

## **Assault and Battery Claims in Civil Court**

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### **ASSAULT AND BATTERY CLAIMS IN CIVIL COURT**

Most people recognize that assault and battery are criminal acts, and tend to use the two words interchangeably. In fact they denote two separate types of intentional conduct. A battery is the touching or physical contact of another that is harmful or offensive and not consented to. This type of conduct could span the gamut of conduct from a "sucker-punch" to the jaw of an unsuspecting person, to a "wet-willy" in the ear of some other unsuspecting victim. An assault is the apparent intent to commit a battery that is perceived as such by the victim, whether or not a battery is actually in fact intended. If an assailant brandishes their fist in the face of a victim and acts like they are going to strike them, then an assault has been committed, so long as the victim reasonably believes that they are about to be battered. If the victim doesn't see the assault (ie., it happens behind their back and they are unaware of it), or if the victim doesn't believe that a battery is imminent (ie., two friends fooling around), then no assault has been committed.

The Penal Code in California is rife with different grades and punishments for assault and/or battery, varying on whether deadly weapons were involved, whether another crime was taking place during the event, and the degree of harm inflicted upon or intended to be inflicted upon the victim. Some are classified as misdemeanors, and some are felonies.

While most victims of an assault or battery would undoubtedly prefer their assailant to get their just dues in a criminal court of law, an equal consideration should be given by the victim as to their right to monetary compensation as may available in a civil court of law.

#### **A. The Hardened Criminal Case:**

Many victims find themselves at the mercy of a hardened criminal, who batters his victim as a means to an end in effectuating a robbery or some other crime, or who may be a social deviant who just enjoys hurting people.

In the experience of these law offices, these types of cases are the most daunting for a victim to pursue civilly, as the hardened criminal or social deviant is not only morally irresponsible, they are usually financially irresponsible as well. Many times the assailant cannot even be identified. When they can be identified, it is usually more often than not that they own little to naught that could be used to satisfy a legal claim against them.

If they are apprehended by law enforcement and sentenced for their misdeeds, then their future home in the Grey Bar Hotel makes their employment and financial prospects somewhat bleak for the indefinite future. Criminal court orders for the convicted felon to make "restitution" to the victim often end up as no more than an inked footnote to the other papers in their criminal court file.

This shouldn't necessarily deter the victim from attempting to secure a judgment - judgments bear interest at .10% per annum and can be renewed indefinitely, and if the judgment is related to an act of moral turpitude (like assault and battery) then it is non-dischargeable in bankruptcy. Even bad guys can win the lottery on any given day, so it pays to be patient if one secures a money judgment against such an individual.

## **B. Vicarious Responsibility:**

Whether or not the victim of an assault and battery is injured due to the acts of a hardened criminal or not, careful consideration should be given as to whether or not some other individual or entity, who would be more financially responsible, might be legally responsible for the conduct of the assailant.

As a general rule of law, the employer of an employee is vicariously responsible for the legal wrongdoing of their employee, so long as the employee has injured somebody within the course and scope of their employment. This is imposed as a social policy under the law - if you deem to hire people to work for you, then you are responsible for those acts committed during and as part of their employment.

However, if the person who commits the assault is actually an independent contractor, then the principal is not vicariously responsible. The distinction between the employee and the independent contractor sometimes becomes disputed when a vicarious liability claim is made by the injured victim: as a general rule, the principal must exercise a greater degree of control and responsibility over the agent and his job duties in order for the latter to be considered a true employee, as opposed to an independent contractor.

In order for an employer to be vicariously liable for an assault or battery perpetrated by an employee, the subject incident must result from an altercation arising out of the performance of the employer's duties. This is especially true if the employment duties contemplate the possibility of force against individuals (ie., the barroom bouncer or a security guard), such that an employer would be vicariously responsible if the employee wrongfully uses force or uses excessive force. A further basis of liability against the employer would be negligence, if they hired an employee that they knew or should have known would pose a hazard or danger to others.

On the other hand, if the employee is motivated solely by a personal agenda unrelated to the performance of their job duties when they commit an assault and battery, then the employer is not vicariously responsible to the injured party, the latter of whom must look solely at the employee for any recompense.

Whether or not the altercation can be related to the employee's duties is quite often a hotly disputed issue of fact. Some acts that have been held not to be within the course and scope of an employee's regular duties would include a situation where the employee was pursuing a personal dispute, even though they were working for their employer at the time; and sexual assault (although claiming direct negligence against the employer would still be a viable theory if the employer negligently hired someone that they should have known might commit such an act, such as hiring a convicted sex offender). However, at least one case found a city liable for the sexual assault of a citizen by an on-duty police officer after a traffic stop, due to the fact that the officer's police power had an inherent potential for abuse, such that the imposition of vicarious responsibility was appropriate [*Mary M. V. City of Los Angeles* (1991) 54 Cal.3d 202, 285 Cal.Rptr. 99].

Acts of sexual assault or harassment in the workplace are governed by statute, and the employer is vicariously liable if an employee in a position of management or supervision sexually assaults or harasses an employee. If the assault or harassment is committed by a co-employee, with no ostensible authority over the affronted employee, then liability is only imposed against the employer if they knew about it or should have known about, but did nothing reasonable to stop it.

While it comes as a surprise to some people, a parent is not ordinarily vicariously responsible for the negligent or intentional wrongdoing of their minor children. If a minor commits an act of willful misconduct that causes injury to another (and assault and battery would fall into this category), then under

Civil Code section 1714.1 the parent is jointly responsible with the minor, however, the parents' liability is limited to \$25,000.00 of the medical expenses, only, of the injured person. The same code section limits the responsibility of the insurance company of the parents to only \$10,000.00.

Again, a negligence theory might be successful in imposing 100% liability on the parent for the wrongful conduct of their child, but this would require very convincing evidence to persuade a trier of fact that an assault perpetrated by a minor could have been avoided, but for the lack of efficient supervision or control by the parental figure. Efficient supervision and control would probably not entail handcuffing an unruly child to their bedpost, so as to prevent the minor from harming others.

A married person is not vicariously responsible for the wrongdoing of their spouse, either. However, if a judgment is obtained against the wrongdoer spouse, then the community property of the married couple may be seized to satisfy the judgment. The spouse who didn't commit the assault may even have their wages garnished to satisfy that judgment, even though they did nothing personally wrong. This is because community property, which is jointly owned and controlled by the married couple, may be seized by a judgment debtor to satisfy the separate property debt of a spouse.

### **C. Premises Liability:**

Some assault incidents take place on private or public property, where the argument can be made that the owner or controller of the property is at fault for the incident, due to a failure to provide security or warnings to people on the premises.

There have been a large number of reported appellate and supreme court cases dealing with the liability of a landowner for the assault and battery of an injured person when the attack has been perpetrated by a third party, the latter of whom most often fall into the "hardened criminal" category referenced hereinabove. The possessor or controller of the property has a duty to protect people on their property from the wrongful acts of third persons threatening their safety, but only from injury resulting from those acts which are *reasonably foreseeable*.

For liability to be imposed on the property owner, there must be found a breach of the landowner's duty to protect and/or warn persons who are on the property from the danger, and there must be a causal relationship between a failure to exercise the duty, and the harm suffered.

A heightened degree of foreseeability is required before the law will impose upon a property owner the onerous and expensive duties to hire security guards, install bright lighting, install electronic security devices, provide fencing, or to provide other extraordinary security measures. California case law has generally required that the landowner be aware of *significant similar acts* occurring on the premises in the past, before it will impose this responsibility and make the landowner legally responsible for the injured party's damages if those responsibilities are not undertaken [*Ann M. V. Pac. Plaza Shopping Ctr.* (1993) 6 Cal.4th 666, 25 Cal.Rptr.2d 137].

It is not enough to show that prior crimes have occurred on or near the premises, the injured party to show a right to damages must show that the prior criminal history was similar to the incident that led to their injury. For example, a history of bank robberies on the ground floor of a bank building was held not to impose liability on the property owner to a person who was sexually assaulted in the underground parking lot of the property, as there was no adequate showing of foreseeability [*Sharon P. V. Arman, Ltd.* (1999) 21 Cal.4th 1181, 91 Cal.Rptr.2d 35].

#### **D. Insurance Coverage and Self-Defense:**

Obtaining compensation on an assault and battery case can be made somewhat more feasible where there is liability insurance coverage that would apply to the claim. In a vicarious liability or negligence situation imposed against a residential or commercial property owner, or against an on-going business of any size, there is usually liability insurance that may be resorted to for purposes of satisfying the meritorious claim.

However, the insurance coverage issue becomes more problematic when the insured is the assailant himself, as opposed to a party who employed the assailant or who owned the property where the assault took place. This is because most liability insurance policies, plus the California Insurance Code, exclude insurance coverage for willful acts that are intended by the insured to cause injury. This exclusion is both a creature of contract law, insofar as the insurance contract is concerned, and of public policy as set forth in the Insurance Code.

Nevertheless, a legal claim for assault and battery against the assailant should always include a cause of action for negligence, as opposed to pleading liability under an assault and battery theory only. The mere allegation that the injury was negligently caused may cause the insurance coverage to be invoked, if only under a "reservation of rights" basis. This is where the insurance company agrees to pay for the legal defense of its insured, but not necessarily any resulting judgment, given the alleged intentional nature of the act constituting the incident. Insurance companies are sensitive to the situation of their insured in such litigation, and the reservation of rights posture aside, they may still settle the case or pay a resulting judgment, to protect their insured and to avoid the possibility of the insured suing the insurance carrier for not protecting them from the claim and the eventual judgment.

This is because most assailants will deny that they assaulted and battered the injured victim. While they may concede that they struck the victim, the usual scenario is for the assailant to claim "self-defense", or a "mutual combat" situation, so as to color their actions as having been either privileged or consented to by the victim.

This often invokes what is sometimes called the "imperfect" self-defense theory - the assailant claims that they were acting to protect their own safety, while the victim contends that the force exercised was wrongful, excessive, or out of proportion to the action initiated by the victim that led to the injury.

For example, one is normally allowed to use deadly force to counter deadly force, but not to counter non-deadly force. In other words, if somebody is threatening to strike you with their fist, you are not ordinarily privileged to draw a knife or firearm on them in response to the threat. If somebody insults you or engages in name-calling, you are not ordinarily privileged to physically strike them. However, it is a fact of life that people do use excessive force to ward off perceived threats, and this is when the imperfect self-defense claim arises.

The injured victim and/or the assailant (the latter in order to invoke the protection of insurance coverage) in an imperfect self-defense theory will argue that the assailant *negligently* believed that they had a right to use that degree of force, even though it may have been objectively unnecessary, such that their conduct was non-intentional, accidental, and should fall within the scope of insurance coverage which normally covers liability of the insured for injuries caused by their negligence.

The imperfect self-defense theory has yet to be tested by the California Supreme Court, but that court has accepted for review an appellate case that has responded in the affirmative to such an argument [*Delgado*

*v. Interinsurance Exchange of the Auto Club of Southern California* (2007) 152 Cal.App.4th 671], such that the highest court in the state will eventually render the final word on the subject.

As a pragmatic consideration apart from the consideration of insurance coverage, in the experience of this law firm it is quite common for the defendant in an assault and battery action to file a cross-complaint for assault and battery in their own name against the plaintiff, accusing the plaintiff of being the aggressor and causing injury to the defendant. While this is often just a baseless tactic, designed to frustrate the prosecution of the complaint and/or to portray the plaintiff as the bad guy, as a practical matter such a crosscomplaint will usually make the case more expensive and problematic, and if the defendant/crosscomplainant sustained any physical injury themselves in the fray, it may even carry a potential for liability against the plaintiff, depending upon whom the trier of fact may eventually believe if the case went as far as a trial.

#### **E. Damages:**

Damages in an assault and battery case fall into one or more of three different categories: (1) Economic Damages, for losses capable of arithmetical ascertainment such as medical bills and loss of earnings; (2) Non-Economic Damages, for intangible damage factors such as physical pain, emotional and mental distress, humiliation, or loss of enjoyment of life; and (3) Punitive Damages, which are an amount to punish the defendant and to make an example of him or her due to conduct that arises, by *clear and convincing evidence*, to the level of malice or oppression.

Economic and non-economic damages need only be proven by a *preponderance of the evidence*, i.e., that which is more likely true than not.

Just like in a more mundane personal injury action arising out of a motor vehicle accident or a fall on somebody's property, damages in an assault and battery action will usually be highly contested by the defense, who will argue that the plaintiff's diagnosis and/or prognosis by their treating physician is exaggerated or flat-out wrong; that their medical bills and/or treatment are unnecessary and unreasonable; and/or that the wage loss being claimed is bogus, unsubstantiated, or not related to the injuries being claimed. Part of the motivation for "driving down" the economic damages will be to "drive down" the noneconomic damages, the latter of which are usually (but not always) in some proportionate amount to the economic damages. A significant amount of legitimate economic damages for medical bills and loss of earnings will support a claim for a significant amount of non-economic damages, and the converse is true as well.

Insurance carriers are not liable for punitive damages, as a matter of law, although an insurance carrier has a duty to its insured to shield them from the prospect of a punitive damage award, *if it can do so* at the price of a fair and reasonable settlement.

In addition to the higher burden of proof associated with proving punitive damages at trial, to be upheld on appeal the punitive damages must bear some reasonable relationship to both the total amount of economic and non-economic damages, as well as the nature and extent of the defendant's assets and property. Wealthy defendants who are found liable for punitive damages deserve to be punished more than indigent defendants who may be found similarly liable, in order to carry out the stated social goal of using punitive damages to make an example of and to deter intentional wrongdoers. While they should always be pled in a complaint, in the usual assault and battery case punitive damages will not come into play, at least if the case is settled with an insurance carrier contributing to the settlement.

**F. Attorney's Fees:**

Unless provided for in a contract between the parties or as imposed by statute, each litigant in a legal case must bear their own attorney's fees, even if they prevail in the case by way of settlement or trial. Under Code of Civil Procedure section 1021.4, in an action against a defendant arising out of a felony offense for which the defendant has been convicted, the court may impose an award of attorney's fees to the plaintiff, upon a motion. However, in order for this to come into play the defendant will have to have been convicted of felony assault and/or battery, and not just a misdemeanor offense; and the plaintiff will have to take the case to trial, prevail, and then bring a motion requesting the fees. Even then, the court for whatever reason would have the discretion to deny the request for attorney's fees.

In addition, if an act of "domestic violence" is perpetrated upon a victim, then under Civil Code section 1708.6 (c), the court again has the discretion to award attorney's fees to a prevailing plaintiff. Victims of domestic violence are defined under Penal Code sec. 13700, and would include within the classification of a "victim" a spouse, co-habitant, co-parent, emancipated minor, or former co-habitant.

**G. Conclusion:**

Assault and battery claims in the civil justice arena can be daunting and complex claims for a plaintiff and their attorney to pursue, involving hotly disputed issues of fact and a small mountain of legal authorities dealing with insurance coverage, discovery procedures, burden of proof, investigation, and presentation and proof of damages.

An experienced and tenacious personal injury litigator is the best guarantee of success for the injured party who has been injured in a physical altercation. Don't get beat up in court too.