



#### OFFICE LOCATION

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## PRACTICE AREAS

Workers Compensation

Personal Injury

Motor Vehicle Accidents

Wrongful Death

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## E-Newsletter

### Assault & Battery

Two common types of personal injury torts are assault and battery. A battery is often confused with an assault, and the two terms are often intermingled and perceived as one tort. In actuality, they are two separate torts and must be regarded as such. An assault is an act that creates a reasonable apprehension of an imminent battery. A battery, in turn, is the intentional and unpermitted physical contact with another by either an individual or an agency set in motion by an individual.

With respect to assaults, all that is required is that the plaintiff perceives a threat that is regarded as imminent. It is not necessary that the plaintiff actually be frightened or intimidated. The focus of the inquiry is whether the apprehension is reasonable. In that regard, for example, where a defendant approaches an individual and says, in a matter-of-fact manner, "If the Bulls don't win the finals this season, I might have to hurt someone," it is unlikely that the plaintiff could successfully bring a claim against the defendant for assault.

In many cases it is said that mere words are not enough to constitute an assault, and that there must be some accompanying overt act. In certain situations, a normally inoffensive movement, such as holding up an arm or reaching into a pocket, when coupled with offensive words, may be enough of an overt act to establish the tort of assault. In the same vein, a threatening gesture when accompanied by words negating any intent to render harm may not be considered an assault if a reasonable person would not perceive an immediate danger of a battery. For instance, if you approach someone shaking your fists, but saying "one of these days, I am going to get even with you" as you smile brightly and laugh, your actions may not constitute an assault, if a reasonable person would conclude you were joking.



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In order to recover on an assault claim, the plaintiff must establish that the defendant was actually capable, at the time the threat was made, of carrying it out. Therefore, if the defendant, who was incarcerated, yells at the plaintiff from behind bars that he would like to punch him "right then and there," it is unlikely that an assault has occurred. However, where the plaintiff reasonably believes that the assault could occur, even though the defendant is not actually capable of carrying out the threat, an assault has occurred. For example, if the defendant points an unloaded gun at the plaintiff and says "I oughtta shoot you," an assault will likely have occurred, as long as the plaintiff was unaware that the gun was, in fact, not loaded.

Therefore, in order to prove a case for assault, the plaintiff must establish that the threat of harm was imminent, that the defendant was actually capable of carrying out the threat or the plaintiff reasonably believed he was actually capable, and that a reasonable person in the plaintiff's position would have been apprehensive.

A battery can occur where an individual, or an item in contact with or closely connected to that individual such as clothing or an object being held, is touched in an offensive manner. As opposed to assault, the plaintiff need not have been aware of the contact at the time it actually occurred in order for a battery to result.

In general, two different types of contact may constitute a battery. The first type of contact includes any type of physical harm including a cut, scrape, bruise, burn or fracture, no matter how slight. Physical pain, without any scar or physical "reminder" can also constitute a battery. The second type of contact includes any type of connection or impact which does not result in physical harm, but which is done without consent. For example, poking another with an angry finger (even in the air in front of them without actually making contact), spitting upon another, throwing a bucket of water upon another, or kissing and hugging someone without permission can constitute a battery.

Battery is an intentional tort, so the plaintiff must prove that the defendant intended his conduct. If the defendant did not intend to impermissibly touch the plaintiff, then battery was not committed. (However, the defendant may be liable in negligence to the plaintiff in those situations.) The plaintiff need not prove that the defendant intended to actually



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harm the plaintiff, but only that the conduct itself was intentional and not an accident. A distinction is therefore drawn between the intent to harm and the intent to contact. For example, if you deliberately spit in another person's face, intending to make that contact but not intending any harm to result, you are still responsible for battery if harm does in fact result.

A plaintiff will not be able to pursue a cause of action for battery if he consented to the contact. For example, medical patients often consent to treatment by a physician. The acts of the physician in treating the patient would constitute battery in many circumstances if consent were not acquired. However, even where consent is obtained, if the actions of the defendant carry beyond the borders of the consent that was given, a battery may occur. In other situations, consent may be assumed given the relationship of the parties and the particular circumstances of the matter. Therefore, where two individuals are lifelong friends who are generally comfortable displaying their emotions to one another, a hug between the two is generally not considered a battery unless one makes clear that such touching is not consented to.

Finally, the type of society that we live in often compels some type of touching, whether consented to or not, which is not considered a battery. For example, if you enter onto a crowded subway car, and bump into or brush up against another passenger, without any more significant contact, then a battery has not occurred. However, if you purposely bump into or brush up against the only other passenger, besides yourself, on a subway car, a battery is more likely to have occurred. Similarly, even on the crowded subway car, if a person bumps into or brushes up against, and then caresses or fondles another passenger, that person is more likely to be found to have committed battery, as well.

Many aspects of criminal law focus on the rights of the criminal. However, recent attention has been focused on the rights of the victims of crimes, who often suffer great emotional, if not physical, injuries at the hands of the criminal. All fifty states and the federal government now have laws that protect victims. In many states, a victim is considered to be the person who directly suffers the effects of the crimes (such as the person who is murdered) and immediate family members who suffer the secondary effects of the crime (such as the loss of a loved one). If you have been a victim of a crime, you should know that there are ten major rights that you may have.



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### Ten Rights of Crime Victims

1. You have the right to seek a criminal complaint against the criminal. As soon as you can, you should contact your local law enforcement agency and report the crime to them. After the police investigate the matter, they may choose to arrest the individual. A prosecutor will then determine what crimes should be charged.

2. You have the right to ask for issuance of a criminal complaint if the police decide not to arrest the alleged criminal. You can usually file an application for such a complaint with the court in the place where the crime occurred. If the court, after an investigation, decides not to file the complaint, you can appeal that decision.

3. You have the right to testify in a probable cause hearing to determine if a criminal complaint should be transferred to another court to be heard. In a probable cause hearing, you will be required to answer questions posed by both the prosecutor and the defendant's attorney.

4. You may be called as a witness at trial. If so, you will be required to testify under oath concerning the crime and will be asked questions by both the prosecutor and the defendant's attorney. You have the right to be present in the courtroom during the trial of the defendant.

5. If the defendant is found guilty, you have the right to address the court and jury either in person or through a writing to describe the impact the crime has had upon you and your family. You will be allowed to make an "impact statement" regarding what punishment you feel would be appropriate for the defendant. Your victim impact statement is important it will be used prior to the sentencing phase, and it may be reviewed on appeal. It will also be referenced in any later parole hearings.

6. You may have rights in some states to receive victim services and protections. These rights may include the right to the assistance of a victim's rights worker, personal security and protection services, crisis counseling, emergency transportation services, assistance in the return of recovered personal property, and other rights.

7. You have the right, before, during, and after a trial, to be free from harassment about the case. If you feel that you are being harassed, tell the prosecutor or check to see whether the court has a victim witness representative to help you.



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8. You may have the right to monetary compensation for any physical or emotional injury the crime caused. You may be entitled to payment for crime-related medical expenses, crime-related mental health services, and lost wages. If you have a loved one who was killed, you may be entitled to compensation for loss of services of the deceased, the costs of funeral and burial expenses for the deceased, and your own medical or mental health care expenses incurred in dealing with your loss, although there may be exceptions to this compensation.

9. In many states, you have the right to be notified if the defendant is going to be released. You may also have the right to be notified if the defendant escapes from prison or jail.

10. You have the right to access to the courts to file a lawsuit if your rights and protections as a victim are not respected.

#### Disclaimer

This publication and the information included in it are not intended to serve as a substitute for consultation with an attorney. Specific legal issues, concerns and conditions always require the advice of appropriate legal professionals.