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## **A RESTATEMENT THIRD OF INTENTIONAL TORTS?**

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# A Restatement Third of Intentional Torts?

by

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## I. Introduction

Should the American Law Institute initiate a new torts project, a Restatement Third of Intentional Torts?

Gary Schwartz, our dearly missed colleague and the first Reporter of the Restatement Third of Torts: General Principles project, thought not. Indeed, in Section 5 of the Draft Restatement Third, addressing Liability for Physical Harm, he suggested:

Although the intentional infliction of physical harm is unfortunately common in society, for a variety of reasons litigation resulting from that harm is relatively uncommon. Given this circumstance, since the publication of the Restatement Second of Torts in 1965 addressing these specific torts, there have been only a limited number of judicial opinions applying the physical-harm intentional-tort doctrines in that Restatement; and there is a scarcity of judicial opinions that have seriously called into question any of those doctrines. Accordingly, the Restatement Second remains largely authoritative in explaining the details of the specific torts encompassed by this Section and in specifying the elements and limitations of the various affirmative defenses that might be available.<sup>1</sup>

My own research confirms that Schwartz's conclusion is essentially correct. A new Restatement Third of Intentional Torts project should not be highest on the agenda of the ALI.

Still, there have been intriguing legal developments in some areas of intentional tort law. And it is also worth looking at intentional torts from a much broader perspective. The bird's eye ("Google Earth"?) view indicates that there is much more complexity to the structure of intentional tort doctrine than we typically assume. Because the new economic torts restatement will undoubtedly make use of some "intent" elements in articulating the contours of doctrine, I will close with suggestions about how the new restatement might intelligently respond to that complexity.

## II. What the Restatement Third has already addressed, or will address

Let me begin with a quick review of the intentional tort doctrines that the Restatement Third projects to date have already addressed, or plan to address.

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<sup>1</sup> Restatement Third of Torts: Liability for Physical Harm, Proposed Final Draft No. 1, April 6, 2006 ("Rest. Third Phys. Harm PFD 1"), p. 77.

1. Section 1 provides a new general definition of intent

This section defines “intent” to produce a consequence as either the purpose to produce that consequence, or the knowledge that the consequence is substantially certain to result.

The new definition is quite similar to the definition of intent in §8A of the Restatement Second of Torts, except for “unblending”<sup>2</sup> the two meanings and placing them in separate subsections, so that courts and legislatures can more easily choose to use just one of the two meanings (either purpose or knowledge) in an appropriate context.

The comments to §1 also include a very useful discussion of the knotty problem of statistical knowledge, which has troubled some courts. The problem is whether a defendant should be deemed to satisfy a knowledge requirement when its activities are extended in space or time. Should awareness that harm is very likely to occur somewhere or some time be enough to count as “intent”? No, according to the comments, and this is a sensible view: a product manufacturer should not be liable for battery, or indeed for any tort at all, simply because it knows that some users will inevitably suffer serious harm in the course of using the product. The comment also makes a valiant effort to identify a criterion for when the “knowledge” requirement should and should not be deemed satisfied.<sup>3</sup>

2. Section 5 gives us an umbrella rule: “an actor who intentionally causes physical harm is subject to liability for that harm.” According to comment a, this framework “encompasses many of the specific torts described in much more detail in the Restatement Second of Torts,” including harmful battery, trespass on land, trespass to chattels, and conversion by destruction or alteration.<sup>4</sup>

But this claim, that the umbrella concept literally encompasses certain other torts, is false or at least misleading, as we’ll see.

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<sup>2</sup> Rest. Third Phys. Harm PFD 1, Section 1, Comment a, p. 3.

<sup>3</sup> The solution suggested in the comment—that “the application of the substantial-certainty test should be limited to situations in which 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 within a localized area”—is not perfect, but it is a good start. See *id.*, comment e, pp. 9-10. For further discussion, see Kenneth W. Simons, *The Conundrum of Statistical Knowledge*, pp. = (unpublished draft, on file with author); Jody Armour, *Interpretive Construction, Systemic Consistency, and Criterial Norms in Tort Law*, 54 *Vand. L. Rev.* 1157, 1161 (2001); Anthony Sebok, *Purpose, Belief, and Recklessness: Pruning the Restatement (Third)’s Definition of Intent*, 54 *Vand. L. Rev.* 1165, 1171-1172 (2001); James Henderson & Aaron Twerski, *Intent and Recklessness in Tort*, 54 *Vand. L. Rev.* 1133, 1141-1143 (2001); Alan Calnan, *Anomalies in Intentional Tort Law*, 1 *Tenn. J. L. & Pol’y* 187, 223-227 (2005).

<sup>4</sup> Rest. Third Phys. Harm PFD 1, Section 5, Comment a, pp. 73-74.

3. Intentional infliction of emotional disturbance is, of course, addressed in a new project, Preliminary Draft No. 5.<sup>5</sup>

4. The new economic harms restatement will undoubtedly include various intent requirements, since these have played a significant role in the development of doctrine in this area.<sup>6</sup>

5. The apportionment restatement addresses intentional torts in several provisions. Intent to cause harm is one factor relevant to assigning shares of responsibility.<sup>7</sup> And intentional tortfeasors are jointly and severally liable for indivisible injuries to which they causally contribute.<sup>8</sup> However, the restatement

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<sup>5</sup> Restatement Third, Torts: Liability for Physical Harm, Preliminary Draft No. 5 (August 29, 2005) (“Rest. Third Phys. Harm PD 5”), §45 provides: “An actor who by extreme and outrageous conduct intentionally or recklessly causes severe emotional disturbance to another is subject to liability...” This provision closely resembles its predecessor, Restatement 2<sup>nd</sup> §46.

<sup>6</sup> The reporter for the new restatement for economic harm currently proposes to address:

- intentional torts of dishonesty (fraud, injurious falsehood, unjustifiable litigation, and bad faith breach);
- intentional torts of disloyalty (breach of fiduciary duty and abuse of confidential relationship);
- “intentional pecuniary harm” (the prima facie tort, interference with contract, interference with business relationship, hindrance of performance or pursuit of business relationship, and electronic interference); and
- intentional interference with right to possession of chattels (trespass to chattels and conversion).

See Restatement Third, Torts: Liability for Economic Harm, Preliminary Draft No. 1 (“Rest. Third Econ. Harm PD 1”), §50, Prospective Table of Contents.

<sup>7</sup> Rest. 3<sup>rd</sup> of Torts, Apportionment, §8:

Factors for assigning percentages of responsibility to each person whose legal responsibility has been established include

(a) the nature of the person's risk-creating conduct, including any awareness or indifference with respect to the risks created by the conduct and any intent with respect to the harm created by the conduct; and

(b) the strength of the causal connection between the person's risk-creating conduct and the harm.

<sup>8</sup> Rest. 3<sup>rd</sup> of Torts, Apportionment, §12. But the drafters recognize that not all “intentional” torts involve aggravated culpability. Comment b provides: “[T]here occasionally may be cases in which, although the defendant technically has committed an intentional tort, the defendant's culpability is quite modest, for example a defendant who committed a battery based on an unreasonable, yet honest, belief that the conduct was privileged. ... In such situations, courts may decide that such low-culpability intentional tortfeasors should not be subject to the provisions of this Section and instead treated in accordance with the rule for nonintentional tortfeasors in the jurisdiction.”

declines to take a position on whether victim fault should ever be taken into account to reduce recovery against an intentional tortfeasor.<sup>9</sup> This was an issue of great controversy, of course. Moreover, the drafters of the restatement did make the sensible point that not all forms of victim fault are the same for purposes of comparative responsibility: it is one thing for a victim to provoke a fight, and another to walk absent-mindedly in a dangerous section of a city.

6. Proximate cause limits are loosened somewhat when the tortfeasor commits an intentional tort.<sup>10</sup>

7. Other discussions of intentional torts in the Third Restatement are not significant.<sup>11</sup>

### III. A selective review of doctrinal developments

In this selective review of the state of intentional tort doctrine today, and of developments since the Restatement Second's publication in 1965, I will focus on battery doctrine, and will offer just a few comments on other doctrines.

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<sup>9</sup> Rest. 3<sup>rd</sup> of Torts, Apportionment §1, comment c.

<sup>10</sup> See Rest. Third Phys. Harm PFD 1, §33(b), Scope Of Liability For Intentional And Reckless Tortfeasors:

(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 that actor would be liable if only acting negligently. In general, the important factors in determining the scope of liability are the moral culpability of the actor, as reflected in the reasons for and intent in committing the tortious acts, the seriousness of harm intended and threatened by those acts, and the degree to which the actor's conduct deviated from appropriate care.

<sup>11</sup> Two other contexts are worth brief mention. First, the products liability restatement says very little about intentional torts. However, the commentary does mention the fairness-based policy argument that a manufacturer's knowledge of expected harms from defects helps support strict liability. Rest. Third, Torts: Products Liability §2, comment a, p. 15 ("Because manufacturers invest in quality control at consciously chosen levels, their knowledge that a predictable number of flawed products will enter the marketplace entails an element of deliberation about the amount of injury that will result from their activity.").

Second, I would expect that the new ALI project on landowner liability will address the extent of the landowner's duties to various categories of entrants, and thus will need to consider whether the landowner owes a limited duty to trespassers not to recklessly or intentionally injure them. There appear to be no current plans to address intentional trespasses to land, intentional nuisances, and other intentional intrusions on property interests. However, as noted, the Restatement Third of Economic Harm does plan to address trespass to chattels and conversion.

## A. Battery

Battery is the one and only intentional tort that every torts professor gets around to teaching. It is often treated as the paradigm intentional tort. And yet, remarkably enough, some basic questions about battery doctrine remain unresolved. I focus on two issues—the nature of the required intent, and the problem of distinguishing battery from negligence when a patient claims that a doctor has exceeded the patient’s consent.

### 1. Dual intent or single intent?

First, what intent is required for battery? Why, “the intent to cause a harmful or offensive contact,” of course!

But this usual way of characterizing the intent is fatally ambiguous.<sup>12</sup> Must the defendant intend only to cause the contact? Or must she also intend that the contact be harmful or offensive?

The courts are split on the issue, with a substantial group following the so-called dual intent approach, requiring both an intent to contact and an intent either to harm or offend<sup>13</sup>; while another substantial group follows the single intent approach, requiring only an intent to contact.<sup>14</sup> (The Restatement Second of Torts

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<sup>12</sup> See Dan Dobbs, *A Handbook of the Law of Torts* 58 (2000). There is also a second ambiguity, one shared by all “intentional” torts: does “intent” refer narrowly to a purpose to bring about the relevant consequence, or does it also encompass knowledge that one will bring about that consequence? Most courts follow the Restatement Second here and endorse the broader “purpose or knowledge” definition, though some continue to apply the narrower definition selectively. See, e.g., *Leichtman v. WLW Jacor Communications*, 634 N.E.2d 697 (Ohio Ct. App. 1994).

<sup>13</sup> See, e.g., *White v. Muniz*, 999 P. 2d 814 (Colo. 2000) (dual intent) (patient suffering from Alzheimer’s who struck her caregiver found not liable for battery because she did not appreciate the offensiveness of her conduct).

<sup>14</sup> See, e.g., *White v. University of Idaho*, 797 P. 2d 108 (Idaho 1990) (piano teacher liable for suddenly touching student’s back in order to show piano technique, despite no intent to harm or offend). The court in *White v. Muniz* indicates that the single intent view is the minority view. 999 P.2d at 817. And a recent article suggests that the dual intent approach is the “traditional rule.” Craig M. Lawson, *The Puzzle of Intended Harm in the Tort of Battery*, 74 *Temp. L. Rev.* 355, 382 (2001).

However, the court in *Wagner v. State*, 122 P.3d 599, 603-604 (Utah 2005), asserts that the majority of jurisdictions support the single intent view. See also

gives muddled guidance here: some language appears to endorse the dual intent view, but there is also some language that supports the single intent view.<sup>15</sup>)

My own view is that the single intent approach is much more defensible, and indeed is the only plausible interpretation of the case law in this area. Let me briefly explain.

In selecting between the two approaches, we should remember three other elements of battery as to which there is no serious dispute. First, the defendant must actually cause a harmful or offensive contact. (And “offensive” is typically defined as “offensive to a reasonable sense of dignity.”) Second, the contact must not have been consented to.<sup>16</sup> And third, under the doctrine of apparent consent,

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Reynolds, *Tortious Battery: Is "I Didn't Mean Any Harm" Relevant?*, 37 Okla. L. Rev. 717, 718 (1984) (reviewing case law and concluding that “a clear majority of cases that have squarely faced the question” conclude that the single intent to contact the plaintiff is sufficient).

<sup>15</sup> Some language in the Restatement Second appears to support the dual intent approach. Consider Illustration 2 under §8A (the general definition of intent), in which A recklessly tries to pass B on a narrow curve “without any desire to injure B, or belief that he is substantially certain to do so.” According to the comment, when A crashes into B’s car, injuring B, A is liable for recklessness but not for any intentional tort. This analysis is plausibly understood as an application of the dual intent approach: the analysis seems to require that A intend to harm (or offend) B, and not merely intend to contact B’s car (i.e., merely desire to contact it, or know that such contact will occur). Moreover, the “transferred intent” provision, §16, would often be otiose if the single intent interpretation were correct. Under that provision, an act done with the intent to offend is deemed sufficient to satisfy the (harmful battery) requirement of intent to cause bodily harm. But there is often no need to deem one intent legally equivalent to the other if a mere intent to contact suffices for either the tort of offensive battery or the tort of harmful battery. (The other transferred intent provision, §20, would often be otiose for the same reason.)

But a number of the Restatement (Second)’s illustrations are difficult to explain if dual intent is required. Thus, Rest. 2<sup>nd</sup> of Torts, §13, comment c, indicates that: (a) the requisite intention for battery causing a harmful contact need not be personal hostility or a desire to injure, and (b) an erroneous belief that the other has consented does not preclude liability. Moreover, in both my medical and practical joker cases, discussed *infra*, the comment indicates that liability would exist; the practical joker “takes the risk” that his victims may not appreciate the humor in his conduct. *Id.* Similarly, §34 specifies that an assault does not require that the actor “be inspired by personal hostility or desire to offend.”

For an extensive discussion of the Restatement Second’s position, concluding that it supports the single intent view, see Wagner, *supra*, 122 P. 3d at 603-606.

<sup>16</sup> Alternatively, the contact must fall within the small category of cases in which consent is not required—for example, incidental contacts on a crowded subway or staircase. See, e.g., *Wallace v. Rosen*, 765 N.E.2d 192 (Ind. App. 2002) (no battery liability for minor intentional contact in the course of evacuating school during fire drill).

if the defendant reasonably believes that the plaintiff consents, the defendant is not liable.

Given these other requirements, which protect against an unduly broad battery doctrine, the dual intent standard is too stringent. Two sorts of counterexamples exist, which are almost impossible to explain under the dual intent view. First, in many cases of medical treatment, doctors are found liable for battery for exceeding the scope of the patient's consent, notwithstanding their belief that they have acted within the scope of consent (or their belief that under the circumstances they are justified in acting despite a lack of actual consent). Yet such a doctor typically does not intend or believe that the contact will be offensive, nor does he intend (or even necessarily believe) that the contact will be harmful.<sup>17</sup>

The second type of counterexample is the practical joker. Specifically, if a practical joker deliberately contacts the plaintiff and foolishly expects that the plaintiff will be amused by falling down, or by being struck by an object, he is routinely held liable for battery, yet he does not satisfy the dual intent; for he intends neither to harm nor to offend.<sup>18</sup> For example, in *Lambertson v. US*,<sup>19</sup> the court found that the [single] intent to contact sufficed when defendant jumped on plaintiff's back, riding him piggyback; although the court found that this was one-

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<sup>17</sup> See *Fox v. Smith*, 594 So.2d 596, 604 (Miss. 1992) (“Concisely stated in one sentence, no physician may perform any procedure on a patient no matter how slight or well intentioned without that patient's informed consent, and violation of this rule constitutes a battery.”); *Curtis v. Jaskey*, 759 N.E.2d 962, 965 (Ill. App. Ct. 2001) (In a medical battery case, “[i]t is unnecessary for a plaintiff to establish hostile intent on the part of the defendant; rather, the gist of an action for battery is the absence of consent on the plaintiff's part.”); *Cathemer v. Hunter*, 558 P.2d 975, 978-79 (Ariz. Ct. App. 1976) (When surgeon exceeds consent, he “is not saved from liability by his good intentions in proceeding.”).

<sup>18</sup> See cases cited in Lawson, *supra* note 14=, at note 23. In some cases, to be sure, he might know to a practical certainty (and thus, for purposes of the Restatement, “intend”) that the victim will suffer legal offense. That might be the case in *Garratt v. Dailey*, 279 P.2d 1091 (Wash. 1955), the case that famously holds that intent for battery is satisfied by knowledge to a substantial certainty, as well as by purpose.

In the Reporter's Notes to §1, comment a, p. 12, Professor Schwartz plausibly concludes that the knowledge/purpose distinction is very likely irrelevant on the facts of *Garratt*, the very case most often cited for the distinction: when a five year old boy pulls out a chair while knowing that his aunt will therefore fall to the ground, he almost certainly is playing a prank, acting not just with knowledge but with the purpose either to hurt her (at least slightly) or to embarrass or offend her. However, in many practical joker cases, the defendant will credibly claim that he meant to surprise but not to offend (or hurt) the victim, and then it will matter whether the single and dual intent approach governs.

<sup>19</sup> 528 F.2d 441 (2<sup>nd</sup> Cir. 1976).

sided horseplay with no intention to injure, it upheld battery liability, relying on the single intent approach.<sup>20</sup>

Finally, the dual intent approach is flatly inconsistent with the well-accepted apparent consent doctrine. Think about what that doctrine says: a defendant with a reasonable belief that plaintiff consents is absolved of liability, even if plaintiff does not actually consent. But the negative pregnant of the apparent consent doctrine is this proposition: a defendant is still liable if he honestly but unreasonably believes that plaintiff consents. (Suppose a surgeon misunderstands and believes that her patient is willing to permit any surgeon from that doctor's office perform the surgery.) Yet this proposition is plainly inconsistent with the dual intent view. After all, if a defendant honestly believes that plaintiff consents, she will not (and indeed logically cannot) believe that plaintiff will be offended by the touching; so she will not satisfy the "intent to offend" requirement. Similarly, it is very difficult (though not quite impossible) to imagine a case in which a defendant both honestly believes that plaintiff consents yet also intends to harm the plaintiff. In short, under the dual intent view, the restriction of the apparent consent doctrine to actors who honestly and reasonably believe that the plaintiff consents would turn out to be superfluous in virtually all cases. Thus, if we believe that that restriction actually accomplishes something, we are implicitly committed to the single intent view.<sup>21</sup> (Indeed, in

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<sup>20</sup> Similarly, in *Ghassemieh v. Schafer*, 447 A.2d 84 (Md. Ct. Spec. App. 1982), a teacher and her husband brought suit against a former student, seeking recovery for back injury teacher sustained when the student, "as a joke," pulled chair out as teacher was sitting down. In dictum, the court stated: "[I]ntent to do harm is not essential to a battery. The gist of the action is not hostile intent on the part of the defendant, but the absence of consent to the contact on the plaintiff's part. ... Thus, horseplay, pranks, or jokes can be a battery regardless of whether the intent was to harm." *Id.* at 88.

To be sure, many practical joker cases involve desire to offend or at least knowledge that offense is very likely to result, and thus could be explained by the dual intent approach. See, e.g., *Caudle v. Betts*, 512 So.2d 389, 392 (La. 1987). Lambertson seems not to have considered this possibility in concluding both that intent to harm is not required and that intent to contact suffices.

Also, Rest. 2<sup>nd</sup> §13 comment c mentions a practical joker case as one of liability despite no desire to offend. And Rest. 2<sup>nd</sup> §34 states that neither "personal hostility" nor "desire to offend" is necessary for assault liability, and gives an example of A disguising himself and, as a joke, pointing an unloaded pistol at B. This results in liability, says the Restatement. To be sure, in this case, although A does not intend offense, he does know to a practical certainty that A will suffer an immediate apprehension of a harmful or offensive contact, and thus satisfies the dual intent standard. Thus, the example does not conclusively demonstrate that the Restatement Second endorses the single intent standard.

<sup>21</sup> Perhaps the response of the dual-intent mavens would be as follows. Any actor who intentionally contacts another but in so doing incorrectly concludes, on the basis of insufficient information, that the other is consenting, is acting culpably, and indeed is acting as culpably as one who literally intends to offend or harm. But this response doesn't work: it pretty much dissolves the distinction between single and dual intent.

quite a few cases in which doctors are held liable for exceeding consent, the doctor seems to have held an honest but unreasonable belief that the treatment was consented to.<sup>22</sup>)

One important difference between single- and dual-intent views is with respect to insane or mentally disturbed individuals who intentionally touch but do not intend thereby to harm or offend: the single intent approach preserves liability, while the dual intent approach precludes it.<sup>23</sup> Some proponents of the dual intent view might be unhappy about this result, and might want to create an exception to preserve liability here, believing that the mental deficiencies of the insane should not be a tort excuse, and that in fairness, the loss should lie with the mistaken or deluded actor, not the innocent victim. But on this fairness rationale, it is not clear why we should not similarly preserve the liability of the sane

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(And it is unpersuasive: this type of fault is not as culpable as the fault of one who really satisfies the dual intent.)

Or perhaps dual-intent supporters would reason thus: D knows that if he exceeds P's consent, P will find that offensive. So he actually satisfies dual intent: "intentionally contacting, knowing this will cause offense." But this argument also fails: it ignores the fact that D honestly believes he has not exceeded P's consent; and treating his "conditional" intent to offend the same as an actual intent to offend is artificial and unjustifiable. For one thing, we cannot assume that such an actor would have ignored P's lack of consent even if this had been clear to D, so he is less culpable than an actor who proceeds despite realizing he lacks consent and who therefore often will know that P will be offended. Moreover, treating this actor as knowingly causing offense when he actually (though unreasonably) believed that she consented and therefore that she would not be offended, is as unjustifiable as treating a different actor D2 as knowingly causing offense or harm when he honestly (though unreasonably) believes that he will not cause any contact at all. (Suppose D2 playfully lunges at his friend, pretending to try to tackle him, while believing that there is little chance of contacting him; but accidentally, he knocks his friend to the ground.)

<sup>22</sup> See, e.g., *Wagner v. State*, 122 P.3d 599, 605 (Utah 2005) ("The actor will be liable for battery even if he honestly but 'erroneously believe[d] that ... the other has, in fact, consented to [the contact].'" Restatement (Second) of Torts § 13 cmt. c."). On the other hand, a few cases do deny battery liability when a doctor honestly believes he is acting with the patient's consent, even when that belief is unreasonable. See, e.g., *Hulver v. United States*, 393 F.Supp. 749, 753 (W.D. Mo. 1975), rev'd on other grounds, 562 F.2d 1132 (8<sup>th</sup> Cir. 1977). This position is inconsistent with the "reasonableness" limitation of the apparent consent doctrine. For similar reasons, Professor Lawson's proposal to impose battery liability when the actor intentionally causes an unauthorized contact, by which he means that the actor must know that the contact is unauthorized, can be criticized as too narrow, for it fails to impose liability on the actor who honestly but unreasonably believes he has the victim's consent. See Lawson, *supra* note 14=, at 384. (Lawson further suggests that an honest but unreasonable belief that one has the victim's consent precludes liability for the tort of intrusion on seclusion, *id.* at 374, but I have found no clear case law either way on the question whether this tort, unlike battery, omits the requirement that the mistake about consent be reasonable.)

<sup>23</sup> See *White v. Muniz*, *supra*.

defendant who makes an honest but unreasonable mistake about consent; yet if we expand the exception this far, the dual intent approach begins to look a lot like the single intent approach.<sup>24</sup>

At 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: does battery doctrine offer stringent protection against nonconsensual contacts, or instead only a much weaker protection against nonconsensual contacts that are accompanied by an additional culpable intention (to harm or offend)? Merely recognizing that battery is an “intentional” tort does not help us resolve this debate.

## 2. Consent to medical treatment

A second area of battery doctrine that has led to significant uncertainty and much litigation is the issue of consent to medical treatment. A new Restatement could offer greater clarity here.

First, there is some confusion and disagreement regarding the difference between the battery and negligence approaches to informed consent, and also regarding the criterion for slotting a case into battery rather than negligence. Where there has been no consent at all, or consent only to a very different type of treatment or procedure than what occurred, the tort is ordinarily viewed as a battery.<sup>25</sup> And where the patient misunderstands only the risks that follow from

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<sup>24</sup> If one believes that tort law should treat the insane defendant in a categorically distinct way, this can partly be accomplished by recognizing (as tort law generally does) liability of the insane for torts of negligence, with no excuse for lack of mental capacity.

<sup>25</sup> See Dobbs, *supra* note 12, at 49-50, 654; Restatement Second, §892A(2)(b) (“To be effective, consent must be ... to the particular conduct, or to substantially the same conduct.”). One treatise summarizes the scope of battery liability as follows:

[Courts reserve] the battery characterization for cases where: (1) the patient gave no consent to the procedure; (2) the procedure deviated substantially and unjustifiably from that which the patient authorized; (3) the physician disclosed no information at all to the patient; or (4) there was fraudulent concealment, misrepresentation, or other deliberate wrongdoing on the physician's part. (footnotes omitted).

3-17 Treatise on Health Care Law § 17.03 [1][b][i] (MATTHEW BENDER & COMPANY INC. 2005).

See also *Gaskin v. Goldwasser*, 520 N.E.2d 1085, 1094 (Ill. App. 1988) (“If the defendants went beyond the consent given, to perform substantially different acts, they will be liable under a theory of battery,” citing *Mink v. University of Chicago*, 460 F.Supp. 713, 718 (N.D. Ill.1978).)

See also *Hernandez v. Schitteck*, 713 N.E.2d 203, 207-208 (Ill.App.3d 1999):

treatment, negligence is the accepted category.<sup>26</sup> But many cases do not fit easily within either category, and courts differ in how they treat such intermediate cases. Some adopt a strong presumption that negligence principles should apply,<sup>27</sup> while

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Recovery in a medical battery case is allowed when the patient establishes a complete lack of consent to medical procedures performed, when the treatment is against the patient's will, and/or when the treatment is " 'substantially at variance with the consent given.' " *Gaskin v. Goldwasser*, 166 Ill.App.3d at 1012, 117 Ill.Dec. 734, 520 N.E.2d at 1094, quoting *Woolley v. Henderson*, 418 A.2d 1123, 1133 (Me.1980). The scope of the patient's consent is critical to a determination of liability, in that the physician's privilege extends to acts substantially similar to those to which the patients consented. See *Mink v. University of Chicago*, 460 F.Supp. 713, 717 (N.D. Ill.1978).

In *Hernandez*, a surgeon performed biopsy on breast of patient, and had indicated that if examination of tissue sample performed while patient remained anesthetized revealed presence of cancer, he would perform quadrantectomy on breast, but if no cancer was detected, he would only remove the lump; although the test results were inconclusive, he performed quadrantectomy; the court concluded that he acted substantially in variance with the consent given, thereby committed a battery.

<sup>26</sup> But there are exceptions even here. In one case, the court permitted a battery claim based only on undisclosed risks of medication, where the defendant pharmacy allegedly knew that she was allergic to the drug and was virtually certain to suffer harm. *Happel v. Wal-Mart Stores, Inc.*, 319 F.Supp.2d 883 (N.D.Ill. 2004). The plaintiff also alleged that defendants' employees intended to cause her harm. It is not clear whether such intent was necessary to the court's holding, or whether knowledge to a substantial certainty would suffice. However, the Restatement Second offers an illustration where A gives B medicine that A but not B knows is poisonous, and concludes that battery liability is proper because the case involves a substantial mistake as to either the nature of the invasion of B's interests or the extent of harm reasonably to be expected. Illustration 3, §892B. See also *id.*, comment i (applying this standard to informed consent to medical treatment).

Apparently only two states, Pennsylvania and Tennessee, currently analyze all informed consent claims as claims of battery, rather than as negligence (or as either negligence or battery, depending on the way in which the consent was deficient). See *Valles v. Albert Einstein Medical Center*, 805 A.2d 1232, 1237 (Pa. 2002); *Blanchard v. Kellum*, 975 S.W.2d 522, 524 (Tenn. 1998); Bryan J. Warren, Comment: Pennsylvania Medical Informed Consent Law: A Call to Protect Patient Autonomy Rights by Abandoning the Battery Approach, 38 *Duq. L. Rev.* 917, 933 n.138 (2000).

<sup>27</sup> For example, the Maine Supreme Court refused to apply a battery theory when a surgeon violated the patient's consent and operated on the wrong vertebrae. In order to be liable for assault and battery, the court concluded that the surgeon must know his act was substantially different from that to which he consented, and thus show a "conscious disregard of the patient's interest in his physical integrity." *Woolley v. Henderson*, 418 A.2d 1123, 1133 (Me., 1980). In the court's words:

We reject any shopworn doctrine that would impose liability for a battery on physicians whose treatment deviated from that agreed to, however slight the deviation and regardless of the reasonableness of the physician's conduct. It places form over substance to elevate what is essentially a negligence action to

others presumptively apply battery principles.<sup>28</sup> Because the categorization can have significant doctrinal and practical consequences,<sup>29</sup> greater guidance would be valuable.

For example, consider so-called “ghost surgery.” Many cases hold that when the patient consents to surgery by a particular doctor, and without the patient’s knowledge a different doctor performs the surgery, the patient can sue for battery.<sup>30</sup> However, some courts have been more cautious in requiring that the patient’s consent encompass other features of the defendant’s situation or background. Thus, the claim that a doctor improperly obtained his license by misrepresenting his credentials was held not to vitiate consent.<sup>31</sup>

Moreover, courts differ in how they treat the failure of the doctor or the medical provider to disclose certain types of information other than the nature or risks of the treatment. Thus, courts have disagreed about whether a doctor’s misrepresentation of the reasons why he chose a particular treatment can support a

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the status of an intentional tort based on the fortuity that touching is a necessary incident to treatment in a relationship which is consensual in nature.

Id. (citations omitted).

<sup>28</sup> For example, in *Mink v. University of Chicago*, 460 F.Supp. 713, 717 (N.D. Ill.1978), the plaintiffs’ assertion that they were given DES without their knowledge as part of a medical experiment was found sufficient to state a battery claim:

The question thus becomes whether the instant case is more akin to the performance of an unauthorized operation than to the failure to disclose the potential ramifications of an agreed to treatment. We think the situation is closer to the former. The plaintiffs did not consent to DES treatment; they were not even aware that the drug was being administered to them. They were the subjects of an experiment whereby non-emergency treatment was performed upon them without their consent or knowledge. ... The plaintiffs in this action are in a different position from patients who at least knew they were being given some form of drug. The latter must rely on a negligence action based on the physician's failure to disclose inherent risks; the former may bring a battery action grounded on the total lack of consent to DES drug treatment.

<sup>29</sup> Doctrinally, battery does not require that physical harm result (and thus permits recovery of damages for emotional harm resulting from an unauthorized operation); does not require proof that the defendant failed to satisfy a professional standard of care; but does require a physical touching, unlike negligence. For a list of some of the practical differences, see text at note 63= infra.

<sup>30</sup> See, e.g., *Meyers v. Epstein*, 282 F.Supp.2d 151 (S.D.N.Y. 2003); *Vitale v. Henchey*, 24 S.W. 3d 651 (Ky. 2000) (also endorsing the single intent view, that battery requires only an intent to contact, not an intent to harm, id. at 657-658); *Grabowski v. Quigley*, 684 A.2d 610 (Pa. Super. 1996); *Perna v. Pirozzi*, 92 N.J. 446, 457 A.2d 431 (N.J. 1983).

<sup>31</sup> *Taylor v. Johnston*, 985 P.2d 460, 465 (Alaska 1999). See also *Howard v. Univ. of Med.*, 800 A.2d 73, 81-82 (N.J. 2002) (characterizing a physician’s misrepresentation of his experience as an issue, not of battery, but instead of informed consent, to be evaluated within a negligence framework).

battery claim.<sup>32</sup> And the disclosure issue has arisen frequently with respect to doctors, dentists, or other medical personnel who are infected with HIV or have contracted AIDS. Of course, a private person who knows he is infected with HIV or a venereal disease and does not disclose this to his or her sexual partner can be liable for battery.<sup>33</sup> If a doctor is infected, does he have a similar duty of

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<sup>32</sup> Compare *Freedman v. Superior Court*, 214 Cal. App. 3d 734, 739, 263 Cal. Rptr. 1, 4 (Cal. Ct. App. 1989), with *Rains v. Superior Court*, 150 Cal. App. 3d 933 (1984).

In *Freedman*, the court held that battery was not available as a cause of action when the patient was induced to consent to a drug under the false representation that it was necessary to prevent infection; the drug's actual purpose was to induce labor. The misrepresentation concerned a collateral matter, and thus might be the basis for an action in fraud. However, because treatment, delivery of the baby, was the purpose of both patient and physician, the court precluded a battery claim. The physician had no improper or independent motive; while the use of this drug in this situation actually might have been contraindicated, the drug was intended to be therapeutic.

In *Rains*, the plaintiffs admitted that they consented to the use of physical violence upon their persons; the beatings were an aspect of the psychotherapeutic treatment they received at the defendants' center, described as "sluggo therapy" because the defendants claimed it facilitated the plaintiffs' mental health. The plaintiffs alleged that the defendants in fact used the program as a pretext for a variety of nontherapeutic purposes, including coercing them to remain in the residential program, serving the defendants without compensation, and recruiting new patients. The court held that the allegations, if proved, would support recovery on a battery theory:

No persuasive reason is advanced by defendants, nor is any apparent to this court, why physicians, to the exclusion of all other persons, should enjoy total immunity from liability where they intentionally deceive another into submitting to otherwise offensive touching to achieve a nontherapeutic purpose known only to the physician. If a physician, for the sole secret purpose of generating a fee, intentionally misrepresented to a patient that an unneeded operation was necessary, it is beyond question that the consent so obtained would be legally ineffective. This court is persuaded by the authorities discussed herein that the therapeutic versus nontherapeutic purpose of touching by a psychiatrist goes to the "essential character of the act itself" and thus vitiates consent obtained by fraud as to that character.

*Id.* at 941.

<sup>33</sup> See Restatement Second, §892B, Illustration 5. See, e.g., *Doe v. Johnson*, 817 F.Supp. 1382, 1396 (W.D.Mich.1993); *Hogan v. Tavzel*, 660 So.2d 350 (Fla.App. 5 Dist.,1995). But see *State Farm Fire & Cas. Co. v. S.S.*, 858 S.W.2d 374, 379 Tex. 1993, holding that battery liability requires proof that infected defendant knew with substantial certainty that by having intercourse with plaintiff, he would transmit herpes to her. This approach is consistent with the dual intent view described earlier, and shows how extraordinarily demanding that approach can be. One would think that knowingly exposing someone to a 50% or even 5% chance of contracting a deadly disease would be highly relevant to that person's decision whether to engage in intercourse, even though the probability of transmission is much less than substantial certainty. (Nevertheless, a defender of the dual intent approach could support battery liability in the hypothesized 50% or 5% risk case, on the alternative basis that the defendant undoubtedly knew to a substantial certainty

disclosure before he treats the patient, on pain of battery (and not simply negligence) liability? Courts have been reluctant to allow a battery claim when the doctor's treatment had no realistic chance of infecting the patient.<sup>34</sup> This position is somewhat surprising, insofar as the patient is arguably mistaken about the essential nature of the invasion,<sup>35</sup> and insofar as it is arguably quite reasonable for the plaintiff to suffer offense once she realizes the nature of the contact. Nevertheless, some courts have expressed an understandable concern about the long-term policy implications of permitting tort recovery when the mode of treatment, despite the medical provider's condition, did not objectively present a significant risk of infection to the patient.<sup>36</sup>

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that his sexual partner would be highly offended by the exposure to such a significant level of risk).

<sup>34</sup> Consider three cases, which together suggest that actual exposure to HIV (if not infection) is a prerequisite to a battery claim. In *Brzoska v. Olson*, 668 A.2d 1355 (Del. 1995), the court declined to permit a battery claim against an HIV-infected dentist. The offensive battery claim was denied even though the dentist had open lesions, because there was no proof of bleeding from the dentist or of any contact between any wound or lesions with a break in the skin or mucous membrane of any of the plaintiffs; accordingly, the court concluded, the contact did not offend a reasonable sense of personal dignity. And the battery claim based on misrepresentation was also denied, even though the dentist falsely denied that he had AIDS when asked, because “[a] patient’s consent is not vitiated ... when the patient is touched in exactly the way he or she consented.” *Id.* at 1366.

In *Kerins v. Hartley*, 27 Cal. App. 4th 1062 (Cal. App. 2<sup>nd</sup> 1994), the court would not permit a battery claim against a doctor who operated on patient while infected with HIV, who did not disclose his condition, and who responded to patient’s question about his health by assuring her that his health was good; the court emphasized that the actual risk of infection was insignificant.

In *K.A.C. v. Benson*, 527 N.W.2d 553 (Minn. 1995), the court did not permit a battery claim against a doctor who performed a gynecological examination at a time when he suffered from AIDS and had running sores on his hands and arms, because plaintiff did not allege that the doctor performed a different procedure from that to which she consented; moreover, since the doctor’s conduct did not significantly increase the risk that plaintiff would contract HIV, “it cannot be said that Dr. Benson failed to disclose a material aspect of the nature and character of the procedure performed.” *Id.* at 561.

According to *Brzoska*, *supra*, 668 A.2d at 1363: “Apparently, Maryland is the only jurisdiction in which the highest court permits recovery for a plaintiff who alleges potential exposure to HIV, yet does not show either a channel of exposure or a positive HIV test. See *Faya v. Almaraz*, Md. Ct. App., 329 Md. 435, 620 A.2d 327 (1993).” However, *Faya* involves claims based on negligence, not battery.

<sup>35</sup> *Dobbs*, *supra* note 12=, at 234.

<sup>36</sup> The policy concerns include worries about ratifying subjective, irrational phobia about AIDS, see *Brzoska*, 668 A.2d at 1363. Such fears could further lead to unjustifiable discrimination against infected persons.

In other cases, too, courts have found that the doctor has some affirmative obligation to disclose personal characteristics that the patient would consider material. Thus, one court concluded that a surgeon had a duty to disclose chronic alcohol use, since this could affect his performance of the operation.<sup>37</sup> And some courts consider information about a doctor's lack of experience in performing a procedure relevant to a negligence claim of lack of informed consent,<sup>38</sup> though I have found no cases upholding a battery claim in this scenario, at least absent an affirmative misrepresentation,<sup>39</sup> and some jurisdictions are very hesitant to require disclosure.<sup>40</sup>

Of course, if the patient explicitly imposes a condition upon his consent and the doctor knowingly acts in violation of that condition, the doctor has committed a battery.<sup>41</sup> Furthermore, even highly idiosyncratic conditions on

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<sup>37</sup> *Hidding v. Williams*, 578 So. 2d 1192, 1198 (La. Ct. App. 1991) (analyzing the issue as a question of negligence, not battery). See also *DeGennaro v. Tandon*, 89 Conn. App. 183, 873 A.2d 191 (2005) (breach of duty of informed consent when dentist did not disclose that she was understaffed, was using unfamiliar equipment, and was using an office not ready for patient visits).

<sup>38</sup> *Johnson v. Kokemoor*, 545 N.W.2d 495, 507 (Wis. 1996).

<sup>39</sup> *Hales v. Pittman*, 576 P.2d 493, 500 (Ariz. 1978), upheld a battery claim in this situation, but a subsequent case suggests that Arizona will now analyze the problem under a negligence framework, not battery. See *Duncan v. Scottsdale Medical Imaging, Ltd.*, 70 P.3d 435, 439 (Ariz. 2003). See also *Prince v. Esposito*, 628 S.E.2d 601, 604 (Ga. Ct. App. 2006) (fraud can vitiate consent and permit battery claim, but failure of chiropractor to disclose a prior sexual battery allegation against him, which did not impair his ability to provide medical care, does not amount to fraud).

<sup>40</sup> *Duttry v. Patterson*, 771 A.2d 1255, 1259 (Pa. 2001) (surgeon misrepresented that he had done procedure 60 times when he had actually done nine; held, doctor's personal experience is not relevant to battery claim, though it could be relevant to a misrepresentation claim); *Ditto v. McCurdy*, 947 P.2d 952, 958 (Haw. 1997). Moreover, Pennsylvania treats all informed consent cases under the rubric of battery, not negligence. See *Gouse v. Cassel*, 615 A.2d 331, 334 (Pa. 1992).

<sup>41</sup> Restatement Second §892A(3). See, e.g., *Duncan v. Scottsdale Medical Imaging, Ltd.*, 205 Ariz. 306, 311, 70 P.3d 435, 440 (Ariz. 2003) (viable battery claim where patient consented to injection only of a particular painkiller and was instead injected with another; "The relevant inquiry here is not whether the patient consented to an injection; the issue is whether the patient consented to receive the specific drug that was administered. *Duncan* could have given broad consent to the administration of any painkiller, but she gave specific instructions that she would accept only morphine or demerol and nothing else. We hold that when a patient gives limited or conditional consent, a health care provider has committed a battery if the evidence shows the provider acted with willful disregard of the consent given."); *Ashcraft v. King*, 228 Cal. App. 3d 604, 609-610; 278 Cal. Rptr. 900, 902-903 (Cal. Ct. App., 1991) (battery action available when plaintiff alleged that doctor willfully ignored condition that only family-donated blood be used during operation); *Lugenbuhl v. Dowling*, 701 So. 2d 447 (La. 1997) (battery action allowed when surgeon violated patient's conditional consent to

consent must normally be honored, on pain of battery liability. Thus, in *Cohen v. Smith*,<sup>42</sup> the court upheld possible claims for battery and the intentional infliction of emotional distress when a hospital patient indicated that her religious beliefs forbade her to be seen unclothed by a man other than her husband, and during the ensuing procedure a male nurse employed by the hospital nevertheless saw and touched her while she was unclothed. Moreover, one court has held that misrepresentation of the risks of not having surgery supported battery liability.<sup>43</sup>

If the American Law Institute does examine the negligence/battery distinction, it should also consider more broadly the scope of the informed consent doctrine as a matter of negligence law; for here, too, jurisdictions disagree about whether doctors must disclose personal information such as their past experience and success rates with a particular operation,<sup>44</sup> or financial conflicts of interest.<sup>45</sup>

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surgery: patient had insisted that mesh be used to repair his hernia, but during surgery, surgeon made choice to suture hernia without mesh).

<sup>42</sup> 648 N.E.2d 329 (Ill. App. 1995).

<sup>43</sup> See *Cacdac v. West*, 705 N.E.2d 506, 512 (Ind.App. 1999). Patient sued neurosurgeon, claiming that defendant committed battery by performing back surgery on her without her informed consent. Held, a genuine issue of material fact existed as to whether plaintiff was induced to consent to the surgery by defendant's allegedly fraudulent representation that she faced a real risk of paralysis if she opted to forego the surgery.

<sup>44</sup> Compare *Johnson by Adler v. Kokemoor*, 199 Wis. 2d 615, 545 N.W. 2d 495 (1996) (requiring disclosure) and *Howard v. Univ. of Medicine & Dentistry of New Jersey*, 800 A.2d 73, 84 (N.J. 2002) (requiring disclosure, but only when misrepresented or exaggerated physician experience significantly increase the risk of a procedure), with *Whiteside v. Lukson*, 947 P.2d 1263, 1265 (Wash. Ct. App. 1997) (not requiring disclosure). See also *Wlosinski v. Cohn*, 713 N.W.2d 16, 20-21 (Mich.Ct. App. 2005) (holding that raw success rates do not need to be disclosed, and asserting that jurisdictions that have allowed disclosure of evidence about a doctor's experience have only done so in cases where the doctor affirmatively asserted her experience and competence).

<sup>45</sup> For example, in *Moore v. The Regents of the University of California*, 793 P.2d 479, 485 (Cal. 1990), the patient claimed that the physicians discovered special qualities in his blood cells and withdrew blood cells to develop a commercial cell line of great value. The patient was not informed. The court treated the failure to disclose facts unrelated to the patient's health (i.e. the physician's financial interest) as a violation of informed consent, because they might affect the doctor's medical judgment. See also *Darke v. Estate of Isner*, 17 Mass. L. Rptr. 689, Not Reported in N.E.2d, 2004 WL 1325635 (2004) (doctor must disclose financial conflicts of interest).

### 3. Other issues in battery doctrine

What kinds of indirect physical contacts are sufficient for battery liability? If I blow smoke in your face in order to annoy you, have I committed a battery? In one recent case, a talk-show host deliberately blew smoke into the face of a famous antismoking advocate. The court held that his action constituted a battery.<sup>46</sup> More generally, many cases have been brought alleging that contacting another with second-hand smoke amounts to a battery, and the claim has often been sustained,<sup>47</sup> though some courts have rejected the viability of a battery claim here.<sup>48</sup> Some courts have also held that exposing a worker to toxic fumes can be a battery.<sup>49</sup> Other courts have supported battery liability of medical practitioners, not only for directly providing medical treatment to the patient, but also for offering medication to the patient, though only in narrow circumstances.<sup>50</sup>

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<sup>46</sup> *Leichtman v. WLW Jacor Communications*, 634 N.E.2d 697 (Ohio Ct. App. 1994). However, the court declined to adopt the broader approach that a smoker is liable for battery if he knows to a substantial certainty (but does not intend or desire) that the smoke will contact another. *Id.* at 699.

<sup>47</sup> See 46 A.L.R.5th 813 (1997), *Secondary Smoke as Battery*; Note, *Smoker Battery: An Antidote to Second-Hand Smoke*, 63 S. Cal. L. Rev. 1061 (1990); Note, *Breathe Deeply: The Tort of Smokers' Battery*, 32 *Houston L. Rev.* 615 (1995).

<sup>48</sup> See, e.g., *Pechan v. Dynapro, Inc.*, 622 N.E.2d 108, 117-118 (Ill. App. Ct. 2<sup>nd</sup> Dist. 1993) (concluding that employee did not intend that the smoke touch nonsmokers, but not considering whether the employees' knowledge that smoke would contact nonsmokers would suffice).

<sup>49</sup> See, e.g., *Gulden v. Crown Zellerbach Corp.*, 890 F.2d 195 (9th Cir. 1989); *Field v. Philadelphia Elec. Co.*, 565 A.2d 1170, 1178 (Pa. Super. Ct. 1989). See Note, *supra* note 47, 32 *Houston L. Rev.* at 663-664. This result is in accord with Restatement (Second) of Torts §18, comment c, which provides that intentionally contacting someone with an offensive foreign substance, even indirectly, constitutes a contact for purposes of battery. See also *Birkliid v. Boeing Co.*, 904 P.2d 278 (Wash. 1995) (allegation of repeated, knowing exposure of workers to toxic chemicals falls within exception to exclusivity of workers' compensation for acting with deliberate intention to harm).

<sup>50</sup> See *Mink v. University of Chicago*, 460 F.Supp. 713, 718 (N.D. Ill.1978) (permitting battery claim when patients were unaware that they were being given a drug). See also *Duncan v. Scottsdale Medical Imaging, Ltd.*, 70 P.3d 435 (Ariz. 2003) (a medical imaging provider can be liable for battery when a patient explicitly conditioned consent to an MRI on being medicated only with either morphine or Demerol, but nurse secretly injected the patient with a different drug). Compare *Trogun v. Fruchtman*, 58 Wis.2d 569, 207 N.W.2d 297, 312-313 (1973) (denying battery liability when patient knowingly took medication but complained that doctor provided inadequate information about its risks); *Applegate v. Saint Francis Hosp., Inc.*, 112 P.3d 316, 319 (Okla. Civ. App. 2005) (administration of codeine to patient, despite notation in patient's history that he had allergy to codeine, is not a battery; extending "medical battery" beyond surgical cases to include medication treatment is not warranted); *Paves v. Corson*, 765 A.2d 1128

The question of which personal characteristics an actor must disclose in order to obtain valid consent to a physical contact also arises outside the context of medical treatment. A remarkable decision by the Supreme Court of Idaho holds that a husband can be liable for battery for having intercourse with his wife if she can prove that she would have refused consent to intercourse had she known he was having an affair.<sup>51</sup> The decision is troubling in its breadth, and to my knowledge no other jurisdiction has followed it. Nevertheless, the decision underscores just how difficult it is to articulate a general criterion of types of mistakes and misrepresentations that should vitiate consent. The Restatement Second's requirement that the mistake be "substantial" rather than "collateral" does not take us very far in the direction of a plausible criterion.<sup>52</sup> Equally unpersuasive is the Restatement's suggestion, in a comment, that if an undisclosed fact would have caused the plaintiff to withhold consent, then the mistake as to the fact is substantial enough to undermine consent.<sup>53</sup> For under this standard, the extraordinary Idaho decision in Neal is correctly decided.<sup>54</sup>

## B. Other doctrinal developments

Some miscellaneous developments since the Restatement Second in various other tort doctrines are worth noting:

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(Pa.Super. Ct. 2000) (reversed on other grounds, 801 A.2d 546 (Pa. 2002)) (recovery is not allowed for battery based on the prescription of medication to a patient).

<sup>51</sup> Neal v. Neal, 125 Idaho 617, 873 P.2d 871 (Idaho, 1994).

<sup>52</sup> Restatement Second of Torts, §892B, comments f, g.

<sup>53</sup> Id., comment f ("the mistake ... must be a substantial one, of such a character that the actor is not justified in assuming that the other would have given his consent if he had knowledge of it.").

<sup>54</sup> Indeed, under this standard, many of the other examples given by the Restatement of merely collateral mistakes would turn out to be material (such as a customer paying a prostitute with counterfeit money, §892B, Illustration 9, or a buyer of land not disclosing to the seller its enormous value and not thereby making his entry on the land a (nonconsensual) trespass, id., Illustration 10). See also Prince v. Esposito, 628 S.E.2d 601, 604 (Ga. Ct. App. 2006) (failure to disclose negative personal information about a doctor does not vitiate consent even if patient would have declined treatment if advised of that information). On the other hand, perhaps the Restatement's counterfactual test of materiality (whether disclosure of the fact would have caused the plaintiff not to consent) is meant as a necessary but not sufficient condition for treating the fact as material.

- At least one court has recognized a new tort of “malicious defense,” with essentially the same elements as the well-recognized tort of malicious prosecution.<sup>55</sup>
- Although the Restatement Second recognizes, as one of the privacy torts, giving publicity that places another in a false light,<sup>56</sup> many states do not recognize this tort.<sup>57</sup>
- In false imprisonment law, the Restatement Second’s requirement that the plaintiff be contemporaneously aware of her confinement has been questioned.<sup>58</sup>

Finally, if we look more broadly at the law of intentional torts since 1965, there have been some especially salient factual developments, including an increase in reported appellate cases involving sexual harassment or assault, as well as the recent clergy abuse scandal. However, these developments have not, to my knowledge, been accompanied by any significant changes in legal doctrine.<sup>59</sup>

In conclusion, the various confusions and uncertainties in battery doctrine could usefully be clarified by a new Restatement of Intentional Torts. And there have been some other doctrinal developments of note in the field of intentional torts. But, as far as I have been able to determine in my research, these confusions and developments are not sufficiently substantial or widespread to suggest a compelling and immediate need for a Restatement Third of Intentional Torts.

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<sup>55</sup> See *Aranson v. Schroeder*, 671 A.2d 1023 (1995), discussed in Christie, Meeks, Pryor & Sanders, *Cases & Materials on the Law of Torts* 1405-1406 (4<sup>th</sup> ed. 2004).

<sup>56</sup> §652E.

<sup>57</sup> See Dobbs, *supra* note 12=, at 1210.

<sup>58</sup> See, e.g., *Scofield v. Critical Air Medicine, Inc.*, 52 Cal. Rptr. 915 (Cal. App. 1996); see Dobbs, *supra* note 12=, at 67. There seems to be less dispute that false imprisonment liability is proper when a plaintiff who was unaware of the confinement at the time is actually harmed by the confinement. See *Creek v. State*, 588 N.E.2d 1319, 1320 (Ind. Ct. App. 1992); Restatement Second of Torts, §42, comment b.

<sup>59</sup> Sexual harassment is frequently a straightforward case of battery or assault; even when it is not, it often fits comfortably within intentional infliction of emotional distress, at least when a pattern of harassing activity can be shown. See Diamond, Levine, & Madden, *Understanding Torts* 26 (Lexis 2000).

#### IV. A broader perspective

What lessons can we derive from these doctrinal examples? The examples help illustrate some important complexities in intentional tort doctrine. These complexities are belied by the usual, simple picture of intentional torts that most lawyers, judges, and legislators still carry with them from their first year of law school.

The simple picture is this. Tort law is divided into three domains: intentional torts, negligence, and strict liability. The most serious level of fault is expressed in the intentional tort domain; a lesser degree of fault in negligence; and no fault at all in strict liability.<sup>60</sup> “Intentional wrongdoers,” as we tend to call them, are the worst type of tortfeasor, worse than merely reckless or negligent actors. (Indeed, on this view, intentional torts could be considered a highly aggravated subcategory of negligence: negligence is modestly unreasonable behavior, while an intentional tort is highly unreasonable behavior.)

This uncomplicated perspective on intentional torts is accurate insofar as quite a few doctrinal and practical consequences do follow from the bare characterization of a tort as intentional. Thus, doctrinally, nominal damages and emotional harm damages are typically available for intentional torts even in the absence of physical harm. The victim’s fault is often considered irrelevant. A looser standard of proximate cause applies. Young, even very young, children can more readily be found liable. Distinct defenses (such as self-defense or private necessity) are often available. These particular doctrinal differences between intentional torts and torts of negligence all turn at least in part on the idea that intentional tortfeasors display a more serious degree or type of fault than do negligent tortfeasors.<sup>61</sup> Consider the last illustration. It might at first appear that the availability of self-defense and necessity as defenses to battery or assault, but not as defenses to negligence, demonstrates that negligence is the more demanding standard of fault, since it cannot be negated by such defenses. But the distinction actually reveals the opposite. In order for a plaintiff to prove negligence, she must prove that the risk was unjustifiable, and a relatively broad set of considerations can justify the creation of a mere risk of harm; by contrast, only a smaller, and more weighty, set of interests and values can justify the intentional infliction of harm.<sup>62</sup>

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<sup>60</sup> A much smaller fourth domain, recklessness, is sometimes recognized; by convention it is located between intentional torts and negligence.

<sup>61</sup> But some legal differences between intentional torts and negligence do not rely on relative fault. For example, shorter statutes of limitations for intentional torts presumably are based on the assumption that evidence of an intentional tort is generally more readily available than evidence of a tort of negligence.

<sup>62</sup> The structure of criminal law doctrine is analogous. See Simons, *The Conundrum of Statistical Knowledge*, *supra* note 3=, at pp. =.

Moreover, numerous practical consequences also depend on whether a tort falls within the broad classification of “intentional” as opposed to “negligence.” For example, intentional torts often have a shorter statute of limitations; usually are not covered by liability insurance, or workers’ compensation; result in liability that is not dischargeable in bankruptcy; very often are beyond the scope of employment and thus not within the employer’s vicarious liability responsibility; and often are not within a government agency’s legal responsibility (i.e. they are often categorically excluded from the government’s waiver of sovereign immunity).<sup>63</sup>

But, alas, the simple picture of intentional torts is also quite misleading. Although in some contexts this depiction accurately describes and credibly rationalizes legal doctrine, in others it distorts the underlying legal phenomena, or fails to offer a plausible justification. Let us look at three problems that the simple picture creates, and then consider three possible solutions.

#### A. The “apples and oranges” problem

The first problem is with the assumption that “intentional” torts invariably or systematically exhibit a more serious degree of fault than torts of negligence display. Many actual tort doctrines belie this assumption. When we compare actual legal standards within the three categories of torts, we are often comparing apples and oranges. More precisely, the interest protected by an intentional tort is often quite different from the interest protected by the tort of negligence; accordingly, we cannot confidently say that intentionally invading the first interest reflects greater fault than negligently invading the second. And in other cases, even if the interests are similar, the way in which the interests are protected or vindicated is quite different.

Consider the most familiar example of the comparison. A deliberate punch that breaks someone’s nose is worse, it seems, than negligently knocking someone to the ground and bringing about the same physical injury. Doctrinally, battery is often treated as a more serious form of fault than negligently causing a physical harm. More generally, we often view an act intended to cause harm as the paradigm intentional tort, and this also seems to justify the view that intentional torts are a more serious type of fault than negligence.<sup>64</sup>

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<sup>63</sup> See Rest. Third Phys. Harm PFD 1, §5, pp. 75-76.

<sup>64</sup> This view is clearly suggested in §1, comment a of the Restatement Third of Torts:

[W]hen tort-liability rules do attach significance to intended consequences, most of the time the consequence in question is the fact of harm, and it is the intention to cause such harm that under ordinary tort discourse renders the actor guilty of an intentional tort.

But is this view accurate? On at least one understanding of the tort of battery, as we have seen, the tort does not require intent to harm, but only intent to contact (together with the causation of actual harm or offense, as well as the absence of consent). On this view, an actor might honestly and in good faith believe that the victim consented and would not suffer harm or offense from the touching, yet still be liable for battery.<sup>65</sup> Moreover, even on the dual intent view, an intentional contact by which an actor merely intends to mildly offend and that surprisingly results in physical harm creates liability for battery,<sup>66</sup> yet we might consider him less culpable than many actors who negligently cause physical harm.

Consider another example, false imprisonment. Although false imprisonment is an “intentional” tort, it requires only that the defendant intend to confine, not that he intend to cause physical or emotional harm to the plaintiff.<sup>67</sup> Thus, if a merchant detained a customer in the honest but incorrect belief that the customer has shoplifted an item from the store, at common law the merchant was liable, even if his mistake was reasonable.<sup>68</sup> This is, of course, a form of strict liability. To be sure, contemporary law (either by judicial decision or by statute) is typically less strict, permitting the merchant a privilege to detain for a limited period based on probable cause to believe a theft has occurred or is being attempted.<sup>69</sup> But even this privilege in effect renders the merchant liable for acting on a merely negligent belief. In any case, the analogy to the “dual intent” view of battery does not seem to exist in false imprisonment doctrine: the defendant need not intend or know that the person detained will suffer physical or

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This characterization is quite misleading. As we will see, text at notes 68-69= infra, the tort of false imprisonment focuses on a particular way in which physical or emotional harm is caused, namely, by unjustified limitation on freedom of movement; and the tort of battery focuses on physical or emotional harm that occurs by way of a physical touching. Neither tort necessarily requires an intent to “harm” if that refers to the physical harm resulting from the confinement or touching. (If “harm” refers more broadly to any legally prohibited consequence of the defendant’s action, including the confinement or touching itself, the comment is accurate but uselessly vague. Cf. Restatement 2<sup>nd</sup> of Torts §7, distinguishing “harm” from the more abstract idea of legal “injury,” meaning an invasion of any legally protected interest.)

<sup>65</sup> To be sure, a certain kind of negligence requirement is typically implicit even on the single intent view: the defendant will only be liable for battery if his belief that the victim consented is unreasonable. See text at notes 99-100= infra. Still, the comparison remains apples to oranges: negligently risking physical harm is not the same as (and indeed sometimes might be considered more faulty than) negligently risking that a physical touching is not consented to.

<sup>66</sup> Restatement Second of Torts, §13.

<sup>67</sup> See Restatement Second, §44 and comment a (requisite intent for false imprisonment is satisfied by purpose to confine or knowledge to a substantial certainty that confinement will result; personal hostility or desire to offend is not required).

<sup>68</sup> See Dobbs, supra note 12=, at 196.

<sup>69</sup> See id. at 197; Restatement Second of Torts, §120A.

emotional harm. In short, false imprisonment is a tort that most directly safeguards the interest in freedom from physical confinement, and only incidentally secures the more general interest in avoiding physical and emotional harm. Its protections cannot readily be compared with the protections afforded by negligence doctrine's prohibition on causing physical harm by creating unreasonable risks.

One interesting example of the confusion created by the “apples and oranges” problem is the limited duty doctrine adopted by many courts for participants in recreational and sporting activities. A common feature of the doctrine is to absolve such participants from liability for ordinary negligence, and to permit liability only if they have acted “recklessly or intentionally.”<sup>70</sup> But in this limited duty formulation, “intentionally” does not signify the type of intent that suffices for battery liability. And this makes sense, in light of how readily most participants in sporting activities would satisfy battery's intent requirement.<sup>71</sup> Rather, when courts employ this special limited duty formulation,<sup>72</sup> they typically interpret “intent” more narrowly: the participant must intend to cause physical harm to the plaintiff in order to be liable.<sup>73</sup> This

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<sup>70</sup> See, e.g., *Knight v. Jewitt*, 834 P.3d 696, 711 (Cal. 1992).

<sup>71</sup> Even under the more stringent dual intent approach to battery, a person satisfies the intent requirement simply by knowing that his contact will cause (even minimal) physical harm; participants will frequently meet this standard in many contact sports (such as high school football or hockey). Furthermore, under the less demanding single intent battery standard, the player will almost always satisfy the requirement that he acted with the purpose or knowledge that a contact will occur.

<sup>72</sup> To be sure, there are other formulations of the limited duty of coparticipants in recreational and sports activities to one another, that also (or instead) give weight to whether the risk resulting in injury is an inherent risk of the sport, is unforeseeable, or violates the rules of the game. See, e.g., *Repka v. Arctic Cat*, 2005 N.Y. App.Div. LEXIS 7428 (N.Y. App. Div. 2005).

<sup>73</sup> See, e.g., *Crawn v. Campo*, 643 A.2d 600, 605 (N.J. 1994) (“[W]e conclude that liability arising out of mutual, informal, recreational sports activity should not be based on a standard of ordinary negligence but on the heightened standard of recklessness or intent to harm.”); *Knight v. Jewett*, 834 P.2d 696, 711 (Cal. 1992) (Plurality opinion by George, J., with Lucas, C. J., and Arabian, J., concurring) (“[W]e conclude that a participant in an active sport breaches a legal duty of care to other participants—i.e., engages in conduct that properly may subject him or her to financial liability—only if the participant intentionally injures another player or engages in conduct that is so reckless as to be totally outside the range of the ordinary activity involved in the sport.”); Wis. Stat. 895.525(4m) (2003-04) (permitting liability of participant in recreational contact sports only if she “acted recklessly or with intent to cause injury”).

The same appears to be true when courts impose on landowners, not the full duty of reasonable care towards trespassers, but only the more limited duty not to “intentionally or recklessly” injure trespassers. See *American National Bank & Trust Co. v. City of Chicago*, 192 Ill.2d 274, 248 Ill.Dec. 900, 735 N.E.2d 551 (2000) (“A wilful or wanton injury must have been intentional [with actual or deliberate intent to harm] or the act must have been committed under circumstances exhibiting a reckless disregard for the

narrower interpretation is, I believe, the only plausible one in contact sports. If the plaintiff need only prove that the injury was caused by an intended contact beyond the scope of consent, that would give very little additional protection to defendants, contrary to the rationale of the special limited-duty rule.

Indeed, in some tort doctrines, although intent is a necessary element, it plays such a minor role that no one thinks to characterize the doctrine as an intentional tort. The commentary to section 1 of the Restatement Third gives two examples. First, the common law used to impose near-automatic liability on a person who intentionally started a fire that spread beyond the person's control.<sup>74</sup> Second, statutes sometimes impose liability on owners who intentionally place their livestock on the highway, with resulting harm. The comment correctly observes: "These liabilities ... are generally not regarded as intentional torts."<sup>75</sup> Rather, they are instances of strict liability. Another example comes from the domain of negligence: one who voluntarily undertakes to take custody of another is under a duty of reasonable care to protect the other.<sup>76</sup> The mere fact that an intentional act triggers the duty here hardly warrants our treating the resulting duty as an instance of an intentional tort. The same is true of the many tort doctrines for which knowledge of a particular fact triggers, or defines the scope of, a duty: such doctrines are pervasive in the domains of strict liability and negligence and certainly do not deserve to be placed within the intentional tort category.

## B. The (lack of) generality problem

The "apples and oranges" problem suggests that we might achieve some desirable simplification by reorganizing intentional tort doctrine into a few general principles. Consider section 5 of the Restatement Third of Torts. In

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safety of others [an utter indifference to or conscious disregard for a person's own safety or the safety or property of others]..." (brackets in original); *Williams v. Cook*, 725 N.E.2d 339, 343 (Ohio Ct. App. 1999) ("Ordinarily, a landowner owes no duty to a ... trespasser except to refrain from willful, wanton, or reckless conduct that is likely to injure him. Willful conduct implies intent, purpose, or design to injure.").

<sup>74</sup> Restatement Third, Comment a to §1 p. 5.

<sup>75</sup> But the commentary also suggests that the reason they are not regarded as intentional torts is because they do not involve intent to harm; this is not convincing, for reasons I have explored.

<sup>76</sup> Restatement Second §314A(4). Other examples of intentional undertakings triggering duties that are conventionally viewed as falling within the domain of negligence law include the duties of professionals (doctors and lawyers), institutions that provide custodial care (prisons), private businesses open to the public, and public institutions that take temporary responsibility for the care of others (schools).

extremely broad language, this provision recognizes liability for “[a]n actor who intentionally causes physical harm.” Comment a aptly characterizes this provision as “an umbrella rule,” one that “provides a framework that encompasses many of the specific torts described in much more detail in the Restatement Second of Torts.”

Is this a wise strategy? Why not employ an “umbrella intentional tort,” to replace the motley assortment of torts now characterized as “intentional”?

If this were our strategy, presumably we would need at least three umbrellas, each corresponding to the type of harm caused:

**1. For intentionally causing physical harm.** (Section 5 of the Proposed Draft of the Restatement 3<sup>rd</sup> is an umbrella criterion of this sort.)

**2. For intentionally causing emotional harm.** (The tort of intentional infliction of emotional distress is a loose approximation of such an umbrella tort.)

**3. For intentionally causing economic harm.** (Again, there is a doctrine that roughly corresponds to this umbrella tort—the Restatement 2<sup>nd</sup> of Torts doctrine of prima facie tort.<sup>77</sup>)

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<sup>77</sup> Actually, the Restatement Second offers its prima facie tort as an umbrella tort for intentionally causing any type of harm, not just economic harms. See §870:

One who intentionally causes injury to another is subject to liability to the other for that injury, if his conduct is generally culpable and not justifiable under the circumstances. This liability may be imposed although the actor's conduct does not come within a traditional category of tort liability.

See also Comment a:

This Section is intended to supply a generalization for tortious conduct involving harm intentionally inflicted. Generalizations have long existed for negligence liability, involving conduct producing unreasonable risk of harm to others ..., and for strict liability, involving the carrying on of an activity that is abnormally dangerous. ... As for conduct intentionally causing harm, however, it has traditionally been assumed that the several established intentional torts developed separately and independently and not in accordance with any unifying principle. This Section purports to supply that unifying principle and to explain the basis for the development of the more recently created intentional torts. More than that, it is intended to serve as a guide for determining when liability should be imposed for harm that was intentionally inflicted, even though the conduct does not come within the requirements of one of the well established and named intentional torts.

But it appears that only three states—Missouri, New Mexico, and New York—have recognized the prima facie tort doctrine. See Dan Dobbs & Ellen Bublick, *Economic and Dignitary Torts* 422 (2006). Moreover, Missouri's recognition is especially grudging. See *Overcast v. Billings Mutual Ins. Co.*, 11 S.W.3d 62, 67 n. 4 (Mo. 2000) (“The prima facie tort claim may be the tort of last resort or the last refuge of those who have no claim, depending on one's point of view. ... It is difficult to find reported cases where a plaintiff actually has recovered on a prima facie tort theory.”). New York's attitude is

Would this be a desirable approach?

It would certainly have the virtue of clarity and simplicity!

It would also have the virtue of expressing, quite directly, the idea of a fault hierarchy—the idea that, *ceteris paribus*, it is worse to cause any particular type of harm intentionally than to cause it negligently. This idea is behind the common, but (as we have seen) misleading, comparison between intentional “wrongdoers” and negligent actors.

Under this radically simplified approach, it might also be easier to grasp an underlying justification for distinctive treatment of intentional torts. Both of the competing justifications for tort doctrine, which we can roughly describe as efficiency and fairness, can support treating intentional torts as a more serious wrong. To oversimplify greatly, the efficiency approach supports special rules for intentional torts because one who intends harm is almost never providing a social benefit and is also more deterrable.<sup>78</sup> The fairness or corrective justice approach supports distinct rules for intentional torts because an actor who aims at causing harm (or who knows that harm is almost certain) is significantly more culpable than one who simply fails to take adequate care to prevent harm.<sup>79</sup>

Moreover, a streamlined structure would highlight the very significant difference between intentionally causing physical harm, which is almost always unjustifiable, and intentionally causing emotional or economic harm, which is often (a) justifiable or permissible, or (b) in any event not appropriately subject to

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significantly more liberal. See, e.g., *Advance Music Corp. v. American Tobacco Co.* 70 N.E.2d 401 (1946); *Andrews v. Steinberg*, 471 N.Y.S.2d 764, 769 (N.Y. Sup. Ct. 1983) (“[P]rima facie tort has developed as a broadly fashioned, adaptable instrument permitting the courts to afford a remedy for a wide range of injuries which society believes should be compensable.”)

The Restatement Third project on economic harm does propose to include “prima facie tort,” but only as one category of intentional pecuniary harm. See Rest. Third Econ. Harm PD 1, §50, Prospective Table of Contents.

<sup>78</sup> See Richard Posner, *Economic Analysis of Law* 204-208 (6<sup>th</sup> ed. 2003) (characterizing most traditional intentional torts as either highly inefficient coerced transfers of wealth or instances of “interdependent negative utilities” where defendant gains utility by lowering the plaintiff’s utility, a category that the common law would call “malicious”); Kenneth Simons, *Rethinking Mental States*, 72 B.U. L. Rev. 463, 503-515 (1992) (actors who plan are often more deterrable; an actor with an intentional mental state often obtains a higher private benefit, so a higher sanction might be needed for deterrence; an intentional mental state might reflect a lack of social benefit; and it might cause aggravated harm to the victim).

<sup>79</sup> See generally Simons, *Rethinking Mental States*, 72 B.U. L. Rev. 463, 496-499 (1992).

tort liability, in light of the availability of alternative legal remedies and the unduly burdensome costs of imposing liability relative to the social benefits.<sup>80</sup>

Despite these advantages, the project of reducing all of intentional tort doctrine to three umbrella torts is not a realistic possibility; nor is it justifiable in principle. As a positive matter, the project is both overbroad and underinclusive relative to the current rules of tort doctrine. But the more important objection is theoretical: the approach is also overbroad and underinclusive relative to any defensible conception of tort doctrine. The distinct intentional torts protect distinct and sometimes incommensurable interests, and often protect them in different ways that a single overarching umbrella tort could not possibly express. And this complexity is not an unfortunate fact about tort doctrine; it is both inevitable and desirable. To defend these claims, I briefly examine each of the three umbrella torts in turn.

### 1. Intentionally causing physical harm

As we've seen, this umbrella principle does not accurately reflect battery doctrine, especially in the jurisdictions endorsing the single intent rather than dual intent view.<sup>81</sup> Nor does it faithfully capture false imprisonment or trespass doctrine, even in the subcategory of instances where those torts result in physical harm.

### 2. Intentionally causing emotional harm

Consider the tort of intentional infliction of emotional distress—perhaps better described as “outrageous conduct causing severe emotional disturbance.” On first impression, this appears to be an umbrella tort. For it embraces any kind of behavior whatsoever, not just physical touchings, or imprisonments, or

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<sup>80</sup> See Restatement Second of Torts §870, comment f; Rest. Third Phys. Harm PFD 1, §5, comment a.

For a helpful discussion of arguments that have been advanced for a general principle of liability of intentional harms in English law, see Peter Cane, Mens Rea in Tort Law, 20 Oxford J. L. Stud. 533, 549-552 (2000).

<sup>81</sup> Even jurisdictions endorsing the dual intent view do not treat battery as simply one instance of the umbrella tort of intentionally causing harm. For example, harmful battery includes intentional contacts in which the defendant intends merely to cause offense, not to cause harm, but in which harm follows. Restatement Second of Torts, §13.

defamatory insults. And it potentially creates liability whenever severe emotional disturbance is caused.

On closer examination, however, this does not really amount to an umbrella tort for intentionally causing emotional harm: it is both broader and narrower than such a tort. First, by its own terms, it can be satisfied if the defendant recklessly causes severe emotional distress; intention is not required. Second, it is limited to extreme and outrageous conduct, and to acts that cause severe emotional distress.

Thus, the “outrage” tort does not offer a formula that could also embrace all other intentional torts causing emotional harm, such as offensive battery and assault. Offensive battery requires intention to cause an offensive contact; recklessly causing such a contact is not enough.<sup>82</sup> At the same time, the resulting “offense” that offensive battery requires need not rise to the level of “severe” emotional disturbance. For similar reasons, this formula does not include assault either.<sup>83</sup>

Or consider the privacy and defamation torts. In a very loose sense, these torts all uniformly impose liability against defendants who intentionally interfere with the interests of victims in such a way as to cause significant emotional harm. But this characterization is useless in describing accurately the specific interests at stake and the ways in which they are, and are not, protected.

Thus, the tort of intrusion upon seclusion imposes liability on “[o]ne who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns ... if the intrusion would be highly offensive to a reasonable person.”<sup>84</sup> This is not simply one example of a general principle of liability for intentionally doing any act that causes significant offense. Only the particular type of act specified here—namely, intentionally intruding on privacy—triggers liability. Similarly, the various doctrines of defamation obviously secure only very specific types of reputational interests against various types of infringement; the doctrines can hardly be understood as merely salient instances of a general norm against unjustified intentional causation of emotional harm.

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<sup>82</sup> Rest. 3<sup>rd</sup> §45, comment f.

<sup>83</sup> Assault’s requirement that the victim suffer “imminent apprehension” of a contact, Rest. 2<sup>nd</sup> §21 (1)(b), is much weaker than the outrage tort’s requirement that the victim suffer severe emotional disturbance.

Conversely, if a jurisdiction adopts the dual intent view of offensive battery, then the defendant must act with either the intent to cause harm or the intent to cause offense; and this standard could be more difficult to satisfy than recklessness as to causing (even severe) emotional distress, which the “outrage” tort requires. See Restatement Second of Torts, §46; Rest. Third Phys. Harm PD 5, §45.

<sup>84</sup> Restatement Second of Torts, §652B.

Finally, for many types of acts, there is, of course, no liability for intentionally engaging in the act even though the actor knows to a certainty that it will cause serious offense or emotional harm to others. Consider such acts as unilaterally breaking up with a spouse or significant other, offering criticism of the work or behavior of another, or giving a public speech that you know will greatly offend many in the audience.

### 3. Intentionally causing economic harm

The prima facie tort is indeed an explicitly general tort for intentionally causing economic harm. But even the few jurisdictions that recognize the prima facie tort decline to apply it in contexts that are already covered by more specific, nominate torts. A plaintiff cannot skirt the limitations of, say, tortious interference with contract by pleading “prima facie tort” instead.<sup>85</sup> Thus, courts seem to view the prima facie tort, not as a general tort standard that is given more concrete specification in particular contexts, but merely as a residual tort for contexts that other doctrines do not already address.

#### C. Tort law’s imperfect hierarchy of fault

Recall the simple picture described earlier. Part of the picture was a fault hierarchy. Perhaps unconsciously, we view intentional torts as analogous to intentional crimes in this sense: intent is the most culpable state of mind or type of fault, in a hierarchy that ranges from intent, down to recklessness, then to negligence, then to strict liability. Thus, assume an actor has caused a particular type of injury, such as death or the loss of a limb. Holding constant the harm

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<sup>85</sup> See *Bogle v. Summit Investment Co., LLC*, 107 P.3d 520 (N.M. 2005); *Engel v. CBS, Inc.*, 711 N.E.2d 626, 630 (N.Y. 1999); *Nazeri v. Missouri Valley College*, 860 S.W.2d 303, 315-16 (Mo. 1993) (“Appellant here, as many others before her, misunderstands the nature of a prima facie tort claim. It is not a duplicative remedy for claims that can be sounded in other traditionally recognized tort theories, or a catchall remedy of last resort for claims that are not otherwise salvageable under traditional causes of action. Instead, it is a particular and limited theory of recovery with specific elements, as any other tort.”)

The Restatement Second of Torts suggests that the prima facie tort can legitimately ignore a limitation of a traditional torts “[i]f it came about as a historical accident or for reasons that no longer have real significance ... If the restriction expresses an important policy of the law against liability, however, the significance of that policy should continue regardless of the name of the tort involved or the date of its origin.” §870, Comment j.

caused, this hierarchy of fault ranks different types of torts as follows. A strictly liable actor has done nothing wrongful, but still should pay if his actions cause the harm. A negligent act that causes the same harm is minimally culpable or wrongful.<sup>86</sup> A reckless actor commits a more serious wrong. And an intentional actor commits the most serious type of wrong.

This hierarchy is indeed the model widely employed in criminal law—for example, in distinguishing the various degrees of the crime of homicide. However, using the hierarchy in tort law raises two difficulties.

First, how valuable is it? In a significant number of tort cases, the hierarchy is completely irrelevant. In criminal law, a more culpable state of mind leads to increased punishment. Intentional murder (typically defined, in part, as purposely or knowingly causing death<sup>87</sup>) is punished much more severely than reckless manslaughter, which in turn is punished much more than negligent homicide.<sup>88</sup> But in tort law, a more culpable state of mind often has no direct consequence of this sort. Causing a harm intentionally often results in precisely the same damages as causing that harm recklessly or negligently or even without fault (if a strict liability rule applies).

To be sure, punitive damages are more readily available for intentional torts. Indeed, for the tort of intentional infliction of emotional distress, in most jurisdictions plaintiffs are automatically entitled to have the jury consider an award of punitive damages.<sup>89</sup> But no other intentional tort is treated as

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<sup>86</sup> It is sometimes useful (especially in criminal law) to distinguish the wrongfulness of an act from the culpability or blameworthiness of the actor, e.g. when an actor under duress or an insane delusion is not blameworthy for causing an unjustified harm, but I do not pursue this complication here.

<sup>87</sup> See, e.g., Model Penal Code, §210.2 (1)(a).

<sup>88</sup> For some doubts about this criminal law hierarchy, see Simons, Rethinking Mental States, *supra* note 78=; Simons, Should the Model Penal Code's Mens Rea Provisions Be Amended?, 1 Ohio State J. Crim. L. 179, 195-198 (2003).

<sup>89</sup> Most jurisdictions permit a jury to award punitive damages in any intentional infliction of emotional distress claim, reasoning that the outrageous conduct necessary to establish the basic tort claim is also sufficient to establish eligibility for punitive damages. See *Borden v. Paul Revere Life Ins. Co.*, 935 F.2d 370, 381-382 (1st Cir. 1991) (interpreting Rhode Island law and cases from Vermont, Alaska, Florida, and the District of Columbia in support). Of course, the award of punitive damages in any particular case is discretionary, not automatic. *Id.* at 382. A few jurisdictions, remarkably enough, draw precisely the opposite conclusion from the premise: since the basic tort requires outrageous behavior that would ordinarily warrant punitive damages, plaintiff cannot recover more than compensatory damages; moreover, in the view of these courts, the award of compensatory damages in these cases essentially amounts to a punitive award. See *Whelan v. Whelan*, 588 A.2d 251, 253-54 (Conn. 1991) (“In light of the fact that the plaintiff's underlying cause of action is based on a claim of outrageous conduct, however, the court believes that an additional recovery for punitive damages would not be appropriate. The court agrees with the Supreme Court of Illinois, which has succinctly held that ‘[s]ince the outrageous quality of the defendant's conduct forms the basis of the

presumptively warranting punitive damages. And given the broad range of doctrines encompassed within the intentional tort category, many intentional tort cases do not warrant punitive damages. After all, if doctor A makes an honest mistake about the scope of the patient's consent, she can still be liable for battery; if B makes a mistake about whether she has a privilege to detain a customer, she can still be liable for false imprisonment; and if C is mistaken—even reasonably mistaken—about whether she is walking on her own land, she can still be liable for trespass to land. In none of these cases would punitive damages be appropriate. And conversely, a merely negligent actor can of course be liable for punitive damages, if he also satisfies the jurisdiction's requirement of extra culpability; yet that extra culpability ordinarily need not rise to the level of intent to harm.<sup>90</sup>

Second, in tort law, the hierarchy is simply inaccurate with respect to a significant portion of intentional tort doctrine. Not all intentional torts involve fault; some, like trespass to land or chattels, are better characterized as imposing a kind of strict liability.<sup>91</sup> Others contain a complex combination of fault requirements that in the aggregate approximate negligence, or that are not clearly more culpable than negligence. For example, consider tort law's treatment of young children. Even a five-year old can be liable for the intentional tort of battery, not only under the single intent standard, but even under the more rigorous dual intent standard.<sup>92</sup> Yet it is obvious that such a young actor has little or no culpability. On the other hand, with respect to liability for negligence, which is supposedly lower down in the hierarchy of fault, a very young actor is considered either incapable of negligence or is judged by the relaxed standard of a reasonable five year old.<sup>93</sup>

Finally, note that several tort doctrines and statutory policies have a perverse effect (if one believes in the fault hierarchy): they make compensation more difficult to obtain if liability is based on an intentional tort rather than on negligence. Examples include intentional tort exclusions from liability insurance coverage, workers' compensation coverage, or sovereign immunity waivers, as

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action, the rendition of compensatory damages will be sufficiently punitive.' Knierim v. Izzo, supra, 22 Ill.2d [73] at 88, 174 N.E.2d 157 [1961].")

With respect to assault and battery: "Most jurisdictions permit a jury to consider an award of punitive damages [only] when attended by certain aggravating elements, such as malice, recklessness, insult, or oppression." 1 Linda L. Schlueter, *Punitive Damages* §9.2, at 519 (5<sup>th</sup> ed. 2005).

<sup>90</sup> Similarly, "recklessness" for punitive damages purposes need not be defined the same as "recklessness" for other tort law purposes. "A definition of recklessness that determines whether the plaintiff can recover full compensatory damages may or may not be appropriate in determining whether the plaintiff can also recover punitive damages." Rest. Third Phys. Harm PFD 1, §2, comment b, p. 21.

<sup>91</sup> See Henderson & Twerski, *Intent and Recklessness in Tort: The Practical Craft of Restating Law*, 54 Vand. L. Rev. 1133, 1136-1137 (2001).

<sup>92</sup> The classic example is *Garratt v. Dailey*, 279 P.2d 1091 (Wash. 1955).

<sup>93</sup> See Dobbs, supra note 12=, at §126.

well as shorter statutes of limitations for many intentional torts. However, we should be careful before drawing any significant conclusions from such policies. These particular legal rules have justifications (whether good or bad) largely independent of whether the intentional torts to which they apply represent the most aggravated degree or type of fault.<sup>94</sup>

#### D. Three responses to these problems

In this section, I explore three different strategies that might alleviate these problems.

##### 1. Distinguish multiple fault elements within a single tort doctrine

One of the great analytic breakthroughs of the Model Penal Code was its adoption of what has been called “element analysis.” Instead of simply treating a crime as requiring purpose rather than negligence, or specific intent rather than general intent, the Code requires separate analysis of the culpability or fault that is required for each distinct element of the offense. Thus, rape is not an intentional crime simpliciter; it is a crime requiring intention to have sexual intercourse with the victim, plus some other level of fault as to whether the victim failed to consent. That other level of fault needs to be separately analyzed and justified: perhaps the perpetrator should have to know that the victim does not consent, perhaps he should only have to be reckless, perhaps negligence should suffice, or perhaps no fault at all should be required.

This insight has not been fully grasped by those who make tort doctrine. After all, a given tort might have many elements, and the level of fault for these different elements need not be identical.

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<sup>94</sup> In interpreting the common exclusion in liability insurance contracts for injuries “expected or intended from the standpoint of the insured,” for example, a court might reasonably assume that the exclusion is mainly designed to protect the insurer against highly unpredictable risks. On the other hand, when a court interprets an insurance contract without such an exclusion as against public policy unless “intentional acts” are excluded, one justification often invoked for this judicially-created exclusion is indeed a policy against rewarding individuals who have committed especially serious moral wrongs. (At the same time, one can reasonably question this policy: so long as the insurance company is permitted to subrogate against the insured, the insured does not actually benefit from his own wrong. Tom Baker, *Insurance Law and Policy: Cases, Materials, and Problems* 488 (Aspen 2003).) For a useful overview of these issues, including insurance contract exclusions for “criminal acts” as well as for intentional acts, see Baker, *id.* at 478-505.

Consider trespass to land. “One is subject to liability to another for trespass ... if he intentionally ... (a) enters land in the possession of the other.”<sup>95</sup> Although the entry on land must be intentional, defendant remains liable for any mistake about whether he owns or is otherwise entitled to enter the land, even a reasonable mistake.<sup>96</sup> Indeed, a trespasser who faultlessly causes harm to someone while on another’s property is liable even if he reasonably believes that he has permission to be on that property.<sup>97</sup> In effect, then, intent is the requisite level of fault for one element of the tort (entering a particular piece of land); while strict liability is the requisite level of fault with respect to other elements (whether the land is in the lawful possession of another, and whether the trespass will cause harm to another). It is obviously a crude and misleading overgeneralization to characterize trespass as an “intentional” tort, insofar as these strict liability elements are prominent. And it would be much more perspicuous if trespass doctrine more explicitly identified and highlighted these different fault requirements.<sup>98</sup>

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<sup>95</sup> Restatement Second of Torts, §158.

<sup>96</sup> See Restatement Second of Torts, §164, Intrusions Under Mistake:

One who intentionally enters land in the possession of another is subject to liability to the possessor of the land as a trespasser, although he acts under a mistaken belief of law or fact, however reasonable, not induced by the conduct of the possessor, that he

(a) is in possession of the land or entitled to it, or

(b) has the consent of the possessor or of a third person who has the power to give consent on the possessor's behalf, or

(c) has some other privilege to enter or remain on the land.

<sup>97</sup> See Restatement Second of Torts §162, Illustration 2 (B informs A that A is permitted to drive on a private road owned by B; actually, B does not own the road; A is liable for injury to child whom A faultlessly injures while driving on the road). This doctrine was recently noted with approval in *Mount Zion State Bank & Trust v. Consolidated Communications, Inc.*, 660 N.E.2d 863, 871 (Ill. 1995).

<sup>98</sup> The tort of trespass to chattels contains very similar fault requirements. See Restatement Second of Torts, §217:

A trespass to a chattel may be committed by intentionally

(a) dispossessing another of the chattel, or

(b) using or intermeddling with a chattel in the possession of another.

See also comment c:

It is not necessary that the actor should know or have reason to know that such intermeddling is a violation of the possessory rights of another. Thus, it is immaterial that the actor intermeddles with the chattel under a mistake of law or fact which has led him to believe that he is the possessor of it or that the possessor has consented to his dealing with it.

And see §244, Effect Of Mistake:

Or reconsider battery. Even on the single intent view, battery actually has two fault requirements, though not the same ones that the dual intent view requires. The requirement that is conventionally emphasized is the intent to contact. But a second, in effect, is negligence as to the victim's lack of consent. If the defendant believes that the victim consents, but is negligent in not realizing that she does not consent, he is liable for battery. Of course, if he is reasonable rather than negligent in believing that she consents, then, under the apparent consent doctrine, he is not liable. (Finally, the single intent view departs from the dual intent view by providing that the plaintiff need not prove that the defendant acted with any independent fault at all with respect to whether his act will cause harm or offense.<sup>99</sup>) An explicit articulation of battery's two fault requirements—intent to contact plus (at least) negligence as to the victim's lack of consent—would be very useful and would allay some of the concerns of those who support the dual intent view because they fear that the alternative single intent view is too hard on defendants. This approach would also avoid such extraordinary doctrinal contrivances as the idea of “negligent assault,” which at least one jurisdiction

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An actor is not relieved of liability to another for trespass to a chattel or for conversion by his belief, because of a mistake of law or fact not induced by the other, that he

- (a) has possession of the chattel or is entitled to its immediate possession, or
- (b) has the consent of the other or of one with power to consent for him, or
- (c) is otherwise privileged to act.

<sup>99</sup> To be sure, insofar as a defendant is negligent as to lack of consent, and insofar as any reasonable person realizes that touching a person without their consent will ordinarily be offensive, he necessarily displays at least minimal fault with respect to causing offense, as well. But this is not the same as knowing to a substantial certainty that he will cause offense (as the dual intent approach requires).

The dual intent view presents an additional ambiguity: what does it mean to intend to cause “offense”? What if the actor “meant no offense” by an unpermitted intentional touching, and is ignorant of the social convention under which that type of touching is “offensive to a reasonable sense of personal dignity” (as the Restatement defines offense)? Arguably, “[s]o long as one has intended the sort of bodily contact that law or social norms deems inappropriate, one has acted with the requisite intent.” Goldberg, Zipursky, & Sebok *Tort Law: Responsibilities and Redress* 554 (Aspen 2004). On this view, if D suddenly kisses a stranger on the lips, believing that no one should be upset by his actions, even an advocate of the dual intent view can treat this as “intent to offend” because D has knowingly brought about the kind of contact that the law regards as offensive (even though D does not so regard it). But this view, though defensible, essentially treats the separate “intent to offend” requirement as embodying only a culpability of negligence: D should have been aware that the contact would satisfy the legal definition of “offense.” More plausible, I think, is the view that under the dual intent requirements, D must realize that the stranger will be upset in order to “intentionally” (i.e., purposely or knowingly) cause “offense.” Of course, under the single intent requirement, D’s obtuseness about whether his actions will cause offense is simply irrelevant.

recognizes when a doctor forgetfully rather than knowingly exceeds the scope of the patient's consent.<sup>100</sup>

In addition, the Restatement drafters (and other legal actors who create or revise intentional tort doctrine) should be careful to specify whether intention means purpose, or knowledge, or both. Indeed, even the distinction between purpose and knowledge is not sufficiently nuanced. There are more than two categories of legal "intention." Tort doctrine actually employs at least four categories and some subcategories, as well:

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<sup>100</sup> See *Chouinard v. Marjani*, 575 A.2d 238, 242 (Conn. App. Ct. 1990):

[I]f the jury were to accept the plaintiff's claim that she never consented to surgery on her right breast, orally or in writing, it must find that the defendant assaulted the plaintiff. The jury could then find either that the defendant intentionally assaulted the plaintiff, if he acted knowing that he had no consent, or that he negligently assaulted her, if he forgot that he had no consent.

Our courts have long adhered to the principle that the theory of intentional assault or battery is a basis for recovery against a physician who performs surgery without consent. . . . We also have recognized a cause of action for negligent assault; see *Russo v. Porga*, 141 Conn. 706, 708-709, 109 A.2d 585 (1954); applying this theory of liability to unconsented-to touching by medical personnel. See *Krause v. Bridgeport Hospital*, 169 Conn. 1, 8-9, 362 A.2d 802 (1975). "Arguably, an *intentional or negligent* extension of physical contact beyond that consented to . . . which results in injury may present an actionable battery . . . ." (Emphasis added.) *Id.*, 9.

Another court suggests that a claim for negligent false imprisonment or negligent assault and battery is possible under Alabama law. *Romero v. City of Clanton*, 220 F.Supp. 2d 1313, 1319 (D. Ala. 2002). The court might have been influenced by the effect of an Alabama statute that imposes liability on a municipality only for the negligent acts of its employees.

1. Knowledge to a substantial certainty (e.g. that a result will occur).<sup>101</sup>
2. Purpose (e.g. to bring about a result).
  - a. As the only reason for an action.<sup>102</sup>
  - b. As the primary reason for an action.<sup>103</sup>
  - c. As merely one reason for an action.<sup>104</sup>
  - d. As merely a disconnected desire for the result—that is, a desire merely contemporaneous with the action, but which is not one of the reasons for the action.<sup>105</sup>
3. Purpose as a further motive or reason for an action that has a more immediate purpose.<sup>106</sup>

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<sup>101</sup> Knowledge can also apply to (what the Model Penal Code would call) a “circumstance” element of a tort. Such an element is not a result (a state of affairs that defendant brings about), but is instead a state of the world that the defendant does not cause but which is relevant to his tort liability. For example, the liability of a landowner for injury to a trespasser might depend on his knowing of the presence of the trespasser.

<sup>102</sup> For example, the Restatement Second §767, comment d, suggests that if the desire to interfere with the other’s contractual relations was the defendant’s sole motive, the interference is almost certain to be held improper.

<sup>103</sup> Consider malicious prosecution, discussed in the text, *infra* note 108=.

<sup>104</sup> Consider interference with contract, which is often interpreted as nontortious if the actor’s purpose is “at least in part to advance his interest in competing with the other.” Restatement Second of Torts, §768(1)(d).

<sup>105</sup> Suppose D negligently pushes a boulder down a hill without looking to see if this will endanger anyone. If D later realizes that P will be hit by the boulder, and D happens to rejoice in P’s ill fate, D’s desire to harm P is reprehensible but is not one of D’s reasons for action. Whether tort law will consider such a “disconnected” desire in assessing liability is unclear (at least if we assume that at the point when D saw P in the boulder’s path, D could not possibly save P from the boulder). However, the Restatement Third of Apportionment’s formula for assigning shares of responsibility does indicate that mental state factors such as “any awareness or indifference with respect to the risks... and any intent with respect to the harm” are relevant to apportionment even if they do not have any causal effect. Restatement Third of Torts, Apportionment, §8, comment c.

The original Restatement Second definition of “intent” bifurcates it into “desires to cause consequences of his act” or “believes that the consequences are substantially certain to result.” Restatement Second of Torts, §8A. By the term “desire,” however, the drafters clearly meant “purpose,” not a disconnected desire or hope.

Strictly speaking, a disconnected desire is not a purpose, because it might simply accompany an act, and need not be part of the actor’s reason for acting as he did. For a discussion of problems with allowing such a disconnected desire or hope to affect criminal liability, see Kenneth Simons, Does Punishment for “Culpable Indifference” Simply Punish for “Bad Character”? Examining the Requisite Connection between Mens Rea and Actus Reus, 6 Buffalo Crim. L. Rev. 219, 238-239 (2002).

<sup>106</sup> For example, the dual intent view of battery requires that the defendant engage in a bodily action (swinging his arm, pulling out a chair, employing medical instruments) for the immediate purpose of causing a bodily contact (or with the awareness that he will

4. Purpose in the sense of spite or ill will, a per se unjustifiable motive.<sup>107</sup>

Thus, in the Restatement Second, several provisions make liability depend on whether an improper goal was the actor's primary purpose; it is not enough that it was one of the actor's goals. Consider the tort of malicious prosecution. Section 668 provides that a defendant is not liable unless he initiated the proceedings "primarily for a purpose other than that of bringing an offender to justice."<sup>108</sup> (And the torts of wrongful use of civil proceedings and abuse of process have very similar requirements.<sup>109</sup>)

Tort doctrine employs other categories of intention or knowledge as well, including the category of "reason to know," which (somewhat confusingly) is narrower than "should know" but broader than "know."<sup>110</sup> The drafters of the

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cause that contact), but also with the further purpose of causing harm or offense (or with the further awareness that he will cause harm or offense).

<sup>107</sup> See, e.g., Restatement Second §870, comment i:

If the only motive of the actor is a desire to harm the plaintiff, this fact becomes a very important factor. A motive of this sort is sometimes called disinterested malevolence, to indicate that the defendant has no interests of his own to promote by his conduct, other than venting his ill will. It is sometimes said that an evil motive cannot make tortious an act that is otherwise rightful. The nature of the motive, however, may be a factor that tips the scale in determining whether the liability should be imposed or not.

See also *id.* 829 (recognizing a per se nuisance if the actor intentionally invades the other's interest in the use or enjoyment of his land and "the conduct is ... for the sole purpose of causing harm to the other" (e.g., putting up a fence merely to spite one's neighbor). For a thoughtful and precise analysis of "malice" and other motives in tort law, see Cane, *supra* note 80, at 539-542.

<sup>108</sup> Comment c further states:

The phrase "primarily for a purpose other than that of bringing an offender to justice" denotes that the person initiating or procuring the criminal proceeding was motivated by some other purpose that played a more important part in influencing his decision than the motive of bringing an offender to justice. When there is evidence that the latter motive played a substantial part in influencing his decision, the determination of whether the ulterior purpose was the primary one is normally for the jury.

<sup>109</sup> See §676 ("To subject a person to liability for wrongful civil proceedings, the proceedings must have been initiated or continued primarily for a purpose other than that of securing the proper adjudication of the claim on which they are based"); §682 ("One who uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed, is subject to liability to the other for harm caused by the abuse of process").

<sup>110</sup> For example, the landowner liability provisions of the Second Restatement make extensive use of the concept of "reason to know," often treating defendants with that state of mind the same as defendants who "know" a relevant fact. The latter refers to an actual

Third Restatement should make a deliberate decision about which of these many mental state categories to employ in formulating each doctrine. In particular, I would suggest jettisoning the potentially misleading phrase “reason to know” and replacing it with more perspicuous language.<sup>111</sup>

The drafting of the economic torts should keep these ideas in mind, separately specifying the fault requirements for different elements of each doctrine, and also clarifying which of the many possible meanings of “intent” are intended.

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subjective awareness that a result is substantially certain to follow or that a circumstance is substantially certain to exist. But “reason to know” occupies a space between negligence and recklessness, on the one hand, and knowledge on the other: it requires the actor to have actual subjective awareness of circumstances from which he should infer the fact in question. Restatement Second of Torts, §12(1). The crucial distinction is that “should know” (negligence) sometimes entails a duty to investigate, while “reason to know” (constructive knowledge) does not.

Some courts, following the Restatement Second, do carefully distinguish “should know” from “reason to know.” See, e.g., *Mason v. City of Mt. Sterling*, 122 S.W.3d 500, 507 (Ky. 2003) (In attractive nuisance case, plaintiff must also show that defendant knew or had reason to know that he had created an unreasonable risk of death or serious bodily harm to trespassing children; it is not enough to show that defendant ‘should know’ of trespasses); *Jones v. Mid-Atlantic Funding Co.*, 766 A.2d 617 (Md. 2001) (Tenant’s lead paint poisoning negligence case against landlord with respect to landlord’s awareness of condition of premises); *Antwaun A. ex rel. Muwonge v. Heritage Mut. Ins. Co.*, 596 N.W.2d 456, 469-470 (Wis. 1999) (Crooks, J., concurring); *Liebelt v. Bob Penkhus Volvo-Mazda, Inc.*, 961 P.2d 1147, 1148-49 (Colo. Ct. App. 1998) (articulating the distinction in the context of negligent entrustment); *Universe Life Ins. Co. v. Giles*, 950 S.W.2d 48, 71-73 (Tex. 1997) (articulating distinction in the context of bad faith denial of insurance claim: insurer can be liable not only when it knows to a substantial certainty that it has no reasonable basis for denying a claim, but also when it is aware of a high degree of risk that it has no such reasonable grounds).

<sup>111</sup> The Restatement Third of Torts, to my knowledge, does not explicitly invoke the concept of “reason to know.” The new economic torts draft does use the phrase, see, e.g., §10(3) and comment e, but it is not clear whether the phrase is to be understood in the Restatement Second sense, as a bit narrower than “should know.” Rest. Third Econ. Harm PD 1. On the other hand, the Proposed Final Draft’s definition of recklessness includes language essentially equivalent to the Restatement Second’s definition of “reason to know”: “A person acts recklessly ... if: (a) the person knows of the risk of harm created by the conduct or knows facts that make the risk obvious to another in the person’s situation ...” Rest. Third Phys. Harm PFD 1, §2 (emphasis added).

This last formulation is a significant improvement over “reason to know,” a phrase which most lawyers would probably erroneously take to be equivalent to “should know.” Indeed, if the “reason to know” concept is useful elsewhere in the Restatement Third of Torts, I would strongly suggest using that formulation, “knows facts that make the risk obvious,” or some variant, such as “knows other facts from which he should infer the fact in question,” rather than the possibly misleading phrase, “reason to know.”

2. Develop distinct standards for intentional tort doctrine and for ancillary doctrines such as the insurance exclusion or the workers' compensation exception

If something like the umbrella approach to intentional tort doctrine replaced the various distinct doctrines, many of the ancillary doctrines could simply piggy-back on this definition. For example, punitive damages might be presumptively appropriate in any intentional tort case if intentional torts invariably required intention to cause physical, emotional, or economic harm.

But the umbrella approach is both unrealistic and unprincipled, as I have explained. Accordingly, the ancillary doctrines need to be applied in a discriminating way. The simple fact that the defendant has committed an "intentional" tort should not be conclusive of whether the defendant should pay punitive damages, whether plaintiff is precluded from obtaining insurance or workers' compensation coverage for defendant's tort, or whether a liability judgment should be nondischargeable in bankruptcy. Rather, how an intentional tort should be treated in these distinct domains should depend at least in part on the distinct policies and principles that operate in those domains.

One example of a court taking a more refined approach to these issues is the Ohio Supreme Court's decision that public policy prohibits liability insurance for "intentional" torts in the sense of "direct intent" (or what the Restatement calls "purpose) but does not preclude insurance for "intentional" torts in the alternative sense of "knowledge to a substantial certainty."<sup>112</sup> By contrast, in a case where plaintiff tried to secure insurance coverage by characterizing the defendant's act of arson as merely "negligent,"<sup>113</sup> the Connecticut Supreme Court addressed the issue quite differently: the court engaged in an elaborate analysis of the mutually exclusive relationship between negligence and intent without even mentioning the nature of the insurance policy exclusion at issue, much less articulating the policies that justify a wholesale importation of tort distinctions into the insurance context.<sup>114</sup>

In other contexts, too, such as the exception to worker's compensation exclusivity and the dischargeability of tort liabilities in bankruptcy, the special tort and statutory rules for "intentional" torts have sometimes been interpreted to

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<sup>112</sup> *Harasyn v. Normandy Metals, Inc.*, 551 N.E.2d 962 (Ohio 1990), noted in Rest. Third Phys. Harm PFD 1, Reporter's Notes to comment a, §1.

<sup>113</sup> Plaintiff's argument was that although defendant deliberately set fire to a number of items in the synagogue, including the curtains covering the ark, he did not intend to burn the Torah scrolls therein, but was merely negligent as to their destruction. Although not mentioned in the opinion, the subtext of this argument is that insurance coverage would then have been available for the loss of the valuable scrolls.

<sup>114</sup> *American National Fire Ins. Co. v. Schuss*, 607 A.2d 418, 422-423 (Conn. 1992). For criticism of the decision, see *Dairy Rd. Partners v. Island Ins. Co.*, 992 P.2d 93, 114-116 (Haw. 2000).

apply only to those torts that are intentional in the narrower sense of intent to cause harm, not in the broader sense of a mere intent to contact in a way that turns out to be harmful or offensive, or a mere intent to confine in circumstances that do not afford a privilege, and so forth.<sup>115</sup> Whether or not these interpretations are sound, at least they reflect awareness that the bare characterization of a tort as intentional is only the beginning, not the end, of the necessary analysis.

A third and final response to the problems we have encountered is this:

3. Recognize intentional torts as an alternative paradigm of tort doctrine, in stark contrast to the reasonableness paradigm

Intentional torts usually employ a paradigm of analysis quite distinct from the reasonableness paradigm that dominates so much of contemporary tort doctrine. Indeed, in rejecting “reasonableness” criteria, torts conventionally classified as strict liability have much in common with torts ordinarily classified as intentional. This shared rejection should give us pause. It suggests, once again, that the simple hierarchical view of torts—ranking intentional as most wrongful, negligence as less wrongful, and strict liability as least wrongful—is inaccurate.

The reasonableness paradigm has been ascending for most of the last century in American tort law, replacing bright-line rules with a more general requirement of reasonable care. We see this phenomenon in landowner liability, in the shift from battery to negligence for the evaluation of many informed consent issues in medical treatment, and even in the increasing use of “reasonable foresight” tests for proximate cause. Moreover, a principal reason for the recent

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<sup>115</sup> Courts differ on the question whether the intentional torts exception to the exclusivity of workers’ compensation encompasses knowledge or is restricted to purpose to cause harm. See 6 Larson’s Workers’ Compensation Law (MB) §§103.03, 103.04 (2005) (suggesting that true purpose is usually required, but almost a dozen jurisdictions apply the exception more broadly to encompass knowing injuries or even gross negligence); Rest. Third Phys. Harm PFD 1, §1, Reporter’s notes, pp. 13-14. At the same time, it seems clear that more than an intention to contact (sufficient under the single intent view of battery) is required. See, e.g., *In Johnson v. Mountaire Farms of Delmarva, Inc.*, 503 A.2d 708, 712 (Md. 1986); *Gunderson v. Harrington*, 632 N.W.2d 695, 702-702 (Minn. 2001) (Receptionist testified that her orthodontist employer struck her on the head on five separate occasions when he reprimanded her, but also testified that she could not say that the orthodontist actually intended to cause her injury; held, she could not maintain a tort action against him because of the intentional tort exception).

With respect to the rule that intentional torts are nondischargeable in bankruptcy, it is unclear whether the tort must be intentional in the narrow sense of purpose or the broader sense of purpose or knowledge. See Rest. Third Phys. Harm PFD 1, §1, Reporter’s notes, p. 14.

sharp dispute in the ALI over the proper role and definition of the “general duty of care” in the Restatement Third was the question of how pervasively the reasonableness paradigm should be applied.<sup>116</sup>

In other areas, too, the reasonableness paradigm has been expanding its empire. Consider victim conduct. With the advent of comparative fault, many jurisdictions abolished numerous bright line doctrines, including not only contributory negligence, but also traditional assumption of risk. Increasingly, courts and legislatures try to fold these doctrines into a general assessment of the reasonableness of the victim’s behavior.

But courts and legislatures sometimes resist the imperial tendencies of the reasonableness paradigm. Important aspects of traditional assumption of risk doctrine have reappeared in the guise of no-duty or limited-duty rules.<sup>117</sup> Consider the question of liability for the risks of recreational and sporting activities. As noted earlier, many courts now limit the duty one participant owes another to an obligation not to recklessly or intentionally injure, thus excluding liability for mere negligence. (Still, a few jurisdictions continue to employ a negligence framework even here, in the dubious belief that it can be very flexibly applied in a way that fully respects the distinctive values at stake.<sup>118</sup>)

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<sup>116</sup> See The ALI Reporter, Fall 2002, Actions Taken with Respect to Drafts Submitted at 2002 Annual Meeting.

<sup>117</sup> See Kenneth Simons, Reflections on Assumption of Risk, 50 UCLA L. Rev. 481, 498-503 (2002).

<sup>118</sup> See, e.g., *Lestina v. West Bend Mut. Ins. Co.*, 502 N.W.2d 28, 33 (Wis. 1993):

Because it requires only that a person exercise ordinary care under the circumstances, the negligence standard is adaptable to a wide range of situations. An act or omission that is negligent in some circumstances might not be negligent in others. Thus the negligence standard, properly understood and applied, is suitable for cases involving recreational team contact sports.

The very fact that an injury is sustained during the course of a game in which the participants voluntarily engaged and in which the likelihood of bodily contact and injury could reasonably be foreseen materially affects the manner in which each player's conduct is to be evaluated under the negligence standard. To determine whether a player's conduct constitutes actionable negligence (or contributory negligence), the fact finder should consider such material factors as the sport involved; the rules and regulations governing the sport; the generally accepted customs and practices of the sport (including the types of contact and the level of violence generally accepted); the risks inherent in the game and those that are outside the realm of anticipation; the presence of protective equipment or uniforms; and the facts and circumstances of the particular case, including the ages and physical attributes of the participants, the participants' respective skills at the game, and the participants' knowledge of the rules and customs.

Depending as it does on all the surrounding circumstances, the negligence standard can subsume all the factors and considerations presented by recreational team contact sports and is sufficiently flexible to permit the 'vigorous competition' that the defendant urges. We see no need for the court to adopt a

Why the resistance to the reasonableness paradigm? First, the paradigm gives vague guidance to courts and primary actors. More carefully specified duties might be preferable to a vague injunction to employ reasonable care under the circumstances (and also better than a reasonable care injunction that is spelled out a bit more by identifying relevant factors to be balanced). So it is not surprising that in a number of contexts—for example, medical professionals, children, and those who violate a criminal statute—the duty of care is more specific than the general standard.

But the second reason for resistance is more telling: sometimes a reasonableness paradigm, even if made more concrete by careful specification, mischaracterizes the interests at stake, or mischaracterizes how they should be weighed and justified.

Battery doctrine is again a useful illustration. The plaintiff need not have good reasons for declining a medical procedure or for resisting any other type of physical touching.<sup>119</sup> Nor is the defendant absolved from liability simply because he has good reasons for ignoring the plaintiff's lack of consent.<sup>120</sup> The very idea of patient autonomy is that the patient is entitled to decide for or against treatment for virtually any reason; the reason itself need not be reasonable.

Once more, a comparison to criminal law doctrine is illuminating. The most faulty conduct, purposely or knowingly assaulting or killing another, is unjustifiable, unless the actor falls within a narrow defense, such as necessity, self-defense, or defense of others. But less faulty conduct, recklessly or negligently harming another, is only criminal in the first instance if the risk

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recklessness standard for recreational team contact sports when the negligence standard, properly understood and applied, is sufficient. (citations and footnote omitted)

The Wisconsin legislature responded to the decision by narrowing the duty of care of participants in recreational contact sports, permitting liability only if the participant “acted recklessly or with intent to cause injury.” Wis. Stat. 895.525(4m)(a) (2003-04).

<sup>119</sup> See, e.g., *Curtis v. Jaskey*, 326 Ill.App.3d 90, 99 (Ill. App. Ct. 2001) (“Whether an individual refuses medical treatment for a justifiable reason, such as avoiding a death prolonged by artificial means, or for a questionable reason, such as mere whim, is not a relevant consideration in cases like the present one. We will not inquire into the basis of a competent patient's decision to forgo a medical procedure and ratify his or her decision only if it appears to be a sensible one.”); *Phillips by and through Phillips v. Hull*, 516 So.2d 488, 491-92 (Miss.1987) (“[A]bsent special circumstances, a competent individual has a right to refuse to authorize a procedure, whether the refusal is grounded on doubt that the contemplated procedure will be successful, concern about probable risks or consequences, lack of confidence in the physician recommending the procedure, religious belief, or mere whim.” (quoting P. Lasky, 11B Hospital Law Manual; Consent to Medical and Surgical Procedures 1, (1986))).

<sup>120</sup> To be sure, in extreme enough circumstances, this principle can be overridden. In genuine emergency circumstances when consent cannot be obtained and life is at stake, a doctor is permitted to provide medical care despite the absence of explicit consent.

created is unjustifiable. Here, “unjustifiability” turns on a much broader, all-encompassing judgment of the reasonableness of the defendant’s action, taking into consideration the circumstances (including the benefits and detriments of the action) and his motives and beliefs while acting.<sup>121</sup> Similarly, insofar as an intentional tort genuinely expresses a high degree of fault, only a narrow set of defenses should be permitted to justify the action.

Yet, as we have seen, many torts that are classified as intentional differ from torts of negligence not so much because they represent a more serious degree of fault, but because they exhibit a type of fault not appropriately governed by the “reasonable care” paradigm: they focus on protection of carefully defined interests (such as freedom from confinement, and choice about medical treatment or other physical touchings), while they limit legal protection to the most deliberate kinds of intrusions on these interests.<sup>122</sup> In this “not necessarily more

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<sup>121</sup> See the Model Penal Code definitions of negligence and recklessness, 2.02(2)(c), (d) (instructing that trier of fact should consider “the nature and purpose” of the actor’s conduct and the “circumstances known to him,” and whether the ignorance of the risk (in the case of negligence) or the conscious taking of the risk (in the case of recklessness) involves a “gross deviation” from a reasonable standard of care).

<sup>122</sup> Limiting protection to the most deliberate intrusions, and not encompassing, for example, negligent touchings or confinements, can be justified by the pragmatic benefits of limiting liability and ensuring that the expensive apparatus of legal liability is only invoked when the injurer could readily have avoided liability. The justification need not be based on the greater wrongfulness of intentional rather than negligent intrusions. See Simons, *Rethinking Mental States*, supra note 78=, at 523-527.

From another perspective, elucidated well by William Powers, some intentional torts are better understood as offering remedies for violating property-like entitlements:

Property law and tort law are ... interdependent. The intentional torts of trespass to land and trespass to chattels are built on the foundation of the entitlement structure created by property law. Although we look to tort principles to provide remedies and to provide exceptions to the entitlements, property law's pre-existing entitlement system provides much of the basis for these torts. Unlike the torts of negligence and nuisance, for which a court and a jury must determine whether an individual defendant acted reasonably under the circumstances, the torts of trespass to land and trespass to chattels simply depend upon who owns the entitlement. Battery law has a similar structure based on an entitlement to one's own body—although this entitlement structure is established by social convention, criminal law, and the remedies provided by tort law, rather than by an independent law of "bodily property." Even the torts of negligence and nuisance—which eschew entitlements in favor of ad hoc determinations of reasonableness—depend on the background entitlements of property law and the implicit entitlement we have to our own bodies. Although liability for these torts is determined on a case-by-case basis under a reasonableness standard, only persons who have property or bodily entitlements have "standing" to complain about an injury.

William Powers, *Border Wars*, 72 *Tex. L. Rev.* 1209, 1213 (1994) (footnotes omitted). See also Cane, supra note 80=, at 552.

faulty” category of intentional torts, it is not at all clear that the defendant should be limited to the narrow range of defenses (such as necessity and self-defense) provided in the Restatement Second for the traditional intentional torts of battery, assault, trespass, and false imprisonment. Indeed, in the economic torts, we see that a much broader range of considerations is deemed relevant, either as matters of formal defense or privilege or even as part of the prima facie case—for example, as part of the definition of “improper interference” in the tort of intentional interference with contract.<sup>123</sup> This strategy makes eminent sense.

In short, the drafters of the economic tort restatement should not feel bound by the artificial, rigid structure that the “simple” view of intentional torts suggests, but should consider these three strategies for developing a body of doctrine more subtle and more responsive to relevant tort principles and policies.

## V. Summary and conclusion

In some areas of intentional tort law, there have been intriguing developments since the Restatement Second was published, and some doctrines remain contentious or obscure. In battery doctrine, a fundamental disagreement persists about whether the tort requires merely the (single) intent to make a nonconsensual contact, or the (dual) intent both (1) to contact and (2) either to harm or to offend. The single intent view is much more plausible; the dual intent view cannot make much sense of the liability of well-intentioned doctors for battery if they exceed the patient’s consent, or the liability of pranksters, or the well-accepted doctrine of apparent consent. Moreover, there is much uncertainty about the appropriate respective scopes of the battery approach and the negligence approach to informed consent to medical treatment, with respect to information other than the nature or risks of the operation.

From a broader perspective, we should beware of an unduly simple picture of intentional tort law, a picture in which “intentional wrongdoers” are those who exhibit the most serious level of fault, relative to the fault of tortfeasors in the domains of negligence and of strict liability. Although doctrinal and practical consequences do follow from the bare characterization of a tort as intentional, in many contexts this simple view distorts the underlying legal phenomena, or fails to offer a plausible justification.

The first (“apples and oranges”) problem is with the assumption that “intentional” torts invariably or systematically exhibit a more serious degree of fault than torts of negligence display. Many actual tort doctrines, including even battery, belie this assumption.

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For the contrasting view that intentional tort doctrine should be subsumed within the reasonableness perspective of negligence doctrine, see Calnan, *supra* note 3=, at 229-238.

<sup>123</sup> Restatement Second of Torts, §767.

The second problem is (a lack of) generality: intentional tort law is not organized into a series of straightforward umbrella rules, e.g., prohibiting intentionally causing physical harm, intentionally causing emotional harm, and intentionally causing economic harm. And streamlining intentional tort doctrine to achieve greater generality and simplicity is both unrealistic and unjustifiable in principle. For example, the distinct protections in such varied torts as false imprisonment, invasion of privacy, and defamation cannot be understood as merely salient instances of a general norm against unjustified intentional causation of emotional harm.

Third, the hierarchy of fault is imperfect. Not all intentional torts involve fault; some are better characterized as imposing a kind of strict liability. And others contain a complex combination of fault requirements that in the aggregate approximate negligence, or are not clearly more culpable than negligence.

Three possible responses to these problems include:

(1) More explicitly distinguish multiple fault elements within a single tort doctrine (as is commonly done in modern criminal statutes employing the analytic structure of the Model Penal Code);

(2) Develop distinct standards for intentional tort doctrine and for ancillary doctrines such as the insurance exclusion or the workers' compensation exception for intentional torts;

(3) Recognize intentional torts as an alternative paradigm of tort doctrine, in stark contrast to the reasonableness paradigm that has come to dominate much of tort law in the last century.

If the drafters of the economic harm restatement respond in these ways to the oversimplified paradigm of intentional tort doctrine, the new restatement stands a much better chance of accurately depicting existing doctrine, clarifying its concepts, and making visible the normative commitments that the doctrine embodies.