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ASSAULT AND BATTERY - INTENT TO HARM - NEGLIGENCE - LIABILITY FOR INJURY TO AN ALLERGIC PERSON

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RECENT DECISIONS

ASSAULT AND BATTERY — INTENT TO HARM — NEGLIGENCE — LIABILITY FOR INJURY TO AN ALLERGIC PERSON — Defendant's agent conducted in plaintiff's store a demonstration of a fly-spray, manufactured by another company, intending to interest plaintiff in retailing it. The spray was placed in an electric difusor which gave off a fly-killing vapor. Plaintiff's wife, unknown to defendant, was allergic to pyrethrum, an ingredient of the spray, and became violently ill upon coming in contact with the vapor. An action for assault and battery was brought. *Held*, defendant was not liable in the absence of an intent to do harm. *Brabazon v. Joannes Bros. Co.*, (Wis. 1939) 286 N. W. 21.

An intent to do harm is not always a requisite in an action for assault and battery. There is even some authority to the effect that recovery may be had where defendant is merely acting negligently and plaintiff is injured thereby,[1] but most courts refuse to extend the battery concept this far.[2] On the other hand, recovery is generally allowed without regard to defendant's actual intent when he is acting "in reckless disregard of consequences" [3] or is engaging in an unlawful act.[4] The meaning of the term "unlawful act" is incapable of a limited definition, but in the light of the cases it is apparent that in its use in battery actions, the courts are referring to unlawful acts which are likely to result in bodily harm. In the principal case, assuming the demonstration was a trespass [5] and hence unlawful, harm was not likely to result from such an act and it would therefore not fall within this category. The requirement of an intent to do harm imposed by the court is apparently due to (1) the court's steadfast adherence to an old concept of the requirement for a simple assault,[6] although the better view today is that defendant need only intend to inflict a harmful or offensive touching, or to put plaintiff in apprehension of such a touching; [7] and (2) a confusion of this requirement for a simple assault with the requisite for a com-

[1] Lentine v. McAvoy, 105 Conn. 528, 136 A. 76 (1927); Fortier v. Stone, 79 N. H. 235, 107 A. 342 (1919); Honeycutt v. Louis Pizitz Dry Goods Co., 235 Ala. 507, 180 So. 91 (1938), and cases there cited; Luttermann v. Romey, 143 Iowa 233, 121 N. W. 1040 (1909).

[2] Baran v. Silverman, 34 R. I. 279, 83 A. 263 (1912); Biggins v. Gulf, C. & S. F. Ry., 102 Tex. 417, 118 S. W. 125 (1909); Raefeldt v. Koenig, 152 Wis. 459, 140 N. W. 56 (1913).

[3] Mercer v. Corbin, 117 Ind. 450, 20 N. E. 132 (1889); Welch v. Durand, 36 Conn. 182 (1869); Peterson v. Haffner, 59 Ind. 130 (1877); Johnson v. Mack, 141 Mich. 99, 104 N. W. 395 (1905); Singer Sewing Machine Co. v. Phipps, 19 Ind. App. 116, 94 N. E. 793 (1911).

[4] Vosburg v. Putney, 80 Wis. 523, 50 N. W. 403 (1891); Nichols v. Colwell, 113 Ill. App. 219 (1903); Mohr v. Williams, 95 Minn. 261, 104 N. W. 12 (1905); Carmichael v. Dolen, 25 Neb. 335, 41 N. W. 178 (1889).

[5] Plaintiff's action for trespass to the premises, based on an alleged revocation of the implied license to make the demonstration, was sent back for a new trial.

[6] 2 GREENLEAF, EVIDENCE, 14th ed., § 83 (1883), relied on in Degenhardt v. Heller, 93 Wis. 662, 68 N. W. 411 (1896).

[7] HARPER, TORTS, § 19 (1933), and cases there cited; 1 TORTS RESTATEMENT, § 43 (1934).

pleted battery.[8] The diversity of authority and resultant uncertainty which pervades the whole battery field could be eliminated by confining the term "battery" to instances where defendant has intentionally invaded plaintiff's right to freedom from harmful and offensive touchings, thereby leaving unintentional invasions of that right to the negligence field.[9] "Intentional invasions" should, however, be construed to comprehend not only cases where defendant actually intends a harmful or offensive touching, but also instances where he acts "in reckless disregard of consequences" or merely intends an unlawful act which is likely to result in bodily harm. In such cases, the required touching is sufficiently probable for the law to imply an intent for its infliction. In the light of these principles, the court in the principal case rightly rejected the battery claim, but its summary requirement of an intent to do harm was too narrow. Nor could plaintiff have recovered in a negligence action.[10] It is generally held that where defendant is using or selling an ordinarily non-injurious article, such as fly-spray, hair dye, dyed furs, or eyeglass frames, there is no duty owed by him to use due care to avoid harming plaintiff unless (1) he knew that persons had previously been adversely affected by the use of such an article,[11] or (2) he could have inferred from the surrounding facts that plaintiff was peculiarly sensitive to an ingredient of his article.[12] There was no evidence in the principal case to support either of these possibilities. An injury suffered by an allergic person due to his peculiar sensitiveness, therefore, unless shown to have been incurred under one of these circumstances, is *damnum absque injuria.*

[8] Donner v. Graap, 134 Wis. 523, 115 N. W. 125 (1908). That a distinction should be made is pointed out in Hoffman v. Eppers, 41 Wis. 251 (1876); Vosburg v. Putney, 80 Wis. 523, 50 N. W. 403 (1891).

[9] HARPER, TORTS, § 16 (1933); Carpenter, "Intentional Invasion of Interest in Personality," 13 ORE. L. REV. 227 (1934); 1 TORTS RESTATEMENT, § 13 (1934).

[10] This possibility was not alleged by plaintiff and therefore did not have to be discussed by the court, but it is of sufficient interest and importance to merit attention herein.

[11] Gould v. Slater Woolen Co., 147 Mass. 315, 17 N. E. 531 (1888); Gerkin v. Brown & Sehler Co., 177 Mich. 45, 143 N. W. 48 (1913).

[12] Walstrom Optical Co. v. Miller, (Tex. Civ. App. 1933) 59 S. W. (2d) 895; Stemons v. Turner, 274 Pa. 228, 117 A. 922 (1922); Arnold v. May Dept. Stores Co., 337 Mo. 727, 85 S. W. (2d) 748 (1935); and see cases collected in 121 A. L. R. 464 (1939).