Fagan v Metropolitan Police Commissioner [1968] 3 All ER 442, Queen's Bench Division

(Lord Parker CJ, Bridge and James JJ)

The defendant was directed by a constable to park his car close to the kerb. He drove his car on to the constable's foot. The constable said, 'Get off, you are on my foot.' The defendant replied, 'Fuck you, you can wait', and turned off the ignition. He was convicted by the magistrates of assaulting the constable in the execution of his duty and his appeal was dismissed by Quarter Sessions who were in doubt whether the driving on to the foot was intentional or accidental but were satisfied that he 'knowingly, unnecessarily and provocatively' allowed the car to remain on the foot.

James J [with whom **Lord Parker CJ** concurred] ... In our judgment, the question arising, which has been argued on general principles, falls to be decided on the facts of the particular case. An assault is any act which intentionally—or possibly recklessly—causes another person to apprehend immediate and unlawful personal violence. Although 'assault' is an independent crime and is to be treated as such, for practical purposes today 'assault' is generally synonymous with the term 'battery', and is a term used to mean the actual intended use of unlawful force to another person without his consent. On the facts of the present case, the 'assault' alleged involved a 'battery'. Where an assault involved a battery, it matters not, in our judgment, whether the battery is inflicted directly by the body of the offender or through the medium of some weapon or instrument controlled by the action of the offender. An assault may be committed by the laying of a hand on another, and the action does not cease to be an assault if it is a stick held in the hand and not the hand itself which is laid on the person of the victim. So, for our part, we see no difference in principle between the action of stepping on to a person's toe and maintaining that position and the action of driving a car on to a person's foot and sitting in the car while its position on the foot is maintained.

To constitute this offence, some intentional act must have been performed; a *mere* omission to act cannot amount to an assault. Without going into the question whether words alone can constitute an assault, it is clear that the words spoken by the appellant could not alone amount to an assault; they can only shed a light on the appellant's action. For our part, we think that the crucial question is whether, in this case, the act of the appellant can be said to be complete and spent at the moment of time when the car wheel came to rest on the foot, or whether his act is to be regarded as a continuing act operating until the wheel was removed. In our judgment, a distinction is to be drawn between acts which are complete—though results may continue to flow—and those acts which are continuing. Once the act is complete, it cannot thereafter be said to be a threat to inflict unlawful force on the victim. If the act, as distinct from the results thereof, is a continuing act, there is a continuing threat to inflict unlawful force. If the assault involves a battery and that battery continues, there is a continuing act of assault. For an assault to be committed, both the elements of actus reus and mens rea must be present at the same time. The 'actus reus' is the action causing the effect on the victim's mind: see the observations of Parke B, in *R v St George* [(1840) 9 C & P 483 at 490, 493]. The 'mens rea' is the intention to cause that effect. It is not necessary that mens rea should be present at the inception of the actus reus; it can be superimposed on an existing act. On the other hand, the subsequent inception of mens rea cannot convert an act which has been completed without mens rea into an assault.

In our judgment, the justices at Willesden and quarter sessions were right in law. On the facts found, the action of the appellant may have been initially unintentional, but the time came when, knowing that the wheel was on the officer's foot, the appellant (i) remained seated in the car so that his body through the medium of the car was in contact with the officer, (ii) switched off the ignition of the car, (iii) maintained the wheel of the car on the foot, and (iv) used words indicating the intention of keeping the wheel in that position. For our part, we cannot regard such conduct as mere omission or inactivity. There was an act constituting a battery which at its inception was not criminal because there was no element of intention, but which became criminal from the moment the intention was formed to produce the apprehension which was flowing from the continuing act. The fallacy of the appellant's argument is that it seeks to equate the facts of this case with such a case as where a motorist has accidentally run over a person and, that action having been completed, fails to assist the victim with the intent that the victim should suffer.

We would dismiss this appeal.