware of existence of living will directing no life-sustaining treatment; patient’s general physician had entered order in patient’s chart providing for immediate administration of resuscitation measures when necessary). 323 See, e.g., Moser v. Stallings, 387 N.W.2d 599 (Iowa). 324 E.g., Hogan v. Morgan, 960 So.2d 1024, 1028 (La. App. 2007) (finding that because physician was unaware of court order limiting his examination of patient, physician, there was no evidence that he intended his examination to be either harmful or offensive).). 325 E.g., Gaskin v. Goldwasser, 520 N.E.2d 1085, ___ (Ill. App. 1988). See also, e.g., Hulver v. U.S., 393 F. Supp. 749 (W. D. Mo. 1975) (“In order to have committed a battery, the defendant must have done some positive or affirmative act and that act must not only have caused but must have been intended to cause an unpermitted contact.”) 326 See, e.g., Cobbs v. Grant, 502 P.2d 1, 8 (Cal. 1972). Cf. Wooley v. Henderson, 418 A.2d 1123 (Me. 1980) (limiting battery to “conscious disregard of the patient’s interest in his physical integrity” because such a rule “best accords with modern principles of medical malpractice favoring a single basis of liability predicated on fault and with the realities of the physician-patient relationship”); Ponholzer v. Simmons, 910 N.Y.S.2d 609 (App.Div. 2010 (“the [physician] is not one who acts antisocially as one who commits assault and battery, but is an actor who in good faith intends to confer a benefit on the patient”). For actions brought under the Federal Tort Claims Act, courts have also found that while a physician who mistakenly operates on the wrong body part might have committed a “technical battery,” Congress did not mean to immunize the government except when the defendant committed an “intentional wrongful act,” such as intentional deviation from the patient’s consent. See, e.g., Lane v. United States, 225 F.Supp. 850, ___ (E.D.Va. 1964)
Several commentators agree with the majority position that in medical cases, only the physician who deliberately deviates from the patient’s wishes should be held to be liable in battery. Professor Lawson proposes that the prima facie case in all forms of battery, including medical cases, should be reformulated as the “intent to cause unauthorized bodily contact,” including an explicit requirement that the defendant know that the contact is unpermitted.327 In a slight variation of this position, Professor King proposes an elaborate test in which the defendant must intend harm or offense or, alternatively, the defendant must know that consent is required and, in addition, the defendant must be “aware and contemporaneously cognizant of the absence of or deviation from the reasonably evident consent of the contemplated recipient….or…[does] not honestly believe he had valid consent….“328 This alternative formulation—which, in my opinion, is too convoluted to be useful—appears to apply primarily in medical and other “helpful intent” cases, although it might also be used in cases involving sexual boors.329

Although the position in the majority of cases, as supported by Professors Lawson and King, is almost certainly justifiable from a public policy point of view in cases involving physicians and other medical personnel,330 it should be acknowledged that this position is apparently inconsistent with battery doctrine as it has generally been applied outside the medical context. For example, outside the medical context, courts have not stated explicitly that the defendant must be aware of the plaintiff’s lack of consent.331 Indeed, this position is apparently inconsistent with the single intent rule, which requires only that the defendant intend a bodily contact that turns out to be either harmful or offensive. Perhaps more importantly, this position appears to be contradicted by Section 892 of the Restatement Second, which provides that consent can be either actual or apparent and that apparent consent consists of “words or conduct [that] are reasonably understood…to be intended as consent.”332 In other words, a battery is committed if the defendant has the requisite intent and the patient does or says nothing that the

327 See Lawson, supra note ___ at 368-381, 384.
328 See King, supra note ___ at 644
329 Id. at 647 (applying alternative formulation to case involving dental surgeon). Medical cases are the ones in which potential defendants are most likely to be conscious of the need to obtain explicit consent before performing invasive examinations or treatments.
330 See supra note ___ & accompanying text. One early commentator recommended an even more radical departure from the standard applied in non-medical cases, arguing that assault and battery should be limited there to cases in which “the physician has engaged in intentional deviations from practice not intended to be beneficial to the patient”; in all other cases, liability would be based on “deviation from the standard of conduct of a reasonably prudent doctor.” Allan H. McCoid, “A Reappraisal of Liability for Unauthorized Medical Treatment,” 41 Minn. L. Rev. 381, 434 (1957). Under that proposal, battery would presumably be limited to egregious cases such as those involving sexual touchings of an unconscious or sedated patient.
331 See supra notes ___ & accompanying text.
332 Restatement Second, supra note ___ at §892(2). Actors such as physicians are also privileged to prevent harm to another without consent in emergency circumstances in which the actor has no reason to believe that the other person would, if asked, refuse to consent. Id. at § 892D.
reasonable physician would interpret as consent. So, for example, under the Second Restatement provisions, if a physician mistakenly operates on a patient’s left knee, when the patient consents to an operation on the right knee, the physician would be liable for a battery because there was intent to make a harmful bodily contact and it is hard to imagine circumstances in which a jury would be permitted to find even apparent consent to an operation on the wrong knee. Under the majority approach, however, the physician will not be liable because, so long as she sincerely believes that she is operating on the correct knee, the physician does not knowingly deviate from the patient’s wishes.

The majority rule is inconsistent with Section 892 of the Restatement Second because the majority rule does not acknowledge liability for battery when a physician unreasonably believes that the patient has consented to the particular contact. However, the Restatement Second position may itself be problematic, because under Section 892A the consent must be “by one who has the capacity to consent or by a person empowered to consent for him”. As a result, the Restatement apparently does not allow for a treating physician to reasonably rely on other physicians to determine whether the patient has consented to the proposed treatment. And indeed there are some medical battery cases in which patients have been allowed to recover despite the fact that the defendants may have reasonably relied on another physician’s advice that the patient consented, because the other physician was not empowered to consent on the patient’s behalf. These defendants would have prevailed under the majority rule (supported by Professors Lawson and King), as well as in jurisdictions that, although not necessarily requiring a deliberate deviation from a patient’s wishes, allow physicians and other medical personnel to rely on others, so long as their reliance is reasonable. As a matter of policy, it may not be either feasible or sensible to require that each and every member of a medical treatment team personally investigate to determine whether consent has been given whenever a team member touches the patient in a way that would be either harmful or offensive in the absence of effective consent.

---

333 Section 892 also makes it clear that it is the patient, or the patient’s authorized representative who must give either actual or apparent consent. See infra note ___ & accompanying text. For a discussion of whether this restricted concept of apparent consent makes sense, particularly in the medical concept, see infra notes ___ & accompanying text.
334 Restatement Second, supra note ___ at § 892A, cmt d (using these precise facts as illustration of the need to adhere to the terms of the consent given).
335 See supra note ___ & accompanying text (indicating that harm is defined to include surgery).
336 There are, however, cases in which courts permit juries to determine the appropriate scope of the consent given by the patient. See, e.g., Kaplan v. Mamelak, 162 Cal.App.4th 637 (2008) (jury to determine “whether operating on the wrong disk within inches of the correct disk is a ‘substantially different procedure’ [than the one authorized by the patient]”).
337 Restatement Second, supra note ___ at §§892A(2)(a).
338 See, e.g., cases cited at supra note ___.
339 See supra note ___ & accompanying text.
340 I am not talking about the types of touching that are impliedly consented to when a patient consents to be admitted to a hospital or to be examined by a physician. I am focused on other contexts, for example, major operations, for which additional and specific consent is typically required. In these situations, there are frequently
In my view, the majority rule excluding battery in medical cases unless the physician deliberately departs from the patient’s wishes may be justified for public policy reasons unique to the medical context, including the necessity of permitting physicians to rely on other medical personnel in determining whether or not the patient has consented to a particular procedure, so long as their reliance is reasonable under the circumstances. Outside of the medical context, however, it may be unduly harsh to exclude from battery those cases in which a defendant believes that the plaintiff has consented, but that belief is unreasonable.\textsuperscript{341} As a result, it would be preferable for courts not only to separate the intent and consent elements,\textsuperscript{342} but also to clarify that requiring knowing departure from the patient’s wishes is a special rule invoked in cases involving consent in the context of medical care.

There is, however, at least one apparent departure from Sections 892 and 892A that might warrant extension to non-medical cases, and that is the defendant’s ability to rely on circumstances other than the words or conduct of the plaintiff herself in order to invoke the privilege of consent. It is not clear to me that defendants should be required, in all cases, to determine consent solely on the basis of the plaintiff’s own words or conduct; perhaps defendants should be permitted to act when, under all of the circumstances, they reasonably believe that a plaintiff with the capacity to do\textsuperscript{343} so has consented to the contact. For example, in recreational sports cases, a defendant might believe that a written consent purportedly executed by the plaintiff (or by someone authorized to act on the plaintiff’s behalf) is legitimate, but it might turn out to be a forgery. So long as the defendant’s reliance is reasonable under the circumstances, I see no reason why the defendant should be liable in battery. The same logic would apply in cases involving mistaken identity. It may be that mistaken identity cases in a medical context will almost always involve negligence on the part of a physician,\textsuperscript{344} but the same is not necessarily true of other, less formal contacts, such as a man who comes up behind a woman he reasonably believes to be his wife and gives her a hug, only to find out that she is a stranger wearing the same coat that his wife was wearing that morning. If a defendant may act

---

\textsuperscript{341} For example, in the sexual context, a defendant may sincerely believe that when the plaintiffs says “no” she really means “yes”; nevertheless, the jury should be permitted to conclude that the defendant’s belief was unreasonable and that the plaintiff should therefore recover in battery. See Dobbs hornbook at ___.  

\textsuperscript{342} See supra notes ___ & accompanying text.  

\textsuperscript{343} According to Professor Dobbs, the defendant’s reasonable belief that the plaintiff has the capacity to consent is already acknowledged as an appropriate basis to involve the consent doctrine. See Dobbs, supra note ___ at ___. He does not discuss statutory rape; however, I presume he would acknowledge that courts will invoke statutory rape legislation as creating an exception to the apparent consent doctrine, thereby rendering a minor’s consent ineffective regardless of whether the defendant reasonably believed she was of age.  

\textsuperscript{344} Cf., e.g., Gill v. Selling, 267 P. 812 (Or. 1928) (physician performed spinal test on wrong patient, who had been mistakenly called in from waiting room by nurse who did not even inquire as to the patient’s identity).
reasonably in self-defense, taking into account all of the attendant circumstances,\textsuperscript{345} then it is far from clear why consent should be limited to conduct manifested by the words or conduct of the plaintiff alone.\textsuperscript{346} In any event, this is a question that ought to be given serious consideration in any attempt to clarify and rationalize the law of consent in battery and other intentional tort actions.

Part VI. Conclusion

Close examination of applicable case law reveals considerable confusion and controversy in the law of battery, which is the most prominent of all of the intentional torts. The full extent of this confusion has not yet been recognized by either courts or commentators. It includes not only the debate between single and dual intent, but also the relationship between intent and the absence of consent. The relationship between intent and consent is a particular concern in medical battery cases, where the majority of courts are applying rules that may make sense, but that may be unique to that context. There has also been little examination of the precise contours of the doctrine of consent, particularly the ability of a defendant to reasonably rely on circumstances other than the words or conduct of the plaintiff or someone authorized to give consent on the plaintiff’s behalf. Once again, this is a particular concern involving physicians and other medical personnel, where it may not be feasible for each member of a treating team to personally investigate the existence and scope of the patient’s consent.

The ALI is clearly mistaken in its conclusion, not only that intentional tort doctrine is clear, but also that the Second Restatement’s intentional tort provisions have been widely adopted. As a result, I join in what may be a growing chorus of commentators urging the ALI to reconsider its decision not to extend the Third Restatement to the intentional torts. It has not been my intention to propose detailed language for any such Third Restatement provisions, including those concerning battery. Indeed, before addressing those provisions, the ALI would need to give serious consideration to the suggestion there should be a radical reformulation the intentional tort doctrine along the lines suggested by Professor Bublick and others.

If, however, the ALI considers and rejects any such radical reformulation, I would urge the following with respect to the provisions relating to the tort of battery: First, the prima facie case in battery should be maintained in its present formulation---what is required is an act, done with intent to cause a harmful or offensive bodily contact (or imminent apprehension of such

\textsuperscript{345} [cite]

\textsuperscript{346} Treating consent as different from other defenses, such as the affirmative defense of self-defense, may derive from the “ancient legal maxim, volenti non fit injuria, meaning that no wrong is done to one who consents,” which explains why lack of consent is typically viewed as an element of the plaintiff’s prima facie case and why actual consent, even when not manifested to the defendant, operates as a complete defense. [Restatement 892A, cmt. a; Dobbs]. But focusing on the lack of injury to the plaintiff’s interest does not explain the apparent consent doctrine, which focuses on the defendant’s right to act on the basis of reasonable appearances, which is the justification for the broader reasonableness test for self-defense, defense of property and defense of others.
contact), that in fact causes either harmful or offensive bodily contact. Second, the comment should clarify that, with respect to the intent to cause a harmful or offensive bodily contact, what is required is both intent to cause bodily contact, as well as intent to cause harm or offense thereby. Third, the comment and illustrations should clarify, with respect to medical and other “helpful intent” situations, that operations constitute harmful bodily contacts (even if they are ultimately beneficial) and that invasive bodily procedures and other bodily touchings are typically offensive when done without the patient’s consent. As a result, physicians and other medical personnel will almost certainly know that, in the absence of consent, medical treatment commonly involves either harmful or offensive contact; therefore, these cases will typically turn on the presence or absence of actual or apparent consent. Fourth, the ALI should decide whether to include absence of consent as an element of the plaintiff’s prima facie case or to specify that consent (either actual or apparent) is an affirmative privilege or defense. Third and finally, the provisions should expressly provide that, in cases involving medical treatment, medical personnel will not be liable in battery unless they intentionally deviate from the patient’s wishes. The ALI should also consider whether, in cases outside the medical arena, defendants should be able to establish consent based on their reasonable belief, under all of the circumstances, that the plaintiff is consenting, or whether the current rule should be continued that consent can only be based on the words or conduct of the plaintiff or the plaintiff’s authorized representative.

Confronting the issues raised in this Article will require the ALI (and others) to confront very basic questions concerning the underlying nature of intentional torts, including the extent to which those torts should reflect the fault principle that underlies most of modern tort law. I look forward to participating in the debate.

If pressed, I would almost certainly argue that the better position is to make consent an affirmative defense, just like self-defense, defense of others, and defense of property. It is unclear to me why consent functions differently, given that it is not limited to actual consent but includes apparent consent, which is very much like the reasonableness tests of the other, clearly affirmative defenses.