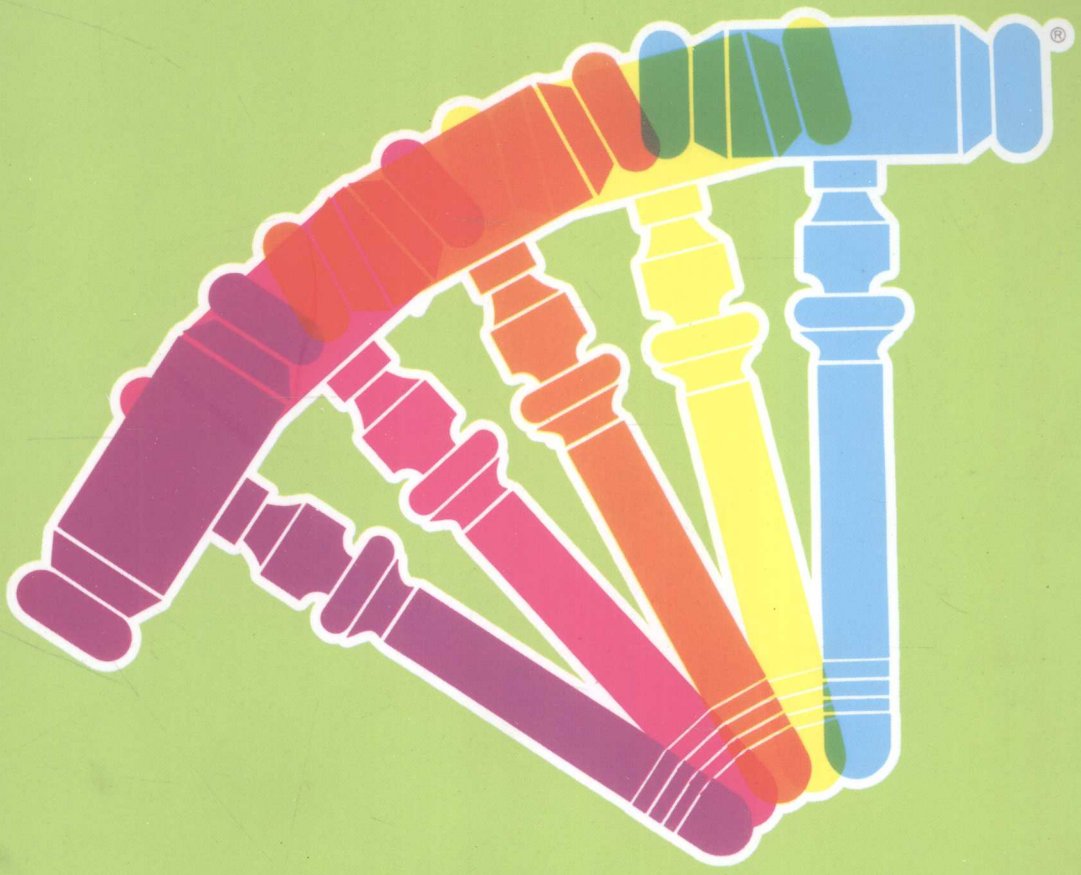

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总　序

吴志攀

加入世界贸易组织表明我国经济发展进入了一个新的发展时代——一个国际化商业时代。商业与法律的人才流动将全球化，评介人才标准将国际化，教育必须与世界发展同步。商业社会早已被马克思描绘成为一架复杂与精巧的机器，维持这架机器运行的是法律。法律不仅仅是关于道德与公理的原则，也不单单是说理论道的公平教义，还是具有可操作性的精细的具体专业技术。像医学专业一样，这些专业知识与经验是从无数的案例实践积累而成的。这些经验与知识体现在法学院的教材里。中信出版社出版的这套美国法学院教材为读者展现了这一点。

教育部早在2001年1月2日下发的《关于加强高等学校本科教学工作提高教学质量的若干意见》中指出："为适应经济全球化和科技革命的挑战，本科教育要创造条件使用英语等外语进行公共课和专业课教学。对高新技术领域的生物技术、信息技术等专业，以及为适应我国加入WTO后需要的金融、法律等专业，更要先行一步，力争三年内，外语教学课程达到所开课程的5%-10%。暂不具备直接用外语讲授条件的学校、专业，可以对部分课程先实行外语教材、中文授课，分步到位。"

引进优质教育资源，快速传播新课程，学习和借鉴发达国家的成功教学经验，大胆改革现有的教科书模式成为当务之急。

按照我国法学教育发展的要求，中信出版社与外国出版公司合作，瞄准国际法律的高水平，从高端入手，大规模引进畅销外国法学院的外版法律教材，以使法学院学生尽快了解各国的法律制度，尤其是欧美等经济发达国家的法律体系及法律制度，熟悉国际公约与惯例，培养处理国际事务的能力。

此次中信出版社引进的是美国ASPEN出版公司出版的供美国法学院使用的主流法学教材及其配套教学参考书，作者均为富有经验的知名教授，其中不乏国际学术权威或著名诉讼专家，历经数十年课堂教学的锤炼，颇受法学院学生的欢迎，并得到律师实务界的认可。它们包括诉讼法、合同法、公司法、侵权法、宪法、财产法、证券法等诸多法律部门，以系列图书的形式全面介绍了美国法律的基本概况。

这次大规模引进的美国法律教材包括：

伊曼纽尔法律精要（Emanuel Law Outlines）美国哈佛、耶鲁等著名大学法学院广泛采用的主流课程教学用书，是快捷了解美国法律的最佳读本。作者均为美国名牌大学权威教授。其特点是：内容精炼，语言深入浅出，独具特色。在前言中作者以其丰富的教学经验制定了切实可行的学习步骤和方法。概要部分提纲挈领，浓缩精华。每章精心设计了简答题供自我检测。对与该法有关的众多考题综合分析，归纳考试要点和难点。

案例与解析（Examples and Explanations）由美国最权威、最富有经验的教授所著，这套丛书历经不断的修改、增订，吸收了最新的资料，经受了美国成熟市场的考验，读者日众。这次推出的是最新版本，在前几版的基础上精益求精，补充了最新的联邦规则，案例也是选用当今人们所密切关注的问题，有很强的时代感。该丛书强调法律在具体案件中的运用，避免了我国教育只灌输法律的理念与规定，而忽视实际解决问题的能力的培养。该丛书以简洁生动的语言阐述了美国的基本法律制度，可准确快捷地了解美国法律的精髓。精心选取的案例，详尽到位的解析，使读者读后对同一问题均有清晰的思路，透彻的理解，能举一反三，灵活运用。该丛书匠心独具之处在于文字与图表、图例穿插，有助于理解与记忆。

案例教程系列（Casebook Series）覆盖了美国法学校院的主流课程，是学习美国法律的代表性图书，美

国著名的哈佛、耶鲁等大学的法学院普遍采用这套教材，在法学专家和学生中拥有极高的声誉。本丛书中所选的均为重要案例，其中很多案例有重要历史意义。书中摘录案例的重点部分，包括事实、法官的推理、作出判决的依据。不仅使读者快速掌握案例要点，而且省去繁琐的检索和查阅原案例的时间。书中还收录有成文法和相关资料，对国内不具备查阅美国原始资料条件的读者来说，本套书更是不可或缺的学习参考书。这套丛书充分体现了美国法学教育以案例教学为主的特点，以法院判例作为教学内容，采用苏格拉底式的问答方法，在课堂上学生充分参与讨论。这就要求学生不仅要了解专题法律知识，而且要理解法律判决书。本套丛书结合案例设计的大量思考题，对提高学生理解概念、提高分析和解决问题的能力，非常有益。本书及时补充出版最新的案例和法规汇编，保持四年修订一次的惯例，增补最新案例和最新学术研究成果，保证教材与时代发展同步。本丛书还有配套的教师手册，方便教师备课。

案例举要（Casenote Legal Briefs）美国最近三十年最畅销的法律教材的配套辅导读物。其中的每本书都是相关教材中的案例摘要和精辟讲解。该丛书内容简明扼要，条理清晰，结构科学，便于学生课前预习、课堂讨论、课后复习和准备考试。

除此之外，中信出版社还将推出教程系列、法律文书写作系列等美国法学教材的影印本。

美国法律以判例法为其主要的法律渊源，法律规范机动灵活，随着时代的变迁而对不合时宜的法律规则进行及时改进，以反映最新的时代特征；美国的法律教育同样贯穿了美国法律灵活的特性，采用大量的案例教学，启发学生的逻辑思维，提高其应用法律原则的能力。

从历史上看，我国的法律体系更多地受大陆法系的影响，法律渊源主要是成文法。在法学教育上，与国外法学教科书注重现实问题研究，注重培养学生分析和解决问题的能力相比，我国基本上采用理论教学为主，而用案例教学来解析法理则显得薄弱，在培养学生的创新精神和实践能力方面也做得不够。将美国的主流法学教材和权威的法律专业用书影印出版，就是试图让法律工作者通过原汁原味的外版书的学习，开阔眼界，取长补短，提升自己的专业水平，培养学生操作法律实际动手能力，特别是使我们的学生培养起对法律的精细化、具体化和操作化能力。

需要指出的是，影印出版美国的法学教材，并不是要不加取舍地全盘接收，我们只是希望呈现给读者一部完整的著作，让读者去评判。“取其精华去其糟粕”是我们民族对待外来文化的原则，我们相信读者的分辨能力。

是为序。

此为试读，需要完整PDF请访问：www.ertongbook.com

FORMAT FOR THE CASENOTE LEGAL BRIEF

PARTY ID: Quick identification of the relationship between the parties.

PALSGRAF v. LONG ISLAND R.R. CO.
Injured bystander (P) v. Railroad company (D)
N.Y. Ct. App., 248 N.Y. 339, 162 N.E. 99 (1928).

NATURE OF CASE: This section identifies the form of action (e.g., breach of contract, negligence, battery), the type of proceeding (e.g., demurrer, appeal from trial court's jury instructions) or the relief sought (e.g., damages, injunction, criminal sanctions).

NATURE OF CASE: Appeal from judgment affirming verdict for plaintiff seeking damages for personal injury.

FACT SUMMARY: This is included to refresh the student's memory and can be used as a quick reminder of the facts.

FACT SUMMARY: Helen Palsgraf (P) was injured on R.R.'s (D) train platform when R.R.'s (D) guard helped a passenger aboard a moving train, causing his package to fall on the tracks. The package contained fireworks which exploded, creating a shock that tipped a scale onto Palsgraf (P).

CONCISE RULE OF LAW: Summarizes the general principle of law that the case illustrates. It may be used for instant recall of the court's holding and for classroom discussion or home review.

CONCISE RULE OF LAW: The risk reasonably to be perceived defines the duty to be obeyed.

FACTS: This section contains all relevant facts of the case, including the contentions of the parties and the lower court holdings. It is written in a logical order to give the student a clear understanding of the case. The plaintiff and defendant are identified by their proper names throughout and are always labeled with a (P) or (D).

FACTS: Helen Palsgraf (P) purchased a ticket to Rockaway Beach from R.R. (D) and was waiting on the train platform. As she waited, two men ran to catch a train that was pulling out from the platform. The first man jumped aboard, but the second man, who appeared as if he might fall, was helped aboard by the guard on the train who had kept the door open so they could jump aboard. A guard on the platform also helped by pushing him onto the train. The man was carrying a package wrapped in newspaper. In the process, the man dropped his package, which fell on the tracks. The package contained fireworks and exploded. The shock of the explosion was apparently of great enough strength to tip over some scales at the other end of the platform, which fell on Palsgraf (P) and injured her. A jury awarded her damages, and R.R. (D) appealed.

ISSUE: The issue is a concise question that brings out the essence of the opinion as it relates to the section of the casebook in which the case appears. Both substantive and procedural issues are included if relevant to the decision.

ISSUE: Does the risk reasonably to be perceived define the duty to be obeyed?

HOLDING AND DECISION: This section offers a clear and in-depth discussion of the rule of the case and the court's rationale. It is written in easy-to-understand language and answers the issue(s) presented by applying the law to the facts of the case. When relevant, it includes a thorough discussion of the exceptions to the case as listed by the court, any major cites to other cases on point, and the names of the judges who wrote the decisions.

HOLDING AND DECISION: (Cardozo, C.J.) Yes. The risk reasonably to be perceived defines the duty to be obeyed. If there is no foreseeable hazard to the injured party as the result of a seemingly innocent act, the act does not become a tort because it happened to be a wrong as to another. If the wrong was not willful, the plaintiff must show that the act as to her had such great and apparent possibilities of danger as to entitle her to protection. Negligence in the abstract is not enough upon which to base liability. Negligence is a relative concept, evolving out of the common law doctrine of trespass on the case. To establish liability, the defendant must owe a legal duty of reasonable care to the injured party. A cause of action in tort will lie where harm, though unintended, could have been averted or avoided by observance of such a duty. The scope of the duty is limited by the range of danger that a reasonable person could foresee. In this case, there was nothing to suggest from the appearance of the parcel or otherwise that the parcel contained fireworks. The guard could not reasonably have had any warning of a threat to Palsgraf (P), and R.R. (D) therefore cannot be held liable. Judgment is reversed in favor of R.R. (D).

CONCURRENCE / DISSENT: All concurrences and dissents are briefed whenever they are included by the casebook editor.

DISSENT: (Andrews, J.) The concept that there is no negligence unless R.R. (D) owes a legal duty to take care as to Palsgraf (P) herself is too narrow. Everyone owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others. If the guard's action was negligent as to those nearby, it was also negligent as to those outside what might be termed the "danger zone." For Palsgraf (P) to recover, R.R.'s (D) negligence must have been the proximate cause of her injury, a question of fact for the jury.

EDITOR'S ANALYSIS: This last paragraph gives the student a broad understanding of where the case "fits in" with other cases in the section of the book and with the entire course. It is a hornbook-style discussion indicating whether the case is a majority or minority opinion and comparing the principal case with other cases in the casebook. It may also provide analysis from restatements, uniform codes, and law review articles. The editor's analysis will prove to be invaluable to classroom discussion.

EDITOR'S ANALYSIS: The majority defined the limit of the defendant's liability in terms of the danger that a reasonable person in defendant's situation would have perceived. The dissent argued that the limitation should not be placed on liability, but rather on damages. Judge Andrews suggested that only injuries that would not have happened but for R.R.'s (D) negligence should be compensable. Both the majority and dissent recognized the policy-driven need to limit liability for negligent acts, seeking, in the words of Judge Andrews, to define a framework "that will be practical and in keeping with the general understanding of mankind." The Restatement (Second) of Torts has accepted Judge Cardozo's view..

CROSS-REFERENCE TO OUTLINE: Wherever possible, following each case is a cross-reference linking the subject matter of the issue to the appropriate place in the *Casenote Law Outline*, which provides further information on the subject.

[For more information on foreseeability, see Casenote Law Outline on Torts, Chapter 8, § II. 2., Proximate Cause.]

QUICKNOTES: Conveniently defines legal terms found in the case and summarizes the nature of any statutes, codes, or rules referred to in the text.

QUICKNOTES

FORESEEABILITY - The reasonable anticipation that damage is a likely result from certain acts or omissions.

NEGLIGENCE - Failure to exercise that degree of care which a person of ordinary prudence would exercise under similiar circumstances.

PROXIMATE CAUSE - Something which in natural and continuous sequence, unbroken by any new intervening cause, produces an event, and without which the injury would not have occurred.

NOTE TO STUDENT

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A NOTE ABOUT LANGUAGE. Please note that the language used in *Casenote Legal Briefs* in reference to minority groups and women reflects terminology used within the historical context of the time in which the respective courts wrote the opinions. We at Casenotes Publishing Co., Inc. are well aware of and very sensitive to the desires of all people to be treated with dignity and to be referred to as they prefer. Because such preferences change from time to time, and because the language of the courts reflects the time period in which opinions were written, our case briefs will not necessarily reflect contemporary references. We appreciate your understanding and invite your comments.

A NOTE REGARDING NEW EDITIONS. As of our press date, this *Casenote Legal Brief* is current and includes briefs of all cases in the current version of the casebook, divided into chapters that correspond to that edition of the casebook. However, occasionally a new edition of the casebook comes out in the interim, and sometimes the casebook author will make changes in the sequence of the cases in the chapters, add or delete cases, or change the chapter titles. Should you be using this Legal Brief in conjunction with a casebook that was issued later than this book, you can receive all of the newer cases, which are available free from us, by sending in the "Supplement Request Form" in this section of the book (please follow all instructions on that form). The Supplement(s) will contain all the missing cases, and will bring your *Casenote Legal Brief* up to date.

EDITOR'S NOTE. *Casenote Legal Briefs* are intended to supplement the student's casebook, not replace it. There is no substitute for the student's own mastery of this important learning and study technique. If used properly, *Casenote Legal Briefs* are an effective law study aid that will serve to reinforce the student's understanding of the cases.

ABBREVIATIONS FOR BRIEFING

The following list of abbreviations will assist you in the process of briefing and provide an illustration of the technique of formulating functional personal abbreviations for commonly encountered words, phrases, and concepts.

acceptance	acp
affirmed	aff
answer	ans
assumption of risk	a/r
attorney	atty
beyond a reasonable doubt	b/r/d
bona fidepurchaser	BFP
breach of contract	br/k
cause of action	c/a
common law	c/l
Constitution	Con
constitutional	con
contract	K
contributorynegligence	c/n
cross	x
cross-complaint	x/c
cross-examination	x/ex
cruel and unusual punishment	c/u/p
defendant	D
dismissed	dis
double jeopardy	d/j
due process	d/p
equal protection	e/p
equity	eq
evidence	ev
exclude	exc
exclusionary rule	exc/r
felony	f/m
freedom of speech	f/s
good faith	g/f
habeas corpus	h/c
hearsay	hr
husband	H
in loco parentis	ILP
injunction	inj
inter vivos	I/v
jointtenancy	j/t
judgment	judgt
jurisdiction	jur
last clear chance	LCC
long-arm statute	LAS
majority view	maj
meeting of minds	MOM
minority view	min
Miranda warnings	Mir/w
Miranda rule	Mir/r
negligence	neg
notice	mtc
nuisance	nus
obligation	ob
obscene	obs
offer	O
offeree	OE
offeror	OR
ordinance	ord
pain and suffering	p/s
parol evidence	p/e
plaintiff	P
prima facie	p/f
probable cause	p/c
proximatecause	px/c
real property	r/p
reasonable doubt	r/d
reasonable man	r/m
rebuttable presumption	rb/p
remanded	rem
res ipsa loquitur	RIL
respondent superior	r/s
Restatement	RS
reversed	rev
Rule Against Perpetuities	RAP
search and seizure	s/s
search warrant	s/w
self-defense	s/d
specific performance	s/p
statute of limitations	S/L
statute of frauds	S/F
statute	S
summary judgment	s/j
tenancy in common	t/c
tenancy at will	t/w
tenant	t
third party	TP
third party beneficiary	TPB
transferred intent	TI
unconscionable	uncon
unconstitutional	unconst
undue influence	u/e
UniformCommercial Code	UCC
unilateral	uni
vendee	VE
vendor	VR
versus	v
void for vagueness	VFV
weight of the evidence	w/e
weight of authority	w/a
wife	W
with	w/
within	w/I
without prejudice	w/o/p
without	w/o
wrongfuldeath	wr/d

GLOSSARY

COMMON LATIN WORDS AND PHRASES ENCOUNTERED IN LAW

A FORTIORI: Because one fact exists or has been proven, therefore a second fact that is related to the first fact must also exist.

A PRIORI: From the cause to the effect. A term of logic used to denote that when one generally accepted truth is shown to be a cause, another particular effect must necessarily follow.

AB INITIO: From the beginning; a condition which has existed throughout, as in a marriage which was void ab initio.

ACTUS REUS: The wrongful act; in criminal law, such action sufficient to trigger criminal liability.

AD VALOREM: According to value; an ad valorem tax is imposed upon an item located within the taxing jurisdiction calculated by the value of such item.

AMICUS CURIAE: Friend of the court. Its most common usage takes the form of an amicus curiae brief, filed by a person who is not a party to an action but is nonetheless allowed to offer an argument supporting his legal interests.

ARGUENDO: In arguing. A statement, possibly hypothetical, made for the purpose of argument, is one made arguendo.

BILL QUIA TIMET: A bill to quiet title (establish ownership) to real property.

BONA FIDE: True, honest, or genuine. May refer to a person's legal position based on good faith or lacking notice of fraud (such as a bona fide purchaser for value) or to the authenticity of a particular document (such as a bona fide last will and testament).

CAUSA MORTIS: With approaching death in mind. A gift causa mortis is a gift given by a party who feels certain that death is imminent.

CAVEAT EMPTOR: Let the buyer beware. This maxim is reflected in the rule of law that a buyer purchases at his own risk because it is his responsibility to examine, judge, test, and otherwise inspect what he is buying.

CERTIORARI: A writ of review. Petitions for review of a case by the United States Supreme Court are most often done by means of a writ of certiorari.

CONTRA: On the other hand. Opposite. Contrary to.

CORAM NOBIS: Before us; writs of error directed to the court that originally rendered the judgment.

CORAM VOBIS: Before you; writs of error directed by an appellate court to a lower court to correct a factual error.

CORPUS DELICTI: The body of the crime; the requisite elements of a crime amounting to objective proof that a crime has been committed.

CUM TESTAMENTO ANNEXO, ADMINISTRATOR (ADMINISTRATOR C.T.A.): With will annexed; an administrator c.t.a. settles an estate pursuant to a will in which he is not appointed.

DE BONIS NON, ADMINISTRATOR (ADMINISTRATOR D.B.N.): Of goods not administered; an administrator d.b.n. settles a partially settled estate.

DE FACTO: In fact; in reality; actually. Existing in fact but not officially approved or engendered.

DE JURE: By right; lawful. Describes a condition that is legitimate "as a matter of law," in contrast to the term "de facto," which connotes something existing in fact but not legally sanctioned or authorized. For example, de facto segregation refers to segregation brought about by housing patterns, etc., whereas de jure segregation refers to segregation created by law.

DE MINIMUS: Of minimal importance; insignificant; a trifle; not worth bothering about.

DE NOVO: Anew; a second time; afresh. A trial de novo is a new trial held at the appellate level as if the case originated there and the trial at a lower level had not taken place.

DICTA: Generally used as an abbreviated form of obiter dicta, a term describing those portions of a judicial opinion incidental or not necessary to resolution of the specific question before the court. Such nonessential statements and remarks are not considered to be binding precedent.

DUCES TECUM: Refers to a particular type of writ or subpoena requesting a party or organization to produce certain documents in their possession.

EN BANC: Full bench. Where a court sits with all justices present rather than the usual quorum.

EX PARTE: For one side or one party only. An ex parte proceeding is one undertaken for the benefit of only one party, without notice to, or an appearance by, an adverse party.

EX POST FACTO: After the fact. An ex post facto law is a law that retroactively changes the consequences of a prior

act.

EX REL.: Abbreviated form of the term ex relatione, meaning, upon relation or information. When the state brings an action in which it has no interest against an individual at the instigation of one who has a private interest in the matter.

FORUM NON CONVENIENS: Inconvenient forum. Although a court may have jurisdiction over the case, the action should be tried in a more conveniently located court, one to which parties and witnesses may more easily travel, for example.

GUARDIAN AD LITEM: A guardian of an infant as to litigation, appointed to represent the infant and pursue his/her rights.

HABEAS CORPUS: You have the body. The modern writ of habeas corpus is a writ directing that a person (body) being detained (such as a prisoner) be brought before the court so that the legality of his detention can be judicially ascertained.

IN CAMERA: In private, in chambers. When a hearing is held before a judge in his chambers or when all spectators are excluded from the courtroom.

IN FORMA PAUPERIS: In the manner of a pauper. A party who proceeds in forma pauperis because of his poverty is one who is allowed to bring suit without liability for costs.

INFRA: Below, under. A word referring the reader to a later part of a book. (The opposite of supra.)

IN LOCO PARENTIS: In the place of a parent.

IN PARI DELICTO: Equally wrong; a court of equity will not grant requested relief to an applicant who is in pari delicto, or as much at fault in the transactions giving rise to the controversy as is the opponent of the applicant.

IN PARI MATERIA: On like subject matter or upon the same matter. Statutes relating to the same person or things are said to be in pari materia. It is a general rule of statutory construction that such statutes should be construed together, i.e., looked at as if they together constituted one law.

IN PERSONAM: Against the person. Jurisdiction over the person of an individual.

IN RE: In the matter of. Used to designate a proceeding involving an estate or other property.

IN REM: A term that signifies an action against the res, or thing. An action in rem is basically one that is taken directly against property, as distinguished from an action in personam, i.e., against the person.

INTER ALIA: Among other things. Used to show that the whole of a statement, pleading, list, statute, etc., has not been set forth in its entirety.

INTER PARTES: Between the parties. May refer to contracts, conveyances or other transactions having legal significance.

INTER VIVOS: Between the living. An inter vivos gift is a gift made by a living grantor, as distinguished from bequests contained in a will, which pass upon the death of the testator.

IPSO FACTO: By the mere fact itself.

JUS: Law or the entire body of law.

LEX LOCI: The law of the place; the notion that the rights of parties to a legal proceeding are governed by the law of the place where those rights arose.

MALUM IN SE: Evil or wrong in and of itself; inherently wrong. This term describes an act that is wrong by its very nature, as opposed to one which would not be wrong but for the fact that there is a specific legal prohibition against it (malum prohibitum).

MALUM PROHIBITUM: Wrong because prohibited, but not inherently evil. Used to describe something that is wrong because it is expressly forbidden by law but that is not in and of itself evil, e.g., speeding.

MANDAMUS: We command. A writ directing an official to take a certain action.

MENS REA: A guilty mind; a criminal intent. A term used to signify the mental state that accompanies a crime or other prohibited act. Some crimes require only a general mens rea (general intent to do the prohibited act), but others, like assault with intent to murder, require the existence of a specific mens rea.

MODUS OPERANDI: Method of operating; generally refers to the manner or style of a criminal in committing crimes, admissible in appropriate cases as evidence of the identity of a defendant.

NEXUS: A connection to.

NISI PRIUS: A court of first impression. A nisi prius court is one where issues of fact are tried before a judge or jury.

N.O.V. (NON OBSTANTE VEREDICTO): Notwithstanding the verdict. A judgment n.o.v. is a judgment given in favor of one party despite the fact that a verdict was returned in favor of the other party, the justification being that the verdict either had no reasonable support in fact or was contrary to law.

NUNC PRO TUNC: Now for then. This phrase refers to actions that may be taken and will then have full retroactive

effect.

PENDENTE LITE: Pending the suit; pending litigation underway.

PER CAPITA: By head; beneficiaries of an estate, if they take in equal shares, take per capita.

PER CURIAM: By the court; signifies an opinion ostensibly written "by the whole court" and with no identified author.

PER SE: By itself, in itself; inherently.

PER STIRPES: By representation. Used primarily in the law of wills to describe the method of distribution where a person, generally because of death, is unable to take that which is left to him by the will of another, and therefore his heirs divide such property between them rather than take under the will individually.

PRIMA FACIE: On its face, at first sight. A prima facie case is one that is sufficient on its face, meaning that the evidence supporting it is adequate to establish the case until contradicted or overcome by other evidence.

PRO TANTO: For so much; as far as it goes. Often used in eminent domain cases when a property owner receives partial payment for his land without prejudice to his right to bring suit for the full amount he claims his land to be worth.

QUANTUM MERUIT: As much as he deserves. Refers to recovery based on the doctrine of unjust enrichment in those cases in which a party has rendered valuable services or furnished materials that were accepted and enjoyed by another under circumstances that would reasonably notify the recipient that the rendering party expected to be paid. In essence, the law implies a contract to pay the reasonable value of the services or materials furnished.

QUASI: Almost like; as if; nearly. This term is essentially used to signify that one subject or thing is almost analogous to another but that material differences between them do exist. For example, a quasi-criminal proceeding is one that is not strictly criminal but shares enough of the same characteristics to require some of the same safeguards (e.g., procedural due process must be followed in a parol hearing).

QUID PRO QUO: Something for something. In contract law, the consideration, something of value, passed between the parties to render the contract binding.

RES GESTAE: Things done; in evidence law, this principle justifies the admission of a statement that would otherwise be hearsay when it is made so closely to the event in question as to be said to be a part of it, or with such spontaneity as not to have the possibility of falsehood.

RES IPSA LOQUITUR: The thing speaks for itself. This doctrine gives rise to a rebuttable presumption of negligence when the instrumentality causing the injury was within the exclusive control of the defendant, and the injury was one that does not normally occur unless a person has been negligent.

RES JUDICATA: A matter adjudged. Doctrine which provides that once a court of competent jurisdiction has rendered a final judgment or decree on the merits, that judgment or decree is conclusive upon the parties to the case and prevents them from engaging in any other litigation on the points and issues determined therein.

RESPONDEAT SUPERIOR: Let the master reply. This doctrine holds the master liable for the wrongful acts of his servant (or the principal for his agent) in those cases in which the servant (or agent) was acting within the scope of his authority at the time of the injury.

STARE DECISIS: To stand by or adhere to that which has been decided. The common law doctrine of stare decisis attempts to give security and certainty to the law by following the policy that once a principle of law as applicable to a certain set of facts has been set forth in a decision, it forms a precedent which will subsequently be followed, even though a different decision might be made were it the first time the question had arisen. Of course, stare decisis is not an inviolable principle and is departed from in instances where there is good cause (e.g., considerations of public policy led the Supreme Court to disregard prior decisions sanctioning segregation).

SUPRA: Above. A word referring a reader to an earlier part of a book.

ULTRA VIRES: Beyond the power. This phrase is most commonly used to refer to actions taken by a corporation that are beyond the power or legal authority of the corporation.

ADDENDUM OF FRENCH DERIVATIVES

IN PAIS: Not pursuant to legal proceedings.

CHATTEL: Tangible personal property.

CY PRES: Doctrine permitting courts to apply trust funds to purposes not expressed in the trust but necessary to carry out the settlor's intent.

PER AUTRE VIE: For another's life; in property law, an estate may be granted that will terminate upon the death of someone other than the grantee.

PROFIT A PRENDRE: A license to remove minerals or other produce from land.

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TABLE OF CASES (Continued)

CHAPTER 1
INTRODUCTION TO THE TORTS PROCESS: LIABILITY FOR HARMFUL AND OFFENSIVE BATTERY

QUICK REFERENCE RULES OF LAW

1. **The Prima Facie Case.** In an action to recover damages for an alleged assault and battery, the victim must only show either that the alleged wrongdoer had an unlawful intention to produce harm (i.e., an unlawful intention in committing the act which occurred) or that he committed an unlawful act. (Vosburg v. Putney)

   [For more information on necessary intent, see Casenote Law Outline on Torts, Chapter 2, § II, Battery.]

2. **The Prima Facie Case.** The intent necessary for the commission of a battery is present when the person acts, knowing, with substantial certainty, that the harmful contact will occur. (Garratt v. Dailey)

   [For more information on necessary intent, see Casenote Law Outline on Torts, Chapter 2, § II, Battery.]

3. **Consent.** Silence and inaction may imply consent to defendant's acts if the circumstances are such that a reasonable person would speak if he objected. (O'Brien v. Cunard Steamship Co.)

   [For more information on the defense of consent, see Casenote Law Outline on Torts, Chapter 2, § VIII, Defenses.]

4. **Consent.** Section 2010 of the Penal Law provides that a person who has sexual intercourse with a female, not his wife, under the age of eighteen is guilty of rape even if the female consented to such intercourse; but, a female under the age of eighteen has no civil cause of action against a male with whom she willingly has intercourse, if she knows the nature and quality of her act. (Barton v. Bee Line, Inc.)

   [For more information on consent to a crime, see Casenote Law Outline on Torts, Chapter 2, § VIII, Defenses.]

5. **Consent.** In an action to recover damages for an unauthorized operation, the question of whether or not there was an unauthorized operation is a fact issue which must be submitted to the jury. (Bang v. Charles T. Miller Hospital)

   [For more information on consent to an intentional tort, see Casenote Law Outline on Torts, Chapter 2, § VIII, Defenses.]

6. **Consent.** Where an internal operation indicated and performed, a surgeon may lawfully (in fact, it is his duty to) extend the operation to remedy any abnormal or diseased condition in the area of the original incision whenever he, in the exercise of his sound professional judgment, determines that correct surgical procedure dictates and requires such an extension of the operation originally contemplated. (Kennedy v. Parrott)

   [For more information on the scope of consent, see Casenote Law Outline on Torts, Chapter 2, § VIII, Defenses.]

7. **Self- Defense.** An action of force is justified by self-defense whenever the circumstances are such as to cause a reasonable man to believe that his life is in danger or that he is in danger of receiving great bodily harm and that it is necessary to use such force for protection. (Courvoisier v. Raymond)

[For more information on the defense of self-defense, see Casenote Law Outline on Torts, Chapter 2, § VIII, Defenses.]

8. **Defense of Property.** Reasonable force may be used to protect property, but not such force as will take human life or inflict great bodily harm. (Katko v. Briney)

[For more information on defense of property, see Casenote Law Outline on Torts, Chapter 2, § VIII, Defenses.]

9. **Defense of Property.** Necessity justifies the entry upon the land of another. (Ploof v. Putnam)

[For more information on trespass to land, see Casenote Law Outline on Torts, Chapter 2, § V, Trespass to Land.]

10. **Defense of Property.** Public necessity may require the taking of private property for public purposes; but our system of jurisprudence requires that compensation be made. (Vincent v. Lake Erie Transportation Co.)

[For more information on the privilege of public necessity, see Casenote Law Outline on Torts, Chapter 2, § VIII, Defenses.]

VOSBURG v. PUTNEY

Student (P) v. Student (D)

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

NATURE OF CASE: Appeal from award of damages for a battery.

FACT SUMMARY: While at school, eleven-year-old Putney (D) kicked fourteen-year-old Vosburg (P) in the leg, and, as a result, Vosburg (P) later lost the use of that leg.

CONCISE RULE OF LAW: In an action to recover damages for an alleged assault and battery, the victim must only show either that the alleged wrongdoer had an unlawful intention to produce harm (i.e., an unlawful intention in committing the act which occurred) or that he committed an unlawful act.

FACTS: Vosburg (P), fourteen years old, and Putney (D), eleven years old, were both students at a high school in Waukesha in 1889. On February 20, 1889, while school was in session, Putney (D) lightly kicked Vosburg (P) in the leg. Since Vosburg's (P) leg was in a weakened condition from a previous injury which was still healing, the kick caused Vosburg (P) to permanently lose the use of that leg (i.e., infection destroyed the bone). Thereafter, Vosburg (P) sued Putney (D) for damages resulting from the kick. The jury found that the kick was the exciting cause of Vosburg's (P) injury, that Putney (D) did not intend harm, and that Vosburg (P) was entitled to $2,500 damages. Thereupon, judgment was entered for Vosburg (P) and this appeal followed.

ISSUE: In an action to recover damages for an alleged assault and battery, must the victim prove that the alleged wrongdoer intended to do him harm?

HOLDING AND DECISION: (Lyon, J.) No. In an action to recover damages for an alleged assault and battery, the victim must only show either that the alleged wrongdoer had an unlawful intention to produce harm (i.e., an unlawful intention in committing the act which occurred) or that he committed an unlawful act. This rule is based upon the rationale that "if the intended act is unlawful, the intention to commit it must necessarily be unlawful." Of course, once it is established that the wrongdoer committed an assault and battery, he is liable for all injuries resulting directly from the wrongful act, whether or not they could have been foreseen by him. Here, since the kick occurred after regular school exercises had commenced (i.e., when there was no "implied license of the playgrounds" allowing for boyish sports, etc.), it was unlawful. As such, Putney (D) committed an assault and battery and he is liable for all damages which resulted, even though Vosburg's (P) leg was in a weakened condition from a previous injury. Since certain testimony, though, was erroneously admitted at trial, the case is remanded for a new trial.

EDITOR'S ANALYSIS: Any intent to do an act which is wrong is sufficient. Malice is not necessary. Note that the intent may be to "do" the wrongful act or to do an act which is "substantially certain" to cause a result which is wrongful. Note, also, that this case demonstrates the well settled proposition that "the tortfeasor must take his victim as he finds him." Referred to in negligence as the "thin skull" doctrine, it essentially means that the fact that a plaintiff, such as Vosburg, is particularly susceptible to serious injury, will not mitigate the tortfeasor's liability whatsoever.

[For more information on necessary intent, see Casenote Law Outline on Torts, Chapter 2, § II, Battery.]

QUICKNOTES

ASSAULT AND BATTERY - Any unlawful touching of another person without justification or excuse.

MALICE - The intention to commit an unlawful act without justification or excuse.

NEGLIGENCE - Conduct falling below the standard of care that a reasonable person would demonstrate under similar conditions.

NOTES:

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