



## Basic Legal Principles

Although frequently used in a single phrase and often thought of as a single offense, the terms "assault" and "battery" refer to two separate torts. The two offenses are often committed almost concurrently, that is, an assault followed immediately by a battery. However, an assault does not include a battery because it is merely the apprehension of a contact that if made would constitute a battery. Although a battery is often a completed assault, a battery still may be committed without an accompanying assault, as in the case where the plaintiff was not aware that a battery was imminent.

A person may be criminally as well as civilly liable for assault and battery. The Penal Code defines assault as an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another. [Pen. Code §240] A battery is any willful and unlawful use of force or violence on the person of another. [Pen. Code §242]

In civil actions for assault and battery, the courts have sometimes applied the Penal Code definitions and relied on criminal cases in rendering their decisions. However, the torts of assault and battery are not defined by statute, and thus the court is afforded the opportunity to extend the concept of the tort beyond the limits placed on the corresponding crime by its statutory definitions. [See *Lowry v. Standard Oil Co.* (1944) 63 Ca1 App 2d 1, 146 P2d 57]

## Elements of Assault

An assault is a demonstration of an unlawful intent by one person to inflict immediate injury on the person of another then present. [*Lowry v. Standard Oil Co.* (1944) 63 Cal App 2d 1, 146 P2d 57] A civil action for assault is based on an invasion of the right of a person to live without being put in fear of personal harm. [*Thing v. La Chusa* (1989) 48 Cal 3d 644, 257 Cal Rptr 865, 771 P2d 814]

However, the Restatement Second, torts provides that a defendant is liable for assault if: (1) he or she acts intending to cause a harmful or offensive contact with the person of the plaintiff or a third person, or an imminent apprehension of such contact, and (2) the plaintiff is put in such imminent apprehension as a result. [Restatement 2d, Torts §21]

The apprehension necessary for an actionable assault requires that the plaintiff believe that the defendant's act may result in imminent contact unless it is prevented by the plaintiff's self-defensive action or by his or her flight or by the intervention of some outside force. The plaintiff must actually be aware of the imminent contact, but the plaintiff need not experience fright at the prospect of the threatened contact.

To make a defendant liable for an assault, the defendant must have intended to inflict a harmful or offensive contact on the plaintiff or to have put him or her in apprehension of such contact. Once that intent is formed and the defendant puts the plaintiff in apprehension of the threatened contact, the defendant is liable, even if he or she subsequently terminates the attempt to inflict harm or that attempt is frustrated for some other reason.

The Penal Code definition of assault requires that the defendant have a present ability to commit a violent injury on the person of another. [Pen. Code §240] However, one civil case has held that the present ability to injure is not necessary for an actionable assault. [Lowry v. Standard Oil Co. (1944) 63 Cal App 2d 1, 146 P2d 57 (pointing of unloaded gun at another in threatening manner constitutes assault unless it is known by plaintiff that gun is in fact unloaded)]

## **Elements of Battery**

A battery is a violation of an individual's interest in freedom from intentional unlawful, harmful, or offensive unconsented contacts with his or her person. To establish a claim for battery a plaintiff must demonstrate that the defendant intentionally subjected him or her to a harmful or offensive touching which actually and proximately caused plaintiff to suffer injury.

The defendant must intend to cause a harmful or offensive contact with the person of the plaintiff or a third person, or an imminent apprehension of such contact. However, intent is the gist of an action for battery only where the battery was committed in the performance of an act not otherwise unlawful. If the cause of action is an alleged battery committed in the performance of an unlawful or wrongful act, the intent of the defendant to injure is immaterial. Moreover, where the defendant is guilty of gross or culpable negligence, this may supply the element of intent, so as to create a liability for an unintentional injury which is the natural proximate consequence of the defendant's conduct.

If the defendant forms the intent to cause the apprehension of the threatened contact, as in an assault, and actual contact results, he or she still is liable for battery, even though the resulting contact was unintended.

The doctrine of transferred intent applies to causes of action for battery. Thus, where a defendant intends to cause a harmful or offensive contact with a third party, but instead causes that contact with the plaintiff, he or she is liable to the plaintiff for battery just as though he or she intended to cause the contact with the plaintiff.

## **Sexual Battery**

Under the Civil Code, a person may be civilly liable for the commission of a sexual battery. A person commits a sexual battery if he or she [Civ. Code §1708.5(a)]:

1. acts with the intent to cause a harmful or offensive contact with an intimate part of another, and a sexually offensive contact with that person directly or indirectly results;
2. acts with the intent to cause a harmful or offensive contact with another by use of his or her intimate part, and a sexually offensive contact with that

person directly or indirectly results; or

3. acts to cause an imminent apprehension of the conduct described in (1) or (2), and a sexually offensive contact with that person directly or indirectly results.

"Offensive contact" means contact that offends a reasonable sense of personal dignity. [Civ. Code §1708.5(f)] "Intimate part" means the sexual organ, anus, groin, or buttocks of any person, or the breast of a female. [Civ. Code §1708.5(d)]

A person who commits a sexual battery on another is liable to that person for damages, including, but not limited to, general damages, special damages, and punitive damages. [Civ. Code §1708.5(b)] The court may also award equitable relief, including, but not limited to, an injunction, costs, and any other relief the court deems proper. [Civ. Code §1708.5(c)]

## **Gender and Domestic Violence**

The California Legislature in 2002 created a new civil action for damages arising from gender violence. Civ. Code §52.4 provides that any person who has been subjected to gender violence may bring a civil action for damages against any responsible party. The plaintiff may seek actual damages, compensatory damages, punitive damages, injunctive relief, any combination of those, or any other appropriate relief. A prevailing plaintiff may also be awarded attorney's fees and costs. [Civ. Code §52.4 subd. (a)]

The term "gender violence," is defined as either one or more acts that would constitute a criminal offense under state law that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, committed at least in part based on the gender of the victim, whether or not those acts have resulted in criminal complaints, charges, prosecution, or conviction; or a physical intrusion or physical invasion of a sexual nature under coercive conditions, whether or not those acts have resulted in criminal complaints, charges, prosecution, or conviction. [Civ. Code §52.4 subd. (c)]

Also in 2002, the California Legislature created a new tort of domestic violence. [Civ. Code §1708.6. In order to prove liability under Civ. Code §1708.6 a plaintiff must prove both of the following elements:

1. the infliction of injury upon the plaintiff resulting from abuse, as defined in Pen. Code §13700 subd. (a); and
2. the abuse was committed by the defendant, a person having a relationship with the plaintiff as defined in Pen. Code §13700 subd. (b).

A person who commits an act of domestic violence on another is liable to that person for damages, including, but not limited to, general damages, special damages, and punitive damages. [Civ. Code §1708.6 subd. (b)] The court, in an action pursuant to this section, may grant to a prevailing plaintiff equitable relief, an injunction, costs, and any other relief that the court deems proper, including reasonable attorney's fees. [Civ. Code §1708.6 subd. (c)] The time for commencement of an action under this section is governed by Code Civ. Proc. §340.15. [Civ. Code §1708.6 subd. (c)]

## **Persons Liable – Aiders and Abettors**

The direct perpetrator of an assault and battery is not the only person liable for the tort. A party injured by an unjustified assault may recover damages not only from the actual assailant, but also from any other person who aids, abets, counsels, or encourages the assault. The type of act which constitutes aiding and abetting the assault depends on the circumstances. For example, a defendant was liable for assault and battery where he brought the direct perpetrator of the assault to the place where the beating took place and waited with him with the evident purpose of waylaying the plaintiff and taking him to a secluded spot, assisted by driving the car, and stood by while the beating was administered.

## **Persons Liable – Minors**

A minor is liable for his or her torts, except that he or she is not liable in exemplary damages unless at the time of the act he or she was capable of knowing that it was wrongful. [Fam. Code §6600] The minor need not possess the mental capacity to appreciate the wrongful character of the act. A minor who forcibly invades the person of another is liable for a battery regardless of an intent to inflict injury; the only intent which is necessary is that of causing the harmful or offensive contact in question. Whether the minor had such intent is a question of fact.

Parents ordinarily are not vicariously liable for the torts of their children. However, a parent is under a duty to exercise reasonable care so as to control his or her minor child to prevent him or her from intentionally harming others or from so conducting himself or herself as to create an unreasonable risk of bodily harm to them, if the parent knows or has reason to know that he or she has the ability to control the child, and knows or should know of the necessity and opportunity for exercising such control.

Certain specific statutes impose liability on a parent for injuries to third persons caused by their children. [See, for example, Civ. Code §1714.1 (civil liability for injuries caused by willful misconduct of minor imputed to parent or guardian) and Civ. Code §1714.3 (civil liability for injuries caused by discharge of firearm by minor imputed to parent or guardian under certain circumstances)]

## **Persons Liable – Employers**

Under the doctrine of *respondeat superior*, an employer is vicariously liable for the intentional torts of his or her employees committed within the scope of the employment, including assault and battery, if the employment includes risks that are inherent in, or created by, the employment. The determination as to whether the risk is inherent in, or created by, the employment is made by asking whether the actual occurrence was a generally foreseeable consequence of the activity. "Foreseeable" in this context means that in the context of the particular enterprise an employee's conduct is not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer's business.

If the assault and battery was motivated by personal malice not engendered by the employment, the employer is not vicariously liable; but otherwise, liability may be found if the injury results from a dispute arising out of the employment.

## Medical Procedures Without Consent

A physician who performs an operation to which the patient has not consented is liable for battery. Moreover, a physician is liable for battery when he or she obtains the consent of the patient to perform one type of treatment, but subsequently performs a substantially different treatment for which consent was not obtained. In such a case, the requisite element of deliberate intent to deviate from the consent given is present. [Grieves v. Superior Court (1984, 4th Dist) 157 Cal App 3d 159, 203 Cal Rptr 556] However, where the patient consents to a certain treatment and the physician performs that treatment, but an undisclosed inherent complication with a low probability occurs, no intentional deviation from the consent given appears. Rather, the physician in obtaining consent may simply have failed to meet his or her due care duty to disclose pertinent information. In that situation, the action should be one for negligence. [Cobbs v. Grant (1972) 8 Cal 3d 229, 104 Cal Rptr 505, 502 P2d 1]

When a physician is confronted with an emergency or an unanticipated condition and immediate action is necessary for the preservation of life or health of the patient and it is impracticable to obtain consent to an operation which the physician deems to be immediately necessary, it is his or her duty to do what the occasion demands within the usual and customary practice among physicians.

## Defenses in Assault & Battery Actions

Consent: One may consent to an act, otherwise a battery, thereby vitiating the wrong. However, if defendant fraudulently obtains the plaintiff's consent plaintiff's consent may be invalidated. Moreover, if the consent is conditional and the condition does not occur, defendant may be liable if he or she acts in spite of the failure of the condition to occur.

The fact that the act consented to is illegal does not vitiate the plaintiff's consent. Where a person submits to an illegal act voluntarily and as a result suffers injury, the consent still is valid and the defendant is not liable for assault or battery.

Self Defense: Any necessary force may be used to protect from wrongful injury the person of oneself, or of a wife, husband, child, parent, or other relative, or member of one's family, or of a ward, servant, master, or guest. [Civ. Code §50] Thus, a person whose act would otherwise constitute an assault or battery is not liable if the person commits the assault or battery in self-defense or in the defense of those persons enumerated in the statute.

A person who is reasonably defending himself or herself against an assailant bears no liability for accidental injury to a third party.

The degree of force which may be used must be limited to such force as would have appeared to be necessary to a reasonable person in all of the circumstances, knowing what the defendant knew, and facing the facts which presented themselves at the time to the defendant. In determining whether the degree of force was reasonable, the amount of force exerted, the means or instruments by which it was applied, the manner or method of applying it, and the circumstances under which it was applied are factors to be considered, but that determination is ultimately one for the trier of fact. . If excessive or improper force is employed, such force will itself constitute an assault and battery though the act would have been lawful if excessive

or improper force had not been used. The necessity for the use of force may be either real or apparent.

Self-defense is not available to a person who procures the assault himself or to a person who has sought a quarrel with the design to create a real or apparent necessity for making an assault.

Defense of Property: Any necessary force may be used to protect from wrongful injury the property of oneself, or of a wife, husband, child, parent, or other relative, or member of one's family, or of a ward, servant, master, or guest. [Civ. Code §50] The property one is entitled to protect includes property that is in one's rightful possession. The degree of force which may be used must be limited to such force as would have appeared to be necessary to a reasonable person in all of the circumstances, knowing what the defendant knew, and facing the facts which presented themselves at the time to the defendant.

A person may not ordinarily use deadly force or force likely to cause serious bodily injury to protect his or her property, unless the person reasonably believes that the defendant if not expelled from the property is likely to cause death or serious bodily harm to the person or to a third person whom he or she is privileged to protect. It has been held that deadly force may be used in defense of property where the recipient of the deadly force is a felonious trespasser.

A person may be held civilly liable for assault and battery if that person sets on his or her property a deadly mechanical device, such as a spring gun, that kills or injures another. However, an exception to this rule applies where the intrusion by the person injured is, in fact, such that the property owner, were he or she present, would be justified in taking the life or inflicting the bodily harm with his or her own hands.

Arrest or Other Lawful Act: A peace officer has the privilege to use reasonable force to effect an arrest, to prevent escape, or to overcome resistance. [Pen. Code §§835, 835a] The peace officer need not have an arrest warrant in order to invoke the privilege. He or she may use reasonable force if he or she has reasonable cause to believe that the person to be arrested has committed a public offense. [Pen. Code §835a] A peace officer, however, is never privileged to use excessive force.

A peace officer who makes or attempts to make an arrest need not retreat or desist from his or her efforts by reason of the resistance or threatened resistance of the person being arrested; nor will the officer be deemed an aggressor or lose his or her right to self-defense by the use of reasonable force to effect the arrest or to prevent escape or overcome resistance. [Pen. Code §835a] A person has a reciprocal duty to refrain from using force or any weapon to resist such an arrest if he or she has knowledge, or by the exercise of reasonable care, should have knowledge, that he or she is being arrested by a law enforcement officer. [Pen. Code §834a]

Merchants and library employees have a statutory privilege to use reasonable force to detain a person for the purpose of conducting an investigation whenever the merchant has probable cause, or the library employee has reasonable cause, to believe the person to be detained is attempting to unlawfully take or has unlawfully taken merchandise from the merchant's premises or library materials from the library. [Pen. Code §490.5]

## Acts Not Constituting a Defense

Provocation: Provocation is not a defense to an action for assault and battery. Provocative acts, conduct, or words, if unaccompanied by any overt hostile act, will not justify an assault and battery, no matter how offensive or exasperating and however much such provocation may be calculated to excite or irritate. However, provocation may be considered as a mitigating factor with respect to an award of punitive damages. The plaintiff's provocation does not absolutely bar recovery of punitive damages, but rather may be considered in reduction of, or setoff against, such damages.

Voluntary Intoxication: Voluntary intoxication is likewise not a defense to an action for assault and battery. [St. Ores v. McGlashen (1887) 74 Cal 148, 15 P 452]

Negligence of The Plaintiff: Assault and battery are intentional torts and thus the negligence of the plaintiff is not a defense available to the defendant. But the plaintiff's negligence may become an issue where an innocent bystander is injured. If a person on whom a battery is being perpetrated exercises his or her right of self-defense, he or she must exercise reasonable care so as not to injure an innocent bystander, and the defense of negligence in that respect may then become available to the person unlawfully attacked as against the innocent bystander. However, a defendant may not assert the negligence as a defense against an innocent bystander who is injured by the defendant's act by claiming that the bystander failed to retreat to an area outside the range of the defendant's conduct.

## General Procedural Outline

No two cases are alike and procedures vary with the nature and complexity of the legal and evidentiary issues involved. The following is a very general outline of the stages of a civil action.

### Complaint Filing

Every case begins with the filing and service of a Summons and Complaint. The Complaint will contain one or more "causes of action" such as "Breach of Contract" or "Fraud".

### Service Of Complaint

After the Summons and Complaint have been filed with the court, they must be properly served on the defendant(s). If the defendant(s) will accept service, he/she may sign an Acknowledgment of Service." Otherwise the documents will have to be formally served.

### Response To Complaint

The Defendant(s) have 30 days from the date of service of the Summons and Complaint to serve on the Plaintiff(s) either an Answer to the Complaint or a pleading challenging the sufficiency of the the Complaint. Responses challenging the sufficiency of the Complaint include a motion called a "Demurrer" and a "Motion To Strike"

### Hearing Of Challenges To Sufficiency Of Complaint (If Applicable)

If the defendant(s) decide to file a demurrer or motion to strike, these motions must be heard and ruled upon before the matter may proceed. This can take up to 2 months. If such motion is sustained and the court grants leave to amend

the Complaint, a new complaint must be drafted and served and the process starts over. Sometimes a second demurrer or motion will be filed causing more delays.

### Discovery

Once the Complaint and Answer have been filed both parties commence "discovery" procedures by which the evidence necessary to prosecute both sides of the case. Depending on the nature and complexity of the case, one or more of the following discovery devices may be used by the parties:

- Interrogatories: Written questions which must be answered under oath.
- Request For Production Of Documents: Demands for production of documents by the parties involved.
- Requests For Admission: Requiring the parties to say which allegations they affirm and which they deny.
- Deposition: The parties may be required to appear in the opposing attorney's office to answer questions under oath in front of a court reporter. Depositions can also be taken from 3rd parties.
- Subpoena Documents From Third Party: Documents may be subpoenaed from 3rd parties such as banks and employers.

### Discovery Motions (If Applicable)

If a party fails or refuses to comply with discovery requests, it may be necessary for the party propounding the discovery to make a motion in court to compel responses. If the court grants the motion, further responses will be made. If those responses are still inadequate, another motion may be made and the court can sanction (fine) the resisting party. In extreme cases the court can even terminate the action in favor of the moving party.

### Trial Setting:

Throughout the case the court will set a series of Case Management Conferences to be attended by attorneys for all parties. These hearings are designed to determine whether the case is ready for trial. When the court feels that a case is ready for trial, it will set the date for trial and make orders concerning completion of discovery and final preparation for trial.

### Settlement Negotiations:

Settlement negotiations may proceed throughout the trial. Often the court will require the parties to try a mediation of the issues or will set a "Mandatory Settlement Conference" (MSC) before the trial date. Settlement negotiations generally become more intense as the trial date approaches.



Trial:

The vast majority of cases settle before trial. However if the parties cannot settle the case, the only way to resolve the issues is by way of trial.

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