

Restatement Second of Torts

§ 164. Intrusions Under Mistake

One who intentionally enters land in the possession of another is subject to liability to the possessor of the land as a trespasser, although he acts under a mistaken belief of law or fact, however reasonable, not induced by the conduct of the possessor, that he

- (a) is in possession of the land or entitled to it, or
- (b) has the consent of the possessor or of a third person who has the power to give consent on the possessor's behalf, or
- (c) has some other privilege to enter or remain on the land.

§ 166. Non-liability for Accidental Intrusions

Except where the actor is engaged in an abnormally dangerous activity, an unintentional and non-negligent entry on land in the possession of another, or causing a thing or third person to enter the land, does not subject the actor to liability to the possessor, even though the entry causes harm to the possessor or to a thing or third person in whose security the possessor has a legally protected interest.

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MISTAKE IN THE LAW OF TORTS.

THE only rational basis for allowing recovery in tort seems to be blamableness. To allow one man to compel another to make good a loss which the first has suffered, when that other is no more to blame than he, simply transfers the misfortune from one innocent party to another equally innocent. That it was the defendant whose act caused the loss does not alter the case. People must act. One cannot then be considered reprehensible merely because he has acted. Because of this necessary action accidents will happen and losses will occur when neither party is at all in fault. If the law is to do anything in such cases the sensible thing would be to divide the loss equally between the parties concerned. The common law does not do this. The reasons no doubt are historical. In a rude stage of civilization it seemed fairly reasonable to make a man pay for all the damage he had done, and the rule of absolute liability was the result. In getting away from that rule the courts have held that, in this case and that where previously there was liability, there shall be no recovery. As a result, in many cases the party suffering the loss can recover nothing, while in the rest he can hold the defendant liable for all the damage done. Granting that we cannot have a division of misfortune, it is useless simply to shift it unless for good reason. It is better, then, where neither party is to blame, to let the loss lie where it happens to fall.

There is of course nothing new in the above paragraph. The

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same ideas have been well expressed again and again.¹ Their good sense has appealed to the judges, and as a result our law of torts has been changed from one of absolute liability to one in which for the most part recovery is based on culpability.² Now, it can be safely said that for accidental injury one is not liable.³ However, in a large class of cases, which may be called cases of mistake, there is no fault on the part of the defendant, just as there is none in cases of accident, and yet recovery is allowed. To call attention to this aspect of such cases this paper is written. ● ● ●

At the outset it is to be noticed that the mistake may be made either negligently or non-negligently. A negligent mistake may be defined as one which a prudent man under the circumstances would not make. We should expect to find that a mistake made negligently would not avail a defendant in any way, for only non-negligent mistake is analogous to accident. Such no doubt is the law.¹

Coming, then, to non-negligent mistake, the cases that have arisen may be noticed, contrasting them with those as to accident.

Concerning torts to the person it must now be conceded that there is no liability for accident, whether the wrong takes the form of assault, battery, or imprisonment.² The authorities regarding mistake are by no means so unanimous. On the one hand, we have certain instances where the mistake is held no excuse; on the other hand, we have even more numerous sets of circumstances in which the defendant is not held. In the following cases the mistake does not aid the defendant: where an officer with valid process arrests the wrong person,¹ or arrests on process not fair on its face,² or commits a battery mistakenly supposing that the plaintiff is unlawfully resisting a levy;³ where a private person arrests for a felony without warrant when none had been committed;⁴ where, without warrant, there is an arrest of one mistakenly supposed to be breaking the peace;⁵ where the defendant erroneously supposes that he is defending his property against non-criminal invasion,⁶ that he is recapturing his property,⁷ or that the plaintiff is a lunatic proper to be imprisoned.⁸ But in the following cases the mistake excuses: where an officer supposes one to be subject to arrest who has a privilege;⁹ where a private person mistakenly supposes that an officer whom he assists has proper process;¹⁰ where an officer erroneously thinks that the plaintiff is a felon,¹¹ or where a private person, a felony having actually been committed, makes the same mistake;¹² where the defendant wrongly supposes that the plaintiff is the aggressor in an affray,¹³ or that the plaintiff is assaulting him when in fact no attack is being made,¹⁴ or another is the assailant;¹⁵ where the defendant commits

a battery on the plaintiff in defence of another person mistakenly thinking that his interference was necessary to repel the plaintiff's assault on such person;¹ where the defendant erroneously supposes he is defending his property against criminal attack;² where a parent,³ teacher,⁴ or captain of a vessel⁵ thinks that actions which deserve punishment have taken place; where a judge makes a mistake of fact as to his jurisdiction,⁶ or a like mistake as to the merits of the case.⁷ There are other instances where the question has arisen, but these sufficiently show the clear divergence of holding.

It is believed that no adequate distinction can be drawn between these two lines of cases. The injury inflicted by the defendant may be as great in one as in the other. The chances of mistake seem about equal. When the defendant is protecting himself against supposed injury, there seems some tendency to excuse him because of the mistake when the injury would be very serious, but not otherwise. For example, in the case of supposed battery to his person or criminal entry into his house, he is excused if he attacks the person he thinks a wrongdoer, while he is not in the case of an entry on land if merely a civil wrong. But preventing a dangerous lunatic from causing injury is about the same as preventing an attack on the person, and yet in that case the defendant is held. The distinction between cases where an officer arrests the wrong person and those where he arrests a privileged person is rather shadowy, since he does not have to make the erroneous arrest in either case.⁸ Also, why is it that an officer has such exemption from liability for error when he is acting without warrant, and yet is held so strictly when acting under a warrant? If anything, one would expect more stringency when acting without warrant. Keeping in mind that in all the cases the defendant can be accused of no lack of care, it does seem that a different decision might well have been reached in those instances where he is held liable. No doubt the doctrines that an officer is liable for an arrest not covered by the process, and that a private person cannot justify an arrest for felony without a warrant unless a felony has been committed, are too well established for judicial overthrow. But in other cases where the law is not so clear, the rule that one is not liable in tort unless culpable might well be applied.

The rule as to accident applies to injuries to personalty quite as fully as to wrongs to the person.¹ On the other hand, in cases of mistake the courts almost invariably refuse to free the defendant. He has been held: where he thought he owned the property,² or that he had a qualified interest which justified his action;³ where he had authority from one supposed to be owner;⁴ where he was a sheriff levying on wrong goods,⁵ or a private party aiding a sheriff

in so doing,¹ or a subordinate public officer acting under orders from his superior;² where he and other assignees in bankruptcy seized property not belonging to the bankrupt;³ where he thought he was justified for the purpose of protecting the property;⁴ where he thought the property wild game.⁵ On the other hand, he has been excused: where he was an officer levying on property privileged from execution;⁶ where he dealt with property under a statute concerning lost property and the property in question proved to be merely hidden;⁷ where he was a judge making a mistake of fact as to jurisdiction,⁸ or merits.⁹

There is little room for argument in the face of such an overwhelming weight of authority. It is important to notice that the contrary might have been held, and yet the rule that the owner may follow his property maintained. It is conceivable that the law should allow the owner to regain his property, and yet that he should have no action for damages against any one who had dealt with it in the non-negligent belief that he was acting rightfully.

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Sir Frederick Pollock, in the first chapter of his treatise on Torts, calls attention to the anomalous character of the rule we have been considering and accounts for it as a result of an early confusion of actions merely to recover property with actions to redress wrongs. The latter being more simple in procedure were sought by suitors desiring merely vindication of property rights, and the courts, without noticing that giving redress as for a wrong was an entirely different thing from merely allowing the owner to regain his property, permitted the innovation.⁴ Whatever the origin of the rule, it certainly is now an anomaly. In the Factors

Acts we see some tendency to get away from it in the hardest cases.¹ While we cannot hope for its entire abolition, we may hope that if its anomalous character were once fully understood it would not be used as furnishing a guiding principle for the decision of analogous cases. In many cases of injuries to the person, we have seen that the principle is not applied. Unfortunately they furnish about the only argument from precedent against the rule.²

If we turn from injuries to personalty to injuries to realty, about the same condition of the law confronts us. As everywhere else there is no liability for accident.³ But in the cases of mistake that have arisen the defendant is held responsible. Such was the decision: where he thought he owned the land,⁴ where he mistook the boundary and so trespassed,⁵ where he thought he had a right

of common,¹ where he had a license from one he thought owner,² where as an officer he entered the wrong land to levy an attachment,³ where he entered under void process,⁴ where he had authority from one he thought competent to give it,⁵ where he entered to retake goods which he erroneously thought were his and wrongfully taken by the owner of the land.⁶ No doubt in some cases defendants who had injured realty under a non-negligent mistake would be excused. Judicial officers causing injury to realty through mistaken judgment would be an example.⁷ But clearly in the absence of special reasons for exemption the defendant is held liable. The reasons against such a ruling are identical with those against a like ruling as to personalty and need not be repeated.



No doubt some will think it useless to argue against a principle that has such a weight of authority back of it as the one under consideration. It must be admitted that in certain instances the law is settled and that there is a strong tendency to apply the rule used in those cases to others that arise. To such as think it impossible to prevent the spread of the rule, what has been said may at least call attention to the following facts: (a) that it is an anomaly inconsistent with the law as to accident, (b) that while there are individual sets of fact in which it is not applied, yet it spreads throughout the law of torts and is not confined in its operation to cases of injury to property,⁸ (c) that the line between absolute liability and liability only for blamableness, so far as it exists, is not drawn between trespass and case or direct and indirect injury, but between accident and mistake.⁹ In the case of accident the theory of culpability is applied; in the case of mistake the defendant is usually held to act at his peril.

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1 HARPER + JAMES ON TORTS § 3.11 (1956)

The privilege to use force short of that which is intended or likely to cause death or serious bodily harm applies when the actor reasonably believes it necessary to avoid bodily harm or confinement intentionally or negligently inflicted by the person against whom the force is used.³ As in the case of any conditional privilege, the invasion of the interests of the other must be for the purpose which makes it privileged. The privilege cannot be employed as a bare excuse for inflicting a battery.⁴ Thus, the actor must actually believe that he is threatened and although the situation might reasonably appear dangerous to an observer, if the actor has special knowledge that there is in fact no danger, he is not privileged. Again, the actor must reasonably believe that the other person intends to assault or confine him⁵ or, though he may know that there is no threat of an intended invasion of his interests, he must reasonably believe that the other is exposing him to harm by his negligent conduct.⁶ In other words, the privilege exists only where the person purporting to exercise it reasonably believes that he is in danger of an intended or negligent invasion of his interests in personality.

It is not necessary that the danger actually exist. It is only necessary that the actor have grounds which would lead an ordinary reasonable man to believe that it exists, and that he so believe.⁷ All the facts and circumstances of the case are to be taken into account to determine the reasonableness of the belief.⁸ The rule that one who reasonably believes the other party intends to assault him is privileged to defend himself although he is in fact in no danger whatever appears to follow the similar rule in the criminal law where it is beyond doubt a sound rule. Since the purpose of the criminal law is to punish for a wrong against the public, it is proper that one who acts reasonably in the belief that such action is necessary to defend himself should be immune. But where, as in the law of torts, the primary function is to afford compensation to one injured by another, it is a question of some doubt whether sound social policy should afford protection to one who acts, even on reasonable grounds, to defend himself against another who is not threatening to injure him either by his intentional or negligent misconduct. However, that may be, the rule is well settled that reasonable belief in the impending peril is sufficient.⁹

³ 1 Restatement of Torts §63.

⁴ *Id.* §64.

⁵ *Courvoisier v. Raymond*, 23 Colo. 113 (1896); *Paxton v. Boyer*, 67 Ill. 132 (1873); *Crabtree v. Dawson*, 119 Ky. 148, 83 S.W. 447 (1904); *Keep v. Quallman*, 68 Wis. 451, 52 N.W. 235 (1887). See also *Logue v. Commonwealth*, 38 Pa. 265 (1861); *Commonwealth v. Drum*, 58 Pa. 9 (1868); *Commonwealth v. Ware*, 137 Pa. 465, 20 Atl. 806 (1890). But see *Chapman v. Hardgrove*, 204 S.W. 379 (Tex. App. 1918).

Baltimore Transit Co. v. Faulkner, 179 Md. 598, 601, 20 A.2d 485 (1941): "The belief of a defendant in an action for assault that the plaintiff intended to do him bodily harm cannot support a plea of self-defense unless it was such a belief as a person of average prudence would entertain under similar circumstances."

Lowry v. Standard Oil Co. of California, 54 Cal. App. 2d 782, 790, 130 P.2d 1 (1942): "... the law ... prescribes a standard ... which is ... would a reasonable man, situated as defendant was, seeing what he saw, and knowing what he knew, be justified in believing himself in danger."

17. MISTAKE

The question of mistake frequently arises in connection with privilege. There is an essential distinction between mistake and accident, which is to be considered in a later chapter.⁹ The plea of unavoidable accident is that the result complained of as a wrong was not intended by the defendant, and could not have been foreseen and avoided by the exercise of reasonable care. The plea of unavoidable mistake, on the other hand, is that, although the act was voluntary, and the result was intended, the defendant acted under an erroneous belief, formed upon reasonable grounds, that circumstances existed which would justify his conduct. It is an accident if the defendant's horse runs away with him and carries him upon the land of another, a mistake if he intentionally enters upon it in the belief that it is his own.¹⁰

While unavoidable accident is commonly recognized as a defense against liability, unavoidable mistake is in itself generally held to be no defense at all. However valid the excuse may be under the criminal law,¹⁰ in a civil action one who intentionally interferes with the person or property of another does so at his peril, and must assume the risk that he is wrong. The line which is drawn between accident and mistake has been condemned as anomalous and unreasonable;¹¹ it can be justified only upon the basis of a policy which makes the defendant responsible for the physical result which he intended, and, as between two parties equally free from moral blame, places the loss upon the one who made the mistake.

Thus it is no defense to an action for battery¹² or false imprisonment¹³ that the defendant mistook the plaintiff for another person on whom he might properly lay hands. A trespasser upon land, who honestly believes that he is the owner,¹⁴ or that he has authority from the owner,¹⁵ or who has merely mis-

taken the boundary,¹⁶ is nevertheless a trespasser. One who sells a chattel,¹⁷ or takes possession of it, even by bona fide purchase,¹⁸ becomes a converter, although he does not know that it is stolen property. In all of these cases, the defendant may be free from moral blame, but the rights of others are protected at his expense against the physical effect which he intends to accomplish.

But such a rule must of necessity have its limitations. Although mistake as to the existence of a privilege, or a mistake of fact in itself, will not excuse the defendant, still his mistake of fact may be important in determining whether the privilege exists. One who reasonably believes that he is being attacked is privileged to defend himself by injuring another, although it turns out that he was wrong.¹⁹ An officer armed with a warrant apparently valid on its face is privileged to make an arrest, although the warrant is in fact invalid because improperly issued;²⁰ or, if he mistakenly thinks that a felony has been committed, and arrests one whom he reasonably supposes to be the culprit, he is likewise privileged.²¹ In such cases the interest to be protected is of such outstanding importance that the defendant is permitted greater freedom of action. The burden of the mistake is placed upon the innocent plaintiff because it is socially necessary that men be free to defend themselves against apparent attack, and that officers have leeway to make arrests.

It is not possible to state a general rule which will determine when a mistake is privileged.²² The boundaries of the privilege will be marked out in each situation upon the basis of the special reasons of policy and expediency bearing upon the facts.²³ In general, without attempting to state a rule, it may be said that a mistake is privileged in cases where it appears necessary for the defendant to act quickly to protect a right as to the existence of which he is not mistaken, or where he is under a duty to act for the protection of a public interest. A private citizen, for example, unlike an officer, is privileged to arrest only when a crime has in fact been committed, and must take the risk that it has not.²⁴ The reason is that he has no public responsibility; there is less necessity for such arrests, and more occasion to deter private citizens from taking the law into their own hands.

9. Salmond, *Law of Torts*, 8th Ed. 1934, 27; Whittier, Mistake in the Law of Torts, 1902, 15 *Harv.L.Rev.* 329.

10. See Keedy, *Ignorance and Mistake in the Criminal Law*, 1908, 22 *Harv.L.Rev.* 75; Perkins, *Ignorance and Mistake in Criminal Law*, 1939, 88 *U.Pa.L. Rev.* 35.

11. Whittier, Mistake in the Law of Torts, 1902, 15 *Harv.L.Rev.* 333. But see Holmes, *The Common Law*, 1881, 98-100.

1 HARPER + JAMES ON TORTS § 3.11 (1956)

But actual belief by the actor that he is in danger is not enough to create the privilege. The belief must be justified by the circumstances. "Where a defendant in a civil suit attempts to justify on a plea of necessary self-defense, he must satisfy the jury not only that he acted honestly in using force, but that his fears were reasonable under the circumstances."⁹ "All the circumstances of the situation in which the actor finds himself are to be considered in connection with the reasonableness of his action." "In determining whether the actor's apprehension . . . is reasonable," says the Restatement of Torts,¹⁰ "the circumstances which are known, or should be known, to the actor must be such as would lead a reasonable man to entertain such an apprehension. In this connection, the qualities which primarily characterize a 'reasonable man' are ordinary firmness or courage. The other's conduct may put the actor in a reasonable apprehension of bodily harm or offensive contact, although it is not the sole cause thereof. The acts or statements of third persons may give to the other's conduct so threatening an appearance as to make it capable of causing such an apprehension, though standing by itself, the conduct would not be capable of so doing." "The actor is not required to behave with extraordinary courage;¹¹ nor is he permitted to act from inordinate timidity.¹² He must react as a reasonable man, under all the circumstances of the occasion, and he is accorded the latitude of judgment which the ordinary person might be expected to indulge on such an occasion. "To rest his justification upon the honest belief which he entertained at the time, without reference to anything else," observed the Vermont court,¹³ "would deprive the jury of all considerations, except the simple inquiry of whether the defendant acted honestly, and if they found he did so act, the justification would thereby be made out, notwithstanding that the defendant acted in the most absurd and cruel manner. The defendant in such a case would be the sole judge of the amount of force and violence which he might inflict upon one who had first assaulted him, notwithstanding that that assault may have been of the most trivial character. The rule which we have adopted in this case has the sanction of all, or nearly all, the cases, not, perhaps, in the same language, but in substance the same."

The threat which creates the privilege must be that of an immediate invasion of the actor's interests.¹⁴ Previous threats or attacks will not, of themselves, justify the use of force although they may be important, in connection with other circumstances, to produce a situation which does create the privilege.¹⁵ If the assailant has terminated the attack or if the danger is past for any reason, the privilege is also terminated. The privilege of self-defense will not afford immunity for acts of revenge or retaliation, but only for invasions reasonably necessary to avert impending peril. The privilege of a person attacked ends with the disappearance of the real or apparent danger.¹⁶ ● ● ●