

Restating the Tort of Battery

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Abstract

This article offers a bold proposal: eliminate the intentional tort of battery and merge cases of both the negligent and intentional imposition of physical harm into a single new tort. The advantages of a single tort of wrongfully causing physical harm to persons are many. It would a) do away with complex and unneeded doctrinal details now contained within battery law, b) pave the way to a sensible regime of comparative fault for all such physical injuries, c) properly shift the legal focus away from the plaintiff's conduct and onto the defendant's, d) eliminate the Restatement's need to supplement battery law with yet a separate intentional physical harm tort when an injury is intentionally caused but without the contact or other requirements of battery, and e) force courts to decide various collateral issues (like whether punitive damages are available or whether liability insurance coverage is applicable) on their own terms and not by linking them to whether this case involves a battery (and then making exceptions, since it turns out that battery is not a reliable basis for deciding those collateral matters). More broadly, the new tort is intellectually more insightful as it anchors acts that now count as batteries more in their wrongfulness than in their intentionality as battery law does today.

Introduction

In tort law, according to existing legal doctrine, a “battery” is an intentional, unjustified, unconsented to, offensive touching. Looked at more carefully, however, there are actually two different torts

embedded in the law of battery. One is (only) a dignitary tort – an “offensive” touching. If I spit in your face, I probably have committed an offensive battery. These sorts of injuries are not my focus here. Batteries that result in physical harm are what concern me at this point. If I punch you in the face and break your nose, I probably have committed the sort of battery I explore in this article.

The American Law Institute (“ALI”) is currently in the process of Restating the Law of Intentional Torts to Persons, and the able Reporters and their Advisers have completed much of the work on the topic of battery.¹ There is no question that the actual law today, as announced and followed by U.S. courts across the country, is that there is (and has long been) a tort of battery, and that the law of battery contains a range of doctrinal details that let us know when an actionable injury has occurred. This article is not primarily a challenge to what the law is now (only a little bit).

It is (primarily) instead a challenge to the way we have long stated it. I propose separating battery into its two parts, and in a subsequent article I will discuss how I think we should deal with dignitary-offending batteries going forward. *In this article, I propose that we eliminate the physical harm battery as a separate tort, and instead embrace a tort of wrongful physical harm to persons. This tort would include both what we now call battery and what we now call physical injuries to persons caused by negligence.*

I. The Broader Principle that joins Battery and Negligence Law: Wrongful Conduct that Physically Harms People is Tortious

The central point I make in this part is that both negligence law and battery rest on a common fault principle. Before discussing how the fault principle determines when something like a punch in the nose currently is and is not a battery, however, I want first to discuss tort law’s treatment of physical harm to the person outside of the law of battery.

A fairly simple doctrinal regime governs what is typically called negligence law. Assuming a duty to exercise due care (to which I will return), if you unreasonably act (or fail to act) in a way that results in physical harm to another that would not have resulted had you acted reasonably (i.e., if you had acted as a reasonable person would have acted), then you are liable in tort for the damage you caused.² In such a case, your victim's bodily integrity has been harmfully invaded by your careless conduct. A simple example of this would be where I am carelessly riding my bicycle not watching where I am going and I run into you (say, a pedestrian) from behind and knock you to the ground, thereby breaking your nose.

If we remove the negligence-specific language and tone of this last paragraph, the more general principle becomes: *my wrongful behavior has physically harmed you (the victim) giving you a right to recover money damages from me in tort.* And, here, as I will next show, is my central point: this proposed general principle easily encompasses both negligence law for personal injuries and what is covered by the part of battery law on which I will be focusing. That is, if I break your nose through an intentional, unconsented to, and unjustified act (the punch in the face example), I have wrongfully physically harmed you just as I have in the careless bike-riding example. And to me, tort law would be better served if we treated both of these injuries under the same tort – that of wrongful physically injuring another.

- a. Negligent injuries and batteries are at most different in degree rather than in kind

To be sure, there are often what I would concede to be *degrees of difference* between negligence cases and battery cases. First, the intentionality of the act may well make the likelihood of the harm coming about substantially more certain (100% or nearly that versus a lesser probability). Second, the intentionality of the act generally

means that the actor is clearly aware of the harm-creating risk being taken. By contrast, negligence liability may lie when the actor should have been aware of the risk taken, but was not – although frequently negligence claims arise from acts of knowing negligence. Third, those who intentionally harm others may desire to impose the harmful outcome, whereas negligent actors may be oblivious to the likely harmful outcome, or even may be hoping that, despite their irresponsible behavior, no harm will result.

The dangerousness of one's act, one's awareness of the risks of one's conduct, and one's objectives in so acting together may make it morally *more* wrongful in the eyes of many to intentionally and wrongfully break my nose than to have done so through an act that we would term "ordinary negligence" – compare the deliberate punch in the nose with the careless bike-riding example. But so what?

For now I will note that, at the core of tort law, victims of negligently caused harms and victims of battery are all (generally) entitled to *the same legal remedy* -- full monetary compensation for their injuries. That is, they are all entitled to recovery for their lost income (and/or earning power), the expenses incurred in connection with their injuries (typically, primarily medical expenses), and a non-economic loss award for the pain and suffering endured. And juries are not supposed to award different amounts of compensatory damages based on their assessment of the degree of fault of the injurer.

To be sure, some tort victims are additionally entitled to punitive damages – a matter addressed more fully below – but it should be noted already here that the line between when those damages are and are not awarded is not drawn at the point that the act becomes a battery.³ Other (arguable or claimed) differences between the existing legal treatment of victims of battery and victims of negligence will also be discussed below.

So far, I have been comparing intentionally wrongful behavior with what is often termed “ordinary” or “mere” negligence. But tort law is more subtle than that. Sometimes an actor’s misconduct is labeled things like “gross negligence” or “willful and/or wanton negligence” or “reckless” -- behaviors that are typically understood in some sense to fall in-between ordinary negligence and intentional wrongdoing in terms of their wrongfulness. These “in-between” behaviors are often characterized by an increased awareness of the dangerousness of the act by the actor and/or an increased likelihood that the act will cause harm and/or an increased indifference to the consequences of the act to others and/or an increased gap between the harm caused and the burden of preventing the harm. But, as with acts at both ends of this spectrum, the basic tort remedy in U.S. law is the same – full monetary compensation.

Negligence, in all of its degrees, contains a wrongful connotation in its very expression. To act negligently is to act as one should not have acted.⁴ One might think of a ruler that measures increasing wrongfulness. Although in reality the extent of one’s fault is a continuum, there are marks on the ruler indicating points at which higher degrees of fault are designated – gross, reckless, wanton, etc. These points are important because certain legal consequences in tort law can indeed sometimes turn on where on this continuum one’s negligent conduct is placed (as will be noted below).

A next crucial point to notice is that to act intentionally does not itself connote acting wrongfully. Hence intentionality is not actually the proper designation for the end of the ruler. In turn, and therefore unsurprisingly, to have committed a battery it is not sufficient that I simply have intentionally punched you in the nose. There are other doctrinal requirements for the tort of battery, and they exist, as I will shortly illustrate, in order to be sure that the act was indeed wrongful. As a matter of “black letter law” if the contact was justified, non-offensive, or consented to, then it is permissible and not actionable.⁵ Put differently, these elements all go to making the intentional striking

non-wrongful. Or, looked at the other way, the fully fleshed-out legal doctrine shows that battery liability for physical harms is not a matter of “strict liability” in tort for intentionally caused injury, but tort liability based on “fault.”

The upshot for me then is that what perhaps should be designated at or toward the far end of the ruler is not “intentional injury” but “intentional wrongfulness” or “deliberate wrongfulness” and even that section of the ruler might have more than one designation, say, “deliberate wrongfulness” and, say, “despicably deliberate wrongfulness.”

- b. Understanding the fault-based nature of battery: when the intentional but socially acceptable harming of another is *not* a battery

In this section, by considering some paradigm cases, I will show in some detail that battery is indeed about wrongful conduct and that merely intentionally causing harm is not enough.

For example, if for no good reason you physically attack me and threaten me with serious bodily injury, and, in order to prevent your harming my body, I respond by punching you in the face and break your nose, I am not liable to you for breaking your nose even though I intentionally did so.

Notice that what is going on here is that tort law allows the use of self-help in these settings. I don't have to submit to your attack and then seek a remedy for money damages in court by suing you for committing a battery on me. I am entitled to use reasonable force to fend off your attack. Under the law of battery, we call my injuring you in the course of my “self-defense” the exercise of a legal “privilege.”⁶ As one might say in the criminal law, my conduct was “justified.”⁷ Note well that just as my intentionally harming you in this instance is not a battery, it also does not satisfy my proposed

general principle for tort liability – I did not wrongfully cause you physical harm.

Indeed, if I reasonably (but incorrectly) believe that you are about to attack me and acting in what I believe to be self-defense I intentionally engage in a reasonable act that physically harms you, I won't be liable to you for battery either. This is because the self-defense privilege applies *even when I make (a reasonable) mistake*. The classic case here involves someone who was under siege and reasonably believed that the plaintiff was part of the attack group when in fact he was coming to help the defendant.⁸

What I want to emphasize once more is that in such a situation, although my conduct was intentional, because my mistake was reasonable my conduct is not considered wrongful, and I am not liable in battery just as I would not be liable under my proposed general principle. In this example, the victim (you, the misperceived rescuer) was innocent, and I intentionally harmed you for what I reasonably thought was my own benefit. But because battery law does not impose strict liability (liability without fault) on those who deliberately cause harm to others for their own benefit, the loss remains where it fell. It is treated as an unfortunate result of an encounter between two innocent parties.

In the conventional self-defense case, where you were at fault as the initial attacker, that alone might make some people (but not me) conclude that you are not entitled to seek relief in court from me (your injurer) when I have harmed you by breaking your nose in self-defense. But that explanation cannot get us to the “no liability” result in the case where I reasonably believe you are attacking me but you are not (and there is nothing to suggest that you are at fault for creating my reasonable mis-perception). For me to escape liability in that setting the focus has to be, not on you, but on me and my lack of fault.

Consider next the removal of your leg by a doctor, an act that is viewed as necessary to prevent gangrene that might well kill you. Assume that you and the doctor discussed this in advance, you were told of the potential benefits and risks of this treatment, as well as alternative treatments and non-treatment, and that you agreed to this procedure. Afterwards you now have only one leg. Assuming for now that the doctor removed the leg properly, you have no claim for battery even though the doctor intentionally cut off your leg. Battery law doctrine typically treats this as matter of *consent*.⁹ Recall that under current doctrine it can only be a battery if the touching was unconsented to. What I want to emphasize once more, however, is that if we focus on the doctor's conduct we see that, although it was intentional, it was not wrongful (there was no malpractice here); and so too the doctor would not be liable to you under my proposed general principle.

Next consider the properly-supervised prize fight. Suppose that in the course of the fight, in keeping with the rules of the sport, I intentionally punch you in the face and this punch breaks your nose. This is not a tort. Battery law doctrine typically treats this too as matter of consent. I have always found the use of the "consent" label a bit awkward in this setting because during the course of the fight you were trying as hard as possible to prevent me from landing a nose-breaking blow to your face. But we can understand the more general idea here that by engaging in a legitimate prize fight both fighters in effect consent in advance to be punched in the face during the course of the fight assuming that is permitted by the rules of the sport. What I want to emphasize once more, however, is that under that assumption my conduct was intentional and for my own benefit yet not wrongful; and that is why I am not and should not be liable to you. Under my proposed general principle and focusing on my behavior, it is not that your "consent" gives me a defense or a privilege; rather your "consent" is what makes my conduct socially acceptable.

Taking stock of what has been covered so far, these examples nicely demonstrate how several paradigm cases of intentional invasions of your bodily integrity that are not “battery” can easily be described as harms that were not wrongfully caused – just as with accidental (non-intentional) injuries that were not the product of negligence. That is, for these paradigm intentional harm cases we get to the right result by focusing on the defendant’s conduct and asking whether or not it violated the community standards of how people should behave under the circumstances of the case. This, of course, is exactly how negligence is evaluated.¹⁰

c. Intentional physical harms that are batteries

Now let’s explore some further classic examples of intentional harm. Suppose in the surgery hypothetical discussed above, we change the facts and the doctor carelessly removes the wrong leg. Under current tort law this is often treated as a battery, as it was an unconsented to intentional harm.¹¹ This is also readily seen to be medical malpractice, which is part of the law of negligence. My point is that under my proposed general principle this is wrongful misconduct for which the doctor should be liable.¹²

Next, reconsider the ordinary situation in which you attack me and I reasonably respond in self-defense. As before, suppose I punch you in the face. But assume now that this knocks you out, rendering you altogether unable to subject me to further harm. At that point I could easily call for the police or other help or simply safely leave. So far, my conduct is not wrongful, and although I have intentionally caused you harm I have not committed a battery (and I have not violated my proposed general principle). But now suppose that with you lying helpless on the ground, I then kick you in the head, causing you additional harm. This is a battery. Battery law gets to this result through the “excessive beating” doctrine which is viewed as an “abuse” of the privilege of self-defense.¹³ Put more simply in my terms, however, kicking a helpless person (even if earlier a wrongful

attacker) is wrongful conduct for which I am appropriately liable. Moreover, again by focusing on the conduct of the injurer we avoid the troubling matter raised earlier that somehow by initially attacking me you might fully forfeit your right to sue me.¹⁴

Assume next that, for no justified reason, I intentionally fire a gun at Jones, seeking to harm her, but the bullet instead strikes innocent you who had been standing next to Jones. Even though I did not intend to cause you physical harm, this is a battery. This result is accomplished in battery law by the creative doctrine of “transferred intent” that deems my wrongful conduct towards Jones as wrongful towards you.¹⁵ In negligence terms, I have unreasonably harmed you by unreasonably firing a gun in your direction. In my terms, I have engaged in a wrongful act, and my conduct has injured you. Under my proposed general principle, the fancy legal move of “transferred intent” is not needed to impose liability on me for my misconduct.

Now assume that I intentionally fire a gun at Jones in the reasonable exercise of self-defense (say, Jones was shooting at me, my life was clearly in danger, and there was nothing feasible for me to do but to fire back). But, assume further, alas, that one of my bullets strikes you (although there is no suggestion that I was careless in how I fired at Jones). The transferred-intent rules are said not to apply in this setting, and I would not be liable to you in battery law.¹⁶ That result follows from negligence law and from my proposed general principle as well – my conduct harmed you when I acted deliberately for my own benefit, but I was not acting wrongfully.

d. Some harder cases

Consider this difficult example. A young child is riding with me on the back of my bicycle. A tiger is chasing us and about to knock over the bicycle rendering us both helpless. If I simply keep trying to flee, the tiger will surely kill and eat us both. There is no way for me to sacrifice my own life to save the child because if I jump off and

surrender to the tiger, I will be eaten first and then the tiger will eat the child who will be altogether unable to escape (assume it is implausible that I will satiate the tiger's hunger). But if I push the child off the bicycle, there is a good chance that the tiger will stop to eat the child and I will escape with my life. Suppose I do that and I am saved. Here I have engaged in an intentional act for my own benefit by knowingly and deliberately causing physical harm (in this case death) to the child. This could well be deemed a battery and the Restatement (Second) says it is.¹⁷ Should it be?

The *doctrinal* issue here in battery law, as I see it, is whether there should in this case be a privilege to save myself arising out the "necessity" of the situation (a kind of self-defense against nature or the tiger).

One view is that I should be liable (to the child's surviving family members) because I should have no right (i.e., no privilege) to sacrifice another person's life to save my own life. This is the Restatement's position. The competing view is that I should have a privilege to so act and not be liable under these terrible circumstances (assuming there was nothing irresponsible about my getting the child and me into this dangerous circumstance in the first place). In either event, to me the right way to approach this issue once more is to focus on me the injurer and to ask whether we consider my conduct to be wrongful. Was it socially unacceptable under the circumstances?

Notwithstanding the Restatement's view, some people may well feel differently about this. I am certain that I would in many respects feel awful about what I did, but what sort of false heroism would it have been to have acted differently with the result that both of us died? (It also seems that my conduct caused the child no harm that would not have occurred had I not so acted; hence tort recovery on behalf of the child seems problematical in any event, possible punitive damages aside.)

To be sure, as no one else was there, the child's parents may be skeptical about the actual tradeoff facing me at the time and may worry that people like me will make pretended claims of "necessity" that are false. Hence, a strong showing that both the child and I would have died had I acted otherwise might well be required.

My broader point here is that, to be consistent with the rest of tort law in this area that I have so far described, this excruciating case should be resolved by determining not whether I deliberately harmed the child, but whether I wrongfully harmed the child – i.e., by applying my proposed general principle. I can imagine parents of the child feeling in two radically different ways about what happened. Some might be outraged that I dared to act like God and sacrifice their child to remain alive, believing it would be better had we both died. Others might be pleased that their child, who would have died anyway, was able to save my life.

A variation on this example arises if X puts a knife at my throat and clearly threatens to kill me unless I fire a pistol at you that X places in my hand. You are an innocent bystander so far as I am concerned, but you are the intended victim of X. I am decidedly under duress. Suppose I pull the trigger in order to save my life, and you are killed (after which X runs away, leaving me alive). Of course X should be liable in tort for your death but what about me? Many would say that it is not socially acceptable for me to kill a stranger in this situation in order to save my own life, particularly when you, the stranger, may well have lived had I not so fired my gun. Maybe I am a much better shot than X and that is why X used me to achieve X's goal. Generally speaking battery law (and the Restatement Second) would hold me liable for your death even though I acted under duress,¹⁸ and it does so on the understanding that my conduct is viewed as socially unacceptable/wrongful (even if I would otherwise almost surely have been killed by X). If we accept this social evaluation, the same result follows from my proposed general principle: I wrongfully killed you. I don't resist this result.

But notice how the chasing-tiger case is harder because there, unlike the case where I fired the gun under threat to my own life, it is stipulated that the child would have definitely died in any event, making it more plausible that some/more people would find my conduct not to be wrongful in that setting.

Next, go back to the properly-supervised boxing match example but change it to a street brawl. Two gangs of young people decide to go at it, and as part of that mutually criminal battle, and in order to prevent you from slugging me, I punch you in the nose and knock you out. The Restatement's view is that I am not liable to you under the normal operation of the "consent" principle.¹⁹ If participating in a street brawl is a crime, then maybe we should both go to jail. But according to this view I am not liable to you in tort. I am troubled by this outcome.

Courts in some jurisdictions are also troubled and have concluded that I am liable to you in battery, and they get to that result by terming your injury as "unconsented to" on the ground that "one cannot consent to a crime."²⁰ Were this the desired result (and it is the one I favor) this result is better reached, in my view, not by focusing on the victim's consent or lack thereof, but by focusing on the injurer – me – and concluding that what I did was wrongful because engaging in a street brawl is not something I should have done. And because my wrongful act harmed you, I am liable to you in tort (putting aside for now how much money you should recover -- a matter I will address below on the topic of what to do when both parties have acted wrongfully).

The Restatement provides a narrow exception to the rule that consent is to be given effect even when the conduct was criminal -- when the purpose of the law was to provide protection of a class of actors including the victim.²¹ One example involves unauthorized boxing matches such as those put on in the old days by traveling carnivals

where local foolish young men are badly injured by expert carnival-employed boxers they challenge in order to try to impress their girlfriends.²² My view is that the carnival and its boxers are engaging in socially unacceptable conduct and should be liable (at least in part) for the harm done. To me, this is much like the street brawl. They are examples of the sorts of fighting we are eager to discourage, and the actions of the carnival-boxers would be torts under my proposed general principle.

Sometimes people deliberately injure others in order to protect, not their own bodies, but their property. Unsurprisingly, I favor the approach I have been advancing here: focus on my conduct and decide whether or not it was wrongful, and impose tort liability only when it was.

For example, if you discover a trespasser on your land you may use mild force to expel the trespasser so long as you have first asked the trespasser to leave (and she does not) and you reasonably believe that the trespasser will not leave unless force is used.²³ However, you may not use force that is intended or likely to cause death or serious bodily harm.²⁴ The point is that under current law, it is wrongful to use force likely to cause a serious injury to the trespasser – and liability would be imposed in such cases both under battery law today and under my proposed general principle.²⁵

In such settings, if the mild use of force will not suffice, tort law takes the position that the property owner must instead ask the police for help and/or sue the trespasser for invading his property. Of course, if the property owner also reasonably fears for her own life or serious bodily injury to herself, then greater force may be used against the trespasser.²⁶ Hence it is not surprising that when X is in the process of robbing a grocer with a weapon, and the grocer pulls out her own gun and shoots the robber, the grocer will likely claim she feared for her own life and was not shooting merely to prevent her property from being stolen – a claim that a jury may well perhaps too quickly accept.

The “privilege” of “defense of property,” in short, is not the same as the privilege of self-defense – and properly so since it is socially understood that preventing physical harm to yourself is more important than preventing entry onto (or even harm to) your property. But, in the end, the current details of the battery doctrine come down to the same thing – “under the facts was the force you used wrongful?” -- just as would be asked under my proposed general principle.

Over the years a number of cases have arisen in which trespassers have been injured by materials that have been placed on the property in order to discourage or if need be injure the trespassers. They tend to fall into two groups. One group is illustrated by barbed wires, sharp glass embedded in walls, and sharp metal spikes. Generally speaking these defensive measures are visible to trespassers and unlikely to cause serious bodily harm even if the trespasser tries to enter the property anyway. Property owners deploying such devices typically will not be held liable to a trespasser who is injured by them, and the Restatement Second, Torts so specifically provides.²⁷ The Intentional Tort Restatement Reporters support this result, but as they point out, a lawsuit by the trespasser against the property owner will normally not properly sound in battery in any event because the victim will be unable to demonstrate the requisite intent on the part of the property owner.²⁸ Rather, as the Reporters explain, these cases are better understood as negligence cases, and have been at least implicitly so viewed by the courts; and the property owners, in the end, are typically found to have acted reasonably and hence are not liable.²⁹

In the second set of cases, often termed the “spring-gun” cases, the property owners, often out of frustration from repeated break-ins, have set devices like shotguns to be triggered when a trespasser enters.³⁰ Shotguns can of course cause serious bodily harm, and property owners in such cases have been held liable to their victims.³¹ Once more, while the Second Restatement locates this result in a

provision about the abuse of the privilege of defending one's property,³² the current Reporters' analysis just discussed shows that this behavior by the property owner is not properly seen as a battery because the owner probably did not know who was going to break in or when, and so the intent aspect of battery law is not met. Instead, here is a case in which the property owner is once again properly held liable in negligence (perhaps even properly found to have engaged in gross, reckless or wanton negligence). I support this result, and what I want to point out is that the confusion of whether it is battery or negligence is nicely eliminated under my proposal: such conduct by the property owner would be the wrongful causing of physical harm

e. Conclusion to this part

What I have tried to demonstrate so far is that both negligent harm to the person and battery law leading to physical injury are both explained by (or contained within) the general principle that wrongful conduct that physically harms people is tortious – even if there can be some dispute as to whether certain conduct is wrongful or not.

This is why, at least at first blush, it seems indeed that we could readily eliminate battery as a separate tort and combine the two situations under my proposed broader principle of tort liability for wrongfully physically harming another. But would that be wise? What about other respects in which the law, some claim, treats intentional torts differently from negligence?

II. Special Rules Inside Tort Law

a. Punitive damages

Some might argue that we need to maintain a clean difference between intentional torts and those caused by negligence because this tells us when punitive damages are awarded (or awardable) and not.

But that is an incorrect statement of the law. Some acts that are thought despicable but not battery can give rise to punitive damages and not all batteries give rise to punitive damages.³³

So, for example, in some states someone who knowingly and repeatedly drives while drunk may be subject to punitive damages to those they injure,³⁴ as may an enterprise that adopted a deliberate policy of misconduct that created a large risk of harm to many even if there was no intention to harm anybody.³⁵ These are not batteries.

By contrast if a very young child deliberately trips someone reasonably expecting only that the person will fall down and not be hurt, but in fact the person is physically injured, this may well be a battery but I am doubtful that punitive damages would be (or should be) awarded.

As the Reporters for the Restatement of Intentional Torts to persons clearly acknowledge, the question of whether or not punitive damages lie in any specific case today is generally a matter of statutory interpretation, and in most or all jurisdictions when physical harm has occurred it would be quite inappropriate to blindly resolve the question by asking whether or not “battery” had taken place.³⁶

Some states disallow punitive damages altogether³⁷ and punitive damages are typically barred under Tort Claims Acts where suits are brought against governmental agencies for the misconduct of employees.³⁸ In states where punitive damages are allowed, the criteria differ.

What is perhaps most important to emphasize is that in today’s world conduct that falls short of being a battery can well give rise to punitive damage award (especially if persistently engaged in by enterprises). It is generally conduct somewhere along that continuum from negligence to battery – perhaps wanton conduct well captures it in some settings.

Hence, under my proposal to merge battery law and negligence law, whether or not punitive damages would lie would properly remain a separate question to be decided on its own merits given the facts of the case and the law of the jurisdiction.

b. Both actors at-fault

I want to return here to instances in which both parties to the lawsuit were at fault. First, consider the negligence context. If you are carelessly jaywalking in the road and I am not paying attention to where I am driving and run you down, negligence law considers us both at fault and both responsible for your injury (assuming both of us could have avoided the crash by acting reasonably).

Traditionally, your lawsuit against me would probably have failed (putting aside here the possible application of the “last clear chance” doctrine)³⁹ because at the common law “contributory negligence” was a complete defense to negligence.⁴⁰ In short, someone who could have prevented his or her own injury by having acted as a reasonable person should have acted was precluded from trying to shift the loss onto someone else who also should have avoided the accident.

But this rule has now been overwhelmingly rejected across the common law world and by the Restatement of Torts in favor of a regime of comparative fault.⁴¹

Today, under negligence law, your fault and mine are compared and, in so-called “pure” comparative fault jurisdictions, you are entitled to recover from me the proportion of your loss that reflects my proportion of the fault. So, if you were deemed 25% at fault and me 75% at fault, I would be liable for 75% of your harm; and if our fault was thought equal, I would be liable for 50% of your harm; and if I was deemed 25% at fault and you 75% at fault, I would be liable for a quarter of your harm, and so on.

Most U.S. jurisdictions have not actually embraced the “pure” form of comparative fault – having opted instead, by statute, for what is termed “modified” comparative fault.⁴² What this means is that if you the victim were more at fault than I was, you still will recover zero – as at common law. But if I was more at fault than you, I would be liable for a share of your harm equivalent to my share of the fault (as under the “pure” form). If we are deemed equally at fault, then modified comparative negligence jurisdictions differ – some denying you recovery altogether, others holding me liable for half of your injury.⁴³

I believe that comparative negligence is better than the common law rule, and nearly all states clearly agree at least when the defendant is more at fault than the victim. After all, why should the worse-acting injurer completely escape liability, leaving the victim to bear both the physical misfortune and all the financial consequences of the encounter? The idea that tort law must yield an “all or nothing” result is not logically required, even though it was traditionally the regime. To be sure, determining precisely what percentage each party was at fault is somewhat arbitrary and contestable. Yet most now think that engaging in this comparative fault evaluation at least gets the legal system closer to the fairer result.

It is also important to make clear that this contemporary approach to comparative fault does not award you full damages just because my conduct was worse than yours. You, the victim, who was also at fault obtain but a partial recovery.

I believe that the same approach should apply to situations that currently fall under the battery regime. Recall the excessive beating example given earlier in which you were at fault for attacking me in the first place and I was at fault for kicking you in the head after I had already rendered you unable to continue your attack on me by knocking you out. In your lawsuit against me for the harm I caused

you, I think your recovery should be reduced by a proportion of your loss that is attributed to your fault as compared to my fault. Just what percentage applies to each of us should depend on the specific facts of the case. The general rule in battery law today, however, is that you can recover in full from me for the harm caused by my kicking you.⁴⁴

It is as though the law of intentional torts treats our encounter as involving two transactions. In the first, you attacked me and in self-defense I successfully resisted. In the second, I kicked a helpless person and for that I am liable. To be sure, today, in response to your suit against me in battery for the second event, I can counter-sue you for the separate tort of your initial battery on me. But assume it turns out that you caused me only nominal harm and I caused you grave harm. Punitive damages aside, I would be liable for a huge sum and you for very little. It seems to me that a fairer result would be for you to be able to recover somewhat less from me given that you were the initial attacker.

Put in terms of my principle, both of us were wrongful actors engaged in a physical encounter. You ended up being badly injured. Your recovery, like the jaywalking pedestrian hit by the inattentive driver, should (as I see it) be proportionate to my overall share of the fault. Deciding what share of the fault is mine as compared with yours is difficult to determine with a precision that all would agree with, but that is equally true, as we have seen, in the jaywalker injury case. So, here is an important situation (albeit fairly uncommon) in which I believe that traditional battery law currently yields the wrong result, an outcome that would be corrected if both negligence law and battery law were reconceived as the law of wrongfully physically harming another and comparative fault were applied.

If we apply my way of thinking to the street brawl setting, then again we are not stuck with having to adopt an all or nothing solution as is the general rule in battery law today. I would view both of us at fault for engaging in the street brawl and after looking more closely at how

we both behaved, I would be liable for a share of your injury to the extent of my share of the overall wrongdoing. And if I were also injured, my recovery from you would be partial based on our same relative shares of fault.

In short, here is a difference between battery and negligence that would be appropriately eliminated, in my view, were the two torts merged into a single tort of wrongfully physically harming a person.⁴⁵

There are situations that arise under current law in which both parties are at fault but one has committed an intentional tort and the other was negligent. Suppose you are inebriated and weaving your car in and out of your lane and I, driving along behind you, in an act of “road rage” deliberately slam my car into yours. Today, your negligence is disregarded in your lawsuit against me for battery, and so you would recover in full for the harm I caused you. I frankly do not see why this all-or-nothing result should follow. While I was arguably very much at fault, why not then assign most, but not all of, the share of the overall fault to me? Maybe you should recover, say, 80% of your losses, but assuming that had you been careful you would not have been injured at all, why do I have no defense at all? It is perhaps understandable that under the common law where contributory negligence was a complete bar in cases involving negligence by both parties, your fault might be ignored in this situation of my deliberately harming negligent you, but why now? If we apply my principle, I wrongfully caused you physical injury but you also wrongfully brought about your own injury and the general principle of comparative fault would be (and I think should be) applied.

If there still are to be occasions under a regime of comparative fault where both parties are at fault but the fault of one will be ignored, then let’s group those cases together and try to sort out what they stand for. What we see is that battery will not suffice to do the sorting. After all, even within negligence law in jurisdictions that have generally adopted the principle of comparative fault there some

instances in which both parties have been at fault but the result of the case is either full recovery or no recovery.

For example if you carelessly injure yourself making medical attention necessary and I, the doctor who treats you, commit malpractice, your initial fault will probably be ignored.⁴⁶ This result is seemingly applied on the principle that as a professional rescuer I owe a full duty of care to my patients regardless of the reason for their need for my services. (Your careless harm to yourself and my misconduct are treated as two different transactions.) Or suppose a school bus driver carelessly lets schoolchildren off the bus on the wrong side of the road, knowing that the children are likely to carelessly dash across the road in front of the bus where they might well be hit by oncoming vehicles – and that happens. In a lawsuit by a child against the bus driver, the child’s contributory negligence may well be ignored because that was the very carelessness that the driver’s conduct was meant to preclude.⁴⁷ My point here is that if there are settings in which one party’s intentional wrongdoing were thought fairly to impose the complete loss on that party, notwithstanding that another party’s misconduct was also a cause of the harm, judges could sensibly deal with that on a case by case basis under my liability for “wrongful misconduct” principle, making it unnecessary (and unhelpful) to retain a separate tort of battery.

c. Burden of proof

As noted already, in negligence cases the victim generally has to prove fault whereas in battery cases it is the defendant who has to prove any claimed privilege. To be sure, the “black letter” law traditionally has been that victims of battery have to prove the lack of consent (even though it is often defendants who are urging that there was consent). Still, on the surface it may initially seem that there is a real difference here between the world of negligence and the world of intentional torts.

Yet, negligence law is very familiar with shifting of the burden in cases where on the face of it one might well think that the defendant had been negligent. This is done via the “res ipsa loquitur” doctrine that forces the defendant to come forward and show that, in fact, he or she did not act unreasonably (or at least offer evidence to that effect).⁴⁸

So, it seems to me, this is exactly what is going on in battery law with privileges. Normally if I punch you in the face and break your nose, our common experience is that I have acted wrongfully. But if I can show that I acted in reasonable self-defense, I overcome that assumption.

My point here, then, is that under my proposed general principle of liability for wrongfully physically harming another, there is plenty of room to put some cases in the category in which the victim must prove wrongful conduct and others in which the defendant must show his or her conduct was not wrongful. And some of the cases now procedurally handled by the “privilege” doctrine could as readily be dealt with in a sensible way via the application of a broader regime of burden-shifting.

In practice, we want to shift the burden in a variety of settings in which the defendant is in a much better position to present the evidence as to why what happened was not the result of wrongful conduct on his or her part. Thinking about those settings as a group is likely to prove more enlightening than separating out intentional unconsented to physical harms and putting them in a doctrinally altogether separate category (as we do today).

d. Scope of liability

Some physical harms to the person that are caused by wrongful behavior are thought sufficiently unforeseeable that the defendant should be relieved of his or her tort liability.⁴⁹ Traditionally in

negligence law this idea was captured by the “proximate cause” requirement. The Restatement Torts, Third has renamed this concept since it is not about “cause” in the “but for” or “physical causation” sense. Now the language used is the “scope of liability.”⁵⁰

The underlying principle here is that even though the defendant wrongfully caused the victim’s harm, the special oddity of the situation sometimes makes it seem unfair for the defendant to be liable after all. For example, in the famous *Polemis* case, the defendant’s employee carelessly dropped a plank into the hold of a ship.⁵¹ The risk created by this was that someone or some property in the hold would be harmed by the plank falling on him or it. Instead, rather mysteriously, the plank caused a fire to start and the fire caused the harm complained of in the litigation. The general view today, it seems, is that because the fire was not the *type* of harm foreseen by the wrongful conduct, the defendant should not be liable for its consequences (under the realization, among other things, that the fire could well yield far more harm than could plausibly have been caused by a direct hit on someone or thing of the falling plank).⁵² Put simply, the fire damage is outside the scope of the negligent party’s liability.

It is frequently said that for intentional harms the scope of liability (proximate cause) may be more broadly drawn than for acts of negligence; i.e., it might be thought fair for the defendant to be liable for injuries that it might have been unfair to hold a merely negligent actor liable for.⁵³ I don’t object to this outcome as a general matter. But it does not mean that the scope of liability doctrine is completely inapplicable to intentional torts.

Even under battery law after all, some injuries are thought to be outside “scope of the risk” taken and for them the defendant will not be liable. In the draft Restatement Third, Torts the Reporters give two examples.⁵⁴ Suppose a doctor commits a battery by wrongly providing medical services for which the patient has not consented and the patient loses a leg. If the patient then commits suicide in

response, the suicide may well be viewed as not the doctor's responsibility. (By contrast, if a malicious person were to cut off someone's leg and in response the victim committed suicide, then that suicide may well be viewed as within the scope of the actor's responsibility.) Or suppose someone attacks another (and commits a battery) and the victim flees and is unexpectedly struck by lightning. The original tortfeasor will probably be viewed as not fairly responsible for the lightning damage (since the initial wrong in no way increased the risk of the victim being struck by lightning).

For me, tort law should apply the general fairness features of "scope of liability" to all physical harm cases. After all, even in negligence cases when a person has been physically harmed we sometimes see a very wide application of the scope of the liability rule. For example, under the notion that defendants must take victims as they find them (what is sometimes said to be the "eggshell skull rule") merely negligent actors are fully liable for any completely unforeseen physical injuries the victim suffered from the contact.⁵⁵ That is, fairness considerations in that setting do not now serve to cut off an unforeseen extent of harm or even an unforeseen type of harm so long as it is still physical harm to the person endangered.

The intentional harm cases, in my view, are simply applications of this approach. So-called transferred intent cases might be thought to well illustrate this. If I carelessly shoot a gun at X but the bullet, to everyone's amazement hits a completely *unforeseeable* person Y, then perhaps Y will be viewed as outside the scope of the risk taken and I will not be liable to Y; but if I intentionally shoot at X and the same thing happens perhaps I will be liable to Y because the fairness of the matter is seen differently.

In sum, under my principle of tort liability for wrongfully causing physical injury, the general scope of liability limit could be readily and reasonably consistently applied to what today are both negligence and battery cases.

e. No duty/limited duty

Sometimes a person can unreasonably impose quite foreseeable physical harm on another and yet is not liable in tort. Under the negligence regime these instances are generally understood to be cases of “no legal duty” (or what some call “limited duty”).⁵⁶

For example, in most states a landowner is not liable to a trespasser for negligently causing harm to the trespasser (or under the Restatement (Third) the landowner is not liable for negligently harming a so-called “flagrant” trespasser, like someone who was on the property stealing something from the owner).⁵⁷ As another example, in most states if two people are simultaneously engaging in recreational activities and one negligently harms another there is no tort liability.⁵⁸ And as a further example, people who ignore others who are in great distress are not held liable even if the rescue could have been carried out almost effortlessly but was not and the victim dies.⁵⁹ On the other hand, by statute, many who do come to the rescue of others are not held liable even if they carelessly injure the person they tried to help.⁶⁰ There are different reasons for these results in which unreasonable conduct fails to generate tort liability because “no duty” can be justified on a variety of grounds.⁶¹

But the point for my purposes here is that, as with punitive damages, the line between duty and no duty (or limited duty) is not properly said to be drawn at battery. Rather, it is frequently the rule that although there may be no duty and hence no liability for mere negligence (as illustrated by several of the examples in the prior paragraph), liability may well attach to the consequences of gross negligence (and worse). This is indeed the rule as note above as to flagrant trespasser injuries, recreational sports injuries, and voluntary rescuers, for example. So, once more we see how it is within negligence law that important lines are drawn, not between negligence and battery.

The liability of children for their conduct is a confused area of the law. Sometimes it is said that young children are incapable of being negligent but capable of battery.⁶² Some states have rather wooden age-based rules about this.⁶³ Some might term these limits a restriction on the “duty” of children. If battery and negligent physical harms were merged into a single tort of wrongful physical harm, then the question that would be sensibly addressed in cases of child defendants would be whether this is the sort of conduct for which we think children can be fairly held accountable (or whether under these facts this specific child may fairly be so held accountable). That broader way of looking at things, I believe, would make the law more consistent on an overall basis.

The current draft version of the Restatement (Third) of Torts on battery does not contain any no-duty limits on battery. That does not undermine my proposal (even if it were correct) because, presumably, no-duty based arguments would fail when applied to the nature of the wrongfulness that occurred in those settings.

With respect to professional athletes who injure each other in the course of play, we might well conclude that it should normally be left to the leagues (and the players’ unions) to work out what conduct is out of bounds, and what increasing penalties should apply as the behavior becomes more transgressive.

Think about soccer: when is a tackle OK, when does it give the other team the ball or even a free kick on goal, when does it yield a yellow warning card, when does it yield a red card that excludes the player from the game, when does it yield a substantial fine after the game, etc. Similar examples could be provided for baseball, football, and so on. These matters are generally viewed as outside of tort law’s concern, and lawsuits by those injured in the course of play will generally not lie even when penalties are imposed.

But if, for example, during a hockey game, a player goes so far as to deliberately smash a hockey stick over the head of another and causes serious physical harm, then perhaps we are no longer willing to leave the victim with only what the league rules (and private insurance) provide. If so, then the duty not to act so badly has been violated and tort law can offer a remedy (as might criminal law as well). One might be tempted to say that this shows the importance of keeping battery law separate because the hockey stick example just given involves a battery. Yet, in fact, with respect to professional athletes it appears that the line as to when the no-duty regime ends and liability begins is not narrowly drawn at when a battery occurs but earlier when the negligent misconduct is gross or wanton.⁶⁴

In any event, it might not be correct to say that there are not any “no duty” situations in the law of battery. Consider a recent California Supreme Court case in which a husband employed someone from an agency to care for his demented wife at home under circumstances in which it was understood that the wife might physically attack the caregiver who, supposedly, was trained to deal with this sort of circumstance.⁶⁵ Sure enough the wife did attack her caregiver who was physically injured by the attack and brought a battery action (among other claims). California has a statute that reflects the traditional common law position that mentally ill defendants are not to be excused for their torts because of their condition.⁶⁶ Clearly, had the demented woman not been ill her conduct would have been a battery (although presumably she would not have so acted). This harsh rule reflects what I believe is an ancient fear or hatred of the mentally ill that, one would have hoped, would have been overcome in more recent times (although the California statute remains in place). Put differently, just as the law does not expect a blind person to see in the same way that a fully sighted person can, so too it seems to me harsh to hold this demented woman responsible for her behavior. The California Supreme Court seemingly agreed with me, but in light of the statute there was no obvious way for it to get to what it viewed was the fairer result.

So, instead, it decided that the statute only applied if there was a legal “duty” in this situation, and then it concluded there was not.⁶⁷ It relied here on the way negligence law treats professional rescuers. If a veterinarian is called in to treat a dog that bites, or an electrician is called in to fix a sparking wire that the homeowner carelessly crossed, or a firefighter is called in to put out a blaze the property owner carelessly set, the usual response of tort law is that a sensible warning of the danger is sufficient and the rescuer is entitled to no more. (That is, professional rescuers do not recover for harms caused by risks they are trained and paid to confront even when those risks are carelessly caused by those calling for help – harms that innocent third parties could successfully sue for in tort if they were injured by, say, the fire, or the dog, or the electrical sparks.) This is how the Court saw the caregiver situation when the agency had been warned and the caregiver trained to deal with potentially violent people with serious dementia.

Just as the court reached the result it favored here by analyzing it as a professional rescue matter where negligence law applies, that approach would be even further facilitated if battery were not a separate tort but simply part of the tort of wrongful misconduct causing physical harm.

III. Rules Outside Tort law

I turn in this next part to further situations in which some might think that maintaining a separate tort of battery is important – not to the outcome of tort claims but to resolve other legal questions. My general view here is that, to the contrary, maintaining a separate category of intentional torts has a negative effect and can mis-focus the proper attention that should be given to the issue at hand.

a. Liability insurance coverage

If you are seeking recovery from me but realistically to obtain compensation you need to access my liability insurance, then you may well lose if the harm I caused you was not accidental, that is, if your injury did not arise out of an accident. The reason for this outcome is that standard liability insurance contracts only provide me with insurance coverage (and hence only can provide cash to my tort victims) in accidental injury situations. Frequently this is achieved through contract law by including the policy a provision that excludes coverage for damage that is “expected or intended” by the insured.⁶⁸ Hence the right way to think about this problem is as a matter of contract law: what is the appropriate interpretation of this phrase in my insurance policy?

It turns out that if I have committed what we today call a battery, it may well be that your damage will be viewed as “expected or intended” and coverage will be denied. We can readily see why my insurance should not be available to pay my tort obligation when I have decided to beat you up for no good reason and do so and then you sue me. The whole notion of insurance is grounded in the idea of spreading the risk. My house might burn down; I might die this year; I might need expensive medical care; my car might be stolen. All of these are genuine risks which the insured hopes won’t happen but worries about financial solvency if they do. Hence, if a lot of us buy insurance, we spread the cost among ourselves, and the one who happens to be the victim can draw on the pool of premiums.

But if I know one of these things is about to happen – say, because I am about to cause it – then paying the low premium that others are paying but then claiming full recovery does not seem right. While I might like to get the financial benefit of having others pay for my loss, this is hardly a situation that makes insurance appropriate. More generally, there is here what is commonly called the “moral hazard” problem in which insurance gives people the wrong incentive to act in destructive ways. So to prevent this result insurers routinely write limitations into their policy documents; e.g., your fire insurance won’t

pay off if you engage in arson and burn your house down. And so it is as well with liability insurance: if your liability is brought about by your deliberate act, this is an event that the company does not want to insure and other insureds don't want to contribute premiums toward.

But, and here is the thing to emphasize, the line here is not exactly the same line as between battery and negligence, even though this line is often pointed to in these insurance coverage cases.⁶⁹ This makes tort law a distraction to the appropriate interpretation of the insurance contract. Indeed, if terming your act a battery automatically makes liability insurance automatically unavailable, sometimes the wrong result may be reached under the contract. As the Reporters for the Intentional Torts to Persons project illustrate,⁷⁰ if a mentally disabled person commits a battery by striking you causing you physical harm, tort law, as we saw earlier, typically disregards the fact that the defendant may well not have realized what she was doing. But for liability insurance purposes, this act could readily be characterized as neither expected nor intended from the perspective of the actor, thereby making the insurance available to compensate the victim.

So, once again, since deciding whether or not the act amounted to a battery is not determinative, having a separate tort of battery turns out to be not necessary (and perhaps misleading) to the appropriate interpretation of the insurance contract.

b. Vicarious liability for employee misconduct

Employers are vicariously liable for the torts of their employees committed in the course of their employment. This is a crucial principle of tort law because without it either a) a great number of tort victims would never have anyone from whom they could realistically recover their tort damages or b) employees would have to routinely start buying liability insurance for torts they may wind up committing in the course of their jobs.

So, while employees are not supposed to act wrongfully while doing their work – like speeding or not paying attention to the road while driving a truck filled with their employers’ goods – employers are liable for this misconduct even though it was not the sort of behavior that the employer wanted from its employees. Indeed, it might have been conduct that the employer tried mightily to prevent through worker selection, training, and supervision. At the opposite extreme if the employee truck driver takes the truck out of the yard at night on an unapproved basis and uses the truck to run over his or her boyfriend or girlfriend who the employee is trying to kill, the employer would not be liable for that act.

Where is the line drawn? The important answer here again is that it is not drawn precisely between battery and negligence. To be sure, there are many batteries that would not generate vicarious liability and routine negligence will typically create vicarious liability. But in the close cases, sometimes there will be vicarious liability for intentional wrongdoing (batteries) and some negligent conduct by employees (even if using employer equipment, or during work time, or on work premises) will be viewed as outside the scope of employment and vicarious liability will not be imposed.

A case well illustrating the point involved a caregiver in the defendant’s childcare facility. While watching over a baby, the caregiver banged the baby’s head against a hard surface when the child would not stop crying. This harm to the child was a battery, but the employer was held vicariously liable because it was seen to have occurred in the course of the caregiver’s employment.⁷¹ As another example, if two workers(A and B) at a construction site (employed by separate sub-contractors) are angrily arguing over how to carry out some work task they are jointly engaged in and one then slugs the other, that is a battery, but it is an act for which the injurer’s employer is likely to be held vicariously liable. By contrast, if those same two workers at the same construction site are both in love with X who works elsewhere and, as an act of jealousy, while at the work site A

fails to attach B's safety latch and B then is injured, then perhaps A's act will be viewed as outside the scope of employment with the result that A's employer would not be vicariously liable to B.

The overall main point here is that because battery law is not determinative of when something is or is not within the scope of employment, the focus should be on the purposes of vicarious liability and the reasons why it should or should not apply in the specific situation; and not centrally on whether the act was intentional or not (or a battery or not).⁷²

c. Workers' compensation claims

Under state workers' compensation laws, the general rule is that employees are not permitted to sue their employers in tort. That is a right they give up, under the relevant statutes, in return for assured no-fault based compensation for work injuries and diseases.

But there are state law exceptions to this that do allow employees to either increased workers' compensation benefits and/or to sue their employers in tort. While it is true that certain batteries committed by employers on employees are paradigm cases for where the tort claim is still allowed in many states, maintaining this exception to the "exclusive remedy" principle does not require tort law to maintain the separate tort of battery. Indeed, having the separate tort may sometimes cloud (or inappropriately oversimplify) the judicial analysis of the workers' compensation question. This is because, like with punitive damages, the relevant legal question here is the interpretation of the workers' compensation statute.

California, for example, allows the employee to sue the employer in tort for deliberate conduct that shows a "wanton and reckless disregard of its possible consequences..."⁷³ This is more than gross negligence, but it need not be a battery.

On the other side, sometimes the behavior of the employee is sufficiently wrongful that the employee is denied workers' compensation benefits even for a job-related injury. But these employer defenses do not necessarily require a showing that is the equivalent of that required to prove a battery. For example, it is common for those employees who are intoxicated when injured are denied recovery (or have their recovery reduced). Also common are defenses against employees who unreasonably fail to observe safety rules or use safety devices.⁷⁴ These behaviors often amount to negligence of one sort or another.

d. Stuck in procedural history

The distinction between intentional torts causing physical harm and physical harms caused by negligence is in some respects a historical product of the ancient *writ* system which required plaintiffs to plead their tort claim in either "trespass" or in "case."⁷⁵ In the paradigm settings, "case" captured *indirect* harms normally caused by negligence. "Trespass" was for *direct* harms, and a battery was the cleanest example.

Nonetheless, some negligently caused direct harms were appropriately brought with the trespass writ,⁷⁶ so that the two writs were not cleanly separated into intentional torts and negligent torts.

But, more importantly, for procedural purposes, we have long abandoned the writ system and simplified pleading no longer requires this sort of distinction. Eliminating the two categories for substantive tort law would be consistent with the long-ago procedural change.

IV. Adjusting the Restatement of Torts to Embrace the Principle of Wrongful Physical Harm to Another

In this part I show what changes could be made to the Restatement Torts, Third: Liability for Physical and Emotional Harm to reflect the merger of battery claims for physical harm to the person with negligently caused physical injuries into a new tort of wrongful physical harm to another.

a. Physical and Emotional Harm Restatement Sections 5 and 6

The Restatement Torts, Third: Liability for Physical and Emotional Harm deals with the current regime in a complex but ultimately clear enough way. Sections 5 and 6 state the basic principles for liability for physical harm caused by intentional and negligent conduct.

Section 6 provides that “An actor whose negligence is a factual cause of physical harm is subject to liability for any such harm within the scope of liability, unless the court determines that the ordinary duty of reasonable care is inapplicable.”⁷⁷

Notice that this pithy statement setting out tort liability for physical harms arising from negligent conduct also includes the “cause in fact” requirement, the “scope of liability” (formerly “proximate cause”) requirement, and the requirement that there is a duty to exercise due care (i.e., to act non-negligently) in the first place – all of which are spelled out in more detail in later Restatement sections. As explained in the comments, the “subject to liability” phrase is meant, among other things, to acknowledge that the defense of contributory fault on the part of the victim is dealt with elsewhere.⁷⁸

Section 5 provides “An actor who intentionally causes physical harm is subject to liability for that harm.”⁷⁹ As with Section 6, the comment to this section makes clear that the language “subject to liability” is meant to acknowledge various liability-limiting doctrines – e.g., the consent of the victim and the privilege of self-defense.⁸⁰ The potential “scope of liability” and “duty” limits on liability for intentional acts

are ignored here. Perhaps the best explanation for this somewhat incomplete and arguably inaccurate provision is that Section 5 was adopted by the ALI as a placeholder for liability for intentional conduct at a time when the ALI was focusing its attention on liability for negligence through its project on Liability for Physical and Emotional Harm. Elaboration of Section 5's meaning in the battery setting is now being spelled out through different sections in the current ALI project on Intentional Torts to Persons.

b. Intentional Torts Restatement Sections 1 and 4

As applied to the aspect of battery before us now (i.e., physical harm to persons), the in-progress Restatement on Intentional Torts to Persons now actually offers two somewhat overlapping sections.

The section said to reflect the common law of battery is Section 1. With respect to the focus of this article, it provides "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... (b) the actor's affirmative conduct causes such a contact... (c) the contact (i) causes bodily harm to the other... and (d) the other does not effectively consent to the otherwise tortious conduct of the actor...."⁸¹

This partially parallels Section 6 (on negligence in the Physical and Emotional Harm Restatement) by its inclusion of the "causation" requirement. Note further that, unlike Section 5 of the Physical and Emotional Harm Restatement, Section 1 of the Intentional Harm Restatement includes the limitation on liability that the contact be unconsented to. As with Sections 5 and 6 of the Physical and Emotional Harm Restatement, it does not address the privileges/defenses which are meant to be referenced by the "subject to liability" language.

Most importantly, in addition to Section 1, the Intentional Torts Restatement also includes Section 4 which provides "An actor is

subject to liability to another for purposeful infliction of bodily harm if: (a) the actor purposely causes bodily harm to the other, either by the actor's affirmative conduct or by the actor's failure to prevent bodily harm when the actor has a duty to prevent such harm; and (b) the other does not effectively consent...."⁸²

These two provisions are later followed, among other things, by mutually applicable sections elaborating the meaning of consent, the doctrine of transferred intent, and the privileges (like self-defense).

As with the Liability for Physical and Emotional Harm Restatement Section 5 (but again unlike Section 6) the potential "scope of liability" and "duty" limits on liability for intentional acts remain ignored in the black letter. However, the scope of liability issue for both Sections 1 and 4 of the Intentional Torts Restatement is dealt with via comments to the relevant sections. The duty requirement is seemingly assumed to be met for affirmative intentional acts under Section 1, but is made clear as a requirement for failure to act cases under Section 4.⁸³ Although the black letter is not quite parallel, this structure with respect to the "duty" issue is not sharply different from that relating to physical harm caused by negligence in the Physical and Emotional Harm Restatement where there are also separate sections on affirmative duties to protect others from harm (compare Section 7 on a general duty of due care with Sections 38-44 on affirmative duties).⁸⁴

c. Why do we need both Section 1 and Section 4 in the Intentional Torts Restatement?

One might wonder why Section 4 is needed if Section 1 restates the law of battery, or why Section 1 is still needed after the inclusion of Section 4. The answer, it seems, is that each is under-inclusive in the view of the Reporters.

Note first that Section 4 imposes liability for purposeful infliction of physical harm without the direct contact requirement of Section 1. The draft Restatement gives several examples of how this captures instances of intentional conduct that should result in liability but are not batteries. For example, a prison guard personally dislikes a specific prisoner and in order to cause her to become ill, she turns off the heat in the prisoner's cell with the desired result that the prisoner becomes ill.⁸⁵ This is not a battery (because of the lack of contact).

Next note that because Section 1 requires there to have been affirmative conduct before imposing liability, while Section 4 imposes liability as well for intentional failures to act (where there is a duty to do so), here is a second reason for Section 4.

Consider this hypothetical. V accidentally falls down the stairs in the middle of the night and is badly bleeding. V's housemate R manages to get V to the nearby hospital emergency room where V is immediately admitted by N who rushes V into one of the treatment rooms to be seen by Dr. D. D quickly sees that by applying a routine bandaging technique D can prevent V from bleeding to death. D is about to start treatment when D realizes that V is someone who shamelessly flirted with D's wife at a community dance the prior week. Still stung with jealousy, D decides not to act and watches V bleed to death. Although this is not a battery, D has violated Section 4 and is liable to V.⁸⁶

So far we see that the tort of battery is insufficient to capture the full range of cases in which deliberately wrongful conducts yields physical harm to another. But if Section 4 provides the needed cover, do we really need Section 1 on battery at all?

For the Reporters, most importantly, Section 1 requires only that the *contact* be intended and not necessarily that the *physical harm* be intended. This is of course important for the part of the battery tort I largely put aside in this article – the dignitary harm of offensive

touching. But what about where there is physical harm – on which the focus is here?

The Reporters make their point with this example: a supervisor, deciding to play a trick on an employee, pulls out the employee's chair just as the employee is about to fall down. The supervisor intended contact with the ground and so this is a battery; but the supervisor did not intend physical harm, so the case is outside Section 4.⁸⁷ Hopefully, the reader, as did the Advisors, can catch the clever subtlety and somewhat frustrating complexity at work here.

By contrast, things are much simpler under my proposed general principle. The key question is whether the defendant's conduct was wrongful and if so then the actor should be liable for the physical harms that follow so long as they are in the scope of liability of the wrongful conduct (assuming a duty not to act wrongfully). Applying that principle would readily lead to the liability of the prison guard, the emergency room doctor, and the supervisor in the three examples just presented.

- d. My proposed language for the Physical and Emotional Harm Restatement Section 6 that would permit the elimination of Sections 5 of that Restatement plus, Sections 1 and 4 of the Intentional Torts to Persons Restatement with respect to physical harms

Suppose that Section 6 of the Liability for Physical and Emotional Harm Restatement (on negligence) were rephrased simply by substituting the phrase "wrongful conduct" for "negligence." With that, Section 5 of that Restatement (on intentional acts), as well as Sections 1 and 4 of the Intentional Torts Restatement just analyzed, could be eliminated (at least with respect to physical harm.)⁸⁸

My proposed general principle would be captured in one straightforward Restatement provision. There is tort liability for

wrongful conduct that results in physical harm (subject to causation, scope of liability, duty, defenses, and perhaps other limits).

Wrongful conduct would then have to be defined. For now assume, following the approach of the existing sections covering negligence law, it would be defined as unreasonable conduct and unreasonable failure to act where there is a duty to act. Unreasonableness would be failing to behave as a reasonable person in the actor's situation would have behaved. This would be clearly stated to include despicable, deliberately wrongful, wanton, reckless, grossly negligent, and ordinary negligent acts.

e. Eliminating the consent and privileges sections

Under the revised Section 6 of the Physical and Emotional Harm Restatement, the focus, as has been emphasized throughout this article, would be on evaluating the nature of the defendant's behavior. But for both of what are now separately thought of as risk taking and intentionally harming acts, the victim's awareness of the risk and society's willingness to allow the victim to accept the risk can make harm-causing conduct *not* unreasonable regardless of the certainty that the harm will occur. In this way we would no longer talk about consent as a limit on the battery doctrine just as the Physical and Emotional Harm Restatement has eliminated the old "assumption of risk" doctrine from the law of negligence.⁸⁹

I have already illustrated how I think this should play out with respect to the world of what we now call battery. For example, when the doctor properly removed the agreed upon leg, it just was not malpractice. Similarly, when the boxer struck the opponent with a legal blow to the head, it was reasonable behavior in the circumstances. On the other hand, when the gang members got into a criminal street brawl, both acted unacceptably (and the injurer should not completely escape liability because of the misplaced application of the "consent" doctrine).

This latter way of looking at things would parallel the way the Restatement now deals with the analogous situation in which a friend accepts a ride home with a driver whom the friend knows is so drunk that the driver is likely to crash the car into something, which then happens, injuring the passenger. “Assumption of risk” (which is the negligence world parallel to “consent”) is *not* applied here to deny the passenger any recovery. Instead, this is treated as a case of both parties being at fault (the defendant for driving drunk and the passenger for accepting a ride from such a driver) and the rules of comparative fault apply.⁹⁰

By folding in the “consent” feature of the current draft of the Intentional Torts Restatement into my newly proposed general principle, this would further mean that the entire set of “consent” Sections 12-19 of the Intentional Torts Restatement Draft could be eliminated (at least with respect to physical harms). This is desirable as well because some of those sections are not really about the victim actually giving consent to the injurer to impose the harm – e.g., the Implied-in-Law Consent rule and the Emergency Doctrine best illustrate this point.⁹¹

In the former, which seems primarily applicable to the offensive touching sort of battery that I have put aside here, a fellow passenger on a crowded bus or subway is said to “consent” to being slightly touched by other passengers seeking to move into or along the vehicle.⁹² But this is best seen, in my view, not as an illustration of the contrived notion of “implied-in-law consent.” Rather it is a nice illustration of what is not wrongful conduct since some slight touching like this is the inevitable consequence of using crowded public transport, and the victim should not recover even if he has a sign around his neck saying “don’t touch me” – an outcome with which the Reporters agree.⁹³

As for the Emergency Doctrine, the Reporters give this clear example. “P is crossing the street when he receives a much-anticipated text from a potential employer. P stops to read the text. D, realizing that P is about to be hit by an approaching car, tackles P, breaking his arm but saving his life.”⁹⁴ D is not liable. To treat this as a case of “consent” requires the assertion that, of course, P would have consented had he realized what was at stake. But this takes away from the thrust of the analysis in the earlier sections in which “actual” consent is required. It is much better understood, as it would be under my revised Section 6 of the Physical and Emotional Harm Restatement, as a clear example of conduct that is not wrongful.

It should further be understood that under my formulation, self-defense and other privileges to commit what otherwise would be a battery now proposed to be covered by Sections 20-22 of the Intentional Torts Restatement⁹⁵ would no longer be defenses set out in separate sections. Rather those circumstances would be relevant instead to a determination of whether the defendant’s conduct was in fact wrongful. Illustrations of reasonable (i.e., non-wrongful) intentional impositions of unconsented to physical harm would be provided in the comments to my proposed revised Section 6.

Some tweaking of other existing Liability for Physical and Emotional Harm Restatement sections on liability for negligence would also be needed but will not be detailed here. The main thing is that my basic point, I trust, is now clear. For wrongfully causing physical harm to another, liability would follow under one main general principle that would cover both negligent misconduct and what we now term battery for physical harms in Section 1 as well as Section 4 of the new Intentional Torts Restatement.

f. Dignitary Torts

If wrongful *physical* harm cases were all grouped under a new, modestly rephrased, section 6 of the Physical and Emotional Harm

Restatement, would there be any need for what remains in section 1 of the Intentional Torts Restatement? Yes, there would still be the need to deal with “offensive battery” as illustrated by the example at the start of this article of someone wrongfully spitting in someone else’s face. Other examples provided by the Restatement Reporters include unconsented to touching of a woman’s breasts and the like spelled out in Section 3 on what constitutes (and what is not) offensive contact.⁹⁶

I will not attempt a full analysis in this article of this matter. But, as a preview, let me say that here too I would favor no longer having a special separate tort for this sort of dignitary harm caused by a deliberate offensive touching. I don’t mean to do away with recovery for such acts. Rather, I think it would be best to establish a single Restatement section involving intentional dignitary harms to the person. This new section would group together what are now covered in the Intentional Torts to Persons Restatement by Sections 1 and 3 on offensive battery, Section 5 on assault, Section 7 on false imprisonment and, Section 6 on the intentional infliction of emotional distress (IIED).

These all involve deliberate conduct that society finds sufficiently unacceptable that a tort remedy should be made available to the victims. The bad behavior at stake does not directly cause physical harm (although victims of such misconduct might, in response, suffer physical consequences as a result of the emotional impact of what happened to them).

I am not suggesting (for now) that battery, assault and false imprisonment be simply merged into the IIED tort, although there might be some merit in that. Indeed, there might well be some merit in simply designating these three traditional dignitary torts as “rule-based” examples of IIED. But these issues will be saved for another day.

The point for now is to emphasize the common theme that runs through these circumstances: the defendant has acted in a deliberate and intolerable manner that victims should not be forced to simply endure. Moreover, we are eager that victims not respond to such misconduct by violence on their part (or by their family and/or friends). Rather, we want to encourage victims to go to “law” to receive an acknowledgement that the defendant acted outrageously as well as deploying tort law as a vehicle for financial recovery for actual damages and probably punitive damages as well (if allowed in the jurisdiction). Furthermore, the threat of such recovery is, of course, meant to deter such bad conduct in the first place to the extent feasible.

In each of these instances the freedom not to have one’s bodily dignity/integrity invaded is protected. Offensive battery involves an actual touching; assault involves a genuine and immediate threat of physical harm (albeit which did not occur but which understandably typically causes a fear of such harm); false imprisonment involves a restriction on the freedom of movement, and IIED involves an outrageous assault on one’s psyche (albeit without requiring that there have been an immediate and direct physical harm).

It is acceptable to me to have a separate “intentional” misconduct section in the Restatement for these sorts of dignitary harms, and not to merge these wrongs in with the tort of negligent infliction of emotional distress (NIED). This is primarily because the NIED tort itself is very circumscribed,⁹⁷ limiting greatly the situations in which recovery is permitted for carelessly inflicting emotional harm. This is in sharp contrast with the general law governing “negligent infliction of *physical* harm” and with which this article has been centrally concerned.

V. Conclusion

I don't expect the ALI to embrace my proposal now and rework the Restatement Third. After all, it is a "restatement" project on which we are working, and the law now treats battery separately. But I hope that judges will pay attention to my way of radically simplifying tort doctrine and over time begin to move in my direction.

Two helpful starts I see are: 1) the states that treat wrongful conduct by doctors who mistakenly remove the wrong leg as malpractice rather than as battery, and similarly the states that treat the failure of doctors to obtain "informed consent" prior to performing medical services as malpractice and not battery, and 2) the recent California Supreme Court case discussed above involving the attack by the demented person on her caregiver, in which the Court reached the no liability result by treating this situation as part of the tort regime properly applicable to professional service providers who are only entitled to reasonable warnings in settings in which they are paid to deal with dangers created by those in need of their help.

I also hope that torts scholars and teachers will grapple with my critique of the current structure. For law and economics aficionados concerned centrally about using tort law to promote "efficient" conduct, it seems to me that, with respect to physical harms to people, my general principle of liability for wrongful conduct could be quickly embraced as reflecting just what they argue for. For legal philosophy folks, who do not favor strict tort liability, my general proposed principle should be congenial regardless of how their theory is put – liability follows when you have a legal duty to act in a socially responsible manner and your failure to do so caused physical harm to another.

Those favoring so-called "enterprise liability" in tort would impose liability on efficient cost-avoiders like businesses and professionals. They would have to offer a broader principle of liability than mine because, for them, there is no need to demonstrate wrongful conduct for at least certain types of injury claims. But, if nothing else, my

proposal would remove for them the troubling barrier that exists in some states that just because an employee acted intentionally and committed a battery, the vicarious liability of the enterprise is automatically rejected.

Those concerned with the details of tort doctrine and practice will note that I have said rather little about the respective roles of judges and juries under my proposal. The Restatement, Third's view with respect to negligence is that whether conduct is socially irresponsible (i.e., unreasonable) or not is normally a jury question, but that trial judges should rule one way or the other as a matter of law if a reasonable jury could not otherwise find.⁹⁸ I support that perspective, and would carry it over to the new tort of wrongful physical harm that I propose here as the product of the merger of battery and negligence law.

To me, appellate judges too often have interfered with jury discretion in torts cases by creating "rules" as to what is and is not reasonable conduct or by pretending that what is really an issue as to whether there was a breach of the duty of due care is instead a "no duty" matter.⁹⁹ For example, this has, in my view, been especially problematic with respect to occupier liability cases as reflected in the old matrix of rules governing invitees, licensees, and trespassers.¹⁰⁰ Fortunately, this complexity has been reined in by the Restatement, Third.¹⁰¹

Nevertheless, for those still favoring certain rules in the realm of what today is covered by the law of battery, I should concede that they are not precluded by my proposal. For example, it could remain true that it is unreasonable as a matter of law to use force likely to cause serious bodily harm in the defense of property. The main point here, I believe, is that differences of opinion among scholars, judges, and lawyers about the respective roles of judges and juries should not preclude the adoption of the proposal advanced in this article.

For those teaching Torts to 1L students, I hope that this article provides a challenge. I teach about so-called “intentional torts” at the end of my course. I don’t focus on the detailed doctrine of existing law (which my students can by themselves readily learn by then). Instead, I try to show my students that the tools of analysis we have developed in our understanding of both negligence law with its no-duty limits and the few pockets of strict tort liability we now have (for extraordinarily dangerous activities and products with manufacturing defects) can be well utilized to understand when there is and is not tort liability in the so-called intentional tort setting (including claims for defamation and invasion of privacy).

This way they quickly see, for example, how the intentional tort privileges parallel what would be understood to be unreasonable burdens to impose on actors in negligence cases, that the misuse of assumption of risk in the law of negligence has its parallel in the consent requirement of battery, and that in turn the unnecessary and inadvisable all-or-nothing outcome that now governs intentional torts can easily be replaced with a thoughtful comparative fault regime.

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¹ This project was initiated in 2012. As of this writing the key drafts of the Intentional Torts Restatement are Tentative Draft No. 1 (April 8, 2015) and Tentative Draft No. 2 (March 10, 2017), which were presented to the ALI members at annual meetings. As a result, what are now numbered Sections 1-5 and 11 have been largely approved by the ALI membership at the 2015 and 2017 annual meetings. Other important proposed provisions now working their way through the ALI Council, as well as more preliminary proposals presented to the Advisers and the Members Consultative Group, include Restatement of the Law Third, Torts: Intentional Torts to Persons, Council Draft No. 3 (September 27,

2016) and Preliminary Draft No. 4 (March 6, 2017). Several additional sections, although not all of those needed to complete the project, are in various stages of drafting by the Reporters. Besides “battery,” this ALI project also addresses assault, false imprisonment, and the intentional infliction of emotional distress of which I will have a bit to say at the end.

² Restatement Third, Torts: Liability for Physical and Emotional Harm section 6 (Am. Law Inst. 2012).

³ Restatement Second, Torts section 908 (Am. Law Inst.1965).

⁴ Restatement Third, Torts: Liability for Physical and Emotional Harm section 3.

⁵ Restatement Third, Torts: Intentional Torts to Persons section 1.

⁶ This will be covered in the forthcoming section 20 of the Restatement Third, Torts: Intentional Torts to Persons.

⁷ See generally, Kent Greenawalt, Distinguishing Justifications from Excuses, 49 *Journal of Law and Contemporary Problems* 89 (1986).

⁸ See *Courvoisier v. Raymond*, 47 P. 284 (1896).

⁹ Restatement Third, Torts: Intentional Torts to Persons sections 12 and 13.

¹⁰ I put aside here the small number of special situations in which I am liable for physically harming you even though I was not at fault; i.e., where strict liability in tort applies.

¹¹ See e.g., Restatement Third, Torts: Intentional Torts to Persons section 13 illustrations 1 and 3.

¹² The draft Restatement Third, Torts: Intentional Torts to Persons includes section 19 which seeks to justify treating these unconsented to medical procedures as batteries rather than as malpractice claims sounding in negligence. One justification concerns situations when the treatment is offensive but no physical harm is done. I have excluded these dignitary harms from this article and my proposal here. A second justification is that battery is a better route for victims because expert testimony is not needed as it might be to show that the doctor’s unconsented to touching amounted to malpractice. I don’t see this as a genuine

hurdle to a fault-based claim. Of course, it was malpractice and indeed expert testimony might well not be needed. Furthermore, the Reporters seek to justify the difference by arguing that under battery the patient is entitled to recover for all physical harm whereas under a malpractice claim for failing to obtain informed consent, the patient must show the she (or perhaps a reasonable patient) would not have agreed to the treatment had consent been properly sought. It seems to me that if the treatment would have been consented to had consent been properly sought then the failure to obtain consent is essentially a dignitary harm to be covered by the law governing offensive battery, and that the victim should not be able to recover damages for physical harm that the failure to obtain consent did not cause in a “but for” sense.

¹³ Restatement Second, Torts section 71. A parallel provision will be forthcoming in the Restatement Torts, Third: Intentional Torts to Persons..

¹⁴ To be sure, if you landed the initial punch, I could counter-sue you for battery in the case where you sue me for the use of excessive force. I will later discuss more generally the matter of how much recovery should be allowed where both parties acted wrongfully.

¹⁵ Restatement Third, Torts: Intentional Torts to Persons section 11.

¹⁶ Restatement of Second, Torts section 75, and see generally Restatement Third, Torts: Intentional Torts to Persons section 11.

¹⁷ See a slightly different example in Restatement Second, Torts section 73, illustration 4.

¹⁸ Restatement Second, Torts section 73 illustration 1.

¹⁹ Restatement Second, Torts sections 60 and 892C, and Restatement Third, Torts: Intentional Torts to Persons section 13. Comment h to draft section 13 explains that while the Restatement Second provisions appeared to be the minority approach at the time, over time a majority of states now favor the Restatement position which is now set out in the Restatement Third, Torts: Intentional Torts to Persons section 13 on consent.

²⁰ See e.g., *Brown v. Patterson*, 108 So. 16 (1926).

²¹ Restatement Second, Torts sections 892C and 61. This exception is proposed to be carried over to the Restatement Torts, Third: Intentional Torts to Persons section 13, which discusses the “exception for protective statutes.”

²² See Restatement Third, Torts: Intentional Torts to Persons section 13 illustration 9.

²³ Restatement Second, Torts section 77 and Restatement Third, Torts: Intentional Torts to Persons section X.

²⁴ Id.

²⁵ Restatement Second, Torts Section 82 and Restatement Third, Torts: Intentional Torts to Persons section X comment f.

²⁶ Restatement Second, Torts section 79.

²⁷ Restatement Second, Torts section 84.

²⁸ Restatement Third, Torts: Intentional Torts to Persons, section X comment g.

²⁹ Restatement Third, Torts: Intentional Torts to Persons, section X, Reporters’ Note g.

³⁰ See e.g., *Katko v. Briney*, 183 N.W.2d 657 (Ia. 1971).

³¹ Id.

³² Restatement Second, Torts section 85.

³³ For the Restatement Second, Torts position on punitive damages, see section 908.

³⁴ See e.g., *Taylor v. Superior Court*, 24 Cal.3d 890 (1979).

³⁵ See e.g., *Mathias v. Accor Economy Lodging*, 347 F.3d 672 (7th Cir. 2003).

³⁶ Restatement Third, Torts: Intentional Torts to Persons Scope Note Reporters’ Note Tentative Draft No. 1 at p. 8.

³⁷ Nebraska, Michigan New Hampshire and Washington generally bar the award of punitive damages. See *Wilson Elser, Punitive Damages Review* (2011)

<https://www.travelers.com/business-insurance/specialized-industries/excess-casualty/docs/punitivedamages.pdf>

³⁸ E.g. 28 U.S.C. 2674 precludes the award of punitive damages under the Federal Tort Claims Act.

³⁹ See the Restatement Second, Torts sections 479 and 480 governing situations in which the plaintiff was either helpless or merely inattentive. “Last clear chance” has largely been abandoned as comparative fault has replaced the rule that contributory negligence was a complete bar to plaintiff’s recovery. See Uniform Comparative Fault Act, 12 Uniform Laws Annotated 33 (1981 Supp.) section 1(a).

⁴⁰ Restatement Torts, Second, section 467.

⁴¹ Restatement Third, Torts: Apportionment of Liability section 7.

⁴² Id. Comment a.

⁴³ Id.

⁴⁴ Restatement Third, Torts: Intentional Torts to Persons Scope Note page 3. See also Restatement Second, Torts section 481.

⁴⁵ Of course, I admit that there is nothing that prevents battery law itself from embracing a comparative fault regime. See the comments to section 1 of the Uniform Comparative Fault Act.

⁴⁶ See e.g., *Fritts v. McKinne*, 934 P.2d 171 (Ok. 1996).

⁴⁷ See e.g., *Chainani v. Board of Education*, 663 N.E.2d 283 (N.Y. 1995).

⁴⁸ Restatement Third, Torts: Liability for Physical and Emotional Harm section 17.

⁴⁹ The famous *Palsgraf* case illustrates this point even if the decision’s doctrinal basis is ambiguous, *Palsgraf v. Long Island Railroad Co.*, 162 N.E. 99 (N.Y. 1928).

⁵⁰ See Restatement Third, Torts: Liability for Physical and Emotional Harm sections 29-36.

⁵¹ *In re Polemis*, 3 K.B. 560 (Court of Appeal 1921).

⁵² Restatement Third, Torts: Liability for Physical and Emotional Harm section 31. In *Darby V. National Trust* [2001] EWCA (Civ) 189 (Eng.), the defendant landowner failed to warn guests not to swim in a lake on the property because rats urinated in the lake and as a result a swimmer could contract the fatal Weil's disease. The victim swam in the lake and died – not from Weil's disease but rather simply from drowning. The court held for the defendant.

⁵³ Restatement Third, Torts: Intentional Torts to Persons Scope Note at p. 3.

⁵⁴ Restatement Third, Torts: Intentional Torts to Persons section 1 comment i.

⁵⁵ See, e.g., *Benn v. Thomas*, 512 N.W.2d 537 (Iowa 1994). This outlook applies to intentional torts as well, see e.g., *Vosberg v. Putney*, 50 N.W. 403 (Wis. 1891).

⁵⁶ See generally Restatement Third, Torts: Liability for Physical and Emotional Harm section 7.

⁵⁷ Restatement Third, Torts: Liability for Physical and Emotional Harm section 52.

⁵⁸ See e.g., *Knight v. Jewett*, 11 Cal. Rptr.2d 2 (1992).

⁵⁹ See e.g., *Harper v. Herman*, 499 N.W.2d 472 (Mn. 1993).

⁶⁰ These so-called “good Samaritan” laws are designed to encourage people to rescue who have no duty to do so and might otherwise hold back for fear of being sued if their rescue fails. See e.g., California Health and Safety Code section 1799.102 (a) & (b).

⁶¹ See generally, Stephen Sugarman, *Why No Duty?*, 61 De Paul Law Review 669 (2012).

⁶² See Restatement Third, Torts: Liability for Physical and Emotional Harm section 10 and *Garratt v. Dailey*, 279 P.2d 1091 (Wa.1955).

⁶³ Id.

⁶⁴ See e.g., *Karas v. Strevell*, 884 N.E.2d 122 (Ill. 2008).

⁶⁵ *Gregory v. Cott*, 2014 Cal LEXIS 5460 (August 4, 2014).

⁶⁶ Cal. Civil Code section 41.

⁶⁷ *Gregory v. Cott*, supra note 58.

⁶⁸ American Law Institute, Restatement: Principles of Liability Insurance section 45, Preliminary Draft No. 7, August 15, 2014.

⁶⁹ Restatement Third, Third: Intentional Torts to Persons Scope Note and Reporters Notes at p. 5.

⁷⁰ Id. at page 5

⁷¹ *Baker v. St. Francis Hospital*, 126 P.3d 602 (Okla. 2005).

⁷² The battery-negligence line sometimes arises with respect to governmental vicarious liability for the torts of public employees under Tort Claims Acts if the Act actually uses the word battery or the phrase intentional tort in excluding vicarious liability. But even so this is a matter of statutory interpretation.

⁷³ *American Smelting & Refining Co v. WCAB*, 144 Cal.Rptr. 898 (App. 1978).

⁷⁴ See A. Larson, 1A Law of Workmen's Compensation ch. 34-39.

⁷⁵ See generally, Gary Schwartz, Tort Law and the Economy in Nineteenth Century America: A Reinterpretation, 90 Yale L. J. 1717 (1981).

⁷⁶ See e.g., *Brown v. Kendall*, 6 Cush. (60 Mass.) 292 (1850).

⁷⁷ Restatement Third, Torts: Liability for Physical and Emotional Harm section 6.

⁷⁸ Id. comment b.

⁷⁹ Restatement Third, Torts: Liability for Physical and Emotional Harm section 5.

⁸⁰ Id. comment b.

⁸¹ Restatement Third, Torts: Intentional Torts to Persons section 1.

⁸² Restatement Third, Torts: Intentional Torts to Persons section 4.

⁸³ Id. comment b, illustration 8.

⁸⁴ Restatement Third, Torts: Liability for Physical and Emotional Harm sections 38-44.

⁸⁵ Restatement Third, Torts: Intentional Torts to Persons section 4 comments illustration 1.

⁸⁶ For a similar example where D has a duty to come to P's aid but wrongfully fails to do so, see Restatement Third, Torts: Intentional Torts to Persons section 4 comments illustration 9 where D chooses not to help X knowing this will yield D a benefit under X's will.

⁸⁷ Restatement Third, Torts: Intentional Torts to Persons 4 comments illustration 4.

⁸⁸ Section 2 of the Intentional Torts to Persons Restatement, which addresses the unbelievably complex matter of whether battery should embrace the so-called "single" or "dual" intent requirement, would also be gone.

⁸⁹ Stephen Sugarman, Assumption of Risk, 31 Valparaiso University Law Review 833 (1997).

⁹⁰ See e.g., *Gonzalez v. Garcia*, 75 Cal. App. 3d 875 (1977).

⁹¹ Restatement Third, Torts: Intentional Harm to Persons sections 17 and 18 respectively. Sections 13-16 are all about situations that have us focus on the reasonableness of the defendant's conduct in various settings – all of which are squarely part of the inquiry to be made under my proposed general principle. Pretty much all of the illustrations could be readily rephrased and put under my proposed new section. And as already illustrated in the text earlier, the transferred intent provision (now covered in the Intentional Torts Restatement section 10) could also be eliminated with respect to physical harms to the person.

⁹² Restatement Third, Torts: Intentional Torts to Persons section 17 comment a.

⁹³ Id. illustration 2.

⁹⁴ Restatement Third, Torts: Intentional Torts to Persons section 18 comment d illustration 7.

⁹⁵ Restatement Third, Torts: Intentional Torts to Persons sections 20-22.

⁹⁶ Restatement Third, Torts: Intentional Torts to Persons section 3.

⁹⁷ Restatement Third, Torts: Liability for Physical and Emotional Harm sections 47 and 48.

⁹⁸ Restatement Third, Torts: Liability for Physical and Emotional Harm section 8 (b).

⁹⁹ Stephen Sugarman, Misusing the ‘No Duty’ Doctrine in Tort Decisions: Following the *Restatement (Third) of Torts* Would Yield Better Decisions, 53 *Alberta Law Review* 913 (2016).

¹⁰⁰ Stephen Sugarman, Land Possessor Liability in the Third Restatement of Torts: Too Much and Too Little, 44 *Wake Forest University Law Review* 1079 (2009).

¹⁰¹ Restatement Third, Torts: Liability for Physical and Emotional Harm sections 49-54.