

PRELIMINARY DRAFT

The Restatement (Third) of Torts: Liability for Intentional Physical Harm

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With two *Restatement Third of Torts* projects now situated in leather-bound volumes and a third project awaiting adoption this year, the goal of a completed *Restatement Third of Torts* is already in view. Yet further challenges, no doubt large ones, lie in wait. For illustration one need look no further than the now stalled *Restatement Third of Economic Torts and Related Wrongs*. Although the need for particular restatement projects may be clear, attempts to bring those projects to fruition may be more tangled. Before substantive doctrinal disputes can be addressed, the scope, structure and principles of each new project must be laid out. This article endeavors to take one step along the path towards a completed *Restatement Third of Torts*. The Article outlines some ideas for designing a *Restatement (Third) of Torts: Liability for Intentional Physical Harm*.

Perhaps the most encouraging prospect for a *Restatement Third of Intentional Physical Harm* is that the central foundation for the project has already been laid. The *Restatement Third of Physical and Emotional Harm* established the central principle of this project in its section 5. That section provides: “An actor who intentionally causes physical harm is subject to liability for that harm.” The *Restatement Third of Physical and Emotional Harm* defines “physical harm” as “physical impairment of the human body or of real property or tangible personal property.”² It then defines intent to harm as a purpose or substantial certainty of producing the result.³

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² Restatement of Physical and Emotional Harms Section 4.

³ Restatement of Physical and Emotional Harms Section 1.

This simple but central foundation—that those who intentionally cause physical harm are subject to liability for it—is critical to the development of the Restatement of Intentional Physical Harm. One reason is that the principle of liability for intended physical harms provides a normatively acceptable baseline from which to organize a structure of liability. Another reason is that the baseline provides a conceptual framework that can be made to mirror the structure and style of the *Restatement Third's* negligence doctrines.

In terms of latter issue, structure and style, some background may be in order. When the American Law institute organized formal conversations about coordination of the Restatement Third of Torts in the fall of 2007, a question was raised as to whether the intentional torts provisions of the Restatement of Second of Torts might simply be carried forward into the Restatement Third with some updating and slight modification. A group of restatement reporters and advisors rejected the idea. One of the reasons (though far from the only one) concerned style differences between the two restatements. The Restatement Second contains specific detailed doctrinal provisions, while the Restatement Third provides a somewhat broader conceptual framework. One hope for future Restatement Third projects would be to marry those works to the existing parts of the Restatement Third in terms of style as well as substance.

The baseline principle of liability for intended physical harms seems to provide a perfect opportunity for matching Restatement third provisions on intentional harm to Restatement Third provisions concerning negligent harm. The negligent harm provisions have at their heart a binary structure. Actors who negligently cause physical harm are subject to liability for harm within the scope of liability.⁴ However, in cases of countervailing principle or policy, those actors may not be liable.⁵ This binary framework of duty (to use reasonable care with respect to

⁴ Section 6.

⁵ Section 7.

risks of physical harm) and no duty, provides both a default rule and a meaningful avenue for creating exceptions. Using a similar principle of liability for intentional physical harms and pairing it with a rule outlining exceptions would provide both a clear underlying obligation and a relief valve for cases in which the general rule is unsatisfactory.

Of course, to say that the conceptual framework for a Restatement of Intentional Physical Harms has a similar structure and style to the former Restatement is not itself sufficient to justify adoption of that structure. More important is that the framework must be normatively useful. A baseline rule of liability, even liability for intentional torts, certainly would not be viable in all circumstances. In the Restatement Third of Economic Harms, for example, a structure that created a baseline rule of duty to avoid economic loss would have been entirely untenable.⁶ To say that economic harm is *prima facie* tortious would make most commercial activity actionable. Although an exception could be crafted for a broad right to compete, too much unobjectionable economic activity might be subject to legal scrutiny.

By contrast, in the context of intended *physical* harms, the liability-no liability structure is likely to be more normatively acceptable and practically useful than in any other context. Deliberately causing “physical injury, illness, disease and death” to other human beings is widely recognized as wrongful conduct. Obvious cases—murder, rape, beating—abound, and are actually quite prevalent scenarios in tort opinions now that apportionment often includes intentional torts alongside third party negligence cases.⁷

A baseline of liability for harm resonates in the context of physical harm to property as well. Chopping apart a boat with an ax is waste. While a person may be entitled to waste his

⁶ Ken Simon’s article in the Arizona Law Review.

⁷ Ellen Bublick, Civil Responsibility for Sexual Assault.

own property (with limited exceptions),⁸ when one person harms the property of another, liability makes sense as a starting point of the discussion.⁹

Although liability is a normatively attractive and stylistically appealing baseline, an accompanying non-liability provision would be needed to release cases in which the liability rule is inapt. Even though the reporters of the Restatement of Physical and Emotional Harms sought to establish the duty of reasonable care as a firm normative baseline and were wary of rampant no duty cases, they did not only enumerate specific exceptions to the general rule of reasonable care, but they also established a mechanism through which courts could craft additional exclusions.

Providing this sort of relief valve for exceptions is crucial to the long-term viability of a developing body of law. The lack of this sort of structure for exceptions was one factor that created difficulty for the Restatement Third of Economic and Related Harms. The initial draft of the Restatement of Economic Harms started with the economic loss rule—a baseline rule of no liability for economic loss. The project then sought to specify all of the many exceptions to that rule. However, the draft had not identified an adequate mechanism through which courts might recognize new doctrines of liability. This gave the document less flexibility to accommodate to legal and social developments. It also led some to worry that recognized liability for economic loss would be frozen to the pockets of litigation that had been recognized before the drafting date.

While a mechanism for exception to the rule of liability for intentional physical harms is important to preserve flexibility, the actual exceptions to the liability rule in the context of intentional physical harm might be quite narrow. Of course there would be exceptions in certain

⁸ Artists' moral rights in intellectual property.

⁹ Posner Arizona article.

circumstances for consent, self defense, defense of third persons, crime prevention and so forth. However, there are only limited circumstances in which intentional physical harm would be appropriate. These circumstances are more limited than those in which failure to use reasonable care might be acceptable. In part, the difference is due to the stronger moral norm to avoid intentional harm to others.

So at the beginning of a Restatement Third of Intentional Physical Harms, the document should include four sections: a definition of intent,¹⁰ a definition of physical harm,¹¹ the principle of liability for intentional physical harm,¹² and a new provision for exceptions to liability.¹³ While it may not be fair to say that the rest of the provisions are commentary, it is certainly true that these four sections would lay the main conceptual framework for the project.

But to say that these provisions would provide an acceptable framework for doctrines prescribing liability for intentional physical harms is not to say that the provisions would match up precisely with current doctrines. Existing Restatement Second causes of action that deal with injuries to persons as do battery, assault and false imprisonment, and causes of action that deal with injury to property interests like trespass and conversion, do not necessarily meet the baseline liability rule's criteria of proscribing either intentional harm or physical injury.

In terms of intent to harm, trespassory torts may in some cases involve an intent to harm and in other cases involve no such intent. Take the tort of trespass for example. Under rules of trespass, an intentional entry onto the land of another is enough to qualify as a trespass. However, that intended conduct may or may not involve intended harm. If a burglar enters a home with the purpose of damaging goods inside and does so, not only is the tort of trespass

¹⁰ (imported from section 1 of the Restatement Third of Liability for Physical and Emotional Harms)

¹¹ (imported from the prior restatement's section 4),

¹² (imported from section 5),

¹³ The structural function of this mechanism should be akin to section 7 of the Resatement of Physical and Emotional Harm.

shown, but intentional physical harm would be as well. If, by contrast, a person enters the land of another mistakenly thinking that the land is hers and does no harm to the property while present, the tort of trespass may be established, but intended physical harm is not. The same would be true of other torts like battery, particularly in single intent jurisdictions if only an intent to contact and not to harm is required.¹⁴

Neither do the trespassory torts necessarily relate to physical injuries. Perhaps the primary example here would be assault. If a person puts another in reasonable apprehension of a punch, but doesn't actually deliver the blow, the resulting claim of assault would be designed to redress the injury to the plaintiff's mental peace. In many cases the tort of false imprisonment might also be seen as protecting mental and not physical interests, as when a plaintiff is confined without privilege by non-physical means. The tort of battery can protect mental state when offensive but not harmful contact is established.

If existing trespassory torts have been generally stable, and an umbrella rule of liability for intended physical harm does not map neatly onto trespassory torts, one answer might simply be to retain the trespassory tort rules and forget about redrafting the doctrines to segregated intended and unintended physical harm. Yet leaving intended harms to detailed, discrete doctrines unconnected to a broader principle belies the fact that a more principle-based ordering is not only possible, but made necessary by other sections of the Restatement project.

An example of why segregation of intended physical harms from others is necessary is seen by a comment in the Restatement of Physical and Emotional Harms. The comment notes that the Restatement of Apportionment "leaves open the possibility that the comparative-fault defense might be applicable to intentional torts."¹⁵ It then includes the provocative possibility

¹⁴ Simons Arizona article. New case from 6th edition.

¹⁵ § 5 comment c.

that “a person who provokes a battery by abusive verbal behavior should suffer a reduction in recovery in a suit against the party committing the battery.”¹⁶ Few courts have allowed comparative fault defenses to be raised by a defendant guilty of this sort of intended physical harm. Courts may well be concerned about the use of comparative fault in cases like this. Legislators too may be concerned, as when one court allowed the defendants who gang-raped a 12-year-old girl to plead the girl’s comparative negligence for drinking alcohol with the boys beforehand.¹⁷ And yet in other cases in which the trespassory torts sound more in negligence than in intentional physical injury, it may be more appropriate to allow defendants to assert comparative fault defenses. For example, when false imprisonment looks like an unreasonable confinement, the fact that the plaintiff behaved in an unreasonable way may seem a more relevant defense.¹⁸

Whether physical harms are intended may affect other policy reasons for treating intentional torts differently than others. For example, insurance often will not cover intentional torts because of issues of moral hazard. Those issues may be raised in some trespassory torts but not others. Similarly, a rule of extended liability may work very well in a case of arson and yet less well in the case of a battery involving an intent to cause slight offense. Special rules for intentional torts may apply to some cases of trespass and not others.

If a broad rule of liability for intended physical harm were recognized, the trespassory torts might have to be reconfigured. Some batteries might fall in the intended physical harm categories and some in another place. At times, commentators have suggested that a tort of reckless or negligent battery might be appropriate.

¹⁶ *Id.*

¹⁷ *Morris v. Jellystone.*

¹⁸ *New Mexico case.*

One large question would be whether intended emotional harms would have to be dealt with alongside the intended physical harms. Because assault and false imprisonment have been so closely linked with battery on a historical level and often protect against mental distress regarding physical harm, it would seem prudent to include these harms alongside the intended physical harms. Rules about intentional infliction of emotional distress might also be placed in this section. Any yet, other types of interests in avoided intended emotional harm, like defamation and privacy torts may be better situated with economic torts that are more similar such as commercial disparagement. Another large question is whether to include physical injury to property here, alongside economic torts, or in a separate project altogether.