

DICKENS v. PURYEAR

Supreme Court of North Carolina, 1981.
302 N.C. 437, 276 S.E.2d 325.

EXUM, JUSTICE.

Plaintiff's complaint is cast as a claim for intentional infliction of mental distress. It was filed more than one year but less than three years after the incidents complained of occurred. . . . Defendants' motions for summary judgment were allowed on the ground that plaintiff's claim was for assault and battery; therefore it was barred by the one-year statute of limitations applicable to assault and battery.

The facts brought out at the hearing on summary judgment may be briefly summarized: For a time preceding the incidents in question plaintiff Dickens, a thirty-one year old man, shared sex, alcohol and marijuana with defendants' daughter, a seventeen year old high school student. On 2 April 1975 defendants . . . lured plaintiff into rural Johnston County, North Carolina. Upon plaintiff's arrival defendant Earl Puryear, after identifying himself, . . . pointed a pistol between plaintiff's eyes and shouted "Ya'll come on out." Four men wearing ski masks and armed with nightsticks then approached from behind plaintiff and beat him into semi-consciousness. They handcuffed plaintiff to a piece of farm machinery and resumed striking him with nightsticks. Defendant Earl Puryear, while brandishing a knife and cutting plaintiff's hair, threatened plaintiff with castration. During four or five interruptions of the beating defendant Earl Puryear and the others, within plaintiff's hearing, discussed and took votes on whether plaintiff should be killed or castrated. Finally, after some two hours and the conclusion of a final conference, the beatings ceased. Defendant Earl Puryear told plaintiff to go home, pull his telephone off the wall, pack his clothes, and leave the state of North Carolina; otherwise he would be killed. Plaintiff was then set free.

Plaintiff filed his complaint on 31 March 1978. It alleges that defendants on the occasion just described intentionally inflicted mental distress upon him. He further alleges that as a result of defendants' acts plaintiff has suffered "severe and permanent mental and emotional distress, and physical injury to his nerves and nervous system." He alleges that he is unable to sleep, afraid he may be killed, suffering from chronic diarrhea and a gum disorder, unable effectively to perform his job, and that he has lost \$1000 per month income. . . . Judge Braswell . . . concluded that plaintiff's claim was barred by G.S. 1-54(3), the one-year statute of limitations applicable to assault and battery. . . .

[T]he Court of Appeals concluded that the complaint's factual allegations and the factual showing at the hearing on summary judgment support only a claim for assault and battery. The claim was therefore, barred by the one-year period of limitations applicable to assault and battery. Plaintiff, on the other hand, argues that the factual showing on

the motion supports a claim for intentional infliction of mental distress—a claim which is governed by the three-year period of limitations. At least, plaintiff argues, his factual showing is such that it cannot be said as a matter of law that he will be unable to prove such a claim at trial. We agree with plaintiff's position.

North Carolina follows common law principles governing assault and battery. An assault is an offer to show violence to another without striking him, and a battery is the carrying of the threat into effect by the infliction of a blow. The interest protected by the action for battery is freedom from intentional and unpermitted contact with one's person; the interest protected by the action for assault is freedom from apprehension of a harmful or offensive contact with one's person. The apprehension created must be one of an immediate harmful or offensive contact, as distinguished from contact in the future. . . .

Common law principles of assault and battery as enunciated in North Carolina law are also found in the Restatement (Second) of Torts (1965) (hereinafter "the Restatement"). As noted in § 29(1) of the Restatement, "[t]o make the actor liable for an assault he must put the other in apprehension of an *imminent* contact." (Emphasis supplied.) The comment to § 29(1) states: "The apprehension created must be one of imminent contact, as distinguished from any contact in the future. 'Imminent' does not mean immediate, in the sense of instantaneous contact. . . . It means rather that there will be no significant delay." Similarly, § 31 of the Restatement provides that "[w]ords do not make the actor liable for assault unless together with other acts or circumstances they put the other in reasonable apprehension of an *imminent* harmful or offensive contact with his person." (Emphasis supplied.) The comment to § 31 provides, in pertinent part:

"a. Ordinarily mere words, unaccompanied by some act apparently intended to carry the threat into execution, do not put the other in apprehension of an imminent bodily contact, and so cannot make the actor liable for an assault under the rule stated in § 21 [the section which defines an assault]. For this reason *it is commonly said in the decisions that mere words do not constitute an assault*, or that some overt act is required. *This is true even though the mental discomfort caused by a threat of serious future harm on the part of one who has the apparent intention and ability to carry out his threat may be far more emotionally disturbing than many of the attempts to inflict minor bodily contacts which are actionable as assaults. Any remedy for words which are abusive or insulting or which create emotional distress by threats for the future, is to be found under §§ 46 and 47 [those sections dealing with the interest in freedom from emotional distress].*

"1. A, known to be a resolute and desperate character, *threatens to waylay B on his way home on a lonely road on a dark night. A is not liable to B for an assault under the rule stated in § 21. A may, however, be liable to B for the infliction of severe emotional distress*

by extreme and outrageous conduct, under the rule stated in § 46.”
(Emphasis supplied.)

... Thus threats for the future are actionable, if at all, not as assaults but as intentional inflictions of mental distress....

Although plaintiff labels his claim one for intentional infliction of mental distress we agree with the Court of Appeals that “[t]he nature of action is not determined by what either party calls it....” The nature of the action is determined “by the issues arising on the pleading and by the relief sought,” and by the facts which, at trial, are proved or which, on motion for summary judgment, are forecast by the evidentiary showing.

Here much of the factual showing at the hearing related to assaults and batteries committed by defendants against plaintiff. The physical beatings and the cutting of plaintiff’s hair constituted batteries. The threats of castration and death, being threats which created apprehension of immediate harmful or offensive contact, were assaults. Plaintiff’s recovery for injuries, mental or physical, caused by these actions would be barred by the one-year statute of limitations.

The evidentiary showing on the summary judgment motion does, however, indicate that defendant Earl Puryear threatened plaintiff with death in the future unless plaintiff went home, pulled his telephone off the wall, packed his clothes, and left the state. The Court of Appeals characterized this threat as being “an immediate threat of harmful and offensive contact. It was a present threat of harm to plaintiff....”

We disagree with the Court of Appeals’ characterization of this threat. The threat was not one of imminent, or immediate, harm. It was a threat for the future apparently intended to and which allegedly did inflict serious mental distress; therefore it is actionable, if at all, as an intentional infliction of mental distress.

Having concluded, therefore, that the factual showing on the motions for summary judgment was sufficient to indicate that plaintiff may be able to prove at trial a claim for intentional infliction of mental distress, we hold that summary judgment for defendants based upon the one-year statute of limitations was error and we remand the matter for further proceedings against defendant Earl Puryear not inconsistent with this opinion....

Notes

1. *Summary judgment.* Summary judgment is granted where there is no material issue of fact and the only issue is one of law. The sequence of procedure in *Dickens* is typical. After the complaint was filed, the defendants engaged in “discovery,” a procedure for taking testimony of witnesses under oath, but before trial and not in court. The testimony was transcribed and the resulting “deposition” filed with the court. The defendant can then move for summary judgment. If the deposition and any formal admissions of the parties reveal disputes about significant facts, the case must go on to the

trial stage for resolution by a jury. If there is no material factual dispute, however, the judge can grant the motion for summary judgment on the legal dispute.

2. What happens to the *Dickens* case after the Supreme Court of North Carolina remands it?

3. Dabbs holds Purtle's cat over the edge of Dabbs' roof. "Purtle," he says, "I'm going to drop your cat now and we can see how many lives it has." As Dabbs knows, Purtle loves his cat. Is Dabbs' action an assault? What rule determines the answer?

4. Dabbs calls Purtle, his next door neighbor, and says: "I'm coming over right now and I'm going to beat you up." Dabbs slams down the phone, but becomes absorbed in a TV program and never leaves the house. Is it an assault? What rule would determine the answer?

5. *Free Access to Clinics Act*. The federal Free Access to Clinic Entrances Act (FACE), 18 U.S.C.A. § 248, creates a civil claim against anyone who by threat, force, or physical obstruction intentionally injures, intimidates, or interferes with a person seeking to obtain or provide "reproductive health services." Dr. Lucero alleged that Father David Trosch appeared on the Geraldo Show, a television program. Trosch allegedly indicated that it would not be murder to kill doctors who performed abortions. Dr. Lucero performed abortions and was also on the same show. Trosch answered the question "would you kill him?" by saying "He is a mass murderer and should be dead." In Birmingham, where Lucero practices, Trosch made similar statements. Would Trosch's words count as a common law assault? Would they be actionable under the statute? *Lucero v. Trosch*, 904 F.Supp. 1336 (S.D.Ala.1995); *Lucero v. Trosch*, 928 F.Supp. 1124 (S.D. Ala. 1996).

6. *Stalkers*. Statutes in a number of states create a claim against stalkers who follow or stalk someone. The stalkers almost always seem to be men and their victims women. The California statute creates a statutory tort called stalking based on a pattern of conduct the "intent of which was to follow, alarm, or harass the plaintiff," with resulting reasonable fear by the plaintiff for herself or an immediate family member. In addition, the defendant must either make a credible threat or violate a restraining order. CAL. CIV. CODE § 1708.7.

7. *Casual language about assault*. Sometimes courts have said that "[e]very battery necessarily involves an assault." *McGlone v. Hauger*, 56 Ind.App. 243, 104 N.E. 116 (1914). Can this be an accurate formulation? To test it, suppose the defendant struck a sleeping plaintiff with a baseball bat. Do you have a firm conclusion? It takes a good deal of knowledge and lawyerly experience to know when judges' remarks should be taken literally and when they should be taken as only a general approximation of the rule or as only remarks addressed to the particular facts of the case under consideration.

8. *Damages*. The plaintiff suing for assault can recover damages of the same kind recoverable for battery.

CULLISON v. MEDLEY, 570 N.E.2d 27 (Ind.1991). Defendants apparently believed that plaintiff had been "bothering" a young woman in their family. The plaintiff claimed they entered his home at night after he had gone to bed. While accusing the plaintiff of being a "pervert" and berating him generally, one of the defendants kept grabbing at a gun strapped to his thigh, as if to shoot the plaintiff. *Held*, such facts are sufficient to show assault for which mental distress damages could be recovered.

The Use of Words in Putative Assaults

(a) *Words alone*. Courts have sometimes said that words alone cannot count as an assault. It is almost impossible to imagine words alone, divorced from any act at all. Suppose someone stands perfectly still at the entrance to a dark alley. He is masked and holding a gun. He says: "I am now going to shoot you dead." Surely this could be reasonably understood as a threat of imminent bodily harm. Maybe "words alone" is another shorthand or inaccurate statement. Perhaps it means that the plaintiff must reasonably apprehend an immediate touching and that in most cases words alone will not suffice to create such an apprehension.

(b) *Words negating intent to effect immediate touching*. Sometimes acts seem threatening but the threat is countered by words. The defendant draws back his arm as if to strike, but at the same time he is saying "If the police officer were not here, I'd punch your nose." The words clearly mean he is *not* going to punch your nose. If there are no facts to make it reasonable to believe that the defendant will strike you in spite of the police officer's presence, this does not look like an assault.

(c) *Words offering a choice of tortious alternatives*. Suppose the defendant in a menacing way says "I won't beat you to a pulp if you give me your basketball tickets; otherwise you are going to be pretty bloody."