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IS THERE A NEGLIGENT CIVIL BATTERY?

In recent years there has been some discussion concerning the negligent battery in criminal law.[1] Since, in many instances, the law of torts is similar to the criminal law, the problem is presented whether or not in civil law there may be such a battery based upon the negligence of the defendant.

The overwhelming weight of authority is that an intent to cause a harmful contact with the person of another is an essential element of a civil battery There are, however, various ways used by the courts to find this intent. If the act which causes the injury is a lawful one, it is necessary to prove an actual intent to maintain an action for battery [2] But, if the act itself is unlawful, then the intent of the wrongdoer is immaterial, because it is held that the actor intended to do the unlawful act and that intent is sufficient to sustain an action for assault and battery [3] Likewise, where the defendant's act was wanton and reckless, showing an utter disregard for the consequences (that is, where the act amounts to criminal negligence) and the plaintiff suffers injury, then the actor will be presumed to have intended those consequences;[4] or from reckless and wanton conduct, the courts may find a constructive intent to do the harm which the plaintiff sustains.[5]

In each instance, the court grants relief on the ground of an intentional battery It is obvious that there is no real intent to cause the injury except in the first case where the actor is performing a lawful act. There it must be shown that the defendant actually intended to injure the person of the plaintiff or some

[1] Hall, *Assault and Battery by the Reckless Motorist* (1940-41) 31 J. Crim. L. 133.

[2] Paxton v. Boyer, 67 Ill. 132 (1873), Hitzelberger v. Kanter, 181 Ill. App. 459 (1913), Biggins v. Gulf, C. & S. F Ry., 102 Tex. 417, 118 S. W 125 (1909)

[3] Peterson v. Haffner, 59 Ind. 130, 26 Am. R. 81 (1887), Bocher v. Trainer, 172 Mo. App. 376, 157 S. W 848 (1913), Carmichael v. Dolan, 25 Neb. 335, 41 N. W 178 (1889), Rolater v. Strain, 39 Okla. 572, 137 Pac. 96, 50 L. R. A. (N. S.) 880 (1913), Vosburg v Putney, 80 Wis. 523, 50 N. W 403 (1891).

[4] Land v. Backman, 223 Ill. App. 473 (1921), Mercer v Corbin, 117 Ind. 450, 20 N. E. 132 (1889)

[5] Reynolds v. Pierson, 29 Ind. App. 273, 64 N. E. 484 (1902).

third person. In all other cases, an implied intent or constructive intent is substituted for actual intent.

The language of the courts to the effect that one is presumed to have intended the natural and probable consequences of his acts, or that from one's reckless acts a constructive or implied intent may be deduced cannot make negligent acts intentional. Whenever courts resort to such language it is merely to allow recovery where there is no other way for them to grant relief. The use of presumptions and implications usually signifies a transition in the law. It is but an attempt upon the part of the courts to get away from the requirement of actual intent for recovery in the case of a civil battery Since, through the application of established principles, relief cannot be granted for a negligent battery, judges find a constructive intent in negligent acts and through this medium satisfy the actual rules of tort law as they exist today.

The present criminal law is in this transitional period and has advanced to the stage in which some cases[6] have already held that there can be a criminal negligent battery At the present time, most courts use vague, fictitional phrases to hold one liable for what amounts to a civil negligent battery, however, one state, Alabama, allows recovery in such a case.[7] In that state, the courts declare that an intent to injure is not essential to the liability of the person committing the assault and battery

It is submitted that instead of camouflaging their actions and hiding behind constructive and implied intent, the courts should allow a recovery for a battery resulting from mere civil negligence. Although all the states except Alabama expressly repudiate such a theory, in reality, they grant relief for the civil negligent battery Each time a court holds that an intent may

[6] Note (1942) 30 Ky. L. J. 418.

[7] Honeycutt v. Louis Pizitz Dry Goods Co., 235 Ala. 507, 180 So. 91 (1938) is the only Alabama case having a factual situation involving negligence. In that case plaintiff was injured when defendant negligently threw a lollipop into a crowd and struck plaintiff in the eye. The action was for an assault and battery and the court allowed the case to be submitted to the jury on the basis of the negligence of defendant. This decision was based upon a long line of *dictum* cases: Pizitz v. Blomburgh, 206 Ala. 136, 89 So. 287 (1921), Birmingham Ry., Light & Power Co. v. Coleman, 181 Ala. 478, 61 So. 890, 892 (1913), Seigel v. Long, 169 Ala. 79, 53 So. 753, 754 (1910); Carlton v. Henry, 129 Ala. 479, 29 So. 924, 925 (1901), Thomason v. Gray, 82 Ala. 291, 3 So. 38, 39 (1887); Chapman v The State, 78 Ala. 463, 465 (1885).

be implied from defendant's criminally negligent acts, or that the consequences may be presumed from his original act, it is really basing plaintiff's recovery upon a negligent battery The time has come to discard these subterfuges, face the actual results of the decisions today, and recognize the civil negligent battery as a basis for tort liability

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