Picard v. Barry Pontiac-Buick, Inc.

What's a tort? It's a wrong that a court is prepared to recognize, usually in the form of ordering the transfer of money ("damages") from the wrongdoer to the wronged. The court is usually alerted to a wrong by the filing of a lawsuit by a private citizen alleging harm: anyone can walk through the courthouse doors and, subject to the limits explored in civil procedure, call someone else (or, if a company, something) to account.

The first chapter deals with that group of torts known as *intentional*. We'll review the spectrum of intent that marks the sometimes-fuzzy boundaries among wrongs that are done intentionally, those done merely "negligently," and others in between, and also have a chance to think about what kinds of damages should be on the table once a wrong is established. What happens when an act that's only a little bit wrongful, even while intentional, results in unexpectedly large harm?

We'll also discuss the sources that courts turn to in order to answer such questions. Rarely, in tort cases, are those sources the ones laypeople expect: statutes passed by legislatures. Without statutes to guide them, what are courts left with? They turn to decisions of prior courts or decide to announce a new rule as they sort out cases that are non-starters, cases that are such slam dunks that juries need not be empaneled to weigh them, and cases that are in a middle ground that call for jury decision. They distinguish, too, between matters of fact (subject to jury ascertainment unless crystal clear), matters of law (for judges to determine and appellate judges to set precedent upon), and mixed questions of fact and law, such as when a particular behavior falls short of a legal standard.

3.1 Righting (or Punishing) the Wrong

3.1.1 Vosburg v. Putney: "The Schoolboy Kicker"

Should defendants be liable for unforeseeable injuries?

Wisconsin Supreme Court

VOSBURG v. PUTNEY

80 Wis. 523

1891-11-17

[. . .]

The action was brought to recover damages for an assault and battery, alleged to have been committed by the defendant upon the plaintiff on February 20, 1889. The answer is a general denial. At the date of the alleged assault the plaintiff was a little more than fourteen years of age, and the defendant a little less than twelve years of age.

The injury complained of was caused by a kick inflicted by defendant upon the leg of the plaintiff, a little below the knee. The transaction occurred in a school-room in Waukesha, during school hours, both parties being pupils in the school. A former trial of the cause resulted in a verdict and judgment for the plaintiff for $2,800. The defendant appealed from such judgment to this court, and the same was reversed for error, and a new trial awarded.

The case has been again tried in the circuit court, and the trial resulted in a verdict for plaintiff for $2,500.

[. . .]

On the last trial the jury found a special verdict, as follows: "(1) Had the plaintiff during the month of January, 1889, received an injury just above the knee, which became inflamed, and produced pus? *Answer.* Yes. (2) Had such injury on the 20th day of February, 1889, nearly healed at the point of the injury? *A.* Yes. (3) Was the plaintiff, before said 20th of February, lame, as the result of such injury? *A.* No. (4) Had the *tibia* in the plaintiff's right leg become inflamed or diseased to some extent before he received the blow or kick from the defendant? *A.* No. (5) What was the exciting cause of the injury to the plaintiff's leg? *A.* Kick. (6) Did the

defendant, in touching the plaintiff with his foot, intend to do him any harm? *A.* No. (I) At what sum do you assess the damages of the plaintiff? *A.* $2,500."

The defendant moved for judgment in his favor on the verdict, and also for a new trial. The plaintiff moved for judgment on the verdict in his favor. The motions of defendant were overruled, and that of the plaintiff granted. Thereupon judgment for plaintiff for $2,500 damages and costs of suit was duly entered. The defendant appeals from the judgment.

[. . .]

Lyon, J.

Several errors are assigned [. . .].

1. The jury having found that the defendant, in touching the plaintiff with his foot, did not intend to do him any harm, counsel for defendant maintain that the plaintiff has no cause of action, and that defendant's motion for judgment on the special verdict should have been granted. In support of this proposition counsel quote from 2 Greenl. Ev. § 83, the rule that "the intention to do harm is of the essence of an assault." Such is the rule, no doubt, in actions or prosecutions for mere assaults. But this is an action to recover damages for an alleged assault and battery. In such case the rule is correctly stated, in many of the authorities cited by counsel, that plaintiff must show either that the intention was unlawful, or that the defendant is in fault. If the intended act is unlawful, the intention to commit it must necessarily be unlawful. Hence, as applied to this case, if the kicking of the plaintiff by the defendant was an unlawful act, the intention of defendant to kick him was also unlawful.

Had the parties been upon the play-grounds of the school, engaged in the usual boyish sports, the defendant being free from malice, wantonness, or negligence, and intending no harm to plaintiff in what he did, we should hesitate to hold the act of the defendant unlawful, or that he could be held liable in this action. Some consideration is due to the implied license of the playgrounds. But it appears that the injury was inflicted in the school, after it had been called to order by the teacher, and after the regular exercises of the school had commenced. Under these circumstances, no implied license to do the act complained of existed, and such act was a violation of the order and decorum of the school, and necessarily unlawful. Hence we are of the opinion that, under the evidence and verdict, the action may be sustained.

[. . .]

3. Certain questions were proposed on behalf of defendant to be submitted to the jury, founded upon the theory that only such damages could be recovered as the defendant might reasonably be supposed to have contemplated as likely to result from his kicking the plaintiff. The court refused to submit such questions to the jury. The ruling was correct. The rule of damages in

actions for torts was held in *Brown v. C., M. & St. P. R. Co.* 54 Wis. 342, to be that the wrongdoer is liable for all injuries resulting directly from the wrongful act, whether they could or could not have been foreseen by him. [. . .]

The judgment of the circuit court is reversed, and the cause will be remanded for a new trial.

3.1.2 Alcorn v. Mitchell: "The Angry Spitter"

Should damages for battery encompass indignities as well as physical injuries? Should juries be able to assign extra damages for particularly malicious or bad-natured conduct?

Illinois Supreme Court

ALCORN v. MITCHELL

63 Ill. 553

1872–06

[. . .]

Mr. Justice Sheldon delivered the opinion of the Court:

The ground mainly relied on for the reversal of the judgment in this case is, that the damages are excessive, being $1000.

The case presented is this: There was a trial of an action of trespass between the parties, wherein the appellee was defendant, in the circuit court of Jasper county. At the close of the trial the court adjourned, and, immediately upon the adjournment, in the court room, in the presence of a large number of persons, the appellant deliberately spat in the face of the appellee.

So long as damages are allowable in any civil case, by way of punishment or for the sake of example, the present, of all cases, would seem to be a most fit one for the award of such damages.

The act in question was one of the greatest indignity, highly provocative of retaliation by force, and the law, as far as it may, should afford substantial protection against such outrages, in the way of liberal damages, that the public tranquility may be preserved by saving the necessity of resort to personal violence as the only means of redress.

Suitors, in the assertion of their rights, should be allowed approach to the temple of justice without incurring there exposure to such disgraceful indignities, in the very presence of its ministers.

It is customary to instruct juries that they may give vindictive damages where there are circumstances of malice, willfulness, wantonness, outrage and indignity attending the wrong complained of. The act in question was wholly made up of such qualities. It was one of pure malignity, done for the mere purpose of insult and indignity.

An exasperated suitor has indulged the gratification of his malignant feelings in this despicable mode. The act was the very refinement of malice. The defendant appears to be a man of *wealth;* we can not say that he has been made to pay too dearly for the indulgence.

We have carefully looked into the instructions given and refused, and do not perceive any substantial error in respect to them.

The judgment must be affirmed.

Judgment affirmed.