Tortious Battery: Is "I Didn't Mean any Harm" Relevant

Osborne M Reynolds, Jr., University of Oklahoma Norman Campus

Available at: https://works.bepress.com/osborne_reynolds/20/
TORTIOUS BATTERY: IS "I DIDN'T MEAN ANY HARM" RELEVANT?

Osborne M. Reynolds, Jr.*

Introduction

It has been called "hornbook law" that the intent required for the tort of battery is the intent to cause contact, not to cause harm. Yet some courts persist in stating that intent to harm is necessary to this tort. The Restatement (Second) of Torts equivocates on the matter by requiring that the actor intend "to cause a harmful or offensive contact." Does this mean intent to cause contact that in fact turns out to be harmful or offensive, or does it mean intent to harm or offend? If the latter, then this tort is inapplicable to many situations

* Professor of Law, University of Oklahoma. The author expresses deep appreciation to his research assistant, Mark Moore.—Ed.

1. Lambertson v. United States, 528 F.2d 441, 444 (2d Cir.), cert. denied, 426 U.S. 921 (1976) ("hornbook law" in New York and most other jurisdictions). There is, it seems, no dispute that physical injury is not essential to battery; either such injury or offensive contact will suffice. See J. Henderson & R. Pearson, The Torts Process 14-15 (2d ed. 1981). But that concerns the result required from the alleged battery. This article deals with the intent required.


3. Restatement (Second) of Torts §§ 13 (dealing with battery causing harmful contact), 18 (dealing with battery causing offensive contact) (1965).

4. Some clarification of the requirement is made by the Restatement (Second) of Torts § 13, comment c (1965), which cross-references to section 8A, defining "intent" as denoting that the actor desires the consequences of his act or believes those consequences are substantially certain to result from it. Section 13, comment c then adds that it is not necessary to battery liability that the actor be inspired by personal hostility or desire to injure the other person, and that liability can result though the harm was caused by an unconsented-to practical joke. Compare section 18, comment c, where in explaining what is necessary to an "offensive contact" battery, the Restatement commentators declare, "All that is necessary is that the actor intend to cause the other, directly or indirectly, to come in contact with a foreign substance in a manner which the other will reasonably regard as offensive."

Restatement (Second) of Torts § 20 (1965) ("Character of Intent Necessary") specifically covers problems arising where a different type of contact from that intended occurs, or where only apprehension of contact was intended but actual contact occurs, or where contact was intended to one person but instead or in addition occurs to another. Thus this section states that if an act is done with the intention of causing harmful contact to another, or of putting the other in apprehension of either harmful or offensive bodily contact, and if offensive bodily contact actually occurs to the other, there is liability; and if an act is done with the intention of causing harmful contact, or apprehension of either harmful or offensive contact, to one person, and offensive contact occurs to another person, there is liability. These situations involve what

717
in which it might otherwise be applied, such as practical jokes, medical treatment, or mistaken identity.

**Majority View Applied to Pranks and Jokes**

The clear majority of cases that have squarely faced the question take the position that intent to harm or offend is not necessary to the tort of battery. There must simply be intent (including, as always in tort law, substantial certainty of producing the result) to cause contact, followed by contact that in fact is either harmful or reasonably offensive. The issue has most often been posed by cases involving practical jokes or horseplay in which the perpetrator intends no harm or embarrassment but in which some such harm nonetheless occurs. For example, a federal case from New York arose from a situation of workplace horseplay in which a coworker of plaintiff at a meat-packing plant suddenly screamed "boo" at plaintiff, pulled plaintiff's hat over his eyes, and climbed on his back and began to ride him piggyback. Though all parties agreed that no harm to plaintiff was intended, plaintiff, as a result of his coworker's conduct, fell forward, struck his face on some meat hooks, and suffered serious injuries. The alleged tort, the court ruled, was clearly the tort of battery because the intent to make contact, not the intent to injure, is required, and because there was no possibility here that the coworker's actions were accidental, not intended.

The same conclusion was reached in a Texas case in which plaintiff was injured by pushing her hand through a glass door while being pursued by agents of defendant chamber of commerce who were trying to lasso her because she did not wear western clothing during the rodeo season. Again, there was certainly no intent to cause physical harm,

is often called "transferred intent," though that term is sometimes used to refer only to the situation in which the actual victim is different from the intended one. All authorities, in any case, seem agreed that there can be liability in all these situations. See generally Prosser, *Transferred Intent*, 45 Tex. L. Rev. 650 (1967). One situation of "transferred intent" is covered by the language of Restatement § 13, defining "harmful contact" battery: if an actor intends harmful or offensive contact with the person of the one contacted or a third person, or intends imminent apprehension of such contact, there is liability when harmful contact results. Cf. Baldinger v. Banks, 26 Misc. 2d 1086, 201 N.Y.S.2d 629 (Sup. Ct. 1960) (child defendant had capacity to know that act of pushing plaintiff was offensive; liable for actual physical harm that occurred).

5. Lamberson v. United States, 528 F.2d 441 (2d Cir.), cert. denied, 426 U.S. 921 (1976). The case Thus held that the action could not be brought under the Federal Tort Claims Act since it fell within the Act's exclusion of assault, battery, and various other torts. See 28 U.S.C. § 2680(h) (1982). Cf. Etcher v. Blitch, 381 So. 2d 1119 (Fla. Dist. Ct. App. 1979) (defendant's shooting of plaintiff, intending to frighten him, was intentional tort, not negligence; thus, self-defense could apply).

6. Moore v. El Paso Chamber of Commerce, 220 S.W.2d 327 (Tex. Civ. App. 1949). Note that the contact that occurred here was not the result that was intended by defendant (lassoing...
though there may arguably have been an intent to cause *offensive* contact. The case may also be explained under the principle that to be held liable, the actor does not have to intend the exact injuries that occur.¹ Similarly, one who whips a horse that plaintiff is driving, causing the horse and the surrey in which plaintiff is riding to collide with a stump to plaintiff’s injury, cannot escape liability by showing he meant no harm since he certainly meant to cause the contact.⁸

It is true that the above-described cases involved jokes or comparable conduct perpetrated by adults, and in many of the situations it may be argued that the perpetrator was substantially certain the harm, as

---

¹ of plaintiff, preceded by apprehension of such lassoing; the apprehension, of course, clearly *did* occur as intended), and was not caused directly by defendant’s conduct but was the indirect result of his attempt to cause contact. Since defendant *did*, however, intend an unpermitted contact—and did intend and cause an unpermitted apprehension—it is immaterial that the harmful contact that resulted had not itself been intended. See *Restatement (Second) of Torts* § 13 (1965), providing recovery where the actor intends harmful or offensive contact, or imminent apprehension thereof, and a harmful contact (not necessarily the harmful contact intended) directly or indirectly results. See also the discussion of “transferred intent,” supra note 4. As for the indirectness of the contact, in many other cases, including Lambertson v. United States, 528 F.2d 441 (2d Cir.), cert. denied, 426 U.S. 921 (1976), the harmful or offensive contact has been an indirect result of defendant’s direct contact or defendant’s other conduct.


³ Lambrecht v. Schreyer, 129 Minn. 271, 152 N.W. 645 (1915). Though the case is not entirely clear on the matter, it would seem the contact on which the action was based was that between the horse-and-surrey and the stump, and between the occupants of the surrey and the sides of the surrey, the ground, and the various other objects against which they were thrown. Such contact was, in all probability, substantially certain to follow from defendant’s conduct. The contact would be sufficient for the tort of battery even though only indirectly brought about by defendant. See supra note 6. However, it is arguable that the horse that was directly struck by defendant was here closely enough associated with the occupants of the surrey that the contact to (i.e., whipping of) the horse would also satisfy the contact requirement. See *Restatement (Second) of Torts* § 18, comment c:

Unpermitted and intentional contact with anything so connected with the body as to be customarily regarded as part of the other’s person and therefore as partaking of its inviolability is actionable as an offensive contact with his person. . . . Thus, the ordinary man might well regard a horse upon which he is riding as part of his personality but, a passenger in a public omnibus or other conveyance would clearly not be entitled so to regard the vehicle merely because he was seated in it. If the actor recognizes any object, however slightly or remotely attached to the other’s person, as being so far a part of the other’s personality that he can accomplish his purpose of offending the other by some contact with it, it is not unreasonable to regard the object in the same light and, therefore, to make the actor liable under the rule stated in this Section.

It is submitted the last two sentences in the quotation would directly conflict with one another as applied to a situation in which defendant had seen his enemy seated in a bus and had therefore intentionally rammed the bus to the injury of the enemy. The court in *Lambrecht* apparently did not rely on the contact with the horse as satisfying the contact requirement, since it was stated that the action would lie if defendant caused plaintiff’s team to run away, even if plaintiff’s horse was never struck. Lambrecht v. Schreyer, 129 Minn. 271, 273, 152 N.W. 645, 646 (1915) (instruction of trial court on “assault” held correct).
well as the contact, would occur. But a number of the “joke” cases have involved children, who, in some instances, may have lacked the capacity to intend, even in the broad legal sense, that harm or offense result, but who were capable of realizing that contact was substantially certain to follow from their actions. In the celebrated case of Garratt v. Dailey, a five-year-old boy pulled the chair out from under plaintiff as she prepared to sit on it. After the lower court had dismissed the case, the Supreme Court of Washington remanded, ruling that the battery action would lie if the boy was shown to have the purpose or intent of causing plaintiff’s bodily contact with the ground. Following a judgment for plaintiff, defendant appealed. In affirming the judgment, the court held that a finding that the boy knew with substantial certainty plaintiff would attempt to sit where the chair had been would suffice to establish the requisite intent for tortious battery. Again, no intent to harm was required. Indeed, it is doubtful that so young a child had either the desire to cause harm or offense, or the capacity to realize that harm or offense was substantially certain to occur.

The Garratt result was also reached in a similar case from Maryland in 1982 in which an eighth-grade student as a joke pulled out the chair on which her teacher was about to sit, causing back injuries to the teacher. Here, the minor-defendant was, at thirteen years of age, perhaps capable of realizing that harm or offense was substantially certain to result to plaintiff. But the court emphasized that no such certainty need be shown since the intent to harm is not essential to battery. The gist of the action was said not to be a hostile intent but simply the contact without consent. Thus it was recognized that pranks

9. Garratt v. Dailey, 46 Wash. 2d 197, 279 P.2d 1091 (1955) (first appeal); 49 Wash. 2d 499, 304 P.2d 661 (1956) (second appeal). Children and persons of limited mental capacity are generally held liable for their torts, though it is occasionally suggested they might not be liable for an intentional tort where they lack the capacity to form the requisite intent. See generally Bohlen, Liability in Tort of Infants and Insane Persons, 23 Mich. L. Rev. 9 (1924); Weisiger, Tort Liability of Minors and Incompetents, 1951 U. Ill. L.F. 227. Similarly, intoxication is no defense to tort liability. See Liljegren v. United Rys. of St. L., 227 S.W. 925, 928 (Mo. App. 1921) (acts of intoxicated passenger in thrusting himself against other passengers in railroad car were “assaults”). Mostly, these holdings that persons of limited or impaired capacity are nonetheless liable for their torts seem to rest on public policy. But they can also be taken as indicating that the requisite intent for most intentional torts is quite minimal (such as intent to touch) and thus can be formed even by immature or impaired persons.


13. At trial, however, the minor-defendant testified that she intended the teacher to fall to the floor but did not intend her to be injured. Id., 447 A.2d at 85.
or jokes can result in battery liability despite absence of any desire to harm or certainty that harm will occur. 14

Another case of youthful play that is familiar to generations of torts students is Vosburg v. Putney, in which defendant (a little over fourteen years of age) kicked plaintiff (just under twelve) while both were sitting in a school classroom. 15 Emphasizing that the incident had not occurred in the schoolyard (where, it seems, a kind of implied consent to such contact might be found), the court ruled that defendant had committed an unlawful act, that the intention to commit such act was thus also unlawful, and that there could be liability for all direct consequences of the act despite the lack of any intent to injure. The same holding appears in an Oklahoma case in which defendants, students in junior high school, were throwing erasers at each other in the classroom before the teacher’s arrival. An eraser struck and seriously injured plaintiff-student, who was not participating in the throwing. Conceding that the defendants had acted in sport and without intent to cause injury, the court nonetheless affirmed a judgment for plaintiff, stating that since the act causing the injury was wrongful, the intent to do the act was wrongful in the eyes of the law. 16 Other cases involving children have also ruled that since there is, aside from such privileges as self-defense, no right to throw objects at another person, the thrower is liable despite lacking intent to injure. Therefore, the only intent necessary is the intent to commit the act of throwing. 17

14. Id., 447 A.2d at 88, citing Garratt v. Dailey, 46 Wash. 2d 197, 279 P.2d 1091 (1955). On this point the court also cited Lewis v. Woodland, 101 Ohio App. 442, 140 N.E.2d 322 (1955), where defendants were held liable when plaintiff broke her back after being frightened by a toy rubber lizard placed in her lap. There liability was based on negligence, but the Maryland court recognized that the act of placing the lizard in plaintiff’s lap was a “technical battery” and noted the case as precedent for the proposition that the perpetrator of a practical joke can be liable for harm caused thereby. Ghassemieh v. Schafer, 52 Md. App. 31, 447 A.2d 84, 88 n.3 (1982).
15. Vosburg v. Putney, 80 Wis. 523, 50 N.W. 403 (1891).
16. Keel v. Hainline, 331 P.2d 397 (Okla. 1958). This case also illustrates the principles of “transferred intent” because it was agreed that defendants did not intend to strike plaintiff with an eraser, let alone injure her. Id. at 399. As to “transferred intent,” see supra note 4. Since a number of participants in the eraser-throwing incident were sued and held liable, not just the student who actually hit plaintiff, the case also illustrates a “joint tort” in which all participants in intentional tortious conduct can be held jointly and severally liable (as where A holds the plaintiff and B hits him).
17. See Singer v. Marx, 144 Cal. App. 2d 637, 301 P.2d 440 (1956) (nine-year-old boy threw rock at one young girl, struck another; court applied “transferred intent” and held intent to injure is not necessary, merely intent to do that particular act); Peterson v. Haffner, 59 Ind. 130 (1877) (13-year-old boy threw piece of mortar at another boy, hit third boy in eye; liability even though act done in sport with no intent to injure). Both the Singer and the Peterson cases are cited in Keel v. Hainline, 331 P.2d 397, 399 (Okla. 1958). Note that in all these cases it is material that the injured party was not participating in the game because otherwise questions of consent and the scope of the consent would be raised. See generally Bohlen, Consent as Af-
In a leading Michigan case,\textsuperscript{18} a number of high school students were playing a game known as "rush," in which the students formed in a line, each pushing the one in advance of him until the last participant "rushes" an unsuspecting nonparticipant. In this case, the victim of the "rush"—a fellow student who was taking no part in the game—was so seriously injured that his neck was fractured and he permanently lost his voice above a whisper. Even though the defendant did not anticipate any injury to the victim, a judgment for him was affirmed on the ground that defendant, the student who was last in the line of participants and was thus the one who actually pushed plaintiff, voluntarily participated in a game involving dangerous contact to the nonconsenting victim. Similarly, in a New York case in which a nine-year-old girl pried from a truck tailgate the fingers of a six-year-old girl with whom she was playing, causing the younger child to fall to the ground, it was held error to require that plaintiff establish intent to injure on the part of her playmate.\textsuperscript{19} The court stated that the requirements of battery liability were bodily contact, offensiveness of the contact, and intent to make the contact.\textsuperscript{20}

\textit{Majority View Applied to Other Unintended Harm}

Besides juvenile (and adult) pranks, many other human activities can lead to situations in which contact is, at least in the legal sense, intended, but in which harm or offense may not be intended. And again, the rule generally applied is that the intent to contact suffices for a tortious battery. This is true, for example, where defendant has intervened in a fight between other persons and causes harm to one of them.\textsuperscript{21} The absence of anger on defendant’s part, and even the presence of good will and pure motives, will not prevent liability.\textsuperscript{22} The same is true where the situation involves the advances of an overzealous lover...
who hugs and kisses another person without that person's consent.\(^2\) Or where one participant in a friendly scuffle, to which consent has been given, exceeds the bounds of the consent and gouges and punches the other with considerable force.\(^3\) Or where, to satisfy some hidden need, a lonely man taps a woman on the buttocks, although he acts without anger or any lustful purpose.\(^4\) Even the effusive greeting of a person who has consented to such a salutation may result in liability to a third person who is harmed by the force of that greeting and who has not himself consented to the force.\(^5\)

Cases of mistaken identity, while seldom actually encountered, are sometimes posed by writers and provide additional examples of situations in which a defendant may be liable though he meant no harm or offense. "Thus if he strikes a cane out of another's hand or a cigar from his mouth, or slaps the other on the back, as a joke upon his friend, and it turns out to be a stranger, who is offended thereby, he may be held for a battery."\(^6\) Where there is no express or implied consent or other defense, medical treatment or other attempts to aid an injured person may, despite the best of intentions, give rise to battery liability if the result turns out to be harmful or reasonably offensive.\(^7\) Today, most medical cases are brought on a negligence

---

\(^2\) Ragsdale v. Ezell, 20 Ky. 1567, 49 S.W. 775 (1899).

\(^3\) See Nicholls v. Colwell, 113 Ill. App. 219 (1903) (if act unlawful, intent said to be immaterial).

\(^4\) See Gates v. State, 110 Ga. App. 303, 138 S.E.2d 473 (1964) (in criminal case, not error to fail to instruct that liability depends on anger or lustful intent or purpose).

\(^5\) See Reynolds v. Pierson, 29 Ind. App. 273, 64 N.E. 484 (1902) (plaintiff was talking to third person, who had hold of his arm; defendant, a large man, seized the third person's arm and pulled him with such force that plaintiff was thrown and injured). The court said it could infer the constructive intent necessary to make the act willful. \textit{Id.} at 275, 64 N.E. at 485. But the court also speaks of defendant's having acted with "reckless disregard of consequences." \textit{Id.} Since it is unclear whether defendant was even aware of plaintiff's presence, recklessness, rather than intent, might be the better way to characterize defendant's state of mind.

\(^6\) Carpenter, \textit{Intentional Invasion of Interest of Personality}, 13 Or. L. Rev. 227, 235 (1934). The author states the general conclusion that, "While harm or offense must result to plaintiff it is not necessary that the defendant intend harm or offense." \textit{Id.} But a little farther on, the author distinguishes harmful touchings from offensive touchings and states that while intent to touch clearly suffices where the touching turns out to be harmful, "On the other hand if it is merely an offensive touching which results, the intention required is one to cause either a harmful or offensive touching or an apprehension of such a touching." \textit{Id.} at 236. However, the tort cases cited for this proposition—Vosburg v. Putney, 80 Wis. 523, 50 N.W. 403 (1891), Johnson v. McConnel, 15 N.Y. 293 (1878), and Reynolds v. Pierson, 29 Ind. App. 273, 64 N.E. 484 (1902)—would not seem to support the supposed distinction. Moreover, in all of those cases, it seems there was actual physical harm.

\(^7\) See Clayton v. New Dreamland Roller Skating Rink, 14 N.J. Super. 390, 82 A.2d 458 (1951) (could be liability for skating rink officer's act of manipulating plaintiff's fractured arm against her will). Citing prior New Jersey cases, the court stated: "The least manual touching of the body of another against his will constitutes an 'assault and battery.'" \textit{Id.} at 398, 82 A.2d at 462.
theory; but it remains true that if there is no consent to the treatment, or if consent can be set aside due to fraud, a battery action remains very much a possibility. The medical situations again illustrate that only intent to contact is required.

Therefore, in any situation in which the trier of fact believes that defendant intended no harm or offense, but in which contact was clearly desired or inevitable, the "intent to contact" rule becomes important. Such situations have arisen where defendant was trying to get possession of a sewing machine, tipped it up and injured plaintiff in the process; where defendant wanted to remove cows that plaintiff-owner had chained to trees on defendant's land, jerked the chain which he knew plaintiff was holding, and thus hurt plaintiff; and where defendant rode his bicycle in such a manner that it would inevitably strike a person using the sidewalk. In some such cases, there was no physical harm, but it was alleged that the contact was offensive. The question for the trier of fact then becomes whether the contact was such as would be offensive to the reasonable person. Such offense may certainly be found under a considerable variety of circumstances, as, for example, where the plaintiff is grasped by defendant and at the same time accused by defendant of some wrongdoing. If the requisite harm

29. See Reidisser v. Nelson, 111 Ariz. 542, 534 P.2d 1052 (1975) (failure to disclose risks does not invalidate consent unless there is fraud); Rolater v. Strain, 39 Okla. 572, 137 P. 96 (1913) (exceeding consent and violating patient's specific instructions by removing bone, is, in absence of emergency, a battery called "trespass upon her person"). See generally Annot., 56 A.L.R.2d 695 (1957).
32. Mercer v. Corbin, 117 Ind. 450, 20 N.E. 132 (1889) (may be willful wrong without a direct design to do harm).
33. See Crawford v. Bergen, 91 Iowa 675, 60 N.W. 205 (1894) (evidence indicated that defendant merely placed his hands on plaintiff's shoulders; was for jury to determine whether under the circumstances this was an assault and battery). Cf. Richmond v. Fisk, 160 Mass. 34, 35 N.E. 103 (1893) (milkman who entered plaintiff's house and shook plaintiff awake in order to present him with bill committed "assault"). In order for contact to qualify as an offensive battery, it must ordinarily be such as would offend the reasonable person. See RESTATEMENT (SECOND) OF TORTS § 19 & comment a (1965) ("reasonable sense of personal dignity" must be offended).
34. See McDonald v. Franchere, 102 Iowa 496, 71 N.W. 427 (1897) (clerk who touches customer and requests her to enter another room, and there accuses her of taking an article, may be liable for "assault"). This assumes, of course, that there is no valid privilege being exercised, such as the privilege of arrest (recognized in varying degrees in all jurisdictions), or the privilege of temporary detention for reasonable investigation ("shopkeeper's—or merchant's—privilege"). The latter is now recognized in nearly all jurisdictions, either at common law or by statute. See Note, "Shoplifters" Beware? Detention of Suspected Shoplifters, 11 Drake L. Rev. 31 (1961); Comment, Stopping and Questioning Suspected Shoplifters Without Creating Civil Liability, 42 Miss. L.J. 260 (1976); Annot., 47 A.L.R.3d 998 (1973). McDonald, 102 Iowa 496, 71 N.W. 427 (1897) and Crawford v. Bergen, 91 Iowa 675, 60 N.W. 205 (1894), are good examples of ones in which there was arguably no intent to harm or offend and no physical harm occurred. Theses cases nonetheless found there could be liability if the contact was intended and the result was reasonably offensive.
or offense is found, the lack of intent to cause the harm or offense is no bar to liability. If defendant intended to hit, or otherwise cause unpermitted contact with plaintiff, he cannot defend by saying he did not foresee or intend any harm as a result.\textsuperscript{35} Nor is it a defense that defendant may have meant his contact to occur harmlessly and inoffensively to some protected area of plaintiff’s body if in fact the blow is deflected and lands on plaintiff’s face.\textsuperscript{36} Intent to do the act that causes the unpermitted contact has been called the central issue in a battery case—not the intent to cause harm.\textsuperscript{37} Battery is, to be sure, an intentional tort, requiring some act of volition on defendant’s part—some exertion of the will manifested in the external world,\textsuperscript{38} or, as said by another writer, some “voluntary muscular contraction.”\textsuperscript{39} But the actor need not will, nor even foresee, the ultimate consequences in order to be liable;\textsuperscript{40} he must simply will the contact.\textsuperscript{41}

\textsuperscript{35} See Jones v. Norval, 203 Neb. 549, 279 N.W.2d 388 (1979) (where 18-year-old man intentionally hits another person in the face with his fist, with force enough to knock the person unconscious, an intent to cause bodily injury can be inferred as a matter of law, and subjective intent of the actor is immaterial).

\textsuperscript{36} See Weisbart v. Flohr, 260 Cal. App. 2d 281, 67 Cal. Rptr. 114 (1968) (seven-year-old shot an arrow toward five-year-old girl, putting her eye out; he testified he intended to shoot at her feet but arrow was deflected by his thumb).

\textsuperscript{37} Brown v. State Auto. & Cas. Underwriters, 293 N.W.2d 822, 825 (Minn. 1980), finding that intent to injure was, however, determinative on the issue of homeowner’s liability policy coverage and holding that such intent would not be inferred where the insured claimed he struck the injured party reflexively after suffering a cut on his finger as a result of an altercation between himself and the injured party. As Brown suggests, exclusions in liability insurance policies are generally construed strictly against the insurer; thus, an exclusion for intentional acts will often be held to apply only where there is actual intent to injure. See Casperson v. Webber, 298 Minn. 93, 213 N.W.2d 327 (1973) (exclusion not applicable where act inflicting assault and battery is intended but resulting injury is not); Lumbermen’s Mut. Ins. Co. v. Blackburn, 477 P.2d 62 (Okla. 1970) (exclusion applies only if was intent to inflict the injury actually inflicted against the person actually injured). Therefore, though statements in some such cases may speak of intent to injure being necessary, those statements are of limited significance due to their context and should not serve as precedents in cases determining the intent needed for tort liability.

\textsuperscript{38} See Vold, The Legal Allocation of Risk in Assault, Battery, and Imprisonment—The Prima Facie Case, 17 Neb. L. Bull. 149, 156-57 (1938).

\textsuperscript{39} R. Pound, Readings on the History and System of the Common Law 453 (1913). See Restatement (Second) of Torts § 14, comment b (1965), stating: “The word ‘act’ is used in the Restatement of this Subject to denote an exertion of the will manifested in the external world. Thus, a muscular movement which is purely reflexive or the convulsive movements of an epileptic are not acts in the sense in which that word is used in the Restatement.”

\textsuperscript{40} O. Holmes, The Common Law 91 (1881).

\textsuperscript{41} See Pitz v. Bloomburgh, 206 Ala. 136, 89 So. 287 (1921) (intent to injure not necessary to liability); Graves v. Peck, 114 Neb. 745, 209 N.W. 617 (1926) (recovery could extend to shame and humiliation resulting from attack and to paralysis of leg); Trousil v. Bayer, 85 Neb. 431, 123 N.W. 445 (1909) (liability could extend to illness resulting from breaking of bones in fist fight); Vosburg v. Putney, 80 Wis. 523, 50 N.W. 403 (1891) (playful kicking of leg caused serious injury; liability).

\textsuperscript{42} See Vold, supra note 38, at 161-62.
The Minority View and Its Rationale

With so much authority supporting the rule that intent to contact will satisfy the intent requirement of battery, why then do cases to the contrary continue to appear? The old adage that hard cases make bad law would seem applicable to some of the authorities, especially in situations where a key problem is the statute of limitations. In most jurisdictions, the statutory period for battery is shorter than that for negligence. Thus cases inevitably arise in which the period for bringing a battery action has expired but the time for commencing a negligence suit has not yet ended. This was true in a Nebraska case in which two men were engaging in horseplay. Defendant playfully jerked plaintiff’s right foot suddenly upward, throwing him backwards out of the chair in which he was sitting. The one-year statutory period for a battery had run, but not the four-year period for bringing a negligence suit. Quoting authorities that were mostly either quite old or dealt with the requirements for criminal battery, the court stated that intent to do harm is necessary to battery, that some evil intent is required, and that the act must be done in an angry, revengeful, or insolent manner.1 The court therefore held that the cause of action stated was for negligence, not assault and battery.2

Similarly, in a Florida case,3 defendant gave a “friendly unsolicited hug” to a coworker with such force as to cause plaintiff sharp pains in her back and at the base of her skull and to lead to paralysis of the left side of her face. Because plaintiff was known by defendant to be a shy person and the unsolicited hug was given in front of other coworkers, it is likely there was intent (at least in the “substantial certainty” sense) to offend, even if no intent to hurt physically. Nonetheless, the court, again faced with a situation in which the battery statute had run out, ruled that the action was for negligence and thus could still be maintained. The court here conceded that a hostile intent or desire to harm was not required for battery. But, distinguishing a battery case involving unsolicited kisses,4 the court held that since the “bizarre results” that occurred were not substantially certain to follow from defendant’s conduct, the action was not a battery.5

44. Id. at 476, 31 N.W.2d at 420.
45. Spivey v. Battaglia, 258 So. 2d 815 (Fla. 1972).
46. McDonald v. Ford, 223 So. 2d 533 (Fla. Dist. Ct. App. 1969), where defendant persisted in embracing plaintiff despite her struggling violently against him, ultimately causing plaintiff to strike her head on an object in the room. The Spivey court distinguished McDonald by saying, “In McDonald, the court, finding as assault and battery, necessarily had to find initially that the results of the defendant’s acts were ‘intentional.’ This is a rational conclusion in view of the struggling involved there.” Spivey v. Battaglia, 258 So. 2d 815, 817 (Fla. 1972).
47. Spivey v. Battaglia, 258 So. 2d 815, 817 (Fla. 1972).
is contrary to the general rule that liability does not depend on defendant’s ability to foresee the exact consequences that in fact follow from his actions. Surely the contact was here intended by defendant. If the other elements of the tort are met and if there was no privilege involved, defendant should be liable in battery for the harmful or offensive results.

In a 1980 Utah case, some junior high school students attempted a prank on the school’s maintenance man. The students threw a “tootsie pop” from the second floor of the school, aiming it at their victim, who was unloading supplies from a pickup truck on the ground below. Defendants testified they intended to hit the maintenance man but did not mean to harm him. Nevertheless, when the “tootsie pop” found its mark, the victim was stunned by the blow and suffered serious consequences. The court stated that though defendants’ act was intentional, it was not an intentional tort because it was done without intent to harm or substantial certainty that harm would result. Thus the maintenance man’s action could come within the statute of limitations applicable to “reckless misconduct”—a form of negligence—rather than within the battery statute, which had expired.

As in that Utah case, some of the statements indicating that intentional torts in general, or battery in particular, require the intent to cause harm appear in cases trying to describe the limits of that borderland between negligence and intent that is known as “recklessness” or “wanton conduct.” In such cases, the courts are struggling to separate recklessness from intentional conduct—situations in which there is merely a high probability of harm from situations in which there is substantial certainty of some unpermitted result. In the latter instances, the unpermitted result may be actual harm or it may be some other effect that is regarded as wrongful, such as unconsented-to contact with another person’s body. But it is not surprising that the courts may sometimes simplify the distinction they are making by comparing probability of harm (necessary to recklessness) with substantial certainty, though in the latter instances, the substantial certainty does not in fact have to be such certainty as to harm. Thus, in one California case, plaintiff was a passenger on one of defendant’s trains

49. Id. at 323, stating: “In the present case, the trier of fact could find the defendants acted with no intent to harm the plaintiff and their acts did not create a substantial certainty of harm from which a harmful intent can be imputed.” Compare Mercer v. Corbin, 117 Ind. 450, 20 N.E. 132 (1889), indicating that intent may be inferred from recklessness and that failure to use even slight care implies a willingness to inflict injury. On the various definitions of “recklessness” or “wanton conduct” or “willful misconduct,” see Williamson v. McKenna, 223 Or. 366, 354 P.2d 56 (1960); Note, Wilful Misconduct and the Guest Statute—A Study in Heterology, 17 Hastings L.J. 337 (1966).
and was injured when that train collided with another that was standing on a siding. The collision occurred because one of defendant’s employees improperly set the switch that controlled the siding, causing the train on which plaintiff was riding to turn onto that siding. The court distinguished three kinds of conduct: negligence, in which the actor fails to exercise the care of a reasonably prudent person under the circumstances but in which the actor has no desire to cause any harm; willful or intentional misconduct, in which the actor (the court says) intends to cause harm; and wanton and reckless conduct, in which the actor has no intent to cause harm but intentionally performs an act so dangerous that he knows, or should know, that harm will probably result. The court concluded that the action here of the switchman might be negligence—even gross negligence—but could not constitute wanton and reckless conduct because he did not intend to throw the switch the wrong way. No question arose of the conduct creating a battery, and the court’s statement on the requirements of intentional torts is clearly dictum. The court correctly defines wanton conduct as involving a high risk of harm;\(^5\) but that offers no support for requiring intent to cause harm in intentional tort cases.

The same is true of a Wyoming opinion in a wrongful death action arising from an automobile accident.\(^2\) In applying a comparative negligence statute that did not require reduction of damages for plaintiff’s negligence if defendant’s conduct had been wanton, the court needed to define "wanton conduct." The conduct was implicitly distinguished from that found in the intentional torts in that no intent to cause injury is here required, but merely the intent to do an act under such circumstances that the reasonable person would know it involves a high probability of substantial harm to another. Again, battery was definitely not a possible action and was not asserted, and thus any reflections on the requirements of intentional torts were dicta.

Far more questionable were statements made in 1979 by a federal court regarding an action brought by a professional football player for injuries sustained when another player intentionally struck him on

---

51. Id. at 859-70, 118 P.2d at 469, stating: “Wanton and reckless misconduct is more closely akin to willful misconduct than to negligence, and it has most of the legal consequences of willful misconduct.” Accord; New York Cent. Ry. v. Mohney, 252 U.S. 152 (1920) (reckless conduct where actor must have known that harm would probably result). See generally Walton, Motive as an Element in Torts in the Common and in the Civil Law, 22 Harv. L. Rev. 501, 519 (1909) (in the common law, “willful damage” done another is actionable unless there is some excuse for it).

52. Danculovich v. Brown, 593 P.2d 187 (Wyo. 1979). Cf. Matheson v. Pearson, 619 P.2d 321 (Utah 1980), declaring that if an act is undertaken without intent to harm or substantial certainty that harm will result from the act, the actor does not commit an intentional tort but may be acting in reckless disregard of safety.
the back of the head during a game. After ruling that there could be tort liability for "the intentional punching or striking of others" even when committed in a professional football game, the court defined battery as "the unprivileged or unlawful touching of another." All this is undoubtedly correct. But the court then summarily concluded that recklessness was the appropriate action here, since in recklessness the required intent is to do the act, not cause the particular harm. This again implies that intent to cause harm—indeed to cause the particular harm—is necessary to battery. But as in some cases discussed supra, the court was really struggling with a statute of limitations problem. By narrowly confining "assault and battery," the court was able to conclude that the action was not barred by the one-year statute applicable to those actions but was still alive under the six-year statute on recklessness. Thus, though the definition of battery here given was not dictum, it must be placed with those other restrictive definitions that have obviously been handed down by courts in order to avoid a harsh result.

Even aside from problems with a statute of limitations, courts may be eager to treat many cases of harmful personal contact under negligence principles rather than under the law of intentional torts. Negligence is a more flexible concept; "its existence must depend in each case upon the particular circumstances which surrounded the parties at the time and place of the events upon which the controversy is based." But the solution to problems raised by a short limitation period on battery, or by the rigidity of battery requirements, is not

53. Hackbart v. Cincinnati Bengals, Inc., 601 F.2d 516 (10th Cir.), cert. denied, 444 U.S. 931 (1979). A bill introduced in the United States House of Representatives on July 31, 1980—H.R. 7903, 96th Cong., 2d Sess. (1980)—provided that if a player in a professional sports event knowingly used "excessive physical force" (as defined in the bill) and thereby caused a risk of significant bodily injury to another person involved in that event, (s)he would be fined not more than $5,000 or imprisoned not more than one year, or both. See generally Note, Torts in Sports—Deterring Violence in Professional Athletics, 48 FORDHAM L. REV. 764 (1980); Annot., 77 A.L.R.3d 1300 (1977).


56. See supra notes 43-45 & 47-49 and accompanying text.


58. Spivey v. Battaglia, 258 So. 2d 815, 817 (Fla. 1972), citing Christopher v. Russell, 63 Fla. 191, 58 So. 45 (1912). See Federer v. Davis, 434 P.2d 197 (Okla. 1967) (treating as possible negligence a high school student's pushing another student's head down on a water fountain; the court dismissed a contention of battery since there was no intent to harm).
the redefining of "battery" so as to exclude all cases except those in
which harm or offense is intended. It has been observed that the con-
cepts of negligence and battery are not mutually exclusive. Thus, as
one case suggested, an intentional act that produces unintended conse-
quences may be the basis of a negligence claim. For example, in a
case where a chair is pulled out from under a person about to sit down,
there may be a battery action based on the contact caused, but there
may in the alternative be a negligence action for acting unreasonably
in the face of a risk of harm to the victim. Many of the statute-of-
limitations cases may be justifiable in their conclusion of upholding
a negligence claim, even if their descriptions of the tort of battery are
questionable. And, considering the fine distinctions that are involved,
many of the cases dealing with possible batteries may justifiably speak
of "recklessness" because if a person acts with intent to cause con-
tact, that person may often be acting not only negligently but even
recklessly toward the safety of the person to be touched.

Conclusion

Old definitions of battery, as in Greenleaf's work on evidence, lend
support to the idea that battery requires intent to harm or at least to

Negligence, Inadvertence and Indifference; the Relation of Mental States to Negligence, 39 HARV.
L. REV. 849 (1926).

case is critical of the "either-or" attitude taken in Lambertson v. United States, 528 F.2d 441
(2d Cir.), cert. denied, 426 U.S. 921 (1976) (discussed supra in notes 1 & 5 and accompanying
text), in which no action was allowed under the Federal Tort Claims Act in a horseplay situation
because such action was considered to involve a battery, which is excluded by the Act from
the government's area of possible liability, rather than to involve negligence. The Ghassemieh
court stated:

We observe that outside the federal statute and any workmen's compensation statute
barring suits between co-employees, an action for negligence may lie if plaintiff
could show that the defendant through intentional horseplay exposed the plaintiff
to an unreasonable risk of harm, i.e., the meat hooks that were six inches from
plaintiff's head and into which he fell, injuring his mouth.
Ghassemieh, 447 A.2d at 90 n.4, citing Lambertson, 528 F.2d 441 (2d Cir.), cert. denied, 426

61. Ghassemieh v. Schafer, 52 Md. 31, 447 A.2d at 90, noting, "Here, an intentional act—
the pulling away of the chair—had two possible consequences: the intended one of embarrass-
ment and the unintended one of injury."

62. See Lambrecht v. Schreyer, 129 Minn. 271, 152 N.W. 645 (1915), finding that defendant,
in whipping up the horses pulling his wagon and passing the team pulling plaintiff's surrey and
in driving near plaintiff's surrey and yelling loudly, may have acted recklessly and in such man-
ner as to be like'y to produce injury. Cf. Mercer v. Corbin, 117 Ind. 450, 20 N.E. 132 (1889),
finding that defendant, in riding his bicycle into plaintiff, was reckless, and that malice could
be inferred from such recklessness.

63. S. GREENLEAF, EVIDENCE, 70-71 (16th ed. 1899).
embarrass. But such definitions seem heavily influenced by the criminal law. In modern times, it can be safely stated that "it is not necessary that the defendant intend harm or offense." Judicial definitions that deviate from the norm reflect struggles to allow recovery to deserving plaintiffs despite the elapse of a short limitation period on battery, or struggles to determine where intent ends and negligence begins. But the better view is that, at least since the death of the old forms of action, the possible existence of one tort, even in the intentional area, does not preclude the existence of another tort, such as negligence. Battery has, in tort law, expanded beyond its original applications, which were situations where one person violently strikes another in anger. Genuinely harmed plaintiffs should not suffer because of artificial and rigid lines that would exclude from recovery those harmed by pranks, medical mistakes, or situations of mistaken identity. Though in many of these cases, the intent of the person causing unpermitted contact may not be so antisocial as to justify criminal liability, the contact surely violates the rule of society and of modern tort law that a person must keep his hands to himself. The injured victim of violations of this rule deserves compensation. This right should not be regarded as clouded by occasional, even recent, judicial language that would indicate tort law is regressing to an earlier time of looser restraints on human conduct and stricter restraints on legal remedies.

64. Carpenter, supra note 27, at 235.