CARDOZO

Benjamin N. Cardozo School of Law • Yeshiva University

Foundations of Legal Analysis and the Judicial Process
Fall 2025

Introduction

This Orientation program in legal process, the legal system, case reading and analysis, case briefing seeks to help students understand the methods and best practices of learning the law introduced in the first year of law school. In engaging students in the questions that characterize the U.S. legal system, and in teaching students the beginnings of the structure of the legal system, students are introduced to the central work of law students and lawyers: (i) understanding the structure and context of the legal system; (ii) reading and understanding judicial opinions; and (iii) learning how to synthesize and use these case readings in a law school class. We will introduce students to methods of learning the law including the skills of questioning, argument, application of legal sources to hypothetical scenarios, case briefing, taking class notes, and making connections between the cases students read. This is a foundational opportunity for the entire first year of law school and beyond, exposing students to the concepts and tools that will be learned and honed through doctrinal courses, the Lawyering and Legal Writing course, and other forms of legal study throughout law school and in legal practice.

Learning Objectives:

In Foundations of Legal analysis and the Judicial Process, students will develop:

1. A foundational understanding of the U.S. legal system, legal process issues, and judicial decision-making;
2. Case reading and analysis skills;
3. An understanding of how to analyze, argue, and apply law and facts to presented questions, facts, and scenarios during a cold call in a classroom setting;
4. Effective and efficient approaches to law school learning, including notetaking, case briefing, and an introduction to course outlining; and
5. Reflective approaches to ethical and inclusive conduct in law school, law learning, academic and professional engagement, and law practice.

Provided Material

All materials necessary for this Orientation can be found on our Canvas page. The materials include:

1. Case Law Packet

Instructor Information

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Assignments and Readings

Session Date & Time	Session Topic	Assignments to Complete BEFORE session
Session 1 (90 mins) 8/18/25 10AM-11:45AM (with 15 min break)	• Review of the Separation of Powers • Introduction to the Common Law • Overview of the Court System & Structure • Anatomy of a Case • Case Discussion – *Garratt v. Dailey*	• Read and take notes on *Garratt v. Dailey* • Read and take notes on *Vosburg v. Putney*
Session 2 (60 mins) 8/18/25 1PM-2PM	• Why do we read cases in law school? • Sources of Law • What is a case brief? • How to do a case brief • Briefing a case – *Vosburg v. Putney*	
Session 3 (60 mins) 8/19/25 10:30AM-11:30AM	• Review case brief – *Hackbart v. Cincinnati Bengals, Inc.* • How we use case law in law school • Introduction to the Socratic Method • Building rules from case law	• Read and brief *Hackbart v. Cincinnati Bengals, Inc.* • Upload your brief to Canvas
Session 4 – Mock Class (60 mins) 8/19/25 12:30PM-1:30PM	• Mock Torts class using *Garratt v. Dailey*; *Vosburg v. Putney*; *Hackbart v. Cincinnati Bengals, Inc.* • Introduction to Outlining	

Foundations of Legal Analysis and the Judicial Process

Excerpted from The Torts Process

James A. Henderson; Douglas A. Kysar

Vosburg v. Putney

80 Wis. 523, 50 N.W. 403 (1891)

The action was brought to recover damages for [a] battery, alleged to have been committed by the defendant upon the plaintiff on February 20, 1889. The answer is a general denial. At the date of the alleged [battery] the plaintiff was a little more than fourteen years of age, and the defendant a little less than twelve years of age.

The injury complained of was caused by a kick inflicted by defendant upon the leg of the plaintiff, a little below the knee. The transaction occurred in a schoolroom in Waukesha, during school hours, both parties being pupils in the school. A former trial of the cause resulted in a verdict and judgment for the plaintiff for $2,800. The defendant appealed from such judgment to this court, and the same was reversed for error, and a new trial awarded. 78 Wis. 84.

The case has been again tried in the circuit court, and [the second trial from which the defendant brings the present appeal] resulted in a verdict for plaintiff for $2,500. The facts of the case, as they appeared on both trials, are sufficiently stated in the opinion by Mr. Justice Orton on the former appeal. . . .

[The facts as stated in the first supreme court opinion referred to are: "The plaintiff was about fourteen years of age, and the defendant about eleven years of age. On the 20th day of February, 1889, they were sitting opposite to each other across an aisle in the high school of the village of Waukesha. The defendant reached across the aisle with his foot, and hit with his toe the shin of the right leg of the plaintiff. The touch was slight. The plaintiff did not feel it, either on account of its being so slight or of loss of sensation produced by the shock. In a few moments he felt a violent pain in that place, which caused him to cry out loudly. The next day he was sick, and had to be helped to school. On the fourth day he was vomiting, and Dr. Bacon was sent for, but could not come, and he sent medicine to stop the vomiting, and came to see him the next day, on the 25th. There was a slight discoloration of the skin entirely over the inner surface of the tibia an inch below the bend of the knee. The doctor applied fomentations, and gave him anodynes to quiet the pain. This treatment was continued, and the swelling so increased by the 5th day of March that counsel was called, and on the 8th of March an operation was performed on the limb by making an incision, and a moderate amount of pus escaped. A drainage tube was inserted, and an iodoform dressing put on. On the sixth day after this, another incision was made to the bone, and it was found that destruction was going on in the bone, and so it has continued exfoliating pieces of bone. He will never recover the use of his limb. There were black and blue spots on the shin bone, indicating that there had been a blow. On the 1st day of January before, 14the plaintiff received an injury just above the knee of the same leg by coasting, which appeared to be healing up and drying down at the time of the last injury. The theory of at least one of the medical witnesses was that the limb was in a diseased condition when this

touch or kick was given, caused by microbes entering in through the wound above the knee, and which were revivified by the touch, and that the touch was the exciting or remote cause of the destruction of the bone, or of the plaintiff's injury. It does not appear that there was any visible mark made or left by this touch or kick of the defendant's foot, or any appearance of injury until the black and blue spots were discovered by the physician several days afterwards, and then there were more spots than one. There was no proof of any other hurt, and the medical testimony seems to have been agreed that this touch or kick was the exciting cause of the injury to the plaintiff. . . .

"The learned circuit judge [at the first trial], said to the jury: 'It is a peculiar case, an unfortunate case, a case, I think I am at liberty to say, that ought not to have come into court. The parents of these children ought, in some way, if possible, to have adjusted it between themselves.' "]

On the [second trial from the results of which the present appeal is taken,] the jury found a special verdict, as follows: "(1) Had the plaintiff during the month of January, 1889, received an injury just above the knee, which became inflamed, and produced pus? Answer. Yes. (2) Had such injury on the 20th day of February, 1889, nearly healed at the point of the injury? A. Yes. (3) Was the plaintiff, before said 20th of February, lame, as the result of such injury? A. No. (4) Had the tibia in the plaintiff's right leg become inflamed or diseased to some extent before he received the blow or kick from the defendant? A. No. (5) What was the exciting cause of the injury to the plaintiff's leg? A. Kick. (6) Did the defendant, in touching the plaintiff with his foot, intend to do him any harm? A. No. (7) At what sum do you assess the damages of the plaintiff? A. $2,500."

The defendant moved for judgment in his favor on the verdict, and also for a new trial. The plaintiff moved for judgment on the verdict in his favor. The motions of defendant were overruled, and that of the plaintiff granted. Thereupon judgment for plaintiff for $2,500 damages and costs of suit was duly entered. The defendant appeals from the judgment.

Lyon, J. Several errors are assigned, only three of which will be considered.

1. The jury having found that the defendant, in touching the plaintiff with his foot, did not intend to do him any harm, counsel for defendant maintain that the plaintiff has no cause of action, and that defendant's motion for judgment on the special verdict should have been granted. In support of this proposition counsel quote from 2 Greenl. Ev. §83, the rule that "the intention to do harm is of the essence of an assault." Such is the rule, no doubt, in actions or prosecutions for mere assaults. But this is an action to recover damages for an alleged assault and battery. In such case the rule is correctly stated, in many of the authorities cited by counsel, that plaintiff must show either that the intention was unlawful, or that the defendant is in fault. If the intended act is unlawful, the intention to commit it must necessarily be unlawful. Hence, as applied to this case, if the kicking of the plaintiff by the defendant was an unlawful act, the intention of defendant to kick him was also unlawful.

Had the parties been upon the play-grounds of the school, engaged in the usual boyish sports, the defendant being free from malice, wantonness, or negligence, and intending no harm to plaintiff in what he did, we should hesitate to hold the act of the defendant unlawful, or that he could be held liable in this action. Some consideration is due to the implied license of the play-grounds. But it appears that the injury was inflicted in the school, after it had been called to order by the teacher, and after the regular exercises of the school had commenced. Under these circumstances, no implied license to do the act complained of existed, and such act was a violation of the order and decorum of the school, 15and necessarily unlawful. Hence we are of the opinion that, under the evidence and verdict, the action may be sustained.

Garratt v. Dailey

46 Wash. 2d 197, 279 P.2d 1091 (1955)

Hill, J. The liability of an infant for an alleged battery is presented to this court for the first time. Brian Dailey (age five years, nine months) was visiting with Naomi Garratt, an adult and a sister of the plaintiff, Ruth Garratt, likewise an adult, in the backyard of the plaintiff's home, on July 16, 1951. It is plaintiff's contention that she came out into the backyard to talk with Naomi and that, as she started to sit down in a wood and canvas lawn chair, Brian deliberately pulled it out from under her. The only one of the three persons present so testifying was Naomi Garratt. (Ruth Garratt, the plaintiff, did not testify as to how or why she fell.) The trial court, unwilling to accept this testimony, adopted instead Brian Dailey's version of what happened, and made the following findings:

"III. . . . that while Naomi Garratt and Brian Dailey were in the back yard the plaintiff, Ruth Garratt, came out of her house into the back yard. Some time subsequent thereto defendant, Brian Dailey, picked up a lightly built wood and canvas lawn chair which was then and there located in the back yard of the above described premises, moved it sideways a few feet and seated himself therein, at which time he discovered the plaintiff, Ruth Garratt, about to sit down at the place where the lawn chair had formerly been, at which time he hurriedly got up from the chair and attempted to move it toward Ruth Garratt to aid her in sitting down in the chair; that due to the defendant's small size and lack of dexterity he was unable to get the lawn chair under the plaintiff in time to prevent her from falling to the ground. That plaintiff fell to the ground and sustained a fracture of her hip, and other injuries and damages as hereinafter set forth.

"IV. That the preponderance of the evidence in this case establishes that when the defendant, Brian Dailey, moved the chair in question he did not have any wilful or unlawful purpose in doing so; that he did not have any intent to injure the plaintiff, or any intent to bring about any unauthorized or offensive contact with her person or any objects appurtenant thereto; that the circumstances which immediately preceded the fall of the plaintiff established that the defendant, Brian Dailey, did not have purpose, intent or design to perform a prank or to effect an assault and battery upon the person of the plaintiff." (Italics ours, for a purpose hereinafter indicated.)

It is conceded that Ruth Garratt's fall resulted in a fractured hip and other painful and serious injuries. To obviate the necessity of a retrial in the event this court determines that she was entitled to a judgment against Brian Dailey, the amount of her damage was found to be eleven thousand dollars. Plaintiff appeals from a judgment dismissing the action and asks for the entry of a judgment in that amount or a new trial.

The authorities generally, but with certain notable exceptions (see Bohlen, "Liability in Tort of Infants and Insane Persons," 23 Mich. L. Rev. 9), state that, when a minor has committed a tort with force, he is liable to be proceeded against as any other person would be.

In our analysis of the applicable law, we start with the basic premise that Brian, whether five or fifty-five, must have committed some wrongful act before he could be liable for appellant's injuries.

The trial court's finding that Brian was a visitor in the Garratt backyard is supported by the evidence and negatives appellant's assertion that Brian was a trespasser and had no right to touch, move, or sit in any chair in that yard, and that contention will not receive further consideration.

It is urged that Brian's action in moving the chair constituted a battery. A definition (not all-inclusive but sufficient for our purpose) of a battery is the intentional infliction of a 21harmful bodily contact upon another. The rule that determines liability for battery is given in 1 Restatement, Torts, 29, §13, as:

An act which, directly or indirectly, is the legal cause of a harmful contact with another's person makes the actor liable to the other, if

(a) the act is done with the intention of bringing about a harmful or offensive contact or an apprehension thereof to the other or a third person, and

(b) the contact is not consented to by the other or the other's consent thereto is procured by fraud or duress, and

(c) the contact is not otherwise privileged.

We have in this case no question of consent or privilege. We therefore proceed to an immediate consideration of intent and its place in the law of battery. In the comment on clause (a), the Restatement says:

Character of actor's intention. In order that an act may be done with the intention of bringing about a harmful or offensive contact or an apprehension thereof to a particular person, either the other or a third person, the act must be done for the purpose of causing the contact or apprehension or with knowledge on the part of the actor that such contact or apprehension is substantially certain to be produced.

See also, Prosser on Torts 41, §8.

We have here the conceded volitional act of Brian, i.e., the moving of a chair. Had the plaintiff proved to the satisfaction of the trial court that Brian moved the chair while she was in the act of sitting down,

Brian's action would patently have been for the purpose or with the intent of causing the plaintiff's bodily contact with the ground, and she would be entitled to a judgment against him for the resulting damages. Vosburg v. Putney (1891), 80 Wis. 523, 50 N.W. 403.

The plaintiff based her case on that theory, and the trial court held that she failed in her proof and accepted Brian's version of the facts rather than that given by the eyewitness who testified for the plaintiff. After the trial court determined that the plaintiff had not established her theory of a battery (i.e., that Brian had pulled the chair out from under the plaintiff while she was in the act of sitting down), it then became concerned with whether a battery was established under the facts as it found them to be.

In this connection, we quote another portion of the comment on the "Character of actor's intention," relating to clause (a) of the rule from the Restatement heretofore set forth:

It is not enough that the act itself is intentionally done and this, even though the actor realizes or should realize that it contains a very grave risk of bringing about the contact or apprehension. Such realization may make the actor's conduct negligent or even reckless but unless he realizes that to a substantial certainty, the contact or apprehension will result, the actor has not that intention which is necessary to make him liable under the rule stated in this Section.

A battery would be established if, in addition to plaintiff's fall, it was proved that, when Brian moved the chair, he knew with substantial certainty that the plaintiff would attempt to sit down where the chair had been. If Brian had any of the intents which the trial court found, in the italicized portions of the findings of fact quoted above, that he did not have, he would of course have had the knowledge to which we have referred. The mere absence of any intent to injure the plaintiff or to play a prank on her or to embarrass her, or to commit an assault and battery on her would not absolve him from liability if in fact he had such knowledge. Without such knowledge, there would be nothing wrongful 22about Brian's act in moving the chair, and, there being no wrongful act, there would be no liability.

While a finding that Brian had no such knowledge can be inferred from the findings made, we believe that before the plaintiff's action in such a case should be dismissed there should be no question but that the trial court had passed upon that issue; hence, the case should be remanded for clarification of the findings to specifically cover the question of Brian's knowledge, because intent could be inferred therefrom. If the court finds that he had such knowledge, the necessary intent will be established and the plaintiff will be entitled to recover, even though there was no purpose to injure or embarrass the plaintiff. Vosburg v. Putney, supra. If Brian did not have such knowledge, there was no wrongful act by him, and the basic premise of liability on the theory of a battery was not established.

It will be noted that the law of battery as we have discussed it is the law applicable to adults, and no significance has been attached to the fact that Brian was a child less than six years of age when the

alleged battery occurred. The only circumstance where Brian's age is of any consequence is in determining what he knew, and there his experience, capacity, and understanding are of course material.

From what has been said, it is clear that we find no merit in plaintiff's contention that we can direct the entry of a judgment for eleven thousand dollars in her favor on the record now before us.

Nor do we find any error in the record that warrants a new trial. . . .

The case is remanded for clarification, with instructions to make definite findings on the issue of whether Brian Dailey knew with substantial certainty that the plaintiff would attempt to sit down where the chair which he moved had been, and to change the judgment if the findings warrant it. . . .

Remanded for clarification.

Schwellenbach, Donworth, and Weaver, JJ., concur.

Fisher v. Carrousel Motor Hotel

424 S.W.2d 627 (Tex. 1967)

Greenhill, J. This is a suit for actual and exemplary damages growing out of an alleged assault and battery. The plaintiff Fisher was a mathematician with the Data Processing Division of the Manned Spacecraft Center, an agency of the National Aeronautics and Space Agency, commonly called NASA, near Houston. The defendants were the Carrousel Motor Hotel, Inc., located in Houston, the Brass Ring Club, which is located in the Carrousel, and Robert W. Flynn, who as an employee of the Carrousel was the manager of the Brass Ring Club. Flynn died before the trial, and the suit proceeded as to the Carrousel and the Brass Ring. Trial was to a jury which found for the plaintiff Fisher. The trial court rendered judgment for the defendants notwithstanding the verdict. The Court of Civil Appeals affirmed. 414 S.W.2d 774. The questions before this Court are whether there was evidence that an actionable battery was committed, and, if so, whether the two corporate defendants must respond in exemplary as well as actual damages for the malicious conduct of Flynn.

The plaintiff Fisher had been invited by Ampex Corporation and Defense Electronics to a one day's meeting regarding telemetry equipment at the Carrousel. The invitation included a luncheon. The guests were asked to reply by telephone whether they could attend the luncheon, and Fisher called in his acceptance. After the morning session, the group of 25 or 30 guests adjourned to the Brass Ring Club for lunch. The luncheon was buffet style, and Fisher stood in line with others and just ahead of a graduate student of Rice 33University who testified at the trial. As Fisher was about to be served, he was approached by Flynn, who snatched the plate from Fisher's hand and shouted that he, a Negro, could not be served in the club. Fisher testified that he was not actually touched, and did not testify that he suffered fear or apprehension of physical injury; but he did testify that he was highly embarrassed and hurt by Flynn's conduct in the presence of his associates.

The jury found that Flynn "forceably dispossessed plaintiff of his dinner plate" and "shouted in a loud and offensive manner" that Fisher could not be served there, thus subjecting Fisher to humiliation and indignity. It was stipulated that Flynn was an employee of the Carrousel Hotel and, as such, managed the Brass Ring Club. The jury also found that Flynn acted maliciously and awarded Fisher $400 actual damages for his humiliation and indignity and $500 exemplary damages for Flynn's malicious conduct.

The Court of Civil Appeals held that there was no assault because there was no physical contact and no evidence of fear or apprehension of physical contact. However, it has long been settled that there can be a battery without an assault, and that actual physical contact is not necessary to constitute a battery, so long as there is contact with clothing or an object closely identified with the body. . . .

Under the facts of this case, we have no difficulty in holding that the intentional grabbing of plaintiff's plate constituted a battery. The intentional snatching of an object from one's hand is as clearly an offensive invasion of his person as would be an actual contact with the body. . . .

. . . Damages for mental suffering are recoverable without the necessity for showing actual physical injury in a case of willful battery because the basis of that action is the unpermitted and intentional invasion of the plaintiff's person and not the actual harm done to the plaintiff's body. Personal indignity is the essence of an action for battery; and consequently the defendant is liable not only for contacts which do actual physical harm, but also for those which are offensive and insulting. We hold, therefore, that plaintiff was entitled to actual damages for mental suffering due to the willful battery, even in the absence of any physical injury. . . .

We now turn to the question of the liability of the corporations for exemplary damages. In this regard, the jury found that Flynn was acting within the course and scope of his employment on the occasion in question; that Flynn acted maliciously and with a wanton disregard of the rights and feelings of plaintiff on the occasion in question. There is no attack upon these jury findings. The jury further found that the defendant Carrousel did not authorize or approve the conduct of Flynn. It is argued that there is no evidence to support this finding. The jury verdict concluded with a finding that $500 would "reasonably compensate plaintiff for the malicious act and wanton disregard of plaintiff's feelings and rights. . . . "

The rule in Texas is that a principal or master is liable for exemplary or punitive damages because of the acts of his agent, but only if: (a) the principal authorized the doing and the manner of the act, or (b) the agent was unfit and the principal was reckless in employing him, or (c) the agent was employed in a managerial capacity and was acting in the scope of employment, or (d) the employer or a manager of the employer ratified or approved the act.

. . . At the trial of this case, the following stipulation was made in open court: "It is further stipulated and agreed to by all parties that as an employee of the Carrousel Motor Hotel the said Robert W. Flynn was manager of the Brass Ring Club." We think this stipulation brings the case squarely within part (c) of the rule. . . .

The judgment of the courts below are reversed, and judgment is here rendered for the plaintiff for $900 with interest. . . .

Hackbart v. Cincinnati Bengals, Inc.

601 F.2d 516 (10th Cir. 1979)

Doyle, Circuit Judge.

The question in this case is whether in a regular season professional football game an injury which is inflicted by one professional football player on an opposing player can give rise to liability in tort where the injury was inflicted by the intentional striking of a blow during the game.

The injury occurred in the course of a game between the Denver Broncos and the Cincinnati Bengals, which game was being played in Denver in 1973. The Broncos' defensive back, Dale Hackbart, was the recipient of the injury and the Bengals' offensive back, Charles "Booby" Clark, inflicted the blow which produced it.

By agreement the liability question was determined by the United States District Court for the District of Colorado without a jury. The judge resolved the liability issue in favor of the Cincinnati team and Charles Clark. Consistent with this result, final judgment was entered for Cincinnati and the appeal challenges this judgment. In essence the trial court's reasons for rejecting plaintiff's claim were that professional football is a species of warfare and that so much physical force is tolerated and the magnitude of the force exerted is so great that it renders injuries not actionable in court; that even intentional batteries are beyond the scope of the judicial process.

Clark was an offensive back and just before the injury he had run a pass pattern to the right side of the Denver Broncos' end zone. The injury flowed indirectly from this play. The pass was intercepted by Billy Thompson, a Denver free safety, who returned it to midfield. The subject injury occurred as an aftermath of the pass play. As a consequence of the interception, the roles of Hackbart and Clark suddenly changed. Hackbart, who had been defending, instantaneously became an offensive player. Clark, on the other hand, became a defensive player. Acting as an offensive player, Hackbart attempted to block Clark by throwing his body in front of him. He thereafter remained on the ground. He turned, and with one knee on the ground, watched the play following the interception.

The trial court's finding was that Charles Clark, "acting out of anger and frustration, but without specific intent to injure . . . stepped forward and struck a blow with his right forearm to the back of the kneeling plaintiff's head and neck with sufficient force to cause both players to fall forward to the ground." Both players, without complaining to the officials or to one another, returned to their respective sidelines since the ball had changed hands and the offensive and defensive teams of each had been substituted. Clark testified at trial that his frustration was brought about by the fact that his team was losing the game.

Due to the failure of the officials to view the incident, a foul was not called. However, the game film showed very clearly what had occurred. Plaintiff did not at the time report the happening to his coaches or to anyone else during the game. However, because of the pain which he experienced he was unable to play golf the next day. He did not seek medical attention, but the continued pain caused him to report this fact and the incident to the 68Bronco trainer who gave him treatment. Apparently he played on the specialty teams for two successive Sundays, but after that the Broncos released him on waivers. (He was in his thirteenth year as a player.) He sought medical help and it was then that it was discovered by the physician that he had a serious neck fracture injury.

Despite the fact that the defendant Charles Clark admitted that the blow which had been struck was not accidental, that it was intentionally administered, the trial court ruled as a matter of law that the game of professional football is basically a business which is violent in nature, and that the available sanctions are imposition of penalties and expulsion from the game. Notice was taken of the fact that many fouls are overlooked; that the game is played in an emotional and noisy environment; and that incidents such as that here complained of are not unusual.

The trial court spoke as well of the unreasonableness of applying the laws and rules which are part of injury law to the game of professional football, noting the unreasonableness of holding that one player has a duty of care for the safety of others. He also talked about the concept of assumption of risk and contributory fault as applying and concluded that Hackbart had to recognize that he accepted the risk that he would be injured by such an act. . . .

The evidence at the trial uniformly supported the proposition that the intentional striking of a player in the head from the rear is not an accepted part of either the playing rules or the general customs of the game of professional football. The trial court, however, believed that the unusual nature of the case called for the consideration of underlying policy which it defined as common law principles which have evolved as a result of the case to case process and which necessarily affect behavior in various contexts. From these considerations the belief was expressed that even intentional injuries incurred in football games should be outside the framework of the law. The court recognized that the potential threat of legal liability has a significant deterrent effect, and further said that private civil actions constitute an important mechanism for societal control of human conduct. Due to the increase in severity of human conflicts, a need existed to expand the body of governing law more rapidly and with more certainty, but that this had to be accomplished by legislation and administrative regulation. The judge compared football to coal mining and railroading insofar as all are inherently hazardous. Judge Matsch said that in the case of football it was questionable whether social values would be improved by limiting the violence. Thus the district court's assumption was that Clark had inflicted an intentional blow which would ordinarily generate civil liability and which might bring about a criminal sanction as well, but that since it had occurred in the course of a football game, it should not be subject to the restraints of the law; that if it were it would place unreasonable impediments and restraints on the activity. The judge also pointed out that courts are ill-suited to decide the different social questions and to administer conflicts on what is much like a battlefield where the restraints of civilization have been left on the sidelines. . . .

Plaintiff, of course, maintains that tort law applicable to the injury in this case applies on the football field as well as in other places. On the other hand, plaintiff does not rely on the theory of negligence being applicable. This is in recognition of the fact that subjecting another to unreasonable risk of harm, the essence of negligence, is inherent in the game of football, for admittedly it is violent. Plaintiff maintains that in the area of contributory fault, a vacuum exists in relationship to intentional infliction of injury. Since negligence does not apply, contributory negligence is inapplicable. Intentional or reckless contributory fault could theoretically at least apply to infliction of injuries in reckless disregard of the rights of others. This has some similarity to contributory negligence and undoubtedly it would apply if the evidence would justify it. But it is highly questionable whether a professional football player consents or submits to injuries caused by conduct not within the rules, and 69there is no evidence which we have seen which shows this. However, the trial court did not consider this question and we are not deciding it.

Contrary to the position of the court then, there are no principles of law which allow a court to rule out certain tortious conduct by reason of general roughness of the game or difficulty of administering it.

Indeed, the evidence shows that there are rules of the game which prohibit the intentional striking of blows. Thus, Article 1, Item 1, Subsection C, provides that:

> All players are prohibited from striking on the head, face or neck with the heel, back or side of the hand, wrist, forearm, elbow or clasped hands.

Thus the very conduct which was present here is expressly prohibited by the rule which is quoted above.

The general customs of football do not approve the intentional punching or striking of others. That this is prohibited was supported by the testimony of all of the witnesses. They testified that the intentional striking of a player in the face or from the rear is prohibited by the playing rules as well as the general customs of the game. Punching or hitting with the arms is prohibited. Undoubtedly these restraints are intended to establish reasonable boundaries so that one football player cannot intentionally inflict a serious injury on another. Therefore, the notion is not correct that all reason has been abandoned, whereby the only possible remedy for the person who has been the victim of an unlawful blow is retaliation. . . .

In sum, having concluded that the trial court did not limit the case to a trial of the evidence bearing on defendant's liability but rather determined that as a matter of social policy the game was so violent and unlawful that valid lines could not be drawn, we take the view that this was not a proper issue for determination and that plaintiff was entitled to have the case tried on an assessment of his rights and whether they had been violated.

The trial court has heard the evidence and has made findings. The findings of fact based on the evidence presented are not an issue on this appeal. Thus, it would not seem that the court would have to repeat the

areas of evidence that have already been fully considered. The need is for a reconsideration of that evidence in the light of that which is taken up by this court in its opinion. We are not to be understood as limiting the trial court's consideration of supplemental evidence if it deems it necessary.

The cause is reversed and remanded for a new trial in accordance with the foregoing views.

Relevant Restatement Sections

According to the Restatement (Third) of Torts: Liability for Physical and Emotional Harm §4 (2010):

"Physical harm" means the physical impairment of the human body ("bodily harm") or of real property or tangible personal property ("property damage"). Bodily harm includes physical injury, illness, disease, impairment of bodily function, and death.

Comment c to §4 states:

[A]ny level of physical impairment is sufficient for liability; no minimum amount of physical harm is required. Thus, any detrimental change in the physical condition of a person's body or property counts as a harmful impairment; there is no requirement that the detriment be major.

§19. What Constitutes Offensive Contact

A bodily contact is offensive if it offends a reasonable sense of personal dignity.

Comment:

a. In order that a contact be offensive to a reasonable sense of personal dignity, it must be one which would offend the ordinary person and as such one not unduly sensitive as to his personal dignity. It must, therefore, be a contact which is unwarranted by the social usages prevalent at the time and place at which it is inflicted.