

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 2: MOTION TO DELETE SECTION
3(b)(ii) (THE PURPOSE 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. By the time that this motion is made, we hope and expect that Section 3(b)(i) will have been deleted as a result of our first motion.

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

The fundamental basis for this motion is the same as the basis for our first motion: There is no case support for the Reporters' proposed extensions of the law in Section 3(b), and all of the decided cases are to the contrary.² It is not the function of a Restatement to enact the personal preferences of the Reporters or other members of the Institute, when those personal preferences have no support in the cases. The Institute's reputation, and the standing of all the Institute's Restatements, suffer when this is done.

The argument for Section 3(b)(ii) rests upon the premise that, by substituting a purpose standard for the knowledge standard of Section 3(b)(i), Section 3(b)(ii) is narrower than Section 3(b)(i). Even if this were true, it would not follow that Section 3(b)(ii) has any place in a Restatement. There is no more case support for the purpose test of Section 3(b)(ii) than there is for the knowledge test of Section 3(b)(i). Since it is not the function of a Restatement to enact the personal preferences of the Reporters or the membership, it is inappropriate to do this regardless of whether the personal preferences are enacted in a more or less unrestrained fashion.

² 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).

In any event, it is not the case that the purpose standard of Section 3(b)(ii) is narrower than the knowledge test of Section 3(b)(i). In the first place, Section 3(b)(ii) does not require that the purpose to cause offense be the sole purpose, or the principal purpose, or even a but-for cause, of the defendant's actions. So long as there was any purpose to cause offense, no matter how minor a role that purpose may have played in the defendant's actions, Section 3(b)(ii) is triggered. This is true regardless of whether or not there were other purposes which played a far greater role, and which would in themselves have been sufficient to cause the defendant's conduct. In other words, under Section 3(b)(ii), even a smidgen of forbidden purpose is enough. It is at least as easy to allege a smidgen of purpose as it is to allege knowledge.

The problem is exacerbated by the fact that cases do not come pre-labeled as "purpose cases" or "no-purpose cases". Purpose, like other states of mind, is normally not proved by direct evidence; instead, it represents an inference from underlying facts. In any situation where the defendant has evinced irritation or frustration with the plaintiff in the past, it will be easy for the plaintiff to allege that this provides the basis for an inference that the defendant had a purpose to cause offense to the plaintiff. And, in a world that is largely made up of ordinary human beings, not saints, it is all too easy for people to evince irritation or frustration with those who make unreasonable demands upon others – who are precisely the people who will be plaintiffs in cases brought under the Reporters' proposed Section 3(b)(ii). Therefore, the allegation of purpose will be an easy one to make in practice, and the requirement of such an allegation will do little to limit the danger of widespread litigation arising from incidents that would not cause offense to any reasonable person.

It is important to bear in mind that we already have a tort of intentional infliction of emotional harm – a tort that (unlike Section 3(b)(ii)) enjoys support in the case law, and that (unlike Section 3(b)(ii)) has been carefully circumscribed and limited to avoid the harms that would flow from channeling a broad range of social frictions into the litigation process.

Section 46 of the Restatement Third of Torts – Physical and Emotional Harm (2012), entitled “Intentional (or Reckless) Infliction of Emotional Harm”, provides:

“An actor who by extreme and outrageous conduct intentionally or recklessly causes severe emotional harm to another is subject to liability for that emotional harm and, if the emotional harm causes bodily harm, also for the bodily harm.”

Comment d to Section 46 explains why liability under Section 46 is limited to cases of “extreme and outrageous conduct”:

“. . . [A]s a matter of policy, even if emotional harm is inflicted for no purpose other than to cause such harm, some degree of emotional harm must be expected in social interaction and tolerated without legal recourse. Under the ‘extreme and outrageous’ requirement, an actor is liable only if the conduct goes beyond the bounds of human decency such that it would be regarded as intolerable in a civilized community. Ordinary insults and indignities are not enough for liability to be imposed, even if the actor desires to cause emotional harm.”

Comment a to Section 46 further explains the reasons why liability for intentional infliction of emotional harm has been carefully limited by the courts:

“A great deal of conduct may cause emotional harm, but the requisite conduct for this claim—extreme and outrageous—describes a very small slice of human behavior. The requirement that the resulting harm be severe further limits claims. These limits are essential in preventing this tort from being so broad as to intrude on important countervailing policies, while permitting its judicious use for the occasions when it is appropriate.”

The Reporters' proposed Section 3(b)(ii) does away with all the limitations that the courts (and, following the courts, the ALI) have imposed on the tort of intentional infliction of emotional harm. Under Section 3(b)(ii), if the plaintiff is highly offended – no matter how unreasonably so – and if this was any part of the defendant's purpose, liability is automatic. This would produce exactly the kind of broad expansion of litigation that the courts have sought to prevent by the limitations that they have placed on the tort of intentional infliction of emotional harm.

It may be argued that Section 3(b)(ii) is different than the normal case of intentional infliction of emotional harm because Section 3(b)(ii) involves battery, which requires a physical contact of some sort. But Section 3(b)(ii), by definition, involves physical contacts which are so minor that no reasonable person would complain of them. This does not justify sweeping aside the limitations imposed by the courts (and the ALI) on the tort of intentional infliction of emotional harm.

For all these reasons, Section 3(b)(ii) of the Reporters' proposal (along with the rest of Section 3(b)) should be deleted, thereby conforming the Restatement Third to the uniform holding of the courts that the tort of offensive battery does not extend to conduct that would not cause offense to a reasonable person.