



Alison Monahan: Welcome to the Bar Exam Toolbox podcast. Today, we have another episode as part of our “Listen and Learn” series. This one covers assault and battery in Torts. Your Bar Exam Toolbox host today is Alison Monahan, and typically, I’m with Lee Burgess. We’re here to demystify the bar exam experience so that you can study effectively, stay sane, and hopefully pass and move on with your life. Together, we’re the co-creators of the [Law School Toolbox](#), the [Bar Exam Toolbox](#), and the career-related website [CareerDicta](#). I also run [The Girl’s Guide to Law School](#). If you enjoy the show, please leave a review on your favorite listening app, and check out our sister podcast, the [Law School Toolbox podcast](#). If you have any questions, don’t hesitate to reach out to us. You can always reach us via the [contact form](#) on BarExamToolbox.com, and we would love to hear from you. With that, let’s get started.

Alison Monahan: Hi there, and welcome to the “Listen and Learn” series from the Bar Exam Toolbox podcast. Today, we’ll be discussing two topics that you’ll likely recall from your 1L Torts class: assault and battery.

Alison Monahan: I remember really enjoying these when I was in law school because of all the bizarre and outlandish scenarios that came up in the hypos that we covered in class. Oh, Johnny pulled a chair out from an old lady right as she was sitting down and she hit the ground? Someone kicked the cane of a blind guy as he was walking by? What is going on here? Who are these terrible people? Well, it kept it interesting. Let’s jump right in. Here we go!

Alison Monahan: First, as usual, we’ll start off with the rules. What is battery? The rule to write down is this: Battery is the intentional infliction of a harmful or offensive bodily contact. Sounds pretty straight forward, right? You can think of hitting, kicking, running someone over with your car – they could all be battery. But, there can also be less-obvious scenarios – for example giving someone food poisoning or a contagious illness that you knew you had – maybe like the coronavirus, or touching them after they said not to. Basically, if you see a person in a Torts fact pattern hurting another person’s physical body, ask yourself if battery could be an issue.

Alison Monahan: Now, the battery rule actually has quite a few hurdles. Let’s unpack them one by one. First of all, what is intent? Intent is something you need for all intentional torts, so this is a crucial rule to know. Intent is acting with either purpose to cause a harmful result, or with the knowledge that a harmful result is substantially certain to be produced.

Alison Monahan: First, what is purpose? Pretty easy, right? Doing something to cause harm on purpose. To clarify, we’re not just talking about the act itself being on purpose.



For example, I could purposely throw a rock thinking no one was around, and it could accidentally hit someone who jumps into the way. That's not a battery; that's not enough. For this rule, I have to purposely throw the rock to try to do something harmful to someone. Otherwise, maybe it would be negligence.

Alison Monahan: What is knowledge now, or knowing that a harmful result will happen? That's a little more complex. If I push someone down the stairs, do I have to know with substantial certainty that they're going to break their left femur and dislocate their shoulder, and go into a coma and then eventually die? No. You don't need to have a magic ability to predict the exact harm that happens. You just have to do something to which a reasonable person would say: "Yikes! That's going to hurt."

Alison Monahan: So, this gets us through the first element of the rule, which is intent. What about the second part – harmful or offensive bodily contact? Well, "harmful" is pretty clear. If I do something that harms someone else's body, that's a recipe for battery. Throwing a ninja star into someone's leg, beating with tire irons, slapping a person across the face when they did not consent to be slapped across the face – these all fit the harmful bodily contact idea. I mention consent here just to say that part of this rule is that the contact is not something the person has already agreed to. If you see consent to a harmful or offensive contact, that will negate the battery claim, so be sure to discuss it if that comes up.

Alison Monahan: Now, what about "offensive"? What does this mean? You don't necessarily, for example, punch someone in the gut maybe, but you spit in their face. Is that battery? Is that contact with their body? Well, the spit made contact, so yes. And would a normal reasonable person be offended by that? Uh, yes, probably so.

Alison Monahan: What about a contact that a normal reasonable person might think is fine, but this particular defendant has already made it known they do not find acceptable? Say, for example, I'm on a bus and I tap a lady on the shoulder and say, "Excuse me, but your wallet is about to fall out of your bag." That's probably okay. What if I tapped her once and she said, "Don't touch me", and then I tapped her again? Yeah, that's more like an offensive contact. You can see how with this prong of the rule, the surrounding situation, who the people are, and where the touching occurs can all have an effect on whether this rule element is going to be checked off.

Alison Monahan: And our final element is the "bodily contact" part. Courts have ruled that items "intimately associated" with a person's body, such as the seat they're sitting on,



their clothes, the camera they have slung around their neck, or hey, while we're at it, that poor blind guy's cane, can actually be considered part of the body for this rule. So, keep that in mind as well.

Alison Monahan: Alright, enough about battery, let's look at assault. The rule to write down here is that assault is the intentional infliction of the reasonable apprehension of an imminent harmful or offensive bodily contact. Whoa, that is a lot of words there! So, let's break this one down. We've already covered what "intentional" means, and we know "reasonable" means what a reasonable person would do. What is "apprehension"? Well, this is kind of like flinching, or being scared. What it means is that you think a battery is going to happen to you. Now, what about "imminent"? Well, that just means you think the battery is going to happen right now.

Alison Monahan: So, if somebody emails me, for example, and says, "I'm going to break into your house tomorrow and beat you with a baseball bat" – that fails the "imminence" test because that's not about to happen right now.

Alison Monahan: Now, what if someone comes after me with a pink plastic squirt gun spraying water and says, "I'm going to shoot you", and I think my life is in danger? But that's probably going to fail the "reasonableness" test because no reasonable person is likely to think that an obviously toy gun is lethal. However, let's say it again – the specific facts really matter here. What if it looked enough like a real gun that a reasonable person might be confused? That well could be assault.

Alison Monahan: Now, another sub-rule here is that mere words are not enough. So, menacing words need to be accompanied by some sort of physical action as well. For example, if I yell a threat – that's not enough, but if I yell a threat and lunge towards the person – that could be assault. Keep this part of the rule in mind when listening to the fact pattern that we're going to go through in a minute.

Alison Monahan: So, how do you keep all these rule elements straight? When I was in law school, one way I liked to make sure I really understood the rules for intentional torts was to line up all the required elements and then cancel only one of them out at a time and imagine scenarios that would fit the new rule. Now, this might sound complicated, but I promise you, it's not.

Alison Monahan: For example, if I go back to our rule for battery – the intentional infliction of a harmful or offensive bodily contact – and cancel out just the "intent" element, I would imagine a situation where the person met all the other elements, but not intent. So, for example, imagine Tom and Bob were building a shed, and Tom swung his hammer back a little too far and hit Bob in the face. We have an infliction of a very harmful contact to Bob's body, but it wasn't intentional. We



made up facts that hit the other elements but did not check off the element of intent. Does this make sense? You could do the same thing for each element of your rule.

Alison Monahan: So, for the next example, maybe Bob thinks to himself, “I really hate Tom! Now is my chance to permanently maul that handsome face of his with my trusty shed-building tools.” And then he swings the hammer. We’ve got intent, because Bob is acting with purpose to maul Tom. But maybe the hammer grazes off the side of Bob’s hat and doesn’t hurt him at all. Bingo! The harm element is canceled out. All the other elements are met, but no harm, no foul. All the other elements of intent and bodily contact are there, but harm didn’t work.

Alison Monahan: So, let’s try another one. What about the element of offensive? Well, it’s pretty hard to come up with contact that’s harmful but not also offensive without getting into consent and other topics. Can you think of anything that could make this work? Anything Bob does that harms Tom’s body is probably also an offensive touching.

Alison Monahan: Could we switch it and go the other way? Are there any kinds of conduct you can think that would be offensive but not harmful? What do you think? What if Bob came over to Tom and flicked him in the forehead a couple of times and said, “Get it through that thick head of yours, this shed is mine, you dum-dum.” Okay, so we’re not looking at the words Bob said, but what about that kind of touching? Would a reasonable normal person out in the world find it offensive to be flicked in the forehead? Yeah, that’s not cool; no one likes that. But on the other hand, is a light flicking really going to be harmful to Tom? Not really. So, this fact scenario checks off offensive but not harmful. And remember, the rule has an “or” in it. Harmful *or* offensive bodily contact – so you only need one or the other, not both.

Alison Monahan: Let’s take our last element – bodily contact. Can we meet all the other elements of the rule but not this one? I mentioned before how touching something “intimately associated” with someone’s person, like their walking stick or the chair they’re sitting in, could check off this element, even though the defendant wouldn’t actually be touching the plaintiff’s body in any way. So, be looking out for those kinds of scenarios as well.

Alison Monahan: I know it sounds nerdy, but this can actually be fun once you start imagining the scenes. The crazier you make them, the easier they will be to remember. The point here is that you need to, first, memorize the exact buzzwords of each rule, and second, know how to play with the facts in such a way that you can figure out which elements of that rule are met or not. When reading a fact pattern,



your goal is to quickly parse out which facts match with which rule elements, and decide whether the rule elements are satisfied or not.

Alison Monahan: Oh, what's that? You want some hypos to practice on? Preferably something involving killing aliens with chainsaws? I thought you'd never ask! Well, here we go! This first one is taken directly from the [February 2016 Torts essay from the California bar exam](#). This is an exact quote; we did not make this stuff up. I don't know what the California bar exam members were doing that day, but here you go:

Alison Monahan: "Jack believed that extraterrestrial aliens had come to earth, were living undercover as humans, and were planning a full-scale invasion in the future. Jack believed that his next-door neighbor, Nancy, was one of these aliens. One day, Nancy called Jack on the phone to complain that Jack's children were playing in her yard. Jack yelled that his children could play wherever they wanted to. He also said he was going to kill her. The next day, Nancy approached Jack, who was playing in his yard with his children. She reminded him to keep his children out of her yard. Jack picked up a chainsaw and said, 'When the invasion comes, I am going to use this baby to cut off your head!' From the other side of the street, Ben saw Jack angrily raise the chainsaw at Nancy. Ben ran across the street and knocked Jack to the ground and injured him.

Alison Monahan: What causes of action can Nancy bring against Jack?"

Alison Monahan: Well, what do you think is at play here, assault or battery? Do we have any kind of physical touching or physical injury to Nancy? No. So, let's start with assault and see which elements we can check off for our rule. Remember, we are looking for an intentional infliction of reasonable apprehension of an imminent harmful or offensive bodily contact.

Alison Monahan: Even though assault doesn't quite mean the same thing as threatening or scaring a person, those are the kinds of facts we look for. So, what happened here? Were there any instances of threatening or scaring? First, there was a phone call where Jack said he was going to kill Nancy. Then, there was the incident with the chainsaw. Let's look at each one separately. And, on a real essay, if you see two instances of possible battery, include a sub-header for each event in question and address them separately. Let's do that now.

Alison Monahan: First, the phone call. When Jack threatened to kill Nancy, they were each located in their separate neighboring houses. They were talking on the phone.



Jack did not specify when he was going to kill Nancy, she could not see him at the time, she could only hear his voice.

Alison Monahan: Let's consider intent. Remember, intent can be met either through the "purpose" or "knowledge" prong of the rule. Did Jack act with purpose of creating apprehension in Nancy, or knowledge that apprehension was substantially certain to be produced? Yes. Threatening to kill someone would check off either element of the "intent" part of the rule. He is trying to make Nancy afraid. Or, at the very least, he should know that a person would be afraid when hearing this kind of threat to their life. So, intent is met.

Alison Monahan: What about reasonable apprehension? Would it be reasonable for Nancy to be afraid? On the one hand, this was just a phone call. No one was standing right there in the same room about to do something violent. On the other hand, Jack is her neighbor, so that tells us if he really did want to kill her, he could probably run over there pretty fast. So, she might actually have been in danger. See how I used the "neighbor" fact here? It seems like just background, but it's not.

Alison Monahan: Alright, back to Nancy. She is inside her house, so she could just lock Jack out, right? If your next-door neighbor said they were going to kill you, would you be afraid even if you had the door locked? Probably. There are enough facts here to make it look reasonable that Nancy could have felt some apprehension in this situation.

Alison Monahan: The next element on our list is imminence. How immediate was this supposed killing going to be? Well, Jack didn't say. He didn't say, "I'm going to come over and kill you right now!" He didn't give a time frame. Like I said, he could get there quickly since he was a neighbor, so it was at least possible the harm could be imminent. This element could also probably be checked off.

Alison Monahan: How about the "harmful or offensive bodily contact" part? Easily met, right? It is both very harmful and beyond offensive to a person to take their life. No trouble checking off this element.

Alison Monahan: So, what's the problem with assault when it comes to the phone call? If you're thinking to yourself, "Mere words are not enough, there needs to be an accompanying physical action," then you are absolutely right! Did Jack accompany his threat with anything physical? The facts say nothing about that, so we can assume he did not. Plus, even if he did, he is in his own house and Nancy can't even see him, so she couldn't possibly feel any extra apprehension due to a physical motion he made, since she would have no way of knowing



what he was doing at that time. This is the element where assault fails as to the phone call question, because it was just words. Does that make sense?

Alison Monahan: Alright, let's try out assault for the part about the chainsaw. Do we have intent? Yes. Cutting off someone's head with a chainsaw would be both harmful and highly offensive. No question about it. Also, where do they even come up with these facts?

Alison Monahan: What about reasonable apprehension? If someone standing next to you grabbed a chainsaw and threatened to cut off your head, would you feel afraid? Yes, of course. And remember, "afraid" is not really our rule element, but it's an easy shorthand to think about. The real question is, would a reasonable person think a battery was about to happen? And the answer here is clearly "Yes".

Alison Monahan: Alright, do we have more than words? Yes. Jack didn't just say he was going to cut off Nancy's head, he grabbed a weapon that could actually be used for exactly that purpose. Was the chainsaw on or off? We don't know. How close was he standing to Nancy? We don't know. Do these things matter? Not really. We know they were close enough to be speaking to each other and they were both in Jack's yard, so that tells us he was too close for comfort. Picking up the chainsaw along with the threat of "using this baby" against her shows this was more than mere words. Plus, the facts also said Ben saw Jack angrily raise the chainsaw at Nancy. That definitely crosses the line. This element could be checked off.

Alison Monahan: How about imminence? Is Jack going to try to cut off Nancy's head right this minute? Nope. How do we know that? Because he's waiting for the alien apocalypse, obviously. He said, "When the invasion comes, I'm going to use this baby to cut off your head."

Alison Monahan: Okay, so first of all, Jack is totally insane, right? This is not a criminal question, so we won't get into that, but yes, the alien invasion is definitely going to happen, and Nancy is an alien so Jack has to kill her with his chainsaw. But that's not going to happen today, so this threat was not imminent enough. This is the element where assault fails as to the chainsaw question.

Alison Monahan: Next, let's take a look at battery. Using the same fact pattern, could Jack bring a cause of action against Ben for battery? Now we're switching from the Nancy facts over to Ben. Remember, Ben is the guy who saw Jack angrily raise the chainsaw at Nancy, ran across the street, knocked Jack to the ground and injured him. What do you think? Is intent met? Well, Ben ran across the street specifically so he could jump on Jack. That means he had the purpose of



wrestling Jack to the ground, and the knowledge that it could hurt Jack if he tackled him. Intent is easily met.

Alison Monahan: What about harmful or offensive bodily contact? We know Jack was injured – it says so right there in the facts, so there’s nothing to explain, just use that fact. He was “injured”, so this was a harmful contact. It is also offensive to get a running start and bowl someone over, right? Yes. Even if it didn’t hurt them, a reasonable person would probably not appreciate that. So, this element is met. All the elements of battery are pretty easily met on these facts.

Alison Monahan: Remember, you can take your battery rule or other intentional tort rules and walk your way through other fact patterns on your own. See if you can cancel out one element at a time the way we did at the beginning of this podcast. Try to get into the nuances of the rule elements, and while you’re at it, review the doctrine of transferred intent because that can come into play as well. But, unfortunately, we don’t have enough time to discuss it today. Because with that, we’re out of time!

Alison Monahan: If you enjoyed this episode of the Bar Exam Toolbox podcast, please take a second to leave a review and rating on your favorite listening app. We would really appreciate it. And be sure to subscribe so you don’t miss anything. If you have any questions or comments, please don’t hesitate to reach out to Lee or Alison at lee@barexamtoolbox.com or alison@barexamtoolbox.com. Or you can always contact us via our website [contact form](#) at BarExamToolbox.com. Thanks for listening, and we’ll talk soon!

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