CHAPTER 20

ASSAULT AND BATTERY

A. ASSAULT

B. BATTERY

C. AFFIRMATIVE DEFENSES

A. ASSAULT

20:1 ELEMENTS OF LIABILITY

For the plaintiff, *(name)***, to recover from the defendant,** *(name),* **on (his) (her) claim of assault, you must find that all of the following have been proved by a preponderance of the evidence:**

1. The defendant intended to cause an offensive or harmful physical contact with the plaintiff or intended to place the plaintiff in apprehension of such contact; and

2. The defendant placed the plaintiff in apprehension of immediate physical contact; and

(3. That contact [was] [appeared to be] [harmful] [or] [offensive].)

If you find that any one or more of these *(number)* **statements has not been proved, then your verdict must be for the defendant.**

On the other hand, if you find that all of these *(number)* **statements have been proved, (then your verdict must be for the plaintiff) (then you must consider the defendant's affirmative defense(s) of** *[insert any affirmative defense that would be a complete defense to plaintiff's claim]***).**

If you find that (this affirmative defense has) (any one or more of these affirmative defenses have) been proved by a preponderance of the evidence, then your verdict must be for the defendant.

However, if you find that (this affirmative defense has not) (none of these affirmative defenses have) been proved, then your verdict must be for the plaintiff.

Notes on Use

1. Omit any numbered paragraph the facts of which are not in dispute, and make such other changes as are necessary in such circumstances to make the instruction understandable.

2. In cases involving multiple defendants or designated nonparties where the pro rata liability statute, § 13-21-111.5, C.R.S., is applicable, see the Notes on Use to Instruction 4:20.

3. Use whichever parenthesized or bracketed words are appropriate and omit the last two paragraphs if the defendant has put no affirmative defense in issue or there is insufficient evidence to support any defense.

4. In some circumstances, for a "contact" to be actionable, whether as a threatened one for an assault or as an actual one for a battery, it need not be "harmful" or "offensive." *See, e.g.*, **Bloskas v. Murray**, 646 P.2d 907 (Colo. 1982). In such cases, the parenthesized numbered paragraph 3 of this instruction, as well as the parenthesized definitions of "harmful" and

"offensive" in Instruction 20:6, when that instruction is given with this instruction, must be omitted.

5. Though mitigation of damages is an affirmative defense, *see* Instruction 5:2, it is rarely a complete defense. For this reason, mitigation should not be identified as an affirmative defense in the concluding paragraphs of this instruction. Instead, if supported by sufficient evidence, Instruction 5:2 should be given along with the actual damages instruction appropriate to the claim and the evidence in the case.

6. Other appropriate instructions defining the terms used in this instruction, for example, Instruction 20:2, defining "apprehension," and Instruction 20:6, defining "contact," must also be given with this instruction.

7. An assault may exist if the defendant's intentional conduct was directed toward a third person, rather than the plaintiff. In such cases, numbered paragraph 1 should be modified accordingly. *See, e.g.*, numbered paragraph 1 of Instruction 20:5.

8. This instruction must be appropriately modified in cases in which there is sufficient evidence that the claimed assault may have occurred under circumstances that would immunize the defendant from liability under certain conditions. *See, e.g.*, § 13-21-108, C.R.S. (the "Good Samaritan" statute).

Source and Authority

This instruction is supported by **White v. Muniz**, 999 P.2d 814, 819 (Colo. 2000) (for assault or battery, plaintiff must prove that defendant intended "to cause offensive or harmful consequences by his act," but need not prove that the defendant intended the harm that actually occurred); **Horton v. Reaves**, 186 Colo. 149, 526 P.2d 304 (1974); **Adams v. Corrections Corp. of America**, 187 P.3d 1190 (Colo. App. 2008); and **Bohrer v. DeHart**, 943 P.2d 1220 (Colo. App. 1996). *See also* RESTATEMENT (SECOND) OF TORTS § 21(1) (1965); 1 F. HARPER ET AL., HARPER, JAMES, AND GRAY ON TORTS §§ 3.4, 3.5 (3d. ed. 2006); W. PAGE KEETON, PROSSER AND KEETON ON THE LAW OF TORTS § 10 (5th ed. 1984).

20:2 APPREHENSION — DEFINED

Apprehension is a state of mind experienced when a person anticipates immediate harmful or offensive physical contact.

Notes on Use

This instruction should be used with Instruction 20:1.

Source and Authority

This instruction is supported by W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 10, at 43-44 (5th ed. 1984); and RESTATEMENT (SECOND) OF TORTS §§ 24, 27 (1965). *See also* **Campbell v. Jenkins**, 43 Colo. App. 458, 608 P.2d 363 (1979).

20:3 INTENT TO PLACE ANOTHER IN APPREHENSION — DEFINED

A person intends to place another in apprehension of physical contact when (he) (she):

1. Acts with the purpose of causing apprehension of physical contact; or

2. Knows that (his) (her) conduct will probably place the other person in apprehension of physical contact.

Notes on Use

Where the intent may have been directed to a third person, rather than the plaintiff, this instruction should be appropriately modified.

Source and Authority

1. This instruction is supported by **White v. Muniz**, 999 P.2d 814 (Colo. 2000). *See also* **Mooney v. Carter**, 114 Colo. 267, 160 P.2d 390 (1945); RESTATEMENT (SECOND) OF TORTS § 32 (1965); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 10, at 46 (5th ed. 1984).

2. "With regard to the intent element of the intentional torts of assault and battery . . . a plaintiff must prove that the actor desired to cause offensive or harmful consequences by his act. The plaintiff need not prove, however, that the actor intended the harm that actually results." **White**, 999 P.2d at 819.

20:4 ACTUAL OR NOMINAL DAMAGES

Plaintiff, *(name)***, has the burden of proving the nature and extent of (his) (her) damages by a preponderance of the evidence. If you find in favor of the plaintiff, you must determine the total dollar amount of the plaintiff's damages, if any, that were caused by the** *(insert appropriate description, e.g., "assault" or "battery")* **of the defendant(s),** *(name[s])***, (and the** *[insert appropriate description, e.g., "negligence"]***, if any, of any designated nonparties).**

In determining these damages, you shall consider the following:

1. Any noneconomic losses or injuries the plaintiff has had to the present time or that the plaintiff will probably have in the future, including: physical and mental pain and suffering, inconvenience, emotional stress, fear, anxiety, embarrassment, humiliation, impairment of the quality of life, and *[insert any other recoverable noneconomic losses for which there is sufficient evidence]***. (In considering damages in this category, you shall not consider damages for [physical impairment] [or] [disfigurement], because these damages, if any, are to be considered in a separate category.)**

2. Any economic losses or injuries the plaintiff has had to the present time or that the plaintiff will probably have in the future, including: loss of earnings or income; impairment of earning capacity; (reasonable and necessary) medical, hospital and other expenses, and *[insert any other recoverable economic losses for which there is sufficient evidence]***. (In considering damages in this category, you shall not consider damages for [physical impairment] [or] [disfigurement], since these damages, if any, are to be considered in a separate category.)**

(3. Any [physical impairment] [or] [disfigurement]. In considering damages in this category, you shall not include damages again for losses or injuries already determined in either numbered paragraph 1 or 2 above.)

If you find in favor of the plaintiff, but do not find any actual damages, you shall award (him) (her) nominal damages of one dollar.

Notes on Use

1. Use only those numbered, parenthesized paragraphs or portions that are appropriate to the evidence in the case.

2. This instruction is also applicable to damages recoverable for a battery. In such cases the parenthesized word "battery" should be substituted for the word "assault."

3. In some cases an appropriate instruction relating to causation may need to be given with this instruction. *See* Instructions 9:18-9:21.

4. Where there is uncontroverted evidence of actual damages, the last paragraph referring to nominal damages should be deleted. **Whitley v. Andersen**, 37 Colo. App. 486, 551 P.2d 1083 (1976), *aff'd on other grounds*, 194 Colo. 87, 570 P.2d 525 (1977).

5. Comparative negligence is not a defense to an intentional tort claim. **Carman v. Heber**, 43 Colo. App. 5, 601 P.2d 646 (1979). Therefore, the first paragraph of this instruction varies from the comparable damage instructions in "simple" negligence cases by eliminating any reference to plaintiff's own negligence.

Source and Authority

1. This instruction is supported by **Jones v. Franklin**, 139 Colo. 384, 340 P.2d 123 (1959) (in an assault and battery case, instruction enumerating basically the same elements of damages approved); **Whitley**, 37 Colo. App. at 488-89, 551 P.2d at 1085; and W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 10, at 43 (5th ed. 1984).

2. Plaintiff's words alone, "even if spoken immediately preceding the assault and battery, cannot be considered by a jury in mitigation of compensatory damages." **Whitley**, 194 Colo. at 88, 570 P.2d at 526. They may, however, be considered in mitigation of punitive damages. *Id.*

3. In an assault action, where there is "no evidence that the fright manifested itself in any physical or mental problems [or] that any medical assistance had been sought[,]" or any other actual damages were incurred, the plaintiff is entitled to recover only nominal damages. **Campbell v. Jenkins**, 43 Colo. App. 458, 459, 608 P.2d 363, 364 (1979). For more than a nominal damage recovery based only on emotional distress, such distress must have manifested itself in some form of physical or mental illness. *Id.*

B. BATTERY

20:5 ELEMENTS OF LIABILITY

For the plaintiff, *(name)***, to recover from the defendant,** *(name)***, on (his) (her) claim of battery, you must find that all of the following have been proved by a preponderance of the evidence:**

1. The defendant's act resulted in physical contact with the plaintiff; and

2. The defendant intended to make harmful or offensive physical contact with the plaintiff (or another person) (or knew that [he] [she] would probably make such contact); and

(3. The contact was [harmful] [or] [offensive].)

If you find that any one or more of these *(number)* **statements has not been proved, then your verdict must be for the defendant.**

On the other hand, if you find that all of these *(number)* **statements have been proved, (then your verdict must be for the plaintiff) (then you must consider the defendant's affirmative defense(s) of** *[insert any affirmative defense that would be a complete defense to plaintiff's claim]***).**

If you find that (this affirmative defense has) (any one or more of these affirmative defenses have) been proved by a preponderance of the evidence, then your verdict must be for the defendant.

However, if you find that (this affirmative defense has not) (none of these affirmative defenses have) been proved, then your verdict must be for the plaintiff.

Notes on Use

1. Note 4 of the Notes on Use to Instruction 20:1 also applies to this instruction.

2. In cases involving multiple defendants or designated nonparties where the pro rata liability statute, § 13-21-111.5, C.R.S., is applicable, see the Notes on Use to Instruction 4:20.

3. Omit any numbered paragraph the facts of which are not in dispute, and make such other changes as are necessary in such circumstances to make the instruction understandable.

4. Use whichever parenthesized words are appropriate and omit the last two paragraphs if the defendant has put no affirmative defense in issue or there is insufficient evidence to support any defense.

5. Though mitigation of damages is an affirmative defense, *see* Instruction 5:2, it is rarely a complete defense. For this reason, mitigation should not be identified as an affirmative defense

in the concluding paragraphs of this instruction. Instead, if supported by sufficient evidence, Instruction 5:2 should be given along with the actual damages instruction appropriate to the claim and the evidence in the case.

6. Other appropriate instructions defining the terms used in this instruction, for example, Instruction 20:6, defining "contact," and Instruction 20:7, defining "intent," must also be given with this instruction.

7. For cases involving persons who allegedly committed a battery while practicing one of the healing arts, see the instructions in subparts B and C of Part I of Chapter 15.

8. This instruction must be appropriately modified in cases in which there is sufficient evidence that the claimed battery may have occurred under circumstances that would immunize the defendant from liability under certain conditions. *See, e.g.*, § 13-21-108, C.R.S. (the "Good Samaritan" statute).

Source and Authority

1. This instruction is supported by RESTATEMENT (SECOND) OF TORTS §§ 13, 18 (1965); 1 F. HARPER ET AL., HARPER, JAMES, AND GRAY ON TORTS §§ 3.1-3.3 (3d ed. 2006); and W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 9 (5th ed. 1984). *See also* **White v. Muniz**, 999 P.2d 814 (Colo. 2000); **Horton v. Reaves**, 186 Colo. 149, 526 P.2d 304 (1974); **Mooney v. Carter**, 114 Colo. 267, 160 P.2d 390 (1945); **Whitley v. Andersen**, 37 Colo. App. 486, 551 P.2d 1083 (1976), *aff'd on other grounds*, 194 Colo. 87, 570 P.2d 525 (1977).

2. In addition to the defenses set out in Part C of this chapter (Instructions 20:10 through 20:17), see section 13-80-119, C.R.S. (circumstances in which a person may not be entitled to recover damages sustained while engaged in the commission of, or during immediate flight from, an act constituting a felony (discussed in **Molnar v. Law**, 776 P.2d 1156 (Colo. App. 1989))).

3. This instruction should be appropriately modified where there is evidence that the defendant did not intend to make contact with the plaintiff or another, but did intend to put the plaintiff or another "in apprehension of a harmful or offensive bodily contact." **Hall v. McBryde**, 919 P.2d 910, 914 (Colo. App. 1996).

4. "With regard to the intent element of the intentional torts of assault and battery . . . a plaintiff must prove that the actor desired to cause offensive or harmful consequences by his act. The plaintiff need not prove, however, that the actor intended the harm that actually results." **White**, 999 P.2d at 819.

20:6 CONTACT — DEFINED

A contact is the physical touching of another person.

(A harmful contact is one that causes physical pain, injury, illness or emotional distress.)

(An offensive contact is one that would offend another's reasonable sense of personal dignity.)

Notes on Use

1. Note 4 of the Notes on Use to Instruction 20:1 is also applicable to this instruction.

2. Use whichever one, or both, of the parenthesized sentences in the second paragraph as is appropriate.

3. In appropriate cases, the first sentence should be modified to read: "A contact is the physical touching of another person or putting into motion anything which touches another person." In addition, in appropriate cases, the following phrase should be added to the first sentence, either as it appears in the instruction or as modified above: "or anything that is connected with or in contact with the other person." Also in appropriate cases, the first sentence should be changed to read: "A contact is the physical touching of another person or causing another person to come in contact with some physical object." *See, e.g.*, **Mooney v. Carter**, 114 Colo. 267, 160 P.2d 390 (1945) (intentionally trying to throw plaintiff from running board of moving car by swerving the car, when the probable result would be that the plaintiff would be thrown to the ground).

Source and Authority

This instruction is supported by the authorities cited in the Source and Authority to Instruction 20:5 and RESTATEMENT (SECOND) OF TORTS §§ 15, 19 (1965).

20:7 INTENT — DEFINED

A person intends to make (harmful) (or) (offensive) physical contact with someone else if (he) (she) acts with the purpose of causing such contact even if (he) (she) did not intend to cause the specific harm that actually occurred.

Notes on Use

1. This instruction should be given with Instruction 20:5 whenever numbered paragraph 1 of that instruction is given.

2. This instruction should be appropriately modified where there is evidence that the defendant did not intend to make contact with the plaintiff or another, but did intend to put the plaintiff or another "in apprehension of a harmful or offensive bodily contact." **Hall v. McBryde**, 919 P.2d 910, 914 (Colo. App. 1996).

Source and Authority

1. This instruction is supported by **White v. Muniz**, 999 P.2d 814 (Colo. 2000); and **Mooney v. Carter**, 114 Colo. 267, 160 P.2d 390 (1945) (defendant had sufficient intent for battery where she intentionally sped up her car and swerved for the purpose of throwing the plaintiff from the running board, because willfully setting in motion a force which in its ordinary course would bring about the injury is sufficient). *See also* **Horton v. Reaves**, 186 Colo. 149, 526 P.2d 304 (1974) (in the case of a very young child, the requisite intent must include some awareness of the natural consequences of intentional acts); RESTATEMENT (SECOND) OF TORTS §§ 16, 20 (1965); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS §§ 8, 9 (5th ed. 1984).

2. "With regard to the intent element of the intentional torts of assault and battery . . . a plaintiff must prove that the actor desired to cause offensive or harmful consequences by his act. The plaintiff need not prove, however, that the actor intended the harm that actually results." **White**, 999 P.2d at 819.

20:8 TRANSFERRED INTENT

It is not necessary that the defendant intended to make (harmful) (or) (offensive) physical contact specifically with the plaintiff.

Intent exists even if the defendant originally intended to make (harmful) (or) (offensive) physical contact with someone else.

Notes on Use

1. As to whether the parenthesized word "harmful" or "offensive" should be given, see Note 4 of the Notes on Use to Instruction 20:1.

2. This instruction should be given only when there is evidence that the defendant may have or did intend to touch the person of another, as well as, or rather than, the person of the plaintiff.

3. When this instruction is given, Instruction 20:7, defining "intent," must also be given.

4. This instruction should be appropriately modified where there is evidence that the defendant did not intend to make contact with the plaintiff or another but did intend to put the plaintiff or another "in apprehension of a harmful or offensive bodily contact." **Hall v. McBryde**, 919 P.2d 910, 914 (Colo. App. 1996).

Source and Authority

1. This instruction is supported by W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 8, at 37-39 (5th ed. 1984); 1 F. HARPER ET AL. HARPER, JAMES, AND GRAY ON TORTS § 3.3, at 317-19 (3d ed. 2006); and RESTATEMENT (SECOND) OF TORTS §§ 16(2), 20(2) (1965).

2. "With regard to the intent element of the intentional torts of assault and battery . . . a plaintiff must prove that the actor desired to cause offensive or harmful consequences by his act. The plaintiff need not prove, however, that the actor intended the harm that actually results." **White v. Muniz**, 999 P.2d 814, 819 (Colo. 2000).

20:9 ACTUAL OR NOMINAL DAMAGES

Use Instruction 20:4.

Note

The damages instruction for battery is the same as that for assault.

C. AFFIRMATIVE DEFENSES

20:10 WORDS ALONE DO NOT JUSTIFY

Words alone do not justify an assault or battery even if they are offensive.

Notes on Use

If there is evidence that an assault or battery was occasioned by an offensive or provocative gesture or gestures, this instruction should be appropriately modified.

Source and Authority

1. This instruction is supported by **Goldblatt v. Chase**, 121 Colo. 355, 216 P.2d 435 (1950); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 19, at 126 (5th ed. 1984); and RESTATEMENT (SECOND) OF TORTS § 31 cmt. a (1965).

2. Words alone, "even if spoken immediately preceding the assault and battery, cannot be considered by a jury in mitigation of compensatory damages." **Andersen v. Whitley**, 194 Colo. 87, 88, 570 P.2d 525, 526 (1977). They may, however, be considered in mitigation of exemplary damages. **Heil v. Zink**, 120 Colo. 481, 210 P.2d 610 (1949).

20:11 CONSENT

The defendant, *(name)*, is not legally responsible to the plaintiff, *(name)*, on (his) (her) claim of (assault) (battery) if the affirmative defense of consent is proved. This defense is proved if you find all of the following:

1. The plaintiff, by words or conduct, (consented) (or) (led the defendant reasonably to believe that [he] [she] consented) to the (contact) (or) (threatened contact) by the defendant; and

2. The (contact) (or) (threatened contact) by the defendant was the same or substantially similar to that consented to by the plaintiff; and

(3. The plaintiff was capable of giving consent.)

Notes on Use

1. Use whichever parenthesized or bracketed words are appropriate.

2. Omit numbered paragraph 3 if there is no evidence of incapacity in the case and omit either of the other numbered paragraphs if the facts are not in dispute.

3. If there is evidence of some particular reason why the plaintiff was incapable of giving consent, for example, infancy or intoxication, paragraph 3 should be included and the following should be added to this instruction: "The plaintiff was not capable of effectively consenting if at the time *(insert a brief description of any conditions which would render the plaintiff incapable of giving effective consent).*" Similarly, if the plaintiff's consent would not be effective for some other reason, for example, because it was obtained by fraud or duress, this instruction must be appropriately modified.

4. If there is a dispute as to whether the defendant made or threatened any contact, this instruction must be appropriately modified.

5. For cases involving persons who allegedly committed a battery while practicing one of the healing arts, see the instructions in Part I of Subparts B and C of Chapter 15.

Source and Authority

This instruction is supported by W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 18 (5th ed. 1984); and RESTATEMENT (SECOND) OF TORTS §§ 49-62 (1965).

20:12 SELF-DEFENSE OF PERSON

The defendant, *(name)***, is not legally responsible to the plaintiff,** *(name)***, on (his) (her) claim of (assault) (battery) if the affirmative defense of self-defense of person is proved. This defense is proved if you find both of the following:**

1. The defendant reasonably believed (even if mistakenly) that under the circumstances it was necessary to use force to protect (himself) (herself) from an actual or threatened (harmful) (or) (offensive) contact; and

2. The defendant used no more force than a reasonable person would have used under the same or similar circumstances to protect (himself) (herself) from the actual or threatened contact.

Notes on Use

1. Use whichever parenthesized words are appropriate. As to whether the parenthesized word "harmful" or "offensive" should be given, see Note 4 of the Notes on Use to Instruction 20:1.

2. When applicable, Instruction 20:13 should also be given with this instruction.

3. Omit either numbered paragraph or portions thereof if the facts are not in dispute, and make such other changes as are necessary in such circumstances to make the instruction understandable.

4. If there is a dispute as to whether the defendant made or threatened any contact, this instruction must be appropriately modified.

Source and Authority

1. This instruction is supported by **Minowitz v. Failing**, 109 Colo. 182, 123 P.2d 417 (1942) (numbered paragraph 2); **Courvoisier v. Raymond**, 23 Colo. 113, 47 P. 284 (1896) (numbered paragraph 1); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 19 (5th ed. 1984); 1 F. HARPER ET AL., HARPER, JAMES, AND GRAY ON TORTS § 3.11 (3d ed. 2006); and RESTATEMENT (SECOND) OF TORTS §§ 63, 65 (1965). *See also* **Valdez v. City & Cty. of Denver**, 764 P.2d 393 (Colo. App. 1988) (question of reasonableness of force used is ordinarily one for the jury).

2. Section 18-1-704, C.R.S., the "make-my-day" statute, creates a defense in criminal cases (use of physical force, including deadly physical force, against an intruder of a dwelling). Section 18-1-704.5 creates immunity from civil liability if the statutory standards and circumstances of the "make my day" criminal defense are met. Although no Colorado appellate case has considered these statutes as applied in civil cases, if they are applicable, an appropriate instruction based on those statutes must be given, and this instruction should not be given, or, if given, must be appropriately modified as may be necessary to distinguish the privilege covered

by this instruction from the privilege provided by the statute. *See* **People v. Guenther**, 740 P.2d 971, 981 (Colo. 1987) (holding that in criminal cases, under section 18-1-704.5(3), the phrase "immune from criminal prosecution" (which is comparable to the phrase "immune from any civil liability for injuries or death" in subsection (4)) requires the trial court to make a preliminary determination of the possible applicability of the statutory immunity to the facts of the case). If at a pretrial hearing the court determines that the defendant has shown by a preponderance of the evidence that the statute applies, the court must dismiss those "charges to which the immunity bar applies." *Id.* If the court does not determine that right to immunity has been so proved, then the defendant may still raise the issue again at trial as an affirmative defense to be determined by the jury. *See, e.g.*, **People v. Janes**, 982 P.2d 300 (Colo. 1999). In **Guenther**, 740 P.2d at 981, the court also set out the specific factual elements which must be proved under the statute.

20:13 SELF-DEFENSE — FORCE CALCULATED TO INFLICT DEATH OR SERIOUS BODILY INJURY

When a person acts in self-defense, the person may not use force that is likely to cause death or serious bodily harm, unless the person reasonably believes that he or she is in danger of death or serious bodily harm and that there is no other reasonable means of defense.

Notes on Use

When the evidence shows that a force likely to inflict death or cause serious bodily injury may have been used in self-defense, this instruction, which elaborates more fully the rule stated in numbered paragraph 2 of Instruction 20:12, should also be given.

Source and Authority

1. This instruction is supported by the cases cited in the Source and Authority to Instruction 20:12. *See also* **Kaufman v. People**, 202 P.3d 542 (Colo. 2009).

2. For a discussion of the use of deadly physical force in self-defense under section 18-1-704, C.R.S., see **People v. Toler**, 9 P.3d 341 (Colo. 2000) (no duty to retreat before using deadly force in self-defense except in certain specifically identified circumstances).

3. See paragraph 2 of the Source and Authority to Instruction 20:12, which discusses the civil immunity provided in section 18-1-704.5, C.R.S. ("make-my-day" statute).

20:14 DEFENSE OF ANOTHER PERSON

The defendant, *(name)***, is not legally responsible to the plaintiff,** *(name)***, on (his) (her) claim of (assault) (battery) if the affirmative defense of defense of another person is proved. This defense is proved if you find all of the following:**

1. The defendant reasonably believed (even if mistakenly) that the plaintiff was making or was about to make (a) (an) (harmful) (or) (offensive) contact with *(name of third person)***; and**

2. The defendant reasonably believed (even if mistakenly) that under the circumstances it was necessary for (him) (her) to intervene and use force to protect *(name of third person)***; and**

3. The defendant used no more force than a reasonable person would have used under the same or similar circumstances to protect *(name of third person)* **from the actual or threatened contact by the plaintiff.**

Notes on Use

1. Use whichever parenthesized words are appropriate. As to whether the parenthesized word "harmful" or "offensive" should be given, see Note 4 of the Notes on Use to Instruction 20:1.

2. Omit any numbered paragraph or portions thereof if the facts are not in dispute.

3. If a force calculated to inflict serious bodily injury or death is involved, it may also be necessary to give Instruction 20:13, appropriately modified.

4. If the defendant's intervention further provoked the plaintiff, so that the defendant became entitled to defend him or herself, Instruction 20:12 should also be given, with such modifications as are necessary to make it understandable in the context of the particular case.

5. If there is a dispute as to whether the defendant made or threatened any contact, this instruction must be appropriately modified.

Source and Authority

1. This instruction is supported by W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 20 (5th ed. 1984); and RESTATEMENT (SECOND) OF TORTS § 76 (1965).

2. In defending another person the defendant may have been mistaken, but reasonably so, as to (a) the need for intervention and (b) whether the third person was exercising or could have lawfully exercised his or her own privilege of self-defense. There is a split of authority on the question whether a defendant is entitled to the privilege of defense of another when the defendant has made either one or both of these mistakes, even reasonably. PROSSER AND KEETON ON THE LAW OF TORTS, *supra*, § 20. RESTATEMENT § 76 adopts the view that a reasonable

mistake will excuse the defendant. This instruction follows the RESTATEMENT view which is favored by W. PROSSER & W. KEETON as being more consistent with the usual rules governing self-defense. *See also* 1 F. HARPER ET AL., HARPER, JAMES, AND GRAY ON TORTS § 3.12 (3d ed. 2006).

3. As in other cases of a privilege to defend persons or property, one may not use more force than is reasonably necessary. PROSSER AND KEETON ON THE LAW OF TORTS, *supra*, § 20.

4. See paragraph 2 of the Source and Authority to Instruction 20:12, which discusses the civil immunity provided in section 18-1-704.5, C.R.S. ("make-my-day" statute).

20:15 BATTERY DEFENSES — DEFENSE OF REAL PROPERTY

The defendant, *(name)*, is not legally responsible to the plaintiff, *(name)*, on (his) (her) claim of battery if the affirmative defense of defense of real property has been proved. This defense is proved if you find all of the following:

1. The plaintiff was on the defendant's property without permission; and

2. Before using any force the defendant (asked) (or) (told) the plaintiff to leave the property and gave (him) (her) a reasonable opportunity to leave (or the defendant reasonably thought that under the circumstances such a request would have been useless); and

3. The defendant reasonably thought it was necessary under the circumstances to use force to remove the plaintiff from (his) (her) property; and

4. The defendant used reasonable force to remove the plaintiff from his property.

Notes on Use

1. Use whichever parenthesized phrases are appropriate.

2. Omit any numbered paragraph the facts of which are not in dispute.

3. If the plaintiff used force to resist the defendant's initial, privileged use of force, then the defendant may also be entitled to claim a privilege of self-defense of person. In such circumstances Instruction 20:12 (and, if appropriate, Instruction 20:13) should also be given with this instruction.

4. If there is a dispute as to whether the defendant used any force, this instruction must be appropriately modified.

Source and Authority

1. This instruction is supported by the general law as set out in W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 21 (5th ed. 1984); and RESTATEMENT (SECOND) OF TORTS § 77 (1965).

2. See paragraph 2 of the Source and Authority to Instruction 20:12, which discusses the civil immunity provided in section 18-1-704.5, C.R.S. ("make-my-day" statute).

20:16 BATTERY DEFENSES — DEFENSE OF PERSONAL PROPERTY

The defendant, *(name)***, is not legally responsible to the plaintiff,** *(name)***, on (his) (her) claim of battery if the affirmative defense of defense of personal property is proved. This defense is proved if you find all of the following:**

1. The defendant had possession of *(insert description of the property)* **(and was entitled to such possession); and**

2. The plaintiff was attempting to interfere with the defendant's possession (or it reasonably appeared to the defendant that the plaintiff was attempting to interfere with the defendant's possession); and

3. Before using any force, the defendant (asked) (or) (told) the plaintiff to stop interfering with the defendant's possession of *(insert description of the property)* **and gave (him) (her) a reasonable opportunity to stop the interference (or the defendant reasonably thought that under the circumstances such a request would be useless); and**

4. The defendant reasonably thought that it was necessary under the circumstances to use force to prevent the plaintiff's interference with the possession of (his) (her) *(insert description of the property)***; and**

5. The defendant used reasonable force to prevent the plaintiff's interference with the possession of (his) (her) *(insert description of the property)***.**

Notes on Use

The Notes on Use to Instruction 20:15 are also applicable to this instruction and should be read and applied accordingly.

Source and Authority

This instruction is supported by the general law as set out in W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 21 (5th ed. 1984); and RESTATEMENT (SECOND) OF TORTS § 77 (1965).

20:17 BATTERY DEFENSES — RECAPTURE OF PERSONAL PROPERTY

The defendant, *(name)***, is not legally responsible to the plaintiff,** *(name)***, on (his) (her) claim of battery if the affirmative defense of privilege to retake personal property is proved. This defense is proved if you find all of the following:**

1. The defendant had possession of *(insert description of the property)* **(and was entitled to such possession); and**

2. The plaintiff (took possession of *[insert description of property]* **either forcibly or fraudulently) (or) (took possession of** *[insert description of property]* **from someone else knowing that the other person had forcibly or fraudulently deprived the defendant of [his] [her] possession of** *[insert description of property]***); and**

3. The defendant (either) (was immediately aware that *[insert description of property]* **had been taken from [his] [her] possession and [he] [she] took prompt action to retake possession) (or) ([he] [she] discovered within a reasonably short period of time that** *[insert description of property]* **had been taken from [his] [her] possession and [he] [she] then took prompt action to retake possession of** *[insert description of property]***); and**

4. Before using any force, the defendant (asked) (or) (told) the plaintiff to return *(insert description of the property)* **and gave (him) (her) a reasonable time to do so (or the defendant reasonably thought that under the circumstances such a request would be useless); and**

5. The defendant reasonably thought it was necessary under the circumstances to use force to retake possession of *(insert description of property)***; and**

6. The defendant used reasonable force to retake possession of *(insert description of property)***.**

Notes on Use

The Notes on Use to Instruction 20:15 are also applicable to this instruction and should be read and applied accordingly.

Source and Authority

1. This instruction is supported by the general law as set out in W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 22, at 137-39 (5th ed. 1984); and RESTATEMENT (SECOND) OF TORTS §§ 100-106 (1965).

2. If the plaintiff lawfully acquired possession, the defense of privilege to recapture is not applicable. PROSSER AND KEETON ON THE LAW OF TORTS, *supra*, § 22, at 138.