MITCHELL | HAMLINE School of Law

Mitchell Hamline Law Review

Volume 49 | Issue 2 Article 2

2023

Civil Liability for Sexual Misconduct

Mike K. Steenson
Mitchell Hamline School of Law, mike.steenson@mitchellhamline.edu

CIVIL LIABILITY FOR SEXUAL MISCONDUCT

Mike Steenson[†]

[†] Bell Distinguished Professor of Law, Mitchell Hamline School of Law. The author thanks St. Olaf College students Nina Dang & Melissa Estrada for their summer research on this project, and research assistant Mike McCall, Mitchell Hamline School of Law for his research.

I. INTRODUCTION

In *Florek v. Vannet*,[1] a case based on a claim of unconsented sexual contact, the plaintiff asserted three claims against the defendant: battery, negligence, and negligence per se based on the defendant's violation of Minnesota's third degree criminal sexual conduct statute.[2] The plaintiff dismissed the negligence claim.[3] The case was tried by a jury, which found against the plaintiff on the battery claim but in her favor on the negligence per se claim.[4]

While the opinion is nonprecedential, it demonstrates not only the limitations on battery actions in cases involving nonconsensual sexual contact, but also the unusual application of negligence per se theory incorporating Minnesota's criminal sexual conduct as the platform definition of what is reasonable conduct.[5] The case effectively appears to have created a new cause of action—negligent sexual contact.[6]

Although many cases involving sexual batteries are pursued as negligence claims against persons or entities who are either vicariously liable for the conduct of individuals who commit sexual batteries or otherwise are negligent in failing to prevent them,[7] this Article uses *Florek* as a springboard to examine the potential theories of recovery for sexual abuse against the person who initiated that contact.[8] *Florek* has broader implications and

---

[1] No. A18-0997, 2019 WL 1320619 (Minn. Ct. App. Mar. 25, 2019).

[2] MINN. STAT. § 609.344, subdiv. 1(d) provides, "A person who engages in sexual penetration with another person is guilty of criminal sexual conduct in the third degree if any of the following circumstances exists . . . [if] the actor knows or has reason to know that the complainant is mentally impaired, mentally incapacitated, or physically helpless." The penalty may be up to "(1) to imprisonment for not more than 15 years or to a payment of a fine of not more than $30,000, or both." *Id.* § 609.344, subdiv. 2.

[3] *Florek*, 2019 WL 1320619, at *1.

[4] *Id.*

[5] *Id.* at *3.

[6] *Id.*

[7] *See, e.g.*, Doe 169 v. Brandon, 845 N.W.2d 174 (Minn. 2014) (allegations of negligence and negligent supervision); Doe v. Columbia Heights Sch. Dist., 873 N.W.2d 352 (Minn. Ct. App. 2016) (allegations of vicarious liability and negligent supervision); Jane Doe 43 C v. Diocese of New Ulm, 787 N.W.2d 680 (Minn. Ct. App. 2010) (allegations of vicarious liability, breach of fiduciary duty, and negligent supervision and retention).

[8] Many cases arising out of sexual abuse are brought against the employer of the person committing the abuse. Employer liability is not an issue in this case, although the vicarious liability issue obviously looms over these cases as well. Intentional misconduct by an employee necessitates a different vicarious liability standard than negligent misconduct by an employee. In Minnesota, vicarious liability as a theory of recovery for claims of sexual assault is based on the supreme court's holding in *Lange v. National Biscuit Co.*, 211 N.W.2d 783 (Minn. 1973). In *Lange*, a cookie salesman assaulted a grocery store manager during a dispute about the salesman's behavior while stocking his cookies in the manager's store. *Id.* at 784. The manager brought a claim for assault against the salesman's employer under a theory of vicarious liability. *Id.* Prior to *Lange*, vicarious liability attached only if the tortfeasor's conduct was motivated by a desire to further his employer's business. *Id.* The

court found this rule problematic, in part, because it potentially provided employers immunity from liability for conduct that they benefited from while leaving the public exposed to harm without an avenue for redress. *Id.* at 785. In striking down the motivation requirement, the court held that an employer who knows he is liable for the intentional acts of his employee "can and should consider this liability as a cost of his business." *Id.* The court's public policy-based decision resulted in a two-part test that finds an employer liable for the intentional torts of his employee when (1) the source of the attack is related to the duties of the employee, and (2) the assault occurs within the work-related limits of time and space. *Id.*

Whether or not sexual assault can be "related to the duties of employment" was addressed by the court in *Marston*. Marston v. Minneapolis Clinic of Psychiatry and Neurology, Ltd., 329 N.W.2d 306 (Minn. 1982). In *Marston*, a psychologist sexually assaulted two patients during therapy sessions in his office. *Id.* at 308. The patients brought claims against the provider and his practice under a theory of vicarious liability. *Id.* In a decision that affirmed the *Lange* test and clarified its scope-of-employment prong, the court held that whether a sexual assault occurred within the scope of employment was a question of fact. *Id.* at 311. The public policy rationale of the *Lange* court was that employers are in a better position than the general public to foresee certain intentional acts committed by their employees. *Lange* at 785. According to the court in *Marston*, the patient's submission of expert testimony that sexual contact between psychologists and patients is a "well-known hazard" was sufficient to create a genuine issue of material fact as to the foreseeability of the attack. 329 N.W.2d at 311.

The means of establishing foreseeability was a relevant issue in a series of cases after *Marston*. In *P.L. v. Aubert*, 527 N.W.2d 142 (Minn. Ct. App. 1995), P.L., a minor student was sexually assaulted by a teacher. P.L. brought a claim against the teacher's employer, the school district. *Id.* at 145. The school district's motion for summary judgment was granted and the student appealed. *Id.* at 144. Because the assaults occurred at school, the time and place prong of the *Lange* test was satisfied, and the remaining issue was whether the abuse was a foreseeable risk within the scope of employment. *Id.* at 146. Although the student did not submit evidence supporting the foreseeability of his abuse, the court of appeals reversed the grant of summary judgment, holding that sexual abuse between a teacher and student has *become* a well-known hazard. *Id.* at 147 (emphasis added). The court noted the district was aware of other abuse between teachers and students and that "Aubert's conduct is not so unusual or startling that it would seem unfair to include the resulting loss from among other costs associated with operating the school district." *Id.*

The Minnesota Supreme Court reversed the court of appeals. P.L. v. Aubert, 545 N.W.2d 666 (Minn. 1996). In essence, the court disagreed with the court of appeals' finding that sexual abuse of a student by a teacher was a foreseeable, well-known hazard, as a matter of law. *Id.* at 668. To survive the motion for summary judgment the student needed to raise an issue of fact by submitting evidence that the sexual abuse in question was a well-known hazard. *Id.* Without testimony or an affidavit supporting a claim that a sexual assault is a well-known hazard, "there can be no implied foreseeability." *Id.* Furthermore, the court held that sexual contact between a student and teacher is not an act that is "indivisible" from the act of teaching, and liability therefore cannot be imputed. *Id.*

Two years after the decision in *Aubert*, the court of appeals, in an unpublished opinion, affirmed a motion for summary judgment despite the plaintiff's submission of an affidavit that sexual assault was a well-known hazard within the circumstances she was attached. In *Fahrendorff v. North Homes, Inc.*, No. Co-98-129, 1998 WL 463310 (Minn. Ct. App. Aug. 11, 1998), Fahrendorff, a counselor, sexually assaulted a minor at the ITASKIN group home. *Id.* at *1. The minor brought a claim against the counselor's employer. *Id.* The group home's motion for summary judgment was granted, and the minor appealed. *Id.* The minor submitted as evidence an affidavit by a professional in the juvenile care industry that stated sexual contact between counselors and youth home residents was a well-known hazard in the field. *Id.* at *2. Nevertheless, the court of appeals affirmed the group home's motion for summary judgment, on grounds that the affidavit "makes no

lessons for the use of criminal sexual conduct statutes in civil litigation, and it also suggests the need for more adequate civil remedies in cases involving sexual abuse, whether those remedies are common law, statutory, or a combination.[9]

---

specific reference to ITASKIN House and does not state any specific evidence why a sexual assault was more likely to occur at the ITASKIN House than any other group home." *Id.* at *3. According to the court, an affidavit that addresses a hazard general to an industry, but which does not specify a well-known hazard at the particular place of employment, fails to raise a genuinely disputed material fact. *Id.*

Fahrendorff appealed, and the Minnesota Supreme Court reversed. Fahrendorff *ex rel.* Fahrendorff v. North Homes Inc., 597 N.W.2d 905 (Minn. 1999). The court's decision clarified the difference between foreseeability in claims of negligence and claims of vicarious liability. *Id.* at 912. In a negligence claim, a foreseeable act is one that is sufficiently likely to occur, such that a reasonably prudent person would take action to avoid it. *Id.* Foreseeability in vicarious liability means "in the context of the particular enterprise an employee's conduct is not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer's business." *Id.* In other words, Fahrendorff's affidavit need not have stated that sexual abuse was a well-known hazard at the specific group home she resided in. *Id.* To hold otherwise would defeat the purpose of vicarious liability as a theory of recovery distinct form negligence. *Id.* The court's decision reaffirmed its stance that vicarious liability is a public policy choice that allocates risk to individuals and entities best positioned to compensate for it. *Id.* at 910. If sexual assault is a well-known hazard in the group home industry, ITASKIN house was better positioned to address the risk than a member of the public. *Id.* at 912.

The court has consistently found foreseeability to be a question of fact. In *Friehler v. Carlson Marketing Group Inc.*, 751 N.W.2d 558 (Minn. 2008), Friehler, an employee, was sexually assaulted by a supervisor at her place of employment. *Id.* at 562. Friehler argued that because her employer provided sexual harassment training to employees, and because sexual harassment in general is widespread in American workplaces, sexual harassment and assault should be considered foreseeable as a matter of law. *Id.* at 583. The court maintained that foreseeability in a vicarious liability claim is a question of fact. *Id.* at 584. Additionally, the court rejected Friehler's argument that evidence of an employer providing sexual harassment training at a particular place of employment is sufficient to establish sexual assault as a well-known hazard within an industry. *Id.*

In *Karlson,* the court of appeals further refined the type of foreseeability necessary to sustain a vicarious liability claim for sexual assault. L.M. *ex rel.* S.M. v. Karlson, 646 N.W.2d 537 (Minn. Ct. App. 2002). Karlson was a daycare provider that sexually assaulted several children. *Id.* at 541. The children and their parents brought a claim against Karlson's employer and submitted as evidence an affidavit stating that sexual abuse of children in a childcare setting is a "paramount concern." *Id.* at 543. Based on the supreme court's holding in *Fahrendorff,* the court of appeals found this affidavit sufficiently raised a genuine issue of material fact on the issue of foreseeability because "foreseeability is not necessarily dependent on the frequency of occurrence." *Id.* at 544.

[9] Many writers have noted that the problem of sexual assault is systemic and that the tort system as currently constituted does not provide adequate remedies for victims of sexual assault. *See, e.g.*, W. Jonathan Cardi & Martha Chamallas, *A Negligence Claim for Rape*, 101 TEX. L. REV. 101 (forthcoming 2022) (available at https://papers.ssrn.com/abstract=4039261); Ellen M. Bublick, *Tort Suits Filed By Rape and Sexual Assault Victims in Civil Courts: Lessons For Courts, Classrooms and Constituencies*, 59 SMU L. REV. 55 (2006); Merle H. Weiner, *Civil Recourse Insurance: Increasing Access to the Tort System for Survivors of Domestic and Sexual Violence*, 62 ARIZ. L. REV. (2020); Tom Lininger, *Is It Wrong to Sue for Rape?*, 57 Duke L.J. 1557 (2008); Deana Pollard Sacks, *Intentional Sex Torts*, 77 FORDHAM L. REV. 1051 (2008); Camille Carey, *Domestic Violence Torts: Righting A Civil Wrong*, 62 U. KAN. L. REV. 695 (2014); Leah M. Slyder,

Part II of this Article sets out the basic facts of the case and briefly explains the plaintiff's theories of recovery and how those theories were submitted to the jury. Part III examines battery theory in Minnesota and how it has been applied by Minnesota courts, comparing this with the approach to battery taken by the Restatement (Third) of Torts: Intentional Torts to Persons. Part IV provides a brief look at negligence theory in Minnesota. Part V explores the overlap between battery and negligence theories in cases involving sexual abuse. Part VI provides an overview of the application of criminal statutes in civil litigation, including the negligence per se issue. Part VII examines the decisions of the Minnesota Supreme Court considering whether there is a separate tort of sexual battery in Minnesota. Part VIII sets out the Minnesota approach to common law change and considers whether there could be a separate tort for sexual battery. Part IX considers the possibility of a separate statutory tort of sexual abuse. Part X examines the issue of insurance coverage in cases involving sexual abuse. Part XI concludes that there is a strong foundation for the expansion of remedies in sexual abuse cases.

II. *FLOREK V. VANNET*

In *Florek v. Vannet*, the plaintiff and defendant had been in a four-and-a-half-year romantic relationship.[10] One January evening, the two had consensual sex.[11] The plaintiff saw the defendant several days later when he asked her to again engage in sex.[12] She declined, and he stated that he had sex with her two other times within that same January evening. She did not remember that because she was "unconscious" at the time.[13]

Florek brought suit against Vannet, who was not prosecuted criminally.[14] She asserted battery, negligence, and negligence per se claims.[15] The jury found in the defendant's favor on the battery claim,[16] in the plaintiff's favor on the negligence per se claim, and awarded $5,000 in damages.[17]

The defendant moved for judgment as a matter of law, arguing that the district court erred in instructing that the criminal sexual conduct statute

---

Note, *Rape in the Civil and Administrative Contexts: Proposed Solutions to Problems in Tort Cases Brought by Rape Survivors*, 68 CASE W. RES. L. REV. 543 (2017).

[10] *Florek*, 2019 WL 1320619, at *1.
[11] *Id.*
[12] *Id.*
[13] *Id.* The defendant's account differed. He stated that the two had engaged in a sort of "sleepy sex" throughout the night, but that the plaintiff was not unconscious, and the sex was consensual. *Id.*
[14] *See* Plaintiff Prevails in 'Date Rape' Civil Suit, Minnesota Lawyer (Jan. 15, 2018), https://minnlawyer.com/2018/01/15/plaintiff-prevails-in-date-rape-civil-suit/ [https://perma.cc/KDZ4-NBA3] (noting that the Itasca County Attorney's office declined to prosecute Vannet).
[15] *Florek*, 2019 WL 1320619, at *1.
[16] *Id.*
[17] *Id.*

could be the basis for a negligence per se claim.[18] The district court denied the motion.[19] The defendant appealed.[20] The court of appeals affirmed the district court.[21]

The defendant argued on appeal that the district court erred in recognizing the plaintiff's negligence per se claim and in creating a new cause of action for sexual abuse.[22] The defendant also argued that the supreme court's decision in *Murphy v. Barlow Realty Co.*[23] applied to preclude the negligence per se claim. The critical issue in *Murphy* was whether the trial court properly dismissed, on demurrer, the plaintiff's claim for "wilful negligence."[24] The court held that the complaints adequately pled the claim and that the trial court erred in granting the defendants' motion.[25]

The supreme court noted that the concept of "wilful negligence" in Minnesota law is both unclear, and yet, a part of Minnesota common law.[26] Stuck with the theory, the court held that the plaintiff's complaint alleged sufficient facts to support it.[27] Along the way, the court discussed the facts, alleging that defendants had concealed dangerous defects in the repaired premises, and immediately after noted that "[o]bviously ordinary negligence is not an intentional tort. As such, it can only result from conduct uncontrolled by intent."[28]

Riding *Murphy*, the defendant's argument in *Florek* turned on the mutual exclusivity of negligence and intentional tort theory and its impact on negligence per se doctrine.[29] Negligence per se requires *negligence*.[30] The statute requires proof of *intent*.[31] Therefore, so the argument goes, the statutory violation cannot be the basis for a claim of negligence per se.[32] That was a key argument.

The court of appeals disagreed. It concluded that "[t]he defendants in *Murphy* intended more than just to commit the acts that produced a defective building. They intended to cause a particular result—the plaintiffs being deceived regarding the safety of the building."[33] Focusing on the crime of criminal sexual conduct in the third degree, the court concluded that Vannet intended only an *act*, the act of sexual penetration, not the *result* of

---

[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.* at *4.
[22] *Id.* at *1.
[23] 289 N.W. 563 (Minn. 1939).
[24] *Id.*

[25] *Id.* at 567.
[26] *Id.* at 564–65.
[27] *Id.* at 567.
[28] *Id.* at 565.
[29] *Florek*, 2019 WL 1320619, at *2.
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.*

harmful or offensive contact.[34] The court's rail switch enabled it to put the plaintiff's claim on the negligence track.

Of course, in *Murphy*, the result may have been deception even if there was no intent to cause the personal harm that resulted.[35] Similarly, in *Florek* it is certainly easy to categorize the defendant's conduct as intending the *result* of sexual penetration. The distinction is not helpful in determining the width of the separation between the theories.

The defendant also argued that Minnesota Supreme Court insurance exclusionary clause cases[36] —holding that specific intent to cause harm is assumed as a matter of law in sexual assault cases—should be applied to require a finding of specific intent to harm in civil actions based on sexual assault. The court of appeals rejected the argument. Continuing to ride the result/act rail, the court questioned "why a rule of interpretation for insurance policies should inform the applicability of negligence per se in cases where the tortfeasor has only an intent to act, not an intent to cause the intended result."[37]

Because the court found that the district court did not err in allowing the negligence per se claim, the court did not reach the issue of whether the district court erred in creating a new cause of action for sexual abuse.[38]

A. The Jury Instructions

The jury instructions in *Florek* set out the plaintiff's theories of battery and negligence per se. The jury instruction on battery reads as follows:

> Proof of battery
>
> A battery occurred if it is proved that the defendant intentionally caused harmful or offensive contact with plaintiff. "Intent" or "intentionally" means that a person (1) wants to cause the consequences of his or her acts, or (2) knows that his or her acts are substantially certain to cause those consequences.
>
> The contact may be caused directly or indirectly.
>
> Consent is a defense to the commission of a battery. If you find by the greater weight of the evidence that the plaintiff

---

[34] *Id.* at *3.

[35] *Murphy v. Barlow Realty Co.,* 289 N.W. 563, 566 (Minn. 1939).

[36] *See* Auto-Owners Ins. Co. v. Todd, 547 N.W.2d 696, 699 (Minn. 1996); R.W. v. T.F., 528 N.W.2d 869, 873 (Minn. 1995); Lehmann v. Metzger, 355 N.W.2d 425, 426 (Minn. 1984).

[37] *Florek*, 2019 WL 1320619, at *3. Of course, the rules applicable to insurance exclusionary clauses are collateral to, but not internal to, tort doctrine. *See* RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS, Scope Note (AM. L. INST., Tentative Draft No. 1, 2015). For a discussion of the insurance issues involved in sexual abuse cases, *see infra*, Part X.

[38] *Florek,* 2019 WL 1320619, at *4.

> consented to the defendant's acts, a battery did not occur.
>
> "Consent" means an apparent willingness that the battery take place. To be effective, consent must be (1) by a person who has the capacity to consent, and (2) to the particular conduct, or to substantially the same conduct. If a person exceeds the consent given, the consent does not protect him from liability for acts beyond the scope of the consent.[39]

The jury instruction on negligence per se tracked the pattern jury instruction:

Legal duties

> A person has certain legal duties that are written into law as statutes.
>
> If a person breaks a law, he or she is negligent.
>
> I will read some laws to you.
>
> If I read a law, it does not automatically mean that this law has been broken. This decision is up to you.
>
> If a law has been broken, then you must decide if it was a direct cause of the plaintiff's injuries.[40]
>
> Proof of statutory violation
> In Minnesota, a person breaks the law if he engages in sexual penetration with another person when he knows or should have known that the other person was physically helpless.
>
> To find that the defendant broke this law, you must find that:
>
> First, the defendant intentionally sexually penetrated the plaintiff. "Intentionally" means that the defendant either has a purpose to do the thing or cause the result specified, or believes that the act performed by the defendant, if successful, will cause the result.
>
> Sexual intercourse constitutes sexual penetration if there is any intrusion, however slight, of the penis into the female genital opening.
>
> Second, the defendant knew or had reason to know that the plaintiff was physically helpless. "To know" requires

[39] Jury Instructions, Florek v. Vannet, No. 31-CV-15-2675 (Minn. Dist. Ct. Dec. 13, 2017), 2017 WL 7370686.

[40] The instruction was from 4A MINN. PRACTICE (JURY INSTRUCTION GUIDES—CIVIL) (6th ed. 2014) CIVJIG 25.45.

> only that the defendant believes that the specified fact exists. "Had reason to know" means that the defendant acted in conscious disregard of a substantial and unjustifiable risk that the plaintiff was physical [sic] helpless.
>
> A person is physically helpless if she is:
>
> (1) asleep or not conscious;
>
> (2) unable to withhold consent or to withdraw consent because of a physical condition; or
>
> (3) unable to communicate non-consent.
>
> If you find that each of these elements has been proven by the greater weight of the evidence, defendant broke the law. If you find that any element has not been proven by the greater weight of the evidence, defendant did not break the law.
>
> A person who is physically helpless cannot consent to a sexual act. Consent is not a defense to a violation of this law.[41]

B. The Special Verdict Form

This is the special verdict form the district court submitted to the jury:

> 1. Did Defendant intentionally cause harmful or offensive contact with Plaintiff on January 18, 2013?
>
> Answer Yes or No: *No*
>
> 2. *If your answer to Question No. 1 was "Yes," then answer this question:* Did the Plaintiff consent to the Defendant's contact with Plaintiff on January 18, 2013?
>
> Answer Yes or No:
>
> 3. Did Defendant intentionally sexually penetrate the Plaintiff on January 18, 2013? Answer Yes or No: *Yes*
>
> 4. *If your answer to Question No. 3 was "Yes," then answer this question:* Did the Defendant know or have reason to know that the Plaintiff was physically helpless at the time

[41] Jury Instructions, Florek v. Vannet, No. 31-CV-15-2675 (Minn. Dist. Ct. Dec. 13, 2017), 2017 WL 7370686. The instruction tracked MINN. STAT. § 609.344, subdiv. 1(d), the third-degree criminal sexual conduct statute.

> he sexually penetrated the Plaintiff?
>
> Answer Yes or No: *Yes*
>
> *The remainder of the questions on the Special Verdict Form must be answered by you, regardless of your answers to the other questions on the Special Verdict Form.*
>
> 5. What amount of money will fairly and adequately compensate Plaintiff for emotional distress damages directly caused by the Defendant's actions on January 18, 2013, up to the date of this verdict?
>
> $ 5,000.00
>
> 6. What amount of money will fairly and adequately compensate Plaintiff for emotional distress damages directly caused by the Defendant's actions on January 18, 2013, which are reasonably certain to occur in the future?
>
> $ 0[42]

C. Putting the Instructions and Verdict Form Together

The jury concluded that the defendant did not intentionally cause harmful or offensive bodily contact with the plaintiff.[43] Because the jury answered "no" to that question, it was not required to consider whether the plaintiff consented to that contact.[44]

The negligence per se questions tracked the statute. The first question asked whether the defendant intentionally sexually penetrated the plaintiff.[45] The jury answered "yes" to that question.[46] The second question was whether the defendant knew or had reason to know that the plaintiff was physically helpless at the time.[47] The jury also answered "yes" to that question.[48] The jury was not asked to determine whether the defendant was negligent, however.

In a case involving negligence per se, there are two ways to submit the negligence per se issue on the special verdict form. In both, the pattern instruction on the issue would be given, telling the jury that a person who breaks the law is negligent. The jury could then be asked whether the defendant is negligent and, if so, whether that negligence was a direct cause of the plaintiff's injuries. The second way, the one followed by the district court in *Florek*, is to frame the special verdict questions so they track the

---

[42] Special Verdict Form, Florek v. Vannet, No. 31-CV-15-2675 (Minn. Dist. Ct. Dec. 13, 2017), 2017 WL 7370678.
[43] *Florek*, 2019 WL 1320619, at *3.
[44] *Id.*
[45] Special Verdict Form, *Florek*, 2017 WL 7370678 (No. 31-CV-15-2675).
[46] *Id.*
[47] *Id.*
[48] *Id.*

elements of the statute.[49] Either way, the jury would have to determine whether the elements of the statute were met.

It should make no difference, however, if the court determines that the statute provides the standard of care for a negligence claim, assuming that there is an underlying duty owed by the defendant to the plaintiff. Alternatively, if the statute does not provide the basis for the creation of a common law duty, it can be used as the standard of care for a common law negligence claim. The court of appeals appears to have taken the latter approach.[50]

It might appear that the practical impact is to effectively establish a separate cause of action for sexual battery. The defendant made that argument, but the court of appeals rejected the new cause of action argument because it accepted the plaintiff's negligence per se theory.[51] The issue is whether that is a distinction without a difference.

As to the battery claim, the jury concluded that the defendant did not "intentionally cause harmful or offensive contact" with the plaintiff.[52] Perhaps the jury thought that Vannet did not think his actions would be harmful or offensive. The court of appeals noted that "[t]he jury was asked to determine whether Vannet committed the intentional tort of battery by intentionally causing harmful or offensive contact with Florek," but that the jury "decided that he did not—in other words, he did not intend the harm."[53] The court concluded that "[t]he only harmonizing construction of the special verdict is that Vannet did not have the necessary intent for battery."[54]

The issue of whether Florek might have been contributorily negligent was not raised, apparently. There was no line on the special verdict form concerning Florek's negligence, nor were there supporting instructions providing a basis for concluding that Florek was in any way negligent.[55] In connection with the negligence per se claim, the district court did instruct the jury that "[a] person who is physically helpless cannot consent to a sexual act," and that "[c]onsent is not a defense to a violation of this law."[56]

If any defense was permitted to the negligence claim, it would have been contributory negligence. That would not have been appropriate under prevailing Minnesota law, however, because the defense would be

---

[49] *Florek*, 2019 WL 1320619, at *2.
[50] *See* negligence per se discussion *infra* Section VI.C.
[51] *Florek*, 2019 WL 1320619, at *4.
[52] *Id.* at *3.
[53] *Id.* (In a supporting footnote the court stated that: "In the reply brief, Vannet argues that 'the jury found that [his] contact with Florek was neither harmful nor offensive' without rendering any verdict on the issue of intent. Vannet's argument is not consistent with the award of damages for Florek's emotional distress. The only harmonizing construction of the special verdict is that Vannet did not have the necessary intent for battery.").
[54] *Id.* at *3 n.2.
[55] *See Florek*, 2019 WL 1320619.
[56] Jury Instructions, Florek v. Vannet, No. 31CV-15-2675 (Minn. Dist. Ct. Dec. 13, 2017), 2017 WL 7370686. That language was taken from the statute.

inconsistent with the underlying theory of recovery.[57] The same would be true with the assertion of secondary assumption of risk. The contributory negligence issue did not arise, however.

Finally, the damages questions on the verdict form covered only damages for emotional distress, past and future. The plaintiff did not seek recovery for any economic loss. The case, then, was effectively a claim for the negligent infliction of emotional distress, given the jury's rejection of the plaintiff's battery claim.[58]

The following discussion attempts to provide some clarity on the many issues raised by *Florek* and other similar cases in which plaintiffs sought recovery for the impact of sexual abuse. It starts with battery theory.

III. BATTERY

There are two primary standards for battery: a dual-intent standard and a single-intent standard. Both standards require proof of a contact that is harmful or offensive. The single-intent standard only requires that the defendant intend a contact that is harmful or offensive.[59] The dual-intent standard also requires that the defendant intend the contact to be harmful or offensive.[60]

The next section briefly explores the history of civil battery actions in Minnesota, followed by a discussion of the significance of the dual versus single-intent formulation of battery.

A. Battery in Minnesota

The tort of battery has a long history in Minnesota. The specific definition of battery has evolved, but the essence of the claim, the invasion of personal autonomy, has been registered in various settings through the nineteenth, twentieth, and twenty-first centuries. Battery is often applied in cases involving sexual abuse, including sexual extortion.[61]

In its earliest formulation, a married woman could only bring a battery claim through her husband, although by 1869, a married woman could sue for battery in her own name.[62] In early cases, there was a

---

[57] There is also an argument that the plaintiff may have assumed the risk, but assumption of risk in its primary sense has been significantly restricted by the supreme court and now has no application outside of certain categories of sports injury cases. *See* Soderberg v. Anderson, 922 N.W.2d 200 (Minn. 2019) (skiing accident); Henson v. Uptown Drink, LLC, 922 N.W.2d 185 (Minn. 2019) (innkeeper's liability/dram shop case).

[58] For a more detailed discussion of the emotional harm issue, *see infra* notes 180–84 and accompanying text.

[59] *See* RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 1 (AM. L. INST., Tentative Draft No. 4, 2019).

[60] *See* Mark A. Geistfeld, *Conceptualizing the Intentional Torts*, 10 J. TORT L. 1, 27 (2017).

[61] *See* Patzwald v. Patrick, 248 N.W. 43 (Minn. 1933).

[62] *See* Colvill v. Langdon, 22 Minn. 565, 566 (1876) (citing General Laws 1869, ch. 58, 1869 Minn. Laws 72 (amending Gen. St. ch. 66, § 29)). The amendment also provided that women

presumption that a battery committed by a wife was the product of coercion by her husband.[63] That made the husband alone responsible for torts that he and his spouse committed together, although the presumption of coercion could be rebutted, in which case the wife could be held jointly liable,[64] a rule that persisted until 1869.[65]

By 1874, the Minnesota Supreme Court had established that it was unnecessary to allege in a complaint for assault and battery that the acts giving rise to the claim "were committed 'with force,' or 'with force and arms.'"[66] Rather, facts alleging "an actual infliction of violence on the person," were deemed sufficient to establish a battery, which, the court said, "includes an assault."[67]

The Minnesota Supreme Court has framed the elements of battery in different ways. The court has stated that "[b]attery is an intentional, unpermitted offensive contact with another,"[68] and also that the two operative elements of battery "are intent and offensive contact."[69] These renditions of battery are vague enough so that battery exists if there is an intent to make contact and the contact turns out to be offensive. That is a single-intent standard.

In *Schumann v. McGinn*, the court noted that the essential elements of battery are intent and contact, but it cited section 18 of the Second Restatement of Torts in support.[70] This is the only time the Minnesota Supreme Court has referred to the Restatement as the appropriate formulation of battery theory in Minnesota.[71] Section 18 goes beyond just intent and contact, however. It reads as follows:

---

could be held liable for the torts they committed. *See* General Laws, 1869 ch. 58 § 1, Minn. Laws 72, 72.

[63] Brazil v. Moran, 8 Minn. 236, 240–41 (1863).

[64] *Id.* at 240–41 ("A *feme covert* is jointly liable with her husband for all torts committed by her when not in company with him, and would be so liable for all committed while in his company, but for the presumption that she acts by his direction, or under his control.").

[65] *See* General Laws, 1869, ch. 56, § 2.

[66] Greenman v. Smith, 20 Minn. 418, 20 Gil. 370, 372–73 (Minn. 1874).

[67] *Id.*

[68] Johnson v. Morris, 453 N.W.2d 31, 40 (Minn. 1990) (citing Paradise v. City of Minneapolis, 297 N.W.2d 152, 155 (Minn.1980)).

[69] *Id.* (citing Schumann v. McGinn, 240 N.W.2d 525, 529 (Minn. 1976)).

[70] 240 N.W.2d 525, 529 n.4 (Minn. 1976) (citing RESTATEMENT (SECOND) OF TORTS § 18 (AM. L. INST. 1965)).

[71] The only other reference to section 18 is in *State Farm Fire & Casualty Co. v. Williams*, 355 N.W.2d 421 (Minn. 1984), a case involving a homeowners insurance policy intentional act exclusion in a sexual abuse case arising out of alleged unconsented to sexual contact by State Farm's insured with a disabled person. The supreme court noted that it has inferred intent as a matter of law for purposes of applying the intentional act exclusion in two sets of cases. *Id.* The first is where the insured's specific intent was to cause bodily injury. *Id.* The second is where the act is such that the court will infer intent to injure as a matter of law. *Id.* The court has done so in cases involving sexual abuse. *See* Horace Mann Ins. Co. v. Indep. Sch. Dist. No. 656, 355 N.W.2d 413 (Minn. 1984) (concerning intent to cause bodily injury as a matter of law in a case involving sexual abuse of a female student by a teacher, who was

> (1) An actor is subject to liability to another for battery if
>
> > (a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and
> >
> > (b) an offensive contact with the person of the other directly or indirectly results.
>
> (2) An act which is not done with the intention stated in Subsection (1, a) does not make the actor liable to the other for a mere offensive contact with the other's person although the act involves an unreasonable risk of inflicting it and, therefore, would be negligent or reckless if the risk threatened bodily harm.[72]

Section 18 requires an intent "to cause a harmful or offensive contact."[73] That can be interpreted as requiring either an intent to cause a harmful or offensive contact (dual-intent) or a contact that turns out to be harmful or offensive (single-intent). There is some ambiguity in the formulation.[74] Minnesota's pattern jury instruction for battery is based on section 18 of the

---

also a coach and chemical dependency counselor). The insured in *Williams* argued that because State Farm stipulated that he did not intend to inflict bodily injury, his specific intent could not be a basis for the exclusion of coverage. 355 N.W.2d at 424. Trying to distance itself from the impact of that stipulation, State Farm argued that specific intent to cause bodily injury was not required to exclude coverage. *Id.* Because the claimant's action was based on an "offensive contact," as noted in section 18 of the Second Restatement, State Farm argued that "[t]he offensive contact itself is the bodily harm," and that the court should infer intent to cause bodily injury as a matter of law in such cases, particularly when it involves violation of a criminal statute. *Id.* The court rejected the argument but nonetheless held that his intent to cause bodily injury could be inferred as a matter of law. *Id.* at 425.

As an aside, section 15 of the Second Restatement states that "[b]odily harm is any physical impairment of the condition of another's body, or physical pain or illness." RESTATEMENT (SECOND) OF TORTS § 15 (Am. L. Inst. 1965). As it turned out, section 18 of the Restatement played no role in the decision of the case. The supreme court held that intent to cause bodily injury could be inferred from the record as a matter of law. *Williams*, 355 N.W.2d at 425.

[72] RESTATEMENT (SECOND) OF TORTS § 18 (AM. L. INST. 1965). Section 18 covers offensive contacts. *Id.* Section 19 of the Restatement defines an "offensive contact" as a bodily contact that "offends a reasonable sense of personal dignity." *Id.* § 19. Section 13, not cited by the Minnesota Supreme Court, is the parallel provision covering harmful bodily contacts. *Id.* § 13. It reads as follows: "An actor is subject to liability to another for battery if (a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and (b) a harmful contact with the person of the other directly or indirectly results." *Id.* § 13.

[73] *Id.* § 18.

[74] *See* Kenneth W. Simons, *A Restatement (Third) of Intentional Torts?*, 48 ARIZ. L. REV. 1061, 1066 (2006). The formulation could support either a dual or single intent requirement.

Second Restatement.[75] It incorporates the dual-intent standard, requiring proof that the defendant intended to cause a harmful or offensive contact with the plaintiff, relying on the supreme court's decision in *Schumann*.[76]

Consent is also a significant issue in battery cases. Minnesota cases are equivocal on who has the burden of proof on that issue. In *Frey v. McManus*, a civil action for sexual assault and battery, the supreme court noted that while the "well established" rule is that the absence of consent is necessary to establish the crime of assault and battery, "consent of the person assaulted is a complete defense" to the action.[77] The court seemed to contrast civil claims for assault and battery in the next sentence, stating that:

> in a civil action for assault and battery based on an alleged act of sexual intercourse with the plaintiff, committed against her will and without her consent, in order to entitle the person assaulted to recover damages, the want of her consent to the act must be shown by a fair preponderance of the evidence.[78]

That conclusion is consistent with the basic definition of battery, part of which requires an unconsented touching of the plaintiff.[79] On the other hand, the medical battery cases appear to place the burden of proof on the consent issue on the defendant.[80]

The Third Restatement takes no position on the burden of proof on the consent issue.[81]

---

[75] 4 & 4A MINN. PRACTICE SERIES (JURY INSTRUCTION GUIDES—CIVIL), CIVJIG 60.25 (6th ed. 2014). Section 18 of the Second Restatement covers cases where the defendant intends a harmful or offensive contact and an offensive contact results. RESTATEMENT (SECOND) OF TORTS § 18 (AM. L. INST. 1965). Section 13 covers cases where the defendant intends a harmful or offensive contact and a harmful contact results: "An actor is subject to liability to another for battery if (a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and (b) a harmful contact with the person of the other directly or indirectly results."
Id. § 13. Section 15 defines "bodily harm" as "any physical impairment of the condition of another's body, or physical pain or illness." *Id.* § 15.

[76] Schumann v. McGinn, 240 N.W.2d 525, 529 n.4 (Minn. 1976).

[77] Frey v. McManus, 191 N.W. 392, 393 (Minn. 1923).

[78] *Id.*

[79] RESTATEMENT (SECOND) OF TORTS § 13 (AM. L. INST. 1965).

[80] *See, e.g.*, Mohr v. Williams, 104 N.W. 12, 15 (Minn. 1905) (implied consent).

[81] RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 12 cmt. e (AM. L. INST., Tentative Draft No. 4, 2019) ("In light of the uncertain state of the law and conflicting policies, this Restatement takes no position on the question of the burden of proof for any of the categories of consent; the question is better left to judicial development."); *see also id.* § 18 ("The consent provisions in § 12 through § 16 apply to sexual conduct, with the qualification that the following more specific criterion displaces those general criteria when its requirements are satisfied: If a person, by words or conduct, expresses to the actor his or her unwillingness to permit any sexual contact, or sexual contact of a specified type, yet the actor proceeds to cause such a contact, then as a matter of law, the criteria of actual, apparent, or presumed consent are not satisfied and the actor is subject to liability for battery."). *See*

B. Battery - Single-Intent and the Restatement (Third) of Torts

The Third Restatement adopts the single-intent rule for battery. It reads as follows:

> An actor is subject to liability to another for battery if:
> (a) the actor intends to cause a contact with the person of the other, as provided in § 2, or the actor's intent is sufficient under § 11 (transferred intent);
> (b) the actor's affirmative conduct causes such a contact; and
> (c) the contact (i) causes bodily harm to the other or (ii) is offensive, as provided in § 3.[82]

The American Law Institute (ALI) has adopted the single-intent rule for three basic reasons:

> First, it is the approach most consistent with the case law, especially medical-battery cases. Second, the single-intent rule is more consistent with the view that a person's right to avoid a nonconsensual touching that causes harm or offense is an entitlement resting on fundamental interests in autonomy, dignity, and security. Third, concerns that this rule would impose unduly burdensome liability are exaggerated in light of the many other tort doctrines that limit battery liability, including actual consent, apparent consent, implied-in-law or constructive consent, and the requirement, for offensive battery, that the contact be offensive to a reasonable sense of dignity (or that the actor knows that the contact will be highly offensive).[83]

In many cases, a single versus dual-intent rule will not make a difference,[84] but there are cases where it will, including cases involving what

---

generally Alex Geisinger, *Does Saying "Yes" Always Make It Right? The Role of Consent in Civil Battery*, 54 U.C. DAVIS L. REV. 1853 (2021) (providing detailed analysis of the consent issue).

[82] RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 1 (AM. L. INST., Tentative Draft No. 4, 2019). *See also id.* § 3 ("A contact is offensive within the meaning of § 1(c)(ii) if: (a) the contact is offensive to a reasonable sense of personal dignity; or (b) although the contact is not offensive to a reasonable sense of personal dignity, the actor knows that the contact is highly offensive to the other's sense of personal dignity, and the actor contacts the other with the primary purpose that the contact will be highly offensive. Liability under Subsection (b) shall not be imposed if the court determines that imposing liability would violate public policy.").

[83] RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 102 cmt. b. (AM. L. INST., Tentative Draft No. 1, 2015).

[84] *Id.* cmt. b, illus. 3 ("Ken and Lance get into a furious argument. Ken punches Lance in the face, breaking his nose. Ken is subject to liability to Lance for battery.").

the Restatement terms the oblivious or indifferent actor,[85] a term that might apply to Vannet's conduct in *Florek*, given the jury's finding that there was no battery in the case. There is no question that Vannet intended the contact with Florek. The jury may have believed that he did not intend for the contact to be either harmful or offensive.

Minnesota law could potentially support the single-intent rule or the dual-intent rule. At best, there does not appear to be a decisive commitment to either rule. Minnesota law is also ambivalent on the consent issue, although it appears to tilt to consent as a defense rather than an element of the plaintiff's case. How the law is cast may make a significant difference. Once again, *Florek* is a case in point. A single-intent rule provides greater protection for personal autonomy than does the dual-intent rule.

IV. NEGLIGENCE

Florek raises the question of whether negligence theory can accommodate an allegation based on violation of a criminal sexual conduct statute under the guise of a negligence per se claim. There are four elements in a Minnesota negligence case. The plaintiff must prove a duty, that the defendant breached that duty, that the plaintiff sustained injury, and that the breach of duty was a proximate cause of the injury.[86] In its narrowest formulation, the supreme court has stated that "general negligence law imposes a general duty of reasonable care when the defendant's own conduct creates a foreseeable risk of injury to a foreseeable plaintiff."[87] The duty is one of reasonable care.[88] As a general proposition, negligence theory protects personal autonomy. The court's decisions involving informed consent theory are excellent examples.[89]

Persons injured by the negligent conduct of others are entitled to recover damages for the injuries they sustain. Compensable damages include pain, embarrassment, and emotional harm,[90] as well as past and future medical expenses and income loss. The same damages are available in a battery action.[91]

---

[85] *Id.* cmt. b, illus. 10, 11. Other cases where the rule will make a difference are medical battery cases and cases involving injuries arising out of pranks or horseplay. *See id.* cmt. b, illus. 8, 9.

[86] *See, e.g.*, Senogles v. Carlson, 902 N.W.2d 38, 42 (Minn. 2017); Domagala v. Rolland, 805 N.W.2d 14, 22 (Minn. 2011); Gradjelick v. Hance, 646 N.W.2d 225, 230 (Minn. 2002); Funchess v. Cecil Newman Corp., 632 N.W.2d 666, 672 (Minn. 2001); Lubbers v. Anderson, 539 N.W.2d 398, 401 (Minn. 1995).

[87] *Domagala*, 805 N.W.2d at 23.

[88] *See* Klingbeil v. Truesdell, 98 N.W.2d 134, 138 (Minn. 1959).

[89] *See, e.g.*, Mohr v. Williams, 104 N.W. 12, 14 (Minn. 1905).

[90] 4 & 4A MINN. PRACTICE SERIES (JURY INSTRUCTION GUIDES—CIVIL), CIVJIG 91.10 (6th ed. 2014).

[91] The damages can be significant in sexual battery cases. In *Johnson v. Ramsey County*, 424 N.W.2d 800 (Minn. Ct. App. 1988), *rev. denied*, C9-87-1638, 1988 Minn. LEXIS 532 (Minn. Aug. 24, 1988), the court of appeals affirmed a district court judgment for the plaintiff based on jury findings that a battery had occurred, based on an unwanted contact by a judge

Negligence and battery may seem mutually exclusive, but the theories overlap, and the distinctions between the theories may blur.

V. BATTERY AND NEGLIGENCE—THE OVERLAP

The Minnesota Supreme Court cases dealing with the distinctions between battery and negligence indicate the difficulty in clearly differentiating between negligence and battery claims. There are several examples.

In *Schumann v. McGinn*,[92] a fifteen-year-old plaintiff was shot and seriously injured by a St. Paul police officer when he fled after hitting a parked car while driving an automobile he had stolen. The plaintiffs alleged negligence and battery theories in their complaint, and as the supreme court explained, "[a]t the beginning of the trial, the plaintiffs took the position that defendant's conduct constituted either a battery or a negligent tort, but during the course of the trial, it appeared that plaintiffs were claiming that a *negligent battery* had occurred."[93] The trial court charged the jury on the negligence theory,[94] but did not instruct the jury on the battery theory.[95]

The plaintiff submitted proposed instructions and interrogatories to the trial court that did not separately set out negligence and battery theories, but the proposed instructions did set out "the substance of the elements" of battery and also the "substance of law officers' privilege to employ firearms."[96] Those interrogatories would have expressly asked the jury to determine if the defendant had probable cause to believe that the plaintiff had committed a felony and whether the defendant used reasonable force in making the arrest.[97] Plaintiff's counsel objected to the trial court's failure to instruct on the battery theory after the jury retired to begin its deliberations.[98]

The jury found, by its answer to special interrogatories, that the defendant was not negligent, that the plaintiff was negligent, and that his

---

on his court reporter. The jury in the case awarded $50,000 in compensatory damages for past injury, $25,000 for future injury, and $300,000 in punitive damages, remitted by the district court to $50,000. *Id.*

[92] 240 N.W.2d 525 (Minn. 1976).

[93] *Id.* at 528–29 (emphasis added).

[94] *Id.* at 529 (negligence instructions) ("[I]f you find that the officer failed to act on reasonable or probable cause or acted absent a reasonable belief that he couldn't effect the arrest without deadly force, then you may find that the officer was negligent, that is, that he breached his duty to apply reasonable standards in his conduct. Recall that the burden to establish or prove that he breached such a standard is on the plaintiff, Richard Schumann . . . . If you find that Richard Schumann breached a duty to use reasonable care as I have defined it, you may find him negligent. The burden to prove his negligence in this instance is upon the defendant . . . . [I]n the event you find the parties equally negligent, that is, 50 percent, the plaintiff cannot recover. If the defendant is more than 50 percent negligent plaintiff would recover a percentage of his claim . . . . Of course, if plaintiff is more than 50 percent negligent then plaintiff is entitled to nothing.").

[95] *Id.* at 529.

[96] *Id.*

[97] *Id.*

[98] *Id.*

negligence was the proximate cause of his own injury.[99]

Following a verdict for the defendant, the plaintiff argued on appeal that the court erred in failing to instruct the jury on battery.[100] The defendant argued that a claim for excessive force could sound in negligence and that the negligence instruction included the elements of excessive force, so that a jury finding of no negligence necessarily included a finding that the police officer's use of force was reasonable under the circumstances.[101]

The Minnesota Supreme Court rejected the arguments. First, the court held that a claim for excessive force sounds in battery,[102] stating that the essential elements are intent and contact.[103] The court also cited its 1923 decision in *Ott v. Great Northern Railway Co.* as establishing, although perhaps not entirely clearly, the same distinction between negligence and battery.[104]

The court's decisions involving the crossover between negligence and battery illustrate the difficulties in drawing a bright line between the theories. The Minnesota cases involving distinctions between battery and negligence in medical cases further illustrate the problem.

Medical battery is a distinct theory of recovery in cases where a medical procedure is performed without the patient's consent, but the lines the court has drawn between battery and negligence claims emphasize not only the lack of clear distinctions between the two theories but also the similarity in the two theories in protecting patient autonomy. In *Mohr v. Williams*,[105] the Minnesota Supreme Court held that a plaintiff was entitled to recover for battery where the plaintiff agreed to an operation on her right ear, but the physician operated on her left ear. The jury awarded the plaintiff damages of $14,322.50.[106] The defendant physician moved for judgment notwithstanding the verdict or, in the alternative, a new trial.[107] The trial court granted the motion for a new trial based on its conclusion that the damages were excessive.[108]

On appeal, the defendant argued the plaintiff consented to the operation on her left ear, and that even if she did not, no consent was necessary, and finally, that there was "a total lack of evidence showing or tending to show malice or an evil intent on the part of the defendant, or that the operation was negligently performed."[109]

The court established the basic standard of care that applies to physicians, acknowledging the latitude they have in treating their patients,

---

[99] *Id.* at 528.
[100] *Id.*
[101] *Id.* at 529.
[102] *Id.* (citing Daly v. Pedersen, 278 F.Supp. 88 (D. Minn. 1967)).
[103] *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 18 (AM. L. INST. 1965)).
[104] 72 N.W. 833 (Minn. 1897).
[105] 104 N.W. 12 (Minn. 1905), *overruled by* Genzel v. Halvorson, 80 N.W.2d 854, 859 (Minn. 1957).
[106] *Mohr*, 104 N.W. at 13.
[107] *Id.*
[108] *Id.*
[109] *Id.* at 14.

subject to certain limitations.[110] Recognizing the necessary "reasonable latitude" a physician must be given in individual cases, the court was unwilling to establish any rule that would be an unreasonable interference with the physicians' discretion or that would prevent physicians from exercising their discretion in cases of emergency.[111]

In discussing the consent issue, the court emphasized the patient's "natural right" to determine whether to submit to an operation.[112] The court also recognized the importance of personal autonomy and the role of battery as a remedy for invasion of that autonomy:

> [E]very person has a right to complete immunity of his person from physical interference of others, except in so far as contact may be necessary under the general doctrine of privilege; and any unlawful or unauthorized touching of the person of another, except it be in the spirit of pleasantry, constitutes an assault and battery.[113]

The defendant argued there was no battery because he performed the operation skillfully and there was no evidence of any evil intent on his part in performing the operation.[114] The court acknowledged that the argument was not without merit, but that performance of the operation without the consent of the plaintiff absent circumstances justifying performance of the operation without that consent "was wrongful; and, if it was wrongful, it was unlawful."[115]

The intersection of negligence and battery theory presented the court with a difficult issue, one that it resolved in favor of the plaintiff based on the first principle of patient autonomy. The Minnesota Supreme Court continued to struggle with the issue over the years. In *Bang v. Charles T. Miller Hospital*,[116] a 1958 case involving a claim for battery based on a physician's failure to inform a patient that his spermatic cords would be

---

[110] *Id.* at 15.

[111] *Id.*

[112] The court stated that "[t]he patient must be the final arbiter as to whether he will take his chances with the operation, or take his chances of living without it. Such is the natural right of the individual, which the law recognizes as a legal one, Consent, therefore, of an individual, must be either expressly or impliedly given before a surgeon may have the right to operate." *Id.* at 14–15 (quoting 1 KINKEAD TORTS §375 (1901)); *see generally* Ranelle A. Leier, *Torts: Defining the Duty Imposed on Physicians by the Doctrine of Informed Consent,* 22 WM. MITCHELL L. REV. 149 (1996) (discussing the consent issue in Minnesota law).

[113] *Mohr*, 104 N.W. at 16 (citing 1 EDWIN A. JAGGARD, HAND-BOOK OF THE LAW OF TORTS 437 (West Publ'g Co. 1895)), http://www.minnesotalegalhistoryproject.org/assets/Jaggard%20%20on%20Torts%20Vol%201%20(1895)..pdf [https://perma.cc/XH8Q-FWUA]. Edwin Jaggard was elected to the Supreme Court of Minnesota in 1904. *Edwin A. Jaggard, Associate Justice 1905-1911*, MINN. STATE L. LIBR., https://mncourts.libguides.com/Jaggard [https://perma.cc/27JY-K6DA]. He was a member of the court when *Mohr* was decided, although he did not participate in the decision. *Id.*, *Mohr*, 104 N.W. at 16. He served on the court until his death in 1911. *Edwin A. Jaggard, Associate Justice 1905-1911, supra.*

[114] *Mohr*, 104 N.W. at 15.

[115] *Id.* at 16.

[116] 88 N.W.2d 186 (Minn. 1958).

severed during a prostate operation, the supreme court set out general standards for resolving claims based on a failure to disclose risks associated with surgery.

The court noted the well-established general rule from *Mohr* that a patient's consent must be obtained before the physician or surgeon may perform an operation on a patient, absent certain exceptional circumstances.[117] The court hastened to add that it had "no desire to hamper the medical profession in the outstanding progress it has made and continues to make in connection with the study and solution of health and disease problems," but that "a reasonable rule is that, where a physician or surgeon can ascertain in advance of an operation alternative situations and no immediate emergency exists, a patient should be informed of the alternative possibilities and given a chance to decide before the doctor proceeds with the operation."[118]

In *Cornfeldt v. Tongen*,[119] the Minnesota Supreme Court adopted the informed consent theory, distinguishing battery and negligence theories. Battery is appropriate in cases where the "touching . . . is of a substantially different nature and character from that to which the patient consented," whereas negligence is the appropriate theory in cases where a "patient substantially understands the nature and character of the touching" but "was not properly informed of a risk inhering in the treatment."[120]
While the theories of battery and negligent nondisclosure may appear to be distinct, at least as they are analyzed in *Cornfeldt*, there may still be overlap between the theories.

The court's subsequent decision in *Kinikin v. Heupel*[121] illustrates the overlap. The facts are complicated, but following a biopsy, the plaintiff, in consultation with Dr. Heupel, declined breast removal surgery absent proof of cancer.[122] However, the surgery performed was "substantially, breast removal."[123] The case was submitted to the jury on both battery and negligent nondisclosure theories.[124] The jury found for the plaintiff on both theories.[125] The defendant argued that it was error to submit battery along with the negligent nondisclosure claim because of the logical redundancy of the two theories.[126]

The Minnesota Supreme Court observed that "[i]t would seem battery is better utilized in the classic situation of a touching of a substantially and obviously different kind, such as operating on one ear when the

---

[117] *Id.* at 190.
[118] *Id.*
[119] 262 N.W.2d 684 (Minn. 1977).
[120] *Id.* at 699.
[121] 305 N.W.2d 589 (Minn. 1981).
[122] *Id.* at 593.
[123] *Id.*
[124] *Id.* at 591.
[125] *Id.* The jury found that the defendant was not negligent in the performance of the surgery. *Id.*
[126] *Id.* at 593.

patient's consent is given for the other,"[127] but that in cases such as Kinikin's where "the focus is more on the extent of the surgery performed and the attendant risks rather than on the kind of surgery," it would seem to be preferable to submit only the negligent nondisclosure theory.[128] Submission of both theories may be redundant and run the risk of an inconsistent verdict.[129] The jury found that the defendant was negligent with respect to disclosure of the risks involved in surgery and that Kinikin did not consent to the surgical procedures the doctor actually performed.[130] The court concluded that while it would have been sufficient to submit only the negligent nondisclosure claim, the facts justified submission of the battery theory also, and that it was not error to do so.[131]

In *Kohoutek v. Hafner*,[132] the court noted the continuing problems in delineating the boundaries between battery and negligence and attempted to establish a clearer line between the two theories. The court stated that battery in the medical malpractice context is "an unpermitted touching, in the form of a medical procedure or treatment," but that the touching is permitted if there is patient consent.[133] The court characterized *Bang* as a case where consent was vitiated because "failure to disclose *a very material aspect of the nature and character of the touching* will undermine the consent, and the touching will constitute a battery."[134] The court did not define what "a very material aspect" might be, other than through its reference to *Bang*, which of course supported both negligence and battery theories.

The court concluded that the argument that inadequately informed consent is no consent at all fails to take into consideration the "practical differences" between negligent nondisclosure and battery. The first difference is that battery focuses "on the patient's right to be free from a touching that is of a substantially different nature and character" from that consented to, which leaves the physician with limited defenses.[135] In negligent nondisclosure cases, "the focus is on the physician's duty to inform the patient of the risks of certain medical procedures," requiring consideration of several factors, including the potential of adverse psychological effects from disclosure of certain risks.[136]

The second difference concerns the proof. The court noted that, in battery cases, there is no need for expert testimony, whereas in negligent nondisclosure cases, which turn on whether a risk of injury should be disclosed, expert testimony is necessary.[137] That, of course, is inconsistent

---

[127] *Id.* (citing Mohr v. Williams, 104 N.W. 12 (Minn. 1905)).
[128] *Id.*
[129] *Id.* at 593–94.
[130] *Id.* at 594.
[131] *Id.*
[132] 383 N.W.2d 295 (Minn. 1986).
[133] *Id.* at 299.
[134] *Id.* (emphasis added).
[135] *Id.*
[136] *Id.*
[137] *Id.*

with the elements of a negligent nondisclosure claim as established in *Cornfeldt*, which imposes a duty on the physician to disclose the risks that the physician knows or should know a reasonable person in the patient's position would deem material.[138] Proof of expert testimony on that issue is not required.[139]

The final difference is in the causation element. In battery cases, the plaintiff need only prove that the procedure performed was substantially different than what the patient consented to, whereas, in negligent nondisclosure cases, the plaintiff must prove that they would have refused to consent to the procedure had they known of the risk.[140] The focus is slightly different, but the consent issue is at the core of both claims.

The purpose of this discussion is not to question the court's analysis, but simply to illustrate that battery and negligence claims in cases involving nondisclosure of either the procedure to be performed or the risks associated with a procedure to be performed are perhaps not as distinct as the court indicated in *Kahoutek*.

Given the blurring of the lines between negligence and battery, there is no reason to limit a plaintiff's choice of claims in cases involving sexual abuse. In sexual abuse cases, the defendant invades the plaintiff's autonomy. While the label attached to the defendant's conduct has consequences, the similarity in the interests protected should not preclude the plaintiff from choosing which claims to assert.[141] Sexually abusive conduct may often have unintended consequences. That is the stuff of negligence law, but it is prompted by intentional conduct. That is the stuff of intentional tort law.

The tendency is to treat negligence and battery theory as mutually exclusive.[142] The label will have consequences. Some are internal to tort law,

---

[138] Cornfeldt v. Tongen, 262 N.W.2d 684, 701 (Minn. 1977).

[139] *Id.* at 700.

[140] *Kohoutek*, 383 N.W.2d at 299. As applied, the court held that the gist of the plaintiff's claim was negligent nondisclosure: "Kohoutek entered the hospital to have a cesarean section. Dr. Wall had earlier discussed with her the risks such a procedure presents. She considered those risks and decided to have the operation. Upon entering the hospital she began experiencing mild contractions. Kohoutek eventually entered the early stages of labor, and Pitocin was administered to facilitate this stage of her delivery. When it became evident that a vaginal delivery was possible, Kohoutek claims, she should have been informed of the risks such a delivery presented. Kohoutek was nearing her forty-third week of pregnancy and her baby was quite large. At this late stage of pregnancy certain risks increase and she alleges that she should have been able to weigh these risks against those of a cesarean section. The issue is not whether Kohoutek consented to a vaginal delivery; it is whether she was informed of its risks. Such is the stuff of negligent nondisclosure. The jury was properly instructed on the elements of that tort, and we adhere to its verdict. It was not an abuse of discretion for the trial court to disallow a claim of battery, and we reverse the court of appeals on this issue." *Id.* at 300.

[141] At the pleading stage, plaintiffs are permitted to "state as many separate claims or defenses as the party has regardless of consistency . . . ." MINN. R. CIV. P. 8.05(b).

[142] *See* RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS, Scope Note (AM. L. INST., Tentative Draft No. 1, 2015).

such as issues concerning defenses,[143] and others are collateral, such as issues concerning insurance coverage[144] or statutes of limitations.[145] The ALI, in the new Third Restatement of Torts advises caution in making the determination of whether an intentional tort designation should preempt

[143] In *Florenzano v. Olson*, the court held that comparative negligence principles are inapplicable in intentional torts cases. 387 N.W.2d 168, 175 (Minn. 1986). In support, the court cited *Schulze v. Kleeber*, 103 N.W.2d 560, 564 (Wis. 1960), which the court noted was in turn "adopted by virtue of *Marier v. Memorial Rescue Service, Inc.*, 207 N.W.2d 706 (Minn. 1973)." *Id.* The definition of "fault" in the Comparative Fault Act does not include intentional torts. *See* MINN. STAT. § 604.01, subdiv. 1a (2022). The same conclusion may not apply in cases involving the comparison of fault between negligent and intentional tortfeasors. *See* ADT Sec. Servs., Inc. v. Swenson, 687 F.Supp. 2d 884 (D. Minn. 2009) (arising out of the shooting death of a home resident at the hands of her ex-boyfriend, who gained entry to her house because of a defect in the alarm system). Although questioning whether fault could be compared between negligent and intentional tortfeasors, primarily because the Comparative Fault Act does not include intentional torts in its definition of fault, the court found it unnecessary to decide the issue, concluding instead that the Minnesota courts would apply section 14 of the Restatement (Third) of Torts and impute the fault of the intentional wrongdoer to a negligent defendant whose fault consisted of the failure to guard against that intentional misconduct. *Id.* at 895–96.

[144] *See infra* Part X.

[145] The statute of limitations for "for criminal conversation, or for any other injury to the person or rights of another, not arising on contract, and not hereinafter enumerated" is six years. MINN. STAT. § 541.05, subdiv. 1(5) (2022). The "other injury" includes negligence claims. The statute of limitations "for libel, slander, assault, battery, false imprisonment, or other tort resulting in personal injury" is two years. MINN. STAT. § 541.07(1) (2022). The lines can blur in cases involving statutes of limitations also. *Plath v. Plath*, 428 N.W.2d 392 (Minn. 1988), is a good example. The case arose out of injuries sustained by Maribelle Plath when she was pushed by her husband, Daryl, after an incident in which she had initially cut his lip with a hem-ripper and then came at him again in the bathroom where he was cleaning the wound. *Id.* at 393. He pushed her in an attempt to avoid being cut again. *Id.* She brought suit against her husband more than two years but less than six years after the incident. *Id.* The trial court held that the two-year statute of limitations governing intentional torts applied, rather than the six-year statute governing negligence claims. *Id.*

Daryl Plath, the defendant, argued that he was actually more culpable, in order to classify the plaintiff's claim as a battery subject to the shorter statute of limitations for intentional torts. *Id.* The court of appeals noted the trial court's finding that Daryl had "'swung his arm back to ward off plaintiff,'" and its conclusion that it was an intentional and unpermitted contact with Maribelle Plath and therefore a battery. Plath v. Plath, 402 N.W.2d 577, 578 (Minn. Ct. App. 1987), *rev'd*, 428 N.W.2d 392 (Minn. 1988). The court of appeals disagreed that his conduct constituted a battery, and reversed. *Id.* The court concluded that Daryl's attempt to "'ward off'" Maribelle was not a battery because, while he "may have intended to keep his wife away . . . he did not intend to create an offensive contact." *Id.* at 579. In the court's opinion, the negligent creation of a risk of contact was insufficient to establish a battery, a finding required the application of the six-year statute of limitations for negligence claims. *Id.*

The supreme court reversed in a terse five-paragraph opinion. As the supreme court characterized the trial court's findings, "[i]n a claimed attempt to avoid further contact, he instinctively pushed Maribelle back and she fell to the floor and broke her hip." *Plath*, 428 N.W.2d at 393. The court held that the court of appeals exceeded the scope of review under the rules of civil procedure, MINN. R. CIV. P. 52.01, when it interpreted the evidence and substituted its own judgment for the trial court. *Id.*

To summarize, the district court concluded that the facts supported the battery claim. The court of appeals saw the claim as a negligence claim. The supreme court decided the case on procedural grounds. The split in the district court and court of appeals opinions is yet another indication of how the lines between battery and negligence claims are blurred.

negligence claims.[146]

VI. TORT LAW AND STATUTES

Tort law intersects with statutory law in a variety of ways. Statutes may replace the common law in whole or in part.[147] They may limit the scope of tort law.[148] They may create express causes of action that did not exist at common law or express causes of action that provide supplemental remedies. Absent express remedies, courts may imply remedies for statutory violations. If there are no remedies, express or implied, for a statutory violation, the violation may be negligence per se. If not, the violation may be evidence of negligence. In some cases, evidence of a statutory violation that results in a criminal conviction may collaterally bar the defendant from contesting liability in a civil action. And finally, a criminal statute that bars consent as a defense may be used to bar the defense, including offshoots of the defense, in equivalent civil actions. Understanding the ways in which statutes may have an impact on civil litigation is important in ensuring that civil remedies are shaped in ways that provide the fullest protection for victims of sexual misconduct.

---

[146] RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS, Scope Note (AM. L. INST., Tentative Draft No. 1, 2015) ("[A] statement that negligence and intentional-tort claims are mutually exclusive, or that the latter precludes the former, might reflect the view that preemption is warranted as a matter of *tort doctrine*. However, preemption is not the usual judicial stance with respect to other tort doctrines, at least where the question is whether the plaintiff can assert different theories of recovery in the alternative. A plaintiff ordinarily may assert various theories of product liability (negligence, strict liability, and warranty) in the alternative. She may ordinarily assert tort and contract claims in the alternative. If the proven facts can support alternative theories, plaintiff is ordinarily permitted to prevail on any such theory. Thus, in the context of internal tort doctrines as well as collateral legal doctrines, courts should carefully consider whether preemption is the more justifiable approach.").

[147] *See, e.g.*, MINN. STAT. § 176.001 (2022). ("[T]hat chapter 176 be interpreted so as to assure the quick and efficient delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to the provisions of this chapter. It is the specific intent of the legislature that workers' compensation cases shall be decided on their merits and that the common law rule of 'liberal construction' based on the supposed 'remedial' basis of workers' compensation legislation shall not apply in such cases. The workers' compensation system in Minnesota is based on a mutual renunciation of common law rights and defenses by employers and employees alike. Employees' rights to sue for damages over and above medical and health care benefits and wage loss benefits are to a certain degree limited by the provisions of this chapter, and employers' rights to raise common law defenses such as lack of negligence, contributory negligence on the part of the employee, and others, are curtailed as well. Accordingly, the legislature hereby declares that the workers' compensation laws are not remedial in any sense and are not to be given a broad liberal construction in favor of the claimant or employee on the one hand, nor are the rights and interests of the employer to be favored over those of the employee on the other hand."). The workers' compensation remedy is the exclusive remedy of an injured employer who is covered by the Act. *See id.* § 176.031. The Minnesota No-Fault Automobile Insurance Act partially replaces tort liability, permitting claims against an insured driver only when certain tort thresholds are met. *See id.* § 65B.51, subdiv. 3.

[148] *See, e.g.*, *id.* § 604.02, subdiv. 1 (adopting a default rule of several liability in lieu of joint and several liability).

A. Express Causes of Action

There are numerous legislatively created causes of action in the Minnesota Statutes. The statutes may create causes of action that did not exist at common law,[149] or they may provide specific statutory remedies for conduct that would also give rise to common law claims but with additional remedies that may transcend the common law remedies.[150]

Other statutes provide remedies in a range of cases. As examples, the legislature has created express causes of action for negligent or intentional failure of a mandatory reporter to report abuse of vulnerable adults,[151] consumer fraud,[152] interference with a funeral or burial service,[153] graffiti damage,[154] injury to a service animal,[155] physical interference with safe access to health care,[156] employer retaliation for employee taking time off to address harassment and stalking issues,[157] bias offenses,[158] parental liability in various cases,[159] forcible eviction,[160] and denying access to places of public

[149] As an example, see Minnesota's Wrongful Death Act. *Id.* § 573.02. There is no common law action for wrongful death. The wrongful death act fills the void by creating a cause of action "[w]hen death is caused by the wrongful act or omission of any person or corporation . . . if the decedent might have maintained an action, had the decedent lived, for an injury caused by the wrongful act or omission." *Id.*

[150] Minnesota's dog injury statute is an example of a statute that provides a strict liability remedy that is in addition to other potential common remedies for injuries caused by animals. *Id.* § 347.22. It creates a cause of action for cases where "a dog, without provocation, attacks or injures any person who is acting peaceably in any place where the person may lawfully be." *Id.* The statute makes the dog's owner "liable in damages to the person so attacked or injured to the full amount of the injury sustained." *Id.*

[151] *Id.* § 626.557, subdiv. 7 ("A mandated reporter who negligently or intentionally fails to report is liable for damages caused by the failure.").

[152] *Id.* § 325F.69.

[153] *Id.* § 609.501, subdiv. 3 ("A person who violates subdivision 2 is liable to a surviving member of the deceased person's family or household for damages caused by the violation. A surviving member of the deceased person's family or household may also bring an action for injunctive relief and other appropriate relief or remedial compensation. In an action brought under this subdivision, a prevailing plaintiff may recover attorney fees.").

[154] *Id.* § 617.90, subdiv. 2 (allowing action for damages to property by a property owner for three times the cost of restoration, against the defendant or parents of a minor, the latter subject to the limitations in Minn. Stat. § 540.18; attorney's fees and costs may be awarded; defendant may be ordered to perform restoration).

[155] *Id.* § 343.21, subdiv. 8a.

[156] *Id.* § 609.7495, subdiv. 4(b) (civil action against violator for damages, costs, attorney fees, and other relief determined by the court; in addition, the aggrieved party may be awarded by the court damages of up to $1,000 for each violation).

[157] *Id.* § 611A.79, subdiv. 2 (1), (2) (provides a civil cause of action against the person committing the offense; "plaintiff is entitled to recover the greater of . . . $500 or ... "actual general and special damages, including damages for emotional distress," as well as punitive damages).

[158] *Id.* § 609.748, subdiv. 10(c) (civil action against employer for retaliation).

[159] *Id.* §§ 540.18, 604.14, subdiv. 3, 617.90, subdiv. 2, 611A.79, subdiv. 4.

[160] Id. § 557.08 ("If a person who is put out of real property in a forcible manner without lawful authority, or who, being so put out, is afterwards kept out by force, shall recover damages therefor, judgment may be entered for three times the amount at which the actual damages are assessed.").

accommodation.[161]

In some cases, the legislative causes of action are for the benefit of vulnerable populations. As examples, there are statutes that expressly provide civil remedies for sexual exploitation,[162] coercion for use in prostitution,[163] and use of minors in sexual performances.[164] The legislature has not provided an express civil remedy for criminal sexual conduct.

B. Implied Private Causes of Action

Absent an express remedy for a statutory violation, the courts may imply one. In *Halva v. Minnesota State Colleges & Universities*, the Minnesota Supreme Court recently noted its general reluctance "'to recognize causes of action' when the language of the statute does not expressly provide one."[165] Implying a civil cause of action for the violation of Minnesota's criminal sexual conduct statutes is not plausible, given the line drawn in *Halva* and other recent supreme court cases noted by the court in *Halva*.

C. Negligence and Negligence Per Se

Florek raises the question of whether negligence theory can accommodate a negligence per se claim based on violation of a criminal sexual conduct statute. As a general proposition, negligence theory comfortably encompasses invasions of personal autonomy. Persons injured by the negligent conduct of others are entitled to recover damages for pain, embarrassment, and emotional harm, as well as past and future medical expenses and income loss.[166] The same damages would be available in a battery action.

There are four elements in a negligence case: duty, breach of duty,

---

[161] *Id.* § 604.12.

[162] *Id.* § 604.201 (cause of action against psychotherapist for sexual exploitation of patients and former
patients).

[163] *Id.* § 611A.81.

[164] *Id.* § 617.246.

[165] 953 N.W.2d 496, 504 (Minn. 2021) (quoting Graphic Commc'ns Loc. 1B Health & Welfare Fund A v. CVS Caremark Corp., 850 N.W.2d 682, 689 (Minn. 2014)) ("In fact, we have declined to recognize implied private causes of action in four of our decisions from the past 30 years. *Id.* at 692 (declining to find a cause of action within Minnesota's Pharmacy Practice and Wholesale Distribution Act because it was not expressly or impliedly provided by the plain language of the statute); *Krueger v. Zeman Constr. Co.*, 781 N.W.2d 858, 864–65 (Minn. 2010) (declining to find a private cause of action for third parties within a specific subdivision of the Minnesota Human Rights Act because the language of the statute was unambiguous and there was no implied cause of action); *Becker*, 737 N.W.2d at 207–08 (declining to find an implied cause of action within Minnesota's Child Abuse Reporting Act because the Legislature 'expressly creates civil liability when it intends to do so'); *Bruegger v. Faribault Cnty. Sheriff's Dep't.*, 497 N.W.2d 260, 262 (Minn. 1993) (declining to find a private cause of action within Minnesota's Crime Victims Reparations Act).").

[166] 4A MINN. PRACTICE SERIES (JURY INSTRUCTION GUIDES—CIVIL), CIVJIG 91.10 (6th ed. 2014).

injury, and the breach of duty being a proximate cause of the injury.[167] In its narrowest formulation, the court has stated that "general negligence law imposes a general duty of reasonable care when the defendant's own conduct creates a foreseeable risk of injury to a foreseeable plaintiff."[168]

The standard of care is the care a reasonably prudent person would exercise under the same or similar circumstances.[169] In some cases, a statute provides the standard of care, and violation of that statutory standard of care is negligence per se.[170] In order for a statutory violation to be negligence per se, the plaintiff must be within the class of persons protected by the statute and suffer the type of harm the statute was intended to avoid.[171] Where the statutory purpose analysis is satisfied, "[a] per se negligence rule substitutes a statutory standard of care for the ordinary prudent person standard of care, such that a violation of a statute . . . is conclusive evidence of duty and breach."[172]

---

[167] *See, e.g.*, Senogles v. Carlson, 902 N.W.2d 38, 42 (Minn. 2017); Domagala v. Rolland, 805 N.W.2d 14, 22 (Minn. 2011); Gradjelick v. Hance, 646 N.W.2d 225, 231 (Minn. 2002); Funchess v. Cecil Newman Corp., 632 N.W.2d 666, 672 (Minn. 2001); Lubbers v. Anderson, 539 N.W.2d 398, 401 (Minn. 1995).

[168] *Domagala*, 805 N.W.2d at 23.

[169] *Id.* at 28. Section 3 of the Third Restatement similarly provides that "[a] person acts negligently if the person does not exercise reasonable care under all the circumstances," and that the "[p]rimary factors to consider in ascertaining whether the person's conduct lacks reasonable care are the foreseeable likelihood that the person's conduct will result in harm, the foreseeable severity of any harm that may ensue, and the burden of precautions to eliminate or reduce the risk of harm." RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 3 (AM. L. INST. 2010).

[170] In *Staub v. Myrtle Lake Resort, LLC*, 964 N.W.2d 613, 624 n.10 (Minn. 2021), the supreme court noted that "[a] negligence per se theory of tort liability 'substitutes a statutory standard of care for the ordinary prudent person standard of care, such that a violation of a statute (or an ordinance or regulation adopted under statutory authority) is conclusive evidence of duty and breach.'" (quoting Gradjelick v. Hance, 646 N.W.2d 225, 231 n.3 (Minn. 2002)). The court emphasized that "[a] successful negligence per se claim . . . establishes as a matter of law only those elements of duty and breach; it does not establish proximate cause, which the plaintiff must still prove with sufficient evidence." *Id.*

[171] Anderson v. State, Dep't of Nat. Res., 693 N.W.2d 181, 190 (Minn. 2005) (citing Anderson v. Anoka Hennepin Ind. Sch. Dist. 11, 678 N.W.2d 651, 662–63 (Minn. 2004)). Similarly, the Third Restatement provides that "[a]n actor is negligent if, without excuse, the actor violates a statute that is designed to protect against the type of accident the actor's conduct causes, and if the accident victim is within the class of persons the statute is designed to protect." RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 14 (AM. L. INST. 2010).

[172] *Anderson*, 693 N.W.2d at 189–90 (quoting *Gradjelick*, 646 N.W.2d at 231 n.3). The duty determination should precede the issue of whether the standard of care is provided by a statute, however. As an example, section 604A.01 of the Minnesota Statutes provides in part that "[a] person at the scene of an emergency who knows that another person is exposed to or has suffered grave physical harm shall, to the extent that the person can do so without danger or peril to self or others, give reasonable assistance to the exposed person." MINN. STAT. § 604A.01, subdiv. 1 (2021). Assuming a case where suit is brought against a defendant who failed to rescue the plaintiff, the issue is whether the statutory violation would give rise to a negligence per se claim. The answer turns on whether there is a common law duty to rescue. *See* DAN B. DOBBS, PAUL T. HAYDEN AND ELLEN M. BUBLICK, THE LAW OF TORTS § 148 (2d ed. 2016) ("[T]he defendant must be under a duty to use reasonable care; if he is

In *Anderson v. State, Department of Natural Resources*, the supreme court regarded negligence per se and negligence as "inseparably intertwined."[173] The court viewed negligence per se as "a form of ordinary negligence" resulting from a statutory violation.[174] In cases involving the violation of what the supreme court has labeled "exceptional" statutes, statutes intended to protect vulnerable classes of individuals, defenses to the negligence claim may be restricted.[175]

There is no separate tort of sexual battery in Minnesota, but there is an issue of whether violation of the criminal sexual conduct statutes is negligence per se. For the negligence per se doctrine to work, the statute provides the standard of care, but there must be a duty that provides the platform for the application of negligence per se. The duty in cases involving sexual abuse might be viewed in various ways, but it seems clear that a person who sexually abuses another has created a foreseeable risk that physical and/or emotional harm will occur.

This raises two issues. One is whether physical harm is required in negligence cases. The problem in cases such as *Florek* is that there may be physical contact, but no allegation of physical injury due to that contact, although there may be allegations of significant emotional harm arising out of the contact. Recovery for those damages would not be a problem if the theory of recovery was offensive battery.[176] Intentionally causing contact that is offensive may give rise to a battery claim but likely not a negligence claim. On the other hand, the supreme court has indicated that a key element of negligence is "injury," without specifically defining it, but in application, the term appears to be broad enough to encompass at least some touchings that are short of actual physical harm.

As an example, the court in *Bjerke v. Johnson*[177] appeared to assume that the plaintiff sustained a sufficient injury to justify a negligence claim against the defendant, who was in a custodial relationship with the

---

not, violation of the statute cannot not prove breach of duty."). If so, the statute could provide the standard of care and violation of the statute would be negligence per se. In Minnesota, nonfeasance is insufficient to establish a duty, absent a special relationship between the defendant and plaintiff. *See* Fenrich v. Blake Sch., 920 N.W.2d 195, 203 (Minn. 2018). Without an underlying duty, however, the statute cannot be applied to supply the standard of care in a negligence case. No duty, no negligence per se.

While statutes may not create common law duties, a court may utilize statutes in fashioning and shaping duty rules. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 14 cmt. i (AM. L. INST. 2010).

[173] 693 N.W.2d at 190.

[174] Seim v. Garavalia, 306 N.W.2d 806, 810 (Minn. 1981).

[175] *See* Michael K. Steenson, *The Impact of "Exceptional" Statutes on Civil Litigation in Minnesota*, 26 Wm. Mitchell L. Rev. 866, 879–913 (2000).

[176] In *Johnson v. Ramsey County*, 424 N.W.2d 800 (Minn. Ct. App. 1988), *rev. denied* (Minn. Aug. 24, 1988), the court of appeals affirmed a district court judgment for the plaintiff based on jury findings that a battery had occurred, based on an unwanted contact by a judge on his court reporter. The jury in the case awarded $50,000 in compensatory damages for past injury, $25,000 for future injury, and $300,000 in punitive damages, remitted by the district court to $50,000. *Id.* at 801.

[177] 742 N.W.2d 660 (Minn. 2007).

plaintiff.[178] The court discussed damages, although only in the context of whether the plaintiff's apparent consent to the contact might have influenced the degree of damages, but not whether the "injury" was sufficient to satisfy that element of a negligence claim.[179] Nonetheless, the duty seems clear. It is a duty to protect the plaintiff's personal autonomy. If that invasion of personal autonomy itself constitutes "injury," the plaintiff would be entitled to recover for the emotional harm caused by the injury.

Florek is at least roughly similar to *Bjerke*. The difference between the two cases is that the plaintiff in *Florek* did not consent to the sexual contact, but the damages that the plaintiff claimed were damages for emotional harm. Assuming that there is a case for establishing that "injury" includes sexual contact, particularly the kind criminalized in the criminal sexual conduct statutes (invasion of personal autonomy), and that the claim is really a claim for emotional distress, a second issue is whether these sorts of cases fit within the supreme court's decisions governing emotional distress claims.

There is no question concerning a plaintiff's right to recover for emotional harm in a negligence case arising out of physical harm. If the person seeking to recover for negligently inflicted emotional harm is not physically injured, Minnesota's zone of danger rules apply.[180] At base, that requires proof that the plaintiff was within a zone of physical danger created by the defendant, reasonably feared for their own safety, and suffered severe emotional distress with attendant physical manifestations.[181] Initially developed in accident cases involving near misses, the test works less well in emotional distress claims involving threats to an individual that fall short of physical injury. *Florek* does not appear to fit the zone of danger requirements—although, even absent personal injury, the case for recovery of emotional harm seems compelling.

Section 47 of the Restatement (Third) of Torts: Liability for Physical and Emotional Harm, provides that "[a]n actor whose negligent conduct causes serious emotional harm to another is subject to liability to the other if the conduct" either "places the other in danger of immediate bodily harm and the emotional harm results from the danger" or if the conduct "occurs in the course of specified activities, undertakings, or

---

[178] *Id.* at 666–67. The person who was involved in the relationship with the plaintiff was convicted of criminal sexual conduct. *See id.* at 663.

[179] *See id.* at 671.

[180] The court adopted the zone of danger rule in *Purcell v. St. Paul City Ry.*, 50 N.W. 1034 (Minn. 1892), and continues to adhere to that rule. *See, e.g.*, Stadler v. Cross, 295 N.W.2d 552, 554 (Minn. 1980). In *Stadler*, the court noted that it had "never extended liability to one who is not personally in physical danger." *Id.* at 554–55. For a detailed history of emotional distress claims in Minnesota, see Michael K. Steenson, *The Anatomy of Emotional Distress Claims in Minnesota*, 19 WM. MITCHELL L. REV. 1 (1993). More recently, the court permitted recovery by one in the zone of danger to recovery for fear for the safety of a closely related person, as long as the basic requirements of the zone of danger theory are satisfied. *See* Engler v. Ill. Farmers Ins. Co., 706 N.W.2d 764, 770–71 (Minn. 2005). For an analysis of *Engler*, see Michael K. Steenson, *Engler v. Illinois Farmers Insurance Co. and Negligent Infliction of Emotional Distress*, 32 WM. MITCHELL L. REV. 1335 (2006).

[181] *See, e.g.*, *Engler*, 706 N.W.2d at 767.

relationships in which negligent conduct is especially likely to cause serious emotional harm."[182] The first part is the zone of danger rule, and the second part is an accommodation for certain cases in which there is a likelihood that certain activities or undertakings are likely to cause serious emotional harm.[183] There is certainly an argument that one of the cases in which there is a high likelihood that emotional injury will result is in cases involving sexual abuse, particularly when that abuse constitutes criminal sexual conduct. That argument provides support and a rationale for permitting recovery for emotional harm in cases involving sexual abuse, which will frequently implicate the criminal sexual conduct statutes, although not always. They are the kinds of cases in which emotional harm is particularly likely to occur. The supreme court seems to have implicitly recognized that in *Bjerke v. Johnson*.[184]

D. Criminal Statutes and Collateral Estoppel

In some cases, the violation of a criminal statute may collaterally estop the defendant from relitigating issues that were resolved in the criminal case. Collateral estoppel applies when four elements are met:

> (1) the issue was identical to one in a prior adjudication;
>
> (2) there was a final judgment on the merits;
>
> (3) the estopped party was a party or in privity with a party to the prior adjudication; and
>
> (4) the estopped party was given a full and fair opportunity to be heard on the adjudicated issue.[185]

"Collateral estoppel bars the relitigation of issues that are both identical to those issues already litigated by the parties in a prior action and necessary and essential to the resulting judgment."[186]

Fain v. Andersen illustrates how collateral estoppel works.[187] In a case of first impression, the court of appeals held that the defendant's conviction for first-degree premeditated murder collaterally estopped the defendant from relitigating issues of liability for battery.[188] Comparing the elements of first-degree murder with the elements of battery, the district

---

[182] RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 47 (AM. L. INST. 2010).

[183] *See, e.g.*, *id.* cmt. f ("[T]he rule has been applied to circumstances in which, for example, a physician negligently diagnoses a patient with a dreaded or serious disease; a physician negligently causes the loss of a fetus; a hospital loses a newborn infant; a person injures a fetus; a hospital (or another) exposes a patient to HIV infection; an employer mistreats an employee; or a spouse mentally abuses the other spouse.").

[184] *See* 742 N.W.2d 660, 670 (Minn. 2007) (describing the long-term effects of sexual abuse).

[185] Ill. Farmers Ins. Co. v. Reed, 662 N.W.2d 529, 531 (Minn. 2003).

[186] State Farm Mut. Auto. Ins. Co. v. Lennartson, 872 N.W.2d 524, 534 (Minn. 2015) (quotation omitted).

[187] 816 N.W.2d 696, 702 (Minn. Ct. App. 2012).

[188] *Id.*

court held that the elements were the same. First-degree murder is causing another's death with premeditation and the intent to kill. Battery is intentionally causing a harmful or offensive contact to another person. Because death is a harmful contact, the district court concluded that the elements are identical.[189] The court of appeals agreed.[190]

Whether the same result would be reached in cases involving criminal sexual conduct depends on which degree is involved and which tort claim is asserted. The criminal sexual conduct statutes all require some contact, but there is a distinction between general and specific intent statutes. In *State v. Holloway*, the court distinguished general and specific intent crimes.[191] The criminal sexual conduct statutes requiring only a general intent to engage in sexual penetration are general intent crimes, rather than specific intent crimes.[192] The general intent standard is satisfied when "the defendant engaged intentionally in specific, prohibited *conduct*."[193] Specific intent requires proof that the defendant intended to cause a particular result.[194] As an example, assault is a specific intent crime.[195]

In *Florek*, the plaintiff's claims were for battery and negligence. The negligence theory was negligence per se, based on the defendant's violation of the third-degree criminal sexual conduct statute.

Assuming the common law battery claim requires dual intent, meaning the defendant must intend not only the contact, but that the contact be harmful or offensive, the intent is specific. The statutory violation does not require specific intent. Assuming a case in which a defendant is convicted of criminal sexual conduct under one of the statutes requiring only general intent, the finding would not collaterally estop the defendant from litigating the battery claim. The issues are obviously not identical. The criminal sexual conduct statutes reach conduct that the common law of battery does not, at least not under its current formulation in Minnesota. The result would be different in cases involving criminal assault where there is a requirement of specific intent to cause harm.

As to negligence claims, a conviction of criminal sexual conduct would be conclusive on the negligence issue if the statute established the applicable standard of care in a negligence per se claim. Absent a criminal conviction, a finding that the defendant in a civil case violated a criminal statute would be conclusive on the breach issue, although there would still have to be finding that the defendant's conduct was the proximate cause of the plaintiff's injury in the civil case.

---

[189] *Id.* at 701.
[190] *Id.*
[191] State v. Holloway, 916 N.W.2d 338, 350 (Minn. 2018).
[192] *Id.*
[193] In re the Welfare of C.R.M, 611 N.W.2d 802, 808 n.10 (Minn. 2000) (quoting State v. Orsello, 554 N.W.2d at 72).
[194] State v. Wilson, 830 N.W.2d 849, 853–84 (Minn. 2013) (fleeing arrest by means other than a vehicle is a specific intent crime).
[195] State v. Fleck, 810 N.W.2d 303, 308 (Minn. 2012) ("[A]ssault-fear statute is violated when one engages in an act 'with the intent' to cause fear in another of immediate bodily harm or death.").

E. Criminal Statutes and Consent in Sexual Abuse Cases

Short of collateral estoppel, criminal statutes may influence the court's view of the appropriate defenses in cases involving sexual misconduct. *Bjerke v. Johnson*,[196] a sexual abuse case involving a minor, is a key case in assessing the impact of the criminal sexual conduct statutes on civil litigation. The plaintiff in the case, Bjerke, stayed with the defendant, Johnson, on Johnson's horse farm for several years while Bjerke was between the ages of fourteen and eighteen.[197] During that time, she entered into a sexual relationship with Bohlman, an employee of the defendant.[198]

Bohlman was arrested and subsequently convicted of two counts of first-degree criminal sexual conduct and one count of third-degree criminal sexual conduct.[199] Bjerke's claim against Johnson was based on the custodial relationship between Bjerke and Johnson,[200] and not on Johnson's violation of the criminal sexual conduct statutes. The primary assumption of the risk issue was raised in connection with Bjerke's claim against Johnson, but the court's discussion of primary assumption of risk was informed by sections 609.343, subdivision 1, 609.343, subdivision 1, and 609.344, subdivision 1 of the Minnesota Statutes which bar consent as a defense to a criminal sexual conduct case involving sexual abuse of a child.[201]

The court noted that there are two varieties of assumption of risk in Minnesota, primary and secondary.[202] The court first considered whether primary assumption of risk applied. Primary assumption of the risk, which at the time *Bjerke* was decided, was a complete bar to recovery in a range of cases, applies "'where parties have voluntarily entered a relationship in which plaintiff assumes well-known, incidental risks.'"[203] In Bjerke's case, her role in the relationship with Bohlman may have provided the basis for an argument that she voluntarily engaged in that relationship, including Bjerke's admission that she took steps to conceal the relationship.[204] Recognizing that this might be the basis for an argument "that the facts in this case go beyond mere consent," the court did not consider that factor to be a meaningful distinction because of the unusual pressures placed on

---

[196] 742 N.W.2d 660 (Minn. 2007).
[197] *Id.* at 663.
[198] *Id.* at 664.
[199] *Id.*
[200] The court concluded that there was a special relationship pursuant to section 314A(4) of the Second Restatement of Torts, which provides that "one who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection is under a similar duty to the other." RESTATEMENT (SECOND) OF TORTS § 314A(4) (AM. L. INST. 1965).
[201] *Bjerke*, 742 N.W.2d at 669 (citing MINN. STAT. §§ 609.342, subdiv. 1, 609.343, subdiv. 1, and 609.344, subdiv. 1 (2006)).
[202] *Id.* at 669 n.5.
[203] *Id.* (quoting Olson v. Hansen, 216 N.W.2d 124, 127 (Minn. 1974)). For a more detailed analysis of the history of assumption of risk in Minnesota, see Michael K. Steenson, *The Role of Primary Assumption of Risk in Civil Litigation in Minnesota*, 30 WM. MITCHELL L. REV. 115 (2003).
[204] *Bjerke*, 742 N.W.2d at 670.

minors in those situations.[205]

After noting that consent is not a defense in certain criminal sexual conduct cases, the court held "that the defense of primary assumption of the risk is unavailable as a matter of law in cases concerning the sexual abuse of a child."[206] The supreme court has subsequently severely limited primary assumption of risk to a narrow range of cases involving sports injuries.[207] That means primary assumption of risk is no longer considered in cases involving sexual abuse against individuals or entities who are responsible for the sexual misconduct of a third person. Those theories may include negligent hiring, retention, supervision, or negligence with respect to a custodial relationship, as in *Bjerke*, or in cases involving vicarious liability.

Notwithstanding the effective elimination of primary assumption (consent) in these cases, the supreme court's observation that the criminal sexual conduct statutes barring the use of consent illustrate Minnesota's "particularly strong interest in protecting children from sexual abuse"[208] has implications in other settings, including common law battery claims or claims that involve negligence per se claims, as in *Florek*.

The Minnesota Supreme Court also hedged on the impact of Bjerke's conduct, noting that some courts have been concerned that the prohibition of consent evidence paves the way for a one-sided version of the events, but the court said that its disposition of the case did not involve that problem for three reasons. First, given the procedural posture of the case, the court addressed only primary assumption of risk and not whether the defendant might be able to assert the defense of secondary assumption of risk.[209] Second, the court did not express any "opinion on the extent to which a child victim's actions can be considered by the jury in analyzing the defendant's negligence."[210] Third, the court made it clear that it was not

---

[205] *Id.* at 670–71 ("To presume that such pressures begin and end simply with the child's consent would be to ignore the disparity of power that typifies the relationship between the abuser and his victim. The pressures brought by the adult to procure the child's participation in sexual activity can be the same pressures that procure the child's silence. Given the impossibility of separating the pressures that give rise to a victim's consent from those that lead the victim to conceal her abuse, we do not believe that even active concealment by a minor victim of sexual abuse is sufficient to establish the defense of primary assumption of the risk."). The court's emphasis on the vulnerability of children could easily translate to any of the abuses that are made crimes under Minnesota's criminal sexual conduct statutes. The victims are vulnerable. Those who violate the statutes prey on that vulnerability in various ways.

[206] *Id.* at 671. There are differences between consent and primary assumption of risk, particularly if proof of the absence of consent is part of the plaintiff's claim for battery.

[207] *See* Soderberg v. Anderson, 922 N.W.2d 200 (Minn. 2019) (skiing accident); Henson v. Uptown Drink, LLC, 922 N.W.2d 185 (Minn. 2019) (innkeeper's liability/dram shop case). For a more detailed discussion, see 4A MINN. PRACTICE SERIES (JURY INSTRUCTION GUIDES—CIVIL) CIVJIG 28.30, Authorities (6th ed. 2014).

[208] *Bjerke*, 742 N.W.2d at 670. The court noted that it has "characterized this law as reflecting 'the feeling of society in general that sexual contact by adults with children . . . is reprehensible whether or not the child consents, because at that age, the child should be deemed incapable of giving consent.'" *Id.* (quoting State v. Steinbrink, 297 N.W.2d 291, 293 (Minn. 1980)).

[209] *Id.* at 671.

[210] *Id.*

commenting on the impact of the plaintiff's conduct on the damages issue.[211]

The triple-hedge is somewhat perplexing, particularly the discussion of secondary assumption of risk. Primary assumption of risk relates to the duty issue, but the court held that primary assumption of the risk was not available because it turned on consent. The criminal sexual conduct statutes express a strong policy in favor of limiting consent as a defense. If so, it is not clear why those same policies would not also preclude the assertion of the defense of secondary assumption of risk, which is now simply a facet of contributory negligence.[212] Secondary assumption of risk has no independent life in Minnesota. The focus is on the issue of whether the party seeking recovery exercised reasonable care for their own safety.[213] Consent is relevant only insofar as that consent might seem to be negligent under the circumstances.

Characterizing a minor's conduct as negligent under the circumstances should in no way diminish the strong policy interest in protecting minors from sexual abuse, or for that matter, anyone who is subject to sexual abuse that constitutes a violation of Minnesota's criminal sexual conduct statutes.

In other contexts, the supreme court has held that contributory negligence is unavailable as a defense, including cases where the defendant is in a custodial relationship with the plaintiff,[214] or where the defendant has violated a so-called "exceptional" statute that is intended for the protection of a specific class of persons because of their lack of judgment.[215] The court recognized in *Bjerke* that consent is not a defense in certain criminal sexual conduct cases, using the criminal sexual conduct statutes to bolster its conclusion that primary assumption of risk is not a bar to recovery.[216] That followed from the court's conclusion that consent is an element of primary assumption of risk.[217]

That underlying policy-based conclusion, along with the parallel cases where the court has precluded the defense of contributory negligence, provide the basis for a strong argument that violation of the criminal sexual conduct statutes should preclude assertion of consent in battery cases where

---

[211] *Id.*

[212] *See* Springrose v. Willmore, 192 N.W.2d 826, 827 (Minn. 1971) ("The doctrine of implied [secondary] assumption of risk must, in our view, be recast as an aspect of contributory negligence, meaning that the plaintiff's assumption of risk must be not only voluntary but, under all the circumstances, unreasonable.").

[213] *See* 4A MINN. PRACTICE SERIES (JURY INSTRUCTION GUIDES—CIVIL) CIVJIG 28.25, Use Note (6th ed. 2014). With the merger of defenses, the single question is whether plaintiffs exercised reasonable care for their own safety. *See id.*

[214] *See* Sandborg v. Blue Earth County, 615 N.W.2d 61, 65 (Minn. 2000) (suicide by prisoner in county jail); Tomfohr v. Mayo Found., 450 N.W.2d 121, 125 (Minn. 1990) (suicide by patient in locked psychiatric ward).

[215] *See* Michael K. Steenson, *The Impact of "Exceptional" Statutes on Civil Litigation in Minnesota*, 26 WM. MITCHELL L. REV. 866 (2000).

[216] *Bjerke*, 742 N.W.2d at 670.

[217] *Id.* at 670–71.

the statutory elements are satisfied, even if the statutory elements do not exactly match the elements of the common law tort of battery.[218] It also supports the conclusion that the defense of contributory negligence should be disallowed in cases where it is inconsistent with the duty of the defendant to use reasonable care for the protection of the plaintiff. That would apply in cases involving claims for negligently caused sexual abuse.

The other points the court made about the plaintiff's conduct are valid. The conduct of the plaintiff (perhaps concealment of the relationship) could have an impact on the issue of whether the custodial defendant was negligent. And it could be relevant to damages in the sense that it bears on the degree of emotional harm that might be expected to flow from the third person's sexual misconduct if the plaintiff consented to the contact.

VII. SEXUAL ABUSE – AN INDEPENDENT TORT?

Sexual abuse may give rise to various tort claims, including battery, assault, false imprisonment, or intentional infliction of emotional distress.[219] In *Lickteig v. Kolar*,[220] the supreme court made it clear that it has "not treated claims based on sexual abuse, in the context of either intentional torts or negligence, as independent of a common-law tort."[221]

Suit was initially filed in federal district court based on diversity jurisdiction.[222] The court dismissed the claim sua sponte, concluding that Minnesota "does not recognize a cause of action for sexual abuse by unemancipated siblings," and that intrafamily immunity barred Lickteig's claim.[223] Following the district court's denial of Lickteig's motion to reconsider or to certify the case to the Minnesota Supreme Court, Lickteig

---

[218] Note that in *Florek v. Vannet*, the court instructed the jury that consent was not a defense to the statutory claim. No. A18-0997, 2019 WL 1320619 (Minn. Ct. App. Mar. 25, 2019). "A person who is physically helpless cannot consent to a sexual act. Consent is not a defense to a violation of this law." Special Verdict Form, Florek v. Vannet, No. 31-CV-15-2675 (Minn. Dist. Ct. Dec. 13, 2017), 2017 WL 7370678. But the special verdict form did not ask that question. It asked if D knew P was physically incapacitated. The special verdict form also asked whether the plaintiff consented to the contact. In this setting, a finding that the plaintiff was incapacitated would have precluded any claim of consent with respect to the battery claim. *See supra* Part II.

[219] Ellen M. Bublick, *Tort Suits Filed by Rape and Sexual Assault Victims in Civil Courts: Lessons for Courts, Classrooms and Constituencies*, 59 SMU L. REV. 55, 71 (2006).

[220] 782 N.W.2d 810 (Minn. 2010).

[221] *Id.* at 815. The court specifically noted its decision in *D.M.S. v. Barber*, 645 N.W.2d 383, 386–87 (Minn. 2002), as an example. D.M.S. was a minor placed in foster care with Barber by a non-profit Minnesota corporation, Professional Association of Treatment Homes (PATH). *Id.* at 385. He was sexually abused by Barber. *Id.* at 386. He brought suit against Barber and PATH, alleging that the corporation negligently hired, retained, and supervised Barber, and because it failed to investigate and act on prior allegations of sexual misconduct that had been made against Barber, and in placing D.M.S. in Barber's care. *Id. D.M.S.* did not specifically deal with the issue of whether there is an independent cause of action for sexual abuse. *See id.* The court's decision in *W.J.L. v. Bugge* is to the same effect. 573 N.W.2d 677 (Minn. 1998).

[222] *Lickteig*, 782 N.W.2d at 811.

[223] *Id.* at 812.

appealed to the Eighth Circuit, which certified three questions to the Minnesota Supreme Court, including "whether Minnesota law recognizes a cause of action by one sibling against another sibling for 'sexual abuse' that allegedly occurred when they were both minor children; and, if so, what are the elements of that cause of action?"[224]

The answers to the questions turned, in part, on two Minnesota statutes. The first was the delayed discovery statute of limitations in cases involving sexual abuse claims, which at the time established a six-year statute of limitations for "sexual abuse."[225] The statute defined "sexual abuse" as conduct that is described in Minnesota's criminal sexual conduct provisions of the criminal code defining criminal sexual conduct in the first through fourth degrees.[226]

The supreme court concluded that the delayed discovery statute did not create a separate cause of action for sexual abuse claims for several reasons. First, as a general proposition, "[a] statute does not give rise to a civil cause of action unless the language of the statute is explicit or it can be determined by clear implication."[227] The court concluded that the delayed discovery statute did not explicitly or implicitly create a cause of action for sexual abuse.

The second reason was the lack of precedent. The court noted that it has never held that a statute of limitations creates a cause of action.[228] Third, the court concluded that the history of the discovery statute does not support the conclusion that the legislature intended to create a cause of action for sexual abuse.[229] Rather, it simply extends the time in which a claim

---

[224] *Id.* at 811 (The remaining questions were "(2) whether intrafamilial immunity applies between siblings for a sexual abuse tort or battery tort committed when both were unemancipated minors living in the same household, where the lawsuit is not brought until both are emancipated adults living in separate households; and (3) whether the statute of limitations, Minn. Stat. § 541.073 (2008), applies retroactively to Lickteig's action, where she was allegedly sexually abused as a minor between 1974 and 1977, but because of repressed memories, she alleged that she did not remember the abuse until 2005."). The supreme court accepted the questions as certified by the Eighth Circuit. *Id.* at 812.

[225] MINN. STAT. § 541.073, subdiv. 2 (At the time, the statute read in part as follows: "(a) An action for damages based on personal injury caused by sexual abuse must be commenced within six years of the time the plaintiff knew or had reason to know that the injury was caused by the sexual abuse. (b) The plaintiff need not establish which act in a continuous series of sexual abuse acts by the defendant caused the injury. (c) The knowledge of a parent or guardian may not be imputed to a minor. (d) This section does not affect the suspension of the statute of limitations during a period of disability under section 541.15." Following a 2013 amendment, subdivision 2 now reads as follows: "(a) An action for damages based on sexual abuse: (1) must be commenced within six years of the alleged sexual abuse in the case of alleged sexual abuse of an individual 18 years or older; (2) may be commenced at any time in the case of alleged sexual abuse of an individual under the age of 18, except as provided for in subdivision 4; and (3) must be commenced before the plaintiff is 24 years of age in a claim against a natural person alleged to have sexually abused a minor when that natural person was under 14 years of age.").

[226] MINN. STAT. §§ 609.342–609.345 (2021).

[227] *Lickteig*, 782 N.W.2d at 814 (quoting Becker v. Mayo Found., 737 N.W.2d 200, 207 (Minn. 2007) (citing Larson v. Dunn, 460 N.W.2d 39, 47 n.4 (Minn. 1990))).

[228] *Id.* at 815.

[229] *Id.* at 816.

for sexual abuse may be brought.[230] Remaining issues are whether there *could* or *should* be a new common claim for sexual abuse or sexual battery.

VIII. CREATING A NEW COMMON LAW TORT

In some circumstances, the Minnesota Supreme Court will create new common law causes of action or defenses. The court has been cautious in doing so, although over time it is clear that the court has been responsive to changing social conditions as it has shaped and reshaped the common law.[231]

In 1909, the supreme court held in *Tuttle v. Buck* that the plaintiff stated a cause of action against the defendant who was alleged to have established a competing barber shop for the sole purpose of injuring the plaintiff.[232] In so holding, the court recognized the adaptability of the common law:

> It must be remembered that the common law is the result of growth, and that its development has been determined by the social needs of the community which it governs. It is the resultant of conflicting social forces, and those forces which are for the time dominant leave their impress upon the law. It is of judicial origin, and seeks to establish doctrines and rules for the determination, protection, and enforcement of legal rights. Manifestly it must change as society changes and new rights are recognized. To be an efficient instrument, and not a mere abstraction, it must gradually adapt itself to changed conditions.[233]

In *Miller v. Monsen*, decided forty years later, the court recognized a child's action for enticement, explaining:

> Novelty of an asserted right and lack of common-law precedent therefor are no reasons for denying its existence. The common law does not consist of absolute, fixed, and inflexible rules, but rather of broad and comprehensive principles based on justice, reason, and common sense. It is of judicial origin and promulgation. Its principles have been determined by the social needs of the community and have changed with changes in such needs. These principles are susceptible of adaptation to new conditions, interests, relations, and usages as the progress of society may require . . . It is but lip service to these principles to say that the common law has such capacity for growth and expansion

---

[230] *Id.*
[231] *See* Michael K. Steenson, *The Character of the Minnesota Tort System*, 33 WM. MITCHELL L. REV. 239, 240–42 (2006).
[232] 119 N.W. 946, 948 (Minn. 1909).
[233] *Id.* at 947.

> and then to refuse to allow it effect in a particular case where that should be done.[234]

Almost fifty years after *Miller*, the supreme court cited *Tuttle* in *Lake v. Wal-Mart Stores, Inc.*, when it adopted three branches of the tort of invasion of privacy.[235] The court again emphasized that it has long recognized that the common law

> is the embodiment of broad and comprehensive unwritten principles, inspired by natural reason, an innate sense of justice, adopted by common consent for the regulation and government of the affairs of men. It is the growth of ages, and an examination of many of its principles, as enunciated and discussed in the books, discloses a constant improvement and development in keeping with advancing civilization and new conditions of society. Its guiding star has always been the rule of right and wrong, and in this country its principles demonstrate that there is in fact, as well as in theory, a remedy for all wrongs.[236]

These are just three of the supreme court's acknowledgments of the capacity of the common law for change. There are others that include adopting new causes of action,[237] reshaping others,[238] removing barriers to recovery,[239] or deleting claims from the common law registry.[240]

Whether this acknowledged common law adaptability translates to cases involving sexual battery in a way that would permit either reforming

---

[234] 37 N.W.2d 543, 547 (Minn. 1949) (citations omitted).

[235] Lake v. Wal-Mart Stores, Inc., 582 N.W.2d 231, 234 (Minn. 1998). The court recognized the right to privacy, "including causes of action in tort for intrusion upon seclusion, appropriation, and publication of private facts," but the court declined "to recognize the tort of false light publicity." *Id.* at 236.

[236] *Id.* at 233 (quoting State *ex rel.* City of Minneapolis v. St. Paul, M. & M. Ry. Co., 108 N.W. 261, 268 (Minn. 1906) (citations omitted)).

[237] *See, e.g.*, Dickhoff v. Green, 836 N.W.2d 321, 334 (Minn. 2013) (adopting loss of a chance theory in medical malpractice cases); Phipps v. Clark Oil & Refining Corp., 408 N.W.2d 569, 572 (Minn. 1987) (adopting common law action for retaliatory discharge, which was subsequently established legislatively); Hubbard v. United Press Int'l, Inc., 330 N.W.2d 428, 439 (Minn. 1983) (adopting tort of intentional infliction of emotional distress); Anderson v. Stream, 295 N.W.2d 595, 601 (Minn. 1980) (abolishing parental immunity); Nieting v. Blondell, 235 N.W.2d 597, 601 (Minn. 1975) (abolishing state tort immunity); McCormack v. Hankscraft Co., 154 N.W.2d 488, 500–01 (Minn. 1967) (adopting strict products liability).

[238] *See* Peterson v. Balach, 199 N.W.2d 639, 644 (Minn. 1972) (abolishing common law categories of licensee and invitee in favor of a general duty of reasonable care owed to entrants on land).

[239] *See* Soderberg v. Anderson, 922 N.W.2d 200, 205–06 (Minn. 2019) (abolishing primary assumption of risk except in a narrow range of sport-injury cases); Holm v. Sponco Mfg., Inc., 324 N.W.2d 207, 213 (Minn. 1982) (abolishing the latent-patent danger rule previously adopted by the court in *Halvorson v. American Hoist and Derrick Co.*, 240 N.W.2d 303 (Minn. 1976), for products liability cases).

[240] *See* Maslowski v. Prospect Funding Partners, LLC, 944 N.W.2d 235, 241 (Minn. 2020) (removing champerty prohibition).

battery law or the adoption of a separate tort of sexual battery based on the criminal sexual conduct statutes are different questions. The former would perhaps be an easier sell than the latter, but there is nothing in Minnesota law that imposes an insurmountable barrier to either.

Although there is an argument that significant changes to the common law should be made by the legislature, the supreme court dispelled that notion in *Salin v. Kloempken*,[241] a case involving a claim for loss of parental consortium. Because the claim for loss of consortium is a common law creation, and common law development is the responsibility of the judiciary, the court saw neither deference to the legislature nor lack of common law authority supporting the claim as a reason for refusing to consider the claim on the merits.[242] While the court ultimately rejected the claim for policy reasons, including problems involved in measuring the damages, the potential for double recovery in injury cases, and statutes of limitations issues, the court did consider the claim on the merits.[243]

If there is a new tort of sexual battery, the issue is what it would look like. As a first step, perhaps the word "new" could be put aside in favor of a focus on what the appropriate structure of common law principles are governing claims of sexual abuse. First, if the common law tort of battery is altered to ensure that there is a single-intent standard, recovery will be somewhat expanded, certainly to take care of the problem posed by *Florek*.[244] Second, if consent in battery cases is deemed to be a defense rather than part of the plaintiff's case, a position the Third Restatement punts on,[245] recovery would be expanded. Third, if the supreme court's decision in *Bjerke* is followed to its logical conclusion, along with other supreme court cases limiting the reach of contributory negligence and the defense of consent in certain custodial cases involving victims rendered vulnerable by age or circumstances, the ability to recover would be expanded.[246]

It might be, then, that the components of change are actually front and center. The effect of these minor changes is to provide for greater protection of personal autonomy, a right that is basic in the supreme court's common law decisions and also in its recognition of the right of personal autonomy as a matter of constitutional law.[247]

---

[241] 322 N.W.2d 736 (Minn. 1982).
[242] *Id.* at 741–42.
[243] *Id.* at 739–41.
[244] Florek v. Vannet, No. A18-0997, 2019 WL 1320619 (Minn. Ct. App. Mar. 25, 2019).
[245] RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 12, cmt. e (Am. L. Inst., Tentative Draft No. 4, 2019).
[246] 742 N.W.2d 660 (Minn. 2007).
[247] *See* Women of the State by Doe v. Gomez, 542 N.W.2d 17, 26–27 (Minn. 1995) (recognizing the fundamental right of privacy in the context of a woman's right to choose whether to have an abortion). The roots of the privacy right in Minnesota are deeper. *See also* Michael K. Steenson, *Fundamental Rights in the "Gray" Area: The Right of Privacy Under the Minnesota Constitution*, 20 WM. MITCHELL L. REV. 383 (1994).

IX. A STATUTORY CAUSE OF ACTION FOR SEXUAL ABUSE?

Statutes dealing with sexual abuse typically define the crime and provide for special statutes of limitations in sexual abuse cases. Statutes less typically provide civil causes of action for sexual abuse.

A. Statutes of Limitations

As an example, the Minnesota Child Victims Act[248] specifies the statute of limitations for actions based on "sexual abuse," defined as "conduct described in sections 609.342 to 609.3451," the statutes governing first through fifth-degree sexual conduct and sexual extortion. Actions for damages for "sexual abuse"

> (1) must be commenced within six years of the alleged sexual abuse in the case of alleged sexual abuse of an individual 18 years or older; (2) may be commenced at any time in the case of alleged sexual abuse of an individual under the age of 18, except as provided for in subdivision 4; and (3) must be commenced before the plaintiff is 24 years of age in a claim against a natural person alleged to have sexually abused a minor when that natural person was under 14 years of age.[249]

While the supreme court has held that there is no implied cause of action for "sexual abuse" based on the statute,[250] the statute does state that it is unnecessary for the plaintiff to "establish which act in a continuous series of sexual abuse acts by the defendant caused the injury."[251]

The statute "applies to an action for damages commenced against a person who was a cause of the plaintiff's damages either by (1) committing sexual abuse against the plaintiff, or (2) negligence."[252]

B. Other Legislative Solutions

This section sets out three statutes that establish causes of action for sexual abuse. The statutes are from New Jersey, California, and Minnesota. New Jersey's statute is the most far-reaching. California's seems to be closely aligned with the common law of battery. Minnesota's statute only involves the use of minors in sexual performances.

---

[248] MINN. STAT. § 541.073 (2021).
[249] *Id.* § 541.073, subdiv. 2.
[250] Lickteig v. Kolar, 782 N.W.2d 810, 814 (Minn. 2010) ("We do not interpret the delayed discovery statute to have created a separate cause of action for claims based on sexual abuse.").
[251] MINN. STAT. § 541.073, subdiv. 2(b) (2021).
[252] *Id.* § 541.073, subdiv. 3.

1. New Jersey

New Jersey provides an express remedy for "sexual abuse," defined as "an act of sexual contact or sexual penetration between a child under the age of 18 years and an adult."[253] The statute also imposes liability on "[a] parent, resource family parent, guardian or other person standing in loco parentis who knowingly permits or acquiesces in sexual abuse by any other person," although there is an affirmative defense if the other person "was subjected to, or placed in, reasonable fear of physical or sexual abuse by the other person so as to undermine the person's ability to protect the child."[254] The statutory remedy is as follows:

> A plaintiff who prevails in a civil action pursuant to this act shall be awarded damages in the amount of $10,000, plus reasonable attorney's fees, or actual damages, whichever is greater. Actual damages shall consist of compensatory and punitive damages and costs of suit, including reasonable attorney's fees. Compensatory damages may include, but are not limited to, damages for pain and suffering, medical expenses, emotional trauma, diminished childhood, diminished enjoyment of life, costs of counseling, and lost wages.[255]

Nothing in the statute would preclude assertion of any other intentional tort claim by the minor, and nothing would prevent the minor from suing other persons for negligence based on other theories. The statute also restricts the use of evidence of a victim's prior sexual conduct,[256] provides for the

---

[253] N.J. STAT. ANN. § 2A:61B-1(a)(1) (West 2019).

[254] *Id.*

[255] *Id.* § 2A:61B-1(h).

[256] *Id.* § 2A:61B-1(d). ("(1) Evidence of the victim's previous sexual conduct shall not be admitted nor reference made to it in the presence of a jury except as provided in this subsection. When the defendant seeks to admit such evidence for any purpose, the defendant must apply for an order of the court before the trial or preliminary hearing, except that the court may allow the motion to be made during trial if the court determines that the evidence is newly discovered and could not have been obtained earlier through the exercise of due diligence. After the application is made, the court shall conduct a hearing in camera to determine the admissibility of the evidence. If the court finds that evidence offered by the defendant regarding the sexual conduct of the victim is relevant and that the probative value of the evidence offered is not outweighed by its collateral nature or by the probability that its admission will create undue prejudice, confusion of the issues, or unwarranted invasion of the privacy of the victim, the court shall enter an order setting forth with specificity what evidence may be introduced and the nature of the questions which shall be permitted, and the reasons why the court finds that such evidence satisfies the standards contained in this section. The defendant may then offer evidence under the order of the court.
(2) In the absence of clear and convincing proof to the contrary, evidence of the victim's sexual conduct occurring more than one year before the date of the offense charged is presumed to be inadmissible under this section. (3) Evidence of the victim's previous sexual conduct shall not be considered relevant unless it is material to proving that the source of semen, pregnancy or disease is a person other than the defendant. For the purposes of this

protection of the victim's privacy through closed-circuit testimony,[257] and imposes limitations on disclosure of the victim's name.[258]

2. California

California law provides an express civil action against a person who commits a "sexual battery."[259] The statute makes the person who commits the sexual battery liable for general, special, and punitive damages.[260] Sexual battery occurs when a person:

> (1) Acts with the intent to cause a harmful or offensive contact with an intimate part of another, and a sexually offensive contact with that person directly or indirectly results.
> (2) Acts with the intent to cause a harmful or offensive contact with another by use of the person's intimate part, and a sexually offensive contact with that person directly or indirectly results.
> (3) Acts to cause an imminent apprehension of the conduct described in paragraph (1) or (4), and a sexually offensive contact with that person directly or indirectly results.[261]

"Offensive contact" is defined as "contact that offends a reasonable sense of personal dignity."[262] The rights and remedies provided for in the statute are in addition to any other rights and remedies the plaintiff might have.[263]

---

subsection, 'sexual conduct' shall mean any conduct or behavior relating to sexual activities of the victim, including but not limited to previous or subsequent experience of sexual penetration or sexual contact, use of contraceptives, living arrangement and life style.").

[257] *Id.* § 2A:61B-1(e).

[258] *Id.* § 2A:61B-1(f).

[259] CAL. CIV. CODE § 1708.5 (West 2022).

[260] *Id.* § 1708.5(b). The statute provides that these "rights and remedies . . . are in addition to any other rights and remedies provided by law." *Id.* § 1708.5 (e).

[261] *Id.* § 1708.5(a).

[262] *Id.* § 1708.5(d)(2).

[263] *Id.* § 1708.5(e). California also provides for civil penalties in cases involving sexual intercourse by an adult with a minor. CAL PENAL CODE § 261.5 (West 2011). The civil penalties are in addition to the criminal penalties imposed by the statute. *Id.* The civil penalties range from $2,000 to $25,000, depending on the age differentials between the adult and minor. *Id.* § 261.5(e)(1). Pursuant to the statute, the district attorney has the authority to bring actions for the recovery of civil penalties under the statute. *Id.* § 261.5(e)(2). The statute requires that from the amounts collected in each action, "an amount equal to the costs of pursuing the action shall be deposited with the treasurer of the county in which the judgment was entered, and the remainder shall be deposited in the Underage Pregnancy Prevention Fund, which is hereby created in the State Treasury." *Id.* The Underage Pregnancy Prevention Fund may be used only for the purpose of preventing underage pregnancy upon appropriation by the legislature. *Id.*

3. Minnesota

Minnesota provides an express cause of action for the use of a minor (person under the age of 16 at the time) in a sexual performance.[264] The statute creates a cause of action "against a person who promotes, employs, uses, or permits a minor to engage or assist others to engage in posing or modeling alone or with others in a sexual performance, if the person knows or has reason to know that the conduct intended is a sexual performance."[265] The statute is not precise in defining the damages to which the minor is entitled, stating only that "[a] person found liable for injuries under this section is liable to the minor for damages."[266] The statute also provides that "[n]either consent to sexual performance by the minor or by the minor's parent, guardian, or custodian, or mistake as to the minor's age is a defense to the action."[267]

4. Drafting Considerations

Statutes providing civil causes of action for sexual abuse or battery may range from simply providing longer statutes of limitations, as many states have done in cases involving sexual abuse of minors,[268] or more limited remedies, as does Minnesota's statute providing for a cause of action for the use of a minor in a sexual performance,[269] or a broader remedy that parallels the crime of sexual misconduct, as does New Jersey's. Remedies may include a set floor for damages or include attorney's fees. The statutory remedies are not in place of, but in addition to, any common law remedies that the plaintiff might have. The statutes may also cover some of the primary evidentiary concerns, including past sexual history of the plaintiff as well as confidentiality of the plaintiff's identity.

The simplest way to create a common law claim for sexual abuse would be to provide that a victim of criminal sexual conduct, as defined in the statutes, also has a civil cause of action for damages, and that consent within the meaning of those statutes would also bar consent as a defense in

---

[264] MINN. STAT. § 617.245 (2022). The statute defines in detail the relevant terms. *Id.* § 617.245, subdiv. 1.
[265] *Id.* § 617.245, subdiv. 2.
[266] *Id.*
[267] *Id.* § 617.245, subdiv. 3 ("An action for damages under this section must be commenced within six years of the time the plaintiff knew or had reason to know injury was caused by plaintiff's use as a minor in a sexual performance. The knowledge of a parent, guardian, or custodian may not be imputed to the minor. This section does not affect the suspension of the statute of limitations during a period of disability under section 541.15.").
[268] *See* National Conference of State Legislatures, *State Civil Statutes of Limitations in Child Sexual Abuse Cases* (May 30, 2017), https://www.ncsl.org/research/human-services/state-civil-statutes-of-limitations-in-child-sexua.aspx [https://perma.cc/KF6H-K2LJ].
[269] MINN. STAT. § 617.245 (2022).

the civil action. The statute could provide for the recovery of actual damages and also for presumed damages, set at a specific level.[270]

X. INSURANCE COVERAGE

In cases arising out of sexual abuse, plaintiffs may assert the usual common law claims for assault and battery, false imprisonment, negligence, negligent infliction of emotional distress, or intentional infliction of emotional distress against the person who committed the sexual abuse or, in some cases, against another person who permitted it to happen or created the risk that it would.

There are two significant problems in establishing coverage under liability insurance policies for claims based on sexual abuse. The first is that the policies exclude coverage for injuries that are expected or intended by the insured, and that, in cases involving sexual abuse, the courts are likely to infer intent to harm as a matter of law. The second is that the courts tend to conclude claims other than sexual abuse are inseparable from the sexual abuse claims for purposes of insurance coverage.

A. Coverage and Exclusions

The availability of insurance coverage is critical to recovery in cases involving sexual abuse, but because the tort claims arising out of sexual abuse invariably involve intentional misconduct, intentional injury exclusions in liability insurance policies may apply to bar coverage no matter how the tort claims are characterized. While there must be an "occurrence" to trigger policy coverage, the intentional nature of the acts that give rise to sexual assault claims means that intentional injury exclusions will apply.

The supreme court has construed occurrence to be "an unexpected, unforeseen, or undesigned happening or consequence."[271] The court has determined that "accidental conduct and intentional conduct are opposite sides of the same coin," and that "[t]he scope of one in many respects defines the scope of the other."[272]

There is no coverage for injuries if the insured "acts with the specific intent to cause bodily injury."[273] Intent to cause injury requires proof that the insured intended not just to do the act, but that the insured intended the harm. The standard is subjective. It may be established either by proof of a specific intent to cause injury or intent may be inferred as a matter of law.[274] The courts infer intent as a matter of law where "the nature and circumstances of the insured's act [are] such that harm [is] substantially

---

[270] For a proposed model statute, see Leah M. Slyder, Note, *Rape in the Civil and Administrative Contexts: Proposed Solutions to Problems in Tort Cases Brought by Rape Survivors*, 68 CASE W. RSRV. L. REV. 543, 578–85 (2017).

[271] Am. Fam. Ins. Co. v. Walser, 628 N.W.2d 605, 609 (Minn. 2001) (quoting Hauenstein v. St. Paul-Mercury Indem. Co., 65 N.W.2d 122, 126 (Minn. 1954)).

[272] *Id.* at 611.

[273] B.M.B. v. State Farm Fire and Cas. Co., 664 N.W.2d 817, 821 (Minn. 2003).

[274] *Id.*

certain to result."[275] In most cases involving consensual sexual contact, intent to cause bodily harm will be inferred as a matter of law.[276]

B. Examples

Allstate Insurance Co. v. S.F.,[277] is a good example of how the exclusion works. The case involved the issue of insurance coverage under a homeowner's policy for sexual assault of C.B. The facts leading to the tort claim were involved but began with a consensual sexual relationship between C.B. and S.F., Allstate's insured, that led to non-consensual sexual encounters by C.B. with S.F. and two other acquaintances, all of whom were sued by C.B. in a six-count complaint for assault, battery, intentional infliction of emotional distress, negligent infliction of emotional distress, defamation, and sexual battery. S.F tendered the defense to Allstate under his homeowner's policy. Allstate denied coverage and instituted a declaratory judgment action seeking a declaration that it had no duty to defend or indemnify S.F. The complainant and S.F. then entered into a *Miller-Shugart* agreement.[278]

Following the district court's entry of judgment for Allstate, the court of appeals affirmed as to the intentional torts claims but reversed as to the negligence claim.[279] The supreme court affirmed the dismissal of the

---

[275] *Id.* (quoting R.W. v. T.F., 528 N.W.2d 869, 872 (Minn. 1995)).

[276] *See* Auto-Owners Ins. Co. v. Todd, 547 N.W.2d 696, 699 (Minn. 1996) (stating that a claim for sexual assault-related false imprisonment is not covered under intentional act exclusion); R.W. v. T.F., 528 N.W.2d 869, 873 (Minn. 1995) (finding intent for the act of unprotected sexual intercourse when insured had knowledge he was infected with herpes); State Farm Fire & Cas. Co. v. Williams, 355 N.W.2d 421, 424 (Minn. 1984) (holding intent to injure as a matter of law in a case involving nonconsensual sexual conduct against person with physical disability); Horace Mann Ins. Co. v. Indep. Sch. Dist. No. 656, 355 N.W.2d 413, 416 (Minn. 1984) (holding intent inferred as a matter law in a case involving sexual assault of a student by a coach); Estate of Lehmann v. Metzger, 355 N.W.2d 425, 426 (Minn. 1984) (stating sexual assault on underage victim ipso facto intentional conduct because one cannot negligently sexually assault another); Fireman's Fund Ins. Co. v. Hill, 314 N.W.2d 834, 835 (Minn. 1982) (stating intent to cause bodily injury inferred as a matter of law in a case involving sexual molestation of a foster child by foster father); Sara L. v. Broden, 507 N.W.2d 24 (Minn. Ct. App. 1993) (stating intent to injure inferred as a matter of law in a nonconsensual contact case notwithstanding insured's status as a diagnosed and admitted pedophile); Illinois Farmers Ins. Co. v. Judith G., 379 N.W.2d 638, 643 (Minn. Ct. App. 1986) (stating intent inferred as a matter of law for purposes of intentional act exclusion based on sexual assaults by minor of minor children for whom he babysat).

[277] 518 N.W.2d 37 (Minn. 1994).

[278] That agreement provided that the insured would pay the complainant $10,000 which would be covered from his personal assets. He also stipulated to judgment against him in the amount of $280,000, which was to be collected from Allstate under his homeowner's policy. *Id.* at 39 and n.1.

[279] Allstate Ins. Co. v. S.F., No. C2-93-968, 1993 WL 430402, at *4 (Minn. Ct. App. Oct. 26, 1993) ("The view of the evidence most favorable to S.F. in this case would be that he *could* have foreseen the danger C.B. faced in being left alone with his two companions. C.B.'s deposition testimony described her subjection to forced sexual activity while S.F. was present. She asked him not to leave and to 'put an end to the situation.' A reasonable inference from this evidence is that S.F.'s departure was negligent because he should have known of the

intentional torts claims and reversed the court of appeals on the negligence claim.[280]

The policy excluded coverage for "An act or omission intended or expected to cause bodily injury or property damage."[281] C.B.'s initial claims alleged nonconsensual sex with the three men, but C.B. also alleged that she was placed in the zone of danger by the three men,[282] and that S.F. abandoned her to the other men.[283]

The court of appeals concluded that the insured's act of abandoning C.B. was distinct from his sexual assault of C.B. The supreme court rejected that argument, concluding that it was an attempt to isolate the one aspect of the conduct throughout that evening and label it negligence. The court instead viewed "the sexual assaults that evening [as] part of an overall intentional plan on the part of the three men to use plaintiff for their sexual pleasure," conduct that it called "reprehensible," but "intentional reprehensible conduct for which all three defendants are liable to plaintiff for intentional assault and battery."[284]

The result would likely be the same in cases involving the assertion of negligence claims. For example, in *R.W. v. T.F.*,[285] a case involving the negligent transmission of genital herpes, the supreme court concluded that it would be "contrary to the purpose of insurance coverage and public policy to indemnify [the insured's] conduct in this case."[286] The jury found that the insured knew that he had herpes and could transfer it to R.W. In holding that the intentional injury exclusion applied, the court refused "to promote the abdication of personal responsibility by providing insurance coverage when an insured engaged in unprotected sexual intercourse despite having knowledge that he is infected with herpes."[287] In a case involving violation of

---

likelihood that his friends would again force C.B. to perform sexual acts after he left. The tape transcripts indicate that S.F. said he would not have allowed such abuse of C.B. to occur had he remained in the apartment. There also was evidence that C.B. suffered real injury as a result of the assaults on her. A medical examination undergone after the incident revealed severe abrasions, and she also suffers ongoing psychological trauma as a result of the assaults. Inasmuch as this view of the evidence must be accepted for the purposes of summary judgment, the trial court's order was error.").

[280] *Allstate*, 518 N.W.2d at 40–41.

[281] *Id.* at 40.

[282] *Id.* at 39 n.2. ("COUNT IV. (Negligent Infliction of Emotional Distress) Plaintiff realleges and incorporates herein by reference Paragraphs 1 through 15 set forth above. 16. S.F., R.K. and Doe had a duty to Plaintiff to allow her to live in a place which does not include a zone of danger. 17. S.F., R.K. and Doe knew that they had the propensity to sexually assault the Plaintiff. 18. By allowing themselves to enter the Plaintiff's home, S.F., R.K. and Doe placed the Plaintiff in a zone of danger of physical impact. 19. As a result of being placed in a zone of danger of physical impact by the Defendants named herein, Plaintiff has suffered and continues to suffer damages including, but not limited to, emotional distress, mental anguish, and lost wages.").

[283] *Id.*

[284] *Id.* at 41.

[285] 528 N.W.2d 869 (Minn. 1995).

[286] *Id.* at 873.

[287] *Id.*

a criminal sexual conduct statute, there is an obvious bridge between that statutory violation and the *R.W.* case.

The intentional act exclusion will create problems, no matter what the plaintiff's theory of recovery is,[288] unless the supreme court redefines its approach in inferring intent as a matter of law in sexual abuse cases.

XI. CONCLUSION

Issues concerning civil remedies for sexual abuse are both simple and complex. In one sense, it seems simple, given the limited civil causes of action that exist for sexual abuse. Common law claims for battery, assault, false imprisonment, and intentional infliction of emotional distress are the typical claims in sexual abuse cases. In Minnesota, there is as yet no separate common law tort action for sexual abuse.

There are problems with the reach of the common law actions, however, as *Florek* illustrates. Battery, with a dual-intent requirement and consent, if it is deemed to be an element of the plaintiff's case, makes recovery more difficult. A single-intent rule with consent as an affirmative defense makes battery a stronger cause of action for sexual abuse. While there is an argument that, in Minnesota, consent is a defense to battery actions rather than part of the plaintiff's cause of action, the single intent theory does not seem to be the current law.

Negligence is a possible additional cause of action. Certainly, the negligence claim will work against entities that employ or are otherwise responsible for the abuse if vicarious liability or negligent supervision, hiring, or retention can be established, or if the existence of a custodial relationship between the plaintiff and defendant can be established. Recovery in those cases will turn in significant part on whether the defendant should have reasonably foreseen the sexual abuse of the victim.

Another question concerns the recoverable damages in cases involving sexual abuse. If there is physical injury, there would be no problem in allowing recovery for the damages sustained by the plaintiff, including damages for emotional harm. Minnesota requires "injury" as an element of a negligence claim. "Injury" could include the kinds of sexual contact covered in the criminal sexual conduct statutes. While the argument may be stronger in cases involving penetration,[289] there is also an argument that the nature of sexual contact is particularly traumatizing and that it should constitute injury.

If not, there is still the possibility that the allegations may be asserted as negligent infliction of emotional distress claims. In many of these cases, the essence of the harm the plaintiffs suffer stems from the emotional

---

[288] *See* W. Jonathan Cardi & Martha Chamallas, *A Negligence Claim for Rape*, 101 TEX. L. REV. 1, 41–43 (2022).

[289] *See id.* at 27–31.

trauma caused by the abuse. While those claims do not fit comfortably in Minnesota's negligent infliction of emotional distress zone of danger theory, claims for emotional harm arising out of sexual abuse appear to have at least some traction in Minnesota. Those claims arise out of situations that are unique in their capacity to cause emotional harm and recognizing that they do not fit comfortably within the zone of danger theory does not mean that recovery should be precluded. The concept has at least implicit recognition in Minnesota. The supreme court's decision in *Bjerke v. Johnson*[290] is pivotal in that understanding.

The negligence claim against the abuser presents different conceptual problems, given the judicial tendency to view intentional tort and negligence theories as mutually exclusive. Battery and negligence theory do overlap, however, as Minnesota cases indicate, which makes it easier to argue the negligence theory in sexual abuse cases involving liability for the unintended consequences of an intentional act. Using the criminal sexual conduct statutes as a basis for a negligence per se claim is innovative, but as applied by the court of appeals in *Florek*, it effectively creates a civil cause of action for violation of the criminal sexual conduct statutes. Those statutes do not seem to fit comfortably in negligence per se theory, but there is an argument that they do. Minnesota common law readily supports a general duty to avoid the invasion of one's personal autonomy. Given that duty, the argument is that the criminal sexual conduct statutes provide the standard of care. Violation of those statutes is negligence per se.

There is always the potential for creating a new tort cause of action for sexual abuse. The contours could follow the criminal law definitions for criminal sexual conduct and track the approaches of those statutes on the consent issue. There would have to be a sexual contact that is harmful or offensive. The theory could blur the lines between negligence and intent in framing the cause of action. The defendant could be subjected to liability for causing the prohibited contact either intentionally or negligently.

Short of that, the criminal sexual conduct statutes have informed the supreme court's understanding of the defenses that should be available in sexual abuse cases. Roughly stated, if consent is not a defense on the criminal side it should not be a defense on the civil side.

The problem of insurance coverage remains a major impediment in civil suits arising out of sexual abuse. The Supreme Court of Minnesota has consistently assumed intent to harm as a matter of law in cases involving sexual abuse. A narrowing construction is possible but changing that line of precedent would be daunting. The change would have to be a less categorical way of approaching cases involving insurance coverage for sexual abuse.

The cap on this winding analysis through the actual and potential application of Minnesota statutory and common law to sexual abuse claims is that remedies for victims of sexual abuse are extremely important—yet

[290] 742 N.W.2d 660 (Minn. 2007).

inadequate. Existing remedies could be expanded judicially or legislatively. The foundations for both are already established in Minnesota law.