A Negligent Criminal Assault?

Roy Vance Jr.
University of Kentucky

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A NEGLIGENT CRIMINAL ASSAULT?

The generally accepted definition of criminal assault is that of Hawkins wherein he says, "An assault is an attempt or offer with force and violence to do a corporal hurt to another." Bishop's New Criminal Law defines an assault as any unlawful physical force creating a reasonable apprehension of immediate physical injury to a human being. The difference between these two definitions is indicative of the great confusion in the law regarding the element of intent in a criminal assault.

Much of this confusion has resulted from the manner in which courts have loosely denominated a particular act as an assault when from a strictly legal standpoint the act was either a battery or an assault and battery. The problem is further complicated by the fact that courts have not defined with exactness what is meant by the word intent as it is used in assault cases.

There are two concepts of the word intent; (1) the intent to do the act which results in the harm, and (2) the intent that the act done will result in harm. In a broad sense, the intent to do the act is present in every negligence case. The act of firing into a moving train and thereby causing the death of another has been held to be a negligent crime despite the fact that firing the gun was intentional. An automobile driver who causes the death of another by reckless driving intends to drive the car, perhaps even to drive it carelessly, but ordinarily he does not intend the harm that follows. However, if injury results, his act is criminal on the theory of negligence rather than intention. Thus, the fact that the actor intended the act which

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3 The best example of this, perhaps, is the automobile cases in which the courts speak in terms of assault where the act is actually a battery. For a discussion of the different considerations presented in cases of assault and of battery, see Hall, The Reckless Motorist, (1940) 31 Jour. Crim. Law 133, 137.
5 State v. Massey, 20 Ala. App. 56, 100 So. 625 (1924); State v. Sheppard, 171 Minn. 414, 214 N.W. 280 (1927); State v. Weltz, 155 Minn. 143, 193 N.W. 42 (1923); State v. Trott, 190 N. Car. 674, 130 S. E. 627 (1925).
resulted in harm does not mean that the crime is intentional rather than negligent. It would seem that the second form of intent, namely, the intent to cause physical injury, is the basis of the distinction between intentional and negligent crimes.

Therefore this paper is limited to a discussion of the element of *intent to cause physical injury* in cases which are, properly speaking, assaults.

The fact that some cases hold present ability to do the act is not an essential element of the criminal assault, is some basis for the contention that specific intent to injure is not necessary. If the actor knew of his inability to inflict injury, it is submitted that he could not possibly have intended to do so. If the actor did not intend to inflict injury and is still guilty of assault, it necessarily follows that specific intent to injure is not an element of the crime.

The apprehension or fear of harm by the person assaulted is the decisive factor in those cases holding present ability unnecessary. Herein lies the second ground for holding specific intent to injure an unnecessary element of the crime. A few of the cases and some of the writers have reached the view that the basis of the crime of assault should be the apprehension of fear by the victim and not the intention of the actor. Thus, if the crime can be predicated upon "the apprehension of fear" theory—specific intent to injure would not necessarily be an element of the crime.

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7 *Price v. United States, 156 Fed. 950, 85 C.C.A. 247 (1907); Comm. v. White, 110 Mass. 107 (1872); Malone v. State, 77 Miss. 612, 26 So. 968 (1900); Beach v. Hancock, 27 N.H. 223, 59 Am. Dec. 373 (1853).*

8 This doctrine has been attacked on two grounds. First, that the application of the "apprehension of fear" doctrine as applied to criminal law leaves no distinction between the tort and the crime of assault. Note (1939) 11 Rocky Mt. Law Rev. 104, 107. Second, that "apprehension of fear" cannot be the sole basis for the crime of assault because a person can be assaulted in ignorance of the fact. Note (1936) 26 Jour. Crim. Law 128, 131. To the first of these objections it is submitted that there need be no distinction between the tort and the crime of assault, except in negligence cases. There, of course, the crime would require a higher degree of negligence than the tort. Can it be said that it is inherently bad for the criminal law to follow the civil? Society has the same interests at stake in both the civil and criminal assault. In each case, society desires protection from being put in fear of harm. To say that the theory of the civil law is compensation and that of the criminal law is
A third argument for the recognition of the negligent criminal assault is found in the trend of the law toward objectivity as contrasted with subjective factors of the actor's mental state. Thus, murder, manslaughter, and battery, all of which originally required intent, now may be committed by negligence. The trend in this direction in the case of assault is indicated by the decisions which do not require proof of evil intent but imply it from the act when the act is malum in se. Once the law starts implying intent for any reason, it is but another step until the blameworthy state of mind as shown by criminal negligence will be allowed to take its place. There seems to be no apparent reason why in assault, as in murder, negligence itself cannot be a separate basis of the crime.

It is submitted that (1) the cases which do not require present ability, (2) the cases and authorities which indicate that the basis of the crime of assault is "apprehension of fear", and (3) the trend of the law toward objectivity, all indicate that the next step in the law should be the recognition of the negligent criminal assault.

An illustration will demonstrate the change advocated. Suppose A fires a gun at B, intending only to scare B but which nevertheless puts him in mortal fear of harm. Under Hawkin's view this would not be an assault because the intent to cause injury is lacking. Under Bishop's rule this would be an assault because the intent to cause injury is lacking. Under Bishop's rule this would be an assault because the intent to cause injury is lacking.

punishment does not negative the fact that the act for which society demands compensation may also be the same act from which it demands protection by criminal punishment.

As to the second objection, it is not the theory of this paper that the sole basis of the crime is apprehension of fear. Criminal negligence in itself is a blameworthy state of mind and while it is only a fiction to say that this state of mind infers intent, courts have often allowed this state of mind to take the place of intent. Cases holding that no specific intent to injure is necessary are some authority for the position that an intent implied from the negligence of the act would be sufficient. Further it should be noted that all the cases cited as sustaining the proposition that a person can be assaulted in ignorance of the fact do not really bear this out. In practically all the cases cited the victim was aware of the assault.


2 Professor Kweigan reaches a similar conclusion in a different manner. Commencing with the propositions that all batteries include assaults and that batteries can be committed negligently, he reasons that assaults too can be negligently committed. His conclusion rests upon the theory that a battery is a consumated assault but there is doubt as to the correctness of this assumption. Kweigan, Assault: Is an Intent to Do Harm Requisite to a Criminal Assault? Note (1929) 17 Geo. L. J. 56.
But suppose A without seeing B fired the gun negligently in B's direction. Again under Hawkin's rule there would be no assault because of the absence of an intent to injure. From B's standpoint just as much harm has been done as if A had fired the gun with the intention of killing him. For this reason it is submitted that the criminal law should be enlarged to attach responsibility for a negligent assault.

ROY VANCE, JR.

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