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The Prosser Myth of Transferred Intent

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The Prosser Myth of Transferred Intent

PETER B KUTNER*

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INTRODUCTION

“Transferred intent” is a familiar doctrine of tort law—familiar, at least, to the many law students who have an assignment on transferred intent in their torts course and must attempt to understand it for the final examination.¹ As with so much else in American tort law, the most prominent doctrinal writing on the subject is that of William Prosser. Each edition of Prosser’s *Law of Torts* treatise contained a section on transferred intent,² and he wrote the first law review article devoted to the subject.³ In the nearly half century since its publication in 1967, there have been only three other substantial articles on transferred intent in tort law—two published in the

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1. See Vincent R. Johnson, *Transferred Intent in American Tort Law*, 87 MARQ. L. REV. 903, 903 n.1 (2004) (citing numerous torts casebooks with material on transferred intent).

2. In the last edition written by Prosser: WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 32–34 (4th ed. 1971). Further references to Prosser’s treatise in this Article are to this edition. An edition of the treatise prepared by others after Prosser’s death also contains a section on transferred intent. W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, *PROSSER AND KEETON ON THE LAW OF TORTS* 37–39 (W. Page Keeton ed., 5th ed. 1984).

3. William L. Prosser, *Transferred Intent*, 45 TEX. L. REV. 650 (1967).

United States⁴ and one in England.⁵ None of the three focuses on whether Prosser's interpretation of the law was correct.

By the time Prosser was writing on transferred intent, the first Restatement of Torts had endorsed liability for battery and assault based on transferred intent. Under the "black letter" rules of the Restatement, a defendant could be held liable for battery if the defendant acted with intent to commit an assault (apprehension of harmful or offensive contact to a person) and liable for assault if the defendant acted with intent to commit a battery (harmful or offensive contact to a person). Also, a defendant could be liable to a plaintiff for battery or assault if the defendant's intent was to cause a battery or assault to a different person.⁶ The Restatement (Second) of Torts contained substantially the same provisions.⁷ American courts have generally accepted these rules.

But Prosser went further in his article on transferred intent. He claimed that a person could be held liable for an intentional tort on the basis of transferred intent if the person intended to cause anything that was within the old common law trespass action and the result was also within the common law trespass action.⁸ Thus, a person could be held liable for battery, assault, false imprisonment, trespass to chattels, or trespass to land if the person's intent was to cause any one of the five torts.⁹ This proposition was then added to the next edition of Prosser's treatise¹⁰ and his casebook.¹¹ If this is correct, a person who attempted to commit a battery or assault could be liable for trespass to land or trespass to chattels despite the absence of any intent to touch the plaintiff's property. More seriously, a person whose intent was only to touch some property without a right to do so, such as throwing a rock at a tree, could be liable for battery if a person was accidentally touched, or for assault if there was apprehension of bodily contact. Intentional tort liability would be imposed on people who had no intent to cause anything resembling what the plaintiff complained of.

The main theme of this Article is that Prosser advanced a mythical doctrine of transferred intent. What Prosser asserted to be the law was not the law when he wrote his article on transferred intent and amended his treatise. The cases he relied on to

4. Johnson, *supra* note 1; Osborne M. Reynolds, Jr., *Transferred Intent: Should Its "Curious Survival" Continue?*, 50 OKLA. L. REV. 529 (1997).

5. Allan Beaver, *Transferred Malice in Tort Law?*, 29 LEGAL STUD. 400 (2009). Perhaps the dearth of articles is because, in recent times, "[s]enior scholars would worry . . . about a junior colleague who proposed to write articles titled . . . 'Transferred Intent.'" Anita Bernstein, *The New-Tort Centrifuge*, 49 DEPAUL L. REV. 413, 428 (1999).

6. See RESTATEMENT OF TORTS §§ 13, 16, 18, 20, 21, 32 (1934).

7. See RESTATEMENT (SECOND) OF TORTS §§ 13, 16, 18, 20, 21, 32 (1965).

8. See Prosser, *supra* note 3, at 655–56, 658–59.

9. See *id.* Prosser's first statement of this was that when the defendant intended any of the first four of these torts, the defendant's intention would be "transferred" to make him liable for any of the five. *Id.* at 655. But the discussion of trespass to land in the article indicates that an intent to commit a trespass to land would also qualify, and this is included in the description of transferred intent that appeared in the next editions of Prosser's treatise and casebook. See PROSSER, *supra* note 2, at 33; WILLIAM L. PROSSER & YOUNG B. SMITH, CASES AND MATERIALS ON TORTS 34 (4th ed. 1967).

10. PROSSER, *supra* note 2, at 33.

11. PROSSER & SMITH, *supra* note 9, at 34.

support his conclusions on transferred intent did not support them. Moreover, despite Prosser's great influence on American tort law, Prosser's position on transferred intent is not the law now and should not be. Its consequences are undesirable. Recognition of transferred intent as a basis of liability is due primarily to its inclusion in the First and Second Restatements of Torts. Transferred intent does not and should not extend beyond the Restatements' rules.

I. THE CONCEPT OF TRANSFERRED INTENT

As the name implies, an "intentional tort" is a tort that has intent as an element of liability.¹² A person must have acted with a certain intent in order to be liable. Under the old common law that prevailed until the nineteenth century, there was sufficient intent for trespass liability if a person engaged in an intentional act, such as throwing an object or driving a vehicle. There was no requirement that the person act with an intent to cause what happened to the plaintiff or any other specific consequence.¹³ But the modern intentional torts require for liability an intent to cause a certain type of result. Usually this means that the defendant acted with the purpose or object of causing the result—for example, throwing a stone or firing a gun with the purpose of hitting a person or an animal. However, a defendant can also be considered to have intended a result if the defendant knew that his act was substantially certain to cause the result.¹⁴

As a general rule, intentional tort liability requires that the defendant have intended the type of interference with the plaintiff's legally protected interests that is the basis of the plaintiff's claim.¹⁵ Thus, liability for battery requires that the defendant act with an intent to cause a harmful or offensive bodily contact.¹⁶ Liability for assault requires that the defendant act with an intent to cause apprehension of an imminent harmful or offensive bodily contact.¹⁷ Liability for false imprisonment requires an intent to confine a person.¹⁸ Liability for trespass to chattels requires an intent to physically "intermeddle" with a chattel.¹⁹ Liability for trespass to land requires an intent to cause an entry into another's land.²⁰

12. See BLACK'S LAW DICTIONARY 1717 (10th ed. 2014).

13. See *infra* Part II.

14. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 1 (2005); RESTATEMENT (SECOND) OF TORTS § 8A (1965); 1 DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS 73–75 (2d ed. 2011); James A. Henderson, Jr. & Aaron D. Twerski, *Intent and Recklessness in Tort: The Practical Craft of Restating Law*, 54 VAND. L. REV. 1133, 1138–39 (2001).

15. See KEETON ET AL., *supra* note 2, at 34–35; Jerome J. Atrens, *Intentional Interference with the Person*, in STUDIES IN CANADIAN TORT LAW 378, 379–83 (Allen M. Linden ed., 1968); Anthony J. Sebok, *Purpose, Belief, and Recklessness: Pruning the Restatement (Third)'s Definition of Intent*, 54 VAND. L. REV. 1165, 1168–69 (2001).

16. RESTATEMENT (SECOND) OF TORTS §§ 13, 18 (1965).

17. *Id.* § 21.

18. *Id.* § 35.

19. *Id.* § 217.

20. *Id.* § 158.

“Transferred intent” extends liability by allowing an action for an intentional tort when the defendant had an intent to cause something different than the result of the defendant’s act. There are actually two types of transferred intent that may create intentional tort liability for an unintended result. The first might be described as “third-party transferred intent.” It treats a defendant’s intent to cause a certain result to one person as sufficient for liability when the defendant’s act causes the intended type of result but to a different person. The classic transferred intent case is that in which the defendant intended to strike A’s body but caused B to be hit. The defendant’s intent to strike A fulfills the intent requirement of battery liability if B sues the defendant for battery. The defendant can therefore be liable to B for battery even though the defendant had no intent to cause a battery to B.²¹ In a sense, the law transfers to B the defendant’s intent to cause a battery to A, hence the label “transferred intent.”²² However, the defendant would be liable for battery to A as well as to B if the defendant’s act caused both to be hit.²³ This type of transferred intent could also apply to other intentional torts. The Restatement of Torts endorses liability for false imprisonment when the defendant intended to confine someone other than the person who was confined²⁴ and liability for assault when the defendant intended someone other than the plaintiff to be put in apprehension of imminent battery.²⁵

The second type of transferred intent treats an intent to cause a certain result as sufficient for intentional tort liability when the defendant’s act caused a different type of result. The classic case of this nature is that of the defendant who intended a harmful or offensive bodily contact—that is, a battery—but whose act caused apprehension of such a contact. (The intended battery might have occurred immediately after the unintended apprehension.) The defendant’s intent to commit a battery fulfills the intent requirement of liability for assault.²⁶ Conversely, the defendant who intended to cause only apprehension of harmful or offensive bodily contact—for example, a defendant who wanted to intimidate a person by firing a gun in the person’s direction—but caused an actual harmful or offensive bodily contact is subject to liability for battery. The defendant’s intent to commit an assault fulfills the intent requirement for a battery action.²⁷ The second type of transferred intent would be better described as “interchangeable intent.” The intent requirements of battery and assault have become interchangeable in the sense that the defendant’s intent to cause either one supplies the intent requirement of liability for both torts.²⁸

21. *Id.* §§ 13, 16, 18, 20.

22. *See* DOBBS ET AL., *supra* note 14, at 116.

23. *See* RESTATEMENT (SECOND) OF TORTS § 20 cmt. b (1965).

24. *Id.* §§ 35, 43.

25. *Id.* §§ 21, 32.

26. *See id.*

27. *Id.* §§ 13, 16, 18, 20.

28. Alan Calnan, in *Anomalies in Intentional Tort Law*, 1 TENN. J.L. & POL’Y 187, 209 n.47 (2005), contended that there is no need for “transfer” of intent when the intent requirement for a tort action is defined to include an intent to commit another tort. However, the essence of what is conventionally described as transferred intent is the defendant having the intent necessary to be liable for an intentional tort because of an intent to cause a different tort or the same tort to a different person. *See* Heidi M. Hurd & Michael S. Moore, *Negligence*

This Article is primarily concerned with the second type of transferred intent (interchangeable intent) and whether transferred intent extends beyond battery and assault to include all of the intentional torts that developed from the old common law trespass action. Prosser asserted that it did. Thus, an intent to cause a trespass to land or chattels could supply the intent requirement in a battery action and vice versa. This Article will contend that Prosser's assertion was erroneous and that it should not be accepted in modern tort law.

II. TRANSFERRED INTENT IN PREMODERN LAW

The origins of tort law are found primarily in the common law actions of trespass and "trespass on the case." Neither action required any intent on the part of the defendant to cause damage or other interference with the plaintiff's interests.²⁹ An action on the case was maintainable when damage was caused by legally wrongful conduct—for example, negligence, nuisance, or slander.³⁰ A trespass action was maintainable when the defendant's act caused a physical interference with the plaintiff's person or property that was "direct" or "immediate." Interference was considered direct or immediate when it resulted from a "force" set in motion by the defendant's act.³¹ While this included acts intended to cause physical contact with the plaintiff's person or property, it also included acts such as throwing an object,³² firing a gun,³³ or driving a horse-drawn vehicle³⁴ done with no such intent, but which resulted in injury. In the famous case of *Scott v. Shepherd*,³⁵ the defendant was held liable to a trespass action for having thrown a "lighted squib" that was thrown again by two persons in a market-house before it hit the plaintiff in the face and exploded.

Despite the trespass action's having no requirement that the defendant act with an intent to cause an injury or other wrongful consequence, Prosser claimed that transferred intent was a foundation of liability for trespass under the common law.³⁶ One basis for Prosser's claim was that criminal law had developed a doctrine of transferred intent at a time when trespass was both a crime and a tort. The "proximity of the criminal law to the trespass action" and similarity of the fact situations

in the Air, 3 THEORETICAL INQUIRIES IN L. 333, 389 (2002) (contending that the doctrine of transferred intent cannot be dispensed with if there is to be liability on the basis of intentional wrongdoing).

29. FLEMING'S THE LAW OF TORTS 23–25 (Carolyn Sappideen & Prue Vines eds., 10th ed. 2011); PROSSER, *supra* note 2, at 28–29.

30. LEWIS N. KLAR, TORT LAW 28 (5th ed. 2012). *See generally* A.K. KIRALFY, THE ACTION ON THE CASE (1951).

31. FLEMING'S THE LAW OF TORTS, *supra* note 29, at 23–24; KLAR, *supra* note 30, at 28–31; *see* Leame v. Bray, (1803) 102 Eng. Rep. 724 (K.B.), 3 East 593.

32. *Scott v. Shepherd*, (1773) 96 Eng. Rep. 525 (C.P.), 2 Wm. Bl. 892, 95 Eng. Rep. 1124, 3 Wils. 403.

33. *Dickenson v. Watson*, (1682) 84 Eng. Rep. 1218 (K.B.), Jones, T. 205; *Weaver v. Ward*, (1616) 80 Eng. Rep. 284 (C.P.), Hobart 134.

34. *Hall v. Fearnley*, (1842) 114 Eng. Rep. 761, 3 Q.B. 919, 7 Jurist 61, 12 L.J.Q.B. 22; *Leame*, 102 Eng. Rep. 724, 3 East 593.

35. *Scott*, 96 Eng. Rep. 525, 2 Wm. Bl. 892, 95 Eng. Rep. 1124, 3 Wils. 403.

36. *See* PROSSER, *supra* note 2, at 32–33; Prosser, *supra* note 3, at 652–54.

explained transferred intent's application to tort actions.³⁷ Prosser also asserted³⁸ that defendants had been held liable to a trespass action on the basis of transferred intent in *Scott v. Shepherd* and a second English case, *James v. Campbell*.³⁹

It is certainly true that there has long been a doctrine of transferred intent or "transferred malice" in criminal law. As early as the sixteenth century, a person who intended to kill A could be found guilty of murder when the result was the death of B.⁴⁰ Blackstone wrote in his *Commentaries*:

[I]f one shoots at A and misses him, but kills B, this is murder; because of the previous felonious intent, which the law transfers from one to the other. The same is the case, where one lays poison for A; and B, against whom the prisoner had no malicious intent, takes it, and it kills him⁴¹

An intent to kill or wound A could also support a prosecution for unlawfully injuring B.⁴² However, it was recognized even earlier that an injured person's claim for damages was not subject to the requirement of malice or wrongful state of mind that would apply to a criminal case.⁴³ Something like transferred intent or transferred malice was necessary in order to prosecute a person who intended to cause death or injury to someone other than the actual victim.⁴⁴ This was not necessary to liability for damages because there was no requirement of intent to cause harm. The defendant would be liable to an unintended victim in a trespass action irrespective of whether the defendant had any intent to cause harm, provided the injury was considered an immediate or direct consequence of the defendant's act.⁴⁵

37. PROSSER, *supra* note 2, at 33; Prosser, *supra* note 3, at 654.

38. PROSSER, *supra* note 2, at 33; Prosser, *supra* note 3, at 654.

39. (1832) 172 Eng. Rep. 1015 (C.P.), 5 Car. & P. 372.

40. See A.J. Ashworth, *Transferred Malice and Punishment for Unforeseen Consequences*, in *RESHAPING THE CRIMINAL LAW* 77, 77–85 (P.R. Glazebrook ed., 1978); Douglas N. Husak, *Transferred Intent*, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 65, 65–66 (1996); Peter Westen, *The Significance of Transferred Intent*, 7 CRIM. L. & PHIL. 321, 324–25 (2013).

41. 4 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 201 (1769).

42. Ashworth, *supra* note 40, at 77–85; Prosser, *supra* note 3, at 652–53; Reynolds, *supra* note 4, at 548–50.

43. *Weaver v. Ward*, (1616) 80 Eng. Rep. 284 (C.P.), Hobart 134; *Cuny v. Brugewode*, (1506) Y.B. 21 Hen. 7, fol. 27, Trin., pl. 5 (Eng.), reprinted in JOHN BAKER, *BAKER AND MILSOM SOURCES OF ENGLISH LEGAL HISTORY* 359–60 (2d ed. 2010); *Hulle v. Orynge (The Case of Thorns)*, (1466) Y.B. 6 Edw. 4, Mich., fol. 7, pl. 18 (Eng.), reprinted in BAKER, *supra*, at 369–73.

44. Arguably there was no need to adopt transferred intent, at least for crimes other than murder and manslaughter. An intent to cause anyone to suffer harm of the type that occurred may have been sufficient. But criminal liability would not extend to causing a harm of a different type not within the same crime. See ROLLIN M. PERKINS & RONALD N. BOYCE, *CRIMINAL LAW* 921–26 (3d ed. 1982); GLANVILLE WILLIAMS, *CRIMINAL LAW* 125–37 (2d ed. 1961); Ashworth, *supra* note 40; Hurd & Moore, *supra* note 28, at 387–89.

45. See Peter H. Mixon, Comment, *Application of Transferred Intent to Cases of Intentional Infliction of Emotional Distress*, 15 PAC. L.J. 147, 154–57 (1983) (distinguishing felony and trespass cases).

It is for this reason, not transferred intent, that the defendants in *Scott v. Shepherd* (the “lighted squib” case) and *James v. Campbell* were held liable in trespass actions. In *Scott v. Shepherd*, the key judgment sustaining the plaintiff’s action is that of Chief Justice De Grey. He said,

Trespass is an injury accompanied with force, for which an action of trespass *vi et armis* lies against the person from whom it is received. The question here is, whether the injury received by the plaintiff arises from the force of the original act of the defendant, or from a new force by a third person. . . . [T]he true question is, whether the injury is the direct and immediate act of the defendant⁴⁶

Chief Justice De Grey concluded that it was.⁴⁷ The dissent of Justice Blackstone is founded on the opposite conclusion: the plaintiff’s injury was not immediate, as the squib had come to rest and been thrown twice again before striking the plaintiff.⁴⁸

Chief Justice De Grey and Justice Blackstone did not make any reference to what the defendant intended to be the result of his throwing the squib other than “indiscriminate” mischief.⁴⁹ Neither did the other two judges, Justice Nares and Justice Gould, who emphasized the unlawfulness of the defendant’s act. Justice Nares distinguished a trespass action, in which the *malus animus* of a defendant was not to be alleged or taken into consideration, from a felony case, in which it was to be considered.⁵⁰ Chief Justice De Grey did refer to a person being guilty of murder when an unintended victim was killed,⁵¹ and he said that “though criminal cases are no rule for civil ones, yet in trespass I think there is an analogy.”⁵² But he also said that “actions of trespass will lie for legal acts when they become trespasses by accident; as in the cases cited for cutting thorns, lopping of a tree, shooting at a mark, defending oneself by a stick which strikes another behind, &c.”⁵³

*James v. Campbell*⁵⁴ is no more supportive of the proposition that transferred intent was a basis of common law trespass liability than *Scott v. Shepherd*. During a quarrel that involved a Mr. Paxon, the defendant struck the plaintiff in the face. The defendant may have intended to strike Paxon rather than the plaintiff. Counsel for the defendant, in his address to the jury, contended that the jury ought to give a verdict for the defendant if the defendant did not intentionally strike the plaintiff.

46. *Scott v. Shepherd*, (1773) 96 Eng. Rep. 525, 528 (C.P.), 2 Wm. Bl. 892, 899 (De Grey, C.J.). The report of the case in 95 Eng. Rep. 1124, 1129, 3 Wils. 403, 411–12, has similar language.

47. 96 Eng. Rep. at 528–29, 2 Wm. Bl. at 899–900, 95 Eng. Rep. at 1129, 3 Wils. at 412–13 (De Grey, C.J.).

48. 96 Eng. Rep. at 526–28, 2 Wm. Bl. at 894–98, 95 Eng. Rep. at 1127–28, 3 Wils. at 409–10 (Blackstone, J., dissenting).

49. 96 Eng. Rep. at 528, 2 Wm. Bl. at 899 (De Grey, C.J.).

50. 95 Eng. Rep. at 1126–27, 3 Wils. at 407–08 (Nares, J.).

51. *Id.* at 1129, 3 Wils. at 412 (De Grey, C.J.).

52. 96 Eng. Rep. at 528, 2 Wm. Bl. at 899 (De Grey, C.J.).

53. *Id.* The report of the case in 95 Eng. Rep. at 1129, 3 Wils. at 411, has similar language.

54. (1832) 172 Eng. Rep. 1015 (C.P.), 5 Car. & P. 372.

Justice Bosanquet instructed the jury that if the defendant struck the plaintiff, the plaintiff was entitled to their verdict “whether it was done intentionally or not.”⁵⁵

The brief report of the case gives no reason at all for this instruction. But it is very likely that the premise of the instruction was that an action for trespass to the person required no intent on the defendant’s part to strike anyone. Justice Bosanquet was probably aware of *Leame v. Bray*,⁵⁶ which was decided after *Scott v. Shepherd*. *Leame v. Bray* is a road accident case in which the principal issue was whether a trespass action could lie when the injury was not caused wilfully. The court decided that a trespass action was maintainable. Lord Ellenborough, citing examples of accidental injuries that were trespasses, declared that “[i]f the injurious act be the immediate result of the force originally applied by the defendant, and the plaintiff be injured by it, it is the subject of an action of trespass *vi et armis* by all the cases both ancient and modern. It is immaterial whether the injury be wilful or not.”⁵⁷

James v. Campbell is a case with facts that would come within transferred intent in modern law if the defendant intended to strike Paxon rather than the plaintiff, and the defendant in *Scott v. Shepherd* may have intended the lighted squib to hit a person or a stand in the market-house. But the fact the defendants were held liable for trespass actions does not imply that transferred intent was a basis of liability in these cases. No intent to cause someone or something to be struck, or any other effect on a person or property, was required for liability. Under the common law, defendants were subject to trespass liability when there was no such intent—when their acts caused a harm or wrong that was regarded as immediate.⁵⁸ In this the common law is fundamentally inconsistent with modern intentional tort law, which requires (for the torts referenced by Prosser) that the defendant have acted with the intent of causing a consequence to another’s property or person.⁵⁹ For this reason, the cases cited by Prosser and the law of trespass under the common law pleading system cannot support the conclusion that transferred intent operates in modern intentional tort law.

Prosser’s *Transferred Intent* article⁶⁰ and his treatise⁶¹ suggested but discounted another possible basis in the common law for the operation of transferred intent:

[A] defendant whose act had directly caused bodily harm to another was *prima facie* liable as a trespasser unless he could exculpate himself by showing that the harm resulted from inevitable accident. To do this he was required to show that he was innocent of fault, and it would be natural to regard it as impossible for him to do this if his conduct was

55. *Id.* at 1016, 5 Car. & P. at 372.

56. (1803) 102 Eng. Rep. 724 (K.B.), 3 East 593.

57. *Id.* at 726, 3 East at 599 (Lord Ellenborough, C.J.).

58. *See Anderson v. Arnold’s Ex’r*, 79 Ky. 370 (1881) (holding that there was a common law trespass action for battery when the defendant’s testator shot at a third person but wounded the plaintiff); *cf. Wright v. Clark*, 50 Vt. 130 (1877) (liability for shooting dog when aiming at fox); *Ball v. Axten*, (1866) 176 Eng. Rep. 890 (Q.B.), 4 F. & F. 1019 (“assault” when defendant struck at dog with whip handle and hit plaintiff’s wife).

59. *See supra* text accompanying notes 12–20.

60. Prosser, *supra* note 3, at 653–54.

61. PROSSER, *supra* note 2, at 33.

intended to inflict upon even a third party an injury the same as, or closely similar to, that which the plaintiff had suffered.⁶²

If the common law did allow a defendant to avoid trespass liability by showing he was innocent of fault—something suggested in *Weaver v. Ward*⁶³ but never clearly established—it would indeed “be natural to regard it as impossible for him to do this” if his conduct was intended to inflict upon a third party an injury similar to that which the plaintiff had suffered. But the defendant would be liable because the defendant did not plead and prove the absence of any fault, including negligence.⁶⁴ The intent to inflict some injury upon a third party would not itself be the basis of liability. At most, it would serve as one variety of fault that would prevent the defendant from prevailing on the ground of freedom from all fault. No explicit or implied concept of transferred intent was in operation.

In short, while a defendant could be liable for a common law trespass action when the defendant acted with an intent to cause a trespass to something or someone other than the plaintiff, the defendant’s liability would not be because of that intent. Intent to cause a trespass to either a plaintiff or anyone else was not an element of liability. The concept of transferred intent was known in criminal law, and criminal law concepts might be applied in a trespass or other civil cause of action, but it was not necessary for civil liability. The wide form of transferred intent envisaged by Prosser, including an intent to cause any legal wrong to person or property within the common law trespass action, is not to be found in premodern common law.

III. AMERICAN CASES OUTSIDE THE RESTATEMENT OF TORTS

In the *Transferred Intent* article and subsequent edition of *The Law of Torts*, Prosser discussed or cited numerous American cases in support of his assertion that transferred intent operates within the five torts descended from the common law trespass action; intent to commit any one of the five satisfies the intent requirement for liability.⁶⁵ In a few of the cases,⁶⁶ acceptance of some form of transferred intent for battery or assault can be attributed to the First Restatement of Torts, discussed below.⁶⁷ Those cases aside, the American cases cited by Prosser may support liability for battery in the typical “defendant intended to hit A but struck B” case and for assault when the defendant committed or attempted a battery to the plaintiff, but otherwise they do not support liability in the modern intentional torts (battery, assault, false imprisonment, trespass to chattels, and trespass to land) on the basis of transferred intent or what I have described as “interchangeable intent.”⁶⁸ The primary reasons why the cases cited by Prosser do not support his claims about transferred

62. This is a quotation from the reporter’s treatise for a tentative draft of the first Restatement of Torts. TORTS TREATISE NO. 1(a) SUPPORTING RESTATEMENT NO. 1, at 36 (1925); see *infra* note 153.

63. (1616) 80 Eng. Rep. 284 (C.P.), Hobart 134.

64. *Id.* at 284, Hobart at 134.

65. PROSSER, *supra* note 2, at 33–34, 67–68; Prosser, *supra* note 3, at 655–61.

66. See *infra* note 122 and accompanying text.

67. See *infra* Part IV.

68. See *supra* text accompanying notes 26–28.

intent are that the defendant in the case did intend the result that created liability, so there was liability without transferred intent, or the defendant was held liable, or subject to liability, without the intent to cause a result (as distinct from the intent to do the act that caused the result) that is required by all of the modern intentional torts.

A. *Trespass to Land Cases*

The cases in which the defendant intended the result that created liability are cases of trespass to land. The defendant intentionally entered the plaintiff's land—a trespass in itself. Defendants were held liable for damage or loss resulting from the trespass, although it was not intended. In some cases of this type, the defendant started a fire that damaged the plaintiff's property.⁶⁹ In others, the defendant removed a fence, allowing livestock to enter or stray,⁷⁰ or caused damage by removing soil.⁷¹ Analogous to the fence-removal cases, defendants were held liable when trespass to the plaintiff's land resulted in loss of valuables that had been on the property.⁷² There was also liability for causing the death of the plaintiff's dog during a trespass.⁷³ Liability for trespass extended to personal injuries⁷⁴ and emotional distress⁷⁵ suffered by occupants of the land as a result of the trespass.

69. *See, e.g.*, *S. Cnty. Ice Co. v. RKO Radio Pictures, Inc.*, 39 F. Supp. 157 (S.D. Cal. 1941); *Newsom v. Meyer*, 128 A. 699 (Conn. 1925); *Wyant v. Crouse*, 86 N.W. 527 (Mich. 1901); *Lee v. Stewart*, 10 S.E.2d 804 (N.C. 1940); *Wetzel v. Satterwhite*, 125 S.W. 93 (Tex. Civ. App. 1910).

70. *See, e.g.*, *Garrett v. Sewell*, 18 So. 737 (Ala. 1895); *Kissecker v. Monn*, 36 Pa. 313 (1860); *Damron v. Roach*, 23 Tenn. (4 Hum.) 134 (1843).

71. *See, e.g.*, *Dickinson v. Boyle*, 34 Mass. (17 Pick.) 78 (1835); *Curtis v. Fruin-Colnon Contracting Co.*, 253 S.W.2d 158 (Mo. 1952); *Whitehead v. Zeiller*, 265 S.W.2d 689 (Tex. Civ. App. 1954).

72. *Renaire Corp. v. Vaughn*, 142 A.2d 148 (D.C. 1958) (tools in plaintiff's house disappeared after defendant broke window in order to enter house); *Eten v. Luyster*, 60 N.Y. 252 (1875) (money in feed box disappeared when defendants tore down plaintiff's stable).

73. *Accidentally in Van Alstyne v. Rochester Tel. Corp.*, 296 N.Y.S. 726 (Rochester City Ct. 1937) (dogs ate pieces of lead dropped by telephone company workers). *Intentionally in City of Garland v. White*, 368 S.W.2d 12 (Tex. Civ. App. 1963) (policeman shot dog).

74. *Rogers v. Bd. of Rd. Comm'rs for Kent Cnty.*, 30 N.W.2d 358 (Mich. 1948) (landowner killed when mowing machine hit fence anchor left on land); *Bouillon v. Laclede Gaslight Co.*, 129 S.W. 401 (Mo. Ct. App. 1910) (trespassing meter reader allegedly caused plaintiff to suffer miscarriage); *Brackett v. Bellows Falls Hydro-Electric Corp.*, 175 A. 822 (N.H. 1934) (farmer injured when mowing machine hit burrow hole made by muskrats present on land because defendant flooded it); *Kopka v. Bell Tel. Co. of Pa.*, 91 A.2d 232 (Pa. 1952) (plaintiff's leg slipped into hole dug for telephone line); *Turner v. Thorne* (1959), 21 D.L.R. 2d 29 (Can. Ont. High Ct.) (plaintiff fell over cartons left in his garage); *see also infra* notes 80–81.

75. *Walker v. Ingram*, 37 So. 2d 685 (Ala. 1948); *Kornoff v. Kingsburg Cotton Oil Co.*, 288 P.2d 507 (Cal. 1955); *Sager v. Sisters of Mercy of Colo.*, 256 P. 8 (Colo. 1927); *Barrow v. Ga. Lightweight Aggregate Co.*, 120 S.E.2d 636 (Ga. Ct. App. 1961); *Ham v. Me.-N.H. Interstate Bridge Auth.*, 30 A.2d 1 (N.H. 1943).

It is apparent from the cases Prosser cited, and even from statements in the *Transferred Intent* article⁷⁶ and Prosser's treatise,⁷⁷ that liability for unintended damage was not based on any concept of transferred intent or interchangeable intent. The defendants were liable because they had trespassed on the plaintiff's land and the injury to the plaintiff or the plaintiff's property was a consequence of the trespass.⁷⁸ To the extent intent to cause any result was a necessary element of liability,⁷⁹ it was an intent to cause what actually occurred and created a cause of action against the defendant—the entry into the plaintiff's land.

In some of the trespass to land cases involving personal injury, the injured person was not the possessor of the land. The plaintiff was the possessor's spouse or child. There is no element of transferred intent in these cases. In allowing an action, the court either assumed without discussion that the plaintiff could sue on the basis of trespass as an occupant of the land⁸⁰ or so held explicitly.⁸¹ As Prosser's *Transferred Intent* article acknowledged, the rationale of these cases is that members of the possessor's family "are regarded as sharing his possession so that the intrusion is a trespass toward them."⁸² If transferred intent were the rationale, someone injured by a trespass but not an occupant or family member living on the land could maintain an action for trespass or battery—a proposition not supported by any authority referenced by Prosser.⁸³ In one of the trespass to land cases involving personal injury to an occupant of the land, the court allowed recovery of damages for the injury in a

76. Prosser, *supra* note 3, at 658–61.

77. PROSSER, *supra* note 2, at 67–68.

78. See RESTATEMENT OF TORTS § 163 cmt. f (1934); RESTATEMENT (SECOND) OF TORTS § 162 (1965); 1 FOWLER V. HARPER & FLEMING JAMES, JR., THE LAW OF TORTS 29 (1956).

79. Some cases reflect the older common law of trespass that did not require such an intent. *E.g.*, *Chi. & Nw. Ry. Co. v. Hunerberg*, 16 Ill. App. 387 (1885) (train driven into plaintiff's house, causing fright and shock resulting in miscarriage); *Guille v. Swan*, 19 Johns. 381 (N.Y. Sup. Ct. 1822) (balloonist descended into plaintiff's garden; crowd following balloon trampled vegetables and flowers).

80. See *Wardrop v. City of Manhattan Beach*, 326 P.2d 15 (Cal. Dist. Ct. App. 1958) (child); *St. Petersburg Coca-Cola Bottling Co. v. Cuccinello*, 44 So. 2d 670 (Fla. 1950) (child); *Preiser v. Wielandt*, 62 N.Y.S. 890 (N.Y. App. Div. 1900) (spouse).

81. See *Engle v. Simmons*, 41 So. 1023 (Ala. 1906) (spouse); *Watson v. Dilts*, 89 N.W. 1068 (Iowa 1902) (spouse); *Lesch v. Great N. Ry. Co.*, 106 N.W. 955 (Minn. 1906) (spouse); *Keesecker v. G.M. McKelvey Co.*, 27 N.E.2d 787 (Ohio App. 1940), *subsequent proceedings*, 42 N.E.2d 223 (Ohio App. 1941), *rev'd*, 47 N.E.2d 211 (Ohio 1943) (child, applying RESTATEMENT OF TORTS § 380 (1934)).

82. Prosser, *supra* note 3, at 659.

83. Prosser claimed this had occurred in *Schmitt v. Kurrus*, 85 N.E. 261 (Ill. 1908). Prosser, *supra* note 3, at 658. In *Schmitt*, during an altercation between the plaintiff and the defendant, the plaintiff went into a telephone booth within a store to call the police. The defendant struck the glass door of the booth with his fist. The glass broke and a piece went into the plaintiff's eye. The plaintiff brought an action for assault and battery. The defendant denied assaulting the plaintiff but was held liable after a trial. Presumably the defendant committed a trespass for which the proprietor of the store could sue, but there is no suggestion in the court's opinion that this was relevant to the defendant's liability to the plaintiff. "The striking and breaking of the glass and driving it into the plaintiff's eye was an assault and battery . . ." *Schmitt*, 85 N.E. at 262.

trespass action but explicitly rejected liability for assault and battery because the defendant had no intent to do harm.⁸⁴

B. Other Cases Involving Damage to Property or Intent to Interfere with Property

Similarly, none of the cases cited by Prosser actually supports the proposition that an intent to commit an assault or battery would allow an action for trespass to chattels,⁸⁵ or that an intent to commit a trespass to land or physical interference with a chattel would allow an action for trespass to other land or a different chattel.⁸⁶ To support his assertion that “one who intends a trespass to a chattel . . . is liable for battery when he hits a man,”⁸⁷ Prosser cited cases of personal injury caused when the defendant fired a gun at a vehicle⁸⁸ or a dog⁸⁹ or attempted to strike a horse.⁹⁰ In some of the cases, it is clear that the only basis of liability was negligence.⁹¹ In the case involving firing a gun at a vehicle,⁹² the only basis of liability suggested in the opinion is that firing the gun was an assault to the occupants of the vehicle.⁹³ The

84. *Brabazon v. Joannes Bros. Co.*, 286 N.W. 21, 26 (Wis. 1939); *see also White v. Sander*, 47 N.E. 90 (Mass. 1897) (plaintiff had no action for fright caused by defendant’s throwing stone into house belonging to plaintiff’s father in absence of any intent to strike or frighten plaintiff).

85. In *Vandenburgh v. Truax*, 4 Denio 464 (N.Y. Sup. Ct. 1847), the defendant, with a pickaxe in his hands, pursued a boy. To protect himself, the boy went behind a counter in the plaintiff’s store. He accidentally knocked out the faucet of a wine cask, causing the wine to spill out. The basis of liability emphasized in the opinion is liability for the consequences of an act dangerous to the persons or property of others—in modern terms, negligence. The court suggested that the proper form of action was an action on the case rather than trespass. *Id.* at 468. If a trespass action were allowable, it would at the time be the old common law action that required no intent to cause any injury or wrongful consequence. *See supra* Part II.

86. In *People v. Washington*, which arose from a juvenile offender adjudication that the court reversed, there is merely a statement in dictum that “[t]he appropriate remedy in such a situation is an ordinary civil action for damages.” 222 N.E.2d 378, 380 (N.Y. 1966). The “situation” was that the defendant’s companion threw a garbage can at a person but it struck a car. It is very likely that the “ordinary civil action” the court had in mind was a negligence action. *John C. Kupperle Foundry Co. v. St. Louis Merchants’ Bridge Terminal Railway Co.*, 205 S.W. 57 (Mo. 1918), is explicitly a negligence case. (The defendant’s employee pushed a railway car off a track, striking a tank containing naphtha for use in the plaintiff’s factory. This caused the naphtha to catch fire. The fire spread to the factory.) In *City of Garland v. White*, 368 S.W.2d 12 (Tex. Civ. App. 1963), both the trespass to land and the shooting of the plaintiff’s dog were intentional.

87. PROSSER, *supra* note 2, at 33; Prosser, *supra* note 3, at 655–56.

88. *State ex rel. Harbin v. Dunn*, 282 S.W.2d 203 (Tenn. Ct. App. 1943).

89. *Corn v. Sheppard*, 229 N.W. 869 (Minn. 1930); *Belk v. Boyce*, 138 S.E.2d 789 (N.C. 1964); *Isham v. Dow’s Estate*, 41 A. 585 (Vt. 1898).

90. *Osborne v. Van Dyke*, 85 N.W. 784 (Iowa 1901).

91. Including “negligence *per se*” because of violation of statute. *See id.*; *Belk*, 138 S.E.2d 789 (defendant found not negligent). In *Osborne*, it would not have been trespass to hit the horse because it was the defendant’s horse.

92. *Harbin*, 282 S.W.2d 203.

93. *Id.* at 207, 213.

principal defendant, a constable, was trying to stop the car and arrest the car's occupants. The car overturned when a shot hit one of the rear tires.⁹⁴

*Isham v. Dow's Estate*⁹⁵ and *Corn v. Sheppard*⁹⁶ may seem more plausible as cases supporting Prosser's analysis, but only because the basis of liability in these cases is not clearly delineated. In the *Isham* case, Dow had (it seems) intentionally shot and wounded Mr. Isham's dog. The dog ran into the Isham residence and knocked down Mrs. Isham, causing injuries. The primary basis of liability recognized in the court's opinion is negligence, but the opinion also suggests liability to Mrs. Isham because the defendant "unlawfully, wantonly, and maliciously" shot at and wounded the dog⁹⁷ and because the injury was the result of the defendant's voluntary act,⁹⁸ for which there was liability under the common law of trespass.⁹⁹ In *Corn v. Sheppard*, the defendant shot at a dog that had been licking garbage cans at his house and wounded a boy the defendant had not seen. It was unlawful to shoot the dog because the dog posed no danger to people or other animals. The trial court charged the jury that the defendant's act was unlawful and he was liable for the injury caused to the boy. The Supreme Court of Minnesota, affirming a judgment for the plaintiff, stated that the defendant was liable for the injury as a matter of law.¹⁰⁰ This may have been because the defendant acted unlawfully, but the opinion can be read as applying a rule that there is liability for injury caused by the intentional discharge of a firearm unless the defendant was without fault (the defendant in the case being at fault because he acted unlawfully).¹⁰¹ There is nothing in *Corn v. Sheppard* suggesting that the plaintiff had a battery action because of the defendant's intent to shoot the dog.¹⁰²

C. Transferred Intent in Assault, Battery, and False Imprisonment

It should be clear from the above discussion that when Prosser wrote his *Transferred Intent* article and included its contents in his treatise, the law had not recognized any form of transferred intent involving trespass to land or trespass to

94. *Id.* at 206.

95. 41 A. 585.

96. 229 N.W. 869.

97. *Isham*, 41 A. at 585.

98. *Id.*

99. Dow's act caused the dog to be set in motion. This is comparable to Shepherd's giving motion to the lighted squib in *Scott v. Shepherd*, *see supra* text accompanying notes 46–53, and Bray's causing the plaintiff's horses to break into a run in *Leame v. Bray*, *see supra* text accompanying notes 56–57.

100. *Corn*, 229 N.W. at 871.

101. In a later Minnesota case, *Corn v. Sheppard* was interpreted, strangely, as an application of the principle of *res ipsa loquitur*. *Sutor v. Rogotzke*, 194 N.W.2d 283, 285 (Minn. 1972).

102. Compare *Renner v. Canfield*, 30 N.W. 435, 435 (Minn. 1886), in which a pregnant woman, with "nerves very sensitive," was "so startled and frightened as to seriously affect her health" when she saw the defendant kill her father-in-law's dog with a gun. The court decided that the defendant would not be held liable on the basis that killing the dog was unlawful because his act was not the proximate cause of the woman's injuries. The injuries were not "consequences that may ensue in the ordinary and natural course of events." *Id.* at 436.

chattels, either as the result or the intended consequence.¹⁰³ Intent to commit a trespass to land or chattels did not supply the intent element for a different intentional tort, and intent to commit a tort to the person did not supply the intent element for a trespass action when the defendant caused damage to property. However, much of Prosser's article is concerned with transferred intent within and between the three intentional torts to the person: battery, assault, and false imprisonment. His claim that transferred intent operated across the torts to the person could potentially be correct even though his claim that it operated across all the torts descended from the common law trespass action was incorrect.

Again it is necessary to examine the cases Prosser cited and ascertain whether they support the existence of transferred intent in these torts. Prosser admitted that there were no cases of transferred intent involving false imprisonment. He assumed that such cases "would go along with the others" if they arose.¹⁰⁴ But numerous cases were cited to support the existence of transferred intent in battery and assault.¹⁰⁵

Some are so clearly irrelevant to the issue of transferred intent as to require no further explanation.¹⁰⁶ Others merely illustrate instances in which the plaintiff was injured by a bullet or other object aimed at someone else.¹⁰⁷ In some of the cases with this fact pattern, the defendant was liable under the old common law of trespass because the plaintiff's injury was the immediate or direct result of the defendant's firing the gun or throwing what hit the plaintiff. No intent to commit any battery or assault was required.¹⁰⁸

103. See generally Reynolds, *supra* note 4, at 537-42.

104. Prosser, *supra* note 3, at 656. Prosser cited *R. v. Huggins*, (1730) 92 Eng. Rep. 518 (K.B.), 2 Ld. Raym. 1574, 93 Eng. Rep. 915, 2 Stra. 883, finding a jailer guilty of murder for confining a prisoner in an unhealthy room, without sanitary facilities, and causing his death from illness. There is nothing in the case suggesting that there would be a battery action against the jailer for causing the illness rather than an action for false imprisonment (or battery when the prisoner was taken into the room) in which the illness would be included in consequential damages.

105. PROSSER, *supra* note 2, at 33; Prosser, *supra* note 3, at 655.

106. See, e.g., *United States v. Jasper*, 222 F.2d 632 (4th Cir. 1955) (military policeman not negligent in firing gun in order to subdue hostile crowd; innocent bystander wounded); *Randall v. Ridgley*, 185 So. 632 (La. App. 1939) (defendant shot plaintiff; liable whether plaintiff wounded deliberately or by carelessness); *Purdy v. Woznesensky*, [1937] 2 W.W.R. 116 (Can. Sask. C.A.) (plaintiff had action for shock caused by witnessing attack on husband).

107. See, e.g., *Tuttle v. Forsberg*, 73 N.E.2d 861 (Ill. App. 1947) (car rental company not liable when policeman fired revolver at person suspected of not returning car and shot bystander); *McKeon v. Manze*, 157 N.Y.S. 623 (Sup. Ct. 1916) (saloon proprietor liable when saloon employee threw glass at customer but hit different customer); *Shaw v. Lord*, 137 P. 885 (Okla. 1914) (bystander hit during exchange of gunshots between deputy marshal and fugitive; judgment against marshal reversed because of errors in jury instructions concerning defenses). Cf. *Reynolds v. Pierson*, 64 N.E. 484, 485 (Ind. App. 1902) (defendant caused plaintiff to fall when greeting person whose arm plaintiff was holding; liability because "there was such a reckless disregard of consequences on the part of the appellant as to imply an intention to assault plaintiff").

108. E.g., *Peterson v. Haffner*, 59 Ind. 130 (1877) (defendant playfully threw piece of mortar at boy; hit boy's brother); *Anderson v. Arnold's Executor*, 79 Ky. 370 (1881) (defendant's testator fired pistol at third person; bullet struck plaintiff); *Murphy v. Wilson*, 44

Some of the cases cited by Prosser more plausibly support some operation of transferred intent in battery or assault. The earliest of these, dating from the end of the nineteenth century, is *Talmage v. Smith*.¹⁰⁹ The defendant ordered some boys to get down from the roof of his shed and threw a stick in the direction of two of the boys. The stick hit a third boy, whom the defendant had not seen. There was conflicting testimony on whether the defendant intended to hit the boys he had seen with the stick. The court approved the trial judge's instruction that the defendant would be liable to the injured boy if the defendant threw the stick with the intent of hitting one of the boys he saw and it was unreasonable force in the circumstances. The opinion said that "the fact that the injury resulted to another than was intended does not relieve the defendant from responsibility."¹¹⁰ However, the instruction was not based on transferred intent. The instruction and the exclusion of liability if the defendant used reasonable force, or only intended to frighten the boys he saw rather than hit one with the stick, must have been based on the defendant's privilege as a landowner to use reasonable force to end the boys' trespass on his property and liability if unreasonable force was used.¹¹¹ If the privilege had not operated in the case, the defendant could have been held liable for trespass to the person without any intent to hit anyone with the stick.

Transferred intent in battery was adopted in substance in a paragraph of a 1932 Missouri case, *Carnes v. Thompson*.¹¹²

[P]laintiff's evidence was sufficient to justify a finding that defendant struck at plaintiff's husband, in anger, with the pliers, and that, when he dodged the blow, plaintiff received it. If one person intentionally strikes at, throws at, or shoots at another, and unintentionally strikes a third person, he is not excused, on the ground that it was a mere accident, but it is an assault and battery of the third person. Defendant's intention, in such a case, is to strike an unlawful blow, to injure some person by his act, and it is not essential that the injury be to the one intended.¹¹³

Carnes v. Thompson was followed in *Morrow v. Flores*¹¹⁴ and *Davis v. McKey*,¹¹⁵ in which the plaintiff had been struck by a bullet aimed at someone else.¹¹⁶

A larger number of the cases cited by Prosser contain decisions that a defendant who struck the plaintiff while intending to strike someone else was liable because

Mo. 313 (1869) (bystander shot during gun fight between two groups).

109. 59 N.W. 656 (Mich. 1894).

110. *Id.* at 657.

111. See THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS 193-95 (2d ed. 1888); 1 FRANCIS HILLIARD, THE LAW OF TORTS OR PRIVATE WRONGS 198-203 (4th ed. 1874); 1 EDGAR B. KINKEAD, COMMENTARIES ON THE LAW OF TORTS 461-63 (1903).

112. 48 S.W.2d 903 (Mo. 1932).

113. *Id.* at 904.

114. 225 S.W.2d 621 (Tex. Civ. App. 1949).

115. 167 So. 2d 416 (La. App. 1964), writ refused, 168 So. 2d 822, 823 (La. 1964).

116. The opinions in *Carnes v. Thompson* and *Morrow v. Flores* cited primarily cases that arose from similar facts but did not ground liability in transferred intent. In *Davis v. McKey*, the only citation is to *Carnes v. Thompson*.

the defendant's act was "wanton,"¹¹⁷ committed with malice,¹¹⁸ "wrongful,"¹¹⁹ or "unlawful."¹²⁰ Arguably the defendant's having the intent to commit a battery to a third person is why the defendant's act was characterized as malicious, wrongful, or unlawful, with the consequence that the defendant was liable in an action for battery. But this is not the same as applying an intent requirement to the battery action that the intent toward the third person fulfills.¹²¹ A few of these cases do, at some point in the opinion, endorse the concept of transferred intent, citing secondary authority that drew this from the First Restatement of Torts.¹²²

Although not overlooked entirely, the most likely operation of what I would call "interchangeable intent"¹²³ is given little emphasis in the *Transferred Intent* article: the defendant's intent to commit a battery fulfills an element of liability for assault.¹²⁴ This would explain why courts in so many cases have said that there was liability for assault and battery, without any indication that the defendant intended assault as such, and why defendants who intended to strike the plaintiff but missed would be liable for assault if the plaintiff was put in apprehension of being struck.¹²⁵ The opposite situation—a defendant who intended only an assault but unintentionally struck and wounded the plaintiff—is represented in the article by only one case in point,¹²⁶ a case which adopted the Restatement position that intent to put a person in apprehension of harmful (or offensive) bodily contact supports a battery action.¹²⁷ For the uncommon occurrence of assault by an act intended to cause an assault to a

117. *Bannister v. Mitchell*, 104 S.E. 800 (Va. 1920).

118. *Davis v. Collins*, 48 S.E. 469 (S.C. 1904).

119. *Keel v. Hainline*, 331 P.2d 397 (Okla. 1958).

120. *Singer v. Marx*, 301 P.2d 440 (Cal. App. 1956); *Lopez v. Surchia*, 246 P.2d 111 (Cal. App. 1952); *Smith v. Moran*, 193 N.E.2d 466 (Ill. App. 1963).

121. See generally Nancy J. Moore, *Intent and Consent in the Tort of Battery: Confusion and Controversy*, 61 AM. U. L. REV. 1585, 1606–12 (2012) (discussing liability for battery, without an intent to cause harmful or offensive bodily contact, prior to the Restatement of Torts).

122. *Moran*, 193 N.E.2d 466; *Keel*, 331 P.2d 397.

123. See *supra* text accompanying notes 26–28.

124. Prosser, *supra* note 3, at 655.

125. See *Lewis v. Hoover*, 3 Blackf. 407 (Ind. 1834); *Townsdin v. Nutt*, 19 Kan. 282 (1877); *Nielson v. Eiler*, 227 N.W. 688 (Mich. 1929). Assault was often equated with an attempt to commit battery. See *Western Union Telegraph Co. v. Hill*, 150 So. 709 (Ala. App. 1933), *cert. denied*, 150 So. 711 (Ala. 1933); *Prince v. Ridge*, 66 N.Y.S. 454 (Sup. Ct. 1900); *Bishop v. Ranney*, 7 A. 820 (Vt. 1887); *Degenhardt v. Heller*, 68 N.W. 411 (Wis. 1896); TORTS TREATISE NO. 1(a) SUPPORTING RESTATEMENT NO. 1, at 64–67 (1925); MELVILLE MADISON BIGELOW, *THE LAW OF TORTS* 323–25 (8th ed. 1907); 1 EDWIN A. JAGGARD, *HAND-BOOK OF THE LAW OF TORTS* 431–33 (1895). An intent to strike the plaintiff may have been the reason for liability in the oldest known case of assault as a tort. *I. de S. et ux. v. W. de S.*, Y.B. 22 Edw. 3, fol. 99, pl. 60 (K.B. 1348), translated in VICTOR E. SCHWARTZ, KATHRYN KELLY & DAVID F. PARTLETT, *PROSSER, WADE AND SCHWARTZ'S TORTS CASES AND MATERIALS* 39 (13th ed. 2015).

126. *Brown v. Martinez*, 361 P.2d 152 (N.M. 1961).

127. RESTATEMENT OF TORTS § 16 (1934). See *infra* text accompanying notes 130–33. A second such case, *Weisbart v. Flohr*, 67 Cal. Rptr. 114 (Ct. App. 1968), is cited in Prosser's treatise. PROSSER, *supra* note 2, at 33.

different person, Prosser cited a single case in which liability was based primarily on the willful and wanton nature of the defendant's conduct.¹²⁸

D. Summary

The cases discussed or cited by Prosser do show some normative results: First, there was usually liability for trespass to the person or battery when the defendant intended to strike a third person but unintentionally hit the plaintiff, absent a valid defense such as self-defense. Second, liability for trespass to the person or battery was typically liability for "assault and battery." But the cases do not support the conclusion that transferred intent had been generally accepted as a basis of liability for intentional torts, even battery.

How, then, has it come to be accepted in American tort law that there is a concept of transferred intent that operates in battery, assault, and (in a more limited way) false imprisonment, but not trespass to land or chattels? The answer is: the Restatement of Torts.

IV. THE RESTATEMENT OF TORTS AND TRANSFERRED INTENT

A. Battery and Assault

Work on development of a Restatement of Torts began soon after the foundation of the American Law Institute (ALI) in 1923.¹²⁹ From the first drafts to the final text, battery and assault were identified as intentional torts, requiring for liability an intent to cause either a touching of another's person or apprehension of such a touching (soon refined to intent to cause a harmful or offensive touching or apprehension of such a touching).¹³⁰ An intent to cause a battery would fulfill the intent requirement of an assault action if the defendant's act caused apprehension of a harmful or offensive bodily contact, and an intent to cause an assault would fulfill the intent requirement of a battery action if the defendant's act resulted in an unintended harmful or offensive contact with the plaintiff's person. The intent requirements of battery and assault were interchangeable in the sense that either an intent to cause a battery or an intent to cause an assault fulfilled the intent requirement of each tort.

128. *Jeppsen v. Jensen*, 155 P. 429 (Utah 1916) (defendant, in the plaintiff's presence, allegedly threatened to kill the plaintiff's husband with a pistol).

129. RESTATEMENT OF TORTS xi (1934). The drafts and other preparatory documents for the Restatement cited in this article are published in the American Law Institute Library of HeinOnline (www.heinonline.org). Citations include the retrospective numbering of early drafts in the HeinOnline collection.

130. RESTATEMENT OF TORTS: BATTERY §§ 1, 11, ASSAULT § 1 (Preliminary Draft No. 2, 1923); RESTATEMENT OF TORTS §§ I.10, II.5 (Preliminary Draft No. 4, 1924); RESTATEMENT OF TORTS §§ 2, 8, 12, 22, 27, 43 (Tentative Draft No. 1, 1925); RESTATEMENT OF TORTS §§ 13, 16, 18, 20, 21, 32 (1934). The earliest draft included sections on liability for trespass to the person, which required only a "wrongful act." RESTATEMENT OF TORTS: TRESPASS TO THE PERSON §§ 1–3 (Preliminary Draft No. 2, 1923). The sections were not included in later drafts or the final text.

Why the Restatement presented battery as an intentional tort but allowed liability when no battery was intended is explained in the final text only by the statement that

The interest in freedom from either [harmful or offensive] contact or from the apprehension thereof is so far a part of the other's interest in his bodily security that the intention to inflict an offensive contact or to create an apprehension of either a harmful or offensive contact is sufficient to make the actor liable for a harmful contact resulting therefrom, even though such harmful contact was not intended.¹³¹

There is no corresponding explanation of why there could be assault liability when apprehension of bodily contact was not intended. A more substantial explanation was given in a treatise written by the Reporter of the Restatement, Francis H. Bohlen, to support the first Tentative Draft.¹³²

If one's act violates either another's right to freedom from bodily harm or from offensive touchings or his right derived therefrom to freedom from apprehension of such violations, it is not necessary that the act be done with the intention of bringing about a violation of the particular right which is actually violated. All of these rights are regarded as so closely connected, the one with the other, that an act done with the intention of violating any one of them but causing a violation of another creates the same liability as though the act were done with the specific intention of bringing about the particular violation which results from it.

Since the right to freedom from apprehension of the immediate infliction of an intentional and harmful or offensive bodily touching was itself created by the fact that attempts to inflict either form of touching were punishable by an action of trespass, it is obvious that the intention to inflict either form of touching was necessarily sufficient to support an action of trespass for a mere assault though the attempt to inflict a battery failed. It is not so obvious that an act which is not intended to do bodily harm but merely to bring about an apprehension of a harmful or offensive touching and which is not done under such circumstances as to make it likely to cause bodily harm or an offensive touching should be regarded as sufficient to create liability for bodily harm or an offensive touching

131. RESTATEMENT OF TORTS § 16 cmt. a (1934).

132. TORTS TREATISE NO. 1(a) SUPPORTING RESTATEMENT NO. 1 (1925). During the ALI annual meeting in which the draft was discussed, Bohlen said that the subject of assault, battery, and false imprisonment was uninteresting and had considerable difficulty. Francis H. Bohlen, *Discussion of the Tentative Draft, Torts, Restatement No. 1*, 3 A.L.I. PROC. 282 (1925). Nevertheless, he produced a lengthy treatise in a short period of time. The treatise is valuable for its explanation of the provisions of Tentative Draft No. 1 (1925), which are similar to the final text regarding transferred intent in battery, assault, and false imprisonment, and indication of what authority supported the provisions. Unfortunately no similar treatise was produced for other portions of the Restatement. See Patrick J. Kelley, *The First Restatement of Torts: Reform by Descriptive Theory*, 32 S. ILL. U. L.J. 93, 131–33 (2007).

unexpectedly resulting from it. None the less what authority there is upon the subject is to the effect that such an intent is sufficient therefor.¹³³

Elsewhere in the treatise, the defendant's intent to commit a battery is emphasized as a basis of liability for assault.¹³⁴ Attempts to commit batteries were a "breach of the King's peace" that could lead to violent reprisals unless the target's grievance was redressed by legal process. "Since batteries were redressed and punished by the action of trespass it was natural that attempts to commit them should also be redressible and punishable in that action."¹³⁵

While Bohlen seems to have had no hesitation in asserting that intent to cause a battery would support an action for assault and vice versa, the question of whether there was liability when the defendant's intent was to cause a battery or assault to a person other than the plaintiff was identified as a major issue in the earliest drafts of the Restatement.¹³⁶ Bohlen believed that there were three alternatives. The first was that an intent to touch the plaintiff or put him in apprehension was necessary to liability. The second was that an intent to touch a third party or put him in apprehension would be a basis of liability. The third was that an intent to touch a third person or put him in apprehension would be a basis of liability if the defendant knew (or, possibly, had reason to expect) that the plaintiff was in close proximity to the third party.¹³⁷ Bohlen found no relevant precedents in assault cases and few in battery cases. He recognized that intent was not the stated basis for liability in these cases. In every case in which an action of "trespass of battery" had been sustained against one whose act was directed against a third party, the defendant's act was wrongful toward the plaintiff because the reasonable person would have recognized a risk of injury to the plaintiff. In criminal law it was necessary to the establishment of guilt that the defendant's conduct be brought within the rigid definitions of particular crimes. But there was no such necessity in the law of torts.¹³⁸ There were few cases in which the plaintiff was actually harmed in which redress could not be given on the basis of "a wrong of probability" (negligence), and in those cases there was no "obvious certainty of the justice of his claim."¹³⁹ Extending the definition of battery and assault to include acts directed against third parties would make it "cumbersome and elaborate."¹⁴⁰ It was therefore advisable to "restrict the definition

133. TORTS TREATISE NO. 1(a) SUPPORTING RESTATEMENT NO. 1, at 32–33 (1925). The same explanation, in condensed form, is given for the provisions on liability for offensive touching and assault. *Id.* at 57, 90. The only "authority" cited is *Johnson v. Mack*, 104 N.W. 395 (Mich. 1905), in which the defendant intentionally fired a gun in the plaintiff's direction to stop his running away, but the basis of liability was "wanton and willful conduct." *Id.* at 396.

134. *See* TORTS TREATISE NO. 1(a) SUPPORTING RESTATEMENT NO. 1, at 65–67 (1925); *see also* RESTATEMENT OF TORTS, at 6–9 (1923) (Preliminary Draft No. 3, 1923).

135. TORTS TREATISE NO. 1(a) SUPPORTING RESTATEMENT NO. 1, at 65–66 (1925).

136. *See* RESTATEMENT OF TORTS: BATTERY §§ 1, 11, ASSAULT § 1 (Preliminary Draft No. 2, 1923); RESTATEMENT OF TORTS at 3, 10 (Preliminary Draft No. 3, 1923).

137. *See* RESTATEMENT OF TORTS at 10 (Preliminary Draft No. 3, 1923). Bohlen thought the same rule should apply to both battery and assault.

138. *Id.* at 10–13.

139. *Id.* at 16–17.

140. *Id.* at 16.

of battery to harmful or offensive touchings directly caused by an act done for the purpose of causing such a touching to the plaintiff or at the least of putting him in apprehension thereof.”¹⁴¹

Bohlen would preclude liability for non-harmful offensive touchings and for assault when the defendant’s intent was directed toward a third person. The probability that the defendant’s act could cause a non-harmful touching of the body or apprehension was not a basis of liability. Assault should not be regarded as a punitive action in which a defendant would be punished if his conduct was an act of aggression against a third person.¹⁴² The law of torts should not adopt the “highly elaborate and artificial concept of constructive or transferred intent.”¹⁴³

Despite Bohlen’s emphatic arguments against third-party transferred intent and belief that case law had not incorporated it into civil liability for assault and battery, a preliminary draft of the Restatement produced several months later provided for liability when the defendant acted with the intention of inflicting a harmful or offensive contact to the plaintiff or a third party, or of putting the plaintiff or a third party in apprehension thereof.¹⁴⁴ In the absence of a published explanation, one can only surmise that the Advisers for the Restatement had disagreed with Bohlen and concluded that an intent to inflict a battery or assault upon a third person was sufficient for liability, even when the plaintiff’s presence was unknown to the defendant. This continued to be the position of the Restatement in drafts submitted to the ALI’s membership¹⁴⁵ and the final text.¹⁴⁶ The provisions of the final text on harmful-contact battery,¹⁴⁷ offensive-contact battery¹⁴⁸ and assault¹⁴⁹ have a uniform intent requirement: acting with an intent to cause a harmful or offensive contact with the person or an apprehension of a harmful or offensive bodily contact to either the plaintiff or a third person.¹⁵⁰

Bohlen included support for this position in his treatise:

[T]he principle . . . works no hardship to a defendant who intended and expected to inflict harm upon a third party substantially similar to that which the plaintiff suffers, and the plaintiff, whose injury is the same as

141. *Id.* at 13. Bohlen would reject *Talmage v. Smith*, 59 N.W. 656 (Mich. 1894); *see supra* text accompanying notes 109–11, because it allowed the defendant to be liable for trespass to the person without knowledge that the plaintiff was on the shed and there was a probability of harm to the plaintiff. RESTATEMENT OF TORTS at 14–15 (Preliminary Draft No. 3, 1923).

142. RESTATEMENT OF TORTS, at 15–16 (Preliminary Draft No. 3, 1923).

143. *Id.* at 16.

144. RESTATEMENT OF TORTS §§ I(2).1, I(2).19, II.1, II.13 (Preliminary Draft No. 6, 1924).

145. RESTATEMENT OF TORTS §§ 2, 10, 12, 24, 27, 45 (Tentative Draft No. 1, 1925); RESTATEMENT OF TORTS §§ 13, 16, 18, 20, 21, 32 (Proposed Final Draft No. 1, 1934).

146. RESTATEMENT OF TORTS §§ 13, 16, 18, 20, 21, 32 (1934).

147. *Id.* §§ 13, 16.

148. *Id.* §§ 18, 20.

149. *Id.* §§ 21, 32.

150. There are slight variations in the language of the relevant sections of the Restatement but the substance is the same.

though the act had been intended to inflict it, should be permitted to recover unless it would be unjust to the defendant to hold him liable.¹⁵¹

Concerning the defendant whose intent was to cause an offensive touching to a third person,

There is no direct authority which holds that an act done with the intention of affecting a third party . . . creates liability to another to whom it causes an offensive touching, but there is no case or dictum which denies its existence and there are cases recognizing and none denying liability where an act done with such an intention causes bodily harm to another. The interests in freedom from bodily harm and in freedom from offensive touchings were both given legal protection by the same action of trespass for battery, and it would seem, therefore, that the same liability should arise when the act causes an offensive touching as where it causes bodily harm.¹⁵²

A similar statement, including the absence of case authority, was made about liability for assault.¹⁵³

B. False Imprisonment

Under the older common law, false imprisonment was a trespass to the person, as were battery and assault.¹⁵⁴ The Restatement grouped false imprisonment with battery and assault as “intentional invasions of interests in personality.”¹⁵⁵ As discussed above, in the provisions on battery and assault an intent to commit either tort was sufficient for liability. But this was not extended to include an intent to commit false imprisonment. For false imprisonment the only intent that satisfied the Restatement’s requirements for liability was an intent to confine a person.¹⁵⁶ A defendant would therefore not be liable to a false imprisonment action on the basis of having acted with an intent to cause a battery (harmful or offensive bodily contact) or an assault (apprehension of such a contact).

Why the arguments for treating an intent to commit the other tort as sufficient for battery and assault were not also applied to false imprisonment is not explained in the Restatement drafts or Bohlen’s treatise. Perhaps the reason is that false imprisonment did not have the close association with battery and assault that battery

151. TORTS TREATISE NO. 1(a) SUPPORTING RESTATEMENT NO. 1, at 36–37 (1925).

152. *Id.* at 61.

153. *Id.* at 91–92. The treatise also contained the statement quoted and discussed *supra*, in text accompanying notes 60–64, that originally a defendant who directly caused bodily harm was prima facie liable as a trespasser, and could not exculpate himself as innocent of fault, when he intended to inflict a similar injury upon a third party. *Id.* at 36.

154. *Id.* at 96–97; RESTATEMENT OF TORTS § 35 cmt. a. (1934).

155. 1 RESTATEMENT OF TORTS ch. 2 (1934); RESTATEMENT OF TORTS 1 (Tentative Draft No. 1, 1925) (“Conduct Intentionally Violating the Rights of Personality”).

156. RESTATEMENT OF TORTS § III.10 (Preliminary Draft No. 6, 1924); RESTATEMENT OF TORTS § 61 (Tentative Draft No. 1, 1925); RESTATEMENT OF TORTS § 35 (Preliminary Draft No. 65, 1933); RESTATEMENT OF TORTS § 35 (1934).

and assault had with each other. Also, it may have been thought that an unintended confinement caused by an act intended to cause a battery or assault, or the opposite, was so unlikely to occur that there was no need to provide for it, and an unintended confinement that caused bodily harm could be the basis of negligence liability.¹⁵⁷

While the provisions on false imprisonment excluded liability based on an intent to cause a different type of interference with the person, the Restatement adopted liability based on an intent to cause the same type of interference to a different person. An intent to cause another person to be confined would satisfy the intent requirement of the plaintiff's false imprisonment action.¹⁵⁸ There would thus be third-party transferred intent in false imprisonment, as well as in battery and assault.¹⁵⁹ The explanation for this in Bohlen's treatise is that

In view of the common origin of these various rights of personality it is believed that there is no difference, in this respect, whether the interest invaded be the interest in freedom from bodily harm, or the interest in freedom from offensive bodily touchings, or the interest in freedom from apprehension of a harmful or offensive touching, or the interest in freedom from conscious confinement.¹⁶⁰

There was no case that decided that a person who acted with the intention of confining a third party was liable for false imprisonment, but there was no case that denied the existence of such liability.¹⁶¹

C. Trespass to Chattels and Trespass to Land

The first drafts of the Restatement's sections on trespass to chattels and trespass to land were written after the issues of transferred intent in battery, assault, and false imprisonment had been settled.¹⁶² The provisions on trespass to chattels in the Restatement drafts and final text contain no element of transferred intent.¹⁶³ In the earliest draft, trespass to chattels was not an intentional tort. It extended to causing contact with the chattel or taking possession of it intentionally, negligently, or in the

157. See RESTATEMENT OF TORTS § 61 cmt. (Tentative Draft No. 1, 1925); RESTATEMENT OF TORTS § 35 cmt. h. (1934).

158. RESTATEMENT OF TORTS § III.10 (Preliminary Draft No. 6, 1924); RESTATEMENT OF TORTS §§ 43, 49 (Preliminary Draft No. 9, 1924); RESTATEMENT OF TORTS §§ 49, 63 (Tentative Draft No. 1, 1925); RESTATEMENT OF TORTS §§ 35, 43 (1934).

159. This was not in the earliest drafts prepared by Bohlen, which did not include third-party transferred intent in the sections on battery and assault. See RESTATEMENT OF TORTS: FALSE IMPRISONMENT § 8 (Preliminary Draft No. 2, 1923); RESTATEMENT OF TORTS § III.4 (Preliminary Draft No. 4, 1924).

160. TORTS TREATISE NO. 1(a) SUPPORTING RESTATEMENT NO. 1, at 134 (1925).

161. *Id.*

162. The first draft concerned with trespass to chattels is apparently *Preliminary Draft No. 55 (1932)*. The first draft on trespass to land is apparently *Preliminary Draft No. 37 (1930)*, but the provision on liability of a trespasser to occupants of the land, discussed *infra* text accompanying notes 177–93, originated as early as *Preliminary Draft No. 25 (1928)*.

163. The main provisions on trespass to chattels in the final text are in RESTATEMENT OF TORTS §§ 216–22 (1934).

course of an extrahazardous activity.¹⁶⁴ However, it was soon reformulated as an intentional tort, leaving unintentional interferences with chattels to the Restatement's sections on negligence, reckless conduct, and strict liability.¹⁶⁵ Liability for trespass to chattels required using or taking the chattel or otherwise intentionally "intermeddling" with it. There was no provision for or discussion of liability based on an intent to interfere with other property or with an "interest in personality." Only the person in possession of the chattel or entitled to its immediate position could maintain an action.¹⁶⁶ If the trespass caused harm to other property of the plaintiff, or bodily harm to the plaintiff or "some person . . . in which the [plaintiff] has a legally protected interest," the plaintiff could obtain damages for this in the trespass to chattels action.¹⁶⁷

The main provisions on trespass to land, in the drafts¹⁶⁸ and the Restatement's final text,¹⁶⁹ likewise contain no element of transferred intent. Insofar as liability for trespass to land was based on the actor's intent,¹⁷⁰ the only intent that was a basis of liability was an intent to cause an entry into the plaintiff's land or permit something to remain there.¹⁷¹ A trespasser was liable only to the person considered to have possession of the land at the time of the trespass.¹⁷² If the trespass caused harm to other property of the possessor, or personal harm to the possessor or a person in whom the possessor had a "legally protected interest," the trespasser was liable for this, but only as consequential damages to the possessor, to be recovered in the possessor's action for trespass to land.¹⁷³

164. RESTATEMENT OF TORTS Part VI §§ 1, 7 (Preliminary Draft No. 55, 1932).

165. RESTATEMENT OF TORTS §§ 1101–1103, 1118 (Preliminary Draft No. 59, 1933); RESTATEMENT OF TORTS §§ 1104–1109 (Preliminary Draft No. 60, 1933).

166. RESTATEMENT OF TORTS §§ 158–163 (Preliminary Draft No. 63, 1933); RESTATEMENT OF TORTS §§ 158–163 (Preliminary Draft No. 67, 1933); RESTATEMENT OF TORTS §§ 158–163 (Proposed Final Draft No. 1, 1934); RESTATEMENT OF TORTS §§ 217–222 (1934). A person entitled to future possession could have an action derived from the common law action on the case. RESTATEMENT OF TORTS § 220 (1934).

167. RESTATEMENT OF TORTS §§ 218–219 (1934). The "person . . . in which the [plaintiff] has a legally protected interest" is probably a person whose injuries could be the basis of a claim for loss of services or consortium—usually a spouse or child of the plaintiff. *Id.* Cf. RESTATEMENT OF TORTS § 165 cmt. c. (1934) (injury caused by trespass to land). *See infra* note 173.

168. RESTATEMENT OF TORTS §§ 1001–1011 (Tentative Draft No. 7, 1931); RESTATEMENT OF TORTS §§ 1000–1011, 1001A–1001B (Preliminary Draft No. 66, 1933); RESTATEMENT OF TORTS §§ 1000–1011A (Proposed Final Draft No. 1, 1934).

169. RESTATEMENT OF TORTS §§ 157–166 (1934).

170. Reflecting older common law, the Restatement included unintentional intrusions under the label trespass, but liability for unintentional intrusions required actual damage and was to be based on negligence, recklessness, or strict liability for an extrahazardous activity. *See* RESTATEMENT OF TORTS §§ 165–166 and preceding scope note (1934).

171. Including personally entering the land or remaining there. RESTATEMENT OF TORTS §§ 158, 163 (1934).

172. RESTATEMENT OF TORTS §§ 157, 162 (1934).

173. *Id.* §§ 163 cmt. f, 165. A possessor's interests included "the physical condition of the members of his family and the servants belonging to his household." *Id.* § 165 cmt. c. Presumably this was because the common law gave the head of a household an action to recover damages for

In the earliest preliminary draft, the Reporter for the trespass to land chapters of the Restatement, Edward S. Thurston, raised the question of whether there was liability for an entry into land when the actor did not intend the entry but did intend another wrong to the possessor of the land or a third person. He gave the example of someone who intended to strike a person and accidentally fell onto the land of that person or the land of a third party. He also considered whether there would be liability if an act intended to cause an unauthorized entry into one person's land resulted in an entry into the land of another. Thurston concluded that there would probably be liability if harm was caused by the entry into the land but no liability if there was no harm.¹⁷⁴ He drafted an additional section that would incorporate this in the Restatement.¹⁷⁵ Neither the section nor the discussion was included in later drafts. Transferred intent did not become a basis of liability when there was an unintended entry into the plaintiff's land.¹⁷⁶

While transferred intent was never a basis of liability in the Restatement's chapters on trespass to land, one of the many sections in the chapters on negligence liability contained a "special rule" subjecting trespassers to liability for bodily harm caused to members of the household of the possessor of the land:

A trespasser on land is subject to liability for bodily harm caused to the possessor thereof or to members of his household by any act done, activity carried on or condition created by the trespasser while upon the land irrespective of whether the trespasser's conduct is such as would subject him to liability were he not a trespasser.¹⁷⁷

"[M]embers of [his] household" included all persons living for "more than a merely temporary period" in the possessor's residence, as family members, guests, or domestic servants.¹⁷⁸ While the text of the section could be read as recognizing a

loss of services when a child or servant was injured and allowed a husband to recover for loss of services and consortium when his wife was injured. *See* 2 THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS 10-13, 25-30, 56-57 (D. Avery Haggard ed., 4th ed. 1932); FOWLER VINCENT HARPER, A TREATISE ON THE LAW OF TORTS 562-66, 574-76 (1933); WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 938-43 (1941).

174. RESTATEMENT OF TORTS, special note to § 2A (Preliminary Draft No. 37, 1930).

175. RESTATEMENT OF TORTS § 2B (Preliminary Draft No. 37, 1930). Its text specifically addressed the actor who intended an "invasion of an interest of personality" (battery, assault, or false imprisonment) or trespass to land possessed by someone other than the plaintiff. *Id.*

176. The final text of the Restatement specified that there was no liability for an unintentional and non-negligent entry except when the actor was engaged in an extrahazardous activity. RESTATEMENT OF TORTS § 166 (1934).

177. *Id.* § 380. Probably this was placed within the provisions on negligence liability to indicate the difference between the "special rule" of liability without negligence and the general rule stated in the next section (§ 381), under which a trespasser could be held liable for negligently causing harm to persons on the land, including people who were not part of the possessor's household. *Id.* § 381.

178. *Id.* § 380 cmt. b. Section 380 contained a caveat stating: "The Institute expresses no opinion as to whether a trespasser on land is subject to the liability stated in this Section to the possessor's servants who, though not members of the possessor's household, are resident on the premises." *Id.* § 380 caveat.

claim by the possessor of the land for loss to the possessor sustained on account of bodily harm to a member of his household, a comment for the section¹⁷⁹ and caveat¹⁸⁰ indicate that the intended meaning is that the trespasser would be liable to the injured person.

This section originated in drafts that preceded the drafts on liability for trespass to land generally. It proved to be one of the most controversial provisions bearing on liability for trespass. Under the earliest version, a trespasser was liable for bodily harm sustained by members of the possessor's household and others lawfully on the premises with the possessor's consent.¹⁸¹ As there was opposition to inclusion of persons who were not members of the household,¹⁸² the next drafts provided that a trespasser was liable for bodily harm to members of the possessor's household and stated in a caveat that no position was taken on whether a trespasser was subject to the same liability for harm to other persons lawfully on the land as licensees or business invitees of the possessor.¹⁸³ But the Council of the ALI decided to revise the provision so that it would apply to injuries to the servants of the possessor of the land regardless of whether the servant was a member of the possessor's household or lived on the land.¹⁸⁴

This provoked a critical commentary by Professor Bohlen as Reporter for the Restatement.¹⁸⁵ Bohlen's position was that the liability for bodily harm resulting from a trespass extended only to the possessor of the land, or at least no further than members of the possessor's family residing on the land.¹⁸⁶ It also generated considerable debate at the next annual meeting of the ALI.¹⁸⁷ A motion to limit liability to harm to the possessor was defeated,¹⁸⁸ but a motion to limit liability to harm to the possessor and members of the household passed by a narrow margin.¹⁸⁹ After further consideration the Council agreed to the final form of the provision, limiting the trespasser's liability to harm sustained by the possessor or a member of

179. *Id.* § 380 cmt. d. The comment gives the example of a person who trespasses by driving on C's private road and runs over C's child. It states that the driver is liable to the child as well as to C. *Id.* § 380 illus. 1.

180. *Id.* § 380 caveat. *See supra* note 178.

181. RESTATEMENT OF TORTS § 250 (Preliminary Draft No. 25, 1928); RESTATEMENT OF TORTS § 251 (Preliminary Draft No. 27, 1928).

182. *See* GEORGE W. WHEELER, COMMENTS ON RESTATEMENT OF TORTS PRELIMINARY DRAFT NO. 27, at 11 (1929).

183. RESTATEMENT OF TORTS § 250 (Preliminary Draft No. 29, 1929); RESTATEMENT OF TORTS § 250 (Preliminary Draft No. 30, 1929); RESTATEMENT OF TORTS § 250 (Preliminary Draft No. 31, 1929). A minority of the Advisers advocated an alternative version, under which the trespasser would incur liability to the possessor or members of the household only when the trespasser knew or should have known he was a trespasser. RESTATEMENT OF TORTS § 251, note to Council (Preliminary Draft No. 31, 1929).

184. RESTATEMENT OF TORTS § 251 (Tentative Draft No. 5, 1930); Bohlen, *supra* note 132 at 204.

185. RESTATEMENT OF TORTS, explanatory notes, at 5–14 (Tentative Draft No. 5, 1930).

186. *Id.* at 5, 13; Bohlen, *supra* note 132 at 200–03, 222–33; 11 A.L.I. PROC. 582–83 (1934).

187. *See* Bohlen, *supra* note 132 at 199–223.

188. *Id.* at 223.

189. *Id.* at 221–22.

the possessor's household (defined to include domestic servants and guests living in the possessor's residence), but with a caveat concerning servants "who though not members of the possessor's household are resident on the premises."¹⁹⁰

It is debatable whether this section, for which there was no precedent,¹⁹¹ adopted a type of transferred intent liability for trespass to land. Arguably it did not, because an action was allowed (absent negligence or strict liability) only when the defendant intentionally intruded into the land where the plaintiff lived.¹⁹² On the other hand, even if it is correct to regard a spouse or other immediate family member as sharing possession of the land with the person who has title as owner or tenant,¹⁹³ in no sense could the land be considered the property of a domestic servant or guest. So it would seem that the injured person is given an action because the defendant had an intent to interfere with a different type of interest belonging to a different person—the land possessor's property interest.

D. Second Restatement

The Restatement (Second) of Torts was developed about thirty years after the First Restatement. Prosser was the Reporter for the project. There is no indication in the available documents on the Second Restatement¹⁹⁴ that there was any proposal by Prosser or others to take a position on transferred intent different from that of the first Restatement or any opposition to the Second Restatement's incorporation of what had been in the first Restatement. With respect to whether an intent to interfere with a different type of interest or with the interests of a third person would fulfill the intent requirement of an action for battery, assault, false imprisonment, trespass to chattels, or trespass to land, the provisions of the Second Restatement¹⁹⁵ are almost identical to those of the First Restatement. In essence, the contribution of the Second Restatement to the law of transferred intent was its endorsement of what had been in the First Restatement.

There were limited revisions to the language of the relevant sections and comments, including the refinement that for battery and assault an intent to cause apprehension of a harmful or offensive bodily contact must be to cause apprehension

190. RESTATEMENT OF TORTS § 250 (Proposed Final Draft No. 2, 1934); RESTATEMENT OF TORTS § 380 (1934).

191. There were cases allowing claims in trespass by the spouse of the person with title to the property, but none allowing claims by people outside the possessor's immediate family. See RESTATEMENT OF TORTS, explanatory notes, at 13 (Tentative Draft No. 5, 1930); Bohlen, *supra* note 132 at 200–01.

192. See Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1, 26 (1998) (inclusion of members of the possessor's household is in accordance with contemporary explanations regarding property rights, leaving intact the fundamental requirement that only those whose property right is violated can sue for trespass).

193. See *supra* text accompanying notes 80–83.

194. Preliminary drafts, council drafts, and tentative drafts are in the American Law Institute Library of HeinOnline (www.heinonline.org), and transcripts of ALI annual meetings are published in *American Law Institute Proceedings*.

195. 1 RESTATEMENT (SECOND) OF TORTS, ch. 2, 7, 9 (1965). The relevant section numbers are the same as in the First Restatement. See *infra* notes 201–04.

of an imminent contact,¹⁹⁶ and some reorganization of the text on trespass to chattels.¹⁹⁷ The “special rule” of trespass to land concerning harm to members of the household of the possessor of the land was moved from its anomalous location in the provisions on negligence¹⁹⁸ to the main provisions on trespass to land, within the section that had provided that a trespasser was liable only to the person in possession of the land at the time of the trespass.¹⁹⁹ The Second Restatement’s version of this section is that the trespasser is liable for physical harm to the possessor of the land, his things or the land, or members of his household or their things.²⁰⁰

V. CASE LAW FOLLOWS THE RESTATEMENT

As discussed in the previous section of this Article, the First and Second Restatements recognized liability based on transferred intent in the following circumstances:

- (1) liability for battery when acting with an intent to commit a battery to a different person;
- (2) liability for battery when acting with an intent to commit an assault;²⁰¹
- (3) liability for assault when acting with an intent to commit an assault upon a different person;
- (4) liability for assault when acting with an intent to commit a battery;²⁰²
- (5) liability for false imprisonment when acting with an intent to confine a different person;²⁰³
- (6) (if actually a variety of transferred intent) liability for harm to members of the household of the possessor of land caused by a trespass on the land.²⁰⁴

The case law prior to the First Restatement provided little direct support for any of this,²⁰⁵ but numerous decisions since publication of the Restatement have adopted

196. The “black letter” states “imminent apprehension of such a contact.” RESTATEMENT (SECOND) OF TORTS §§ 13, 18, 21 (1965). But obviously what is meant is apprehension of an imminent harmful or offensive contact. *See id.* § 21 cmt. d.

197. *Id.* §§ 216–222.

198. RESTATEMENT OF TORTS § 380 (1934).

199. *Id.* § 162.

200. RESTATEMENT (SECOND) OF TORTS § 162 (1965). Liability to the members of the household was not limited to bodily harm, as in the first Restatement. The definition of members of the household, *see supra* text accompanying note 178, was not changed.

201. RESTATEMENT OF TORTS §§ 13, 16, 18, 20 (1934); RESTATEMENT (SECOND) OF TORTS §§ 13, 16, 18, 20 (1965).

202. RESTATEMENT OF TORTS §§ 21, 32 (1934); RESTATEMENT (SECOND) OF TORTS §§ 21, 32 (1965).

203. RESTATEMENT OF TORTS §§ 35, 43 (1934); RESTATEMENT (SECOND) OF TORTS §§ 35, 43 (1965).

204. RESTATEMENT OF TORTS § 380 (1934); RESTATEMENT (SECOND) OF TORTS § 162 (1965).

205. This was acknowledged by the Reporter for the First Restatement, Francis Bohlen. *See supra* text accompanying notes 132–53 (battery and assault); 158–61 (false

or applied the Restatement's rules on liability for battery and assault.²⁰⁶ There seems to be no judicial resistance to adoption of transferred intent as a basis for liability to a battery or assault claim.²⁰⁷ It has therefore become established in American tort law that a defendant had the intent necessary for liability for battery when the defendant's intent was to commit a battery to a person other than the plaintiff²⁰⁸ or to cause the plaintiff to suffer apprehension of an imminent battery rather than a battery itself.²⁰⁹ Although there are few cases in point, it is also clear that the intent necessary for liability in an assault action will be found when the defendant had an intent to commit a battery to the plaintiff²¹⁰ or an intent to put a third person in apprehension.²¹¹

imprisonment); 185–91 (trespass to land).

206. See case annotations in RESTATEMENT (SECOND) OF TORTS APPENDIX §§ 13, 16, 18, 20, 21, 32 (1966 & Supps.) and cases citing treatises incorporating the Restatement's rules. *Singer v. Marx*, 301 P.2d 440 (Cal. App. 1956); *Smith v. Moran*, 193 N.E.2d 466 (Ill. App. 1963); *Morrow v. Flores*, 225 S.W.2d 621 (Tex. Civ. App. 1949).

207. As distinct from application of transferred intent when a cause of action for battery or assault would have adverse consequences in insurance coverage, application of workers compensation law, or the statute of limitations. See *infra* text accompanying notes 247–58.

208. *Kraus v. Allstate Insurance Co.*, 258 F. Supp. 407, 413 (W.D. Pa. 1966), *aff'd*, 379 F.2d 443 (3d Cir. 1967) (pedestrians injured when man detonated dynamite in car where he was meeting his estranged wife); *Singer*, 301 P.2d at 443 (child threw rock at another child); *Smith*, 193 N.E.2d 466 (defendant fired gun at third person); *Baska v. Scherzer*, 156 P.3d 617 (Kan. 2007) (plaintiff struck unintentionally by boys fighting with each other when plaintiff attempted to stop fight); *Hendrix v. Burns*, 43 A.3d 415, 428–30 (Md. Ct. Spec. App. 2012), *cert. denied*, 50 A.3d 607 (Md. 2012) (can be battery liability on basis of transferred intent, but in case there was no evidence of intent to inflict battery on third person); *Morrow*, 225 S.W.2d at 623–24 (defendant shot plaintiff while in pursuit of another person).

209. *Manning v. Grimsley*, 643 F.2d 20, 22 (1st Cir. 1981) (baseball pitcher committed battery to spectator hit with ball if pitcher threw ball with intent to cause spectators imminent apprehension of being hit, because of their continuous heckling); *Weisbart v. Flohr*, 67 Cal. Rptr. 114, 116 (Ct. App. 1968) (seven-year-old liable for battery in hitting another child in face with arrow even if he intended only to shoot near her and frighten her); *Hall v. McBryde*, 919 P.2d 910 (Colo. App. 1996) (battery liability for wounding occupant of car with gunshot because, in firing gun at car to protect his home from car's occupants, defendant had intent to put occupants in apprehension of harmful or offensive bodily contact); *Etcher v. Blitch*, 381 So. 2d 1119 (Fla. Dist. Ct. App. 1979), *cert. denied*, 386 So. 2d 636 (Fla. 1980) (assault and battery liability for firing gun into car with intent to frighten occupant); *Nelson v. Carroll*, 735 A.2d 1096 (Md. 1999) (commission of assault with gun basis of liability for battery when plaintiff accidentally shot); *Trott v. Merit Dep't Store*, 484 N.Y.S.2d 827 (App. Div. 1985) (security guard pursuing plaintiff fired gun at ground as warning shot; bullet hit plaintiff in back); *Labadie v. Semler*, 585 N.E.2d 862 (Ohio Ct. App. 1990) (intentional tort liability if teenager threw snowball with intent to put plaintiff in apprehension of being hit by it); see also *infra* text accompanying notes 212–14 (cases in which the defendant acted with an intent to cause such apprehension to a third person).

210. *Acosta v. Islamic Republic of Iran*, 574 F. Supp. 2d 15, 28 (D.D.C. 2008) (firing shots at victims).

211. *Holloway v. Wachovia Bank & Trust Co., N.A.*, 428 S.E.2d 453, 460–62 (N.C. Ct. App. 1993), *rev'd in part*, 452 S.E.2d 233 (N.C. 1994) (claim of plaintiff who feared being shot from gun pointed at someone else).

In some cases, liability for an unintended battery has been found by combining “transfer” of the intent to affect a person other than the plaintiff and the interchangeability of the intent requirements of battery and assault. The most prominent cases are *Brown v. Martinez*²¹² and *Alteiri v. Colasso*.²¹³ In *Brown*, the defendant was held liable to the plaintiff when he had fired a rifle in the direction of other boys, who were stealing melons from his land, in order to scare them away. In *Alteiri*, the defendant was held liable to a battery action for striking the plaintiff with a stone on the jury’s finding that the stone was thrown with an intent to scare some other person. The jury had found that the defendant had no intent to strike anyone with the stone and had not acted negligently. To find liability for battery in these circumstances is squarely within the “black letter” language of the Restatement²¹⁴ though possibly beyond what the authors of the First Restatement had in mind.

There is limited but consistent support in the case law for the proposition that there can be liability for false imprisonment when the defendant acted with an intent to confine a person other than the plaintiff.²¹⁵ In *Gau v. Smitty’s Super Valu, Inc.*,²¹⁶ the court quoted from the Restatement’s provisions on false imprisonment²¹⁷ in holding that a four-year-old child had an action against a retail store that confined the child when the child’s mother was detained on suspicion of shoplifting. In the case law, as well as the Restatement, liability for false imprisonment when the defendant intended to confine a third person is the only type of transferred intent that operates when the defendant intended or caused confinement. There appears to be no support for intentional tort liability when the defendant intended confinement but caused something different, or vice versa.²¹⁸

With one minor exception, there also appears to be no support in modern case law for an intent to commit a trespass to chattels or land to be a basis of liability for battery, assault or false imprisonment.²¹⁹ The exception is *Bailey v. County of San*

212. 361 P.2d 152 (N.M. 1961).

213. 362 A.2d 798 (Conn. 1975). *Manning*, 643 F.2d 20, is similar if the plaintiff was not one of the hecklers the pitcher intended to suffer apprehension of being struck by the ball.

214. RESTATEMENT OF TORTS §§ 13, 16 (1934); RESTATEMENT (SECOND) OF TORTS §§ 13, 16 (1965).

215. *Gau v. Smitty’s Super Valu, Inc.*, 901 P.2d 455 (Ariz. Ct. App. 1995); *Du Lac v. Perma Trans Products, Inc.*, 163 Cal. Rptr. 335 (Ct. App. 1980); *Adams v. Nat’l Bank of Detroit*, 508 N.W.2d 464, 464–69 (Levin, J.), 474 (Mallett, J.) (Mich. 1993), *reh’g denied*, 511 N.W.2d 685 (Mich. 1993). *Thomas v. Schwegmann Giant Supermarket, Inc.*, 561 So. 2d 992 (La. Ct. App. 1990), which rejected false imprisonment claims on behalf of two small children who were with their grandmother when she was detained at a store, did not address whether a false imprisonment action could arise when the plaintiff was confined by an act intended to confine another person.

216. 901 P.2d 455 (Ariz. Ct. App. 1995).

217. RESTATEMENT (SECOND) OF TORTS §§ 35, 43 (1965).

218. *See Marcano v. Nw. Chrysler-Plymouth Sales, Inc.*, 550 F. Supp. 595, 602–03 (N.D. Ill. 1982) (intent to confine plaintiff’s car and its contents did not supply element of intent required for false imprisonment action).

219. *See id.* at 602–03 (no false imprisonment action when defendant intended to confine plaintiff’s car and its contents); *Criscuolo v. Grant Cnty.*, No. 10-CV-0470-TOR, 2014 WL 527218 (E.D. Wash. Feb. 10, 2014) (no transferred intent that would allow assault action because of defendant’s intent to shoot dog); *Hall v. McBryde*, 919 P.2d 910, 913–14 (Colo.

Joaquin,²²⁰ in which a federal district court, on a dubious interpretation of state law,²²¹ decided that the defendant's intent to harm a dog when firing a gun "transferred to all those who were hit," giving rise to claims for battery.²²² Another federal district court has specifically rejected transferred intent as a basis of liability for assault when the defendant's intent was to shoot a dog.²²³

There are only a few opinions that consider the Restatement's extension of trespass to land claims to members of the household of the person who possessed the land.²²⁴ In *Keesecker v. G.M. McKelvey Co.*,²²⁵ a department store's employee entered a house through the doorway of a "sunroom," to deliver a package that actually should have been delivered to the house next door, and left the door open. A disabled child living in the house went to the open doorway and tumbled down the stairs outside. In an action initiated in the name of the child, the Ohio Court of Appeals decided that the employee was a trespasser "as a matter of law" and that the child's injuries were caused by the trespass.²²⁶ It then addressed the point that the plaintiff was a member of the family of the person in possession of the premises, not a "possessory owner." Quoting Section 380 of the Restatement,²²⁷ the court concluded that while the common law rule had been that the plaintiff must have been in possession of the property on which the trespass was committed, "[t]he law has wisely adapted itself to the changing requirements of society, so that today we find that the members of a man's family share with him the right of protection from the results of trespass upon the property of the head of the household."²²⁸

App. 1996) (defendant fired shots towards car, wounding one of its occupants; Restatement applied so that defendant liable for battery because of intent to commit assault, not intent to strike car); *Webb v. Jackson*, 583 So. 2d 946, 951 (Miss. 1991) (requisite intent for assault and battery absent if police officer fired gun to stop dog charging at him); *Brabazon v. Joannes Bros. Co.*, 286 N.W. 21, 26 (Wis. 1939) (defendant trespassing on plaintiff's property not liable for assault and battery when no intent to commit that). Cases in which a person was accidentally wounded when the defendant was attempting to shoot an animal are usually litigated as negligence actions, not as actions for battery. *See Metro. Dade Cnty. v. St. Claire*, 445 So. 2d 614 (Fla. Dist. Ct. App. 1984) (police officer fired at dog); *Belk v. Boyce*, 138 S.E.2d 789 (N.C. 1964) (defendant fired at dog); B. Finberg, Annotation, *Hunter's Civil Liability for Unintentionally Shooting Another Person*, 26 A.L.R.3d 561 (1969).

220. 671 F. Supp. 2d 1167 (E.D. Cal. 2009).

221. Principally *Singer v. Marx*, 301 P.2d 440 (Cal. Ct. App. 1956), in which the defendant threw a rock at a child, not an animal.

222. *Bailey*, 671 F. Supp. 2d at 1175.

223. *Criscuolo v. Grant Cnty.*, No. 10-CV-0470-TOR, 2014 WL 527218 (E.D. Wash. Feb. 10, 2014).

224. RESTATEMENT OF TORTS § 380 (1934); RESTATEMENT (SECOND) OF TORTS § 162 (1965).

225. 27 N.E.2d 787 (Ohio Ct. App. 1940), *subsequent proceedings*, 42 N.E.2d 223 (Ohio Ct. App. 1941), *rev'd*, 47 N.E.2d 211 (Ohio 1943).

226. *Id.* at 789.

227. *See supra* text accompanying notes 177–80.

228. *Keesecker*, 27 N.E.2d at 790. When the case reached the Supreme Court of Ohio, it was held that whether the employee was a trespasser was a question for the jury. *See Keesecker*, 47 N.E.2d 211. Justice Hart, in a concurring opinion, decided that the defendant would be liable to the child if the child's injury was the result of a trespass by the defendant's

There are other modern cases in which it was assumed without discussion that a child injured by a trespass on the property where the child's family lived had a trespass-based cause of action.²²⁹ These, as well as opinions applying the Restatement,²³⁰ apparently proceed from the *Keesecker* rationale that family members living on residential property with the legal possessor of the property share with the possessor legal protection from trespass and thus have a remedy for harm caused by trespass.²³¹ There is no element of transferred intent in this basis of liability. The defendants' liability stems from intentionally entering the land where the plaintiff resided.²³² No reported opinion citing the Restatement goes beyond allowing a member of the possessor's immediate family to recover. Liability for harm caused by trespass has not been extended to other persons residing on the land.

As far as can be ascertained,²³³ no court has ever endorsed and applied Prosser's claim that a defendant could be liable for any of the five torts stemming from the old trespass action when the defendant intended any one of the five. In modern American tort law, transferred intent operates only to the extent specified in the First and Second Restatements of Torts.

Prosser's claim also has no support in the authoritative texts and modern case law of England and other common law jurisdictions. To the extent transferred intent operates at all in these jurisdictions, it goes no further than liability for assault and battery when the defendant intended either and liability for battery when the defendant intended to strike someone other than the plaintiff.²³⁴ The most recent

employee. *Id.* at 215–17 (Hart, J., concurring) (quoting RESTATEMENT OF TORTS § 380).

229. *Beavers v. W. Penn Power Co.*, 436 F.2d 869, 873 (3d Cir. 1971) (child killed by contact with power line at edge of parents' property); *Wardrop v. City of Manhattan Beach*, 326 P.2d 15 (Cal. Ct. App. 1958) (child contracted polio from contaminated water pumped into yard of family's home); *St. Petersburg Coca-Cola Bottling Co. v. Cuccinello*, 44 So. 2d 670, 675–77 (Fla. 1950) (child hit by delivery truck).

230. In addition to *Keesecker*, see *Smith v. Lenoci*, 11 Conn. L. Rptr. 51 (Super. Ct. 1994) (child hit by tree falling into parent's property); *Connolley v. Omaha Public Power District*, 177 N.W.2d 492, 496–99 (Neb. 1970) (Spencer J., dissenting) (child injured by contact with power line on father's property).

231. See Prosser, *supra* note 3, at 659. The Second Restatement allows family members who live with the possessor of land to maintain an action for a private nuisance that interferes with their use and enjoyment of the family home because "members of the family of the possessor of a dwelling who occupy it along with him may properly be regarded as sharing occupancy with intent to control the land and hence as possessors." RESTATEMENT (SECOND) OF TORTS § 821E cmt. d (1979).

232. Some courts have denied liability for personal injuries resulting from trespass on the ground that a trespass action extends only to damage directly resulting from the trespass and the plaintiff's injuries were an indirect consequence of the trespass. *Mawson v. Vess Beverage Co.*, 173 S.W.2d 606 (Mo. Ct. App. 1943); *Connolley*, 177 N.W.2d 492.

233. Including by search of opinions citing Prosser in proximity to "transferred intent."

234. See R.P. BALKIN & J.L.R. DAVIS, *LAW OF TORTS* 32–34 (5th ed. 2013) (Australia); GARY CHAN KOK YEW & LEE PEY WOAN, *THE LAW OF TORTS IN SINGAPORE* 37–38 (2011); ALLEN M. LINDEN & BRUCE FELDTHUSEN, *CANADIAN TORT LAW* 34–35 (9th ed. 2011); CHRISTIAN WITTING, *STREET ON TORTS* 252–54 (14th ed. 2015) (England); EOIN QUILL, *TORTS IN IRELAND* 168–69 (4th ed. 2014). In these jurisdictions, unlike the United States, trespass to the person survives as a tort, and it has not been authoritatively established that a trespass

English case on transferred intent, *Bici v. Ministry of Defence*,²³⁵ accepted it as a basis of liability only when the plaintiff was struck by a force intended to apply to another person.²³⁶ There is no indication that a court in England or elsewhere would require intent for liability but decide that the intent requirement would be fulfilled by a type of transferred intent not accepted in the Restatements.

VI. EXPANSIVE TRANSFERRED INTENT LIABILITY SHOULD BE REJECTED

Would it be desirable to hold people liable for battery, assault, false imprisonment, trespass to chattels, or trespass to land when they have intended any result within the five torts? Even with recognition that transferred intent liability has so far been limited to battery, assault, and (for unintended confinees) false imprisonment, Prosser's theory of transferred intent might be adopted if it were thought that this would have desirable results. But transferred intent liability can be strongly criticized on a number of grounds, even in its application to battery and assault.²³⁷

The fundamental objection to transferred intent—one that Prosser made no attempt to refute—is, of course, that transferred intent subjects people to intentional tort liability when they had no intent to cause what happened to the plaintiff.²³⁸ This criticism has the strongest force when the defendant did not intend a result of the type that occurred, even under a broad concept of “type” or category of legally protected interests—as when the defendant had an intent to interfere only with some property interest (land or chattels) but unintentionally caused personal injury or apprehension of being injured. The interchangeability of the intent requirements of battery and assault may be justified on account of the closely related interests that these torts pertain to and the likelihood that apprehension of imminent battery will result from an act intended to cause a battery;²³⁹ but trespass to land, trespass to

action now requires intent to cause contact with the plaintiff's person (for trespass to the person) or property (for trespass to land or chattels). A defendant may be held liable because the injury was a direct result of the defendant's act and the act was negligent or at least reckless. Consequently, a rule of transferred intent is not needed to hold a defendant liable for an unintentional injury. See BALKIN & DAVIS, *supra*, at 32–34, 118; KIT BARKER, PETER CANE, MARK LUNNEY & FRANCIS TRINDADE, *THE LAW OF TORTS IN AUSTRALIA* 37–41 (5th ed. 2012); MICHAEL A. JONES, CLERK & LINDSELL ON TORTS 1092–93 (21st ed. 2014); LINDEN & FELDTHUSEN, *supra*, at 279–83; EDWIN PEEL & JAMES GOUDKAMP, *WINFIELD AND JOLOWICZ ON TORT* 50–51, 56–57 (19th ed. 2014). In the older English cases of trespass, clearly no intent to cause any particular consequence was required for liability. See *supra* text accompanying Part II.

235. [2004] EWHC 786 (QB) (Eng.).

236. *Id.* at [66]–[72]. The judge rejected a claim of assault, *id.* at [73]–[81], saying that he was “far from satisfied that the doctrine of transferred malice would apply to an assault in the same way as it applies to a battery.” *Id.* at [80]. He also doubted that transferred malice would apply when the defendant aimed at an animal and hit a person. *Id.* at [69].

237. The principal critical examinations are those of Beever, *supra* note 5, and Johnson, *supra* note 1.

238. See Hurd & Moore, *supra* note 28, at 389–90; Johnson, *supra* note 1, at 937 (both advocating abolition of transferred intent).

239. See TORTS TREATISE NO. 1(a) SUPPORTING RESTATEMENT NO. 1, at 32–33 (1925)

chattels, and intentional torts to the person (battery, assault, and false imprisonment) involve fundamentally different interests (respectively, control and use of land, control and use of chattels, and bodily integrity and dignity),²⁴⁰ their rules of liability are different, and there is no likelihood that an act intended to cause only physical contact with property will cause physical interference with a person, or that an act intended to cause only physical interference with a person will cause an invasion of property interests.²⁴¹

Transferred intent is objectionable also because it creates liability in the absence of negligence or actual injury to the plaintiff's person or property. There would usually be liability without transferred intent if the defendant caused actual injury and was shown to have acted negligently. There is no great need for liability when there is no actual injury, and it seems anomalous and unjust to impose liability when the defendant was not negligent or conducting an activity subject to strict liability. A person who is not negligent should not be held liable for battery or assault because the person aimed at an animal or inanimate property,²⁴² or for trespass to property because of an intent to commit a tortious interference with a person. Acting with such an intent is not in itself such culpable conduct as to warrant liability for any injury that results.²⁴³

In the reported cases, the main instances in which a defendant was held liable for injury because of transferred intent although not liable on the basis of negligence have involved children who threw an object or shot an arrow without intending to strike the person who was injured.²⁴⁴ Being able to hold a child liable for an intentional tort when the child had no intent to strike the plaintiff is hardly a persuasive argument for transferred intent.²⁴⁵ But even if there is some justification

(quoted *supra* text accompanying note 133); DOBBS ET AL., *supra* note 14, at 118–19.

240. See RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 110 cmts. b & c (Tentative Draft No. 1, 2015).

241. Because intent is defined to include knowledge that a consequence is substantially certain to result, RESTATEMENT (SECOND) OF TORTS § 8A (1965), there would be liability without transferred intent if the defendant knew that the defendant's act would cause a result within one of the five torts, even when the defendant's purpose was to cause a different type of result. For example, there would be liability for trespass to land or chattels when the defendant acted with a purpose to harm a person but knew that property would be harmed by the defendant's act. Cf. Sebok, *supra* note 15, at 1176 (example of battery when defendant acted with purpose of burning house and knowledge that person inside house would die).

242. There should not be liability for battery or assault when the defendant's intent was merely to handle property or enter land, especially if the defendant mistakenly believed he had a right to do so. See DOBBS ET AL., *supra* note 14, at 117; James Gordley, *The Common Law in the Twentieth Century: Some Unfinished Business*, 88 CAL. L. REV. 1815, 1845–47 (2000).

243. See Beever, *supra* note 5, at 408–10 (policy arguments support liability for consequences when conduct falls below a standard of care, not transferred intent); Johnson, *supra* note 1, at 931–33.

244. See *Weisbart v. Flohr*, 67 Cal. Rptr. 114 (Ct. App. 1968); *Singer v. Marx*, 301 P.2d 440 (Cal. Dist. Ct. App. 1956); *Alteiri v. Colasso*, 362 A.2d 798 (Conn. 1975).

245. See Johnson, *supra* note 1, at 925. Under Prosser's theory, Brian Dailey, the five-year-old defendant in *Garratt v. Dailey*, 279 P.2d 1091 (Wash. 1955), would be liable for battery because he intended to move the chair in which the plaintiff was about to sit (trespass to chattels), even if he had no intent to cause the plaintiff to fall and hit the ground. See

for allowing a battery claim and not requiring proof of negligence when the defendant acted with an intent to strike or frighten a person, this does not support allowing a battery action when the defendant had no intent to affect any person in this way. If there is no cause of action in negligence against the defendant because harm to the plaintiff was beyond the foreseeable risks or entirely unforeseeable, the defendant should not be held liable nevertheless by extending transferred intent beyond battery and assault.²⁴⁶ An intent to enter or physically interfere with the plaintiff's property should be an indispensable requirement of liability for trespass to land or chattels, and an intent to interfere with a person should be an indispensable requirement of liability for intentional torts to the person.

From a practical perspective, transferred intent is undesirable because of consequences that flow from a decision that there is intentional tort liability, especially when the plaintiff would otherwise have a viable negligence action.²⁴⁷ The consequences include disadvantages for plaintiffs as well as for defendants. There are decisions that the plaintiff's action is time-barred because the applicable limitation is the time allowed for battery actions rather than the longer time allowed for negligence actions.²⁴⁸ There are also decisions that the defendant's liability is not covered by insurance because there was an intentional tort.²⁴⁹ It might be more difficult to establish vicarious liability if there is an intentional tort,²⁵⁰ and an action against a government entity may be barred when the government is immune from liability for an intentional tort.²⁵¹ An injury claim against an employer might come under an exception for intentional injuries in the state's workers compensation law.²⁵² If the defendant is liable for an intentional tort, contributory negligence is not

Gordley, *supra* note 242, at 1843–45.

246. See *Beever*, *supra* note 5, at 409–10.

247. See RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS, at 2–15 (Tentative Draft No. 1, 2015) (discussing consequences of finding an intentional tort generally); *Johnson*, *supra* note 1, at 916–27.

248. *Baska v. Scherzer*, 156 P.3d 617 (Kan. 2007); *Trott v. Merit Dep't Store*, 484 N.Y.S.2d 827 (App. Div. 1985). *Cf.* *Alteiri v. Colasso*, 362 A.2d 798 (Conn. 1975) (action not time-barred, when limitation period longer for intentional tort action than for negligence action).

249. *Hermitage Ins. Co. v. Sportsmen's Athletic Club*, 578 F. Supp. 2d 399 (D. Conn. 2008) (victims shot by nightclub patron who aimed at other person); *Kraus v. Allstate Ins. Co.*, 258 F. Supp. 407 (W.D. Pa. 1966), *aff'd*, 379 F.2d 443 (3d Cir. 1967) (pedestrians injured when man intentionally detonated dynamite in car in which man was meeting estranged wife); *Eady v. Capitol Indem. Corp.*, 502 S.E.2d 514 (Ga. App. 1998) (bystanders shot during confrontation in bar); *Everhart v. Founders Ins. Co.*, 993 N.E.2d 1170 (Ind. App. 2013) (bartender shoved patron; patron stumbled and grabbed plaintiff as he fell); *Norman v. Ins. Co. of N. Am.*, 239 S.E.2d 902 (Va. 1978) (during argument, defendant fired pistol at floor; bullet ricocheted and hit plaintiff). *Cf.* *Farm Bureau Mut. Auto. Ins. Co. v. Hammer*, 177 F.2d 793 (4th Cir. 1949), *cert. denied sub nom.* *Beverage v. Farm Bureau Mutual Auto. Ins. Co.*, 339 U.S. 914 (1950) (car passengers injured when truck driver intentionally caused collision between truck and car).

250. See *Johnson*, *supra* note 1, at 920–21.

251. *Id.* at 924–25.

252. See *Citizen v. Theodore Daigle & Brother, Inc.*, 418 So. 2d 598, 603–04 (La. 1982) (Watson J., dissenting) (battery because of intent to assault); *Gray v. Morley*, 596 N.W.2d 922,

a defense.²⁵³ The limitations of “proximate cause” would not apply, so there could be liability for remote or unforeseeable consequences that would not be imposed if the basis of the defendant’s liability were negligence.²⁵⁴ The judgment debt may not be dischargeable in bankruptcy.²⁵⁵ These consequences are not inevitable. A court might, for example, decide that an injury was not intentionally caused for purposes of liability insurance coverage²⁵⁶ or workers compensation²⁵⁷ when the basis of intentional tort liability was transferred intent rather than intent to cause the injury that occurred.²⁵⁸ But they are sufficiently likely to warrant resistance to transferred intent operating as projected by Prosser.

When the plaintiff suffered the type of consequence intended by the defendant but was not the person intended to suffer it, transferred intent liability is less objectionable than when the defendant did not intend the type of consequence that occurred. Arguably a defendant deserves to be held liable (absent a defense) when the defendant intended to cause the type of harm that was suffered by the plaintiff,

927 n.3 (Mich. 1999) (Kelly J., dissenting) (battery because of intentional assault). This would be disadvantageous to the plaintiff if the plaintiff wanted workers compensation but not if the plaintiff wanted to maintain a tort action, as in *Gray v. Morley*.

253. *Labadie v. Semler*, 585 N.E.2d 862 (Ohio Ct. App. 1990) (plaintiff hit and injured by snowball; no contributory negligence defense because snowball thrown with at least intent to put plaintiff in apprehension of being hit). *But see* *City of Winter Haven v. Allen*, 541 So. 2d 128 (Fla. Dist. Ct. App.), *review denied*, 548 So. 2d 662 (Fla. 1989) (sheriff’s deputy shot by police officer during drug raid; if police officer’s action justifiable, there was “no wrongful intent to be transferred” and comparative negligence could apply).

254. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 33 cmts. c–e (2010); JOHN L. DIAMOND, LAWRENCE C. LEVINE & ANITA BERNSTEIN, UNDERSTANDING TORTS 5, 8 (5th ed. 2013); Atrens, *supra* note 15, at 401–06; Reynolds, *supra* note 4, at 531.

255. *In re White*, 18 B.R. 246 (E.D. Va. 1982) (bankrupt shot at motorcyclist and hit bystander). *See* Johnson, *supra* note 1, at 926–27.

256. *Allstate Ins. Co. v. Lewis*, 732 F. Supp. 1112 (D. Colo. 1990) (teenager aimed gun at victim and pulled trigger, believing gun to be empty); *American Ins. Co. v. Saulnier*, 242 F. Supp. 257 (D. Conn. 1965) (13-year-old threw soda bottle at child, possibly with intent to strike child; bottle hit different child); *Vanguard Ins. Co. v. Cantrell*, 503 P.2d 962 (Ariz. Ct. App. 1972) (gun fired with intent to frighten but not strike victim); *Farmers Ins. Grp. v. Sessions*, 607 P.2d 422 (Idaho 1980) (dissatisfied patron threw bar stool at restaurant manager but hit another employee); *Smith v. Moran*, 209 N.E.2d 18 (Ill. App. Ct. 1965) (victim shot when insured fired gun with intent to shoot someone else); *Cincinnati Ins. Co. v. Mosley*, 322 N.E.2d 693 (Ohio Ct. App. 1974) (motorist struck pedestrian while attempting to run down others).

257. *Citizen v. Theodore Daigle & Brother, Inc.*, 418 So. 2d 598 (La. 1982) (to frighten coworker as practical joke, employee aimed rifle at coworker and fired, erroneously believing that rifle was not loaded); *Rivera v. Safford*, 377 N.W.2d 187 (Wis. Ct. App. 1985), *review denied*, 383 N.W.2d 64 (Wis. 1986) (police officer swung at suspect; hit another officer in face).

258. Concerning the statute of limitations, see *Gottfried v. Joseph*, No. 1-87-12, 1988 WL 38099 (Ohio Ct. App. April 21, 1988). Plaintiff, accidentally injured during a fight in a bar, filed a complaint after expiry of the statute of limitations for assault and battery. The court held that the existence of assault and battery because of transferred intent did not preclude an action based on negligence.

even if the defendant did not intend harm to the plaintiff personally.²⁵⁹ Application of transferred intent might be accepted in cases involving property that are closely analogous to the cases of defendants held liable on grounds of battery for striking the plaintiff when intending to strike someone else. There could, for example, be liability for trespass to chattels when the defendant destroyed the plaintiff's airplane with explosives when intending to destroy a different airplane, or intentionally fired a gun into a pack of dogs without an intent to kill the plaintiff's dog specifically. Also, although it does involve an unintended type of harm, holding a defendant liable for battery in the unlikely scenario of harmful bodily contact resulting from an act intended to confine the plaintiff,²⁶⁰ or for false imprisonment in the even more unlikely scenario of unintended confinement resulting from an act intended to cause harmful or offensive bodily contact, might be accepted because battery and false imprisonment are both infringements of bodily freedom and dignity.²⁶¹ But any acceptance of transferred intent beyond what is endorsed in the Restatements, however limited, is likely to lead to further expansion of transferred intent liability. Unqualified limitation of transferred intent to battery, assault, and (when there was intent to confine a different person) false imprisonment is preferable. If a person really should be held liable for harm caused, when different from the harm or wrongful interference intended, a cause of action for negligence will almost always be available.

CONCLUSION

Prosser asserted that a defendant would be liable on the basis of transferred intent for any of the five torts descended from the common law trespass action—battery, assault, false imprisonment, trespass to chattels, and trespass to land—when the defendant intended to cause a result within any of the five. However, this has never been the law. In English common law and older American tort law, liability for these torts did not require intent to cause a specified consequence, so no doctrine of transferred intent was needed in order to hold a defendant liable. In modern American tort law, intent to cause a certain consequence is a requirement of liability, and there has been acceptance of some liability based on transferred intent. But this has not gone beyond the acceptance of transferred intent in the First and Second Restatements of Torts, which is limited to battery, assault, and (for plaintiffs other

259. See DOBBS ET AL., *supra* note 14, at 118. *But see* Beever, *supra* note 5, at 405–08 (contending that to disregard the identity of the person harmed would be fundamentally inconsistent with “the most basic and obvious structural features of the law of tort,” which creates a cause of action because of a personal wrong to the plaintiff and which allows only the victim of a tort to bring suit because of its commission, unlike criminal law).

260. An example would be accidentally slamming a room door on the plaintiff's hand when the plaintiff was to be locked in the room. JOHN C.P. GOLDBERG, ANTHONY J. SEBOK & BENJAMIN C. ZIPURSKY, *TORT LAW: RESPONSIBILITIES AND REDRESS* 635 (3d ed. 2012). If the intended confinement occurred and caused bodily harm, this would be consequential damage to be remedied in a false imprisonment action. See RESTATEMENT (SECOND) OF TORTS § 42 cmt. b (1965); KEETON ET AL., *supra* note 2, at 48.

261. See RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 110 cmts. b & c (Tentative Draft No. 1, 2015).

than the person the defendant intended to confine) false imprisonment.²⁶² Transferred intent does not operate between torts to the person and property torts or within the property torts.

It is curious that Prosser reached the conclusions he did. Undoubtedly he saw patterns in the results of the cases, with defendants held liable to people they did not intend to injure for torts the defendants did not intend to commit or types of damage they did not intend to cause. But most of the cases he discussed or cited were decided before intent in the modern sense was required for liability, or cases of liability for the unintended consequences of trespass to land. Prosser also had little to say in favor of transferred intent on its merits. He called it a “curious survival of the antique law”²⁶³ and an “arrant, bare-faced fiction of the kind dear to the heart of the medieval pleader.”²⁶⁴ Prosser’s only defense of transferred intent liability was that there was “some merit in the old idea of the absolute wrong,”²⁶⁵ with the defendant required to pay for the damage caused, if it was within the scope of the trespass action and directly caused. He gave the example of a plaintiff struck by a bullet intended for someone else, but none involving a property tort.

Prosser’s claim about transferred intent is mentioned in a number of torts treatises and casebooks,²⁶⁶ but only one²⁶⁷ presents Prosser’s position as if it were the law today. The editors of the posthumous edition of Prosser’s *Law of Torts* considered it necessary to change the text to state that possibly transferred intent would apply beyond battery and assault to include false imprisonment, so the defendant would be liable for any of the three when the defendant intended any of the three.²⁶⁸ The previous edition’s references to trespass to chattels and trespass to land²⁶⁹ were deleted.

There was not much authority recognizing transferred intent when the First Restatement was written, even for battery and assault.²⁷⁰ The Reporter, Francis Bohlen, was aware of this.²⁷¹ As Reporter for the Second Restatement, Prosser might,

262. Interpreting the Restatement’s position on trespass to land as recognition that family members of the household share occupancy with the land’s possessor, not as acceptance of transferred intent liability when the defendant trespassed on land belonging to a third party. See *supra* text accompanying notes 177–93, 224–32.

263. Prosser, *supra* note 3, at 650.

264. *Id.*

265. *Id.* at 661.

266. DIAMOND ET AL., *supra* note 254, at 4; DOBBS ET AL., *supra* note 14, at 116; GOLDBERG ET AL., *supra* note 260, at 636; VINCENT R. JOHNSON, *STUDIES IN AMERICAN TORT LAW* 54 (5th ed. 2013); LINDEN & FELDTHUSEN, *supra* note 234, at 35; SCHWARTZ ET AL., *supra* note 125, at 31; DAVID WEISSBRODT, MARY PATRICIA BYRN & DONALD MARSHALL, *THE COMMON LAW PROCESS OF TORTS* 63 (2d ed. 2012).

267. DIAMOND ET AL., *supra* note 254, at 4.

268. KEETON ET AL., *supra* note 2, at 38.

269. PROSSER, *supra* note 2, at 33.

270. So far as can be determined, transferred intent was not mentioned in any reported tort case until *Palsgraf v. Long Island Railroad Co.*, 162 N.E. 99 (N.Y. 1928), *rearg. denied*, 164 N.E. 564 (N.Y. 1928), and then only to contrast it with negligence liability. *Id.* at 101. The author of the opinion, Chief Judge Cardozo, was an Adviser for the Restatement of Torts and thus familiar with the inclusion of transferred intent in drafts of the Restatement.

271. See *supra* note 205.

despite the absence of solid precedent for it, have attempted to expand transferred intent in the Restatement to include trespass to chattels, trespass to land, and false imprisonment generally; but there is no indication that he ever did so. It is likely that the Third Restatement will maintain the position on transferred intent adopted by its predecessors.²⁷² The Restatements have consistently excluded liability for one of the torts to the person because of an intent to commit one of the torts to property and vice versa.

While acting with an intent to cause physical interference with a person or property, absent a legal right to do so, is legally wrongful conduct, it is not so wrongful as to warrant liability for unintended consequences as a general rule. If transferred intent liability is justified at all, it is only when the type of harm caused is the same as or at least closely associated with the type of harm intended and vital interests may warrant a *per se* rule of liability, as when the defendant intended a battery to A and caused a harmful or offensive bodily contact to B, or caused A to be put in apprehension of the intended battery. Otherwise, any liability for an unintended result of the defendant's act should be grounded in negligence or strict liability. An intentional tort should not be found when in reality there was no intent to cause what happened.

Prosser's treatise and articles on tort law have such authority that there is always a possibility that anything he wrote may be accepted by a judge or legal author. But no court has adopted or applied Prosser's position on transferred intent in a reported case. When D accidentally hits P while throwing a rock at a tree belonging to P or a third party, it is not battery. It is not assault if P is unintentionally put in apprehension of being hit by the rock, or trespass to chattels if P's car or cat is accidentally hit. Prosser's description of transferred intent was not the law when he incorporated it into his *Transferred Intent* article and treatise, it is not the law now, and it should not become the law.

272. See RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 110 (Tentative Draft No. 1, 2015).