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伊曼纽尔法律精要影印系列 law outlines

# 侵权法

[美] 史蒂文·L·伊曼纽尔/著  
(Steven L. Emanuel)

## Torts



中信出版社  
CITIC PUBLISHING HOUSE

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伊曼纽尔法律精要影印系列 law outlines

本丛书是美国哈佛、耶鲁等著名大学法学院广泛采用的主流课程学习用书，是快捷了解美国法律的最佳读本。作者史蒂文·L·伊曼纽尔是哈佛法学院的法学博士。

本丛书的主要特点包括：

- 内容精练，语言深入浅出，独具特色
- 提供切实可行的方法，达到事半功倍的学习效果
- 概要部分提纲挈领，浓缩精华
- 每章精心设计了简答题供自我检测
- 综合分析了众多考题，归纳出考试的要点和难点
- 直观的图表清晰诠释法律问题

本书是其中的《侵权法》，从故意侵权行为、对故意侵权行为的防范、过失责任、共同侵权及责任、代理责任、严格责任、产品责任等专题对美国侵权法进行了全面介绍，列举经典案例，为读者加深理解相关内容提供了很大帮助，是学习研究美国侵权法的首选。

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刑法	刑事诉讼程序
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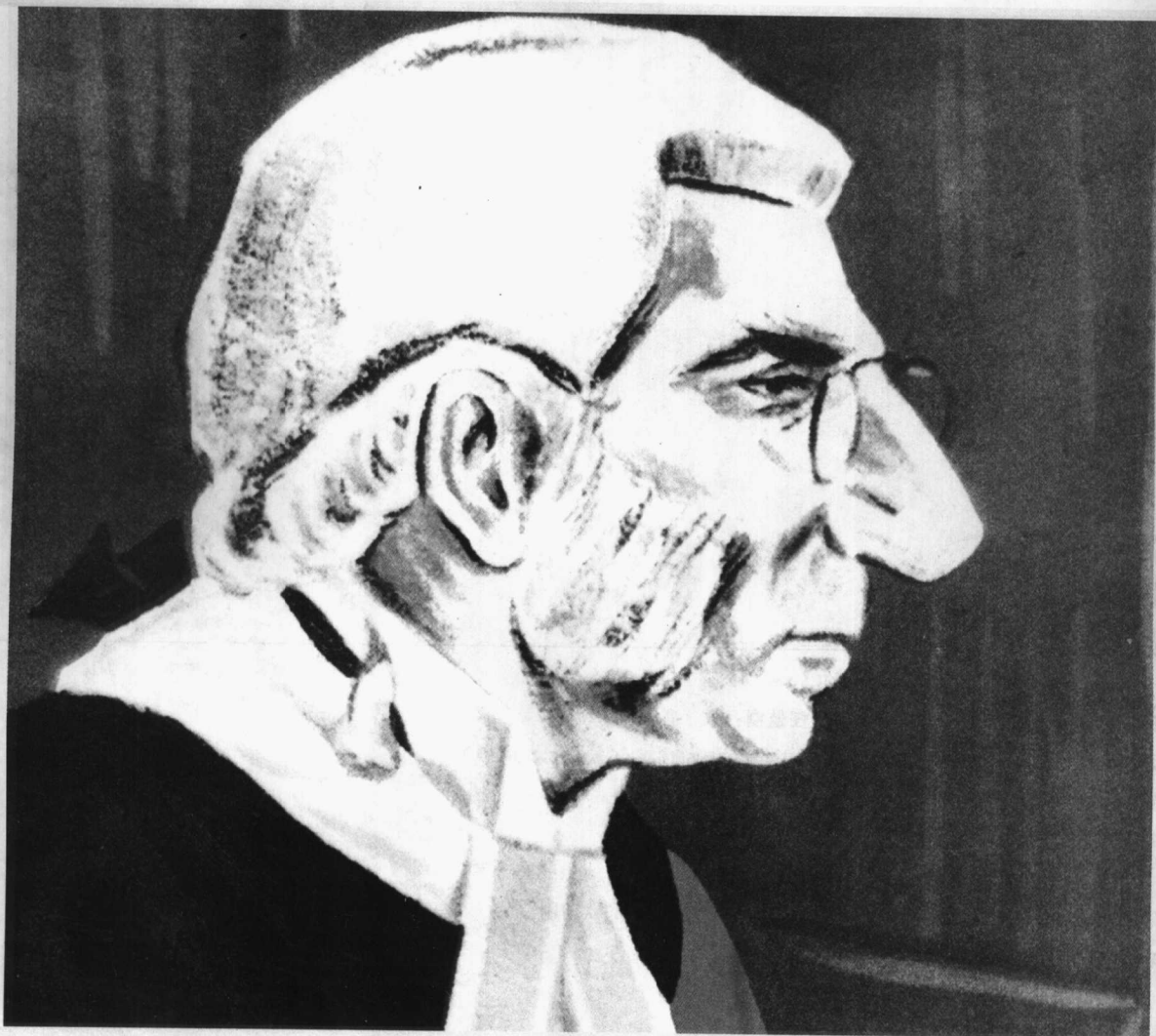
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# 总 序

吴志攀

加入世界贸易组织表明我国经济发展进入了一个新的发展时代——一个国际化商业时代。商业与法律的人才流动将全球化，评介人才标准将国际化，教育必须与世界发展同步。商业社会早已被马克思描绘成为一架复杂与精巧的机器，维持这架机器运行的是法律。法律不仅仅是关于道德与公理的原则，也不单单是说理论道的公平教义，还是具有可操作性的精细的具体专业技术。像医学专业一样，这些专业知识与经验是从无数的案例实践积累而成的。这些经验与知识体现在法学院的教材里。中信出版社出版的这套美国法学院教材为读者展现了这一点。

教育部早在2001年1月2日下发的《关于加强高等学校本科教学工作提高教学质量的若干意见》中指出：“为适应经济全球化和科技革命的挑战，本科教育要创造条件使用英语等外语进行公共课和专业课教学。对高新技术领域的生物技术、信息技术等专业，以及为适应我国加入WTO后需要的金融、法律等专业，更要先行一步，力争三年内，外语教学课程达到所开课程的5%—10%。暂不具备直接用外语讲授条件的学校、专业，可以对部分课程先实行外语教材、中文授课，分步到位。”

引进优质教育资源，快速传播新课程，学习和借鉴发达国家的成功教学经验，大胆改革现有的教科书模式成为当务之急。

按照我国法学教育发展的要求，中信出版社与外国出版公司合作，瞄准国际法律的高水平，从高端入手，大规模引进畅销外国法学院的外版法律教材，以使法学院学生尽快了解各国的法律制度，尤其是欧美等经济发达国家的法律体系及法律制度，熟悉国际公约与惯例，培养处理国际事务的能力。

此次中信出版社引进的是美国ASPEN出版公司出版的供美国法学院使用的主流法学教材及其配套教学参考书，作者均为富有经验的知名教授，其中不乏国际学术权威或著名诉讼专家，历经数十年课堂教学的锤炼，颇受法学院学生的欢迎，并得到律师实务界的认可。它们包括诉讼法、合同法、公司法、侵权法、宪法、财产法、证券法等诸多法律部门，以系列图书的形式全面介绍了美国法律的基本概况。

这次大规模引进的美国法律教材包括：

**伊曼纽尔法律精要 (Emanuel Law Outlines)** 美国哈佛、耶鲁等著名大学法学院广泛采用的主流课程教学用书，是快捷了解美国法律的最佳读本。作者均为美国名牌大学权威教授。其特点是：内容精炼，语言深入浅出，独具特色。在前言中作者以其丰富的教学经验制定了切实可行的学习步骤和方法。概要部分提纲挈领，浓缩精华。每章精心设计了简答题供自我检测。对与该法有关的众多考题综合分析，归纳考试要点和难点。

**案例与解析 (Examples and Explanations)** 由美国最权威、最富有经验的教授所著，这套丛书历经不断的修改、增订，吸收了最新的资料，经受了美国成熟市场的考验，读者日众。这次推出的是最新版本，在前几版的基础上精益求精，补充了最新的联邦规则，案例也是选用当今人们所密切关注的问题，有很强的时代感。该丛书强调法律在具体案件中的运用，避免了我国教育只灌输法律的理念与规定，而忽视实际解决问题的能力培养。该丛书以简洁生动的语言阐述了美国的基本法律制度，可准确快捷地了解美国法律的精髓。精心选取的案例，详尽到位的解析，使读者读后对同一问题均有清晰的思路，透彻的理解，能举一反三，灵活运用。该丛书匠心独具之处在于文字与图表、图例穿插，有助于理解与记忆。

**案例教程系列 (Casebook Series)** 覆盖了美国法学校院的主流课程，是学习美国法律的代表性图书，美

国著名的哈佛、耶鲁等大学的法学院普遍采用这套教材，在法学专家和学生中拥有极高的声誉。本丛书中所选的均为重要案例，其中很多案例有重要历史意义。书中摘录案例的重点部分，包括事实、法官的推理、作出判决的依据。不仅使读者快速掌握案例要点，而且省去繁琐的检索和查阅原案例的时间。书中还收录有成文法和相关资料，对国内不具备查阅美国原始资料条件的读者来说，本套书更是不可或缺的学习参考书。这套丛书充分体现了美国法学教育以案例教学为主的特点，以法院判例作为教学内容，采用苏格拉底式的问答方法，在课堂上学生充分参与讨论。这就要求学生不仅要了解专题法律知识，而且要理解法律判决书。本套丛书结合案例设计的大量思考题，对提高学生理解概念、提高分析和解决问题的能力，非常有益。本书及时补充出版最新的案例和法规汇编，保持四年修订一次的惯例，增补最新案例和最新学术研究成果，保证教材与时代发展同步。本丛书还有配套的教师手册，方便教师备课。

**案例举要 (Casenote Legal Briefs)** 美国最近三十年最畅销的法律教材的配套辅导读物。其中的每本书都是相关教材中的案例摘要和精辟讲解。该丛书内容简明扼要，条理清晰，结构科学，便于学生课前预习、课堂讨论、课后复习和准备考试。

除此之外，中信出版社还将推出教程系列、法律文书写作系列等美国法学教材的影印本。

美国法律以判例法为其主要的法律渊源，法律规范机动灵活，随着时代的变迁而对不合时宜的法律规则进行及时改进，以反映最新的时代特征；美国的法律教育同样贯穿了美国法律灵活的特性，采用大量的案例教学，启发学生的逻辑思维，提高其应用法律原则的能力。

从历史上看，我国的法律体系更多地受大陆法系的影响，法律渊源主要是成文法。在法学教育上，与国外法学教科书注重现实问题研究，注重培养学生分析和解决问题的能力相比，我国基本上采用理论教学为主，而用案例教学来解析法理则显得薄弱，在培养学生的创新精神和实践能力方面也做得不够。将美国的主流法学教材和权威的法律专业用书影印出版，就是试图让法律工作者通过原汁原味的外版书的学习，开阔眼界，取长补短，提升自己的专业水平，培养学生操作法律实际动手能力，特别是使我们的学生培养起对法律的精细化、具体化和操作化能力。

需要指出的是，影印出版美国的法学教材，并不是要不加取舍地全盘接收，我们只是希望呈现给读者一部完整的著作，让读者去评判。“取其精华去其糟粕”是我们民族对待外来文化的原则，我们相信读者的分辨能力。

是为序。

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## Abbreviations Used in Text

### CASEBOOKS

- D&H — Dobbs & Hayden, *Torts and Compensation* (West, 4th Ed., 2001)
- Epstein — Epstein, *Cases and Materials on Torts* (Little, Brown, 6th Ed., 1995)
- H,P&S — Henderson, Pearson and Siliciano, *The Torts Process* (Little, Brown, 4th Ed., 1994)
- K,T&K — Keeton, Sargentich & Steiner, *Tort and Accident Law* (West, 3rd Ed., 1998)
- P,W&S — Prosser, Wade & Schwartz, *Cases and Materials on Torts* (Foundation Press, 9th Ed., 1994)

### HORNBOOKS & OTHER REFERENCE MATERIALS

- ALI Study — American Law Institute, *Reporters' Study: Enterprise Responsibility For Personal Injury* (ALI, 1991)
- Dobbs — Dan Dobbs, *The Law of Torts* (West, 2000)
- Epstein Tbk — Epstein, *Torts* (Aspen, 1st Ed. 1999) (Textbook)
- H,J&G — Harper, James & Gray, *The Law of Torts* (Little, Brown, 2nd Ed., 1986, with 1994 Cumulative Supplement)
- Nutshell — Edward Kionka, *Torts in a Nutshell; Injuries to Persons and Property* (West, 2nd Ed. 1992)
- P&K — Keeton, Dobbs, Keeton & Owen, *Prosser & Keeton on Torts* (West, 5th Ed., 1984, with 1988 Supplement)
- Pr. L. Nut. — Noel & Phillips, *Product Liability in a Nutshell* (West, 1981)
- Rest. 2d — American Law Institute, *Restatement Second of Torts* (Student Edition)
- Rest. 3d — American Law Institute, *Restatement Third of Torts* (Products Liability and Apportionment volumes)
- W&S — White & Summers, *Uniform Commercial Code* (West, 4th Ed., 1995)



## Preface

Thanks for buying this book.

Here are some of its special features:

- **“Casebook Correlation Chart”** — This chart, located just after this Preface, correlates each section of our Outline with the pages covering the same topic in the five leading Torts casebooks.
- **“Capsule Summary”** — This is a 77-page summary of the key concepts of the law of Torts, specially designed for use in the last week or so before your final exam.
- **“Quiz Yourself”** — At the end of nearly every chapter we give you short-answer questions so that you can exercise your analytical muscles. There are nearly 100 of these questions. Most are from the *Law in a Flash* Torts title; some are from a book we publish called *Steve Emanuel’s First-Year Questions and Answers*. (Also, we’ve got other questions, in a multiple-choice format, at p. 503).
- **“Exam Tips”** — These alert you to what issues repeatedly pop up on real-life Torts exams, and what factual patterns are commonly used to test those issues. We created these Tips by looking at literally hundreds of multiple-choice and essay questions asked by law professors and bar examiners. You’d be surprised at how predictable the issues and fact-patterns chosen by profs really are!

I intend for you to use this book both throughout the semester and for exam preparation. Here are some suggestions about how to use it:<sup>1</sup>

1. During the semester, use the book in preparing each night for the next day’s class. To do this, first read your casebook. Then, use the *Casebook Correlation Chart* to get an idea of what part of the outline to read. Reading the outline will give you a sense of how the particular cases you’ve just read in your casebook fit into the overall structure of the subject. You may want to use a yellow highlighter to mark key portions of the *Emanuel*.
2. If you make your own outline for the course, use the *Emanuel* to give you a structure, and to supply black letter principles. You may want to rely especially on the *Capsule Summary* for this purpose. You are hereby authorized to copy small portions of the *Emanuel* into your own outline, provided that your outline will be used only by you or your study group, and provided that you are the owner of the *Emanuel*.
3. When you first start studying for exams, read the *Capsule Summary* to get an overview. This will probably take you about one day.
4. Either during exam study or earlier in the semester, do some or all of the *Quiz Yourself* short-answer questions. You can find these quickly by looking for *Quiz Yourself* entries in the Table of

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1. The suggestions below relate only to this book. I don’t talk about taking or reviewing class notes, using hornbooks or other study aids, joining a study group, or anything else. This doesn’t mean I don’t think these other steps are important — it’s just that in this Preface I’ve chosen to focus on how I think you can use this outline.

Contents. When you do these questions: (1) record your short “answer” on the small blank line provided after the question, but also: (2) try to write out a “mini essay” on a separate piece of paper. Remember that the only way to get good at writing essays is to write essays.

5. In the week before the exam, do the 30 multiple-choice questions at the back of the book.
6. Three or four days before the exam, review the *Exam Tips* that appear at the end of each chapter. You may want to combine this step with step 4, so that you use the Tips to help you spot the issues in the short-answer questions. You’ll also probably want to follow up from many of the Tips to the main outline’s discussion of the topic.
7. The night before the exam: (1) do some *Quiz Yourself* questions, just to get your thinking and writing juices flowing; and (2) re-scan the *Exam Tips* (spending about 2-3 hours).

This edition was prepared with the assistance of Helene Schonbrun, J.D., whose excellent work I very much appreciate. I’m also very pleased that Emanuel Publishing Corp. is now part of the Aspen Law & Business family; in my opinion, Aspen is the most outstanding publisher of materials for law students and practicing lawyers.

Good luck in your Torts course. If you’d like any other publication of Aspen Law & Business, you can find it at your bookstore or at [www.aspenpublishers.com](http://www.aspenpublishers.com).

Steve Emanuel

Larchmont NY

October, 2001

## CASEBOOK CORRELATION CHART

(Note: general sections of the outline are omitted from this chart. NC = not directly covered by this casebook.)

Emanuel's Torts Outline (by chapter and section heading)	Epstein Cases and Materials on Torts (7th Ed. 2000)	Prosser, Wade & Schwartz's Cases and Materials on Torts (19th Ed. 2000)	Franklin & Rabin Cases and Materials on Tort Law and Alternatives (7th Ed. 2001)	Henderson, Pearson & Siliciano The Torts Process (5th Ed. 1999)	Dobbs & Hayden Torts and Compensation (4th Ed. 2001)
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## CASEBOOK CORRELATION CHART (cont.)

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## CAPSULE SUMMARY

This Capsule Summary is intended for review at the end of the semester. Reading it is not a substitute for mastering the material in the main outline. Numbers in brackets refer to the pages in the main outline where the topic is discussed.

### CHAPTER 1 INTRODUCTION

#### I. GENERAL INTRODUCTION

- A. Definition of tort:** There is no single definition of “tort.” The most we can say is that: (1) a tort is a *civil wrong* committed by one person against another; and (2) torts can and usually do arise *outside of any agreement* between the parties. [1]
- B. Categories:** There are three broad categories of torts, and there are individual named torts within each category: [2-4]
1. **Intentional torts:** First, *intentional* torts are ones where the defendant desires to bring about a particular result. The main intentional torts are:
    - a. *Battery.*
    - b. *Assault.*
    - c. *False imprisonment.*
    - d. *Infliction of mental distress.*
  2. **Negligence:** The next category is the generic tort of “*negligence.*” Here, the defendant has not intended to bring about a certain result, but has merely behaved *carelessly*. There are no individually-named torts in this category, merely the general concept of “negligence.” [3]
  3. **Strict liability:** Finally, there is the least culpable category, “*strict liability.*” Here, the defendant is held liable even though he did not intend to bring about the undesirable result, and even though he behaved with utmost carefulness. There are two main individually-named torts that apply strict liability: [3-4]
    - a. Conducting of *abnormally dangerous activities* (e.g., blasting); and
    - b. The *selling* of a *defective product* which causes personal injury or property damage.
- C. Significance of categories:** There are two main consequences that turn on which of the three above categories a particular tort falls into: [4]
1. **Scope of liability:** The three categories differ concerning D’s liability for *far-reaching, unexpected, consequences*. The more culpable D’s conduct, the more far-reaching his liability for unexpected consequences — so an intentional tortfeasor is liable for a wider range of unexpected consequences than is a negligent tortfeasor. [4]
  2. **Damages:** The *measure of damages* is generally broader for the more culpable categories. In particular, D is more likely to be required to pay punitive damages when he is an intentional tortfeasor than when he is negligent or strictly liable. [4]

- D. **Exam approach:** First, review the fact pattern to spot each individual tort that has, or may have been, committed. Then, for each tort you have identified:
1. **Prima facie case:** Say whether a prima facie case for that tort has been made.
  2. **Defenses:** Analyze what *defenses* and justifications, if any, D may be able to raise.
  3. **Damages:** Finally, discuss what *damages* may be applicable, if the tort has been committed and there are no defenses. Pay special attention to: (1) punitive damages; (2) damages for emotional distress; (3) damages for loss of companionship of another person; (4) damages for unlikely and far-reaching consequences; and (5) damages for economic loss where there has been no personal injury or property damage.

## CHAPTER 2

## INTENTIONAL TORTS AGAINST THE PERSON

### C A P S U L E S U M M A R Y

#### I. “INTENT” DEFINED

- A. **Meaning of intent:** There is no general meaning of “intent” when discussing intentional torts. For each individual intentional tort, you have to memorize a different definition of “intent.” All that the intentional torts have in common is that D must have intended to bring about some sort of physical or mental effect upon another person. [7-8]
1. **No intent to harm:** The intentional torts generally are *not* defined in such a way as to require D to have intended to *harm* the plaintiff. [9] (*Example:* D points a water gun at P, making it seem like a robbery, when in fact it is a practical joke. If D has intended to put P in fear of imminent harmful bodily contact, the “intent” for assault is present, even though D intended no “harm” to P.)
  2. **Substantial certainty:** If D *knows with substantial certainty* that a particular effect will occur as a result of her action, she is deemed to have intended that result. [8] (*Example:* D pulls a chair out from under P as she is sitting down. If D knew with “substantial certainty” that P would hit the ground, D meets the intent requirement for battery, even if he did not desire that she do so. [*Garratt v. Dailey*])
    - a. **High likelihood:** But if it is merely “highly likely,” not “substantially certain,” that the bad consequences will occur, then the act is not an intentional tort. “Recklessness” by D is not enough.
  3. **Act distinguished from consequences:** Distinguish D’s act from the *consequences* of that act. The act must be intentional or substantially certain, but the consequences need not be. [9] (*Example:* D intends to tap P lightly on the chin to annoy him. If P has a “glass jaw,” which is broken by the light blow, D has still “intended” to cause the contact, and the intentional tort of battery has taken place, even though the consequences — broken jaw — were not intended.)
- B. **Transferred intent:** Under the doctrine of “*transferred intent*,” if D held the necessary intent with respect to person A, he will be held to have committed an intentional tort against *any other person* who happens to be injured. [9] (*Example:* D shoots at A, and accidentally hits B. D is liable to B for the intentional tort of battery.)



## II. BATTERY

**A. Definition:** Battery is the *intentional infliction of a harmful or offensive bodily contact*. (*Example:* A intentionally punches B in the nose. A has committed battery.) [11]

**B. Intent:** It is not necessary that D desires to physically *harm* P. D has the necessary intent for battery if it is the case *either* that: (1) D intended to cause a harmful or offensive bodily contact; or (2) D intended to cause an *imminent apprehension* on P's part of a harmful or offensive bodily contact. [11]

Example 1: D shoots at P, intending to hit him with the bullet. D has the necessary intent for battery.

Example 2: D shoots at P, intending to miss P, but also intending to make P think that P would be hit. D has the intent needed for battery (i.e., the "intent to commit an assault" suffices as the intent for battery).

**C. Harmful or offensive contact:** If the contact is "harmful" — i.e., it causes pain or bodily damage — this qualifies. But battery also covers contacts which are merely "*offensive*," i.e., damaging to a "*reasonable sense of dignity*." [11]

**Example:** D spits on P. Even if P is not "harmed" in the sense of being caused physical pain or physical injury, a battery has occurred because a person of average sensitivity in P's position would have her dignity offended.

**D. P need not be aware:** It is *not* necessary that P have *actual awareness* of the contact at the time it occurs. [12] (*Example:* D kisses P while she is asleep. D has committed a battery.)

## III. ASSAULT

**A. Definition:** Assault is the intentional causing of an *apprehension of harmful or offensive contact*. [13]

**Example:** D, a bill collector, threatens to punch P in the face if P does not pay a bill immediately. Since D has intended to put P in imminent apprehension of a harmful bodily contact, this is assault, whether D intends to in fact hit P or not.

**B. Intent:** There are two different intents, either of which will suffice for assault:

1. **Intent to create apprehension:** First, D intends to put P in *imminent apprehension* of the harmful or offensive contact, even if D does not intend to follow through (e.g., D threatens to shoot P, but does not intend to actually shoot P); [13-14] or

2. **Intent to make contact:** Alternatively, D intends to in fact *cause* a harmful or offensive bodily contact. (*Example:* D shoots a gun at P, trying to hit him. D hopes P won't see him, but P does. P is frightened, but the shot misses. This is assault.)

3. **Summary:** So D has the requisite intent for assault if D either "intends to commit an assault" or "intends to commit a battery." [13-14]

**C. No hostility:** It is not necessary that D bear malice towards P, or intend to *harm* her. (*Example:* D as a practical joke points a toy pistol at P, hoping that P will falsely think that P is about to be shot. D has one of the two alternative intents required for assault — the intent to put P in imminent apprehension of a harmful or offensive contact — so the fact that D does not desire to "harm" P is irrelevant.) [13]