

Doing Away With Battery Law

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Stephen D. Sugarman, *Restating the Tort of Battery* (Sept. 19, 2017), UC Berkeley Public Law Research Paper, available at [SSRN](#).

Steve Sugarman is one of contemporary tort law's leading figures, and one feature of his career which stands out is that he is willing to challenge modern orthodoxy. As the title of his classic 1985 article, [Doing Away With Tort Law](#) suggests, Sugarman is willing to recommend sweeping changes to private law. In *Restating the Tort of Battery*, Sugarman offers a proposal almost as radical as his 1985 proposal to get rid of tort law. Although he doesn't say he wants to get rid of battery, once he is finished "restating" it, it is hard to see what is left of it. In this essay, I will not engage directly with Sugarman's proposal, but I will try to describe its motivation and determine its limits – which, I believe, are not as easy to find as Sugarman may believe.

Sugarman thinks that the Reporters for the Restatement of the Law, Third, Torts: Intentional Torts to Persons have done the best that could be done given the job they were asked to do. The Reporters were asked by the American Law Institute to restate the law of intentional torts, including battery. Sugarman believes that the project is based on a false assumption, which is that there is a separate branch of tort law called "battery". This is, Sugarman thinks, no longer true, if it were ever true. The truth is, if we were to restate the case law as it exists in 2017, we would see that all of our battery law that deals with harmful batteries can really be explained as instances of the same legal principles that explain liability for physical harm due to negligence.

In other words, Sugarman thinks that more than just the Third Restatement sections currently being drafted about battery need to be rewritten; so do the sections concerning negligence that have already been adopted by the ALI. So, for example, within the Restatement of Torts, Third, Liability for Physical and Emotional Harm, § 6 (Liability for Negligence Causing Physical Harm) ought to be combined with § 5 (Liability for Intentional Physical Harm), and, although he does not argue this in the article, it may be the case that future Reporters would have reason to eliminate §§ 1 – 3, which define intent, recklessness, and negligence, unless a continued use for these concepts can still be found in other parts of tort law (for example, where the victim has suffered pure emotional harm) or some other part of the law, such as the awarding of punitive damages.

The reason for combining §5 and §6, according to Sugarman, is that nothing is added to the analysis of whether a defendant is liable in tort by denoting that the defendant acted intentionally when the result is a physical harm to the victim. In these cases, argues Sugarman, the law determines whether a defendant is liable by asking not whether the defendant was *negligent* or *acted with the intent to make a contact*, but simply whether the defendant acted *wrongfully* and caused the victim's harm. As Sugarman says early in the paper at p. 3:

If we remove the negligence-specific language [of § 6] the more general principle becomes, my wrongful behavior has physically harmed you (the victim) giving you a right to recover money damages from me in tort.

So, for at least some parts of negligence (those involving personal injury and injury to property) and intentional tort (involving harmful battery) there is one master rule to "rule them all". Let's call this the Wrongdoing Rule. Under the Wrongdoing Rule, one has a duty to repair all physical injuries actually and proximately caused by one's wrongful behavior.

Sugarman anticipates a number of objections to the elimination of battery in favor of the Wrongdoing Rule. Some might object that intentional conduct cannot be treated under the same rule as negligence because it is an essential element of battery that the defendant acted intentionally. Sugarman's response to this is that this argument is circular *and* incomplete. It is circular because, while it may be the case that an essential feature of battery, as it has been defined in the common law, is that the defendant acted with intent (as defined in §1 of Restatement of Torts, Third, Liability for Physical and Emotional Harm), that does not entail that the category is particularly useful and should be retained. It is incomplete because in many battery cases it is not the intentional quality of the defendant's act that determines whether the defendant is liable, but the wrongfulness of the defendant's intentional act, all things considered. Sugarman points out that in cases involving self-defense and consent, what determines liability is whether the defendant is deemed to have acted wrongfully (or not) when causing the victim's injury. According to Sugarman, in these types of cases, at least, the question of liability is not answered by asking, did the defendant establish that there was no battery, despite proof of an intentional act, but rather, did the defendant show that the "harms were not wrongfully caused" ... which, Sugarman points out, "is exactly how negligence is evaluated." (P. 9.)

Sugarman has responses to further objections to his project of collapsing battery and negligence into the Wrongdoing Rule, some more startling than others. He is surely right that the objection that the category of battery is necessary so that parties will know when punitive damages should be available is hard to sustain given that punitive damages are available in certain cases of negligence, and nothing, presumably, would prevent courts from importing into the new Wrongdoing Rule principles that allow punitive damages to be awarded in some cases of wrongdoing. (See pp. 16 – 18.)

Sugarman also rejects the argument that the line between harmful battery and negligence leading to injury to persons and property must be maintained in order to determine when to apply two different tests for proximate cause (on the assumption that batterers are liable for a greater range of consequences than merely negligent actors). (See pp. 23 – 26.) Here he is on solid ground, since it must be admitted that one of the more puzzling aspects of proximate cause is why, as it is often said, that courts as a matter of policy will allow liability to be imposed for more remote consequences in the cases of wrongful intent than in negligence. See, e.g., **Leon Green, Rationale of Proximate Cause** 170 (1927). Sugarman invites us to stop worrying about whether the in fact courts treat intentional tortfeasors differently than negligent tortfeasors by asking us to see both groups as wrongdoers, and the proximate cause judgments of courts in any individual case as reflective of the specific circumstances of the actor's wrongdoing.

Sugarman's treatment of various doctrines that are entailed by the invocation of either battery or negligence – and why they are functionally the same, and thus suitable to be reclassified as instances of the Wrongdoing Rule – is fascinating, but they cannot be treated fully in this short essay. Instead, I want to make two observations, one which might be seen as supportive of Sugarman's project, and the other as a challenge.

First, in support. Although he does not invoke comparative law in support of his project, Sugarman might have wanted to note that European tort systems are structured in much the way he proposes. For example, German tort law does not distinguish between intentional and negligent wrongdoing. BGB 823, which is the portion of the German code that forms the foundation of the German tort law's protection of interests in bodily integrity, covers anyone who "wilfully or negligently injures" the victim. As Markesinis and Unberath point out in their commentary on BGB 823, the "fault" that grounds a claim under this portion of the code can be categorized under five or six types of culpability, ranging from *dolus directus* (direct intent) to *leichte Fahrlässigkeit* (light negligence). See **Basil S. Markesinis & Hannes Unberath, The German Law of Torts** 83 (4th ed. 2002). The same tort category that grounds a claim for compensation in cases of road accident is also the same category in which consent to surgery is deemed non-tortious. See Markesinis and Unberath at 80. This approach is exactly as Sugarman would have it. Sugarman argues that under his proposed Wrongdoing Rule, there would be no need for a separate concept of consent, since it would be part of the very meaning of "wrongdoing" that the harms to which the victim could not be deemed wrongdoing.

Second, a challenge. Certainly, Sugarman is taking on a big challenge by proposing the merger of battery into negligence, and the rebranding of intentional and negligent injury to the body under the more general Wrongdoing

Rule. But battery does have another dimension, offensive contacts, which of course Sugarman recognizes. He promises to give full treatment to his view, which is that offensive battery should be merged with negligence under the Wrongdoing Rule, but that it would be “best to establish a single Restatement section involving intentional dignitary harms to the person” covering offensive battery, false imprisonment and intentional infliction of emotional distress. (P. 43.)

It is not at all obvious why Sugarman’s Wrongdoing Rule does not cover all intentional dignitary harm as well as harmful batteries. His rationale for collapsing the categories between negligence and intentional contacts that harm applies equally to all forms of voluntary conduct that causes foreseeable emotional distress. If anything, the Sugarman’s chief point, that modern tort law focuses primarily on society’s judgment about the wrongfulness of conduct, and not the actor’s intentions or the victim’s voluntary choices, would apply even more, I would think, to conduct which is interpreted through the lens of society’s values, and not the actor’s or defendant’s beliefs or values.

It is worth pausing a moment to think about what we might learn from taking seriously the Wrongdoing Rule’s full scope, as entailed by Sugarman’s argument for the elimination of harmful battery. Offensive battery and assault, false imprisonment and IIED would be placed under the same rule because, according to Sugarman, “in each of the these instances the freedom not have one’s bodily dignity/integrity invaded is protected.” (P. 44.) But there is something odd about this rationale – it reminds the reader that intentional tort protects *rights* (such as the right to control how one’s body is touched) and it does so sometimes without regard to the reasonableness of the defendant’s conduct. In other words, sometimes intentional tort overlaps with strict liability (it does so even more in the tort of trespass to land, which Sugarman does not discuss). Earlier in his article, Sugarman considered much the same point in the context of harmful battery for self-defense based on reasonable mistake. (P. 7.) In that context, however, he said the “focus has to be” on the defendant’s reasonableness in promoting his ends, and not the victim’s right not to have her bodily integrity invaded. When explaining why harmful battery was merely an expression of the Wrongdoing Rule, the victim has no right that cannot be trumped by the defendant’s reasonableness. If he were to be consistent, Sugarman should treat all losses – whether bodily, property, or hedonic – as subject to the same test of wrongfulness.

If one believed that tort protects autonomy interests separate from the welfare interests embodied in our physical and emotional selves, then the the strict liability aspect of intentional tort provides to tort plaintiffs something that the test of reasonableness does not. The Wrongdoing Rule would, if it were adopted, come to rule almost all of tort because it is grounded on a premise – not too deeply hidden – that the only interests that tort protects are the welfare embodied in the bodies, property and emotional states of all members of society. I think that Sugarman may have undersold the reach of his project. It may be that by promising to restate only a part of battery law, Sugarman has given us a glimpse of how he would restate all of tort law were tort law to reject any ambition to protect rights.

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