View metadata, citation and similar papers at core.ac.uk

brought to you by CORE

provided by University of Kentucky

Kentucky Law Journal

Volume 21 | Issue 2 Article 1

1933

Restatement of the Law of Torts Annotated with Kentucky Decisions

Andrew J. Russell
University of Louisville

Follow this and additional works at: https://uknowledge.uky.edu/klj

Part of the State and Local Government Law Commons, and the Torts Commons

Right click to open a feedback form in a new tab to let us know how this document benefits you.

Recommended Citation

Russell, Andrew J. (1933) "Restatement of the Law of Torts Annotated with Kentucky Decisions," *Kentucky Law Journal*: Vol. 21 : Iss. 2 , Article 1.
Available at: https://uknowledge.uky.edu/klj/vol21/iss2/1

This Article is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.

KENTUCKY LAW JOURNAL

Volume XXI | January, 1933 | Number 2

THE AMERICAN LAW INSTITUTE'S

RESTATEMENT OF THE LAW OF TORTS ANNOTATED WITH KENTUCKY DECISIONS*

CONDUCT VIOLATING THE RIGHT TO FREEDOM FROM OFFENSIVE BODILY TOUCHINGS (BATTERY)

BY ANDREW J. RUSSELL**

Section 12. Causing an offensive touching of another person, although involving no bodily harm, unless privileged, subjects the one causing it to a liability to the other, if

(a) it is not consented to by the other, and

(b) it is directly or indirectly caused by

(i) an act done with the intention of bringing about a harmful or offensive touching or an apprehension thereof to the other or a third person, or

---

* This is the first installment of the Kentucky Annotations to the Restatement of the Law of Torts. The restatement work is being done by the American Law Institute. The annotation work is being done by the authority of and in cooperation with the Kentucky State Bar Association and the American Law Institute. It is being prepared on this and other subjects by the members of the faculties of the University of Louisville Law School and the University of Kentucky Law College. Other installments will appear in the Kentucky Law Journal. However Sections 1 to 11 inclusive will not appear in the Kentucky Law Journal. The author is starting with Section 12 because the material in the first eleven sections may easily and logically be covered in Sections 12 to 48 inclusive. This omission is made for the purpose of economizing space in the Law Journal. When the book is complete in a bound volume these first eleven sections will be included just as they appear in the Restatement. The author of this article is indebted to Mr. Joe R. Gathright, an honor student in the University of Louisville Law School, for valuable assistance.

** Andrew J. Russell, A. B., Berea College, 1926; LL. B., Yale University, 1928; Associated with Dean Robert M. Hutchins and Mr. Donald Slessinger in the preparation of articles on the law of Evidence and Psychology; Professor of Law, School of Law, University of Louisville, since 1929.

(ii) a breach of a duty to protect the other from such a touching or apprehension.

Annotation

Section 10 of the Kentucky Statutes provides that "no right of action for personal injury or injury to real or personal estate shall cease or die with the person injuring or injured, except actions for assault, slander, criminal conversation, etc." An accidental shooting constitutes an assault and battery under this statute and does not survive the one charged with the offense. Anderson v. Arnold's Exr. (1881), 79 Ky. 370, 2 Ky L. R. 364.

A death caused by negligently running over one with a wagon is not an assault and battery and does not survive. "Intention to do harm is of the essence of assault." Perkins v. Stein (1893), 94 Ky. 433, 22 S. W 649, 15 Ky. L. R. 203, 20 L. R. A. 861.

Note also Section 241 of the Constitution of Kentucky providing for a recovery for a death caused by negligence. The Kentucky Statutes provide under what circumstances and by whom recovery may be had.

See K. S. 4, allowing a widow and minor children, or either, or both of them, to recover for the death of a person caused by the careless, wanton, or malicious use of fire arms or weapons.

The terms "assault and battery" are used rather loosely in Kentucky. "Assault" is sometimes used to include both assault and battery. It is interesting to note that only "assault" is used in K. S. Sec. 10.

The plaintiff's son in order to oust the defendant's wife from the house for not paying rent, removed the furniture and the cap from the stove and poured water on the fire to "smoke her out" The woman was in bed sick. The Court of Appeals sustained an instruction that "if the jury should believe that the assault was willful and malicious it might in its discretion award punitive damages." Wood v. Young (1899), 20 Ky L. R. 1931, 50 S. W 541.

Section 13. A touching is offensive if

(a) it offends a reasonable sense of personal dignity, or

(b) although not causing bodily harm, it violates the physical structure of the other's body, or

(c) it creates a reasonable apprehension that it will cause bodily harm.

(a) A flicks a glove in B's face. This is an offensive touching of B.

(b) A, while walking in a densely crowded street, deliberately but unavoidably pushes against B. This is not an offensive touching of B.

(c) A, a surgeon, makes a trivial and harmless scratch

upon B's body in the course of an operation to which B has not consented. This is an offensive touching of B.

(d) A, who is suffering from a contagious skin disease, touches B's hands, thus putting B in reasonable apprehension of contagion. This is an offensive touching of B.

Annotation

"A battery is an actual infliction of violence on the person. The degree of the violence is not regarded in the law. Thus any touching of the person in an angry, revengeful, rude or insolent manner; spitting upon the person; jostling him out of the way; pushing another against him; throwing a squib or any missile or water upon him, striking the horse he is riding, whereby he is thrown; taking hold of his clothes in angry or insolent manner to detain him—is a battery. So, striking the skirt of his coat or the cane in his hand is a battery; for anything attached to the person partakes of its inviolability" Perkins v. Stein (1893), 94 Ky. 433, 15 Ky. L. R. 203, 22 S. W 649.

No decision has held that one is liable to another if he inflicts upon the other a touching which he knows will be offensive to the other's abnormally acute sense of personal dignity. This Section states the effect of the decided cases, and is not intended to express any opinion as to the advisability or inadvisability of recognizing liability in such case, as to which see Treatise.

Section 14. An offensive touching intentionally inflicted upon another without his consent creates liability although the other did not at the time know that it was being inflicted upon him.

(a) A, a surgeon, while B is under anesthesia, makes an examination of her person to which she has not given her consent. A is liable to B.

(b) A kisses B while B is asleep but does not waken or injure her. A is liable to B.

Annotation

No local authorities.

Section 15. The touching may be by any part of the actor's body, by his clothing, by anything held by or attached to him, or by anything set in motion and directed by him against the other.

(a) A touches B with a cane, a stick, or glove, or throws even a drop of water upon him. A is liable to B if the touching is intended to be and is offensive.

Annotation

No local authorities. See the annotation to Section 13 for illustrations of a battery and annotation to Section 12 on the question of intention.

Section 16. (1) Clothing worn by or anything so closely attached to one as to be reasonably regarded as a part of one's personality, partakes of its inviolability and a touching thereof is a touching of one's person.

(a) A takes hold of the lapel of B's coat to detain him against his will, or strikes a cigar from B's mouth or a cane from B's hand. This is an offensive touching of B's person.

(2) If the thing, though attached to the other's person, is not so closely attached to it as to be reasonably regarded as part of his personality, a touching of it is not a touching of his person, unless the touching is intended to be and is offensive to the other's personality and is not directed against the thing as a thing.

(b) A is leading a dog owned by himself or another on a leash. The dog snaps at B's heels and B kicks the dog. This is not a touching of A's person.

(c) A, being angry at B and desiring to insult him, kicks B's dog which he is leading on a leash. This is a touching of B's person.

Annotation

The game warden forcibly took a pair of saddle bags which the plaintiff was holding in his hands under a claim of right to search. The court held that defendant was privileged because "the uncontradicted proof shows that no assault was committed and that the case is one of trespass only" Manning v. Roberts (1918), 179 Ky. 550, 200 S. W 937.

Section 17. An offensive touching intentionally inflicted on another's person without his consent creates liability although it causes no bodily harm to him.

Comment

An offensive touching is actionable even if it benefits the physical condition of the other's body Bodily harm is defined in Section 3.

(a) A intentionally spits in B's face. A is liable to B

though his act acuses B no physical pain and does no substantial harm to his body or clothing.

(b) A, a surgeon, having performed an operation on B's nose to which B has consented, proeeds to remove a polypus which B has refused to permit him to remove. The operation causes no pain, involves no expense for its after treatment and is successful and beneficial. A is liable to B.

Annotation

The Kentucky Courts hold in accordance with this view. The defendant came to the home of a young married woman and took undue liberties with her person by rubbing her face and squeezing her shoulders and breast. The defendant was held liable. Hatchett v. Blacketer (1915), 162 Ky. 266; 172 S. W 533.

Section 18. The intentional infliction of an offensive touching, if privileged, creates no liability

Section 19. The infliction of an offensive touching upon another does not subject one causing it to a liability if the other consents thereto.

Section 20. If an act is done with the intention stated in Section 22 (1) and causes an offensive touching of another, the actor is liable whether the offensive touching results directly or indirectly from the act.

(a) A daubs with filth a towel which he expects B to use in wiping his face, for the purpose of having B smear his face with it. B does so. A is liable to B for the injury which he has done to B's personal dignity

(b) A pulls from under B a chair upon which A knows B is about to sit. B falls to the floor but sustains no bodily harm. A is liable to B.

Annotation

No local authorities.

Section 21. The touching, unless it results from a breach of duty to protect another therefrom, must be caused by an act of the person whose liability is in question.

(a) A takes hold of B's hand and with it strikes C or pushes B against C doing no bodily harm. A, and not B, is liable to C.

Annotation

This section is supported by the Kentucky authorities. The defendant's conductor shoved and kicked plaintiff's father against her

while committing assault and battery on the father. The plaintiff suffered bodily harm. C. & O. Ry. Co. v. Robinet (1913), 151 Ky. 778, 152 S. W 976, 45 L. R. A. (N. S.) 433.

A and B would both be liable in C. & O. Ry. Co. v. Robinet, supra, if it could be shown that there was a conspiracy between them or that they are acting in concert. Kroger Grocery & Baking Co. v. 'Flora (1930), 237 Ky. 191, 35 S. W. (2) 275.

In an action by the plaintiff against several defendants for assault and battery, evidence of a previous affray between some of the parties is admissible to show a combination of the defendants to beat the plaintiff. Sodusky v. McGee (1831), 28 Ky. (5 J. J. Marsh.) 621.

There is joint liability where one procures the beating of another. The beating must have been procurred and not merely encouraged. It is error to instruct the jury to find for the plaintiff if it finds that the defendant encouraged the beating. The court should have used "procured' instead of "encouraged." Bird et al. v. Lynn (1850), 49 Ky. (10 B. Mon.) 422.

Section 22. (1) To create liability an act which causes an offensive touching, involving no bodily harm, must be done with the intention of bringing about either a harmful or offensive touching or an apprehension thereof.

Comment

In order that an offensive touching may be actionable it is not necessary that the actor intends to inflict an offensive touching. It is enough that he intends to inflict either an offensive or a harmful touching or to bring about an apprehension thereof.

(a) A aims a blow at B with a heavy stick. A bystander checks his arm so that the stick merely grazes B's arm, doing it no harm. A is liable to B.

(b) A, intending merely to frighten B, throws a bucketful of water towards him. The water unexpectedly splashes in B's face. This is an actionable touching of B's person.

(2) Causing a touching which is offensive but involves no bodily harm does not create liability unless done with the intention stated in Subsection (1).

(c) A, without any intention of wetting anyone, throws water out of his window at night. He knows that B is walking down the street towards his house and that there is a strong probability, though, not a certainty, that the water will wet B. A is not liable to B if a small quantity of water splashes in his face but does him no bodily harm.

(d) A throws dirty water from his window at B who is walking on a street below A few drops fall on B's hand but do him no bodily harm. A is liable to B.

(e) A drives an automobile through a city street. Being engrossed in conversation, he does not see B, a pedestrian, who, in seeing A's car approaching, steps aside. The mudguard brushes B's coat and the wheels splash mud in B's face. A is not liable to B.

(f) A while driving an automobile sees B standing on the sidewalk. He drives his car through a muddy puddle for the purpose of splashing B. A few drops of muddy water splash on B's hand but neither do her bodily harm nor injure her clothing. A is liable to B.

(g) A drives a motor car recklessly through a crowded street at a speed prohibited by ordinance. The pedestrians upon the street, seeing him approach, leap out of the way, but the mudguard brushes the coat of B, one of the pedestrians, and the wheel splashes mud in the face of C, another pedestrian. A is not liable to B or C.

Annotation

The Kentucky decisions are in accord with this section. One can recover punitive damages only when the striking was wilful and malicious. Hollis v. Gorham (1902), 23 Ky. L. R. 2185, 66 S. W 823.

In a battery case the court held that any evidence which might tend to show malice or improper motive on the part of the defendant is admissible. Sodusky v. McGee (1830), 27 Ky. (4 J. J. Marsh.) 267.

An injury inflicted by the negligence of one is not an assault and battery because of the absence of an intention to do harm. Perkins v. Stein (1893), 94 Ky. 433, 15 Ky. L. R. 203, 22 S. W 649, 20 L. R. A. 861.

The case of negligence is to be distinguished from Anderson v. Arnold's Exr.'s. (1881), 79 Ky. 370, 2 Ky. L. R. 364, where the plaintiff's intestate was accidentally shot and killed by the defendant who was shooting at another person, on the ground that the shooting was a wilful act.

Section 23. An act is done with the intention of inflicting upon another a harmful or offensive touching or putting another in apprehension thereof if it is done for the purpose of bringing about such a touching or apprehension or with knowledge that such a touching or apprehension will result from the act.

Annotation

No local authorities.

Section 24. An act which is intended to affect a third person in the manner stated in Section 23 but which causes an offensive touching to another creates liability to the other as fully as if intended to so affect him.

(a) A throws a bucketful of water over B for the purpose of wetting him. C is known by A to be standing arm in arm with B. A neither knows nor has reason to expect that D is in the vicinity of B. Just as A throws the water, D suddenly comes up behind B. The water wets B, C and D. A intends to wet B since he throws the water with the purpose of wetting B. He intends to wet C, since, although he has no desire to wet C, he knows that water thrown at B will wet C. While A does not intend to wet D, A is liable to D because D is wet by an act intended to wet B and C.

Annotation

The defendant in making an attack on plaintiff's husband ran against plaintiff. The defendant was held liable to the plaintiff. McGee v. Vanover (1912), 148 Ky. 737, 147 S. W 742, Ann. Cases 1913E, 500.

The defendant shot and killed the plaintiff's slave while the slave was stealing the defendant's chickens. The defendant thought that he was using small shot that would not kill but only wound. By mistake the defendant used large shot, not intended, and killed the slave. The lower court instructed the jury to find for the plaintiff if the defendant shot without speaking to the slave. The upper court held that this was error. The instructions should have been qualified so that if the defendant intended only to wound the slave and reasonably thought that the shot would only have that result, and if it was at night when the slave could not be apprehended judgment should be for the defendant. McClelland v. Kay (1853), 53 Ky. (14 B. Mon.) 84.

Section 25. If an act, which causes an offensive touching of another is done with the intention stated in Section 22 (1) it creates liability although it is not inspired by personal hostility or desire to offend.

(a) A and B are in the habit of playing rough practical jokes on one another. A mistakes C and B and pulls his hat down over his eyes. A is liable to C.

Annotation

No local authorities.

Section 26. (1) An offensive touching caused by the breach of a duty to protect another therefrom creates the liability stated in Section 12.

Annotation

As to the duty of a husband to protect another from the assaults of his wife see Faulkner v. Davis (1897), 18 Ky L. R. 1004, 38 S. W 1049; Phillips v. Phillips (1847), 46 Ky. (7 B. Mon.) 268; Bobich v. Dackow (1929), 229 Ky. 830, 18 S. W (2nd) 280; Beavers v. Bowen (1904), 26 Ky. L. R. 291, 80 S. W. 1165.

(2) There is no general duty to protect another from offensive. touchings inflicted by a third party

(a) A knows that B is about to throw a glass of wine in C's face. A could, without any inconvenience to himself, prevent B from carrying out his purpose but deliberately refrains from so doing or upon B's request refuses to do so. B, and not A, is liable to C.

Annotation·

The relationship between a defendant and one may be such as to impose a duty on a defendant to stop an attack on a third party by a companion. See a very unusual case in Gillon v. Wilson (1826), 19 Ky. (3 T. B. Mon.) 216.

CONDUCT VIOLATING THE RIGHT TO FREEDOM FROM APPREHENSION OF A HARMFUL OR OFFENSIVE BODILY TOUCHING (ASSAULT)

Section 27. Causing to another an apprehension of an immediate and harmful or offensive touching, unless privileged, subjects the one causing it to a liability to the other·

(a) if it is not consented to by the other, and

(b) it is directly or indirectly caused by

(i) an act, other than the mere speaking of words, intended to bring about such a touching or an apprehension thereof to the other or a third person, or

(ii) a breach of duty to protect the other from such apprehension.

Annotation

There are not many cases in Kentucky on assault. Most of them include a battery.

"An assault is an unlawful offer of corporal injury to another by force, or it is force unlawfully directed, toward the person of another under such circumstances as to create a well founded fear of immediate peril." Justice v. Phillips (1885), 7 Ky. L. R. 439, 13 Ky. Op. 836.

Comment

A harmful touching is one which causes bodily harm as defined in Section 3. An offensive touching is such a touching as is defined in Section 13.

Annotation

Flourishing a cocked pistol about in an angry manner and pointing it at one constitutes an assault. Although the defendant had no ill will against the plaintiff. Justice v. Phillips (1885), 7 Ky. L. R. 439; 13 Ky Op. 836.

Section 29. An attempt to bring about a harmful or offensive touching or an apprehension thereof does not create the liability stated in Section 27, if the attempt is abandoned or frustrated before the other knows of it.

(a) A, standing behind B, points a pistol at him. C overpowers A before he can shoot. B, hearing the noise, turns around and for the first time realizes the peril in which he has been. A is not liable to B.

Annotation

No local authorities.

Section 30. (1) There is no liability if the other although knowing of the act and realizing its purpose does not believe that it actually threatens a touching.

(2) There is a liability as stated in Section 27, although the other believes that the touching may be prevented by self-defensive measures, flight or intervening force.

(a) A aims a blow at B. B is confident that he can escape the blow by retreat or by dodging it and succeeds in doing so. A is liable to B.

(b) A, when within a few feet of B, starts towards him threatening to hit him. A number of B's friends are standing

about. B believes that his friends will interfere and prevent A from striking him. They do so. A is liable to B.

Annotation

No local authorities.

Section 31. Except as stated in Section 48, the apprehension must be of a touching inflicted by the one who causes the apprehension.

(a) A, for the purpose of frightening B, says to him, "Hide! C is pointing a pistol at you." B is frightened but suffers no bodily harm. A is not liable to B whether his statement to B is true or false.

Annotation

No local authorities.

Section 32. The other must be put in apprehension of a touching of his own person.

(a) A points a pistol at the husband of B with the intention of causing B to apprehend an immediate touching of her husband. A is not liable to B.

Annotation

The plaintiff cannot recover for fright caused by a battery on her husband. There was no evidence of any intention to create fear in her, nor was she put in fear of harm to herself. McGee v. Vanover (1912), 148 Ky. 737, 147 S. W 742, Ann. Cas. 1913E, 500.

The defendant in a drunken condition made an atrocious attack on McConnell just outside the plaintiff's room. The plaintiff hearing the noise and threats was frightened and suffered a miscarriage. The defendant neither knew or had reason to know that the plaintiff was in the room. The court held that the defendant was not liable to the plaintiff. Reed v. Ford (1908), 129 Ky. 471, 112 S. W 600.

Shields went into his house after a combat with defendant. His wife who had recently given birth to a child seeing blood on his hand became nervous and ill. Milk stopped flowing which resulted in under nourishment of the child and retarding its growth. The court refused consideration of these facts as items of recovery. Shields Admr. v. Rowland (1912), 151 Ky. 136, 151 S. W 408.

Section 33. It is not necessary that an act, which puts another in apprehension of an immediate and harmful or offensive touching, be such as would put a person of ordinary courage in apprehension of a touching.

Annotation.

The plaintiff must reasonably believe that she is about to be struck. Morgan v. O'Daniel (1899), 21 Ky. L. R. 1044, 53 S. W 1040.

Section 34. It is not necessary that the other believe that the actor intends to inflict a touching upon him.

(a) A fires a pistol at the ground near B's feet for the purpose of making him dance, having obviously no intention of hitting B. B, fearing that A's markmanship may not be so good as A himself believes it to be, is put in apprehension that he may be shot. A is liable to B.

Annotation

No local authorities.

Section 35. (1) The apprehension must be of an immediate touching.

Comment

The act must be apparently efficient to carry into immediate effect an intention to inflict the touching apprehended by the other. It is not necessary that one shall be within striking distance of the other or that a weapon pointed at the other shall be in a condition for instant discharge. It is enough that one is so close to striking distance that he can reach the other or that he can make the weapon ready for discharge within a very short interval of time.

(a) A and B are engaged in an altercation in A's shop. B refuses to leave A's shop at A's order. A collects his workmen who muster around B, tucking up their sleeves and aprons and threatening to break B's neck if he does not leave. A and his workmen are liable to B.

(b) A threatens to strike B and rushes towards him with hand or weapon raised. A's purpose is frustrated while he is still some few feet from effective striking distance. A is liable to B.

(c) A points an uncocked pistol at B, who knows it is uncocked. The pistol can be cocked and made ready for effective use in an instant. A is liable to B.

Annotation.

It is an assault for one to use threatening language and to make menacing gestures towards another. Morgan v. O'Daniel (1899), 21 Ky L. R. 1044, 53 S. W 1040.

The plaintiff ran towards the defendant reaching for him with one hand, with the other dropped by his side causing the defendant to reasonably believe that he had a knife concealed therein. Held to be an assault. Hixon v. Slocum (1913), 156 Ky. 487, 161 S. W 522, 51 L. R. A. (N. S.) 838.

(2) An act apparently intended as a step to carry out a purpose to inflict a future touching, but not apparently efficient to cause an immediate touching, does not create liability

Comment

Such an act is mere preparation. The point at which an act ceases to be preparation for a future touching and threatens a touching so immediate as to be actionable is incapable of statement so exact as to be automatically applicable to the circumstances of every case which may arise. What is immediate depends upon the circumstances of the particular case and is a matter for the judgment of the court or jury

(d) A threatens to shoot B and leaves the room with the express purpose of getting his revolver. A is not liable to B.

(e) A threatens to shoot B, having in his hand a revolver which both know to be unloaded. He goes to the desk to get cartridges to load the revolver but before he can put them in the revolver he is overpowered by bystanders. A is not liable to B.

Annotation

The court held that there was no assault where the defendant's son threatened to nail up all the doors if plaintiff did not move from the house where she had not paid rent. Plaintiff was in bed with flu and left sooner than she would have, causing her illness. Smith v. Gowdy (1922), 196 Ky. 281, 244 S. W 678, 29 A. L. R. 1353.

Section 36. One who intentionally puts another in apprehension of an immediate and harmful or offensive touching is liable although he gives the other an option to escape the touching by obedience to a command given by him.

Comment

It is immaterial whether the act which the actor commands the other to do or cease doing is or is not an act which the other is under a legal duty to do or to cease doing. It is also immaterial whether the other does or does not obey the command.

(a) A points a pistol at B and says "Your money or your life." A is liable to B.

(b) A, standing near B, draws back his hand and threatens to knock B down unless he retracts certain defamatory statements that he has made about A or a member of his family A is liable to B.

(c) A, standing near B, draws back his hand and threatens to knock B down if he does not stop talking. A is liable to B.

(d) A owes B a sum of money B points a gun at A, saying· "If you do not pay me my money, I will have your life." B is liable to A.

Annotation

No local authorities.

Section 37. If the act has put another in apprehension of an immediate and harmful or offensive touching it creates liability although the actor abandons his purpose or his purpose is frustrated.

(a) A threatens to shoot B and points a pistol at him, but changes his purpose and lowers it without firing. A is liable to B.

(b) A points a pistol at B but, before he can shoot, C, a bystander, strikes the pistol from his hand. A is liable to B.

(c) A points at B a pistol which he, A, has forgotten to load. He unsuccessfully attempts to shoot B. A is liable to B.

(d) A points a loaded pistol at B but before he can shoot, B knocks him down. A is liable to B.

Annotation

No local authorities..

Section 38. The intentional putting of another in apprehension of an immediate and harmful or offensive touching, if privileged, does not create liability

Annotation

Privilege is treated in Section 78 to Section 164 of the Restatement.

Section 39. To create liability the apprehension must be without the consent of the person put in apprehension.

Annotation

Consent is treated in Section 66 to Section 77 of the Restatement.

Section 40. If an act is done with the intention stated in Section 43 (1) and causes to another an apprehension of an immediate and harmful or offensive touching, the actor is liable whether the apprehension results directly or indirectly from the act.

Annotation

No local authorities.

Section 41. The apprehension, unless it results from a breach of a duty to protect another therefrom, must be caused by an act done by the one whose liability is in question.

(a) A takes hold of B's hand and with it strikes at C. C dodges the blow A and not B is liable to C.

Annotation

No authorities as to a battery committed in a similar way; see annotation to Section 21.

Section 42. (1) To create the liability stated in Section 27 the apprehension, unless it results from a breach of a duty to protect another therefrom, must be caused by an act other than the mere speaking of words.

(a) A utters a threat to shoot B. A does no act to carry it into effect. A is not liable to B.

Annotation

Accord. "In law mere words cannot justify an assault, though they can be considered by the jury in mitigation of damages." Doerhoefer v. Shewmaker (1906), 123 Ky. 646, 29 Ky. L. R. 1193, 97 S. W 7; Grau et al. v. Forge et al. (1919), 183 Ky. 521, 209 S. W 369, 3 A. L. R. 642.

Mere words will not constitute an assault. Louisville R. R. Co. v. Kramer (1928), 226 Ky. 739, 11 S. W (2nd) 930. (Words spoken were pleaded in defense to an action of assault and battery.)

Reed v. Maley (1903), 115 Ky. 816; 74 S. W. 1079, 25 Ky. L. R. 209, 62 L. R. A. 900. (The defendant solicited the plaintiff to have intercourse with him.)

L. & N. R. R. Co. v. Simpson (1916), 171 Ky. 138, 188 S. W 297. (The defendant ordered the plaintiff from his house for no just cause, using abusive language)

See also Hixon v. Slocum (1913), 156 Ky. 487, 161 S. W 522, 51 L. R. A. (N. S.) 838; Morgan v. O'Daniel (1899), 21 Ky. L. R. 1044, 53 S. W 1040.

(2) Words accompanying or preceding acts, if heard or known and understood, may be evidence of the other's apprehension and of the actor's intention to bring it about.

(b) A half draws his sword from its scabbard and says to B "If it were not assize time I would not take such language from you." A is not liable to B, although but for his words his conduct would have been actionable.

(c) A utters a threat to shoot B and puts his hand to his hip pocket. B believes that A is about to draw a pistol and carry out his threat. A has no pistol. A is liable to B.

Annotation

The plaintiff was approaching the defendant in a menacing manner using threatening language. The plaintiff's right hand was dropped by his side. In fact it was in this position because of its crippled condition. The defendant thought the plaintiff had a knife. There was an assault. Hixon v. Slocum (1913), 156 Ky 487, 161 S. W. 522, 51 L. R. A. (N. S.) 838.

Section 43. (1) To create liability an act which causes only an apprehension of an immediate and harmful or offensive touching must be done with the intention of bringing about either a harmful or offensive touching or an apprehension thereof.

Comment

If an act causes to another an apprehension of an immediate and harmful or offensive touching, it is not essential to the existence of liability that it is done with the intention of bringing about such an apprehension or that the actor has reason to recognize the probability that such an apprehension may result from his act. It is enough that the act is done with the intentions of bringing about a harmful or offensive touching.

(a) A throws a stone at B whom he believes to be asleep. B is in fact awake, sees A throwing the stone and escapes being hit by dodging it. A is liable to B.

(b) A, during an altercation, raises a glass of wine to

throw it in B's face. Bystanders interfere and prevent him from throwing it. A is liable to B.

(c) A points a gun, which he believes to be loaded with blank cartridges, at B and pulls the trigger. The cartridge is blank and B, although, frightened, is not injured. A is liable to B.

Annotation

No local authorities.

(2) An act which, while causing to another an apprehension of an immediate and harmful or offensive touching, is not done with the intention stated in Paragraph (1) and invades no interest of the other except his interest in freedom from such apprehension, does not create liability, although a reasonable man, under the circumstances which the actor knows or has reason to know would recognize a probability that the act would cause such an apprehension.

Comment

The interest in freedom from apprehension of an immediate and harmful or offensive touching is protected only against such acts as are done with the intention stated in Subsection 1. Therefore, a mere apprehension, however negligently caused, creates no liability. Such an apprehension, directly or indirectly caused by an act done without the intention stated in Subsection 1, is not actionable although a reasonable man would recognize the act as containing a probability of causing such an apprehension, and this is so, although the actor himself recognizes that his act makes such an apprehension highly probable. The fact that the actor realizes that his act creates such a probability may be evidence that he intends to bring about such an apprehension but does not of itself make him liable.

There may, however, be a liability for the invasion of interests, other than the interest in freedom from such an apprehension, although the invasion is caused by an apprehension unintentionally created. Such a liability may arise if the interest invaded is protected against merely negligent invasion and the circumstances which the actor knows or has reason to know are such that a reasonable man would recognize it as probable that an apprehension of a harmful or offensive touch-

ing would materially affect such interest. The principles which determine liability for an invasion of the interest in freedom from bodily harm and of other interests also protected against negligent conduct by the unintentionally, but negligently, putting another in apprehension of a harmful or offensive touching, are stated in those divisions of the restatement which deal with the negligent invasions of the respective interests concerned.

(d) A drives a car at a very high rate of speed down a city B steps out from the curb to cross the street and then sees A's car coming rapidly towards him. He leaps back and barely escapes. If B suffers no bodily harm as a result of his fright, A is not liable to him although any reasonable man would have recognized that driving a car in such a manner was very likely to cause serious injury to pedestrians.

Annotation

"Intention to do harm is of the essence of assault." Perkins v. Stein (1893) 94 Ky. 433, 22 S. W 649, 15 Ky. L. R. 203, 20 L. R. A. 861.

Section 44. An act is done with the intention of inflicting upon another a harmful or offensive touching or putting another in apprehension thereof if it is done for the purpose of bringing about such a touching or apprehension or with knowledge that such a touching or apprehension will result from the act.

(a) A fires a gun at B. The bullet misses B but B, knowing of A's attempt, is put in apprehension of being touched. A intends to inflict a harmful touching on B and B is put in apprehension of such a touching. A is liable to B.

(b) A points at B a pistol which A, but not B, knows to be unloaded. A intends to put B in apprehension of a harmful touching and B is put in such an apprehension. A is liable to B.

(c) A, intending to kill B, throws a bomb into a room in which he knows B is in company with C, against whom A has no hostile purpose. The bomb does not go off but both B and C are put in apprehension. A, having thrown the bomb for the purpose of injuring B, intends to inflict a harmful touching upon him. A, though having no desire to injure C, knows that if the bomb explodes it must injure C as well as B and,

therefore, intends to inflict a harmful touching on C. A is liable to B and C, both of whom A puts in apprehension of a harmful touching.

Annotation

No local authorities.

Section 45. An act intended to affect a third person in the manner stated in Section 44 but which causes another an apprehension of an immediate and harmful or offensive touching, creates liability to the other as fully as if intended so to affect him.

(a) A and B are trespassing in C's woods. C sees B and points a gun at him and threatens to shoot him. A at the moment comes from behind a tree, and, seeing C's gun pointed at him, is put in apprehension of being shot. C does not intend to bring about either a touching or apprehension thereof to A, but since A is put in apprehension of being harmfully touched by an act intended to inflict such a touching on B, C is liable to A.

Annotation

No local authorities.

Section 46. To create liability stated in Section 27, it is not necessary that one has, or believes that he has, the ability to inflict the touching which his act apparently threatens.

Comment

It is only necessary that the other believes that one has the ability and that one intends to bring about such belief.

(a) A, knowing a pistol to be unloaded, points it at B and threatens to shoot him. B believes the pistol to be loaded. A is liable to B.

Annotation

The plaintiff needs only to reasonably believe that she is about to be touched. Morgan v. O'Daniel (1899), 21 Ky. L. R. 1044, 53 S. W 1040.

Section 47. If an act which puts another in apprehension of an immediate and harmful or offensive touching is done with the intentions stated in Section 43 (1) it creates liability, although it is not inspired by personal hostility or desire to offend.

(a) A, as a joke upon B, disguises himself as a tramp and accosts B on a lonely road, and, pointing an unloaded pistol at B says, "Your money or your life." A is liable to B.

Annotation

In an action of assault the lower court instructed the jury that if the defendant did *intend* or *attempt* to strike the plaintiff, to find for the plaintiff, but if the defendant did not intend or attempt to strike the plaintiff and was not in striking distance of her, to find for the defendant. This instruction was held to be erroneous because all that is necessary to constitute an assault is that the plaintiff reasonably believes that she is about to be struck. Morgan v. O'Daniel (1899), 21 Ky. L. R. 1044, 53 S. W 1040.

The defendants in a group armed with clubs went to the plaintiff's house to rescue an idiot which was being held by the plaintiff. An affray ensued. The lower court instructed the jury that "if a man or men, armed with clubs and other weapons, beset to come into a man's house in a threatening manner it is an assault in law." The court held this instruction to be erroneous saying "it is of the essence of an assault, therefore, that the act which constitutes the assault should be done with an intention to do some personal injury." Metcalfe v. Conner (1821), 16 Ky. (4 Littell) 370.

Section 48. (1) An apprehension of an immediate and harmful or offensive touching caused by the breach of duty to protect another therefrom creates the liability stated in Section 27.

Annotation:

No local authorities.

(2) There is no general duty to protect another from being put by a third party in apprehension of an immediate and harmful or offensive touching.

(a) A knows that B is about to aim an empty gun at C. A could, without inconvenience, prevent B from doing so or could inform C that the gun is unloaded. He does neither. B points the gun, putting C in apprehension. A is not liable to C.

Annotation

No local authorities.