

Assault in Crime and Tort

Canadian Criminal Code

PART VIII : OFFENCES AGAINST THE PERSON AND REPUTATION

Assault

265. (1) A person commits an assault when

(a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;

(b) he attempts or threatens, by an act or a gesture, to apply force to another person, if he has, or causes that other person to believe on reasonable grounds that he has, present ability to effect his purpose; or

(c) while openly wearing or carrying a weapon or an imitation thereof, he accosts or impedes another person or begs.

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Linden & Feldthusen, Canadian Tort Law, 8th Ed.

CHAPTER 2 - INTENTIONAL INTERFERENCE WITH THE PERSON

C. Assault

Assault is the intentional creation of the apprehension of imminent harmful or offensive contact. The tort of assault furnishes protection for the interest in freedom from fear of being physically interfered with. Damages are recoverable by someone who is made apprehensive of immediate physical contact, even though that contact never actually occurs. The underlying policy thrust of the tort of assault, like that of battery, is the reduction of violence. Because threatening to inflict harm is apt to attract retaliation in the same way as causing harm, it must also be discouraged by tort law.¹

Assault should be distinguished from battery, although the two are often blurred together and called "assault".² This does not usually matter very much because in most cases both assault and battery are committed in rapid succession. If a battery occurs, the assault tends to be ignored since the quantum of damages for it will be rather small. An assault can be committed without a battery and battery can occur without an assault preceding it. For example, swinging at someone and missing is an assault but not a battery; striking someone from behind, without his or her knowledge, is a battery but not an assault.

Conduct which intentionally arouses apprehension of an imminent battery constitutes an assault. Shaking a fist at another person,³ lunging at someone in an effort to attack,⁴ and swinging an axe at another person,⁵ are actionable assaults. An assault may also be committed if a person is surrounded by a group of people in a hostile manner,⁶ or if a loaded gun is pointed threateningly at someone.⁷ Unleashing a growling dog in order to frighten someone can be an assault. Tailgating another car, intentionally putting the other driver in fear of an imminent collision, can also amount to assault.⁸ Blocking another person's progress has also been said to amount to an assault, but this is questionable.⁹

Frightening or threatening someone, however, does not constitute an assault unless the event feared is imminent. To threaten to do harm to someone at some future time, because this is not as likely to spur retaliation, does not amount to an assault, although it may give rise to other tortious or even criminal responsibility.¹⁰ Hence, shaking one's fist at someone who is out of reach, making a threat

over the telephone, or reaching for someone who is standing safely behind a counter, lack the required immediacy for assault liability.¹¹

Words may transform an apparent assault into innocent behaviour and, conversely, they may render actionable conduct which would otherwise be harmless.¹² For example, if one person draws a sword and points it at another person within range, this would be an assault. If at the same time, however, the person utters words that make it clear that there is no intention to use the sword, it will not amount to an assault.¹³ Conversely, innocuous conduct such as putting one's hand in one's pocket is not an assault, but if at the same time one proclaims that one is reaching for one's gun and will shoot, it would constitute an assault. In the same way, to make a lewd suggestion to someone is not an assault, but if the speaker then advances threateningly, it may become actionable.¹⁴

Another problem involving the use of words is the question of "conditional assault". If one person points a gun at another and says, "Your money or your life!", it might be argued that it is not an assault because the plaintiff may avoid any harm by complying with the condition and parting with the money. It could be contended that the requirement of immediacy is absent. Such an argument is fallacious, however, for one cannot impose conditions upon another, when one has no legal right to do so.¹⁵ It would be otherwise if a landowner said to a trespasser, "Get off my land or I'll throw you off," for in such a case, the landowner is only threatening to do that which the landowner is entitled to do.

It is sometimes said that words alone cannot constitute an assault.¹⁶ Normally, this is correct, but it is not invariably so. This notion is a variant of the requirement of immediacy; in other words, a mere threat unaccompanied by some conduct indicating that it is to be executed immediately lacks the element of imminence necessary for liability. A responsible plaintiff in these circumstances need not be fearful and need not take defensive measures, for mere menacing words are cheap and all too common. Threats must normally be combined with action before they become so dangerous as to invite a response. It is possible, however, to arouse apprehension of imminent harm by words alone and, if this transpires, it is actionable.¹⁷ One example of such a threat would be telephoning someone and announcing that their telephone receiver has dynamite in it and is being detonated immediately. Anyone hearing such words would be reasonably apprehensive of imminent physical harm and should be entitled to recover for assault. Another situation where words alone might amount to assault would be if a motionless highwayman, standing with a gun in hand pointed at a person, shouted "Stand and deliver!"¹⁸

The actual ability to execute a threat need not be present, as long as it appears to a reasonable plaintiff that it is there. If a person is reasonably apprehensive of imminent physical contact, even though in no real danger, there may still be recovery for assault. Therefore, to point an unloaded gun at someone who reasonably believes it to be loaded is assault.¹⁹ To reach for someone's throat with a choking motion, even in jest, is assault if the person reasonably believes the threat is serious.

The emotion of fear is not required for assault; it is enough if there is an apprehension of unpleasant contact.²⁰ If a pipsqueak holds a fist up to the heavyweight boxing champion of the world and threatens to knock his block off, the boxer may sue for assault, even though he is not in the least frightened. Tort law protects even the brave from offensive threats. It also seeks to curtail acts of retaliation which could be vicious.

Because the interest being protected by the law of assault is that of mental security, there can be no assault if the plaintiff is not conscious that there is any danger. Thus, to point a loaded gun at a

sleeping person is probably not an assault, though if the person were actually shot while asleep, it would be a battery.²¹

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<p>Restatement of Torts (2d) § 13 Battery: Harmful Contact An actor is subject to liability to another for battery if</p> <ul style="list-style-type: none">(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) a harmful contact with the person of the other directly or indirectly results.	<p>Model Penal Code § 211.1. Assault. (1) . . . A person is guilty of assault if he:</p> <ul style="list-style-type: none">(a) attempts to cause or purposely, knowingly or recklessly causes bodily injury to another; or(b) negligently causes bodily injury to another with a deadly weapon
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