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INTENT IN CIVIL ASSAULT AND BATTERY IN NEBRASKA

INTRODUCTION

In 1948, the Supreme Court of Nebraska held in *Newman v. Christensen*¹ that an injury occasioned by horseplay gave rise to a cause of action in negligence rather than battery, thus affording plaintiff a longer statute of limitations. In so doing, the court adopted the minority definitions of both assault and battery which require an intent to injure to be proved. This is an element of criminal law which is usually not carried over into tort law. This article will compare intentional tort and negligence, showing that the "horseplay" case is and has been capable of being analyzed as a civil battery. The article will also consider the practical differences in liability between intentional tort and negligence, concluding that although they might not be sufficient in Nebraska to require distinction between intentional tortious battery and negligence in this peculiar situation, the Nebraska plaintiff is denied a legitimate cause of action in the "horseplay" case.

ASSAULT AND BATTERY IN NEBRASKA

Newman and Christensen were playing pitch at the Elks Club in Fremont, Nebraska. Newman swept some money from the table onto the floor. As Christensen stooped to pick up his money, he jokingly jerked Newman's foot upward. The chair on which Newman was sitting spun away and he fell over backwards, striking and allegedly injuring his back. Christensen admitted the occurrence, which he claimed was mere "horseplay" and pleaded that the cause of action was barred by the statute of limitations.² The court considered several definitions of assault and battery, concluding that because of the absence of an "intent to injure"³ the case should be brought in negligence which has a longer statute of limitations.⁴

Prior to *Newman* the only Nebraska case defining assault and battery was *Miller v. Olander*⁵ which defined battery as an "[i]njury actually done to the person of another, in an angry, resentful, or insolent manner."⁶ This language suggests that an intent to

¹ 149 Neb. 471, 31 N.W.2d 417 (1948).

² NEB. REV. STAT. § 25-208 (1943).

³ 149 Neb. at 475, 31 N.W.2d at 419.

⁴ NEB. REV. STAT. § 25-207 (1943).

⁵ 133 Neb. 762, 277 N.W. 72 (1938).

⁶ *Id.* at 765, 277 N.W. at 73.

injure is an element of civil battery since injury done to another in an angry manner would indicate an intent to do bodily injury. It seems more appropriate, however, to speak of an "intent to injure" in relation to criminal actions since a man-injuring mens rea is an element in both criminal assault and battery.⁷

Nebraska is not alone in requiring an intent to injure in civil battery. The court in the principal case cited and discussed *Perkins v. Stein & Co.*,⁸ which based its definition of battery on *Bishop on Criminal Law*.⁹ The court in *Perkins* considered the intent to injure as the essence of assault, and required an evil intent for battery,¹⁰ concluding: "We are therefore prepared to say that to constitute an assault and battery . . . the act complained of must be done with hostile intent."¹¹ *Donner v. Graap*¹² was cited in *Newman*, for the proposition that a battery is an intentional tort embodying elements of criminal intent. *Ott v. Great Northern Ry. Co.*,¹³ was cited as holding that "[A] battery . . . is an action founded upon an intentionally administered injury to the person—such an injury as could be made the basis of a criminal prosecution."¹⁴ The remaining case cited in *Newman* was *Razor v. Kiney*¹⁵ which also required an intent to injure another as a factor in civil battery. These decisions were cited from jurisdictions following the minority position requiring criminal intent in civil assault and battery. None of these cases cited involved a "horseplay" situation.

ASSAULT AND BATTERY DEFINED

Requiring an intent to injure in civil assault and battery is inconsistent with the law elsewhere.¹⁶ Cooley states:

[A]n action for assault and battery must be based upon willful and intentional acts, as distinguished from mere negligence, but in civil, as distinguished from criminal assaults and batteries, an actual

⁷ Byrn, *Assault, Battery and Maiming in New York: From Common Law Origins to Enlightened Revision*, 34 *FORDHAM L. REV.* 613 (1966).

⁸ 94 Ky. 433, 22 S.W. 649 (1893).

⁹ 2 J. BISHOP, *NEW COMMENTARIES ON THE CRIMINAL LAW* § 72c (8th ed. 1892).

¹⁰ 94 Ky. at 437, 22 S.W. at 650.

¹¹ *Id.*

¹² 134 Wis. 523, 115 N.W. 125 (1908).

¹³ 70 Minn. 50, 72 N.W. 833 (1897).

¹⁴ *Id.* at 54, 72 N.W. at 834.

¹⁵ 55 Ill. App. 605 (1894).

¹⁶ See Recent Decisions, 23 *ST. JOHN'S L. REV.* 352, 355 (1949), where the author, speaking of the principal case, states: "[T]here is a dearth of respectable authority to support the position taken."

intent to injure is not an essential element It is not essential that the precise injury which was done should have been designed.¹⁷

According to the *Restatement of Torts*,¹⁸ a person's intent to cause harmful or offensive contact creates liability in civil assault and battery. Prosser states that the only intent required is the intent to bring about unpermitted contact.¹⁹ The defense of "horseplay" has not traditionally relieved defendants from liability in civil battery.²⁰ Prosser's statement is the prevailing view of the case law.²¹ In *Cook v. Kinzua Pine Mills Co.*,²² the defendant, aware that such result might occur, deliberately drove his truck on a narrow road, striking plaintiff's automobile which had pulled off the traveled portion of the road to let the truck pass. The court found an intent to injure necessary in civil battery although this

¹⁷ 1 T. COOLEY, A TREATISE ON THE LAW OF TORTS § 98 (4th ed. 1932) (footnotes omitted); cf. 1 F. HARPER & F. JAMES, THE LAW OF TORTS § 3.3 (1956).

¹⁸ RESTATEMENT (SECOND) OF TORTS § 21 (1965).

¹⁹ W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 9 (3d ed. 1964).

²⁰ *Keel v. Hainline*, 331 P.2d 397 (Okla. 1958) (high school students threw chalk and erasers at one another in sport, hitting plaintiff, a non-participant); *Garratt v. Dailey*, 46 Wash. 2d 197, 279 P.2d 1091 (1955) (a boy pulled a chair away just as plaintiff was about to sit down); *Reynolds v. Pierson*, 29 Ind. App. 273, 64 N.E. 484 (1902) (defendant grabbed the arm of a friend who had a hold of plaintiff, the force of the motion knocking plaintiff down); *Peterson v. Haffner*, 59 Ind. 130, 26 Am. R. 81 (1877) (involved boys playing, one throwing mortar at the other as he ran away, hitting the latter in the eye); *Markley v. Whitman*, 95 Mich. 236, 54 N.W. 763 (1893) (plaintiff, a nonparticipant in the game in which defendant was engaged, was given a push by defendant); *Fitzgerald v. Cavin*, 110 Mass. 153 (1872) (in a friendly scuffle, defendant went beyond the limits to implied consent and squeezed plaintiff's testicles).

²¹ *Vosberg v. Putney*, 80 Wis. 523, 50 N.W. 403 (1891) (defendant in jest kicked plaintiff in the leg during a session of school); *accord*, *Lutterman v. Romney*, 143 Ia. 233, 121 N.W. 1040 (1909) (defendant injured plaintiff while trying to obtain sexual intercourse with her); *Morrow v. Flores*, 225 S.W.2d 621 (Tex. 1949) (defendant shot a pistol at one person, missed and hit plaintiff, a stranger); *Rullis v. Jacobi*, 79 N.J. Super. Ct. 525, 192 A.2d 186 (1963) (defendant grabbed plaintiff's arm while objecting to the removal of a fence); *Baldinger v. Banks*, 26 Misc. 2d 1086, 201 N.Y.S.2d 629 (1960) (defendant playfully pushed plaintiff, a little girl, to discourage her from playing with defendant and others); *Nichols v. Colwell*, 113 Ill. App. 219 (1903) (defendant engaged plaintiff in a "friendly scuffle").

²² 207 Or. 34, 293 P.2d 717 (1956) (defendant collided his truck with the car of plaintiff). The court said there was no difference between hitting plaintiff with one's fist or with one's car if the act was in fact a battery.

injury was legal, not physical in nature—a violation of a protected right to freedom from unpermitted contact. The court further held that one charging civil battery need only allege intent to bring about the unpermitted contact.

Where an operation is performed without plaintiff's consent, it is considered unnecessary to show that the defendant intended to injure the plaintiff to state a cause of action in civil battery.²³ In *Johnson v. McConnell*,²⁴ the defendant, in attempting to stop a scuffle between plaintiff (who was drunk) and another, broke the plaintiff's leg. He was held liable by the court although he was acting in the plaintiff's best interest. Where defendant set a broken bone despite plaintiff's protestations that she wanted a doctor, the action was found to be a battery even though the defendant was motivated by the best of intentions.²⁵

Two necessary elements for a tortious battery can be culled from these cases. There must only be an intent to do the act, and absence of consent on the part of the injured party. Terms such as "hostile intent" and "intent to injure" are not found to be elements of civil battery. The definition is an interference with plaintiff's bodily integrity causing an unpermitted contact by the actor, who intends such contact. The defendant in *Newman* intended to jerk plaintiff's foot which, according to the definitions above, is sufficient to create liability in civil battery.

An intent to injure is required only for criminal assault. To constitute tortious assault, there must be an apprehension on the part of the plaintiff of an immediate harmful or offensive touching of his person, caused by one intending to create such apprehension.²⁶ An apparent intent and an apparent present ability to commit a battery are sufficient for civil assault.²⁷ Thus, where the defend-

²³ *Mohr v. Williams*, 95 Minn. 261, 104 N.W. 12 (1905); cf. Annot., 26 A.L.R. 1036 (1923), on the liability of doctors in assault and battery.

²⁴ 115 Hun. 293 (N.Y. 1878).

²⁵ *Clayton v. New Dreamland Roller Skating Rink*, 14 N.J. Super. Ct. 390, 82 A.2d 458 (1951).

²⁶ *Carpenter, Intentional Invasion of Interest of Personality*, 13 ORE. L. REV. 227 (1934); *Perkins, An Analysis of Assault and Attempts to Assault*, 47 MINN. L. REV. 71 (1962); *Byrn, Assault, Battery and Maiming in New York: From Common Law Origins to Enlightened Revisions*, 34 FORDHAM L. REV. 613 (1966); *Turner, Assault at Common Law*, 7 CAMBRIDGE L.J. 56 (1939).

²⁷ *Howell v. Winters*, 58 Wash. 436, 108 P. 1077 (1910); accord, *Newell v. Whitcher*, 53 Vt. 589, 38 Am. R. 703 (1880). *Contra*, *Degenhardt v. Heller*, 93 Wis. 662, 68 N.W. 411 (1896). Wisconsin is in the anomalous position of requiring intent to injure in tortious assault, but not in tor-

ant points a gun at plaintiff in a threatening manner, this would constitute an assault.²⁸ All that is necessary is an intentional act on the part of the defendant reasonably calculated to create apprehension of a present battery, and a fear that the defendant might go further and commit a battery upon plaintiff's person.²⁹ The commonly accepted criminal definition of assault is found in *Burton v. State*:³⁰ "An assault is an attempt or offer with force and violence to do a corporal injury to another, whether from malice or wantonness, under such circumstances as denote a present intention of doing it, coupled with the present ability." Today many authorities agree that the definition of criminal assault has come to mean an attempted battery done for the purpose of harming plaintiff, while tortious assault means an intentional act placing another in apprehension of receiving an immediate battery, but not requiring the intent to injure.³¹ Thus although the better view sees an intent to injure as characteristic of a criminal assault and completely unnecessary for a tortious assault, the Nebraska rule requires an intent to injure in both tortious battery and assault.

A battery can roughly be equated to a striking or touching, but underlying many batteries is an assault which may exist inde-

entious battery; cf. *Vosberg v. Putney*, 80 Wis. 523, 50 N.W. 403 (1891) for a Wisconsin case involving civil battery.

- ²⁸ *Commonwealth v. White*, 110 Mass. 407 (1872); accord, 6 AM. JUR. 2d, *Assault and Battery* § 28 (1963); cf. *Oshogay v. Schultz*, 257 Wis. 323, 43 N.W.2d 485 (1950) (dissenting opinion).
- ²⁹ RESTATEMENT (SECOND) OF TORTS § 32 (1965); accord, *Rollins, Torts: Assault and Battery*, 17 NOTRE DAME L. REV. 2, 17 (1941); *Langford v. Shu*, 285 N.C. 135, 128 S.E.2d 210 (1962); *Turner, Assault at Common Law*, 7 CAMBRIDGE L.J. 56 (1939).
- ³⁰ 8 Ala. App. 295, 62 So. 394 (1913); accord, *State v. Jones*, 18 Del. 573, 47 A. 1006 (1900); *State v. Daniel*, 136 N.C. 571, 48 S.E. 544 (1904); *Bodeman v. State*, Tex. Crim. App., 40 S.W. 981 (1897); *Berkley v. Commonwealth*, 88 Va. 1017, 14 S.E. 916 (1892); *State v. Hatfield*, 48 W. Va. 561, 37 S.E. 626 (1900).
- ³¹ One of the earliest definitions of assault is found in 2 W. HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 16 (7th ed. 1795): "An attempt or offer, with force and violence to do a corporal hurt to another." The use of assault in its criminal sense is achieved by analyzing Hawkins' use of the words "attempt or offer" as necessarily implying a purpose, and if the words are so employed in the definition, it necessarily follows that there can be no criminal assault without a definite purpose to harm the plaintiff. *Keigwin, Is an Intent to Do Harm Requisite to a Criminal Assault?* 17 GEO. L.J. 56 (1928); accord, *Perkins, An Analysis of Assault and Attempts to Assault*, 47 MINN. L. REV. 71 (1962); 1 R. ANDERSON, WHARTON'S CRIMINAL LAW AND PROCEDURE § 154 (Anderson ed. 1957); 1 W. BURDICK, THE LAW OF CRIME § 135 (1946); M. WINGERSKY, A TREATISE ON THE LAW OF CRIMES (CLARK & MARSHALL) § 4.08 (6th ed. 1958).

pendently. Defendant's conduct may and frequently does, include both assault and battery, but even where defendant's attempt to inflict a battery is successful, an assault is not necessarily present. A battery may be inflicted upon the plaintiff before he has time to be placed in apprehension.³² Some jurisdictions have confused the two torts, probably for historical reasons.³³ Originally, both battery and assault were pleaded in the action of trespass, an action that was semi-criminal in nature because the defendant had to pay a fine for breaching the King's peace.³⁴ Because both assault and battery were "breaches of the King's peace," they are comparable except for the different character of the invasion of plaintiff's interests. For these reasons a court's use of the term "assault and battery" should be analyzed with care to insure that in fact both torts were present.

INTENTIONAL TORT AND NEGLIGENCE

Nebraska's use of the minority definition of battery, requiring an intent to injure, shows awareness of the fact that in most cases involving tortious battery or assault, the defendant's act is motivated by a desire to do bodily injury. To require the plaintiff to prove such intent as an element of the tort is thus not considered to be an inequitable burden in jurisdictions following this position. The problem in applying the Nebraska rule arises where the court is faced with the "practical joke" or "horseplay" case, for when the rule is applied to this situation, as in *Newman*, there is no basis for implying this intent to injure. Since the defendant was not motivated by an intent to injure, the minority courts will turn to negligence lest there be no remedy for this tort. The author feels that the minority thesis falters at this point because it fails to deal effectively with defendant's intentional action, as found in *Newman*, where an intent to engage in unpermitted physical contact is clearly shown. This rule produces an illogical limitation on the scope of the interest protected—the right to freedom from unpermitted contact. Because of this position, Nebraska lawyers may have hesitated to place their faith in the law of intentional tort, thus denying plaintiff a legitimate cause of action.

It is axiomatic then that negligence is unintentional whereas assault and battery are both intentional. In negligence, a person

³² W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 10 (3d ed. 1964). Thus in civil assault, apprehension on the part of the plaintiff is essential.

³³ Some courts have referred to battery as an "assault," *Mailand v. Mailand*, 83 Minn. 453, 86 N.W. 445 (1901).

³⁴ W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 7 (3d ed. 1964); Woodbine, *The Origins of the Action of Trespass*, 34 YALE L.J. 343, 359 (1925).

who acts necessarily creates a risk to others, and it is only when this risk becomes excessive is liability for negligence imposed. Since public policy requires certain activities to be carried on, tort law recognizes a privilege to act as long as the acts are not disproportionate to the desired or protected interests of society.³⁵ The measure of what acts are disproportionate to the interests of society is the "prudent man" standard. In the principal case, the defendant was not culpable nor did he intend to injure the plaintiff, but the defendant's action was not that of a "prudent man" according to the *Newman* court, which then concluded that the defendant must have been negligent.³⁶

Tortious battery, however, includes those acts which a person does when he knows with substantial certainty that they must result in an invasion of plaintiff's right to freedom from unpermitted contact.³⁷ The courts have attempted to draw the line of demarcation between intentional torts and negligence at the point where the risk ceases to be merely foreseeable by a reasonable man and becomes an apparent certainty.³⁸ The risk of harm in intentional battery is inherent in the very act itself. Public policy thus prohibits these activities because of the intentional invasion of the protected interest without regard to any privileged conduct that attends an inquiry into negligence. There is no public interest in allowing one person to intentionally jerk another's foot whether it is done only as a practical joke, or with the worst intentions, because of the apparent certainty of harm.

The Nebraska rule suggests that if the injury is not intended, the act is negligent.³⁹ Unintended harm, however, does not change an intentional act into a negligent one. Where the act involves the intentional touching of another, the actor is liable in civil battery for the resulting unintended bodily harm.⁴⁰ That such consequences actually resulting could not reasonably have been fore-

³⁵ Seavy, *Principles of Torts*, 22 NEB. L. BULL. 177, 190 (1934).

³⁶ 149 Neb. at 476, 31 N.W.2d at 420; Brief for Appellee at 15, *Newman v. Christensen*, 149 Neb. 471, 31 N.W.2d 417 (1948).

³⁷ Carpenter, *Intentional Invasion of Interest of Personality*, 13 ORE. L. REV. 227, 234 (1934) [hereinafter cited as Carpenter].

³⁸ RESTATEMENT OF TORTS § 13, Comment d, & § 21 (1934); *accord*, Garratt v. Dailey, 46 Wash. 2d 197, 279 P.2d 1091 (1955), where a boy who pulled away a chair just as plaintiff was about to sit down was held liable for battery because he knew that she was substantially certain to suffer a forcible seating on the ground.

³⁹ *Newman v. Christensen*, 149 Neb. 471, 31 N.W.2d 417 (1948).

⁴⁰ RESTATEMENT (SECOND) OF TORTS § 16(1) (1964); *accord*, Vosberg v. Putney, 80 Wis. 523, 50 N.W. 403 (1891); *Cook v. Kinzua Pine Mills Co.*, 207 Ore. 34, 293 P.2d 717 (1956).

seen is immaterial.⁴¹ Since the defendant is liable for such injuries as directly result from his wrongful act, whether or not they could be foreseen by him, it would seem that plaintiff need only allege an intentional, unprivileged contact with his person and resulting damages to prove civil battery.⁴²

Requiring plaintiff to show negligence in a situation where intent to engage in unpermitted contact is clearly shown, unduly restricts plaintiff since liability in negligence can be much more limited than it is in civil battery. Only when defendant can reasonably foresee that such contact is likely to result and that it involves an unreasonable risk is such an act negligence.⁴³ Negligent liability is also more difficult to prove. It is a jury question whether or not the defendant has met the standard of reasonable conduct, a standard not considered in tortious assault and battery.⁴⁴ Plaintiff in negligence must show that defendant owed a duty of care generally, which when violated, might foreseeably result in harm to someone,⁴⁵ and then show that his injury was proximately caused by defendant.⁴⁶ Causation is not usually a consideration in intentional torts, liability being closely akin to absolute liability when imposed.⁴⁷ Punitive damages are often imposed on defendant in intentional torts.

Punitive damages are given to the plaintiff over and above the full compensation for his injuries, for the purpose of punishing and discouraging possible repetition as well as for deterring others.⁴⁸ Such damages are allowed where the defendant's action has been

⁴¹ *Id.*

⁴² *Lutterman v. Romney*, 143 Iowa 233, 121 N.W. 1040 (1909); *accord*, *Vosberg v. Putney*, 80 Wis. 523, 50 N.W. 403 (1891); *Baldinger v. Banks*, 26 Misc. 2d 1086, 201 N.Y.S.2d 629 (1960); F. JAMES, *CIVIL PROCEDURE* § 2.9 (1965).

⁴³ *Carpenter*, *supra* note 37.

⁴⁴ *Russel v. Electric Garage Co.*, 90 Neb. 719, 134 N.W. 253 (1912); *Walter v. Village of Exeter*, 87 Neb. 125, 126 N.W. 868 (1910); *City of Omaha v. Houlihan*, 72 Neb. 326, 100 N.W. 415 (1904); *Spears v. Chicago B. & Q. Ry.*, 43 Neb. 720, 62 N.W. 68 (1895).

⁴⁵ *Palsgraf v. Long Island Ry.*, 248 N.Y. 339, 350, 162 N.E. 99, 103 (1928) (*Andrews, J.*, dissenting opinion).

⁴⁶ *Rasmussen v. Benson*, 133 Neb. 449, 275 N.W. 674 (1937) *aff'd on rehearing*, 135 Neb. 232, 280 N.W. 890 (1938); *Hanford v. Omaha & C.B. St. Ry.*, 113 Neb. 423, 203 N.W. 643 (1925).

⁴⁷ *Vold*, *The Legal Allocation of Risk in Assault, Battery and Imprisonment—The Prima Facie Case*, 17 NEB. L. BULL. 152, 164 (1938); *Smith, Tort and Absolute Liability*, 30 HARV. L. REV. 241 (1917); *Bauer, The Degree of Moral Fault as Affecting Defendant's Liability*, 81 U. PA. L. REV. 586.

⁴⁸ W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 2 (3d ed. 1964).

intentional and deliberate, and occasionally where the defendant has been grossly negligent.⁴⁹ But the doctrine of punitive or exemplary damages has been repudiated in Nebraska.⁵⁰ The Nebraska courts have held that fines deterring the defendant from future intentionally tortious conduct belong to the criminal courts since punishment and deterrence are objectives of criminal law,⁵¹ and yet, as shown above, there is little difference between the civil and criminal definitions of assault and battery in Nebraska. Secondly, the state constitution gives all "penalties" and "fines" arising from the law of the state to the school board.⁵² It is arguable that any damages in addition to compensation for injury would be such a penalty.⁵³ Financially then, the result in dollars of either civil battery or negligence would be the same to the plaintiff since in Nebraska the measure of recovery in all civil actions is compensation for the injury sustained. A court's reluctance to consider the nicer distinctions of tort law is more comprehensible in this light. Some jurisdictions, however, consider punitive damages as extra compensation for injured feelings or sense of outrage rather than punishment. The courts in these jurisdictions allow these damages to enlarge compensatory allowance, but do not consider them as authorizing a separate sum by way of example or punishment.⁵⁴

⁴⁹ *Id.*

⁵⁰ *Bee Publishing Co. v. World Publishing Co.*, 59 Neb. 713, 82 N.W. 28 (1900); *Riewe v. McCormick*, 11 Neb. 261, 9 N.W. 88 (1881); *Winkler v. Roeder*, 23 Neb. 706, 37 N.W. 607 (1888).

⁵¹ *Boyer v. Barr*, 8 Neb. 68, 30 Am. R. 814 (1878).

⁵² NEB. CONST. art. VII, § 5.

⁵³ *Abel v. Conover*, 170 Neb. 926, 104 N.W.2d 684 (1960) where it was held that a statute imposing treble damages in a civil suit for fraud violated the constitutional provision in question.

There are other statutory problems in Nebraska. The statutory definition of criminal assault and battery is: "Whoever unlawfully assaults, or threatens another in a menacing manner, or unlawfully strikes or wounds another. . . ." NEB. REV. STAT. § 28-411 (Reissue 1948). There is little difference between this definition and that found in *Miller v. Olander*, 133 Neb. 762, 277 N.W. 72 (1938). The author feels that the materials reviewed by the court in the principal case, were not sufficient to differentiate between tortious battery and criminal battery. Considering this along with the court's obvious desire to get around the statute of limitations problem, the result reached is not too difficult to understand.

⁵⁴ Michigan and New Hampshire courts have utilized this approach in order to bring the concept of punitive damages within the theory of compensatory damages. See, *Bixby v. Dunlap*, 56 N.H. 456 (1876); *Wise v. Daniel*, 221 Mich. 229, 190 N.W. 746 (1922).

CONCLUSION

The requirement of an intent to injure imposed by the Nebraska rule is due to the adoption of the minority definition of battery requiring an intent to injure, which confuses the required intent in tortious battery with the requirement for criminal law, although the better view today is that the defendant need only intend to inflict the unpermitted contact. In cases where such intent does not exist, the plaintiff has the more difficult burden of proving negligence. The problem could be eliminated by confining the term "battery" to instances where the defendant has intentionally invaded the plaintiff's right to freedom from harmful and offensive touching, leaving unintentional invasions to the negligence field. "Assault" should be clarified by restricting it to those situations where the defendant puts the plaintiff in apprehension of such a harmful or offensive touching. An intent to injure should not be an added element of proof which the plaintiff has to sustain in a civil battery or assault. Although the concept of negligence could be broadened to cover the "horseplay" case where the intent to injure is not a consideration, it would be conceptually and practically sounder to allow the cause of action in terms of intentional tort.

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