Supreme Court of Wisconsin

Vosburg v. Putney

50 N.W. 403 (Wis. 1891) *

Lyon, J.

"[The plaintiff, 14 years old at the time in question, brought an action for battery against the defendant, 12 years old. The complaint charged that the defendant kicked the plaintiff in the shin in a schoolroom in Waukesha, Wisconsin, after the teacher had called the class to order. The kick aggravated a prior injury that the plaintiff had suffered and caused his leg to become lame. The jury found, in a special verdict, that the plaintiff had, during the month of January 1889, received an injury just above the knee, which became inflamed and produced puss and that such injury had, on February 20, 1889, nearly healed at the point of the injury. The jury further found that the plaintiff had not, prior to February 20, been lame as a result of such injury, nor had his tibia in his right leg become inflamed or diseased to some extent before he received the blow or kick from the defendant. Instead, it was the defendant's kick that was the exciting cause of the injury to the plaintiff's leg. And, although the defendant, in touching the plaintiff with his foot, did not intend to do plaintiff any harm, the jury awarded plaintiff twenty-five hundred dollars. The trial court entered a judgment for the plaintiff on the special verdict and the defendant appealed.]

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

Hence, as applied to this case, kicking the plaintiff by the defendant was an unlawful act, and the defendant desired to kick plaintiff. Had the parties been upon the playgrounds of the school, engaged in the usual boyish sports, the defendant being free from malice, wantonness, or negligence, and intending no harm to plaintiff in what he did, we should hesitate to hold the act of the defendant unlawful or that he could be held liable in this action. Some consideration is due to the implied license of the playgrounds. But it appears that the injury was inflicted in the school, after it had been called to order by the teacher and after the regular exercises of the school had commenced.

Under these circumstances, no implied license to do the act complained of existed, and such act was a violation of the order and decorum of the school and necessarily unlawful. In addition, although the defendant might not have intended the plaintiff to become lame, there is no question that he intended to kick him. One who intends the act is also responsible for the subsequent harm. Hence, we are of the opinion that, under the evidence and verdict, the action may be sustained."

*This edited version of Vosberg is from Ruta K. Stropus & Charlotte D. Taylor, Bridging the Gap Between College and Law School 31-32 (2d ed. 2009)