TENTATIVE DRAFT NO. 2
RESTATEMENT THIRD OF INTENTIONAL TORTS

MOTIONS TO AMEND SECTION 3 TO REAFFIRM THE REQUIREMENT THAT OFFENSIVE BATTERY MUST BE OFFENSIVE TO A REASONABLE SENSE OF PERSONAL DIGNITY

MOTION 1: MOTION TO DELETE SECTION 3(b)(i) (THE KNOWLEDGE STANDARD)

Motion Made by: Guy Miller Struve
Motion Seconded by: H. Mark Stichel
And Andrew H. Struve

We move to amend Section 3 of Tentative Draft No. 2 of the Restatement Third of Intentional Torts by deleting the language bracketed and stricken out below:

§ 3. Battery: Definition of Offensive Contact

A contact is offensive within the meaning of § 1(c)(ii) if:

(a) the contact is offensive to a reasonable sense of personal dignity; or

(b) the contact is highly offensive to the other's unusually sensitive sense of personal dignity, and

[~~(i) the actor knows to a substantial certainty that the contact will be highly offensive to the other; or~~

~~(ii)~~] the actor contacts the other with the purpose that the contact will be highly offensive.

Liability under Subsection (b) shall not be imposed if the court determines that avoiding the contact would be unduly burdensome or that imposing liability would be against public policy.[1]

[1] The language set forth above is the Reporters' latest version of Section 3, which was posted on the ALI website on May 1, 2017, and which differs from the language contained in Tentative Draft No. 2.

This is the first of two motions addressed to Section 3(b). The second motion will be to strike the remainder of Section 3(b), thereby bringing Section 3 into agreement with the unanimous decisions of the courts.

Background

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 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. During the period of more than 80 years since the caveat was first published, no court has held that the tort of offensive battery should be extended to unreasonably sensitive persons. On the contrary, as described below, the courts have uniformly dismissed claims of offensive battery where the contact would not be offensive to a reasonable person.

Despite the absence of any supporting case authority, the Reporters for the Restatement Third of Intentional Torts proposed in Section 103(b) of Tentative Draft No. 1 of the Restatement Third of Intentional Torts (2015) that the tort of offensive battery should be extended to persons with an unusually sensitive sense of personal dignity. At

the sparsely attended final session of the 2015 Annual Meeting, a motion to strike Section 103(b) resulted in a tie vote of 42 to 42. (The Reporters were then invited to vote on the motion if they wished and they did so, making the final recorded vote 42 to 44.)

Following the 2015 Annual Meeting, it was announced that the Reporters would revisit Section 103(b) (now renumbered as Section 3(b)). The Reporters' reconsideration did not lead to any substantive change in the black letter of Section 3(b). Therefore, we moved once again to delete Section 3(b).

After our motion was filed, the Reporters submitted a revised proposal for Section 3(b), with the apparent objective of increasing the chances that at least some of their proposal will survive our motion. The Reporters' new language (which is set forth on page 1 of this motion) now contains two separate standards for liability under Section 3(b), one based on knowledge to a substantial certainty that the contact will be highly offensive to a person of unreasonable sensitivity (Section 3(b)(i)), and the other based on a purpose to the same effect (Section 3(b)(ii)).

Because the Reporters are now proposing two separate standards for liability under Section 3(b), we are making two separate motions, one directed to each of the two standards. This motion is to delete the knowledge standard of Section 3(b)(i), and the second motion will be to delete the purpose standard of Section 3(b)(ii). The combined effect of the two motions will be to delete Section 3(b) of Tentative Draft No. 2, and to return the Restatement Third of Torts to where the law has always been: that a contact which causes no physical harm must be offensive to a person of reasonable dignity in order to be actionable as a battery.

The Reporters' Proposed Extension of the Tort of Offensive Battery Is Contrary to All the Cases in Point

The Reporters have admitted that there is no "explicit judicial support" for Section 3(b).[2] Tentative Draft No. 2, p. 8, line 22. This admission is correct as far as it goes, but it does not go far enough.

The fact is that the courts have uniformly dismissed claims of offensive battery where the contact would not be offensive to a reasonable person.[3] Thus the case law not only does not support the Reporters' proposed extension of the tort of offensive battery, but is flatly contrary to it.

The most recent case in point is Gerber v. Veltri, 2016 WL 4468065 (N.D. Ohio 2016), appeal filed, 6th Cir., Case No. 16-4062. Gerber v. Veltri involved a claim for assault and battery by one law professor against another. (You can't make this stuff up.) The trial court found that the defendant had touched the plaintiff on the shoulder in an attempt to direct him to the nearby faculty lounge so that the two could discuss the

[2] The Reporters made this admission in the most recent Council Draft of Section 3(b). See Council Draft No. 3, p. 8, line 22. This admission was deleted from the Tentative Draft now being presented to the Institute, but the Tentative Draft still admits that there is "little explicit support in the case law and in jury instructions for the rule stated in [Section 3(b)]." Tentative Draft No. 2, p. 17, lines 5-6. In support of this statement, the Reporters cite only a single Texas jury instruction and several Texas cases which did not pass on this question. See id. at p. 17, lines 6-18.

[3] See, e.g., Balas v. Huntington Ingalls Industries, Inc., 711 F.3d 401, 411 (4th Cir. 2013); Gerber v. Veltri, 2016 WL 4468065 (N.D. Ohio 2016), appeal filed, 6th Cir., Case No. 16-4062; 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).

plaintiff's recent confrontation with a law school librarian. 2016 WL 4468065, at *1. The claim for assault and battery was dismissed, among other reasons, because this contact would not have been offensive to a reasonable person. Id. at *5-*6.

While it is sometimes appropriate for the Institute to adopt in a Restatement a rule which enjoys only minority support in the cases, it is not appropriate for the Institute to adopt a rule which is contrary to all of the cases in point. On the contrary, the Institute should reaffirm that offensive battery is limited to contacts that would be offensive to a reasonable person.

The Proposed Extension of Offensive Battery Would Have Serious Real-World Consequences

Gerber v. Veltri, 2016 WL 4468065 (N.D. Ohio 2016), appeal filed, 6th Cir., Case No. 16-4062, illustrates the unfortunate practical consequences that would follow from the adoption of the Reporters' proposed rule. The case wasted five days of trial time of a busy federal court. 2016 WL 4468065, at *1. Most of that time was spent rehashing plaintiff's unrelated grievances against his fellow law school faculty members. Id. This should not be surprising. If plaintiffs are permitted to bring claims of battery that would not be brought by a reasonable person, it should surprise no one if the plaintiffs bringing such claims are motivated by ulterior grievances.

The Reporters suggest that the practical impact of Section 3(b) will be limited by its requirement that the defendant must know to a substantial certainty that the plaintiff will be highly offended by the contact. Tentative Draft No. 2, p. 5, lines 17-24. Only an academic could take comfort from this suggestion. In the real world, a plaintiff with a reputation for angry and irrational behavior will have no difficulty in alleging that the defendant must have known to a substantial certainty that the plaintiff's reaction to even

an inoffensive contact would be angry and irrational. Thus the Reporters' proposed rule will furnish a new litigation weapon to precisely the kinds of plaintiffs who are most likely to misuse it for purposes of harassment and retaliation. Indeed, the Reporters' proposed rule would even embrace claims of offense brought by plaintiffs who are mentally ill.

In the Illustrations to Section 3(b), the Reporters offer various factual situations that they believe should result in the imposition of liability. To the extent that such cases have actually arisen in the courts and have been found to call for relief, the courts have been able to accommodate them without any such drastic change in the law as the Reporters are proposing.[4] No court has found that any such factual situation justifies the Reporters' proposed rule.

Because battery is an intentional tort, claims under Section 3(b) 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 magnifying the harassing effect of such claims (and increasing their attractiveness to persons seeking revenge for unrelated grievances).

[4] For example, Illustration 4 to Section 3(b) involves a case in which medical personnel violated an express limitation on the patient's consent to surgery. No change in the law is necessary to impose liability in such a case because, as the Reporters themselves have explained in their draft of Comment b to Section 19 of the Restatement Third of Intentional Torts, "courts treat any physical touching in the context of medical treatment that is beyond the scope of the patient's consent as offensive to a reasonable sense of personal dignity as a matter of law." Preliminary Draft No. 4, p. 170, lines 8-9.

The Institute's Reputation Suffers When the Institute Violates Its Own Ground Rules

The reputation of the Institute's Restatements is founded upon the Institute's adherence to the ground rules governing Restatements. When the Institute departs from those ground rules in order to reach some desired result, the Institute's reputation suffers. The harm to the Institute's reputation is far out of proportion to whatever substantive ends are sought to be gained by disregarding the Institute's ground rules.

These concerns are not merely theoretical. They have already happened in this case.

Following the 2015 Annual Meeting, an op-ed piece appeared in *The Wall Street Journal* about Section 3(b). Ronald D. Rotunda, *Thin-Skinned and Upset? Call a Lawyer—An influential law group wants the tort of battery redefined to protect the 'unusually sensitive'*, *The Wall Street Journal*, June 22, 2015. The op-ed inspired a lively set of reactions from readers on the *Journal's* website,[5] almost all of which make distressing reading for one who loves the Institute. In addition to numerous unflattering comments about Section 3(b) itself, there were comments sharply questioning how a self-perpetuating, unelected group such as the ALI could claim the authority to change the law in the manner advocated by the Reporters.

Thus Section 3(b) has already done significant harm to the reputation of the Institute. Passing the present motion will not totally eradicate this harm. But it will be a start.

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[5] http://www.wsj.com/articles/SB11614593350830634792804581047743451728306

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.