

TENTATIVE DRAFT NO. 1
RESTATEMENT THIRD OF INTENTIONAL TORTS

MOTION TO AMEND SECTION 103 TO REAFFIRM
THE REQUIREMENT THAT OFFENSIVE BATTERY MUST BE
OFFENSIVE TO A REASONABLE SENSE OF PERSONAL DIGNITY

Motion Made by: Guy Miller Struve
Motion Seconded by: Andrew H. Struve

We move to amend Section 103 of Tentative Draft No. 1 of the Restatement Third of Intentional Torts by deleting the language bracketed and stricken out below:

§ 103. Battery: Definition of Offensive Contact

A contact is offensive within the meaning of § 101(c)(ii) if[:]

~~[(a)] the contact offends a reasonable sense of personal dignity[; or~~

~~(b) the contact is highly offensive to the other's unusually sensitive sense of personal dignity, and the actor knows that the contact will be highly offensive to the other.~~

~~Liability under (b) shall not be imposed if the court determines that such liability would violate public policy or that requiring the actor to avoid the contact would be unduly burdensome].~~

Executive Summary

The law has traditionally required that a contact which causes no bodily harm must be offensive to a person of reasonable dignity in order to be actionable as a battery. Both the First and Second Restatement of Torts embody this requirement. In identically worded caveats, both Restatements raised the question whether the tort of battery should be extended to contacts which are offensive only to persons with an abnormally acute sense of personal dignity. It is now more than 80 years since this question was first raised, and no court has answered the question in the affirmative. On the contrary, the

courts have reaffirmed that contacts which are merely offensive must be offensive to persons of reasonable dignity in order to be actionable as batteries. While it is sometimes appropriate for a Restatement to adopt a rule that is supported by only a minority of courts, it is not appropriate to adopt a rule that has been rejected by every court that has considered the question.

Extending the tort of offensive battery to persons of unreasonable sensitivity would have serious real-world impacts. It would provide a legal tool for persons with abnormal sensitivities – such as unreasonable antipathy to another person or group, obsessive-compulsive disorder (OCD), or pet phobias – to force others to comply with their abnormal sensitivities, on pain of being sued for battery.

Obviously aware of the risks inherent in extending offensive battery to persons of unreasonable sensitivity, the Reporters have tried to limit the extension in the final paragraph of their proposed Section 103. Unfortunately, the proposed limitation suffers from conceptual, procedural, and practical defects which render it an insufficient safeguard. The only way to be sure that the tort of offensive battery will remain cabined within reasonable bounds is to limit it – as the law has always limited it – to contacts which are offensive to a reasonable sense of personal dignity.

**The Proposed Extension of Offensive Battery
Has Failed to Obtain Any Judicial Support**

Both the First and Second Restatement of Torts limit the tort of offensive battery to contacts that would be offensive to a person of reasonable dignity. Restatement, Torts § 19 (1934); Restatement, Second, Torts § 19 (1965). In identically worded caveats, both the First and the Second Restatement expressed no opinion on the question whether

offensive battery should be extended to contacts which are offensive only to persons with an abnormally acute sense of personal dignity:

The Institute expresses no opinion as to whether the actor is liable if he inflicts upon another a contact which he knows will be offensive to another's known but abnormally acute sense of personal dignity.

This caveat was published in 1934, and was republished without change in 1965. Thus the question whether or not to extend offensive battery to abnormally sensitive persons has been before the courts for more than three quarters of a century.

During all those years, no court has held that offensive battery should be extended to unreasonably sensitive persons. On the contrary, the courts have dismissed claims of offensive battery where the contact would not be offensive to a reasonable person.¹ An example is Wishnatsky v. Huey, 584 N.W.2d 859 (N.D. Ct. App. 1998), which is the basis for Illustration 3 to Section 103 of Tentative Draft No. 1. The facts and result of Wishnatsky are described as follows in Illustration 3:

3. Lawyers A and B are engaged in a conversation in A's office with the door closed. C, a paralegal, opens the door to enter the office and give some papers to A. In order to continue the conversation in private, B gently pushes the door against C, thereby pushing C back into the hall, and closes the door. B is not liable for offensive battery. Although B's conduct is rude, it is insufficient to satisfy the requirement that B intentionally caused a contact with C that is offensive to a reasonable sense of dignity.

¹ See, e.g., Balas v. Huntington Ingalls Industries, Inc., 711 F.3d 401, 411 (4th Cir. 2013); Haddock v. Wal-Mart Stores East, LP, 2014 U.S. Dist. LEXIS 74143, at *9-*10 (M.D. Tenn. 2014); Workman v. United Fixtures Co., 116 F. Supp. 2d 885, 896-97 (W.D. Mich. 2000); Holdren v. General Motors Corp., 31 F. Supp. 2d 1279, 1286-87 (D. Kan. 1998); Brzoska v. Olson, 668 A.2d 1355, 1362-64 (Del. 1995); MacNeil Environmental, Inc. v. Allmon, 202 Minn. App. LEXIS 449, at *6-*8 (Minn. Ct. App. 2002) (unpublished decision); Wishnatsky v. Huey, 584 N.W.2d 859, 861-62 (N.D. Ct. App. 1998).

The result in Wishnatsky was clearly correct, and Illustration 3 properly approves it. However, the result in Wishnatsky would be reversed under proposed Section 103(b) if the paralegal had taken the trouble to notify everyone present in the office that any bodily contact of any kind, direct or indirect, would be highly offensive to him because of his abnormal personal sensitivity. The paralegal in Wishnatsky told the court that, because of his religious beliefs, he was “very sensitive to evil spirits” and “greatly disturbed by the demonic”. 584 N.W.2d at 861. Under proposed Section 103(b), if the paralegal had put everyone in the office on notice of his obsession with the demonic, he could state a claim for offensive battery.

The American Law Institute should not range itself in opposition to all the courts that have considered this question. On the contrary, the Institute should reaffirm that offensive battery is limited to contacts that would be offensive to reasonable persons.

**The Proposed Extension of Offensive Battery
Would Cause Serious Practical Problems**

In order to assess the real-world impact of the expansion of tort liability proposed by the Reporters, it is important to bear in mind that the concept of “contact” in Tentative Draft No. 1 is much broader than the usual understanding of the term. Under Tentative Draft No. 1, “contact” includes not only an actual touching of the plaintiff’s person, but also causing any other object to contact the plaintiff’s person. Section 101, Comment e. And an actual purpose to cause such an indirect contact is not required; knowledge that it is substantially certain to occur is enough. Section 102, Comment a.

Especially against the backdrop of this expansive concept of “contact”, allowing persons of unreasonable personal sensitivity to bring claims of offensive battery would

cause serious practical problems. Some examples are given below, but others will surely occur to members of the Institute.

Unreasonable Antipathy to Specific Persons or Groups of People. There are individuals whose antipathy to specific persons or groups of people (including, but not limited to, persons of a particular race, ethnicity, religion, gender, gender identification, or sexual preference) is so strong that they are highly offended by any contact with such persons (or even with papers and other objects that such persons have touched). Such antipathies may result from psychiatric disturbances, social prejudices, or religious beliefs, among other things. Whatever their origin, such antipathies give rise to no claim for battery under present law, because the law does not recognize them as reasonable. If (as the Reporters have proposed) the requirement of reasonableness were to be removed, persons harboring such unreasonable antipathies could bring a claim for battery, unless their claims were held to be barred by the final paragraph of the Reporters' proposed Section 103 (in which case the final paragraph would in effect reinstate the requirement of reasonableness).

Obsessive-Compulsive Disorder (OCD). Certain people with obsessive-compulsive disorder (OCD) may be highly disturbed by contact with anything that has been touched by any other person. Under the proposed rule, persons with OCD could put everyone in their place of employment on notice of their extraordinary sensitivity, and instruct them to wear plastic gloves when handling any papers or other things that such persons might touch, on pain of being sued for battery if they do not.

Pet Phobias. Some persons have a highly disturbing phobic reaction to contact with common pets such as cats or dogs. Under the proposed rule, persons with such pet

phobias could notify everyone in their apartment building or residential subdivision of their extraordinary sensitivity to any contact with such pets, and then sue for battery if any contact with their neighbors' pets should ensue.

Because battery is an intentional tort, such unreasonable offensive battery claims would typically not be covered by liability insurance, nor would they necessarily be covered by workers' compensation or by indemnification from an employer. Therefore, defendants sued on such claims would often have to use their own personal resources to defend against them, thereby significantly magnifying the harassing effect of such claims (and significantly increasing their attractiveness to persons wishing to avenge their unreasonable feelings of hurt).

The Reporters' Proposed Limitation on Unreasonable Offensive Battery Claims Is an Insufficient Safeguard

Obviously aware of the risks in their proposal to extend the tort of offensive battery to unreasonable claims of offense, the Reporters have proposed the following limitation on the proposed extension in the final paragraph of proposed Section 103:

Liability under (b) shall not be imposed if the court determines that such liability would violate public policy or that requiring the actor to avoid the contact would be unduly burdensome.

Unfortunately, the limitation proposed by the Reporters is insufficient to safeguard against the dangers of their proposed extension of battery liability to unreasonable claims of offense, for a number of reasons – procedural, practical, and conceptual.

From a procedural standpoint, the Reporters' proposed limitation envisions a common-law court of last resort, at the same time as it adopts the proposed extension of offensive battery liability, cabining the proposed extension by requiring trial courts to

make essentially legislative findings in individual cases. Requiring trial courts to make such findings is a very unusual thing for a common-law court to do. In many states, constitutional jury trial guarantees would not permit trial courts to make such findings. In the federal courts, the Seventh Amendment and the limitations on the Erie doctrine might impose similar limitations. For these reasons, it is far from clear that it would be procedurally possible for the final paragraph of Section 103 to perform the protective function envisioned by the Reporters.

Another procedural drawback of the Reporters' proposed limitation is that it would appear to envision the creation of an affirmative defense to the tort of offensive battery. Unlike the current requirement of reasonableness – which is an element of the tort of offensive battery, and therefore lends itself to cutting off meritless claims at the outset of the case – an affirmative defense is often not able to dispose of meritless claims until after burdensome and expensive pretrial discovery has taken place.

Aside from these procedural problems, the proposed limitation on unreasonable claims of offensive battery would also offer insufficient protection from a practical standpoint. Even if all or most claims of unreasonable personal offense were ultimately to be dismissed by the courts pursuant to the proposed limitation, the dismissed claims would still have subjected the defendants and the judicial system to the costs and burdens of objectively unreasonable litigation. At a time when the courts are struggling to deal with even meritorious claims, such a result has little to commend it.

Finally, from a conceptual standpoint, the Reporters' proposed limitation simply reintroduces through the back door the kind of limitation upon unreasonable claims of offensive battery which it has historically been the function of the requirement of

reasonableness to supply. But unlike the concept of reasonableness – which has the inherent flexibility to allow the trier of fact to take account of all relevant factors – the Reporters’ proposed limitation is focused on a limited pair of factors (public policy and undue burden), thereby arguably precluding consideration of all other relevant factors.

Conclusion

For all these reasons, the Institute should align itself once again with all the courts that have considered this question, and reaffirm that a contact which causes no bodily harm is actionable as a battery only if it offends a reasonable sense of personal dignity.