



1967

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## Recommended Citation

William H. Erickson, What Constitutes an Assault, 16 Clev.-Marshall L. Rev. 14 (1967)

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## What Constitutes an Assault?

William H. Erickson\*

### Historical Background

THE COMMON LAW FORMS of action established the procedure (writs) that an aggrieved person must follow if he was to obtain redress for trespass to his person, in the King's court.<sup>1</sup> The formalism, fiction, and confusion which gave birth to the law which grants a plaintiff recovery for a tortious assault is to be found "secreted in the interstices" of common law procedure.<sup>2</sup> The writs of *trespass* and that for *trespass on the case* provided the only two writs which were available for tortious wrongs. Trespass, which included a right of action for assault, was basically criminal in character and was directed at serious breaches of the King's peace.

Breach of the peace provided the King's court with a foundation for taking jurisdiction and for granting relief when tortious assaults occurred. In dealing with the injuries to the person, and the type of injuries that would be likely to cause a breach of the peace, the courts laid down the procedure and the limitative boundaries of trespass. Trespass was available to obtain redress for any injury that was committed with direct force, either actual or implied, which created direct and immediate injury to the person.<sup>3</sup> Assault and battery both fell within the confines of trespass.<sup>4</sup> Trespass on the case, which was an outgrowth of the law of trespass and gave a basis for relief for wrongful conduct which was not forcible or direct, came about centuries after the action of trespass was recognized. Today some of the technical asinities which heretofore provided a fertile field for judicial quibbling are looked upon as meaningless history, but the law of torts undisputedly found its creation in common law procedure.<sup>5</sup>

The technicalities which confronted every plaintiff are exemplified in the famous "squib case."<sup>6</sup> The facts which were established in the squib case were that a lighted squib, or bomb, was tossed into a market house by the defendant, only to have a bystander, who was attempting to protect himself, take up the squib and throw it toward another stand in the market house. A

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<sup>1</sup> Prosser, *Law of Torts* 37 (3d ed. 1964), cites typical early English cases, at footnote 86 therein.

<sup>2</sup> Maine, *Early Law and Custom* 389 (1883).

<sup>3</sup> Shipman, *Common-Law Pleading* p. 66 (3d ed. 1923).

<sup>4</sup> *Scott v. Shepherd*, 3 Wils. 403, 2 Wm. Bl. 892 (1773).

<sup>5</sup> *Op. cit. supra*, n. 2, at 389 *et seq.*

<sup>6</sup> *Scott v. Shepherd, supra*, n. 4.

second victim, fearing for his safety, threw the squib in yet another direction, only to have a third victim, who was the recipient of the last toss, suffer the loss of an eye from the explosion of the squib.<sup>7</sup> Trespass was the writ that was sued out against the defendant who first threw the bomb, and the action in trespass was sustained. However, Sir William Blackstone, who was a member of the court and one of the common law's most famous authors, took the position that the harm was not immediate and was not the direct result of the plaintiff's act, and that, although liability was not in issue, *case* alone would be the writ of action that the plaintiff would have to obtain if he were to be allowed to recover damages.<sup>8</sup>

These ghosts of the past, consisting of vestiges of the common law forms of action for trespass and for trespass on the case, have not only haunted the courts, but have also provided historical enigmas in the law of assault.<sup>9</sup> The significance of the forms of action in determining a plaintiff's right to recover for assault has all but disappeared with the passage of time. Today it is not controverted that recovery is available to a plaintiff who has been assaulted, and the plaintiff need not fear that the modern rules of civil procedure will form a basis for defeating his right to recovery. As an outgrowth of our English common law writs, we have the uncontroverted right to protection of an individual's interest in freedom from apprehension of harmful or offensive conduct.<sup>10</sup>

### Analytical Framework

The courts have seldom failed to recognize that the most important object of a civilized society is to protect an individual

<sup>7</sup> *Ibid.*

<sup>8</sup> *Id.*

<sup>9</sup> Apparently, if we go back far enough, we come to the time when the civil action for trespass for assault was "an action brought by the person aggrieved by the actor's attempt to commit a battery upon him." Restatement (2d), Torts § 24, comment c., at 41 (1965):

"c. Rationale. The apparent anomaly of the fact that almost from the very beginning of the common law legal protection was accorded to the interest in freedom from this one curious type of mental impression, but until recently protection was denied to the interest in freedom from other emotional disturbances which everyone recognizes as extremely distressing, such as serious fright or anxiety for the safety of oneself or a member of his family, is explainable only by the fact that the action for assault is a survival from the time when the action of trespass gave to the persons who were the victims of minor crimes a private right of action. The primary purpose of this action was to punish the wrongdoer, although the major part of the penalty imposed upon him went to the private individual aggrieved. The civil action of trespass for assault still presents a strong analogy to criminal prosecutions for an attempt to commit a crime. In reality, it was originally an action brought by the person aggrieved by the actor's attempt to commit a battery upon him."

<sup>10</sup> Prosser, *op. cit. supra*, n. 1, at 37, 38.

against unlawful assaults, because without security against assault, society loses most of its value. In recognizing the historical basis for protection, the court, in *Allen v. Hannaford*,<sup>11</sup> branded the action of a landlord as an assault for his treatment of a tenant when the plaintiff and his movers were threatened with a pistol when they attempted to get the plaintiff's possessions beyond the landlord's reach.

The dissent in the squib case may have provided Blackstone<sup>12</sup> with a background for the following statement that he made as a guide to the bench and bar in 1790:

[A]ssault . . . [is] an attempt or offer to beat another, without touching him; as if one lifts up his cane, or his fist, in a threatening manner to another; or strikes at him but misses him; this is an assault, *insultus*, which Finch describes to be "an unlawful setting upon one's person." This also is an inchoate violence, amounting considerably higher than bare threats; and therefore, though no actual suffering is proved, yet the party injured may have redress by action of *trespass vi et armis*; wherein he shall recover damages as compensation for the injury.

The earliest assault case that the author has been able to find was handed down in 1348, when a defendant suffered judgment for striking out at another with a hatchet when his efforts fell short of making actual contact, but caused harm and the actual existence of a trespass.<sup>13</sup>

Prosser has defined an assault as "apprehension of a harmful or offensive contact with a person, as distinguished from the contact itself," and also as "any action of such a nature as to excite an apprehension of a battery. . . ." <sup>14</sup>

The American Law Institute, in its *Restatement of the Law of Torts*,<sup>15</sup> has provided the following definition:

§ 21. Assault

"(1) An actor is subject to liability to another for assault if

(a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and

(b) the other is thereby put in such imminent apprehension.

(2) An action which is not done with the intention

<sup>11</sup> 138 Wash. 423, 244 P. 700 (1926).

<sup>12</sup> 3 Blackstone, Commentaries 120 (1790).

<sup>13</sup> *I. de S. and Wife v. W. de S.*, [1348] Y. B. Lib. Assis., f. 99, pl. 60 [in Gregory and Kalven, *Cases and Materials on Torts*, p. 794 (1959)].

<sup>14</sup> Prosser, *op. cit. supra* n. 1, at 37, 38.

<sup>15</sup> Restatement (2d) Torts § 21, at 37 (1965).

stated in Subsection (1, a) does not make the actor liable to the other for an apprehension caused thereby although the act involves an unreasonable risk of causing it and, therefore, would be negligent or reckless if the risk threatened bodily harm.

### Judicial Criteria of Whether an Assault Has Occurred

As the courts have been called upon to hear case after case, the definitions have been peculiarly measured and tailored to fit the fact situation in each particular case and have not provided a uniform pattern for future use.<sup>16</sup> Many of the definitions of assault define the condemned conduct as an intentional attempt by a person, by force of violence to do an injury to the person of another, or as any threatening gesture showing in and of itself, or by words accompanying it, an immediate intention to commit a battery.<sup>17</sup> Another definition that has been voiced is that an assault is an unlawful offer of corporeal injury to another by force, or force which is unlawfully directed to the person of another under such circumstances as to create a well-founded fear of immediate peril.<sup>18</sup>

The criminal aspects of an assault have also led to confusion because of the intermingling of the criminal act with the tortious assault that finds remedy in a civil action.<sup>19</sup>

The *Restatement of Torts* has clearly spelled out the fact, which is supported by a wealth of case law, that words in and of themselves ordinarily will not constitute an assault.<sup>20</sup>

<sup>16</sup> *State v. Hazen*, 160 Kan. 733, 165 P. 2d 234, 239 (1946), declared that too frequently definitions have been so limited in their scope, because of the facts involved, or so broadly stated as a result of an attempt to include all situations that might arise, that confusion and misunderstanding has come about in analyzing the definition of an assault as it relates to a fact situation.

<sup>17</sup> *Cook v. Kinzua Pine Mills Co.*, 207 Ore. 34, 293 P. 2d 717 (1956); *Clark v. Downing*, 55 Vt. 259, 45 Am. Rep. 612 (1882); *Peasley v. Puget Sound Tug and Barge Co.*, 13 Wash. 2d 485, 125 P. 2d 681 (1942).

<sup>18</sup> *Brown v. Crawford*, 296 Ky. 249, 177 S. W. 2d 1 (1944).

<sup>19</sup> See, Perkins, *An Analysis of Assault and Attempts to Assault*, 47 Minn. L. Rev. 71 (1962). See, also, Note: *Civil Assault—Comparison with Criminal Assault—Importance of Apparent Ability and Apprehension in Civil Actions*, 30 Tex. L. Rev. 120 (1951).

<sup>20</sup> *Restatement (2d)*, Torts § 31, p. 47 (1965):

“§ 31. Threats by Words.

“Words 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 this person.” That words alone, irrespective of their viciousness or propensity, to result in injury of a physical or mental nature do not constitute an assault is not the end of the matter. Such conduct may be actionable under the emergent tort doctrine: intentional infliction of emotional harm. This new theory of tort liability, while still in its embryonic stages, is separate and distinct from the traditional doctrine of assault. For general background concerning this

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Acts which aggravate an assault must, in final analysis, be distinguished from those acts which constitute an assault. Generally, words or acts by a defendant that may embarrass and distress a plaintiff, and which may cause the greatest of indignity, may not amount to an assault, but may aggravate and increase the damage occasioned by the assault.<sup>21</sup> Basically, an assault is an intentional act, and without the requisite intent, recovery will not be granted for harmful or offensive conduct.<sup>22</sup>

The cases which were formulated under the original concepts of assault and battery have declared that an intention to do harm, or an unlawful attempt, is not only an essential element of the crime or tort, but also an important criterion in fixing damages.<sup>23</sup> Some jurisdictions, with the passage of time, have relaxed the strict requirements of intent, substituting wantonness<sup>24</sup> or negligence<sup>25</sup> as the test.

In most cases, we all know that assault and battery generally exist together, and it has become customary for the courts to refer to the term "assault and battery" as if it were a single thought and an action of its own.<sup>26</sup> Even though assault and

(Continued from preceding page)

new theory of tort liability, see Prosser, *op. cit. supra*, n. 1 at § 11, Infliction of Emotional Distress; Magruder, Mental and Emotional Disturbance in the Law of Torts, 49 Harv. L. Rev. 1033 (1936); Prosser, Insult and Outrage, 44 Cal. L. Rev. 40 (1956); Prosser, Intentional Infliction of Mental Suffering: A New Tort, 37 Mich. L. Rev. 874 (1939); Wade, Tort Liability for Abusive and Insulting Language, 4 Vand. L. Rev. 63 (1950); Gregory and Kalven, Cases and Materials on Torts, Ch. 12, pp. 787-860 (1959).

<sup>21</sup> Stearns v. Sampson, 59 Me. 568, 8 Am. Rep. 442 (1871).

<sup>22</sup> Restatement (2d) Torts § 32, p. 49 (1965):

"§ 32. Character of Intent Necessary.

"(1) To make the actor liable for an assault, the actor must have intended to inflict a harmful or offensive contact upon the other or to have put the other in apprehension of such contact.

"(2) If an act is done with the intention of affecting a third person in the manner stated in Subsection (1), but puts another in apprehension of a harmful or offensive contact, the actor is subject to liability to such other as fully as though he intended so to affect him."

<sup>23</sup> Gilmore v. Fuller, 198 Ill. 130, 65 N. E. 84 (1902); Perkins v. Stein, 94 Ky. 433, 22 S. W. 649 (1893); Newman v. Christian, 149 Neb. 471, 31 N. W. 2d 417 (1948); State v. Davis, 23, 1 Iredell's Law 125, 35 Am. Dec. 735 (N. C. 1840); MacDonald v. United Pacific Ins. Co., 210 Or. 395, 311 P. 2d 425 (1957); Raefeldt v. Koenig, 152 Wis. 459, 140 N. W. 56 (1913).

<sup>24</sup> People v. Carlson, 160 Mich. 426, 125 N. W. 361 (1910); Cook v. Kinzua Pine Mills Co., *supra*, n. 17.

<sup>25</sup> Mohr v. Williams, 95 Minn. 261, 104 N. W. 12 (1905), wherein an assault was charged for the performance of an unauthorized surgical operation, and the court held that it was sufficient to show that the assault complained of was wrongful and unlawful or the result of negligence, and that intent was only necessary when a criminal prosecution was undertaken for assault and battery.

<sup>26</sup> Commonwealth v. McKie, 1 Gray 61 (Mass. 1854); State v. Maier, 13 N. J. 235, 99 A. 2d 21 (1952).

battery are separate and distinct causes of action, there is a relation between them. An assault is the initial stage of the breach of the peace which becomes more serious when it is increased to a battery.<sup>27</sup> Case law supports the statement that an assault is "an inchoate battery," and that an assault is an intentional attempt by force to do violence to the person of another, while battery is the actual application to such person of the attempted force and violence.<sup>28</sup>

### Acts Which Do Constitute Assault

The cases which have dealt with the problem of what does or does not constitute an assault have been couched in riddles of cause and effect, abhorrence of viciousness, and protection of the innocent.<sup>29</sup>

Thus, a defendant has suffered judgment for his acts as a landlord when he shook his fist under the nose of the demure and pregnant plaintiff in an attempt to evict her.<sup>30</sup>

The fact that a gun was unloaded has often been the controversial point for the court, but has generally found the plaintiff securing judgment, even though no present ability to harm existed.<sup>31</sup> Generally, the use of a firearm by the defendant brings about apprehension and fear in the plaintiff and results in a finding that an assault has been committed.<sup>32</sup>

The utterance of threats, followed by a shot at the direction where the plaintiff was standing, constitutes an assault, even

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<sup>27</sup> *Mendenhall v. State*, 18 Okla. Cr. 441, 196 P. 736 (1921); see, also, *State v. Davis*, *supra*, n. 23, where the court declared that "Where an unequivocal purpose of violence is accompanied by an act, which, if not stopped, or diverted, will be followed by personal injury, the execution of the purpose is then begun, the battery is attempted."

<sup>28</sup> *Johnson v. Sampson*, 167 Minn. 203, 208 N. W. 814 (1926); *Cook v. Kinzua Pine Mills Co.*, *supra*, n. 17.

<sup>29</sup> In *Plonty v. Murphy*, 82 Minn. 268, 84 N. W. 1005 (1901), it was held to be an assault when a landlord entered the plaintiff's apartment without permission and demanded that plaintiff's five-year-old son pick up trash which was strewn throughout the back yard. The defendant landlord, in his anger, had threatened to thrash the child, spoke angrily, and had raised his fists as though to strike the plaintiff and had put her in fear of attack; he was held liable.

<sup>30</sup> *Stockwell v. Gee*, 121 Okl. 207, 249 P. 389 (1926).

<sup>31</sup> *Allen v. Hannaford*, *supra* n. 11; *Lowry v. Standard Oil Co.*, 63 Cal. App. 2d 1, 146 P. 2d 57, 60 (1944), wherein the court observed: "It is clear that a person's right to live in a society free from being put in fear of personal harm is invaded if he believes that an unloaded firearm being pointed at him is loaded." See, also, *State v. Godfrey*, 17 Or. 300, 20 P. 625 (1889), where it was held to be error to instruct the jury that if the victim reasonably believed that the gun was loaded the actor was guilty and liable for an assault, whether the gun was loaded or not.

<sup>32</sup> *Kline v. Kline*, 158 Ind. 602, 64 N. E. 9 (1902), where the defendant was found to have assaulted the plaintiff when he pointed a pistol at the plaintiff and threatened to shoot her and her child.

though there is a time differential between the threats and the shot and even though the plaintiff is not hit.<sup>33</sup> A defendant has been called upon to answer in money damages when he threatened a pregnant plaintiff, while not more than one and one-half feet away, with a threatened gesture of a club, and thereby caused a miscarriage.<sup>34</sup> Even though the cases declare that words do not constitute an assault, the holding of a walking stick in a threatening position, with the utterance accompanying the act of, "I will whip hell out of you," is an assault.<sup>35</sup>

Physical contact is not an essential element, although threatened or offered violence is.<sup>36</sup>

### Acts Which Have Not Amounted to Assault

All of the cases are dependent upon their own immediate fact situations, and no formula has been found which will enable a lawyer to predict with absolute certainty whether a particular fact situation, with all of its attendant circumstances, will amount to an assault in the eyes of the law. In *Gelhaus v. Eastern Airlines*,<sup>37</sup> an officer of the defendant company, after firing the plaintiff, threatened to have him thrown out if he was not off the premises by five o'clock. The court, in reviewing the conduct of the defendant officer, had no difficulty in declaring that there was no assault.

The manager of the defendant's store in *Republic Iron & Steel Co. v. Self*,<sup>38</sup> told the plaintiff that she was no lady and then called her a liar and ordered her out of the store. The court declared that the conduct fell short of an assault, since there was no threatening gesture to accompany the acts and conduct complained of. The well-known fact that abusive words will not in and of themselves constitute an assault was analyzed by the court in *Hixson v. Slocum*.<sup>39</sup> In the principal case, the court declared that the abusive words were not an assault, and that, even though the defendant had hit the plaintiff, the plaintiff had justified the defendant's actions and could not complain of the battery or of the abusive words.

In determining whether or not the plaintiff had assaulted the defendant and had by his conduct justified the defendant's assault on him, the court in *Hulse v. Tollman*,<sup>40</sup> held that even

<sup>33</sup> *Nielson v. Eiler*, 248 Mich. 545, 227 N. W. 688 (1929).

<sup>34</sup> *Holdorf v. Holdorf*, 185 Ia. 838, 169 N. W. 737 (1918).

<sup>35</sup> *Trogden v. Terry*, 172 N. C. 540, 90 S. E. 583 (1916).

<sup>36</sup> *Johnson v. Sampson*, *supra*, n. 28.

<sup>37</sup> 194 F. 2d 774 (5th Cir. 1952).

<sup>38</sup> 192 Ala. 403, 68 S. 328 (1915).

<sup>39</sup> 156 Ky. 487, 161 S. W. 522 (1913).

<sup>40</sup> 49 Ill. App. 499 (1893).



though the plaintiff had put his hand into his pocket where the defendant knew he had a sling-shot, he had not assaulted the defendant and did not give the defendant the right to attack him.

The courts have gone so far as to say that shooting a pistol which was not aimed at the plaintiff and with the bald intention of frightening the plaintiff, but without the intent to injure him, was not an assault.<sup>41</sup> It has also been held that threats to commit harm, without an overt act, even though the evidence was that the defendants did have blackjacks on their persons, did not constitute an assault when the blackjacks were not exhibited to the plaintiff.<sup>42</sup>

In *Hornaday v. Hornaday*,<sup>43</sup> the court declared that a gesture, however vicious, could not be an assault in and of itself without more. In *Fraguglia v. Sala*,<sup>44</sup> the defendant's act in reaching for a pitchfork without testimony to establish his intent to attack the plaintiff was short of an assault in the eyes of the court.

### Conclusion

Assault, as it has been judicially defined, finds its basis in the protection against the apprehension of receiving harmful or offensive contact. It is the threshold for the more serious tort of battery, the actual contact with the person of the plaintiff.

The law of assault has been developing over hundreds of years and will continue to do so.

Of key importance to the tort, and the one factor more than any other which differentiates the tort of assault from other forms of intentional wrongdoing, is the element of apprehension in the mind of the victim. Without the awareness by the victim of the offered but uncompleted harmful or offensive contact, there is no basis for a cause of action sounding in assault. It is the mental tranquillity of the victim that the law of assault protects.

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<sup>41</sup> *Degenhardt v. Heller*, 93 Wis. 662, 68 N. W. 411 (1896).

<sup>42</sup> *Cucinotti v. Ortman*, 399 Pa. 26, 159 A. 2d 216 (1960).

<sup>43</sup> 95 Cal. App. 2d 384, 213 P. 2d 91 (1950).

<sup>44</sup> 17 Cal. App. 2d 738, 62 P. 2d 783 (1936).