ASPEN COURSEBOOK SERIES

Nadia E. Nedzel

Legal Reasoning, Research, and Writing for International Graduate Students

FIFTH EDITION

Nadia E. Nedzel, Southern University Law Center

Legal Reasoning, Research, and Writing for International Graduate Students, Fifth Edition, helps international students understand and approach legal reasoning and writing the way law students and attorneys do in the United States. With concise and clear text, Professor Nedzel introduces the unique and important features of the American legal system and American law schools. Using clear instruction, examples, visual aids, and practice exercises, she teaches practical lawyering skills with sensitivity to the challenges of ESL students.

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Fifth Edition

Nadia E. Nedzel, J.D., LL.M.
Reilly Family Professor of Law
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ASPEN PUBLISHING

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To my husband, Nicholas Capaldi, for his encouragement; my children, Chantal and Michael, for their patience; and my LL.M. students, for their insight and comments.

SUMMARY OF CONTENTS

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PREFACE FOR THE FIFTH EDITION

Much has changed since the first edition of this textbook, which was the first of its kind aimed at helping international law students understand U.S.-style legal reasoning, research, and writing. Nevertheless, the aim remains the same: to use clear instruction, simple examples, visual aids, and practice exercises while remaining sensitive to the challenges faced by ESL and other international students. Those challenges include adjusting to massive quantities of reading in doctrinal classes and active classroom participation (whether in person or via distance learning), as well as learning to reason and write about law from an entirely new perspective. They do not need (and will not use) a verbose text on writing. Simply put, they need to write more than they need to read about writing.

This Fifth Edition has been entirely refreshed. A streamlined presentation makes the material easily accessible: chapters begin with flowcharts to provide a concise, visual overview and each chapter is short, direct, and to the point with simple examples and exercises. The book begins with those skills most needed in a U.S. law school including case briefing, course outlines, time management, reading citations, and addressing hypotheticals. Five of the eleven chapters focus on writing and reasoning, including exam skills, office memos, and rewriting with full chapters on scholarly writing and contract drafting. Citation has been updated to the 21st edition of The Bluebook, and the three chapters on legal research have been thoroughly updated.

My experience teaching students from a wide variety of cultures in a wide variety of places around the world and my immersive background in both comparative law and several languages have enabled me to see things from the point of view of both civil law and common law students; nevertheless, I am eternally thankful to those of my colleagues who have provided me with helpful feedback over the years as well as my students past, present, and future for their insights.

ACKNOWLEDGMENTS

I would like to thank Hon. Carl E. Stewart for trusting me with a position as judicial clerk so many years ago, Northwestern University Law School for accepting me into their LL.M. program and hiring me to help my non-U.S. colleagues gain writing skills, Tulane University School of Law for recognizing my potential as Director of LL.M. programs (which led to this book), Southern University Law Center for enabling me to work with U.S. law students, the Fulbright organization for enabling me to work with Chilean students, Olivier Moreteau of the Paul M. Hebert Law Center for enabling me to work with French and other European students, and other organizations for allowing me to work with students all over the world. Most of all, I would like to thank Aspen Publishing for their patience in allowing me to finish several other projects before attempting this rewrite, and my editor, Elizabeth Kenny, for seeing me through five editions and pushing me to make this edition better than I thought possible.

Nadia E. Nedzel
Southern University Law Center

October 2020

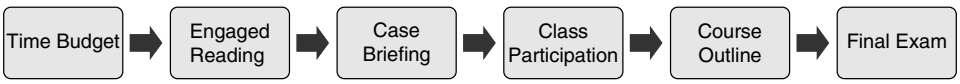
LEGAL REASONING, RESEARCH, AND WRITING FOR INTERNATIONAL GRADUATE STUDENTS

Introduction and Survival Skills (Case Briefing and Outlining)

Prior to starting your study of U.S. law, you probably learned that classes are taught using "Socratic dialogue." Rather than lecturing, the law professor calls on individual students to answer questions about the reading assignment and its implications. He then clarifies or corrects the students' answers. This means that you must be very well prepared before you come to class. It is not enough to have read the assigned material (and there is a lot of it); you have to be ready to discuss it in class.

This introductory section will introduce you to the skills you will need in order to do this, including how to read the material efficiently and effectively and how to brief cases for class. Furthermore, in most classes, your grade will be based on a hypothetical essay exam. You are given a fictional legal problem and must analyze and explain the legal solution in a coherent essay. Consequently, this section will also introduce how to organize what you learn into a course outline in preparation for the final exam, though outlining and exam writing are explained in more detail in Chapter 3. Because this introduction is focused on developing immediate and necessary skills, the explanation for *why* it is done this way in the United States will be discussed in Chapter 1.

FLOWCHART: STUDY PROCESS



I. PREPARING FOR AND PARTICIPATING IN U.S. LAW SCHOOL CLASSES

Law school classes in the United States are traditionally much more interactive than law school classes elsewhere. A law student in a U.S. law school class expects that for each class, the student must prepare 20-30 pages of a casebook for Socratic dialogue. During class, students take notes on these interactions, in addition to the notes they took to prepare for class. Socratic dialogue keeps students engaged and learning

more actively than they would learn were the class taught solely by lecture: the student understands the concept better and is more likely to be able to use the concept in a real-life situation. Professors also 'flip' the classroom, expecting students to understand the assignment well enough to be able to discuss and apply those concepts to hypothetical questions.

After class, each student researches topics not fully understood in a treatise or hornbook and then compiles all notes into his or her own course outline to study for the final exam. Sometimes students work in study groups to help them prepare. At the end of the semester, the student's entire grade is often based on one essay exam in which the student is presented with one or more hypothetical questions and expected to answer them based on the material studied.

Though effective, Socratic dialogue is also slow and cumbersome and therefore is usually used more in first-year common law courses such as contracts and torts than in the upper-level, statute-based courses most LL.M. candidates are likely to take, such as intellectual property, securities regulation, international business transactions, etc. Nevertheless, U.S. professors in general pride themselves on engaging students and expect not only that students will answer questions when called upon in class, but also that students will themselves ask questions. We try to engage students in a lawyerly discussion of the course material and how it applies to both sides of real-life legal problems. Given the adversarial process of common law procedure, it is important for an attorney to anticipate arguments both for and against his client.

If your law-school experience has been in traditional lecture classes, the U.S.-style classes may at first seem intimidating, but exciting. Review your case briefs (i.e., your notes on the assignment) before class and, if called upon, simply do your best to answer the professor's questions based on your understanding of the material. Most professors try hard not to embarrass students who make mistakes in class because we want students to feel comfortable participating, and we want them to learn. And most of us especially welcome the insights brought by non-U.S. LL.M. students, because they add to the richness of class discussion.

The strength of this method of learning is that students learn to "think on their feet" and speak extemporaneously — skills they will need as practicing attorneys. Although a student's ego may be momentarily bruised when she realizes that the answer she gave was not what the professor wanted, that embarrassment only lasts for a few minutes. The knowledge gained, both of the subject matter and of how to engage in a legal discussion, lasts for a lifetime.

For example, when she was an LL.M. candidate herself, the author of this textbook was in an International Business Transactions class when the subject turned to *forum non conveniens*, a civil procedure concept that allows a U.S. court to dismiss a case, under certain conditions, when it can (and should) be heard elsewhere. The doctrine was explained and then the professor asked students whether they believed it was a good concept. The U.S. students had no opinions, but two LL.M. candidates spoke up. A German LL.M. candidate strongly supported it because, as he argued, a court should not be forced to hear a case when all of the underlying incidents took place elsewhere and all of the parties were elsewhere. To do so, he argued, would be inefficient and expensive. Another LL.M. candidate, an attorney from India, responded, arguing passionately that the doctrine was unfair because it denies deserving plaintiffs

much-needed reparations and enables a tortfeasor to evade liability. She explained that she had been a plaintiffs' attorney for victims of a terrible toxic gas disaster at a Union Carbide chemical plant in India: an estimated 558,125 people were injured and 14,787 killed. After a U.S. court dismissed the case under *forum non conveniens*, it was tried in India in a special court, but the victims did not recover as much as they might have in the United States.[1] Regardless of one's opinion, the class was particularly effective because we all learned, in an unforgettable way, arguments both for and against *forum non conveniens.*

In addition to Socratic dialogue and 'flipped' classes, U.S. professors — as well as the global legal educational community — are increasingly focused on providing students with opportunities to develop practical legal skills. The ABA is strongly encouraging law schools to prepare students to be *practice-ready* when they graduate. Consequently, professors are likely to include many different kinds of *experiential* learning techniques. For example, students in a Bankruptcy Negotiation class are likely to be divided into groups and given life-like problems to negotiate; Contracts students may have to draft contracts; Civil Procedure students may draft complaints and answers; and Criminal Law students may be divided into "prosecuting attorneys" and "defense attorneys" in order to give them practice using the concepts being taught.

Learning can be divided into the acquisition of active and passive skills. Most likely, English is your second (or even third) language. Reading and listening in a new language are passive skills. In contrast, writing and speaking are active skills. As you are undoubtedly aware, active skills are more difficult to acquire than passive ones: It is much easier to read in a foreign language than it is to speak in one. U.S. law school instruction focuses on both passive and active learning. Passive learning is done outside of the class, when you initially read the material, but in class, you must be prepared to be active. Merely reading the material is not enough; you must put it into an accessible form in preparation for class.

II. ENGAGED READING AND A STUDY PLAN

The first skill needed for U.S. law school classes is active, engaged reading. Doctrinal classes such as Contracts, International Taxation, Secured Transactions, etc., all usually cover an entire 800- to 1,000-page 'casebook' per semester. As a general rule, American law students are told that they will need 2-4 hours per class session to prepare, and if you read English slowly, you may need twice that amount of time at first. Multiply this by four or five courses, and this is a lot of material to have to cover. Some of the problems that you will recognize early on include: (1) How can I possibly read all of this in order to prepare for class?; (2) Even if I read all of it, I can't possibly remember it all; (3) After class, when I realize I didn't understand it, do I reread it?; and (4) How am I possibly going to brief all of these cases?

[1] *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India, in Dec. 1984*, 809 F.2d 195 (2d Cir. 1987).

So, in order to accomplish all of this, you will need skills in (1) time management; (2) strategy and prioritization; (3) engaged, focused reading and studying; and (4) briefing cases (a case brief is a one-page summary of a judicial opinion).

A. Time Management and Prioritization

You probably budget money already, but your time needs to be budgeted as well. The time required depends on your reading style as well as the subject matter, and it requires an organized, consistent schedule that you can live with, one that is flexible enough to adjust to changes—and as with a financial budget, nothing ever goes according to plan, so plan on 'replanning.' Law IS a "jealous mistress," but you still need to maintain your health, healthy relationships, and "down" time. You also need to anticipate emergencies—the unexpected illness, the doctor's appointment, the assignment that is taking longer than you expected, and an occasional evening out with your new friends. Once you have your course materials and syllabi, plan out a weekly schedule, marking study time, meals, sleep, exercise, and recreation. Assess its effectiveness each week and adjust it as needed. You may use the sample schedule on the next page as a pattern.

The author had a challenging and complicated personal life involving both full-time work and small children when she entered law school, yet finished in the top 2% of the class. What worked was being organized: pre-reading and 'book briefing' all material for the following week on the weekend before, then briefing the cases the day before class, and afterward reviewing that material, adding it to the course outline as soon after class as possible: exposure, re-exposure, and re-re-exposure to the material is vital in order to build the pathways of knowledge in the brain. In order to make this effective, one must begin by learning to spot what is important to know from each reading assignment.

B. Engaged Reading

In many courses of study, you can generally read the assigned material passively, in the expectation that the teacher's obligation is to teach it to you and that you simply regurgitate that teaching on the exam. That is not the case in U.S. law schools. The expectation is that, as an attorney, you must learn how to figure out new concepts for yourself. None of your clients is going to come into your office and say: "Please help me, Ms. Attorney. My company makes mattresses and our trademark is famous, but Company X is selling our mattresses online cheaply, without permission, and shipping them folded up, which ruins them. This violates the Trademark Dilution Revision Act of 2006 because they are using our famous trademark in commerce in a way that is likely to cause dilution by blurring or dilution of our mark, and this is tarnishing our mark under 15 U.S.C. §1125(c)."[2] Instead, they are likely to say: "How can we stop Company X from selling our mattresses?" Then you, as the attorney, must decide whether the

[2] *See generally Dan-Foam A/S v. Brand Named Beds, LL.C.*, 500 F. Supp. 2d 296 (S.D.N.Y. 2007).

Sample Weekly Schedule

	Mon	Tues	Wed	Thurs	Fri	Sat	Sun
6-7am	Exercise		Exercise		Exercise	Sleep late	Sleep late
7-8am	Breakfast	Breakfast	Breakfast	Breakfast	Breakfast		
8-9am						Breakfast	Breakfast
9-10am						Recreate	Church or Meditation
10-11am						Recreate	
11-12 noon						Lunch	
12-1pm	Lunch	Lunch		Lunch	Lunch		Lunch
1-2pm							
2-3pm							
3-4pm							
4-5pm							
5-6pm							Dinner
6-7pm	Dinner	Dinner	Dinner	Dinner	Dinner	Dinner	
7-8pm					Recreate		
8-9pm					Recreate		
9-10pm					Recreate		
10-11pm		Sleep		Sleep	Recreate		Sleep
11-12 midnite	Sleep	Sleep	Sleep	Sleep	Sleep	Sleep	Sleep

underlying issue is based in contract, tort, or intellectual property. And you will have to find the applicable principle and assess the effectiveness of arguments on both sides.

In order to help you prepare for this, the professor's job is to help you learn to think through and understand the concepts yourself. Thus, you need to read with your brain in the "ON" position, and this takes energy and focus. You need to get sleep and you need to time your reading so that you do not exceed your ability to concentrate on what you are doing: as a general rule, read for 45 minutes maximum at a time, and then take a few minutes' break before returning for another 45 minutes. Furthermore, minimize distractions: Do not try to study with your toddler in the same room, turn off your phone, and do not put yourself in a position where you will be distracted by your environment.

1. Strategic Reading

Reading a casebook is NOT like settling down in a comfortable porch swing with a glass of icy lemonade and a nice novel. It is a collection of excerpted judicial opinions organized under various legal headings, and perhaps referring to or quoting applicable statutes. It does not directly explain the law the way a textbook might explain nuclear physics. Thus, your internal question must always be, "What do I need to get out of this reading assignment?" You must organize all the material presented in law school in a way that you can learn it, and no one can learn anything unless they first understand its context.

For example, suppose you opened your course textbook and read: "A proton is made of two up quarks and one down quark, while the atomic nucleus of helium-4 is composed of two protons and two neutrons. Composite particles include all hadrons, a group composed of baryons (e.g., protons and neutrons) and mesons (e.g., pions and kaons)." For a minute you would be completely lost. In order to figure out where you are and what you are doing, you would need to put everything in context. You would first have to realize that you must be in some physics course (or in the middle of a nightmare), the course must be nuclear physics (you may remember from elementary school physics that a molecule is made up of protons, neutrons, and electrons), and that this course must be venturing into the field of sub-atomic particles. In other words, you would put it all in context.

It is the same with a law school casebook: Do not just blindly read the next case assigned. Ask yourself: "WHY am I reading this? What legal doctrine is it supposed to demonstrate?" You will find the answers to these questions in the table of contents, headings, subheadings, and notes, not necessarily in the text of the opinions. So, for example, if you are studying the subject of Trademarks, and the chapter that you have been assigned is titled "Dilution," you should first get some idea of what dilution is and how it relates to the subject of trademarks even before you read the first case in that chapter. You might look up the topic in Black's Law Dictionary if the casebook does not include a definition. You will find that a trademark is "[a] word, phrase, logo, or other graphic symbol used by a manufacturer or seller to distinguish its product or products from those of others,"[3] such as the Nike "Swoosh." A "famous trademark" is

[3] *Trademark, Black's Law Dictionary* (11th ed. 2019).

one "that not only is distinctive but also has been used and heavily advertised or widely accepted in the channels of trade over a long time and is so well known that consumers immediately associate it with one specific product or service." The Nike "Swoosh" is a famous trademark. The holder of a trademark can sue for damages and an injunction if his famous trademark is diluted, defined as "[t]he impairment of a famous trademark's strength, effectiveness, or distinctiveness through the use of the mark on an unrelated product, usually blurring the trademark's distinctive character or tarnishing it with an unsavory association."[4]

Consequently, before you tackle a reading assignment, look at its placement in your casebook, and at the table of contents: What are the legal concepts that this section will discuss? How are they organized? How do the cases fit into that structure? Skim the cases before reading them carefully, just to gain some understanding of what legal concept they are illustrating. You should also consult a one-volume treatise, study aid, or hornbook on the subject to gain some preliminary understanding and make your reading easier. Bear in mind that casebooks sometimes include a case for historical purposes or to illustrate a minority position, but that you will ultimately be tested on what the law is now, not what it was a hundred years ago. Consequently, although they add to your understanding of the subject, you will not want to spend as much time on these kinds of cases. The primary mistake most students make at the beginning is to assume that they must "learn" each case presented in the casebook. They then get lost in the forest of cases, rather than learning how to use the concepts being taught through the cases.[5] On exams, professors almost never care whether you know the case names. They give credit only for an articulate, informed explanation of the legal concept taught and an accurate explanation of how that concept would apply to the hypothetical client's legal problem and perhaps an analogy to the facts of one or more cases studied. You must study with that aim in mind.

2. Reading with Focus, Efficiency, and Engagement

a. Book Briefing and Engaged Reading

After identifying the legal doctrine at issue from context, read the case and identify five things:

1. **Parties:** Who is involved in the case and what relationship did the parties have?
2. **Conflict:** What was the dispute about? How did it arise?
3. **Issue:** What legal issue did the court address?
4. **Holding:** Who won the case and what remedy did they receive?
5. **Rule:** What legal rule did the court use to decide the issue, and where did the court find that rule?
6. **Rationale:** What facts did the court say applied to the rule and how so?

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[4] *Id.*

[5] *See* Ann M. Burkhart & Robert A. Stein, *How to Study Law and Take Law Exams in a Nutshell* 98-104 (1996); Richard Michael Fischl & Jeremy Paul, *Getting to Maybe: How to Excel on Law School Exams* 3-11 (1999).

As you find the answers to these questions, note them in the margins of your casebook. This is known as "briefing in the margins," and it will help speed up your formal case briefing. Furthermore, it will force you to focus on the topic being studied. If you were lucky enough to have purchased a used book, this may already have been done for you, but you will still need to verify that the previous owner was correct.

In writing opinions, modern judges usually follow a certain sequence (Issue, Rule, Application, Conclusion, or IRAC), and you can use this sequence to help you read efficiently. Usually, the first thing the opinion will discuss, and the first thing you want to know is *who* the parties are and how their conflict arose. Next, gain some understanding of what the legal *issue* is. Often, judges state the issue early on in the opinion, but if they do not, then get some idea of what the issue is and how it relates to the heading you previewed earlier. Once you find the issue, skip to the end of the case and figure out the *holding*—who won and who lost. That will help you understand the rationale and the rule as well as what facts are important. Then, read to understand what *facts* led to the disagreement between the parties—what is their story, and what is it each of them wants from the lawsuit.

Understanding the facts is an exciting and very necessary part of reading a case: Remember that you are reading about real people and a dispute that was so important to them that they took it to court and spent a lot of time, money, or both doing so.

Before reading the rule/rationale, imagine how you would decide the case if you were the judge and why; then read what the court had to say. Compare it to your hypothesis and try to understand why or how the court either agreed with you or did not. What change in facts would have led to the opposite result? Finally, put the rule and rationale of the case back in context—what did it teach you about the subject at hand, the one that was identified in the heading? You can probably ignore anything else in the opinion, though the professor might ask a question relating to extraneous issues, when it comes to the exam, you will be tested on the topic of the heading. (When a professor puts together a casebook, he or she tries to edit out unnecessary material, but can never do so entirely because it will likely harm the student's understanding of the case.) Keep asking yourself what this case adds to an understanding of the concept being taught.

b. Read with Legal Dictionary, Hornbook, and Statute Book at Hand

Reading with efficiency requires reading with a pen or pencil in hand and a dictionary, hornbook, or statute book at your side. And yes, you will have to use those sources—trying to read the casebook when you do not really understand the terms being used will slow you down and likely cause you to lose understanding, interest, and engagement. Thus, although it is tedious to open the statute book and read the applicable statute or look for the definition of a term, you cannot engage with the material in the casebook if you do not understand the terminology. Similarly, do not wait until you have read everything to look up the terms, because then you will have to reread it all.

III. BRIEFING CASES

Students in U.S law schools must prepare a *brief* of each case assigned in order to be able to answer questions about the case in class. Briefing cases leads to a greater understanding of the case opinion and encourages one's memory of it.[6]

A. Why Should You Prepare Case Briefs?

- To begin with, if you are called on in class to discuss a case, you will not have time to fumble around in your casebook for the correct answer — you need to have it right in front of you, in easily understood, concise language so that you can quickly answer the professor's questions.
- Second, even if you are not called on in class, your brief enables you to follow the classroom conversation and take notes on what the professor indicates is important.
- Furthermore, reading assignments are lengthy, and you will not have time to reread the casebook (even if your native language is English); therefore, case briefs (with the addition of your class notes) become a primary tool in preparing the course outline that you will study for the final exam. Whether you are one of the more active speakers in class, or whether you try to avoid speaking whenever possible, you will maximize your learning by preparing the material properly.

A case brief is a **one-page**, organized, written summary of the important elements of a judicial opinion, *in your own words*. It is the best way to distill what is important out of a case, and the best way to begin to learn how to write about the subject being taught. If you read cases in an engaged fashion, preparing briefs will not be difficult. In class, you will add notes to your brief as class discussion warrants. Within a few weeks, briefing becomes faster and easier. It does not have to be perfect as no one other than you is likely to see it. It just has to get you through class and help you study the material.

B. Components of a Case Brief

After you have read the case, then on a piece of lined paper (or on your laptop), write down the name of the case, the court, the year, the page on which the case starts in your casebook, and the six sections listed below (or make a template in your word processing program). Fill in each section with a few sentences according to the following guidelines. Leave room for class notes between sections so that you can incorporate them quickly while in class. The sections of a case brief include:

1. Facts
2. Procedural History (or *posture* of the case)
3. Issue
4. Holding

[6] *See* Robert H. Miller, *Law School Confidential: The Complete Law School Survival Guide: By Students, for Students* 150-154 (3d ed., rev. 2011).

5. Rationale (or reasoning or *ratio decidendi*)
6. Rule

In greater detail, the sections of the brief are as follows.

TITLE, DECIDING COURT, YEAR

1. ***Facts*** The facts section provides a brief summary of the facts that gave rise to the litigation (who the parties are, and what happened), and the *relevant* or *legally significant facts*—the facts on which the writing court relied in reaching its decision. The particular facts of the case are much more important in the United States than in civilian systems and are essential in determining the fitness of the case as precedent for later cases. You might want to develop your own simple symbols for commonly used words: *Plaintiff* is often indicated as "P" or "Π" (pi), *defendant* can be indicated as "D" or "Δ" (delta). If there are a number of parties or causes, it might be best to use last names to avoid confusion, rather than "P" or "D."
2. ***Procedural History*** The procedural history explains how the case came before the writing court. Most cases in casebooks are opinions written by higher-level courts, not the original trial court. Therefore, begin by stating the plaintiff's *cause of action* (the plaintiff's legal claim) and the trial court's *disposition* (what the trial court decided); and then explain how the case got to the writing court (who is appealing and why).
3. ***Issue*** Usually in an opinion, the court itself states the legal issue. Very often, this statement appears early in the opinion, especially in a U.S. Supreme Court case. If so, it is quite simple to restate the issue in the case brief. If the opinion does not straightforwardly state the issue, then examine what the trial court allegedly did wrong and derive it from that. Once you discern it, state the issue as a one-sentence question incorporating the key facts and the legal rule that is in controversy. There may be more than one issue. If so, number and list them – but ultimately, it is likely that only one issue is pertinent for the legal concept being studied, so don't spend too much time on secondary issues.
4. ***Holding or Judgment*** The *holding* is the disposition of the decision you are briefing, and it answers the question asked by the issue. What did the writing court decide? Who won, who lost, and what remedy was given by the writing court? Be careful here: Some professors use the term *holding* to refer to the general legal principle on which the court decided the case, although this text calls this the *rule* of the case, as explained in item 6. As you become familiar with your professor's terminology, you will learn which he or she wants.
5. ***Rationale*** This may be the most important part of the brief. The rationale explains why the writing court decided the way it did. A commonly used synonym is *ratio decidendi*: the reason for the decision. A court could base its decision on any number of rationales. The reasoning of the court is usually based on precedent, and the result may be the same (or different) as in the precedent because the facts of the case at hand are similar to (or different from) the facts of the precedential case. Sometimes decisions are based on equity (fairness or justice). Other decisions are based on policy interests and the interests of society as a whole; sometimes on logic and a desire to avoid inconsistencies in the law; and very often on a combination of two or more of these reasons. Sometimes the rationale for a decision is easy to find,

but sometimes it must be teased out of the opinion. *All of these rationales, as well as the rules described in item 6, should become tools that you will take with you to help reason through questions on the final exam*. Therefore, it is important to understand them and learn how they affect the area of law you are studying.

6. ***Rule*** In simple, clear language, state the general principle that caused the court to decide the way it did, and which can be applied to future cases.

Once you have delineated these six sections, your brief is essentially done. However, before you move on, you should consider one or two more things. Consider whether there are any significant *obiter dicta*, observations made by the court directed at types of facts not present in the case.[7] Dicta are not necessary to the holding of the opinion but may nevertheless be interesting and contribute to your understanding of the legal concept being studied.

Consider also the contents of any *concurring* or *dissenting opinion*. Although a U.S. trial court usually has only one judge, a reviewing court consists of at least three judges (nine judges in the case of the United States Supreme Court). For an opinion to become law, a majority of these judges must agree on it. Sometimes a judge will agree with the opinion, but on a slightly different reasoning. That judge will write a concurring opinion, also called a *concurrence*. The rationale of that concurrence may add to your understanding of the legal concept at issue. Likewise, a deciding judge who strongly disagrees with the majority opinion may write a *dissent*. The *dissent* is the losing position, and therefore is not law, but you should still consider what the judge found objectionable about the majority opinion and why the textbook's author chose to include it. Occasionally, the reasoning of a dissent will eventually triumph in a later case — remember, the hallmark of common law is its ability to change.

Finally, think again for a few minutes about why the case was assigned: Did it significantly change the law, does it illustrate an established principle, or was it assigned merely for historical reasons? The reason you had to read the case may or may not be immediately apparent, but it should become clear before the final examination. Additionally, be sure you described the case in your own words. This will force you to determine exactly what the court meant. Simply copying parts of the case will not help, but if you can describe the concept in your own words, you can feel reasonably confident that you understand it and will be able to explain it orally in class (and in a concise manner on your exam).[8]

Sometimes you may find that you simply do not understand everything in the case — the rationale is confused, or you cannot formulate an appropriate rule, or the stated facts seem ambiguous or incomplete. In this situation, check to see whether the case is mentioned or discussed in a hornbook or treatise, or simply jot down what you understand as well as what is confusing to you. If the professor calls on you, you can then explain the limits of your understanding, as well as the source of your confusion. Do not be too concerned that you may not look like a genius in class: The point that puzzled you may be exactly the point the professor will want to discuss, and he may then applaud your insight. At the very least, remember that if you understood

[7] Samuel Mermin, *Law and the Legal System, An Introduction* 289 (2d ed. 1982).
[8] Burkhart & Stein, *supra* note 5, at 104-05.

everything, you would be the professor, not a student. The most important thing is that you show the professor that you read the case and thought about it, not necessarily that you understood everything before the class even took place. After briefing your case, carefully examine the noted cases in the casebook, or the questions that follow it. Often these are as important to your understanding of the topic as the original case, or even more so.

PRACTICE ASSIGNMENT

Read the following case using focused, engaged reading and book briefing. Then brief it and compare your brief to the sample brief that follows. This case and the briefing exercise that follows deal with a legal subject that most LL.M. candidates will not be studying as part of their course program: potential liability for negligence in connection with amateur soccer games. Later chapters will demonstrate concepts with legal subjects that are more likely to be of interest to your studies, but at this point, the legal subject was chosen in an effort to provide common law flavor in an area where there is some convergence with civil law — generally, the *bon père de famille* standard of French law is similar to the U.S. *reasonably prudent person* standard used to determine whether someone was negligent. Soccer was chosen because many LL.M. students, regardless of where they come from, are likely to have some familiarity with the sport and its rules. It is not necessary that you understand negligence (or soccer, for that matter), just that you *identify* legal terms and phrases used in discussing negligence.

JEROME JONES, JR., Plaintiff-Appellee v. ADRIEN SMITH, ET AL., Defendants-Appellants[*]

Court of Appeal of Louisiana, Ninth Circuit

April 14, 1976

WATSON, JUDGE

OPINION:

Plaintiff, Jerome Jones, Jr., filed this suit to recover damages for personal injuries received in a soccer game. Made defendants were Adrien Smith, a member of the opposing team who inflicted the injuries, and Smith's liability insurer, Allstate Insurance Company. The trial court rendered judgment in favor of plaintiff against both defendants and defendants have appealed. We affirm.

Both Smith and Allstate contend that the trial court erred: in not finding that Jones assumed the risk of injury by participating in the soccer game; and in failing to find that Jones was guilty of contributory negligence. Defendant Smith also contends that the trial court erred in finding him negligent. Allstate further contends that the trial court erred in finding coverage under its policy, which excludes injury intended or expected by the insured.

[*] Adapted from *Bourque v. Duplechin*, 331 So. 2d 40 (La. Ct. App. 1976).

On June 9, 1974, Jones was playing goalie on a team sponsored by Boo Boo's Lounge. Smith was a member of the opposing team sponsored by Murray's Steak House and Lounge. According to Jones, who watched the first half of the game, the game was "a little bit rough," with players from both sides pulling on shirts, running into each other pretty hard, and elbowing; more of the rough conduct was initiated by the Murray's Steak House team, but Jones admitted that "I'm not going to say we weren't pushing back."

Jones began playing the position of goalie in the second half of the game; for the first five minutes of the second half, he was not involved in any play because the Boo Boo's Lounge team kept the ball in the opposing team's half of the field. Between five and ten minutes into the second half of the game, a Murray's Steak House player, whom Jones later learned was Smith, broke away with the ball and proceeded to run toward the goal Jones was defending; two of Jones's teammates were in close pursuit. To avoid the defenders, Smith was running and kicking the ball about 10 to 12 feet in front of himself. Smith last kicked the ball when he was seven or eight feet outside the penalty area boundary. The penalty area is an area marked on the field and extends about 18 yards in front of the goal. The goalie is the only player allowed to touch the ball with the hands, and only if the ball is within the penalty area; a ball controlled by a goalie's hands is considered "out of fair play" for all other players until the goalie releases the ball.

Jones came out of the goal box and into the penalty area to intercept. He waited for Smith to kick the ball one last time and then Jones advanced. When the ball crossed into the penalty area, Jones was about two meters inside the penalty area boundary line; he caught and was pulling the ball to his chest with both hands when he realized Smith was not stopping and was about to charge into him. Holding onto the ball, he turned and ran from Smith, a much bigger man, zigzagging in an effort to get away. Smith, unfortunately, was faster, grabbed Jones from behind in a classic American football tackle, and threw him to the ground, landing on top of him. Jones's neck was broken as a result, and he is now confined to a wheelchair. According to Smith's declaration, he "forgot" he was playing soccer, but in any case, was only joking and did not mean to hurt Jones.

Pertinent to the trial court's decision was the following testimony:

Plaintiff Jones, age 22 at the time of trial, testified that he is 5′7″ tall. He knew there was a possibility of being slide-tackled, but as goalie had never imagined what actually happened, which he regarded as unbelievable under the circumstances.

John Gregory Laborde, a student at Tulane Law School, testified that he witnessed the incident from the sidelines and saw Smith turn and run directly toward Jones. Smith did not attempt to decrease his speed and instead charged into the penalty zone, seemingly deliberately to tackle Jones.

Franz Lockerwood, soccer coach at Louisiana State University, testified as an expert witness that under the official FIFA rules of soccer, "Decision 4" says, "A tackle, which endangers the safety of an opponent, must be sanctioned as serious foul play." In such an instance, a player who tackled another player would be "shown the red card" and excluded from playing the rest of the game.

Steve Pressler, Smith's teammate, testified that the game was suspended as a result, because the collision was a flagrant violation of the rules of the game and no one felt much like playing after Jones was taken by ambulance to the hospital.

Orthopedic surgeon Mike R. Wallace saw Jones following the accident and said the nature of the injury was consistent with someone being tackled and characterized the injury as one that may have been common in football before the use of helmets and proper training in how to tackle.

While other testimony was presented, both cumulative and contradictory, the evidence summarized above provides a reasonable evidentiary basis for the trial court's conclusions.

There is no question that defendant Smith's conduct was the cause in fact of the harm to plaintiff Jones. Smith was under a duty to play soccer in the ordinary fashion without unsportsmanlike conduct or wanton injury to his fellow players. This duty was breached by Smith, whose behavior was, according to the evidence, substandard and negligent. Jones assumed the risk of being hit by a slide tackle. *Benedetto v. Travelers Insurance Company, 172 So. 2d 354 (La. App. 4 Cir. 1965)* writ denied *247 La. 872, 175 So. 2d 108; Richmond v. Employers' Fire Insurance Company, 298 So. 2d 118 (La. App. 1 Cir. 1974)* writ denied, *302 So. 2d 18*. As a goalie, Jones may also have assumed the risk of an injury resulting from being run into as he dove for the ball in the penalty area. However, Jones did not assume the risk of Smith going out of his way to tackle him. A participant in a game or sport assumes all of the risks incidental to that particular activity which are obvious and foreseeable. A participant does not assume the risk of injury from fellow players acting in an unexpected or unsportsmanlike way with a reckless lack of concern for others participating. *Hawayek v. Simmons, 91 So. 2d 49 (La. App. Orl. 1956); Carroll v. Aetna Casualty & Surety Company, 301 So. 2d 406 (La. App. 2 Cir. 1974); Rosenberger v. Central La. Dist. Livestock Show, Inc., 312 So. 2d 300 (La. 1975)*. Assumption of risk is an affirmative defense which must be proven by a preponderance of the evidence, and the record here supports the trial court's conclusion that Jones did not assume the risk of Smith's negligent act.

There is no evidence in the record to indicate contributory negligence on the part of Jones.

Allstate contends on appeal that there is no coverage under its policy, because its insured, Smith, committed an intentional tort and should have expected injury to result.[1]

However, while Smith's action was negligent and perhaps even constitutes wanton negligence, the evidence is that he did not intend the harm that resulted. The distinction between an intentional tort and one resulting from negligence is summarized in *Law of Torts*, 4th Ed., by William L. Prosser, at page 32, as follows: ". . . the mere knowledge and appreciation of a risk, short of substantial certainty, is not the equivalent of intent. The defendant who acts in the belief or consciousness that he is causing an appreciable risk of harm to another may be negligent, and if the risk is great his conduct may be characterized as reckless or wanton, but it is not classed as an intentional wrong." Smith was not motivated by a desire to injure Jones. Smith tried to regain the ball with a reckless disregard of the consequences to Jones. Smith's action was negligent but does not present a situation where the injury was expected or intended. There is coverage under Allstate's policy.

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[1] The Allstate policy, exhibit D-1, provides an exclusion of coverage in the following language:

> This policy does not apply:
> . . . to bodily injury or property damage which is either expected or intended from the standpoint of the following Insured. (TR. 29).

The trial court awarded plaintiff Jones $250,000 for his pain and suffering and $50,000 for his special damages. There is no dispute about the amount awarded. Jones's neck was broken and his spine severed. He will never be able to walk again, though he retains use of his arms.

There is no manifest error in the trial court's conclusions which we summarize as follows: plaintiff Jones's injuries resulted from the negligence of defendant Smith; Jones was not guilty of contributory negligence and did not assume the risk of this particular accident; and defendant Allstate did not prove that coverage was excluded under the terms of its policy.

For the foregoing reasons, the judgment of the trial court is affirmed at the cost of defendants-appellants, Adrien Smith and Allstate Insurance Company.

Affirmed.

HOLMES, Judge, dissenting:

The majority affirms the lower court's judgment against the tortfeasor's liability insurer, concluding that the tortfeasor negligently injured the plaintiff. This writer strongly dissents, basing this disagreement on a finding that the majority opinion has wrongly characterized the tortfeasor's acts as negligent rather than intentional.

As correctly stated in the majority opinion, Smith admitted that he tackled Jones. As a result plaintiff received severe injuries, principally because of the difference in size between the two players; Smith was five feet, eleven inches tall and weighed two hundred ten pounds, while the plaintiff was five feet, seven inches tall and weighed one hundred forty pounds.

The majority opinion sets forth the distinction between an intentional tort and one resulting from negligence, as follows: ". . . the mere knowledge and appreciation of a risk, short of substantial certainty, is not the equivalent of intent."

In the present case the danger of Smith colliding with the plaintiff and causing him injury was more than a foreseeable risk which a reasonable man would avoid. The collision and resulting injury were a substantial certainty, particularly in view of the fact that Smith was larger than the plaintiff, was running in an upright position at full speed directly at the plaintiff, and intentionally tackled him in an impermissible effort to gain control over the ball. Even though Smith may not have intended to injure the plaintiff, he intended an impermissible contact with the plaintiff, and this constitutes an intentional tort,[2] for which the Allstate policy[3] excludes coverage.

CASE BRIEF

TITLE:

Jones v. Smith, Louisiana Appellate Court 1976

FACTS:

In a recreational game of soccer, π [or P] Jones was playing goalie. In an apparent attempt to regain control of the ball, Δ [or D] Smith ran full speed into Jones

[2] William L. Prosser, *Law of Torts* §9 (4th ed. 1971).
[3] See Footnote 1 of the majority opinion.

and tackled him. Jones was injured by the collision. A Tulane law student testified that Smith went out of his way to tackle Jones, and a soccer coach testified that acts such as Smith's are a flagrant violation of the rules of the game. Jones sued Smith and his liability insurer, Allstate, for damages.

PROCEDURAL HISTORY:

The trial court held: (1) Smith's negligence caused Jones's injuries, (2) Jones was not guilty of contributory negligence and did not assume the risk of this particular accident, and (3) Smith's insurance company was liable. Smith and Allstate appeal.

ISSUES:

(1) Was Smith negligent?
(2) Did Jones assume the risk of this particular accident, or was he contributorily negligent?
(3) Does Allstate have to pay because Smith intentionally injured Jones?

HOLDING:

Affirmed. (1) Smith was negligent, (2) Jones did not assume the risk, and (3) Allstate has to pay.

RATIONALE:

(1) Smith's conduct was negligent because he had a duty to play soccer in the ordinary fashion, the way a reasonably prudent player would, but instead used unsportsmanlike conduct that caused Jones's injury.
(2) Jones did not assume the risk of Smith's tackling him because Smith's conduct was unexpected and unsportsmanlike.
(3) Smith was reckless, but his actions were not motivated by a desire to injure Jones and the injury was unintentional. Therefore, because Allstate did not prove that the injury was intentional such that coverage would be excluded, Allstate is obligated to pay for the damage Smith caused.

RULE:

(1) "A participant in a game or sport does not assume the risk of injury from fellow players acting in an unexpected or unsportsmanlike way with a reckless lack of concern for others participating." An injury caused by a reckless lack of concern for others is not the same as an intended or expected sports injury with regard to a liability insurance policy's exclusionary clause.

DISSENT:

Judge Holmes argues that Smith's act was intentional, not negligent, because even though Smith may not have intended to injure Jones, he intended the tackle and the resulting injury was a substantial certainty given the parties' relative sizes.

OTHER THOUGHTS:

[These include your reactions to the case, and may help you put the case in context, or provoke a good conversation in class.]

1. Was this really negligence, or in view of the dissent, could negligence be a "legal fiction" propounded by the court to ensure that Jones's injuries would be covered by the insurance policy?
2. What would happen if this became typical in recreational sports cases — wouldn't it discourage nonprofessional sports? Is this a typical case? Is this still good law?
3. The case contains dicta in that the court mentions that Jones "assumed the risk of a slide tackle" and may also have "assumed the risk of an injury resulting from being run into as he dove for the ball," but none of these possible facts were present in the case. Would the court's decision have been different if Jones had been hit when he "dove for the ball"?

IV. CLASS PARTICIPATION

As discussed early on, students are expected to participate in U.S. law school classes, whether answering Socratic questions, discussing doctrine with the professor, or engaging in experiential learning exercises with other classmates. In some courses, it counts toward your grade — the professor's syllabus will indicate how grades are calculated.

Whether or not class participation counts in grading, take full advantage of it as a learning opportunity. Before class, quickly review your briefs to refresh your memory. Then, whether you are called on or not, be careful to follow the classroom conversation and listen actively: Would you have answered the question the same way had the professor called on you? Did your classmate answer correctly, or did he make a mistake? What point is the professor trying to get the class to understand? Some students take notes, others listen and absorb better without doing so, but be sure to pay attention if you decide not to take notes. Unlike professors elsewhere, U.S. professors pride themselves on going beyond the material studied. They will further explain it, update it, add additional details needed for the exam, and provide hypothetical questions that may themselves be included in the exam. They do not follow the same notes year after year. If you miss it in class, you may not be able to catch up. Immediately after class, note those points that the professor seemed to think were most important.

V. OUTLINING

The components of being successful in U.S. law school classes include active reading and briefing before class, participating during class, and organizing the material into an outline after class. An outline compiles everything studied during the course. It includes material from the casebook, from any treatises you consulted, explanations given by the professor, and short (3-sentence) summaries of each case studied that explain what insight they gave into the concept being studied. Like a case brief, the only person who will see your outline is you, so it need not be polished or elegant. The

process of compiling the outline itself teaches you how to explain and apply the concepts being taught, and if you update your outline on a regular basis, it will make studying for the final exam much simpler: You simply rewrite your outline several times, shortening it and improving your language each time. Law school is hectic, and you may be tempted to purchase either outlines from students who took the course previously or commercial outlines, but beware of doing this for two reasons:

1. That student did not take your course, neither did the commercial entity that prepared the canned outline. The professor has updated and improved the course since then, emphasizing different things.
2. You cannot do well on an essay exam if you are not comfortable explaining the doctrines studied in the course, and the only way you can become comfortable doing so is to force yourself to practice explaining them—i.e., the only way you can effectively and efficiently study for this kind of exam is to outline the material for yourself.

See Chapter 3 for further details on outlining, exam preparation, and techniques for taking essay exams.

EXERCISE

Read, mark-up, and brief the following case:

Robert F. Lestina v. West Bend Mutual Ins. Co. and Leopold Jerger

501 N.W. 2d 28 (Wis. 1993)

SHIRLEY S. ABRAHAMSON, Justice.

This is an appeal, from a judgment of the circuit court for Waukesha County, Patrick L. Snyder, Circuit Judge. The case comes to this court on certification by the court of appeals pursuant to sec. 809.61, Stats. 1991-92. The sole question presented by the certification is "what is the standard of care in Wisconsin for a [recreational] sports player who is alleged to have caused injury to another player during and as part of the [recreational team contact sports] competition." The circuit court determined that negligence was the governing legal standard. For the reasons set out below, we conclude that the rules of negligence govern liability for injuries incurred during recreational team contact sports. Accordingly, we affirm the judgment of the circuit court.

I.

Robert F. Lestina, the plaintiff, filed this personal injury tort action against Leopold Jerger, the defendant, and Jerger's homeowner's insurer, West Bend Mutual Insurance Company, after the plaintiff was injured in a collision with the defendant. The collision occurred during a recreational soccer match organized by the Waukesha County Old Timers League, a recreational league for players over the age of 30.

The plaintiff (45 years of age) was playing an offensive position for his team and the defendant (57 years of age) was the goalkeeper for the opposing team on April 20, 1988, when the injury occurred. Shortly before the plaintiff was injured, he had scored the first goal of the game. After his goal the plaintiff regained possession of the ball and was about to attempt a second goal when the

defendant apparently ran out of the goal area and collided with the plaintiff. The plaintiff asserted that the defendant "slide tackled" him in order to prevent him from scoring.[1] Although slide tackles are allowed under some soccer rules, this league's rules prohibit such maneuvers to minimize risk of injury. The defendant claimed that the collision occurred as he and the plaintiff simultaneously attempted to kick the soccer ball.

The plaintiff seriously injured his left knee and leg in the collision and commenced this action, alleging that the defendant's conduct was both negligent and reckless. The defendant moved for summary judgment on the negligence issue, asserting that the plaintiff's allegations of negligence were insufficient as a matter of law to state a cause of action for injuries sustained during a recreational team contact sports competition. Relying on *Ceplina v. South Milwaukee School Board*, 73 Wis.2d 338, 243 N.W.2d 183 (1976), the circuit court denied the summary judgment motion.

Thereafter the parties agreed to limit the trial to the issue of negligence and to preserve the right to appeal regarding the appropriateness of the negligence standard. The parties also stipulated the amount of damages to be awarded the plaintiff on the basis of the jury determination of the defendant's negligence.

After the jury returned a unanimous verdict finding the defendant 100% causally negligent, the defendant filed motions raising, among other issues, the question whether negligence was the appropriate legal standard. The circuit court denied the post-verdict motions and entered judgment in favor of the plaintiff. The defendant appealed one issue to the court of appeals—whether negligence was the appropriate legal standard in this case. The court of appeals certified the cause to this court.

[1] A player "slide tackles" by sliding on his or her knee, with one foot forward, across the front of another player. The objective is to dispossess the opponent of the ball.

II.

This case presents a single question of law: is negligence the standard governing the conduct of participants in recreational team contact sports? We review this question of law independently of the decision of the circuit court.

Relying on *Ceplina v. South Milwaukee School Board*, 73 Wis.2d 338, 243 N.W.2d 183 (1976), the circuit court held that negligence was the controlling standard. We do not view the *Ceplina* case as persuasive precedent. In *Ceplina*, two sixth grade students were on the same team in a playground softball game. The complainant was injured when her teammate unintentionally struck her in the face with a softball bat during the game. She brought an action in negligence against the batter, the school authorities, and the insurers. The batter moved for summary judgment, claiming that he owed no duty to the complainant to exercise care in swinging the bat because the danger of being struck under these circumstances was open and obvious to the complainant. The trial court declined to grant summary judgment, and this court affirmed the trial court's order.

The *Ceplina* court rejected the batter's absence of duty defense.[2] [C]omplainant had stated a cause of negligence which gave rise to a question for the jury "whether either or both of the actors were causally negligent." 73 Wis.2d at 344, 243 N.W.2d 183.

While the *Ceplina* court considered the batter's duty and "open and obvious danger" argument within the context of the complainant's negligence claim and referred to this sport-related injury case as an ordinary negligence case, the opinion

[2] The court stated that the duty of any person is the obligation of due care to refrain from any act which will cause foreseeable harm to others. The court concluded that the complainant's appreciation of the dangers inherent in a swinging bat was, "under the circumstances of this 'ordinary negligence case'" properly accommodated by the principles of contributory negligence. 73 Wis.2d at 343, 243 N.W.2d 183.

must be put in perspective. The court considered only whether the circuit court erred in refusing to grant summary judgment on the claim that the batter owed no duty because the danger of being struck by a bat was an open and obvious danger.

73 Wis.2d at 340-41, 243 N.W.2d 183. The *Ceplina* court was not asked to, and did not, evaluate the applicability of the negligence standard to a sports-related injury.[3] Whether negligence was the appropriate standard for gauging a teammate's conduct was not briefed or presented to the court for decision. Under these circumstances, *Ceplina* cannot be viewed as persuasive precedent on the issue in the case at bar. We therefore examine anew whether negligence is the appropriate standard in this case.

Courts in other jurisdictions have applied three divergent legal theories to uphold actions for sports-related injuries: 1) intentional torts, 2) willful or reckless misconduct, and 3) negligent conduct. See generally Raymond L. Yasser, *Liability for Sports Injuries*, in Law of Professional and Amateur Sports (Gary A. Uberstine ed., 1992) at sec. 14.01.

Courts have historically been reluctant to allow participants in contact sports to recover money damages for injuries, absent a deliberate attempt to injure. The intentional tort in a recreational team contact sport is assault and battery. A battery is the intentional, unprivileged, harmful or offensive touching of a person by another.[4] Both parties agree that a player in a recreational team contact sport should be liable for an intentional tort. Neither party urges us to hold that a player should be held liable only for intentional torts. The defendant asks the court to adopt the recklessness standard. The plaintiff urges that the negligence standard is appropriate.

> Several courts have held that recklessness is the appropriate standard to apply in personal injury actions between participants in recreational team contact sports. From the various formulations courts have used to define reckless conduct, recklessness apparently falls somewhere on a continuum between an intentional act and an act of negligence. The Restatement (Second) of Torts (1965) describes recklessness as acting without intent to inflict the particular harm but in a manner which is so unreasonably dangerous that the person knows or should know that it is highly probable that harm will result.[5]
>
> *Nabozny v. Barnhill*, 31 Ill. App.3d 212, 334 N.E.2d 258, 261 (1975), is the lead case establishing that "a player is liable for injury in a tort action if his conduct is such that it is either deliberate, willful or with reckless disregard for the safety

[3] *See* vol. 3258 *Appendices and Briefs*, 73 Wis.2d 318-400.

[4] Restatement (Second) of Torts sec. 13 (1965). The *Restatement (Second) of Torts* (1965) addresses sports injuries only in the context of intentional torts and in the context of apparent consent to an intentional invasion. Comment b to sec. 50 describes the touching to which a player willingly submits by taking part in a game. The full text of the comment is as follows: *b. Taking part in a game*. Taking part in a game manifests a willingness to submit to such bodily contacts or restrictions of liberty as are permitted by its rules or usages. Participating in such a game does not manifest consent to contacts which are prohibited by rules and usages of the game if such rules and usages are designed to protect the participants and not merely to secure the better playing of the game as a test of skill. This is true although the player knows that those with or against whom he is playing are habitual violators of such rules.

[5] Section 500 of the Restatement states:
"The actor's conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize not only that his conduct creates an unreasonable risk of physical harm to another, but also such risk is substantially greater than that which is necessary to make his conduct negligent."

> of the other player so as to cause injury to that player."[6]

Like the present case, *Nabozny* arose out of a soccer match where the litigants were members of opposing high school teams. The complainant, playing the goal position and having just captured the ball, was crouched in the goal area when the tortfeasor kicked him in the head. Witnesses testified at trial that the tortfeasor had an opportunity to turn away and avoid kicking the complainant and that the tortfeasor's action violated the rules under which the game was being played.

The *Nabozny* court adopted a recklessness standard, rather than a negligence standard, believing that recklessness strikes the proper balance between freeing active and vigorous participation in recreational team contact sports from the chilling effect of litigation and providing a right of redress to an athlete injured through the fault of another. On the one hand, wrote the court, care must be taken not to inhibit free and active participation in recreational team contact sports. Threatening participants with possible liability for injuries might make them reluctant to compete. On the other hand, the court also recognized that tort law condemns unreasonably dangerous behavior and that the playing field should not provide license to engage in unreasonably dangerous behavior. Making the balance, the *Nabozny* court reasoned that public policy supported the application of the recklessness standard to organized athletics. "The court believes that the law should not place unreasonable burdens on the free and vigorous participation in sports by our youth. However, we also believe that organized, athletic competition does not exist in a vacuum. Rather, some of the restraints of civilization must accompany every athlete onto the playing field. One of the educational benefits of organized athletic competition to our youth is the development of discipline and self-control." 334 N.E.2d at 260.

The Massachusetts Supreme Judicial Court has similarly adopted the recklessness standard, explaining the policy considerations as follows:

> Allowing the imposition of liability in cases of reckless disregard of safety diminishes the need for players to seek retaliation during the game or future games. . . . Precluding the imposition of liability in cases of negligence without reckless misconduct furthers the policy that "[v]igorous and active participation in sporting events should not be chilled by threats

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[6] Commentators have observed that it is not clear from the *Nabozny* opinion exactly what legal standard the court intended to announce. Charles E. Spevacek, *Injuries Resulting from Nonintentional Acts in Organized Contact Sports: The Theories of Recovery Available to the Injured Athlete*, 12 Ind.L.Rev. 687, 701-02 (1979) (the *Nabozny* court "enunciated nothing more than an ordinary negligence standard of conduct, narrowly tailored to further the policy considerations unique to the activity to which it is applied."); Lynn A. Goldstein, *Participant's Liability for Injury to a Fellow Participant in an Organized Athletic Event*, 53 Chi.Kent L.Rev. 97, 105 (1976) ("it is unclear from the language used what standard of conduct should be applied. . . . One interpretation is that *Nabozny* enunciates an ordinary negligence standard of conduct.").

The claim pleaded in the *Nabozny* case was one of ordinary negligence. The court, moreover, considered whether the injured player had been contributorily negligent, a defense which would not have ordinarily been available in an action based on reckless conduct. 334 N.E.2d at 261.

Other commentators have viewed *Nabozny* as setting forth a recklessness standard. *See, e.g.*, Raymond L. Yasser, *Liability for Sports Injuries*, in Law of Professional and Amateur Sports (Gary A. Uberstine ed., 1992), at sec. 14.01[4], p. 14-5. Cases after *Nabozny*, including an Illinois case, have interpreted *Nabozny* as adopting a recklessness standard. *See, e.g., Gauvin v. Clark*, 404 Mass. 450, 537 N.E.2d 94 (1989); *Dotzler v. Tuttle*, 234 Neb. 176, 449 N.W.2d 774 (1990); *Oswald v. Township High School District*, 84 Ill.App.3d 723, 40 Ill.Dec. 456, 406 N.E.2d 157 (1980); *Kabella v. Bouschelle*, 100 N.M. 461, 672 P.2d 290 (Ct.App.1983).

> of litigation." *Gauvin v. Clark*, 404 Mass. 450, 537 N.E.2d 94, 97 (1989) (citations omitted).

Several other courts have adopted the recklessness standard, often adopting the policy considerations expressed in *Nabozny*.[7] One commentator has discerned a judicial trend toward holding sports-related injuries actionable only "if the aggrieved person demonstrates gross negligence or reckless disregard by the defendant." Mel Narol, *Sports Torts: Emerging Standards of Care*, Trial, June 1990, at 20.

The plaintiff asks this court to disregard these cases. He argues that these courts established a recklessness standard because they recognize the doctrine of assumption of risk. These cases do not apply in Wisconsin, urges the plaintiff, because the assumption of risk doctrine is not recognized in Wisconsin; conduct which was formerly denominated assumption of risk may constitute contributory negligence. *McConville v. State Farm Mut. Auto Ins. Co.*, 15 Wis.2d 374, 384, 113 N.W.2d 14 (1962). The plaintiff's analysis of the relationship between the recklessness standard and the assumption of the risk defense does not hold true for all the cases.[8] In any event we are not persuaded by these cases adopting the recklessness standard and dismissing claims based on negligence.

[1] A third basis for actions for sports-related injuries is negligence. Negligence consists of failing to use that degree of care which would be exercised by a reasonable person under the circumstances.[9]

Few sports cases can be found which have allowed a complainant to recover on proof of negligence.[10] One commentator has concluded that this scarcity results

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[7] *See, e.g., Gauvin v. Clark*, 404 Mass. 450, 537 N.E.2d 94 (1989) (applying reckless disregard of safety standard to injury arising in college hockey game); *Ross v. Clouser*, 637 S.W.2d 11 (Mo.1982) (applying "recklessness" standard to injury arising from church picnic softball game); *Dotzler v. Tuttle*, 234 Neb. 176, 449 N.W.2d 774 (1990) (applying willful or reckless disregard of safety standard to injury arising in a "pick-up" basketball game); *Marchetti v. Kalish*, 53 Ohio St.3d 95, 559 N.E.2d 699 (1990) (applying reckless standard to injury arising in "kick the can" game); *Oswald v. Township High School Dist. No. 214*, 84 Ill.App.3d 723, 40 Ill.Dec. 456, 406 N.E.2d 157 (1980) (applying *Nabozny* "deliberate, willful or reckless disregard" standard to injury in high school gym class basketball game); *Picou v. Hartford Ins. Co.*, 558 So.2d 787 (La.Ct.App.1990) (applying reckless standard to injury in softball game); *Crawn v. Campo*, 257 N.J.Super. 374, 608 A.2d 465 (1992) (applying reckless disregard of safety of others to injury in "pick-up" softball game); *Kabella v. Bouschelle*, 100 N.M. 461, 672 P.2d 290 (Ct.App.1983) (disallowing claim for negligence in injury in recreational football game, relying on *Hackbart v. Cincinnati Bengals, Inc.*, 601 F.2d 516 (10th Cir.1979), *cert. denied*, 444 U.S. 931, 100 S.Ct. 275, 62 L.Ed.2d 188 (1979), which disallowed claim for negligence and permitted claim for recklessness in injury in professional football game); *Connell v. Payne*, 814 S.W.2d 486 (Tex.App.1991) (applying reckless standard to injury in polo match).

[8] *Kabella v. Bouschelle*, 100 N.M. 461, 672 P.2d 290, 292 (1983), *Picou v. Hartford Ins. Co.*, 558 So.2d 787 (La.App.1990) and *Connell v. Payne*, 814 S.W.2d 486 (Tex.App.1991), for example, applied the recklessness standard even though the defense of assumption of risk had been subsumed in those states by the defense of contributory negligence.

[9] *Osborne v. Montgomery*, 203 Wis. 223, 231, 242-43, 234 N.W. 372 (1931); *Schuster v. St. Vincent Hospital*, 45 Wis.2d 135, 140-141, 172 N.W.2d 421 (1969); Wis.J.I.Civil 1005.

[10] While several cases adopt the negligence standard, most of these cases do not involve contact team sports. *See, e.g., Babych v. McRae*, 41 Conn.Sup. 280, 567 A.2d 1269 (Super. Ct.1989) (applying negligence standard to injury in professional hockey game); *LaVine v. Clear Creek Skiing Corp.*, 557 F.2d 730 (10th Cir.1977) (applying negligence standard to injury in collision between snow skiers); *Gray v. Houlton*, 671 P.2d 443 (Colo.Ct.App.1983) (applying negligence standard to injury in collision between snow skiers); *Duke's GMC, Inc. v. Erskine*, 447 N.E.2d 1118 (Ind.Ct.App.1983) (applying negligence standard to golf injury); *Jones v. Smith*, 331 So.2d 40 (La.Ct.App.1976) (applying negligence standard to injury in softball game) (but see *Picou v. Hartford Ins. Co.*, 558 So.2d 787 (La.Ct. App.1990), adopting a reckless standard); *Jenks v. McGranaghan*, 32 A.D.2d 989, 299 N.Y.S.2d 228 (App.Div.1969) (applying negligence standard to golf injury); *Gordon v. Deer Park School District*, 71 Wash.2d 119, 426 P.2d 824 (1967) (applying negligence standard

from fear that the imposition of liability in such cases would discourage participation in sports-related activities. Cameron J. Rains, *Sports Violence: A Matter of Societal Concern*, 55 Notre Dame Lawyer 796, 799 (1980). We do not agree that the application of the negligence standard would have this effect. We believe that the negligence standard, properly understood and applied, accomplishes the objectives sought by the courts adopting the recklessness standard, objectives with which we agree.

Because it requires only that a person exercise ordinary care under the circumstances, the negligence standard is adaptable to a wide range of situations. An act or omission that is negligent in some circumstances might not be negligent in others. Thus the negligence standard, properly understood and applied, is suitable for cases involving recreational team contact sports.

[2] The very fact that an injury is sustained during the course of a game in which the participants voluntarily engaged and in which the likelihood of bodily contact and injury could reasonably be foreseen materially affects the manner in which each player's conduct is to be evaluated under the negligence standard. To determine whether a player's conduct constitutes actionable negligence (or contributory negligence), the fact finder should consider such material factors as the sport involved; the rules and regulations governing the sport; the generally accepted customs and practices of the sport (including the types of contact and the level of violence generally accepted); the risks inherent in the game and those that are outside the realm of anticipation; the presence of protective equipment or uniforms; and the facts and circumstances of the particular case, including the ages and physical attributes of the participants, the participants' respective skills at the game, and the participants' knowledge of the rules and customs. *Niemczyk v. Burleson*, 538 S.W.2d 737 (Mo.Ct.App.1976).

to softball spectator injured when struck on the head with a bat).

> Depending as it does on all the surrounding circumstances, the negligence standard can subsume all the factors and considerations presented by recreational team contact sports and is sufficiently flexible to permit the 'vigorous competition' that the defendant urges.[11]

We see no need for the court to adopt a recklessness standard for recreational team contact sports when the negligence standard, properly understood and applied, is sufficient.

For the reasons set forth, we affirm the judgment of the circuit court.

WILCOX, Justice (*dissenting*).

I dissent because I conclude that the unique nature of contact sports calls for the application of a standard of care other than ordinary negligence. I disagree with the majority's basic premise that ordinary negligence is flexible enough to be applied under any set of circumstances. I believe application of the ordinary negligence standard in personal injury actions arising out of participation in contact sports will discourage vigorous and active participation in sporting events. I agree with the majority of jurisdictions that have considered this issue and concluded that personal injury cases arising out of athletic events must be predicated on reckless disregard of safety; an allegation of negligence is not sufficient to state a cause of action. *See* cases cited in the majority opinion at footnote 7; an excellent analysis of many of the cases adopting the majority rule is provided in *Dotzler v. Tuttle*, 234 Neb. 176, 449 N.W.2d 774 (1990).

[11] The plaintiff refers the court to sec. 895.525, Stats. 1991-92, arguing that the legislature adopted a negligence standard for participants in recreational activities.

We do not address this issue. This statute was adopted after the date of injury in this case, and neither party argues the statute applies directly to this case. Furthermore the parties disagree whether recreational activity defined in sec. 895.525(2) includes team contact sports.

DISCUSSION QUESTIONS

Compare *Lestina* and *Jones*:

1. They reach similar conclusions, is their reasoning similar? Their rules?
2. How important is the public policy discussion in *Lestina*?
3. Louisiana is a 'mixed-civilian' or 'bi-jural' jurisdiction in that it has a traditional civil code. Is the opinion more like a common law or civil law decision?

SUPPLEMENTARY EXERCISE

Read and brief ONE of the following cases and compare it to *Jones* and *Lestina*, considering how the law differs from state to state or has changed:

1. *Knight v. Jewett*, 834 P.2d 696 (Cal. 1992).
2. *Hemady v. Long Beach Unified Sch. Dist.*, 49 Cal. Rptr. 3d 464 (Ct. App. 2006).
3. *Noffke ex rel. Swenson v. Bakke*, 748 N.W.2d 195 (Wis. Ct. App. 2008) & Wis. Stat. §895.525 (2006).

CHECKLISTS

Engaged Reading

- ☐ 1. Read casebook with legal dictionary, statute book, and treatise at hand
- ☐ 2. Focus on doctrinal context — headings, titles, etc.
- ☐ 3. Book brief
- ☐ 4. Brief each case, leave room for class notes
- ☐ 5. Review briefs before class and bring them to class
- ☐ 6. Incorporate briefs and class notes into course outline

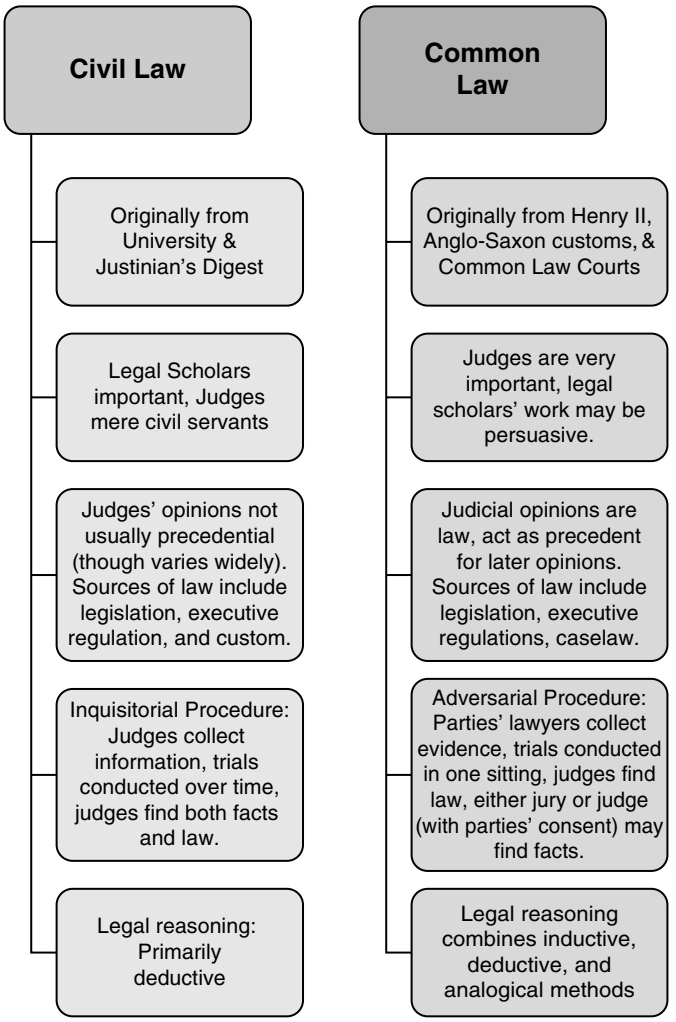
Case Brief

- ☐ 1. Facts
- ☐ 2. Procedural History
- ☐ 3. Issue
- ☐ 4. Holding
- ☐ 5. Rationale
- ☐ 6. Rule
- ☐ 7. Miscellaneous

CHAPTER 1

United States Common Law

FLOWCHART: COMPARISON OF CIVIL LAW AND COMMON LAW



INTRODUCTION

The U.S. legal system and law school experience are unique. The United States is one of only a few countries that fully adopt judicial decisions as a major source of law and use them as precedent in deciding future cases. This, combined with the procedural differences of an adversarial system has led to the fact that common law attorneys think about law in a way that is very different from the way civil law attorneys think. This text will teach you how to think, write, and research in an Anglo-American common law system.

The influence of common law systems is much greater than the number of common law countries would indicate,[1] and some scholars argue that the international trend is toward the adoption of case law.[2] An understanding of how to read, interpret, and synthesize case law is likely to become increasingly important to attorneys who have clients with ties to a common law country or who practice in the global marketplace. United States law schools are among the few, even among common law jurisdictions, to use Socratic dialogue and case law in the classroom.

This text does not teach substantive law. Instead, this text teaches something infinitely more useful: a new way to think about law; new methods of researching law, both in a law library and on computer; and ways to analyze and synthesize a number of legal sources so that they can be accurately applied to specific factual situations. Not only will these skills enhance your understanding of and performance in the substantive law courses of your LL.M. program, but also you are likely to use these skills throughout your future career. In addition to teaching reasoning and research skills, the text explains how to draft several kinds of commonly used documents: predictive writing (American-style law firm memoranda), scholarly articles, advocacy (court filings), and preventive writing (contracts).

In the United States, an attorney's income is directly related to his or her skill in reasoning, research, and writing. A saying common among lawyers in the United States is that a case is won or lost "on the paper." Writing and analytical skills are mutually dependent: When one improves, so does the other. Basic Socratic survival skills were presented in the previous chapter. This chapter presents a short comparative explanation of how and why U.S. law and law school developed the way they did. Once you

[1] *See* Nadia E. Nedzel, *The Rule of Law, Economic Development, and Corporate Governance* (2020) and sources cited therein.

[2] *See*, *e.g.*, Lawrence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranatural Adjudication*, 107 Yale L.J. 273, 276, 280, 282 (1997) (describing the growing body of case law from the European Court of Justice and the European Court of Human Rights; the United Nations Human Rights Committee's increasingly court-like behavior; and projecting a global community of law developed by overlapping networks of national, regional, and global tribunals, respectively). *See also* David A. Westbrook, *Islamic International Law & Public International Law: Separate Expressions of World Order*, 33 Va. J. Int'l L. 819, 875 (1993) (describing trend of public international law: "[c]ourts publish opinions, refer to prior cases, and so forth, so that even where there is no formal doctrine of precedent, an expanding body of case law develops."); Marcelo Halpern & Ajay K. Mehrotra, *From International Treaties to Internet Norms: The Evolution of International Trademark Disputes in the Internet Age*, 21 U. Pa. J. Int'l Econ. L. 523, 533 (2000) (discussing "Internet Common Law").