

A bus passenger was seated next to a woman he did not know. The woman stood to exit the bus, leaving a package on the seat. The passenger lightly tapped the woman on the back to get her attention and to inform her that she had forgotten her package. Because the woman had recently had back surgery, the tap was painful and caused her to twist and seriously injure her back.

If the woman sues the passenger to recover for the back injury, will she likely prevail?

- A. No, because she is presumed to have consented to the ordinary contacts of daily life.
- B. No, because she was not put in apprehension by the touching.
- C. Yes, because she did not consent to the harmful contact.
- D. Yes, because the passenger's intentional touching seriously injured her.

Explanation:

A defendant is liable for **battery** if he/she intends to create contact (or imminent apprehension of contact) and causes harmful or offensive contact with the plaintiff. However, the defendant is not liable for battery if the plaintiff **consented** to such contact. There are three types of consent:

actual consent – the plaintiff willingly submits to contact (eg, the plaintiff orders the defendant to hit him/her)

apparent consent – consent is reasonably understood based on the plaintiff's conduct or social customs (eg, shaking hands and other ordinary social contact)

consent implied by law – the plaintiff is unable to consent and emergency action is required to save the plaintiff's life or prevent serious harm (eg, administering CPR)

Here, the passenger tapped the woman on her back to get her attention (intentional contact), causing her to seriously injure her back (harm). However, the passenger is not liable for battery because he could reasonably presume that the woman *consented* to ordinary contacts of daily life like a light tap on the back (apparent consent).

(Choice B) The harm required for assault is *apprehension* of contact, whereas battery requires *actual* contact. Therefore, the fact that the woman was not put in apprehension by the touching is irrelevant to her battery claim.

(Choice C) Although the passenger's intentional tap caused harmful contact with the woman, it is presumed that the woman consented to the passenger's ordinary social contact (*apparent consent*) unless she gave some indication suggesting otherwise (eg, had she told the passenger not to touch her). Since the woman gave no such indication, the passenger is not liable for battery.

(Choice D) The severity of harm caused by an intentional touching has no effect on liability for battery (eg, pinching and punching equally support a battery claim). Therefore, the seriousness of the woman's injury does not matter.

Educational objective:

Consent (actual, apparent, or implied) is a defense to battery. Apparent consent exists when consent is reasonably understood based on the plaintiff's conduct or social customs.

References

Restatement (Second) of Torts § 13 (Am. Law Inst. 1965) (battery by harmful contact).

Restatement (Second) of Torts § 18 (Am. Law Inst. 1965) (battery by offensive contact).

Restatement (Second) of Torts § 892(2) (Am. Law Inst. 1979) (apparent consent).

Restatement (Second) of Torts § 892A (Am. Law Inst. 1979) (effect of consent).

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Consent to contact

Actual

Plaintiff willingly
submits to contact



Apparent

Consent is reasonably understood
based on plaintiff's conduct or
implied by custom



Implied by law

Plaintiff is unable to consent and
emergency action is required to save
his/her life or prevent serious harm

