Working with Textbooks

INTRODUCTION

These questions are for practising the technique of reading a legal textbook. They are based on using a textbook because a textbook is one of the most common and important type of legal texts. In any event the techniques for using a textbook adapt, often directly, to working with other legal texts such as articles in periodicals.

Textbooks chosen for the questions are textbooks on torts. The questions involve three torts:

- False Imprisonment
- Battery
- Assault

Problems with Texts

The analysis contained in the model answers which follow has been written by (1) reading several texts on torts and (2) selecting what appear to be the main elements and dividing them into their sub-elements. This task, however, contained some difficulties which are reflected in the way that the answers are set out.

First, textbooks generally do not use the rigorous division of law into elements and sub-elements advocated in *Legal Technique*. Consequently, it is not clear from the textbooks precisely what the elements are. Nor do all textbooks cover the same points. Therefore, the model answers represent a best guess as to how the law fits together based on reading several torts textbooks. (The fact that this comment is needed here demonstrates how inadequate it is when a writer of a text does not organise law properly.)

Secondly, there is a hazy or surreal quality about some of the elements. In part this is a problem arising because the torts textbooks do not use this method of analysis. In part it is the nature of the torts.

QUESTIONS ON WORKING WITH TEXTS

Instructions for Questions

These three questions involve organising the law in a torts textbook on three torts – false imprisonment, battery and assault. This is what you have to do. Find a reasonably current textbook on the law of torts (or if you wish, consult two or more textbooks). Go to the part dealing with the relevant tort. Organise or analyse the law in this tort by breaking it down into elements, sub-elements etc, but ignoring two other things which are normally involved in organising law:

- Defences to these torts.
- Consequences. (These, of course, take the standard form. The defendant is guilty of the tort and liable for a remedy in damages.)

Here is some specific advice on how to go about this task.

Identifying Pieces of the Elements

For every bit of the text ask this question: Is this telling me something that a plaintiff needs to establish? If it is, it is part of the elements. Keep it. If it is not, put it aside, but not out of sight. Categorise it if you can, eg history of the tort, social context or effect, some famous cases which involve it, practical advice and so on.

Gathering Like Pieces

Gather together all of the bits of the elements which relate to the same point.

Identifying Categories

Go through the texts looking for categories and sub-categories which will be part of, and hence will structure, the elements. Even if the text does not say it, where applicable note an alternative category which is not stated. For example, the text may say that a tort is an intentional tort. This indicates that the alternative category, of a tort that is not an intentional tort, has been rejected. Later the text might consider whether recklessness is sufficient. Now the category "intention" can be divided into three sub-categories, "specific intention", "recklessness" and "no intent".

Organising Categories

This stage involves taking the bare statements of categories, identifying the relationship between them, then setting out the categories in an organised statement of elements and sub-elements. At this stage do this initially in point form: simply write down the label of the category.

Fleshing Out Categories

This stage involves taking these bare statements of categories and fleshing them out. Because tort law is hazy and surreal, the best way to state the elements properly is in narrative form. This amounts to a short text. Having done this, check your efforts against the model answers.

Upgrading Categories

This stage goes beyond what you are required to do in the question. It probably involves more time than you want to spend, but is put forward as a possibility because readers should be aware of what can be done from here on, and why it can be done. Shortly stated, this final stage consists of using the statement of elements that you have made so far to write a full text, realistically a chapter of a textbook, on the relevant tort. By now it should be obvious why this is suggested. It shows the close relationship between the elements of a tort and a text describing the tort. If the text is properly written, it will be squarely and manifestly based on the elements of the tort. Elements are the organisational structure or syntax for describing legal rules. It is as simple as that. If a writer does not structure their account of legal rules according to their elements, what they write will not be clear and will be of limited use.

Consequences

Do not be concerned with the consequences when the tort is committed. In any event these will be standard. The defendant will be guilty of the tort and liable for a remedy in damages.

Analysing False Imprisonment

This question requires you to organise the tort of false imprisonment. Do this in the manner indicated above in "Instructions for Questions".

Analysing Battery

This question requires you to organise the tort of battery. Do this in the manner indicated above in "Instructions for Questions".

Analysing Assault

This question requires you to organise the tort of assault. Do this in the manner indicated above in "Instructions for Questions".

Checking your Answer

Having done this question you may find it interesting to compare the account that you have done with the textbook from which you have done it. Compare the way in which you have structured the law with the way in which the author of this book has done it.

ANSWERS TO QUESTIONS ON WORKING WITH TEXTS

These three answers to questions respectively involve organising the torts of false imprisonment, battery and assault. The questions involved extracting the elements, sub-elements etc of the tort, but without being concerned about either defences or remedies.

Read the section *Problems with Texts* in the *Introduction to Working with Texts* and remember the difficulties with texts referred to there. A major consequence of these difficulties is that the answers here are, to some extent, a guess as to what the elements are – the texts are not written in a way which makes it clear what the elements are.

Sub-elements

A sub-element of a legal rule can involve any of the following:

(1) Sub-requirements of the element, ie the components of an element.
(2) Alternative ways of constituting an element or sub-element.
(3) Rejected propositions or categories. For example, there could be a heading "Mental State" which has as sub-headings "Intent", "Recklessness" and "No Intent". For an intentional tort the category "No Intent" does not count, but using it highlights a contrast – in the simple case there is actual intent, recklessness can be as good as actual intent, but complete lack of intent means that the tort has not been committed. This contrast shows the rejected version or alternative and thus helps in understanding and learning the law.
(4) Questionable propositions or categories. Even if these categories are not now part of the tort they indicate a possible area in which the law may develop and provide a file in which to put dissenting cases or opinions.

Two Forms of Answers

Answers are in two forms. One is a skeleton statement of the elements. The other is a fuller textual or narrative statement.

Skeleton Form

Initially there is a statement of the actual or possible elements in point form. This states the elements as lists and sub-lists using a formal numbering system. For example, to describe degree of confinement for the tort of false imprisonment I use the following classification:

1.1.2 Degrees of confinement
  1.1.2.1 Total confinement
  1.1.2.2 Partial confinement.

These lists, however, do not tell the full story to someone who is not familiar with the tort. Thus, they do not necessarily explain if an item is a sub-component of the requirement in the element, an alternative way of constituting the element, a rejected proposition or category, or a questionable proposition or category.

These defects are fixed by the narrative statement (which is discussed below). This limitation shows that you can use the check list in skeletal form properly only when you understand its content.

Narrative Form

There is also a statement of the elements in narrative form. Effectively, this form of the answer is like an account of the torts in a textbook, although it is not as long as the typical textbook account. The account in the model answers describes the basic elements as best they can be described. This has an obvious advantage because, where applicable, the uncertainty surrounding an element is explained in the narrative.

This fuller account of the elements also shows two things about writing a textbook. It should be built on a sound understanding of the elements of the relevant law. It is very easy to write a textbook when you have a sound understanding of the elements of the relevant law. Elements and sub-elements are the framework that you add to – hence there is a place for everything and everything goes in its place.

There is another way in which the model answers demonstrate how elements make writing a textbook easy and, at the same time mitigate the problem of the hazy and surreal nature of the elements. In places, the narrative contains comments or examples to throw some further light on the elements. *This has been done selectively (to help readers) rather than comprehensively.* It should also help the reader to understand further how to organise law by making a distinction, which texts do not always make, between:

- a statement of the law
- discussion of ambiguity in the law
- an example
- an illumination of a point by a comment.

Which of these is intended will be clear in the narrative account of the elements because the narrative will indicate the status of sub-elements. (This, however, is not always clear from the skeleton form of the elements. Thus, it shows that you can use the check list properly only when you understand its content.)

Further Exercise

Having done these questions you may find it interesting to compare the account that you have done with the textbook from which you have done it. Compare the way in which you have structured the law with the way in which the author of this book has done it. Judging by the way law textbooks are generally written, writers will frequently not analyse law by reference to elements. Typically, this has two consequences:

- It makes the book harder to read. Indeed, the answers to these questions are tentative for this reason; in many cases it is a matter of guesswork as to what the elements are, because writers talk around them and about them without emphatically stating them.
- It leads to sloppy thinking by the writer. One example of this is that text writers who do not clearly state elements will misunderstand cases interpreting parts of these elements; frequently they do not precisely identify the part of the element which the case is interpreting.

FALSE IMPRISONMENT

Introduction

False imprisonment involves the imprisonment of another person or the restraint of their movement. To establish false imprisonment a plaintiff has to establish at least three elements, and possibly a fourth:

(1) The plaintiff is confined (and in this sense is imprisoned).
(2) The plaintiff is confined because the defendant causes the confinement of the plaintiff.
(3) The plaintiff has the appropriate mental state, ie intentional, probably recklessness and possibly negligence.
(4) It is arguable, but highly contentious, that there is a fourth element, viz that the plaintiff must know of the imprisonment.

Where these elements are satisfied there is false imprisonment. In some cases, though, an imprisonment which does not satisfy all of these elements may still be actionable in one of two ways:

(1) It may be actionable in negligence. See, for example, *Sayers v Harlow Urban District Council* [1958] 1 WLR 623 (where the imprisonment was not done intentionally).
(2) It may be actionable by an action on the case. See, for example, *Williams v Hursey* (1959) 103 CLR 30 at 78 and *Wright v Wilson* (1699) 1 Ld Raym 739 (where the restraint was only partial and not total), *De Freville v Dill* (1927) 96 LJKB 1056 (where the imprisonment was caused negligently).

Outline of Elements

An expansion of the elements of false imprisonment is as follows.

1 Confinement

1.1 Nature of confinement
1.2 Means of confinement
  1.2.1 Physical confinement
  1.2.2 Non-physical confinement
1.3 Degree of confinement
  1.3.1 Total confinement
    1.3.1.1 Physical confinement
    1.3.1.2 Non-physical confinement
  1.3.2 Partial confinement
1.4 Duration of confinement
1.5 Place of confinement
  1.5.1 Nature of place
    1.5.1.1 Any place
    1.5.1.2 Particular places

1.5.2 Size of place
1.5.2.1 Unlimited size
1.5.2.2 Limited size
1.5.3 Boundaries of place
1.5.3.1 Degree of fixation
1.5.3.1.1 Fixed boundaries
1.5.3.1.2 Moveable boundaries
1.5.3.2 Degree of perceivability
1.5.3.2.1 Visible or tangible
1.5.3.2.2 Non-visible and non-tangible

2 Cause of Confinement

2.1 Directness of causation
2.1.1 Direct causation
2.1.2 Indirect causation
2.2 Means of causation
2.2.1 Action
2.2.2 Words
2.2.3 Omission

3 State of Mind

3.1 Nature of mental state
3.1.1 Intention
3.1.2 Recklessness
3.1.3 Negligence
3.2 Time of mental state
3.2.1 Coincidence of mental state and confinement
3.2.2 Non-coincidence

4 Knowledge of Confinement

3.1 Awareness of confinement
3.2 Ignorance of confinement

Confinement

Introduction

There are five aspects to confinement:

(1) The nature of confinement.
(2) The means of confinement.
(3) The degree of confinement.
(4) The duration of confinement.
(5) The place of confinement.

Nature of Confinement

A person is confined when they are in some way restricted from moving.

Means of Confinement

Confinement may be one of two kinds:

(1) Physical confinement.
(2) Non-physical confinement.

Physical Confinement

Physical confinement may be done by either of two means

(1) Actively causing the plaintiff's confinement.
(2) Preventing the plaintiff from leaving the place where she is.

Non-Physical Confinement

Confinement for the purposes of the tort can also be non-physical (*Lippl v Haines* (1989) Aust Torts Reports ¶80-302 at 69,312 per Hope JA, *Harnett v Bond* [1925] AC 669). In these cases no physical contact, not even light touching, is necessary (*Warner v Riddiford* (1858) 4 CB (NS) 180 at 204).

Non-physical confinement can be effected in two ways:

(1) By intimidation (*Harnett v Bond* [1925] AC 669). This intimidation must amount to compulsion, ie if the plaintiff fails to submit voluntarily to not moving away, they will be compelled to do so (*Watson v Marshall* (1971) 124 CLR 621, *Marshall v Watson* (1972) 124 CLR 640).
(2) By psychological compulsion (*Chaytor v London, New York and Paris Association of Fashion* (1961) 30 DLR (2d) 527 at 536). It involves confining a plaintiff on the basis that, if they leave the confines, something will happen which will be distressing to them. An illustration is a plaintiff who, to avoid the embarrassment of a public altercation in street with a store detective, agrees to their request to accompany the detective to the storeowner or the police (*Conn v David Spencer* (1930) 1 DLR 805).

Degree of Confinement

Partial confinement is not sufficient so the plaintiff must be totally confined (*Bird v Jones* (1854) 7 QB 742 at 752). What constitutes totally containing the plaintiff depends on whether the plaintiff is contained by either of two means:

(1) Physical means.
(2) Non-physical means.

Physical Confinement

To be totally contained physically the plaintiff must be unable to move from the place of confinement. A plaintiff is, therefore, not totally contained if there is a means of escape. However, it must be a reasonable and proper means of escape (*Burton v Davies* [1953] St R Qd 26). It was, for example, a reasonable means of escape in *Wright v Wright* (1699) 1 Ld Raym 739 where the escape involved a nominal trespass on the land of a third party.

Non-Physical Confinement

A plaintiff who is contained by non-physical means is totally contained only when there is complete submission by the plaintiff to the control of the defendant (*Greenwood v Ryan* (1846) 1 Legge 275 at 278, *Symes v Mahon* [1922] SASR 447 at 453).

Duration of Confinement

There is no minimum time prescribed for the tort. Consequently, a defendant is guilty of the tort even if the time of confinement is for a very short period (*Re Watters and Town of Glace Bay* (1987) 34 DLR (4th) 474).

Place of Confinement

There are three dimensions of the place of confinement. These involve the nature of the place, the boundaries of the place and the size of the place.

Nature of Place

A person may be confined anywhere (Blackstone *Commentaries on the Laws of England* (1765-1769) III at 127). For example, the plaintiff may be confined in the street (at 127), down a mine (*Herd v Weardale Steel, Coal and Coke Co* [1913] 3 KB 771 (CA), affirmed [1915] AC 67 (HL)), in a vehicle (*Burton v Davies* [1953] St R Qd 26), in a house (*Warner v Riddiford* (1858) 4 CB (NS) 180), or in a prison (*Cobbett v Grey* (1850) 4 Exch 729).

Size of Place

The size of the place, ie how large the place may be, depends on the circumstances. To illustrate, in *Louis v Commonwealth* (1986) 87 FLR 277 the plaintiff was confined to Australia because they had been deported there; this was not false imprisonment.

Boundaries of Place

The place of confinement must have a boundary (*Bird v Jones* (1854) 7 QB 742 at 744, 115 ER 668). There are two points about the boundary:

(1) The boundary may be either "moveable or fixed".
(2) The boundary may be either "visible and tangible" or something properly perceived as a boundary even though not tangible and visible.

Cause of Confinement

It is the essence of the tort that the defendant causes the confinement of the plaintiff. There are two aspects to causing confinement:

(1) The directness of the causation.
(2) The means of causation.

Directness of Causation

For false imprisonment the defendant must cause the confinement directly and not indirectly (*Bird v Holbrook* (1828) 4 Bing 628, *De Freville v Dill* (1927) 96 LJKB

1056). Hence, it is not false imprisonment to cause the detention of a person in an asylum by making a false complaint to the authorities (*De Freville v Dill*) or to dig a pit into which the plaintiff falls.

However, the line between causing imprisonment directly and indirectly may be hard to draw where there are two or more parties involved in the imprisonment. This occurs, for example, where a person is detained and charged but the arrest is unjustified.

Means of Causation

There are three cases to consider:

(1) Causing confinement by action.
(2) Causing confinement by words.
(3) Causing confinement by omission.

Action

The defendant may cause the confinement of the defendant by a positive act. This is the simple case.

Words

In principle, mere words (without action) could constitute confinement when they are sufficiently threatening to the plaintiff to cause either physical confinement (they lock themself in a room for protection) or non-physical confinement (they stay in the one place out of fear) of the defendant.

Omission

There are two cases of omission considered in the cases:

(1) Failure to perform a public duty.
(2) Failure to perform a private duty.

First, failure to perform a public duty (*Cowell v Corrective Services Commission* (1988) 13 NSWLR 714). Here it is false imprisonment to fail to perform the duty. An illustration is where a jailer fails to release a prisoner from jail at the end of his sentence (*Cowell v Corrective Services Commission*; *Withers v Henley* (1614) Cro Jac 379, 79 ER 324; *Morris v Winter* [1930] 1 KB 243).

Second, there is failure to perform a private duty. This can be any of three things at least:

(1) Omission to perform a contractual duty.
(2) Omission to perform an undertaking given as part of the terms of a licence to enter premises.
(3) It can be something analogous to the case of the licence, contract or understanding, generically referred to as an arrangement. This form of failure to perform a private duty occurs in the situation where I have done three things. (a) I have induced someone to put themself in a place. (b) It is not possible for them to leave the place without my intervention. (c) As I induce the person to put themself in the place I have led them to believe that I will intervene to enable them to leave when they want to. When these things happen there are two possibilities:

(i) The defendant is not released at the time or in the manner contemplated in the arrangement. In these cases the general rule is that failure to release the person constitutes confinement for the purpose of false imprisonment.

(ii) The defendant asks to be released in either of two ways. (A) They ask to be released at a time different to that contemplated in the arrangement (*Herd v Weardale Steel, Coal and Coke Co* [1913] 3 KB 771 (CA), affirmed [1915] AC 67 (HL), where the plaintiff was a miner who had descended a mine shaft for the purpose of working a shift; once underground, the plaintiff had an industrial dispute with management, refused to do the allocated work and demanded to be taken to the surface). (B) They ask to be released in a manner different to that contemplated in the arrangement (*Balmain New Ferry Co v Robertson* (1906) 4 CLR 379 at 391 per O'Connor J, *Robinson v Balmain New Ferry Co* [1910] AC 295 at 299 per Lord Loreburn (PC). Note that the Privy Council got the plaintiff's name wrong. Here the plaintiff paid their fare for a ferry ride and went through the turnstile to await the ferry. Then the plaintiff changed his mind. To go through the turnstile it was normally necessary to pay a fare, fares being paid only at this end of the journey. The ferry owners refused to let the plaintiff out without payment). It is not firmly established whether this type of omission can cause false imprisonment. For example, is it necessary to turn around an airline in mid flight just because one passenger has had enough? In cases such as these the logical thing is for the court to consider and weigh two things. (A) They have to consider how necessary is it for the plaintiff to leave. Obviously, the greater the emergency the greater the case for releasing the plaintiff. (B) They have to consider how reasonable it would be in these circumstances for the defendant to release the plaintiff. For example, just unlocking a door or a driver stopping a taxi is an easy thing to do, but for an ocean liner to change course and head to port so that a passenger can disembark involves major expense and disruption.

State of Mind

The third element of false imprisonment concerns the state of mind or mental state of the defendant. There are two aspects – the nature of the mental state, and the time of the mental state.

Nature of Mental State

There are three states of mind to consider – intention, recklessness and negligence.

(1) Intention. Intention is definitely sufficient as a state of mind for false imprisonment. Malice, however, is not necessary. The requisite intention is that the defendant must do an act which is at least substantially certain to cause the imprisonment.

(2) Recklessness. It may be enough for a defendant to imprison the plaintiff recklessly on the basis that recklessness can amount to intention. There is some authority in this regard in *R v Venna* [1976] 1 QB 421, *Beals v Hayward* [1960] NZLR 131, *R v Parker* (1976) 63 Cr App R 211 at 214. Policy

considerations for this view are set out by Zelling J in *MacPherson v Brown* (1975) 12 SASR 184.

(3) Negligence. Negligence as a state of mind for false imprisonment is a matter of doubt. There are cases for it. For example, there is incidental support from Australian cases such as *Williams v Milotin* (1957) 97 CLR 465 and *McHale v Watson* (1964) 111 CLR 384 holding that trespass to the person, a comparable tort, can be committed either intentionally or negligently. There is also contrary authority (*Sayers v Harlow Urban District Council* [1958] 1 WLR 623, *De Freville v Dill* (1927) 96 LJKB 1056).

Time of Mental State

Time of the mental state involves the question as to whether the mental state must coincide with the act causing confinement of the plaintiff. It seems that, generally, intention and action do not have to coincide (*Mee v Cruickshank* (1902) 86 LT 78, *Fagan v Metropolitan Police Commissioner* [1969] 1 QB 439). To illustrate this, take the case of a prisoner who goes to jail under sentence, serves out their sentence, but is not released. In these circumstances the prisoner is confined at the time they are not released.

Knowledge of Confinement

There are two views on whether the plaintiff must know of his or her confinement or imprisonment:

(1) One view is that, if the plaintiff is unaware of his imprisonment, there is no false imprisonment (*Herring v Boyle* (1834) 1 Cr M&R 377, *Meering v Graham-White Aviation* (1919) 122 LT 44 per Duke LJ).

(2) The other view is that the gravamen of the tort is the confinement and loss of liberty it occasions, not the awareness of it (*Meering v Graham-White Aviation* per Atkin LJ, *Murray v Ministry of Defence* [1988] 1 WLR 692). Hence, knowledge by the plaintiff of their confinement is not necessary.

BATTERY

Introduction

This sets out the answer to the question on reading a torts textbook on battery. In the question you were required to read the text and to analyse the tort in terms of elements and sub-elements.

Since the torts of battery and assault are connected, it is necessary to describe battery and to explain the relationship between assault and battery. Battery (one of three torts constituting trespass to the person) is physical interference with another. By contrast, assault (another form of trespass to the person), in the strict sense of the term, consists of making a threat of physical violence. Assault and battery developed out of the common law writ of trespass *vi et armis* (literally this means by force and arms; it translates idiomatically as "by force of arms") which protected people against forcible wrongs.

Often the two torts will be committed together, and indeed in rapid succession, when the defendant threatens battery then makes good the threat. Yet they are separate and independent torts. (There is, however, a contrary view in *Gambriell v Caparelli* (1975) 54 DLR (3d) 661 at 664. There a Canadian judge said that "the distinction between assault and battery has been blurred, and that when we now speak of an assault, it may include a battery"). Since they are separate and independent torts, it is not necessary for one to have the other. Hence, there can be an assault without battery (*Stephens v Myers* (1830) 4 C&P 350 where the defendant advanced on the plaintiff to attack him but was stopped). There can also be battery without assault (*Gambriell v Caparelli* at 664 where the defendant crept up swiftly and quietly behind the plaintiff and struck him without warning). As a matter of terminology, however, "assault" is sometimes used to mean battery, or to include both assault and battery (see *Fagan v Metropolitan Police Commissioner* [1969] 1 QB 439 at 444, *Butchard v Barnett* (1980) 86 LSJS 47 at 53, *Doyle v Garden of the Gulf Security* (1980) 65 APR 123).

Battery is both a tort and a criminal offence at common law. Frequently, therefore, cases on the criminal aspects will be relevant to the tortious ones (*Scott v Shepherd* (1773) 2 Wm Bl 892 at 899 per De Grey CJ, *Coward v Baddeley* (1859) 4 H&N 478 at 480, *James v Campbell* (1832) 5 C&P 372, *Ball v Axten* (1866) 4 F&F 1019).

Outline of Elements

In simple form the elements of battery are as follows:

(1) The defendant does an act.
(2) The act causes contact with the body of the plaintiff.
(3) The defendant has the relevant mental state.
(4) The plaintiff does not consent to the contact.

An expansion of the elements of battery is as follows:.

1 Act

1.1 Act of the defendant
1.2 Other conduct of the defendant
- 1.2.1 Passive conduct
- 1.2.2 Omissive conduct
- 1.2.3 Default

2 Causing the Contact

2.1 Contact
- 2.1.1 Nature of contact
- 2.1.2 Subject of contact
  - 2.1.2.1 Plaintiff's flesh or clothing
  - 2.1.2.2 Something connected with plaintiff
    - 2.1.2.2.1 The "something" is sufficiently identified with the plaintiff
    - 2.1.2.2.2 Touching is adverse
      - 2.1.2.2.2.1 It involves force
      - 2.1.2.2.2.2 It is done in a rude, insolent or insulting manner
- 2.1.3 Degree of contact
  - 2.1.3.1 Severe degree
  - 2.1.3.2 Light degree
- 2.1.4 Knowledge of contact
  - 2.1.4.1 Knowledge of contact
  - 2.1.4.2 Lack of knowledge of contact

2.2 Causation
- 2.2.1 Direct causation
- 2.2.2 Chain of causation
  - 2.2.2.1 Defendant does an act
  - 2.2.2.2 A train of events follows this act in a chain.
  - 2.2.2.3 The last event in the chain causes contact with the plaintiff.
  - 2.2.2.4 The train is unbroken from the first action of the defendant to contact with the plaintiff.
    - 2.2.2.4.1 No third party in chain so defendant causes everything that happens in the chain of events – chain is not broken
    - 2.2.2.4.2 Third party in chain
      - 2.2.2.4.2.1 Contact is caused by an innocent third party – chain is broken
      - 2.2.2.4.2.2 Contact is caused by a third party who acts out of instinct or natural compulsion – chain is not broken.

- 2.2.3 Failure to discontinue contact
  - 2.2.3.1 Unintentional contact
  - 2.2.3.2 Contact continues
  - 2.2.3.3 Defendant is able to discontinue
  - 2.2.3.4 Defendant does not discontinue

2.3 Causer
- 2.3.1 Defendant
- 2.3.2 Person or thing under defendant's control

2.4 Exemptions
- 2.4.1 Touching is a harmless incident of everyday life
- 2.4.2 Touching is unavoidable
- 2.4.3 Touching is necessary or advantageous to the plaintiff
- 2.4.4 Touching is socially acceptable

3 Mental State

3.1 Intending the act
- 3.1.1 Defendant wills the act
- 3.1.2 Defendant's will is in abeyance
  - 3.1.2.1 Physical compulsion
    - 3.1.2.1.1 Third party forces defendant to act
    - 3.1.2.1.2 Defendant reacts to, or is controlled by outside force
    - 3.1.2.1.3 Defendant is compulsive because of an illness such as epilepsy
  - 3.1.2.2 Lack of full consciousness or awareness
    - 3.1.2.2.1 Defendant is totally or partly unconscious
    - 3.1.2.2.2 Defendant is asleep
    - 3.1.2.2.3 Defendant is in a state of automatism

3.2 Intending the contact
- 3.2.1 Total intent
- 3.2.2 Partial intent
  - 3.2.2.1 Strong probability of contact
  - 3.2.2.2 Weak probability of contact
- 3.2.3 Transferred intent

3.3 Intending the plaintiff

3.4 Intending the harm
- 3.4.1 Harm
- 3.4.2 Type of harm
- 3.4.3 Degree of harm

4 Lack of Consent

4.1 Lack of consent

4.2 Consent, but defendant's act is outside the terms of the consent

Act

There are two propositions about this element of battery:

(1) Battery is committed by an act of the defendant. This act causing battery may take many forms. For example, the act can be done by striking with the hand (in the words of Lord Denman in *Pursell v Horn* (1838) 8 Ad & E 602 at 604, that is "something done cominus"). The act can also be done by a weapon, by spitting (*Alcorn v Mitchell* (1872) 63 Ill 553, *R v Cotesworth* (1704) 6 Mod Rep 172), or by taking away a chair on which the plaintiff is about to sit so that the plaintiff falls (*Garrat v Dailey* 279 P 2d 1091 (1955)).

(2) Battery is not committed if the defendant merely engages in passive conduct, omissive conduct, or just defaults (*Platt v Nutt* (1988) 12 NSWLR 231). As an example, a defendant who allows something propelled by another to hit the plaintiff, or who does not stop it, is not guilty of battery (*Innes v Wylie* (1884) 1 Car & Kir 257 at 263).

Causing the Contact

For battery the defendant must cause physical contact. This contact has several dimensions:

(1) Contact.
(2) Causation.
(3) Causer.
(4) Exemptions.

Contact

Contact has four aspects:

(1) Nature of the contact.
(2) Subject of the contact.
(3) Degree of contact.
(4) Knowledge of contact.

Nature of the Contact

Contact means there is a touching of the plaintiff by something or someone. Consequently, it is not battery just to obstruct a plaintiff from entering a room (*Innes v Wylie* (1884) 1 Car & Kir 257 at 263). Similarly, since physical contact is necessary, mere intrusion or invasion of privacy, eg by photographing the plaintiff against his will, is not battery (*Murray v Minister of Defence* [1985] 12 NIJB 12).

Subject of the Contact

The defendant has to make contact with either the plaintiff's person or something sufficiently connected with the plaintiff.

Plaintiff's Person

Contact with the plaintiff's person may entail contact with:

(1) The flesh of the plaintiff.
(2) The clothing or boots of the plaintiff.

Something Connected with the Plaintiff

Contact with something connected with the plaintiff is sufficient for battery when two requirements are satisfied:

(1) The defendant causes contact with something which is sufficiently identified with, or is near or attached to, the plaintiff. For example, the defendant snatches something from the plaintiff's hand such as a book or a plate.
(2) This touching has an element of adversity. For this, the touching has to be in one of the following categories (which can easily overlap):
    (a) It involves force, eg the defendant forcibly takes a package from under the plaintiff's arm.
    (b) It is done in a rude or insolent manner, eg it has some element of insult.

Degree of Contact

There are two points. (1) As explained under "Exemptions", some touching is considered not to be battery and some of this involves light touching, eg touching someone on the shoulder to attract their attention. (2) Generally, and subject to these exempt cases, the contact does not have to be severe. It may be slight and does not have to cause injury. Hence, the least touching of another in anger is a battery.

Knowledge of Contact

It is not necessary for the plaintiff to know of the contact.

Causation

For battery the defendant must cause the contact with the plaintiff. Since contact by the defendant is essential, it is not battery for the defendant to tell a third party something which may result, or is likely to result, in the third party attacking the plaintiff (*Bird v Holbrook* (1828) 4 Bing 628).

A defendant causes contact when they do something that results in contact. It is essential that, without the act of the defendant, there would be no contact. This said, causation takes three forms:

(1) Direct causation.
(2) Chain of causation.
(3) Failure to discontinue contact.

Direct Causation

There is simple causation when the act of the defendant directly causes contact with the plaintiff. As an example, a defendant who throws a log which hits the plaintiff performs a direct act; by contrast, when a defendant leaves a log on the highway over which the plaintiff tumbles, there is not a direct act, and hence not a battery (*Reynolds v Clarke* (1752) 2 Ld Raym 1399, *Leame v Bray* (1803) 3 East 593 at 603).

Chain of Causation

There is a direct act causing battery involving a chain of causation when four things occur:

(1) The defendant does the act.
(2) A train of events follows in a chain as a continuation of this act.
(3) The last event in the chain causes contact with the plaintiff.
(4) The train is unbroken from the first action of the defendant which started the chain to contact with the plaintiff. This can happen in two ways:
    (a) There is no third party in the chain. Intervening events are an unbroken series which are set in motion by the plaintiff's act.
    (b) There is a third party in the chain. There are two possibilities:
        (i) The chain will be broken where the contact is caused accidentally by an innocent third party. An example is *Dodwell v Burford* (1669) 1 Mod Rep 24. Here the defendant struck the plaintiff's horse. The horse bolted and threw the plaintiff who, while on the ground, was trampled by the horse of a third party.
        (ii) The chain is not broken when persons intervening between the defendant's act and contact with the plaintiff act out of instinctive or "compulsive necessity for their own safety and self preservation". An example is *Scott v Shepherd* (1773) 2 Wm Bl 892 at 899 per De Grey CJ. Here the plaintiff threw a lighted fire cracker into a crowded market house. Two interveners successively and instinctively threw it away and it finally hit the plaintiff. The defendant was held liable. Another example is when A strikes B who falls and hits C (*Hilmer v Leitch* [1936] SASR 490). Note that the chain is still not broken when the plaintiff acts intentionally as well as compulsively, eg A throws a lighted squib to B who throws away the lighted squib which hits C (*Scott v Shepherd* (1773) 2 Wm Bl 892).

Failure to Discontinue Contact

For the purposes of battery, contact can also be caused by a failure by a defendant to discontinue contact with the plaintiff (*Fagan v Metropolitan Police Commissioner* [1969] 1 QB 439, *R v Miller* [1983] AC 161 at 167). This has four components:

(1) A defendant unintentionally comes into contact with the plaintiff, eg their motor vehicle is unintentionally driven onto the foot of another person (*Fagan v Metropolitan Police Commissioner*).
(2) The contact will continue unless steps are taken to stop it.
(3) The defendant is capable of taking these steps to discontinue the contact.
(4) The defendant does not, as soon as they can, stop the contact continuing.

Causer

For battery the defendant causes the contact. This can be done by either of two means:

(1) By the defendant themselves (*Stephens v Myers* (1830) 4 C&P 349, 172 ER 735).
(2) By a person or thing within the defendant's control (*Barton v Armstrong* [1969] 2 NSWR 451 at 455).

Exemptions

Touching of another is not battery if it falls within generally accepted standards of conduct. This has several categories although these may not be exhaustive and they can overlap:

(1) The touching is one of the harmless incidents of everyday life. An example is when the defendant taps a person on the shoulder to get their attention.
(2) The touching is unavoidable. An example is when the plaintiff and defendant are shoulder to shoulder in a crowded bus, or brush in a narrow passage.
(3) The touching is necessary or advantageous to the plaintiff. An example is when the defendant holds the plaintiff back from danger.
(4) The touching is socially acceptable. Two examples illustrate this. (a) The defendant warmly touches someone's hand at a social gathering. (b) The defendant gently touches a child while admonishing them.

It is necessary to note that it is hard to define acceptable contact precisely. One reason for this is that it happens in a wide range of circumstances. Another reason is that touching which is permissible in one circumstance may not be permissible in another.

Mental State

There are several aspects to the mental state for battery:

(1) Intending the act.
(2) Intending the contact.
(3) Intending the plaintiff.
(4) Intending the harm.

Intending the Act

The defendant must intend to do the act which caused the harm. An act, however, can still be intentional if it is unpremeditated, ie it is done impulsively or on the spur of the moment (*Sibley v Milutinovic* (1990) Aust Torts Reports ¶81-013).

Intention has two aspects, one positive and one negative:

(1) An act is intentional, and there is battery, when the act is conscious, deliberate or wilful, so that the defendant "meant to do it" (*McNamara v Duncan* (1979) 26 ALJR 584 at 587).
(2) An act is not intentional, and there is not a battery "when the will [of the defendant] is in abeyance" (*Stokes v Carlson* 240 SW 2d 132 at 135-136 (1951)). This can happen in a variety of circumstances. Some major categories are:
    (a) Physical compulsion (*Gibbons v Pepper* (1695) 2 Salk 637, *Weaver v Hand* (1616) Hob 134, *Holmes v Mather* (1875) LR 10 Ex 261):
        (i) The defendant is physically forced to do what she did by a third party (*Smith v Stone* (1647) Sty 65, 82 ER 533, *Public Transport Commission v Perry* (1977) 137 CLR 107 at 133 per Gibbs J). For example, a third party forcibly takes the defendant's hand and strikes the plaintiff with it (*Weaver v Ward* (1616) Hob 134 – the person who took the defendant's hand is the one liable). Or the defendant's horse bolts and collides with the plaintiff (*Gibbons v Pepper*).

(ii) The act "is purely a reaction to some outside force" (*Stokes v Carlson* at 135-136).

(iii) The act consists of the "convulsive movements of an epileptic" (*Stokes v Carlson*).

(b) Lack of full consciousness:

(i) The act is done by the defendant "during periods of unconsciousness" (*Stokes v Carlson* at 135-136) or when the defendant has impaired, diminished or clouded consciousness.

(ii) The act is done in a state of automatism.

(iii) The act is done by the defendant while asleep (*Stokes v Carlson* at 135-136).

Intending the Contact

While it is clear that a defendant must intend the act, it is not so cut and dried as to the extent to which, or the way in which, they must intend to make contact with the plaintiff. There are several categories to consider:

(1) Total intent.
(2) Partial intent.
(3) Transferred intent.

Total Intent

Total intent on the part of the defendant is sufficient for battery.

Partial Intent

Partial intent refers to the case where there is some probability that the defendant's action will cause harm and they proceed to do it anyway. They do not totally intend to cause harm, but at the same time they do not intend to avoid it because they take the risk.

To consider this it is necessary to look at two cases:

(1) There is a relatively strong probability of making or causing contact. Strong probability of contact is covered by two labels. In the United States it is called substantial certainty, while in the United Kingdom it is called recklessness.
(2) There is only a weak probability of making or causing contact.

Strong Probability

Under the doctrine of substantial certainty a defendant is liable in battery if their action causes contact with the plaintiff in the following circumstances:

(1) They take an action which involves a substantial risk of contact.
(2) They foresee the risk. Alternatively, they should reasonably foresee the risk – a defendant cannot escape liability by deliberately refusing to see the obvious.
(3) While they do not wish the contact they take the action anyway.

These three requirements are sufficient intent for battery. So, in these circumstances, a reckless act is treated as an intentional act (*R v Venna* [1976] QB 421 at 428-429, *Beals v Hayward* [1960] NZLR 131). A defendant who deliberately closes their mind to the obvious consequences of their action is taken to know and

intend what they do (*R v Parker* (1976) 63 Cr App R 211 at 214). On this basis a defendant who pleads "I neither reck nor ken" (that is, "I neither know nor care") cannot escape liability. Two examples will illustrate substantial certainty. (a) A defendant, angry at being refused service, was liable for firing a shot through a restaurant window when he hit and injured a diner (*R v Holder* [1967] Crim LR 66). (b) A defendant was liable for hitting a train guard by dropping a piece of stone from a railway bridge onto a train below (*DPP v Newbury* [1976] 2 All ER 365).

Weak Probability

In cases of substantial certainty or recklessness the point is that a person intends a result, and is liable for it, when there is a sufficiently strong chance that the result will flow from an action which they intended to do. Obviously when the chance of harm is small, ie there is a weak probability, the doctrine should not apply. (There is, however, a view against this. There is some judicial authority in *Hillier v Leitch* [1936] SASR 490 that it is sufficient for an act causing battery to be done negligently.) In the classic case, *Bolton v Stone*, a batsman hit the cricket ball out of the ground and struck Miss Stone. The batsman was not liable in trespass because the chance of hitting her was only a "conceivable possibility" (*Bolton v Stone* [1951] AC 850 at 858). For him to be liable for such a shot would just not be cricket.

Transferred Intent

There is a doctrine of transferred intent or transferred malice which deals with a special case. It applies to two situations to make a defendant liable:

(1) D hits P2 while intending to hit P1. The doctrine will make D liable to P2 (*Carnes v Thompson* 48 SW 2d 903 at 904 (1932), *R v Latimer* (1886) 17 QBD 359, *Fordyce v Montgomery* 424 SW 2d 746 at 751 (1968). An example is when the defendant throws a stone which hits the plaintiff but was intended to frighten another (*Alteiri v Colasso* 362 A 2d 798 (1975), *White v Saunders* 47 NE 90 (1897)). In *Bunyan v Jordan* (1937) 57 CLR 1 at 12, Latham CJ suggested that transferred intent applied in Australia. It was applied in England in *James v Campbell* (1832) 5 Car & P 372 and *Ball v Axten* (1866) 4 F&F 1019 without specific recognition.
(2) D intends to commit one form of trespass against P but commits another. *Scott v Shepherd* (1773) 2 Wm Bl 892 could be an example of this according to Prosser in his article, WL Prosser "Transferred Intent" (1967) 45 Tex LR 650.

This doctrine:

(1) Finds favour in the United States (*Restatement of the Law of Torts*, *Second* (ALI, 1965-1979) s 32, *Carnes v Thompson* 48 SW 2d 903 at 904 (1932), *Livingstone v Minister of Defence* [1984] NI 356 (CA)).
(2) Has not been indorsed by an Australian court.

Intending the Plaintiff

Logically one would think that the defendant has to not only intend the contact, but to intend contact with the plaintiff. Yet there is a case holding that it was still battery when the defendant ran over the plaintiff believing that he was a dead animal (*Law v Visser* [1961] QSR 46 at 58).

Intending the Harm

Battery is actionable per se. Consequently, it is not necessary that a defendant intends in any way to cause harm to the plaintiff. Provided that they intend to do the act which caused the harm it matters not that they did not intend to cause harm (*William v Humphrey* (1975) *The Times* 12 February 1975). Taken to its logical conclusion this entails several propositions (*William v Humphrey* (1975) *The Times* 12 February 1975):

(1) The defendant does not have to intend to harm the plaintiff.
(2) The defendant does not have to intend the type of harm, ie to harm the part of the plaintiff that he harmed.
(3) The defendant does not have to intend to inflict the degree of harm which actually occurred (*William v Humphrey* (1975) *The Times* 12 February 1975).

This notion that there did not have to be any intent to cause the harm was the basis for holding an infant liable for battery. The infant was capable of intending the act, the court reasoned, even though they were not capable of intending the harm resulting from it (*Ellis v D'Angelo* 253 P 2d 675 (1953)).

Lack of Consent

Physical contact with another is a battery only if it is done without the other's consent. A party, therefore, cannot be assaulted "by his own permission" (*Chrstopherson v Bare* (1841) 11 QB 473 at 477; see also *R v Donaldson* [1934] 2 KB 498, *Latter v Braddell* (1881) 50 LJQB 448, *Freeman v Home Office (No 2)* [1983] 3 All ER 589 at 594-595, [1984] QB 524, [1984] 1 All ER 1036). Consequently, it is not battery to tackle an opposing player in a game of football (*McNamara v Duncan* (1979) 26 ALR 584), nor is it battery for a surgeon to operate on a patient with their consent (*Schweizer v Central Hospital* (1975) 53 DLR (3d) 494).

This means that:

(1) Actions which are commonly performed with consent will be battery if performed without consent.
(2) Actions will also be battery if the defendant does the action outside the terms of consent. Consequently, a footballer who fells an opponent illegally (*McNamara v Duncan* (1979) 26 ALR 584), or a surgeon who does the wrong operation (*Schweizer v Central Hospital* (1975) 53 DLR (3d) 494), are guilty of battery.

ASSAULT

Introduction

This sets out the answer to the question on reading a torts textbook on assault. In the question you were required to read the text and to analyse the tort in terms of elements and sub-elements.

Outline of Elements

Assault, in the pure sense of the term, is committed when three things happen:

(1) The defendant makes a threat of battery.
(2) The threat places the plaintiff in reasonable apprehension of the battery.
(3) The defendant intends to create this apprehension of attack.

I will now state the sub-elements of these elements in point form.

1 Threat

1.1 Nature of a threat
- 1.1.1 Statement by defendant
- 1.1.2 Statement as to future conduct

1.2 Content of threat

1.3 Means of making threat
- 1.3.1 Conduct
- 1.3.2 Words
- 1.3.3 Conduct and words

1.4 Conditional and unconditional threat
- 1.4.1 Unconditional threat
- 1.4.2 Conditional threat
  - 1.4.2.1 Plaintiff doing something that they have a legal right to do
  - 1.4.2.2 Plaintiff is obliged to do something for defendant
    - 1.4.2.2.1 Defendant's legal right
    - 1.4.2.2.2 Improper means of enforcing right

2 Reasonable Apprehension

2.1 Apprehension
- 2.1.1 Knowledge of threat
- 2.1.2 Ability to carry out threat
  - 2.1.2.1 Perceived ability
  - 2.1.2.2 Actual ability

2.1.3 Intent to carry out threat
2.1.3.1 Perceived intent
2.1.3.2 Actual intent
2.2 Reasonableness
2.2.1 Objective measurement – person in plaintiff's position
2.2.2 Subjective measurement – plaintiff's position
2.2.1.1 Plaintiff has special sensitivity
2.2.1.2 Defendant knows of this sensitivity

3 Mental State of Defendant

3.1 Intentional cause of apprehension
3.2 Reckless cause of apprehension

Threat

One of the ingredients is that the defendant makes a direct threat to the plaintiff. There are four components of this element:

(1) The nature of a threat.
(2) The content of the threat.
(3) The means of making the threat.
(4) Whether the threat can be unconditional as well as unconditional.

Nature of a Threat

A threat has two components:

(1) It is a statement by defendant.
(2) It is a statement as to future conduct. Consequently, a mere expression of ill feeling is not an assault. For this reason it is not a threat if the defendant makes clear that he would like to hit the plaintiff but will not do so. A classic case is *Tuberville v Savage* (1669) 1 Mod Rep 3 where the defendant, after a heated exchange of words with the plaintiff, put his hand on his sword and said: "If it were not assize time I would not put up with such language from you".

Content of Threat

Essentially the threat necessary for assault is a threat of battery. The components of battery are discussed in the answer to the question which involves analysing battery.

Means of Making the Threat

A threat, it seems, can be made in any of three ways:

(1) By conduct.
(2) By words.
(3) By words and conduct together so that the threat is derived from their combined effect.

Conduct

A threat can be made purely by conduct. To illustrate, the defendant chases after a person with a raised whip (*Mortin v Shoppee* (1828) 3 C&P 373), points a pistol at the plaintiff (*R v Hamilton* (1891) 12 LR (NSW) 111 at 114), or surrounds the plaintiff with a display of force (*Read v Coker* (1853) 13 CB 850).

Words

A threat can be made purely by words. Thus, it is a threat to say: "I am going to get you" (there is, however, authority to the contrary – see *Meade and Belte's Case* (1823) 1 Lewin 184 at 185); to command as the highwayman did: "your money or your life" (*Barton v Armstrong* [1969] 2 NSWR 451 at 455, *Police v Greaves* [1964] NZLR 295); or for a leader of a gang to say to the members: "get out your knives" (*R v Wilson* [1955] 1 All ER 744 at 745, and see also *Fairclough v Whipp* [1951] 2 All ER 834).

Words may be spoken in two modes:

(1) To a person's face.
(2) Over the telephone (*Barton v Armstrong* at 455).

Words and Conduct

A threat can be made by words and conduct together so that the threat is derived from their combined effect. Here are some examples. (1) In *Fogden v Wade* [1945] NZLR 724 a man made a sexual suggestion to a woman and then advanced towards her in a menacing way. (2) In *Purdy v Wozesensky* [1937] 2 WWR 116 the defendant was beating up a father in the presence of his daughter and saying to the daughter: "You're next".

Conditional and Unconditional Threats

A threat may be unconditional but can also, in some circumstances, be conditional.

Unconditional Threat

In the simple case a threat is unconditional. This does not present a problem.

Conditional Threat

A conditional threat will constitute a threat for the purposes of assault in at least two circumstances:

(1) The plaintiff is threatened with battery if she does something legal that she is perfectly entitled to do. For example, the defendant says to a person that they will be hit if they move (*Blake v Barnard* (1840) 9 C&P 626, *Police v Greaves* [1964] NZLR 295).
(2) The defendant threatens a person by demanding something where two things occur:
    (a) The defendant has a legal right to demand something of the plaintiff.
    (b) The threatened action is an improper means of enforcing the legal right (*Read v Coker* (1853) 13 C&B 850).

Reasonable Apprehension

An assault is a threat which creates reasonable apprehension in the plaintiff of physical contact. This has two components:

(1) There is apprehension, ie the plaintiff apprehends that the defendant will batter her.
(2) This apprehension is reasonable.

Apprehension

A plaintiff must have good reason to apprehend the battery (*Police v Greaves* [1964] NZLR 295 at 298). This apprehension has three components – the plaintiff knows of the threat, the defendant appears to have the ability to carry out the threat, and the defendant appears to have the intent to carry out the threat. It is not, however, necessary that the defendant fears the contact (*Brady v Schatzel* [1911] St R Qd 206 at 208).

Knowledge of Threat

It is an essential part of the tort that the plaintiff knows of the threat.

Ability to Carry out Threat

Regardless of the reality, the defendant must appear to have the ability to carry out the threat immediately. (An example is *Brady v Schatzel* [1911] St R Qd. It involved the defendant pointing an unloaded pistol at a plaintiff who did not know that it is not loaded.)

There are two aspects to this:

(1) Appearance. Appearance of the ability to carry out an assault is necessary. Consequently, there is an assault when a defendant points an unloaded gun at the plaintiff if the plaintiff can reasonably believe that the gun is loaded (*R v St George* (1840) 9 C&P 483). There is also some practical advice. Whether the defendant has the means to carry out the assault may, as a matter of fact, help a court to determine if the defendant actually created the apprehension.
(2) Ability. There is no assault if a defendant lacks the ability to carry out the threatened battery. A defendant can lack the ability to carry out a battery for any of several reasons. Two examples. (a) The plaintiff is adequately protected from the battery (*Thomas v National Union of Mineworkers* [1985] 2 All ER 1 at 24). (b) The threatened battery is not imminent thus allowing the plaintiff time to seek assistance to evade it (*Barton v Armstrong* [1969] 2 NSWR 451 at 455).

Intent to Carry out Threat

Regardless of the reality, the defendant must appear to have the intention to carry out the threat (*Stephens v Myers* (1830) 4 C&P 349, 172 ER 735). However, whether the defendant has the intent to carry out the assault may, as a matter of fact, help a court to determine if the defendant actually created the apprehension.

Reasonableness

Apprehension of the threatened violence must be reasonable. There are two means to measure apprehension – an objective measurement and a subjective measurement.

Objective Measurement

In earlier times there was a tendency to measure the apprehension of threat of battery from the subjective intention of the defendant. Did the defendant have an intention to commit battery? Thus in those times a defendant who pointed an unloaded gun at a plaintiff had not committed assault (*Blake v Barnard* (1840) 9 C&P 626) because he lacked the means to carry it out (*Osborn v Veitch* (1858) 1 F&F 317).

Now the position has changed. Generally, apprehension is measured objectively. How would the threat reasonably appear to a reasonable person in the plaintiff's position? (*Logdon v DPP* [1976] Crim LR 121). A reasonable person neither entertains extreme fears nor has excessive timidity.

Subjective Measurement

While reasonable apprehension of battery is generally measured by an objective standard there is a special case where it is measured subjectively. This happens when two requirements are met:

(1) The victim apprehends the battery because of a "peculiar sensitivity" which they have (*Bunyan v Jordan* (1937) 57 CLR 1). An example is a plaintiff who is "exceptionally timid" (*MacPherson v Beath* (1975) 12 SASR 174 at 177).

(2) This peculiar sensitivity of the victim is known to the defendant (*Bunyan v Jordan*).

Mental State

The mental state of the defendant necessary for assault has two aspects:

(1) The defendant intends to create the apprehension of attack in the mind of the plaintiff (*MacPherson v Brown* (1975) 12 SASR 184, *Hall v Fonseca* [1983] WAR 309). This is always sufficient.

(2) The defendant acts recklessly. This is the law with regard to the intent for battery, so logically it should be the law for assault. However, the matter is not beyond doubt. For example, in *MacPherson v Brown* (1975) 12 SASR 184 the South Australian Full Court did not take this view.