
Volume 60
Issue 3 *Dickinson Law Review* - Volume 60,
1955-1956

3-1-1956

Criminal Battery in Pennsylvania

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Recommended Citation

Samuel J. Serata, *Criminal Battery in Pennsylvania*, 60 DICK. L. REV. 261 (1956).
Available at: <https://ideas.dickinsonlaw.psu.edu/dlra/vol60/iss3/6>

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CRIMINAL BATTERY IN PENNSYLVANIA

Section 708 of the Penal Code of 1939 provides:

"Whoever commits an assault and battery, or an assault, is guilty of a misdemeanor, and upon conviction thereof, shall be sentenced to pay a fine not exceeding one thousand dollars (\$1,000), or undergo imprisonment not exceeding two (2) years, or both."¹

An initial observation of this enactment reveals that it contains no definition of "assault" or "assault and battery"² with the result that the courts of Pennsylvania have applied the common law definition. At common law a battery was a misdemeanor³ and was defined by Blackstone as "The least touching of another's person wilfully, or in anger."⁴ In addition, some reference has been made to the definition of battery contained in the Restatement, Torts, § 18, as being applicable to criminal cases.⁵ From an examination of the cases, however, a battery is best defined as the intentional or negligent touching of the person of another without legal justification or excuse. "Assault and battery" and "battery" are synonymous, and the terms are to be distinguished from "assault" which is merely an attempt with force and violence to do a corporal hurt to another.⁶ The cases frequently use the term "assault" when speaking of an "assault and battery" or a "battery".⁷

Like most crimes, battery may be readily divided into physical and mental elements. To facilitate this discussion, these two elements will be further defined: the physical element being an act causing a touching of the person of another under circumstances rendering the touching unlawful; and the mental element as being either the intent to touch another or carelessness as to whether another is touched or not.⁸

The Physical Element Of Battery

The first requirement of the physical element of a battery is that some act be committed or omitted. Although the question has not been litigated in a criminal case in Pennsylvania, some willed physical activity or passivity would seem to be required. *Lobert v. Peck*⁹, a tort case, presents a discussion of the problem of tort liability for an act committed by a sleeping defendant. The principles contained therein would appear applicable in determining the nature of the act required for the commission of a criminal battery.

¹ PA. STAT. ANN. tit. 18 § 4708 (Purdon 1939).

² Commonwealth v. Comber, 374 Pa. 570, 97 A.2d 343 (1953).

³ Commonwealth v. Dunmire, 38 Pa. Super. 155 (1909).

⁴ Commonwealth v. Gregory, 132 Pa. Super. 507, 1 A.2d 501 (1938).

⁵ Commonwealth v. Gregory, note 4 *supra*; Commonwealth v. Bird, 152 Pa. Super. 648, 33 A.2d 531 (1943).

⁶ Commonwealth v. Moon, 151 Pa. Super. 555, 30 A.2d 704 (1943).

⁷ Commonwealth v. Dooley, 6 Dist. 381, 19 Pa.C.C. 367 (1897).

⁸ The author wishes to acknowledge the invaluable aid rendered by the outline of criminal battery prepared as a study aid by W. H. Hitchler, former Dean and Professor of Criminal Law at the Dickinson School of Law.

⁹ 337 Pa. 103, 9 A.2d 365 (1940).

The thing touched must be the person of another, although this does not necessarily mean that the living body of the victim must be touched. Contacts made with the clothes¹⁰ or a cane carried in the hand of the victim¹¹ have been held sufficient. The means whereby the touching is effected varies as well, and may be by the defendant's hand¹², his foot¹³, a club¹⁴, an automobile¹⁵, a beer glass¹⁶, or a bullet fired from a gun¹⁷. Early cases have held that the defendant was guilty of a battery when the wheel of a carriage touched the pedal of a bicycle ridden by the victim causing physical harm to him¹⁸ or a thrown coat struck the forefeet of a horse causing a jar to be transmitted to the rider¹⁹. The variety suggests that the requirement is simply that the touching be accomplished by some agency set in motion by the defendant and the contact made with some object capable of transmitting the physical shock to the body of the victim, or so closely allied with his body as to be considered part of his person.

Ordinarily, the degree of touching is unimportant, since the courts require only the "least intentional violence, in ever so small a degree."²⁰ However, in cases involving the corporal punishment of a child by a parent²¹ or a school-teacher²² and where the defendant acts in self defense²³ the degree of touching becomes important since only reasonable force is permitted. There is no need for a distinct physical harm to the body of the victim.²⁴

The touching must be unlawful or no battery is committed. Thus, where the victim consents there is no battery²⁵, but consent must be distinguished from mere submission.²⁶ The touching of another in defense of the person²⁷, real²⁸ or personal property²⁹, in the performance of a legal duty such as an arrest by a constable³⁰ or specially appointed policeman³¹, or while assisting a

¹⁰ *Commonwealth v. Bird*, 152 Pa. Super. 648, 33 A.2d 531 (1943); *U.S. v. Ortega*, 27 Fed. Cas. 359, No. 15,971 (Wash.C.C. 1825).

¹¹ *Respublica v. DeLongchamps*, 1 Dall. 111 (1784).

¹² *Commonwealth v. Gregory*, 132 Pa. Super. 507, 1 A.2d 501 (1938).

¹³ *Commonwealth v. Comber*, 374 Pa. 570, 97 A.2d 343 (1953).

¹⁴ *Commonwealth v. Stirk*, 5 Lanc. Rev. 415 (1888).

¹⁵ *Commonwealth v. Ireland*, 149 Pa. Super. 298, 27 A.2d 746 (1942).

¹⁶ *Commonwealth v. Roman*, 52 Pa. Super. 64 (1912).

¹⁷ *Smith v. Commonwealth*, 100 Pa. 324, 12 W.N.C. 196 (1822).

¹⁸ *Commonwealth v. Dooley*, 6 Pa. Dist. 381, 19 Pa. County Ct. 367 (1897).

¹⁹ *Commonwealth v. Fleet*, 8 Phila. 614 (1871).

²⁰ *Commonwealth v. Jaynes*, 137 Pa. Super. 511, 10 A.2d 90 (1939).

²¹ *Commonwealth v. Blaker*, 1 Brewst. 311 (1867).

²² *Commonwealth v. Yalk*, 30 Luz. L. Reg. Rep. 173 (1934).

²³ *Commonwealth v. Sono*, 98 Pa. Super. 347 (1929).

²⁴ *Commonwealth v. Gregory*, 132 Pa. 507, 1 A.2d 501 (1938).

²⁵ *Commonwealth v. Shrodes*, 354 Pa. 70, 46 A.2d 483 (1946).

²⁶ *Commonwealth v. Tuck*, 169 Pa. Super. 35, 82 A.2d 288 (1941); *Commonwealth v. Carpenter*, 172 Pa. Super. 271, 94 A.2d 74 (1953).

²⁷ *Commonwealth v. Mandarino*, 23 Wash. County Rep. 6 (1941).

²⁸ *Commonwealth v. Moreland*, 9 W.N.C. 272 (1880).

²⁹ *Commonwealth v. Emmons*, 157 Pa. Super. 495, 43 A.2d 568 (1945).

³⁰ *Shovlin v. Commonwealth*, 106 Pa. 369 (1884).

³¹ *Commonwealth v. Jayne*, 11 Pa. Super. 459 (1899).

known public officer even if the latter acts without authority³² is not a battery because the touchings in all instances have been held lawful. The relationship between the parties may give the defendant the right to touch the victim, as where a parent³³ or a schoolteacher³⁴ disciplines a child.

The Mental Element

To constitute a battery the unlawful touching of another must be accompanied by the requisite mental element. The battery must have been intentional, not accidental or merely negligent.³⁵ There is no requirement that the intent be to injure a specific person, since the intent will be implied from the doing of an act calculated to injure another.³⁶ There is no battery if the touching is done without the intention of inflicting a harmful or offensive contact.³⁷ The distinction has been clarified by the comparison of two situations. The first is where one strikes another with his fist and knocks him down. This is clearly a battery. However, if one slips on an icy pavement and in so doing falls against another causing him to fall, there is no battery. The intent to hit another is absent in this latter situation.³⁸

The intent to commit a battery may be actual and specific or it may be implied from circumstances.³⁹ An early case⁴⁰ indicated in dictum that a person doing a negligent act could be convicted of a battery although he had no intention of injuring another. The more recent cases indicate that intent is the very gist of the offense and becomes a paramount problem in automobile injury cases. The court may instruct the jury that the intent to injure may be inferred from circumstances such as "the grossly negligent use of a potentially dangerous instrument like an automobile, in wanton disregard of the safety of others lawfully on the highway. . ."⁴¹ In the same case, the court said contributory negligence of the injured persons is not a defense, but a circumstance to be considered in determining the guilt of the accused, since it would absolve the driver of the wilful or wanton disregard of the safety of others from which the intent to injure could be inferred.⁴² There has been no mention by the Pennsylvania courts of negligence from which intent will be presumed by law. From the more recent cases, one can conclude that Pennsylvania requires an intentional touching for a battery, but the jury may infer intent from grossly negligent behavior.⁴³

³² Commonwealth v. Sadowsky, 80 Pa. Super. 496 (1923).

³³ Commonwealth v. Blaker, 1 Brewst. 311 (1867).

³⁴ Commonwealth v. Yalk, 30 Luz. L. Reg. Rep. 173 (1934).

³⁵ Commonwealth v. Comber, 374 Pa. 570, 97 A.2d 343 (1953).

³⁶ Smith v. Commonwealth, 100 Pa. 324, 12 W.N.C. 196 (1822).

³⁷ Commonwealth v. Gregory, 132 Pa. 507, 1 A.2d 501 (1938).

³⁸ Commonwealth v. Ireland, 149 Pa. Super. 298, 27 A.2d 746 (1942).

³⁹ Commonwealth v. Comber, 374 Pa. 570, 97 A.2d 343 (1953).

⁴⁰ Commonwealth v. Fleet, 8 Phila. 614 (1871).

⁴¹ Commonwealth v. Ireland, 149 Pa. Super. 27 A.2d 746 (1942).

⁴² Commonwealth v. Ireland, note 41, *supra*.

⁴³ For a more complete discussion of negligent criminal battery see *The Negligent Criminal Battery in Pennsylvania*, 53 DICK. L. REV. 147 (1948-49).

It is a general rule that if one voluntarily commits an unlawful act and inflicts personal injury he is criminally liable for such injury, but in some cases a distinction is made between unlawful acts *mala in se* and merely *mala prohibita*.⁴⁴ There are no Pennsylvania cases discussing this point.

Conclusion

The elements of the crime of battery are relatively fixed and certain, the most recent change being a certain relaxation of the formerly strict requirement of an intentional touching. However, by allowing the jury to infer intent from gross negligence, the courts respond to present social needs and continue to protect the individual from offensive contact.

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CEMETERY TRUSTS IN PENNSYLVANIA

Testator leaves property the income to be used for the care and maintenance of a cemetery lot. Formerly the validity of such a provision was challenged on the grounds that there were no beneficiaries and therefore no trust, and that in any case, such provision violated the Rule against Perpetuities or the Rule against Indestructible Trusts. In the United States generally and in Pennsylvania particularly the validity of such provisions is no longer questioned. This note will explain briefly how this position has been reached and will point up problems still unresolved, especially in regard to provisions where the amount for the care of a tomb is excessively large.

It is not within the scope of this note to consider exhaustively the Rule against Perpetuities or the Rule against Indestructible Trusts. Suffice it to say that the rules are aimed at the unreasonable continuance of restraint on alienation which is accomplished by the creation of various future interests.¹ The purpose of the rules is to preserve freedom of alienation, and to prevent restrictions on the circulation of property.² In a number of instances, trusts of indefinite duration for the maintenance or repair of private property not devoted to charitable uses, such as trusts for the perpetual care of cemetery lots, have been held to have created perpetuities; but it seems that the term is used in its sense of continuing interest, and the real basis for invalidity is want of a beneficiary.³ Gray, one of the most prominent authorities on the rule, submits that the rule is inapplicable to cemetery trusts. He argues that the Rule against

⁴⁴ 2 Burdick, *Crime* § 353 (1946).

¹ 10 AM. JUR., *Charities*, § 75 (1937).

² *Ryan v. Ward*, 192 Md. 342, 64 A.2d 258, 7 A.L.R. 2d 1078 (1949).

³ *Bliven v. Borden*, 56 R.I. 283, 185 Atl. 239 (1936).