3.10 ASSAULT AND BATTERY (Approved prior to 1984; Revised 03/2015)

A. Definition

A person is subject to liability for an assault if (a) s/he acts intending to cause a harmful or offensive contact with the person of the plaintiff, or an imminent apprehension of such a contact, and (b) the plaintiff is thereby put in such imminent apprehension. A battery necessarily includes a preceding assault and in addition extends to actual, nonconsensual contact.

The term contact means the same thing when used in relation to assault and battery and includes any application of force to the person of the plaintiff even though it entails no pain or bodily harm and leaves no mark. No particular degree of contact is necessary for an assault and battery and therefore the least touching or striking of the body of the plaintiff [1] without legal justification against his/her will constitutes an assault and battery.

Cases:

Leang v. Jersey City Bd. of Educ., 198 *N.J.* 557, 591 (2009); *Kelly v. County of Monmouth*, 380 *N.J. Super.* 552, 559 (App. Div. 2005); *Wigginton v. Servidio*, 324 *N.J. Super.* 114, 129 (App. Div. 1999); *Giovine v. Giovine*, 284 *N.J Super.* 3, 34 (App. Div. 1995); *Perna v. Pirozzi*, 92 *N.J.* 446, 461 (1983).

[1] Where appropriate add: "…in an angry, revengeful, rude or insolent manner…" *State v. Maier*, 13 *N.J.* 235, 242 (1953).

An assault which is unknown to the other person is not actionable unless accompanied by a battery. *Restatement (Second) of Torts*, Sections 18, 21 (1965).

B. Self Defense — Burden of Proof

The defendant denies that he/she should be called upon to pay damages to the plaintiff on the ground that whatever injury was sustained by the plaintiff was inflicted by the defendant in defense against an assault being made upon him/her by the plaintiff. Thus he/she raises what is known in the law as the defense of self defense. Since it has been introduced by the defendant the law imposes upon the defendant that burden of proving this defense according to the standard of burden of proof which I have set out in this charge.

Fundamentally, no person has a lawful right to lay hostile and menacing hands on another. However, the law does not require anyone to submit meekly to the unlawful infliction of violence upon him/her. He/She may resist the use or threatened use of force upon him/her. He/She may meet force with force, but he/she may use only such force as reasonably appears to him/her to be necessary under all the circumstances for the purpose of self protection. Accordingly, if you find that the defendant in this case has succeeded in proving that he/she was under attack by the plaintiff, and that the injury sustained by the plaintiff was inflicted by the

defendant's having used only such force as, under all the circumstances, was necessary or reasonably appeared to have been necessary for his/her own protection, then the defense of self defense has been proven, and you must find in favor of the defendant and against the plaintiff. Should you find, however, that the defendant was not under attack, or, if he/she was under attack, that he/she used more force than reasonably appeared necessary to defend himself/herself, or that he/she continued the use of force after the apparent necessity for self defense had ceased, then the defense of self defense has not been proven.

You may bear in mind; however, that one is not ordinarily expected to exercise the same refined degree of judgment at times of great stress or excitement that he/she would under more placid circumstances. And so the degree of force actually used by the defendant should not be appraised by you from the standpoint of one who has the leisure to make a calm, unhurried judgment. The conduct of the parties at the moment of conflict should be evaluated by you from their perspective at that time and in the light of the judgment of which they were then reasonably capable.

Cases:

State v. Goldberg, 12 *N.J. Super*. 293, 303, 307 (App. Div. 1951); *Hagopian v. Fuchs*, 66 *N.J. Super*. 374, 379 (App. Div. 1961); *State v. Black*, 86 *N.J.L*. 520, 524 (Sup. Ct. 1914).

C. Self Defense — Serious Bodily Harm

Where serious bodily harm is inflicted by the defendant upon the plaintiff, or where a means of defense is employed which is intended or likely to cause death or serious bodily injury, you may find that the defendant acted in self defense only if the defendant satisfies you by the greater weight of the believable evidence that he/she reasonably believed that he himself/she herself was in peril of death or serious bodily harm which he/she could have averted only by the immediate use of such a self defensive measure. You must therefore determine from the evidence whether the circumstances which were known to the defendant, or which should have been known to him/her, were such as would lead a reasonable person, one of ordinary firmness and courage, to entertain an apprehension that he/she was in danger of death or serious bodily harm.

The term "serious bodily harm" is used to describe a bodily harm, the consequence of which is so grave or serious that it is different in kind and not merely in degree from other bodily harm. A harm which creates a substantial risk of death is a "serious bodily harm", and is harm involving the permanent or protracted loss of the function of any important member or organ.

Cases:

State v. Hipplewith, 33 *N.J.* 300, 316-317 (1960); *State v. Abbott*, 36

N.J. 63, 70-72 (1961); *Hagopian v. Fuchs,* 66 *N.J. Super*. 374, 381-382 (App. Div. 1961).

Injuries amounting to mayhem, *N.J.S.A.* 2A:125-1, also constitute "serious bodily harm". *Hagopian v. Fuchs, supra,* at 381.

D. Self Defense — Duty to Retreat

The plaintiff maintains, however, that even should you find that the defendant reasonably apprehended that he/she was in danger of death or serious bodily harm, still the defendant was not justified in using a deadly force upon the plaintiff. For under the circumstances disclosed by the evidence, the plaintiff contends, the defendant had a duty to retreat which he/she did not fulfill, and that his/her use of a deadly weapon was, accordingly, not privileged.

I charge you that the use of a deadly force is not justifiable when an opportunity to retreat with complete safety is known by the defendant to be at hand. By a deadly force is meant a force which is used for the purpose of causing, or which is known by the defendant to create a substantial risk of causing, death or serious bodily harm. The use of such force is not justifiable if the defendant knew that it could have been avoided with complete safety to himself/herself by retreating. Where these conditions are present the defendant has a duty to retreat, and his/her

use of a deadly force under these circumstances cannot be justified as an act of self defense. In resolving the question of whether the defendant knew that the opportunity to retreat existed and whether it would have afforded him/her complete safety, the total attendant circumstances, including the excitement of the occasion, must be considered.

If you find from all of the testimony on this issue that the defendant had a duty to retreat which he/she did not fulfill, you have determined that the defendant did not act justifiably in self defense.

Cases:

State v. Abbott, 36 *N.J.* 63, 71 (1961); *Hagopian v. Fuchs*, 66 *N.J. Super*. 374, 381 (App. Div. 1961).

E. Defense of Another

In this case the defendant denies that he/she should be required to pay damages to the plaintiff for the reason that whatever injury was sustained by the plaintiff was inflicted by the defendant in defense of a third party who reasonably appeared to have been in peril of death or serious bodily harm at the hands of the plaintiff.

I charge you, therefore, that one may justifiably intervene in defense of any person who is in actual or apparent imminent danger of death or serious bodily harm, and in so doing he/she may use such force as he/she has reason to believe, and does believe, necessary under the circumstances. The defendant must be reasonable in his/her belief that the third party is in dire peril of death or serious bodily harm. He/She must also have a reasonable basis to believe that the force he/she uses is necessary to protect the apparent victim from the threatened harm.

Whether the defendant was reasonable in both these respects, that is, his/her belief that the apparent victim was in peril of death or serious bodily harm and that the force used was necessary are questions which you must resolve. Your conclusions must be arrived at on the basis of the facts which were known to the defendant at the time, not those known only to the plaintiff and the third party, unless

you further conclude that the defendant could and reasonably should have apprised himself/herself of those facts before acting as he/she did.

The defendant has the burden of proving to you that he/she inflicted the injuries complained of while acting in defense of the third party within the foregoing principles.

You may bear in mind that one is not ordinarily expected to exercise the same refined degree of judgment at times of stress and great excitement that he/she would under more placid circumstances. Thus, the defendant's evaluation of the gravity of the danger threatening the third party and his/her estimate of the degree of force necessary to protect the third party should not be weighed by you from the standpoint of one who has the leisure to make a calm, unhurried judgment. Defendant's conduct at the moment of conflict should be evaluated by you from his/her perspective at that time and in light of the judgment of which he/she was then reasonably capable.

Case:

State v. Chiarello, 69 *N.J. Super*. 479, 492 (App. Div. 1961).