



11-1-1941

Torts: Assault, Battery

W. D. Rollison

Follow this and additional works at: <http://scholarship.law.nd.edu/ndlr>



Part of the [Law Commons](#)

Recommended Citation

W. D. Rollison, *Torts: Assault, Battery*, 17 Notre Dame L. Rev. 1 (1941).

Available at: <http://scholarship.law.nd.edu/ndlr/vol17/iss1/1>

This Article is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

NOTRE DAME LAWYER

A Quarterly Law Review

VOL. XVII

NOVEMBER, 1941

NO. 1

TORTS: ASSAULT; BATTERY

BATTERY

Definition. A harmful, or an offensive, touching of the plaintiff's person, caused directly or indirectly by a voluntary act of the defendant with an intention to inflict a harmful or an offensive touching, is a battery.

Offensive Touching. A touching of another's person may be both offensive and harmful, or it may be merely offensive and not inflict substantial harm. A touching which is not harmful but which is offensive to a normal or reasonable person is a battery, and it subjects the actor to liability if the touching is not consented to or privileged. In this type of battery, it is the insult or offensiveness of the touching that is important and not damage in fact. A certain amount of contact with one's person must be tolerated in decent society. Thus, "if two or more meet in a narrow passage, and without any violence or design of harm, the one touches the other gently, it will be no battery."¹ But "if any of them

¹ Per Holt, C. J., in *Cole v. Turner*, 6 Mod. Rep. 149, 90 Eng. Rep. 958 (1704), B. 5, H. 98, K. 87, G. 6.

The cases cited are keyed up to some of the case books on Torts, as follows: B—Bohlen's Cases (3rd ed.); Burdick—Burdick's Cases (4th ed.); G—Green's Cases (2nd ed.); H—Hepburn's Cases (2nd ed.); K—Keigwin's Cases (3rd ed.); W—Wilson's Cases (2nd ed.).

use violence against the other, to force his way in a rude inordinate manner, it will be a battery.”² An offensive touching may be inflicted in many ways. Thus, forcibly pushing the plaintiff’s hat back on his head, in order to see his face and identify him, was held to be a battery.³ A milkman who, against the express command of a customer, entered the latter’s sleeping room early one morning and forcibly wakened him in order to present a milk bill, was held liable in trespass for a battery.⁴ The forcible cutting of a pauper’s hair by parish officials was held to be a battery.⁵ On the other hand, merely touching a fireman, who was engaged in directing a stream of water upon a burning house, for the purpose of attracting his attention and giving him advice, was held not to be a battery; it was not an act which would be offensive to a normal sense of personal dignity.⁶ Touching another person in a friendly manner, for a benevolent purpose, is not a battery.⁷ A certain amount of horseplay might be tolerated and not be illegal conduct as between certain persons and on certain occasions.⁸ A gentle slap, in a friendly greeting, probably would not be offensive to a reasonable person; but if the touching is inflicted with a great amount of force, it should be a battery. A touching in a friendly scuffle, voluntarily entered into, might not be an offensive touching; furthermore, consent, or assumption of risk, might bar a recovery in such a case. So, in regard to horseplay on the playground of a school; but in the schoolroom such conduct is out of order and constitutes a

² *Cole v. Turner*, 6 Mod. Rep. 149, 90 Eng. Rep. 958 (1704), B. 5, H. 98, K. 87, G. 6.

³ *Seigel v. Long*, 169 Ala. 79, 53 So. 753, 33 L. R. A. (N. S.) 1070 (1910), W. 45.

⁴ *Richmond v. Fiske*, 160 Mass. 34, 35 N. E. 103 (1893), G. 7, H. 47.

⁵ *Forde v. Skinner*, 4 Car. & P. 239, 34 R. R. 791 (1830), H. 43.

⁶ *Coward v. Baddeley*, 4 H. & N. 478 (1859), K. 89.

⁷ *United States v. Ortega*, Fed. Cas. No. 15, 971, 4 Wash. C. C. 531 (1825), B. 5.

⁸ See: *Reynolds v. Pierson*, 29 Ind. App. 273, 64 N. E. 484 (1902), G. 112.

battery.⁹ A particular touching might not be offensive to a reasonable person, but if it is inflicted on a very sensitive person, with knowledge of his peculiar sensitiveness, it should be a battery. A touching may not be regarded as offensive at the time it is inflicted, due to a mistake or to false representations; if, however, the person upon whom it is inflicted later regards it as offensive, upon discovering the true situation, and if the touching really offends a normal sense of personal dignity, it is a battery. Thus, a magnetic healer who induced a young girl to unnecessarily expose her person and took indecent liberties with her, was held liable on a charge of assault and battery.¹⁰ The interest protected by this type of battery is the interest in freedom from a bodily touching which is offensive to a reasonable sense of personal dignity.

Harmful Touching. A battery may consist of a harmful touching of the plaintiff's person, caused by the defendant with an intent to inflict a harmful or an offensive touching either of the plaintiff's person or that of a third person. As to common law procedure, the numerical weight of authority supports the view that for an immediate and forcible injury to the plaintiff's person, attributable to a negligent act of the defendant, either trespass or case will lie, at the option of the plaintiff.¹¹ The minority rule is that trespass is the only remedy for such an injury.¹² Trespass is the only remedy, at the common law, for a wilful and immediate injury to the plaintiff's person.¹³ Where the plaintiff has an option to declare in trespass or case, for a negligent battery, he must consider the rule that in case of negli-

⁹ Vosburg v. Putney, 80 Wis. 52, 50 N. W. 403, 14 L. R. A. 226, 27 A. S. R. 47 (1891), B. 7, W. 46, G. 107.

¹⁰ Bartell v. State, 106 Wis. 342, 82 N. W. 142 (1900), B. 51. Accord, in principle: De May v. Roberts, 46 Mich. 160, 9 N. W. 146 (1881); Blossom v. Barrett, 37 N. Y. 434 (1868).

¹¹ Shipman's Common Law Pleading (2nd ed.) 57.

¹² Shipman's Common Law Pleading (2nd ed.) 58.

¹³ Puterbaugh, Common Law Pleading and Practice (10th ed., by Jones) 448.

gence there is no such invasion of rights as to entitle a plaintiff to recover at least nominal damages; there must be some damage in fact, in order to recover in an action for a negligent injury, if the plaintiff declares in case.¹⁴ But if the plaintiff declares in trespass, or in the case of a wilful touching, nominal damages only may be awarded.¹⁵ But the jury should not be restricted to an award of nominal damages merely in case of an intentional touching; the jury may consider the features of insult, indignity, and hurt to feelings.¹⁶ Also, an intentional touching, although it may not substantially impair the physical structure of the plaintiff's body, is a physical injury in the sense that it will authorize an award of punitive damages.¹⁷ While, as stated above, in case of a mere negligent touching some damage in fact is necessary in order to entitle the plaintiff to recover, it is difficult, as a practical matter, to distinguish between substantial and unsubstantial impairments of the physical structure of the plaintiff's body. In case of a mere negligent touching of the plaintiff's body, producing no appreciable effect, the maxim *de minimis non curat lex* would be applicable. But if a slight, negligent, impact with the plaintiff's body results in a physiological or an emotional disturbance or in pain, recovery has been allowed.¹⁸ Some courts have defined battery as an *intentional* infliction of violence upon the plaintiff; but they have said that in case of gross negligence or recklessness an intent may be implied.¹⁹

¹⁴ *Sullivan v. Old Colony St. Ry. Co.*, 200 Mass. 303, 86 N. E. 511 (1908); *Ochs v. Public Service Ry. Co.*, 81 N. J. L. 661, 80 Atl. 495, 36 L. R. A. (N. S.) 240, Ann. Cas. 1912 D, 255 (1911).

¹⁵ *Armstrong v. Little*, 20 Del. 255, 54 Atl. 742 (1903); *Wood v. Cummings*, 197 Mass. 80, 83 N. E. 318 (1908); *Shaffer v. Austin*, 68 Kan. 234, 74 Pac. 1118 (1904).

¹⁶ *South Brilliant Coal Company v. Williams*, 206 Ala. 637, 91 So. 589 (1921).

¹⁷ *South Brilliant Coal Company v. Williams*, 206 Ala. 637, 91 So. 589 (1921).

¹⁸ *Homans v. Boston Elevated R. Co.*, 189 Mass. 456, 62 N. E. 737 (1902), B. 296; *Hack v. Dady*, 127 N. Y. S. 22 (1911).

¹⁹ *The Lord Derby*, 17 Fed. 265 (1883), H. 37 (construing the 16th Admiralty rule to determine whether the action was properly brought *in personam*); *Perkins v. Stein & Co.*, 94 Ky. 433, 22 S. W. 649, 20 L. R. A. 861 (1893), W. 44 (construing survival statute). But *cf.* *Anderson v. Arnold's Ex'r*, 79 Ky. 370 (1881).

The interest protected by this type of battery is the interest in freedom from a harmful contact with the plaintiff's person, whether inflicted intentionally or negligently. One of the early functions of the writ of trespass, in case of a battery, was preservation of the King's peace. It served to avert private vengeance and the desire for reprisal. The end of law was a peaceable ordering of society.²⁰ The writ of trespass was useful for this purpose because of its punitive function and because it furnished the injured person a substitute for revenge. It served to protect the social interest in the general security. Incidentally, it gave protection to the individual interest in freedom from harmful or offensive touchings. At the early common law, it was probably necessary for the plaintiff, in an action of trespass, to allege and prove that the trespass was committed by force and arms.²¹ A trespass had a penal nature; the defendant, if found guilty, could have been punished by the court trying the action. Thus, the action of trespass was of a mixed character,—penal and reparatory.²² There is uncertainty as to the time of origin of the reparatory function of the action of trespass; but in the reign of Edward I we find in the Year Books a record of the successful plaintiff recovering his damages.²³ The penal feature, the fine, of a trespass, was abolished by statute in 1694.²⁴ In the course of time, the allegation as to force and arms came to be regarded as unnecessary or as mere surplusage. The action of trespass came to be looked upon as a private remedy. Its development has, however, closely coincided with that of battery in the criminal law, and many essentials of the civil wrong are identical with those of the crime. In modern law the emphasis in trespass for a battery

²⁰ Pound, *The End of Law as Developed in Legal Rules and Doctrines*, 27 *Harv. L. Rev.* 195, 199.

²¹ See: Woodbine, *The Origins of the Action of Trespass*, 33 *Yale L. Jour.* 799; 34 *id.* 343, 358.

²² Holdsworth, *A History of English Law*, vol. 3, p. 308.

²³ *Y. B.*, 33 *Edw. I (R. S.)* 258.

²⁴ *Stat. 5 & 6 William and Mary, C. 12.*

is upon the interest of the plaintiff in freedom from harmful or offensive impacts with his person.

Another's Person. There can be no doubt as to whether or not violence inflicted upon another's person by striking, beating, or kicking him is sufficient contact with his person to constitute a battery. The cases dealing with the question as to the sufficiency of the contact with another's person deal with offensive touchings where the contact is with something closely associated with another's physical person or body. There are many examples in the cases of insulting contacts with things closely connected with one's body which the courts have regarded as part of one's personality and as an offense to one's sense of personal dignity: Seizing the breast of the coat of the prosecuting witness;²⁵ pushing the plaintiff's hat back on his head;²⁶ striking the cane carried by the prosecuting witness;²⁷ snatching paper from the plaintiff's hand;²⁸ throwing over a chair or carriage in which the plaintiff is sitting;²⁹ jerking and pulling a third person against whom the plaintiff is leaning;³⁰ opening and putting hand in box held by plaintiff;³¹ starting an automobile of which the plaintiff has hold;³² and striking a horse hitched to a vehicle in which the plaintiff is sitting.³³ It is doubtful as to whether or not the mere striking of a vehicle would be considered an offensive touching as to all persons seated therein. So, with reference to a kick or blow inflicted on a dog attached to a leash held by its master. If the force so applied is intended

²⁵ United States v. Ortega, Fed. Cas. No. 15, 971 (1825), B. 5.

²⁶ Seigel v. Long, 169 Ala. 79, 53 So. 753, 33 L. R. A. (N. S.) 1070 (1910), W. 45.

²⁷ Republica v. De Longchamps, 1 Dall. 111, 1 L. ed. 59 (1784).

²⁸ Dyk v. De Young, 35 Ill. App. 138 (1889), H. 35.

²⁹ Hopper v. Reeve, 7 Taunt. 698, 129 Eng. Rep. 278 (1817), H. 33.

³⁰ Reynolds v. Pierson, 29 Ind. App. 273, 64 N. E. 484 (1902), G. 112.

³¹ Wilson v. Orr, 210 Ala. 93, 97 So. 133 (1923).

³² Brodsky v. Rieser, 195 App. Div. 557, 186 N. Y. S. 841 (1921).

³³ Bull v. Colton, 22 Barb. 94 (1856); Clark v. Downing, 55 Vt. 259, 45 Am. Rep. 612 (1882).

to and does reach the persons seated in the vehicle, or the master leading the dog, the conduct of the actor should be held to be a battery.

Direct and Indirect Contacts, or Impacts, with the Plaintiff's Person, Legally Caused by the Defendant. At the common law, trespass is the only remedy for an intentional and immediate injury to the plaintiff's person. For all direct contacts, or impacts, with the plaintiff's person, trespass is, by the numerical weight of authority, a proper remedy; for a direct contact, caused negligently by the defendant, the plaintiff may elect between trespass and case, as a procedural matter at the common law. For all indirect contacts, or impacts, with the plaintiff's person, case is the only remedy. The usual illustration used in distinguishing between direct and indirect consequences of an act is that of throwing a log into a highway. If the log strikes a traveler in falling, the consequence is direct; but if the traveler stumbles over the log, after it has come to rest, the result is indirect. Stated differently, the damage caused by a force set in motion by the act of the defendant, and resulting before the force reaches a state of stable equilibrium, is direct; but damage caused by the force after it has reached a state of stable equilibrium is indirect and consequential. The matter is not as simple as this test might appear to be, and the distinction does not possess any logical basis. It is often difficult to determine when the results of a force set in motion by an act cease to be direct and become indirect. Nomenclature and classification of rights still depend, to some extent, upon the distinction. Thus, in *Innes v. Wylie*³⁴ a policeman, acting under orders of the defendants, prevented the plaintiff from entering a room, by standing in the doorway; the court instructed the jury that if he merely passively obstructed the entrance no "assault" was committed. Suppose the defendants had cried out "fire," and thus caused some one in

³⁴ 1 Car. & Kir. 257, 70 R. R. 786 (1844), H. 35.

the room to run against the policeman? In *State v. Monroe*³⁵ the defendant administered croton oil to the prosecuting witness by placing the oil in a piece of candy; the court instructed the jury that if the defendant intended the prosecuting witness, or some other person, to consume the croton oil, by way of a trick or joke, he would be guilty of an assault and battery. In *Scott v. Shepherd*³⁶ the defendant threw a lighted squib into a market place, probably intending to do mischief of some kind; the squib fell upon the "standing" of Y, and W, to prevent injury to himself and the wares of Y, threw the squib across the market place and it fell upon the "standing" of R, who, to prevent injury to his goods, threw the squib across another part of the market place, and, "in so throwing it, struck the plaintiff then in the said market" place, causing the plaintiff to lose the sight of one eye. The court entertained no doubt as to the defendant's liability. The only question was in what form of action, whether trespass or case, the defendant was liable. Blackstone, J., thought that trespass would not lie against the defendant, at the instance of the plaintiff, on the theory that the force set in motion be the defendant had come to rest, and a new impetus, a new direction, was given to the squib by "two successive rational agents." He said that case would probably lie for the consequential damage to the plaintiff. The majority of the court held that trespass would lie, on the theory that the plaintiff's injury was the immediate result of the act of the defendant; the acts of W and R were instinctive and in self defense, and were a continuation of the force set in motion by the defendant.

The person causing a harmful or an offensive touching need not come into immediate contact with the plaintiff's person. The touching may be inflicted through some instrumentality or as a result of some force set in motion by the

³⁵ 121 N. C. 677, 28 S. E. 547, 43 L. R. A. 861, 61 A. S. R. 686 (1897), H. 34.

³⁶ 2 W. Bl. 892, 95 Eng. Rep. 1124 (1773), H. 29, G. 90, W. 505, B. 258.

actor. Examples: Striking with a whip;³⁷ throwing a piece of mortar which hits the plaintiff;³⁸ spitting in the plaintiff's face;³⁹ and the croton oil and squib cases considered in the preceding paragraph.

Voluntary Act. Professor Beale says that "the starting point of any investigation of legal liability is some act or non-action of a human being."⁴⁰ There are very few instances of legal liability based upon non-action. In most cases wherein liability has been imposed there has been a voluntary act on the part of the defendant. In *Innes v. Wylie*⁴¹ the court instructed the jury that if the policeman, standing in the doorway, with whom the plaintiff came in contact, was merely passive, no "assault" was committed. Thus, in battery, some voluntary, physical act on the part of the defendant is necessary to create liability; mere non-action is not sufficient. Some difficulty has been encountered in the cases in determining when a physical act is voluntary. In *Smith v. Stone*,⁴² in an action of trespass, the defendant pleaded that he was carried upon the plaintiff's land by other persons and that he "was not there voluntarily." The court held that the effect of the plea was to deny the trespass, and that there was no trespass on the part of the defendant. In *Gibbons v. Pepper*⁴³ an action of trespass for an assault and battery was brought against the defendant; his plea was that he was riding a horse on the highway, that the horse became frightened and ran away with him, so that he could not stop the horse, and the horse ran over the plaintiff against his (the defendant's) will. On demurrer, judgment was given for the plaintiff, because the effect of the plea was to deny that there was a battery. The defendant

³⁷ *State v. Davis*, 1 Ired. L. 125, 35 Am. Dec. 735 (1840), B. 12.

³⁸ *Peterson v. Hafner*, 59 Ind. 130, 26 Am. Rep. 81 (1877).

³⁹ *Alcorn v. Mitchell*, 63 Ill. 553 (1872).

⁴⁰ Beale, *The Proximate Consequences of an Act*, 33 Harv. L. Rev. 633, 637.

⁴¹ 1 Car. and Kir. 257, 70 R. R. 786 (1844), H. 35.

⁴² *Style* 65, 82 Eng. Rep. 533 (1647), W. 24, B. 1.

⁴³ 1 Ld. Raym. 38 (1695), W. 24, B. 1.

should have pled the general issue, as his act was not voluntary, and he could have shown this under the general issue. The court said that if the defendant had spurred the horse and thus caused it to run over the plaintiff, there would have been a battery. An "act," as thus considered, means a physical act of the defendant, and does not include its consequences. The term "voluntary act" means an exertion of the will objectively determined. So defined, the use of the defendant's body, by third persons, as an instrument by which to invade the plaintiff's interest in the exclusive possession and enjoyment of his real estate is not a voluntary act of the defendant.⁴⁴ Where the defendant, while driving his automobile, is stricken with paralysis or with an epileptic fit, which he has no reason to anticipate, and while in this condition the movement of his car continues and it strikes the plaintiff, there is no voluntary act on the part of the defendant.⁴⁵ So, if the defendant is overtaken by sleep while driving his automobile; any wrongful conduct must be predicated upon his conduct in permitting himself to fall asleep. An instinctive act or movement of the defendant in an emergency not created by him is not a voluntary act.⁴⁶ The difficulty in this type of cases is to determine whether or not the act is instinctive or a rapid exercise of reasoning power.⁴⁷ In *Cole v. Turner*^{47a} the court said that "the least touching of another in anger is a battery." While a touching in anger would be a sufficient act to constitute a battery, it is not necessary that the touching should be in anger. Any intentional touching of or impact with the plaintiff's person, caused or committed by the defendant, and offensive to a reasonable sense of personal dignity, is an offensive touch-

⁴⁴ *Smith v. Stone*, Style 65, 82 Eng. Rep. 533 (1647), W. 24, B. 1.

⁴⁵ *Slattery v. Haley*, 3 Dom. L. Rep. 156 (1923), B. 2; *Wishone v. Yellow Cab Co.*, 20 Tenn. App. 229, 97 S. W. 2d 452 (1936).

⁴⁶ *Filippone v. Reisenburger*, 119 N. Y. S. 632 (1909), B. 4; *Laidlaw v. Sage*, 158 N. Y. 73, 52 N. E. 679 (1899).

⁴⁷ See: 7 Harv. L. Rev. 302.

^{47a} 6 Mod. Rep. 149, 90 Eng. Rep. 958 (1704), B. 5, H. 98, K. 87, G. 6.

ing in the law of battery; the fact that the act of the defendant is done as a practical joke,⁴⁸ or without malice or personal hostility towards the plaintiff,⁴⁹ is no defense. In Illinois a statute permits the issuance of an execution against the body of the defendant in case of a judgment recovered for a tort, if there has been a special finding in the case that malice is the gist of the action. In construing this statute, the Illinois courts have held that malice is the gist of the action of trespass for an assault and battery, where the defendant has been arrested on a *capias ad satisfaciendum* issued in a judgment recovered in the action.⁵⁰ In case of a harmful touching, as distinguished from an offensive touching, the act of the defendant may be a voluntary, negligent act.

ASSAULT

Definition. An act done by one person which causes, and is intended to cause, to another an apprehension of an immediate and harmful or offensive touching or contact with his person is an assault. In *Lewis v. Hoover*⁵¹ the court says: "An assault is an attempt or offer with violence to do a corporal hurt to another, as if one lift up his cane or fist at another in a threatening manner, or strike at him with a stick, his fist, or any other weapon, within striking distance, but miss him." These definitions embody the following essentials: (1) An intent to inflict a battery upon another person or to cause to him an apprehension of a battery; (2) An act done for this purpose, as distinguished from mere violent or abusive language; and (3) An apprehension of a battery.

⁴⁸ See: *State v. Monroe*, 121 N. C. 677, 28 S. E. 547, 43 L. R. A. 861, 61 A. S. R. 686 (1897), H. 34.

⁴⁹ As in *Vosburg v. Putney*, 80 Wis. 52, 50 N. W. 403, 14 L. R. A. 226, 27 A. S. R. 47 (1891), B. 7, W. 46, G. 107.

⁵⁰ *In re Murphy*, 109 Ill. 31 (1884); *Miles v. Glad*, 299 Ill. App. 185, 19 N. E. (2d) 844 (1939).

⁵¹ 3 Blackf. 407 (1834), H. 24.

Under common law pleading the appropriate and exclusive form of action for a battery or for an act done with the intention of causing to another person an apprehension of a battery was trespass for an assault and battery.⁵² Originally, one function of the writ of trespass was preservation of the King's peace; acts which created a desire for reprisals or led to violent self-protection were punished in an action of trespass. Relief was not given in an action of trespass for an assault and battery because the interest in freedom from emotional disturbance was deemed worthy of protection, but rather because the plaintiff was seeking compensation for the grievance caused to him by a breach of the King's peace.⁵³ Thus, we see a probable explanation for the following: (1) Some courts, in recent cases have referred to a battery as an "assault;"⁵⁴ (2) The averment that a trespass was committed *vi et armis*; (3) Some essentials of a civil assault, in modern law, are identical with those of criminal assault, even though forms of action are no longer of controlling importance and the punitive function of the writ of trespass has been abolished; and (4) Some courts, in recent cases dealing with assaults, speak of violence offered as causing the plaintiff to strike in self defense or retreat to avoid blows. The true test of whether or not the defendant's conduct amounts to an assault is not necessarily its tendency to produce a breach of the peace, for abusive language has this tendency and it does not, at the common law, constitute an assault. Holdsworth refers to a statement in an early case that threatening words which put the plaintiff in fear and caused him damage constituted an assault.⁵⁵ But he says that the case of *Tuberville v. Savage*⁵⁶ held that a present

⁵² Restatement of the Law of Torts, Sec. 1, Tentative Draft.

⁵³ Restatement of the Law of Torts, Sec. 27, Tentative Draft.

⁵⁴ In *Mailand v. Mailand*, 83 Minn. 453, 86 N. W. 445 (1901), the court says: "The least or slightest wrongful and unlawful touching of the person of another is an assault."

⁵⁵ Holdsworth, *A History of English Law* (2nd ed.) vol. 8, p. 422.

⁵⁶ 1 Mod. 3 (1669), W. 33, H. 24.

threat of violence is necessary to constitute an assault. This case was decided before the fine payable to the Crown in an action of trespass was abolished.⁵⁷ The explanation for this may be that "the law makes an allowance for the angry passions of man,"⁵⁸ and that members of society are expected to have a certain amount of fortitude. In modern law the action for an assault is exclusively a private remedy, and it protects the plaintiff's interest in freedom from apprehension of a battery.

A civil assault is one of the earliest torts. The first case to hold that an unsuccessful attempt to commit a battery is an assault is *I de S et ux v. W de S*.⁵⁹ Actions for assault and battery have passed through three stages. In the Anglo-Saxon period in England they were probably of a civil nature only and belonged to the civil law. At a later period and before Bracton's time (13th century) they were both civil and criminal in nature, probably at the same time.⁶⁰ By the time of Bracton a purely criminal proceeding was developed for the punishment of batteries; this was either by indictment or by appeal of felony. Actions for assault and battery became subjects of separate civil and criminal jurisdiction. The appeal, in the sense in which it was used at this time, was not the removal of a cause from a court of inferior jurisdiction to one of superior jurisdiction for the purpose of obtaining a review and retrial; it meant an original action, either a criminal prosecution, or it could be used as a civil remedy by omitting the word "feloniously" from the charge. The action of trespass supplanted it as a civil remedy. While Bracton refers to a civil remedy for a battery,⁶¹ it was not until the reign of Edward III, in the fourteenth century, that assaults began to be considered as dis-

⁵⁷ By the Statute of 5 & 6 William & Mary, c. 12 (1694).

⁵⁸ *State v. Myerfield*, 61 N. C. 108, 110 (1867).

⁵⁹ Y. B. Lib. Assessorum, Fol. 99, Pl. 60 (1348), B. 12, W. 33.

⁶⁰ See: Ames, *Lectures on Legal History*, 39.

⁶¹ Bracton, 154 b, Sec. 3.

tinct causes of action. Since batteries were redressed and punished it was but natural that attempts to commit them should be redressed and punished.⁶²

The defendant's conduct may, and frequently does, include both an assault and a battery. But even where the defendant's attempt to commit a battery is successful there is not necessarily an assault. A battery may be inflicted upon the plaintiff before he has time to be placed in apprehension thereof. Also, in case of a battery inflicted upon the plaintiff by negligent conduct of the defendant there is no assault.

Physical Act. Mere violent and abusive language does not constitute an assault.⁶³ Threats over the telephone, even at short range, do not constitute an assault.⁶⁴ In the latter instance the defendant threatened the plaintiff over the telephone, intimating that he would come over to her home to avenge himself for an assumed wrong. While this would not be an assault, the defendant should have been subject to liability for the intentional infliction of mental suffering.⁶⁵ "Bare words . . . are often the exhibition of harmless passion and do not of themselves constitute a breach of the peace, as the law supposes that against mere rudeness of language ordinary firmness will be a sufficient protection."⁶⁶ Mere preparation to commit a battery is not an assault.⁶⁷

Some physical act, on the part of the defendant, which seems reasonably calculated to result in a battery, is neces-

⁶² Restatement of the Law of Torts, Sec. 27, Tentative Draft.

⁶³ Irlbeck v. Bierl, 101 Iowa 242, 67 N. W. 400 (1896).

⁶⁴ Kramer v. Ricksmeier, 159 Iowa 48, 139 N. W. 1091, 45 L. R. A. (N. S.) 928 (1913), W. 41.

⁶⁵ See: Barnett v. Collection Service Co., 214 Iowa 1303, 242 N. W. 25 (1932).

⁶⁶ Per Walker, J., in State v. Daniel, 136 N. C. 571, 48 S. E. 544, 103 A. S. R. 970 (1904).

⁶⁷ State v. Painter, 67 Mo. 84 (1877). (The court said: "If the defendant had gone and procured the gun for the express purpose of taking the life of Andrews (the prosecuting witness), but, after coming up with Andrews, made no demonstration towards the accomplishment of that purpose, he would not have been guilty.")

sary to constitute an assault.⁶⁸ There must be an "offer to do violence," or "violence begun to be executed."⁶⁹ In *Tuberville v. Savage*⁷⁰ the court held that a present threat of violence is necessary to constitute an assault. In most cases the defendant's conduct involved abusive language, or threats, accompanied or followed by a physical act or the use of means reasonably calculated to inflict a battery. Thus, in *Stephens v. Myers*⁷¹ the defendant, in the course of an angry discussion, advanced with his fist clenched towards the plaintiff, with an apparent intent to strike him, and was stopped by a third person. The jury was instructed that this constituted an assault. Threatening gestures are sufficient to constitute an assault. Thus, in *Martin v. Shoppee*⁷² the plaintiff was walking along a footpath and the defendant, who was on horseback, rode after him so as to compel him to run into his own garden for shelter to avoid being beaten; this was held to be an assault on the plaintiff.

Intent; Ability to Commit a Battery. In addition to a physical act, the defendant must intend to put the plaintiff in apprehension of an immediate and offensive or harmful touching and have the present ability, actual or apparent, to inflict such a touching to be subject to liability for an assault. The intent of the defendant and his ability to commit a battery are generally considered together in the cases, and questions concerning these two essentials usually have been considered in cases involving the use of firearms. By the better view, both in civil and criminal assaults, it is not the secret intent of the defendant, nor the undisclosed fact of his ability or inability to commit a battery, that is material; but what his conduct and the attending circumstances denote at the time to the plaintiff. It is the probable and

⁶⁸ *Hixson v. Slocum*, 156 Ky. 487, 161 S. W. 522, 51 L. R. A. (N. S.) 838 (1913), W. 39.

⁶⁹ *State v. Daniel*, 136 N. C. 571, 48 S. E. 544, 103 A. S. R. 970 (1904).

⁷⁰ 1 Mod. 3 (1669), W. 33, H. 24.

⁷¹ 4 Car. & P. 349 (1830), W. 34.

⁷² 3 Car. & P. 373 (1828), W. 35.

natural effect of the conduct of the defendant on the plaintiff, or the tendency of the defendant's act to induce a breach of the peace, that is important in determining whether or not an assault has been committed. Accordingly, an apparent intent and an apparent present ability to commit a battery are, by the better view, sufficient in the law of assault.⁷³ Thus, where the defendant points a gun at the plaintiff, in a threatening manner, this would constitute an assault, even though the plaintiff may not know whether or not the gun is loaded and even though the gun is not loaded and the defendant knows this.⁷⁴ All that is necessary is an intentional act on the part of the defendant, reasonably calculated to create apprehension of a present battery, and a fear that he might go further and commit a battery upon the plaintiff's person. On the other hand, in *Blake v. Barnard*⁷⁵ there is a dictum that if the defendant points a gun at the plaintiff, in a threatening manner, and the gun is not loaded, there is no civil assault. In some states present ability to inflict the threatened battery is necessary in criminal cases,⁷⁶ while *apparent* present ability is sufficient in civil cases.⁷⁷

A reckless act which is likely to produce the personal injury which it actually causes has been held to constitute an assault. Thus, where the defendant whipped up his horses to great speed and yelled loudly and passed the plaintiff and team and vehicle in such manner as to be likely to produce injury, and the act caused the plaintiff's team to run away. An instruction that this constituted an *assault* was held to

⁷³ Commonwealth v. White, 110 Mass. 407 (1872), W. 39; State v. Shepard 10 Iowa 126 (1859); Beach v. Hancock, 27 N. H. 223, 59 A. D. 373 (1853), B. 17, H. 28, Burdick, 566, G. 8; Allen v. Hannaford, 138 Wash. 423, 244 Pac. 700 (1926).

⁷⁴ See: Commonwealth v. White, 110 Mass. 407 (1872), W. 39; Beach v. Hancock, 27 N. H. 223, 59 A. D. 373 (1853), B. 17, H. 28, Burdick 566, G. 8.

⁷⁵ 9 Car. & P. 626 (1840), W. 38.

⁷⁶ Klein v. State, 9 Ind. App. 365, 36 N. E. 763 (1893).

⁷⁷ Kline v. Kline, 158 Ind. 602, 64 N. E. 9, 58 L. R. A. 397 (1902).

be correct.⁷⁸ A person who is placed in peril by the negligence of another, but who escapes without physical injury, is not entitled to recover damages because of the apprehension of a physical injury.⁷⁹ There is no such thing as a negligent assault.⁸⁰

By the better view and the weight of authority, an intent to frighten the plaintiff but not to inflict a physical injury is a sufficient intent in both criminal and civil assaults.⁸¹

While words, or threats, are not sufficient to constitute an assault, former threats of personal violence, or words preceding or accompanying the act of the defendant, are important in giving character to his act,⁸² or in determining whether or not an apparent intent to commit a battery is present.⁸³ Thus, in *Tuberville v. Savage*⁸⁴ the defendant put his hand on his sword and said to the plaintiff: "If it were not assize time I would not take such language from you." This was held not to constitute an assault. The words showed that the defendant did not intend to inflict a battery, as the court was in session.

In many jurisdictions, either by statutory definition of assault or by judicial decision, the defendant must have had an actual present ability to inflict a battery at the time of the alleged assault in order to convict him on a criminal charge of assault; it makes no difference as to whether or

⁷⁸ *Lambrecht v. Schreyer*, 129 Minn. 271, 152 N. W. 645, L. R. A. 1915 E, 812 (1915).

⁷⁹ *Atchison, T. & S. F. R. Co. v. McGinnis*, 46 Kan. 109, 26 Pac. 453 (1891), B. 20.

⁸⁰ *White v. Sander*, 168 Mass. 296, 47 N. E. 90 (1897).

⁸¹ *State v. Baker*, 20 R. I. 275, 38 Atl. 653, 78 A. S. R. 863 (1897); *State v. Triplett*, 52 Kan. 678, 35 Pac. 815 (1894); *Pastrana v. State*, 48 Tex. Cr. R. 224, 87 S. W. 347 (1905); *Burgess v. Commonwealth*, 136 Va. 697, 118 S. E. 273 (1923). Contra: *Dagenhart v. Heller*, 93 Wis. 662, 68 N. W. 411, 57 A. S. R. 945 (1896), criticised in 10 Harv. L. Rev. 252.

⁸² *Hulse v. Tollman*, 49 Ill. App. 490 (1893); *Keep v. Quallman*, 68 Wis. 451, 32 N. W. 233 (1887).

⁸³ *Tuberville v. Savage*, 1 Mod. 3 (1669), W. 33, H. 24; *Tubervell v. Savadge*, 2 Keble 545 (1669), W. 34; *State v. Davis*, 1 Ired. L. 125, 35 A. D. 735 (1840), B. 12.

⁸⁴ 1 Mod. 3 (1669), W. 33, H. 24.

not the defendant believes he has the present ability to inflict a battery.⁸⁵ In Alabama it has been held that if the defendant knows he does not have the present ability to inflict a battery he is not guilty of a criminal assault.⁸⁶ According to the better view and the weight of authority, an actual present ability is not necessary; an *apparent* present ability will sustain a criminal charge of assault.⁸⁷ Accordingly, pointing an unloaded gun at another person who does not know but that the gun is loaded, in a manner to terrify the person aimed at and within shooting distance, is a criminal assault.

Apprehension of a Battery. As a general rule, in order for the defendant's threat or display of force to constitute an assault it must be such as to cause reasonable apprehension of an immediate battery on the part of the plaintiff, that is, the defendant's conduct must be such as would induce a person of ordinary firmness to believe he would immediately receive a harmful or offensive touching.⁸⁸ If the plaintiff is peculiarly susceptible to fear and if the defendant knows this and takes advantage of it to intentionally cause him apprehension of a battery, by a threat of display of force that would not affect a person of ordinary firmness, the defendant is subject to liability for an assault.⁸⁹ The movement of the defendant, however threatening, which does not cause to the plaintiff a reasonable fear of an immediate battery is not

⁸⁵ *People v. Lee Kong*, 95 Cal. 666, 30 Pac. 800, 29 A. S. R. 165 (1892); *State v. Swails*, 8 Ind. 524, 65 A. D. 772 (1856); *Klein v. State*, 9 Ind. App. 365, 36 N. E. 763, 53 A. S. R. 354 (1894).

⁸⁶ *Mullen v. State*, 45 Ala. 43, 6 A. R. 691 (1871).

⁸⁷ *State v. Barry*, 45 Mont. 598, 124 Pac. 775, 41 L. R. A. (N. S.) 181 (1912); *Commonwealth v. White*, 110 Mass. 407 (1872), W. 39; *State v. Shepard*, 10 Iowa 126 (1859).

⁸⁸ *State v. Davis*, 1 Ired. L. 125, 35 A. D. 735 (1840), B. 12; *Ross v. Michael*, 246 Mass. 126, 140 N. E. 292 (1923); *Dahlin v. Fraser*, 206 Minn. 476, 288 N. W. 851 (1939); *Brooker v. Silverthorne*, 111 S. C. 553, 99 S. E. 350, 5 A. L. R. 1283 (1918).

⁸⁹ See: *Brooker v. Silverthorne*, 111 S. C. 553, 99 S. E. 350, 5 A. L. R. 1283 (1918).

an assault.⁹⁰ In some cases dealing with criminal assaults the courts have said that an attempt of the defendant to inflict a battery upon another person may be an assault, even though the other person is ignorant of the attempt until after it has been frustrated or abandoned.⁹¹ But in *State v. Barry*⁹² the court held that there can be no assault upon a person who is unconscious of the attempted battery until after the attempt has been frustrated or abandoned. This view is in accord with the modern conception of tort liability for an assault, according to which emphasis is placed upon the interest protected (namely, freedom from apprehension of a battery).⁹³

There is a limitation upon the general rule that the defendant's act or threat must cause the plaintiff reasonable apprehension of an immediate battery, *viz.*, the defendant's threat is an assault though he gives the plaintiff an opportunity to escape the threatened battery by complying with some demand which he (the defendant) has no right to make.⁹⁴ In many cases dealing with this limitation there is an apprehension of a battery because the defendant's conduct is such as to cause the plaintiff to doubt the defendant's intent to refrain from inflicting a battery until the demand is complied with or because such immediate compliance is required by the defendant. In *United States v. Richardson*^{94a} and *State v. Church*⁹⁵ the courts referred to the demands as ones which the defendant had no right to make. But even a lawful demand may be made in a manner that

⁹⁰ *Tuberville v. Savage*, 1 Mod. 3 (1669), W. 33, H. 24; *Brooker v. Silverthorne*, 111 S. C. 553, 99 S. E. 350, 5 A. L. R. 1283 (1918); *Ryan v. Conover*, 59 Ohio App. 361, 18 N. E. (2d) 277 (1938) (officer threatened to shoot motorist's tires unless he stopped).

⁹¹ *Chapman v. State*, 78 Ala. 463, 56 A. R. 42 (1885); *People v. Pape*, 66 Cal. 366, 5 Pac. 621 (1885); *People v. Lilley*, 43 Mich. 521, 5 N. W. 982 (1880).

⁹² 45 Mont. 598, 124 Pac. 775, 41 L. R. A. (N. S.) 181 (1912).

⁹³ See: Restatement of the Law of Torts, Sec. 27, Tentative Draft.

⁹⁴ *United States v. Myers*, 1 Cranch 310, Fed. Cas. No. 15,845 (1806), H. 27; *United States v. Richardson*, 5 Cranch 348, Fed. Cas. No. 16,155 (1837), *Burdick* 568; *Keefe v. State*, 19 Ark. 190 (1857), B. 15; *Trogden v. Terry*, 172 N. C. 540, 90 S. E. 583 (1916), G. 10.

^{94a} 5 Cranch 348, Fed. Cas. No. 16,155 (1837), *Burdick* 568.

⁹⁵ 63 N. C. 15 (1868).

will cause a reasonable apprehension of an immediate battery.⁹⁶ In *State v. Myerfield*⁹⁷ the court made a curious distinction, saying that if the condition is one which the defendant has a right to impose, an "offer to strike" unless the condition is complied with is not an assault, if the "offer to strike" is not made with a deadly weapon, but held that because the defendant had used a deadly weapon to compel compliance with his demand he was guilty of an assault.

As has been stated in a prior part of this work, mere words, however insulting or abusive, will not constitute an assault. The defendant must do some act in execution of his purpose; and the act and the means used must reasonably appear to the plaintiff to be adapted to the end, or the plaintiff does not suffer a reasonable apprehension of a battery. Thus, where the defendant made threatening gestures towards the prosecuting witness with an ax but was not within striking distance of her and not sufficiently near to put her in fear of being struck, he was held not guilty of an assault.⁹⁸ On the other hand, while the defendant may not be within "striking distance" of the plaintiff at the time the threatened violence is frustrated or the defendant abandons his purpose, if the distance is such as to induce a person of ordinary firmness to believe he would instantly receive a blow, unless he retreated or struck in self defense or unless the defendant's efforts were otherwise frustrated or he abandoned his purpose, the plaintiff is placed in reasonable apprehension of a battery.⁹⁹

⁹⁶ *Ross v. Michael*, 246 Mass. 126, 140 N. E. 292 (1923), H. 25.

⁹⁷ 61 N. C. 108 (1867).

⁹⁸ *Grimes v. State*, 99 Miss. 232, 54 So. 839, 33 L. R. A. (N. S.) 982 (1911).

⁹⁹ *State v. Davis*, 1 Ired. L. 125, 35 A. D. 735 (1840), B. 12; *Tombs v. Painter*, 11 East 1, 104 Eng. Rep. 265 (1810), H. 23 (the plaintiff and the defendant "being in the same public-house in different parts of the room, the defendant jumped up from his seat, with his fist clenched, as if to strike the plaintiff, but was pulled back to his seat by another person, and did not get within reach of the plaintiff"); *Mortin v. Shoppe*, 3 Car. & P. 373 (1828), W. 35 (the defendant, who was on horseback, rode after the plaintiff so as to compel him to run into a garden for shelter to avoid being beaten).

It is not necessary that the plaintiff believe that the act done by the defendant will actually result in a battery. It is sufficient if he reasonably believes that the defendant will immediately inflict a battery upon him unless he retreats or strikes in self defense or unless the defendant's efforts are otherwise frustrated or he abandons his purpose.¹⁰⁰ Thus, if the defendant attempts to strike the plaintiff and the latter knows he can escape the blow by dodging, outrunning the defendant, or that bystanders will intervene in time to prevent the threatened blow from taking effect, and a battery is avoided in one of these ways, there is an assault.

W. D. Rollison.

University of Notre Dame, College of Law.

¹⁰⁰ Restatement of the Law of Torts, Sec. 24.