1.DIRECTIONS

a. Read the article "How to Read a Legal Opinion. . ." (p. 1).
b. Read the article "Briefing a Case" (p. 8).
c. Read the case of *Gray v. Martino* (p. 10).
d. Read the second version of *Gray v. Martino* (p.11).
e. Write a brief of *Gray v. Martino*.
f. Compare your brief of *Gray v. Martino* with the one provided (p.13).
g. Read, brief, and be prepared to discuss *Garratt v. Dailey* (p. 14).

2.ARTICLE

HOW TO READ A LEGAL OPINION: A Guide for New Law Students

By Orin S. Kerr
Green Bag, Autumn, 2007

I. WHAT'S IN A LEGAL OPINION?

When two people disagree and that disagreement leads to a lawsuit, the lawsuit will sometimes end with a ruling by a judge in favor of one side. The judge will explain the ruling in a written document referred to as an "opinion." The opinion explains what the case is about, discusses the relevant legal principles, and then applies the law to the facts to reach a ruling in favor of one side and against the other.

Modern judicial opinions reflect hundreds of years of history and practice. They usually follow a simple and predictable formula. This ***52** section takes you through the basic formula. It starts with the introductory materials at the top of an opinion and then moves on to the body of the opinion.

The Caption

The first part of the case is the title of the case, known as the "caption." Examples include *Brown v. Board of Education* and *Miranda v. Arizona*. The caption usually tells you the last names of the person who brought the lawsuit and the person who is being sued. These two sides are often referred to as the "parties" or as the "litigants" in the case. For example, if Ms. Smith sues Mr. Jones, the case caption may be *Smith v. Jones* (or, depending on the court, *Jones v. Smith*).

In criminal law, cases are brought by government prosecutors on behalf of the government itself. This means that the government is the named party. For example, if the federal government charges John Doe with a crime, the case caption will be *United States v. Doe*. If a state brings the charges instead, the caption will be *State v. Doe, People v. Doe,* or *Commonwealth v. Doe,* depending on the practices of that state.[1]

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* Special thanks to Prof. Naomi Goodno who very kindly provided several of the documents which are included in these materials.

[1] English criminal cases normally will be *Rex v. Doe* or *Regina v. Doe*. Rex and Regina aren't the victims: the words are Latin for "King" and "Queen." During the reign of a King, English courts use "Rex"; during the reign of a Queen, they switch to "Regina.

The Case Citation

Below the case name you will find some letters and numbers. These letters and numbers are the legal citation for the case. A citation tells you the name of the court that decided the case, the law book in which the opinion was published, and the year in which the court decided the case. For example, "U.S. Supreme Court, 485 U.S. 759 (1988)" refers to a U.S. Supreme Court case decided in 1988 that appears in Volume 485 of the *United States Reports* starting at page 759.

The Author of the Opinion

The next information is the name of the judge who wrote the opinion. Most opinions assigned in law school were issued by courts with multiple judges. The name tells you which judge wrote that particular opinion. In older cases, the opinion often simply states a last name followed by the initial "J." No, judges don't all have the first initial "J." The letter stands for "Judge" or "Justice," depending on the court. On occasion, the opinion will use the Latin phrase "per curiam" instead of a judge's name. Per curiam means "by the court." It signals that the opinion reflects a common view among all the judges rather than the writings of a specific judge.

The Facts of the Case

Now let's move on to the opinion itself. The first part of the body of the opinion presents the facts of the case. In other words, what happened? The facts might be that Andy pulled out a gun and shot Bob. Or maybe Fred agreed to give Sally $100 and then changed his mind. Surprisingly, there are no particular rules for what facts a judge must include in the fact section of an opinion. Sometimes the fact sections are long, and sometimes they are short. Sometimes they are clear and accurate, and other times they are vague or incomplete.

Most discussions of the facts also cover the "procedural history" of the case. The procedural history explains how the legal dispute worked its way through the legal system to the court that is issuing the opinion. It will include various motions, hearings, and trials that occurred after the case was initially filed. Your civil procedure class is all about that kind of stuff; you should pay very close attention to the procedural history of cases when you read assignments for your civil procedure class. The procedural history of cases usually will be less important when you read a case for your other classes.

The Law of the Case

After the opinion presents the facts, it will then discuss the law. Many opinions present the law in two stages. The first stage discusses the general principles of law that are relevant to cases such as the one the court is deciding. This section might explore the history of a particular field of law or may include a discussion of past cases (known as "precedents") that are related to the case the court is deciding. This part of the opinion gives the reader background to help understand the context and significance of the court's decision. The second stage of the legal section applies the general legal principles to the particular facts of the dispute. As you might guess, this part is in many ways the heart of the opinion: It gets to the bottom line of why the court is ruling for one side and against the other.

Concurring and/or Dissenting Opinions

Most of the opinions you read as a law student are "majority" opinions. When a group of judges get together to decide a case, they vote on which side should win and also try to agree on a legal rationale to explain why that side has won. A majority opinion is an opinion joined by the majority of judges on that court. Although most decisions are unanimous, some cases are not. Some judges may disagree and will write a separate opinion offering a different approach. Those opinions are called "concurring opinions" or "dissenting opinions," and they appear after the majority opinion. A "concurring opinion" (sometimes just called a "concurrence") explains a vote in favor of the winning side but based on a different legal

rationale. A “dissenting opinion” (sometimes just called a “dissent”) explains a vote in favor of the losing side.

II. COMMON LEGAL TERMS FOUND IN OPINIONS

Now that you know what's in a legal opinion, it's time to learn some of the common words you'll find inside them. But first a history lesson, for reasons that should be clear in a minute.

In 1066, William the Conqueror came across the English Channel from what is now France and conquered the land that is today called England. The conquering Normans spoke French and the defeated Saxons spoke Old English. The Normans took over the court system, and their language became the language of the law. For several centuries after the French-speaking Normans took over England, lawyers and judges in English courts spoke in French. When English courts eventually returned to using English, they continued to use many French words.

Why should you care about this ancient history? The American colonists considered themselves Englishmen, so they used the English legal system and adopted its language. This means that American legal opinions today are littered with weird French terms. Examples include plaintiff, defendant, tort, contract, crime, judge, attorney, counsel, court, verdict, party, appeal, evidence, and jury. These words are the everyday language of the American legal system. And they're all from the French, brought to you by William the Conqueror in 1066.

This means that when you read a legal opinion, you'll come across a lot of foreign-sounding words to describe the court system. You need to learn all of these words eventually; you should read cases with a legal dictionary nearby and should look up every word you don't know. But this section will give you a head start by introducing you to some of the most common words, many of which (but not all) are French in origin.

Types of Disputes and the Names of Participants

There are two basic kinds of legal disputes: civil and criminal. In a civil case, one person files a lawsuit against another asking the court to order the other side to pay him money or to do or stop doing something. An award of money is called “damages” and an order to do something or to refrain from doing something is called an “injunction.” The person bringing the lawsuit is known as the “plaintiff” and the person sued is called the “defendant.”

In criminal cases, there is no plaintiff and no lawsuit. The role of a plaintiff is occupied by a government prosecutor. Instead of filing a lawsuit (or equivalently, “suing” someone), the prosecutor files criminal “charges.” Instead of asking for damages or an injunction, the prosecutor asks the court to punish the individual through either jail time or a fine. The government prosecutor is often referred to as “the state,” “the prosecution,” or simply “the government.” The person charged is called the defendant, just like the person sued in a civil case.

In legal disputes, each party ordinarily is represented by a lawyer. Legal opinions use several different words for lawyers, including “attorney” and “counsel.” There are some historical differences among these terms, but for the last century or so they have all meant the same thing. When a lawyer addresses a judge in court, she will always address the judge as “your honor,” just like lawyers do in the movies. In legal opinions, however, judges will usually refer to themselves as “the Court.”

Terms in Appellate Litigation

Most opinions that you read in law school are appellate opinions, which means that they decide the

outcome of appeals. An “appeal” is a legal proceeding that considers whether another court's legal decision was right or wrong. After a court has ruled for one side, the losing side may seek review of that decision by filing an appeal before a higher court. The original court is usually known as the trial court, because that's where the trial occurs if there is one. The higher court is known as the appellate or appeals court, as it is the court that hears the appeal.

A single judge presides over trial court proceedings, but appellate cases are decided by panels of several judges. For example, in the federal court system, run by the United States government, a single trial judge known as a District Court judge oversees the trial stage. Cases can be appealed to the next higher court, the Court of Appeals, where cases are decided by panels of three judges known as Circuit Court judges. A side that loses before the Circuit Court can seek review of that decision at the United States Supreme Court. Supreme Court cases are decided by all nine judges. Supreme Court judges are called Justices instead of judges; there is one “Chief Justice” and the other eight are just plain “Justices” (technically they are “Associate Justices,” but everyone just calls them “Justices”).

During the proceedings before the higher court, the party that lost at the original court and is therefore filing the appeal is usually known as the “appellant.” The party that won in the lower court and must defend the lower court's decision is known as the “appellee” (accent on the last syllable). Some older opinions may refer to the appellant as the “plaintiff in error” and the appellee as the “defendant in error.” Finally, some courts label an appeal as a “petition,” and require the losing party to petition the higher court for relief. In these cases, the party that lost before the lower court and is filing the petition for review is called the “petitioner.” The party that won before the lower court and is responding to the petition in the higher court is called the “respondent.”

Confused yet? You probably are, but don't worry. You'll read so many cases in the next few weeks that you'll get used to all of this very soon.

III. WHAT YOU NEED TO LEARN FROM READING A CASE

Okay, so you've just read a case for class. You think you understand it, but you're not sure if you learned what your professor wanted you to learn. Here is what professors want students to know after reading a case assigned for class:

Know the Facts

Law professors love the facts. When they call on students in class, they typically begin by asking students to state the facts of a particular case. Facts are important because law is often highly fact-sensitive, which is a fancy way of saying that the proper legal outcome depends on the exact details of what happened. If you don't know the facts, you can't really understand the case and can't understand the law.

Most law students don't appreciate the importance of the facts when they read a case. Students think, “I'm in law school, not fact school; I want to know what the law is, not just what happened in this one case.” But trust me: the facts are really important.[2]

[2] If you don't believe me, you should take a look at a few law school exams. It turns out that the most common form of law school exam question presents a long description of a very particular set of facts. It then asks the student to “spot” and analyze the legal issues presented by those facts. These exam questions are known as “issue-spotters,” as they test the student's ability to understand the facts and spot the legal issues they raise. As you might imagine, doing well on an issue-spotter requires developing a careful and nuanced understanding of the importance of the facts. The best way to prepare for that is to read the fact sections of your cases very carefully.

Know the Specific Legal Arguments Made by the Parties

Lawsuits are disputes, and judges only issue opinions when two parties to a dispute disagree on a particular legal question. This means that legal opinions focus on resolving the parties' very specific disagreement. The lawyers, not the judges, take the lead role in framing the issues raised by a case.

In an appeal, for example, the lawyer for the appellant will articulate specific ways in which the lower court was wrong. The appellate court will then look at those arguments and either agree or disagree. (Now you can understand why people pay big bucks for top lawyers; the best lawyers are highly skilled at identifying and articulating their arguments to the court.) Because the lawyers take the lead role in framing the issues, you need to understand exactly what arguments the two sides were making.

Know the Disposition

The "disposition" of a case is the action the court took. It is often announced at the very end of the opinion. For example, an appeals court might "affirm" a lower court decision, upholding it, or it might "reverse" the decision, ruling for the other side. Alternatively, an appeals court might "vacate" the lower court decision, wiping the lower-court decision off the books, and then "remand" the case, sending it back to the lower court for further proceedings. For now, you should keep in mind that when a higher court "affirms" it means that the lower court had it right (in result, if not in reasoning). Words like "reverse," "remand," and "vacate" means that the higher court thought the lower court had it wrong.

Understand the Reasoning of the Majority Opinion

To understand the reasoning of an opinion, you should first identify the source of the law the judge applied. Some opinions interpret the Constitution, the founding charter of the government. Other cases interpret "statutes," which is a fancy name for written laws passed by legislative bodies such as Congress. Still other cases interpret "the common law," which is a term that usually refers to the body of prior case decisions that derive ultimately from pre-1776 English law that the Colonists brought over from England.[3]

In your first year, the opinions that you read in your Torts, Contracts, and Property classes will mostly interpret the common law. Opinions in Criminal Law mostly interpret either the common law or statutes. Finally, opinions in your Civil Procedure casebook will mostly interpret statutory law or the Constitution. The source of law is very important because American law follows a clear hierarchy. Constitutional rules trump statutory (statute-based) rules, and statutory rules trump common law rules.

After you have identified the source of law, you should next identify the method of reasoning that the court used to justify its decision. When a case is governed by a statute, for example, the court usually will simply follow what the statute says. The court's role is narrow in such settings because the legislature has settled the law. Similarly, when past courts have already answered similar questions before, a court may conclude that it is required to reach a particular result because it is bound by the past precedents. This is an application of the judicial practice of "stare decisis," an abbreviation of a Latin phrase meaning "That which has been already decided should remain settled."

In other settings, courts may justify their decisions on public policy grounds. That is, they may pick

[3] The phrase "common law" started being used about a thousand years ago to refer to laws that were common to all English citizens. Thus, the word "common" in the phrase "common law" means common in the sense of "shared by all," not common in the sense of "not very special." The "common law" was announced in judicial opinions. As a result, you will sometimes hear the phrase "common law" used to refer to areas of judge-made law as opposed to legislatively-made law.

the rule that they think is the best rule, and they may explain in the opinion why they think that rule is best. This is particularly likely in common law cases where judges are not bound by a statute or constitutional rule. Other courts will rely on morality, fairness, or notions of justice to justify their decisions. Many courts will mix and match, relying on several or even all of these justifications.

Understand the Significance of the Majority Opinion

Some opinions resolve the parties' legal dispute by announcing and applying a clear rule of law that is new to that particular case. That rule is known as the "holding" of the case. Holdings are often contrasted with "dicta" found in an opinion. Dicta refers to legal statements in the opinion not needed to resolve the dispute of the parties; the word is a pluralized abbreviation of the Latin phrase "obiter dictum," which means "a remark by the way."

When a court announces a clear holding, you should take a minute to think about how the court's rule would apply in other situations. During class, professors like to pose "hypotheticals," new sets of facts that are different from those found in the cases you have read. They do this for two reasons. First, it's hard to understand the significance of a legal rule unless you think about how it might apply to lots of different situations. A rule might look good in one setting, but another set of facts might reveal a major problem or ambiguity. Second, judges often reason by "analogy," which means a new case may be governed by an older case when the facts of the new case are similar to those of the older one. This raises the question, which are the legally relevant facts for this particular rule? The best way to evaluate this is to consider new sets of facts. You'll spend a lot of time doing this in class, and you can get a head start on your class discussions by asking the hypotheticals on your own before class begins.

Finally, you should accept that some opinions are vague. Sometimes a court won't explain its reasoning very well, and that forces us to try to figure out what the opinion means. You'll look for the holding of the case but become frustrated because you can't find one. It's not your fault; some opinions are written in a narrow way so that there is no clear holding, and others are just poorly reasoned or written. Rather than trying to fill in the ambiguity with false certainty, try embracing the ambiguity instead. One of the skills of top-flight lawyers is that they know what they don't know: they know when the law is unclear. Indeed, this skill of identifying when a problem is easy and when it is hard (in the sense of being unsettled or unresolved by the courts) is one of the keys to doing very well in law school. The best law students are the ones who recognize and identify these unsettled issues without pretending that they are easy.

Understand Any Concurring and/or Dissenting Opinions

You probably won't believe me at first, but concurrences and dissents are very important. You need to read them carefully. To understand why, you need to appreciate that law is man-made, and Anglo-American law has often been judge-made. Learning to "think like a lawyer" often means learning to think like a judge, which means learning how to evaluate which rules and explanations are strong and which are weak. Courts occasionally say things that are silly, wrongheaded, or confused, and you need to think independently about what judges say.

Concurring and dissenting opinions often do this work for you. Casebook authors edit out any unimportant concurrences and dissents to keep the opinions short. When concurrences and dissents appear in a casebook, it signals that they offer some valuable insights and raise important arguments. Disagreement between the majority opinion and concurring or dissenting opinions often frames the key issue raised by the case; to understand the case, you need to understand the arguments offered in concurring and dissenting opinions.

IV. WHY DO LAW PROFESSORS USE THE CASE METHOD?

I'll conclude by stepping back and explaining why law professors bother with the case method. Every law student quickly realizes that law school classes are very different from college classes. Your college professors probably stood at the podium and droned on while you sat back in your chair, safe in your cocoon. You're now starting law school, and it's very different. You're reading about actual cases, real-life disputes, and you're trying to learn about the law by picking up bits and pieces of it from what the opinions tell ***62** you. Even weirder, your professors are asking you questions about those opinions, getting everyone to join in a discussion about them. Why the difference?, you may be wondering. Why do law schools use the case method at all?

I think there are two major reasons, one historical and the other practical.

The Historical Reason

The legal system that we have inherited from England is largely judge-focused. The judges have made the law what it is through their written opinions. To understand that law, we need to study the actual decisions that the judges have written. Further, we need to learn to look at law the way that judges look at law. In our system of government, judges can only announce the law when deciding real disputes: they can't just have a press conference and announce a set of legal rules. (This is sometimes referred to as the "case or controversy" requirement; a court has no power to decide an issue unless it is presented by an actual case or controversy before the court.) To look at the law the way that judges do, we need to study actual cases and controversies, just like the judges. In short, we study real cases and disputes because real cases and disputes historically have been the primary source of law.

The Practical Reason

A second reason professors use the case method is that it teaches an essential skill for practicing lawyers. Lawyers represent clients, and clients will want to know how laws apply to them. To advise a client, a lawyer needs to understand exactly how an abstract rule of law will apply to the very specific situations a client might encounter. This is more difficult than you might think, in part because a legal rule that sounds definite and clear in the abstract may prove murky in application. (For example, imagine you go to a public park and see a sign that says "No vehicles in the park." That plainly forbids an automobile, but what about bicycles, wheelchairs, toy automobiles? What about airplanes? Ambulances? Are these "vehicles" for the purpose of the rule or not?) As a result, good lawyers ***63** need a vivid imagination; they need to imagine how rules might apply, where they might be unclear, and where they might lead to unexpected outcomes. The case method and the frequent use of hypotheticals will help train your brain to think this way. Learning the law in light of concrete situations will help you deal with particular facts you'll encounter as a practicing lawyer.

Good luck!

3.ARTICLE ON BRIEFING

Excerpt from LawNerds.Com

Available at http://www.lawnerds.com/guide/briefing.html

How to Brief a Case - Briefs should be a one-page summary of the case. Structure the summary according to the elements listed below. The structure adheres to the types of questions the professor asks in class and to the information you'll need for outlining. Not every case can be summed up in one page, but it's a good discipline to attempt to condense the material.

You might consider creating a standard form using a word processor, then fill in the blanks as you read the case; *however, not every element listed in the chart above is used in every brief you make.* You may want to modify the form as you go along through the semester. Professors will differ as to what they like. At the end of this chapter is a sample brief.

Facts - A well-written case gives the relevant facts that brought the parties to court. In a Torts case, for instance, the judge recites the facts of the accident or injury. In Contracts, the prior business relationship might be discussed. In Criminal Law, the crime is described.

Case law is at its worst when the court leaves out the facts. Judges sometimes don't include facts because the question before the appellate court doesn't require all of the details to be resolved. The issue on appeal is so narrow, that the facts as determined by a jury are often no longer relevant to the issue at hand. However, it helps when the judges give you a context by outlining all of the facts.

You'll probably encounter such a case in Civil Procedure. Pennoyer v. Neff is one of those traditional law school cases that is extremely frustrating to understand because it lacks a background history of the facts. In situations like this, you want to revert to secondary sources such as hornbooks,[4] to pick up on the material.

Procedural History - How did this case get to this particular court? Typically, you will be reading case law from the appeals court. That means the case has already been decided at a lower court and the losing party has appealed to a higher court. Typically, the lower courts don't write opinions on their decisions, consequently, you'll almost always be reading appellate decisions.

The judge often starts the case with information on how the court below decided the case and which party is making the appeal. Often the cases will present a detailed history of the arguments presented by both parties in the court below as well. At minimum, you should be able to answer the following two questions that your professor is likely to ask in class: (1) *Who is appealing on what issues?* (2) *What happened in the lower court?*

Issue - A well-written opinion starts out by telling you the legal issue up-front. Language that the court uses might include such phrases as: *"The question before us is whether....;" "This case was brought before us to decide whether...".*

Appellate courts hear a case on appeal when there has been a problem with the case in the court below. The problem could be an error that the court made or the appellate court may want to take the case

[4] Hornbooks are summaries of the law that can be found in your library.

because the lower courts in its jurisdiction are not consistent in their decisions. By taking this case, it gives the higher court a chance to give guidance and establish precedent for the lower courts to follow. If you're having trouble spotting the issue, then try to key into the word "whether." It often signals the turning point for a case.

Rule - The court should give a clear statement of the rule that controls the issue. The court often traces the development of the law within its own jurisdiction, starting with the common law rule. Since many of these bodies of law differ slightly between states, the court prefers to look within its own jurisdiction before it cites to a case from another state or country. The judge then either reaffirms a principle of law or fashions a new rule that evolves the law. The rule is the Rule arm of IRAC.

Analysis (Reasoning) - The reasoning is the Analysis arm of IRAC. This is how and why the court fits the particular facts and circumstances of this case into the rule. The courts often fashion tests or rely on precedent, which forms part of the reasoning. You should take special note of the reasoning and try to emulate it in your own writing.

Holding (Conclusion) - The holding is the court's decision on the issue. Who wins? The holding may be narrowly construed to a particular issue or be very broad. Identifying the holding may merely consist of finding the words "We hold that..." The holding should include the disposition of the case. Is the ruling of the lower court affirmed? Overturned? Remanded for retrial?

Policy - Rules don't stand by themselves without any sort of reason behind them. If there isn't a sound policy behind a rule, then the court tries to fashion a rule that serves the principles of equity or justice. Sometimes a statute that does not further the policies of equity or justice binds the judge. In those circumstances, the judge sometimes upholds the statute but writes the opinion in such a way to bring the injustice to the attention of the legislature in order to encourage them to change the law.

Dicta - Dicta refers to anything that isn't relevant to the case's holding. Often judges will use a case to expound upon their theories of the law. The theories may not be relevant to the case at hand, but it gives the judge a chance to give direction to the lower courts by putting the theory in writing. Dicta does not carry weight as a precedent. But it's useful to note how the court might have ruled given a different set of circumstances.

Concurrence - A Concurrence is a separate opinion in which one of the judges agrees with the result but has different reasoning. Like dissents, you will find that concurrences proliferate in Supreme Court cases. Look at the concurrence to see how the reasoning differs. Make a note of it in the brief.

Dissents - Typically, a panel of judges tries appellate cases. Not surprisingly, there is not always unanimous agreement. Consequently, a judge who is not in the majority will write a dissent. Dissents are ubiquitous in Supreme Court cases. Make sure that you pick up the major sticking points in the dissent. What principles does the dissenting judge disagree with the majority on? Dissents are sometimes indicators of a direction the court may eventually move towards.

4.THE CASE OF *GRAY V. MARTINO*

STEPHEN GRAY, RESPONDENT, v. THERESA D. MARTINO, APPELLANT

Supreme Court of New Jersey
91 N.J.L. 462; 103 A. 24
February 2, 1918, Decided

MINTURN, J. The plaintiff occupied the position of a special police officer, in Atlantic City, and incidentally was identified with the work of the prosecutor of the pleas of the county. He possessed knowledge concerning the theft of certain diamonds and jewelry from the possession of the defendant, who had advertised a reward for the recovery of the property. In this situation he claims to have entered into a verbal contract with defendant, whereby she agreed to pay him $500 if he could procure for her the names and addresses of the thieves. As a result of his mediation with the police authorities the diamonds and jewelry were recovered, and plaintiff brought this suit to recover the promised reward.

The District Court, sitting without a jury, awarded plaintiff a judgment for the amount of the reward, and hence this appeal.

Various points are discussed in the briefs, but to us the dominant and conspicuous inquiry in the case is, was the plaintiff, during the period of this transaction, a public officer, charged with the enforcement of the law?

The testimony makes it manifest that he was a special police officer to some extent identified with the work of the prosecutor's office, and that position, upon well-settled grounds of public policy, required him to assist, at least, in the prosecution of offenders against the law.

The services he rendered, in this instance, must be presumed to have been rendered in pursuance of that public duty, and for its performance he was not entitled to receive a special quid pro quo.

The cases on the subject are collected in a footnote to *Somerset Bank v. Edmund, 10 Am. & Eng. Ann. Cas. 726; 76 Ohio St. Rep. 396*, the head-note to which reads: "Public policy and sound morals alike forbid that a public officer should demand or receive for services performed by him in the discharge of official duty any other or further remuneration or reward than that prescribed or allowed by law."

This rule of public policy has been relaxed only in those instances where the legislature for sufficient public reason has seen fit by statute to extend the stimulus of a reward to the public without distinction, as in the case of *United States v. Matthews, 173 U.S. 381*, where the attorney-general, under an act for "the detection and prosecution of crimes against the United States," made a public offer of reward sufficiently liberal and generic to comprehend the services of a federal deputy marshal. Exceptions of that character upon familiar principles serve to emphasize the correctness of the rule, as one based upon sound public policy.

The judgment below for that reason must be reversed.

5. **THE CASE OF *GRAY V. MARTINO* WITH COMMENTS**

The case	The elements of this case
STEPHEN GRAY, RESPONDENT, v. THERESA D. MARTINO, APPELLANT	**The parties:** The people or entities that are involved in the lawsuit. Also referred to as the caption. There may be multiple parties. And sometimes you must sort out the parties in order to understand the case. In other words the names that appear in your textbook caption may not be the parties who are relevant to the discussion. And this caption is tricky. Because Gray is the respondent, it means he won below. If you look at the procedural history it means that he is the plaintiff in this case.
Supreme Court of New Jersey 91 N.J.L. 462; 103 A. 24 February 2, 1918, Decided	**The citation:** Usually there is no need to include the citation in your brief other than to note the court involved and the date.
MINTURN, J.	**The judge or justice**: This is the person who authored the majority opinion. Usually you do not have to note the name of the judge or justice unless he or she is a member of the United States Supreme Court or a particularly famous judge or justice.
The plaintiff occupied the position of a special police officer, in Atlantic City, and incidentally was identified with the work of the prosecutor of the pleas of the county. He possessed knowledge concerning the theft of certain diamonds and jewelry from the possession of the defendant, who had advertised a reward for the recovery of the property. In this situation he claims to have entered into a verbal contract with defendant, whereby she agreed to pay him $500 if he could procure for her the names and addresses of the thieves. As a result of his mediation with the police authorities the diamonds and jewelry were recovered, and plaintiff brought this suit to recover the promised reward.	**The facts**: These are the real world events that led to this lawsuit. Usually the facts will be much more extensive than these, and you will spend a great deal of time sorting out the relevant facts. Once you have determined the relevant facts, arrange them in chronological order. At first this process appears overwhelming; however, you will soon get very good and very fast at this task. [I promise you that this statement is true.]
The District Court, sitting without a jury, awarded plaintiff a judgment for the amount of the reward, and hence this appeal.	**Procedural History:** What was the result (who won) in the court or courts below? Often you will need to understand the procedural history to understand the holding. In this case, procedural history is the key to knowing who is the plaintif and who is the defendant. This element is very important in some classes and less so in others. It is usually very important in Civil Procedure.
Various points are discussed in the briefs, but to us the dominant and conspicuous inquiry in the case is, was the plaintiff, during the period of this transaction, a public officer, charged with the enforcement of the law?	**The issue:** The issue is always a question; it is the question that the court must answer yes or no in order to decide the case. Learning how to determine the issue is the most important skill that you must learn in the early days of your law school career.

	The issue may be one of fact; did something happen that violated or invoked the law. Or the issue may be one of law; what law or rule should govern these facts. The problem is complicated by the fact that the issue as stated by the court may not be the one that your professor wants to talk about. This particular issue is a factual one.
The services he rendered, in this instance, must be presumed to have been rendered in pursuance of that public duty, and for its performance he was not entitled to receive a special quid pro quo.	**The analysis**: The court resolves the factual issue and begins to apply the rule to the facts.
The cases on the subject are collected in a footnote to *Somerset Bank v. Edmund, 10 Am. & Eng. Ann. Cas. 726; 76 Ohio St. Rep. 396*, the head-note to which reads: "Public policy and sound morals alike forbid that a public officer should demand or receive for services performed by him in the discharge of official duty any other or further remuneration or reward than that prescribed or allowed by law."	**The rule:** Here we get a full statement of the rule along with a little bit of rationale (public policy and sound morals) for the rule. The court is following persuasive authority from Ohio and is in effect making this rule the law of New Jersey.
This rule of public policy has been relaxed only in those instances where the legislature for sufficient public reason has seen fit by statute to extend the stimulus of a reward to the public without distinction, as in the case of *United States v. Matthews, 173 U.S. 381*, where the attorney-general, under an act for "the detection and prosecution of crimes against the United States," made a public offer of reward sufficiently liberal and generic to comprehend the services of a federal deputy marshal. Exceptions of that character upon familiar principles serve to emphasize the correctness of the rule, as one based upon sound public policy.	**The rule (cont.):** Actually the court gives an exception to the rule (where the legislature acts), but does not apply the rule. Rather it uses the exception to bolster the rule itself.
The judgment below for that reason must be reversed.	**The holding**: This is the result in the case. Note this holding does not make sense unless you know the procedural history.

6.**SAMPLE BRIEF OF *GRAY V. MARTINO***

Gray (Plaintiff) v. **Martino** (Defendant), Supreme Ct of NJ (1918)
Facts: Defendant's jewelry was stolen and she offered a reward. She made a verbal contract with the plaintiff, a police officer, to find the stolen jewelry. She promised to pay $500. Plaintiff had knowledge of whereabouts of jewels at contract formation. Plaintiff found the stolen goods and returned them. Evidently defendant refused to pay him, and plaintiff brought this action to recover the $500.

Procedural History: District court (no jury) awarded money to the plaintiff and defendant appealed.

Issue: At the time the contract was formed, was the plaintiff acting as a police officer charged with a legal duty to catch criminals without further reward?

Rule:

1. A public officer cannot demand or receive remuneration or a reward for carrying out the duty of his job as a matter of public policy and morality.
2. However, it is not against public policy for a police officer to receive a reward in performance of his legal duty if the legislature passes a statute giving the reward to the public at large in furtherance of some public policy - such as preventing treason against the US.
3.

Analysis (reasoning or application): Court finds sufficient evidence that plaintiff was a public officer. Since he is a public officer, he cannot, as a matter of law, receive a contractual reward for the performance of his duties.

Holding: Court reverses decision of lower court in favor of the plaintiff and so plaintiff recovers nothing.

7.**THE CASE OF *GARRATT V. DAILEY***

Ruth Garratt, Appellant, v. Brian Dailey, a Minor, by George S. Dailey, his Guardian ad Litem, Respondent

Supreme Court of Washington

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

OPINION. HILL, J.

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

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

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

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

The authorities generally, but with certain notable exceptions (see Bohlen, "Liability in Tort of Infants and Insane Persons," 23 Mich. L. Rev. 9), state that, when a minor has committed a tort with force, he is liable to be proceeded against as any other person would be. Paul v. Hummel (1868), 43 Mo. 119, 97 Am. Dec. 381; Huchting v. Engel (1863), 17 Wis. 237, 84 Am. Dec. 741; Briese v. Maechtle (1911), 146 Wis.

89, 130 N. W. 893; 1 Cooley on Torts (4th ed.) 194, § 66; Prosser on Torts 1085, § 108; 2 Kent's Commentaries 241; 27 Am. Jur. 812, Infants, § 90.

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

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

It is urged that Brian's action in moving the chair constituted a battery. A definition (not all-inclusive but sufficient for our purpose) of a battery is the intentional infliction of a harmful bodily contact upon another. The rule that determines liability for battery is given in 1 Restatement, Torts, 29, § 13, as: "An act which, directly or indirectly, is the legal cause of a harmful contact with another's person makes the actor liable to the other, if "(a) the act is done with the intention of bringing about a harmful or offensive contact or an apprehension thereof to the other or a third person, and " (b) the contact is not consented to by the other or the other's consent thereto is procured by fraud or duress, and "(c) the contact is not otherwise privileged."

We have in this case no question of consent or privilege. We therefore proceed to an immediate consideration of intent and its place in the law of battery. In the comment on clause (a), the Restatement says: "Character of actor's intention. In order that an act may be done with the intention of bringing about a harmful or offensive contact or an apprehension thereof to a particular person, either the other or a third person, the act must be done for the purpose of causing the contact or apprehension or with knowledge on the part of the actor that such contact or apprehension is substantially certain to be produced." See, also, Prosser on Torts 41, § 8.

We have here the conceded volitional act of Brian, i.e., the moving of a chair. Had the plaintiff proved to the satisfaction of the trial court that Brian moved the chair while she was in the act of sitting down, Brian's action would patently have been for the purpose or with the intent of causing the plaintiff's bodily contact with the ground, and she would be entitled to a judgment against him for the resulting damages. Vosburg v. Putney (1891), 80 Wis. 523, 50 N.W. 403; Briese v. Maechtle, supra.

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

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

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

A battery would be established if, in addition to plaintiff's fall, it was proved that, when Brian moved the chair, he knew with substantial certainty that the plaintiff would attempt to sit down where the chair had been. If Brian had any of the intents which the trial court found, in the italicized portions of the findings of fact quoted above, that he did not have, he would of course have had the knowledge to which we have referred. The mere absence of any intent to injure the plaintiff or to play a prank on her or to embarrass her, or to commit an assault and battery on her would not absolve him from liability if in fact he had such knowledge. Mercer v. Corbin (1889), 117 Ind. 450, 20 N. E. 132, 3 L. R. A. 221. Without such knowledge, there would be nothing wrongful about Brian's act in moving the chair, and, there being no wrongful act, there would be no liability.

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

It will be noted that the law of battery as we have discussed it is the law applicable to adults, and no significance has been attached to the fact that Brian was a child less than six years of age when the alleged battery occurred. The only circumstance where Brian's age is of any consequence is in determining what he knew, and there his experience, capacity, and understanding are of course material.

From what has been said, it is clear that we find no merit in plaintiff's contention that we can direct the entry of a judgment for eleven thousand dollars in her favor on the record now before us. Nor do we find any error in the record that warrants a new trial.

What we have said concerning intent in relation to batteries caused by the physical contact of a plaintiff with the ground or floor as the result of the removal of a chair by a defendant, furnishes the basis for the answer to the contention of the plaintiff that the trial court changed its theory of the applicable law after the trial, and that she was prejudiced thereby.

It is clear to us that there was no change in theory so far as the plaintiff's case was concerned. The trial court consistently from beginning to end recognized that, if the plaintiff proved what she alleged and her eyewitness testified, namely, that Brian pulled the chair out from under the plaintiff while she was in the act of sitting down and she fell to the ground in consequence thereof, a battery was established. Had she proved that state of facts, then the trial court's comments about inability to find any intent (from the connotation of motivation) to injure or embarrass the plaintiff, and the italicized portions of his findings as above set forth, could have indicated a change of theory. But what must be recognized is that the trial court was trying in those comments and in the italicized findings to express the law applicable, not to the facts as the plaintiff contended they were, but to the facts as the trial court found them to be. The remand for clarification gives the plaintiff an opportunity to secure a judgment even though the trial court did not accept her version of the facts, if from all the evidence the trial court can find that Brian knew with substantial certainty that the plaintiff intended to sit down where the chair had been before he moved it, and still without reference to motivation.

The plaintiff-appellant urges as another ground for a new trial that she was refused the right to cross-examine Brian. Some twenty pages of cross-examination indicate that there was no refusal of the right of

cross-examination. The only occasion that impressed us as being a restriction on the right of cross-examination occurred when plaintiff was attempting to develop the fact that Brian had had chairs pulled out from under him at kindergarten and had complained about it. Plaintiff's counsel sought to do this by asking questions concerning statements made at Brian's home and in a court reporter's office. When objections were sustained, counsel for plaintiff stated that he was asking about the conversations to refresh the recollection of the child, and made an offer of proof. The fact that plaintiff was seeking to develop came into the record by the very simple method of asking Brian what had happened at kindergarten. Consequently, what plaintiff offered to prove by the cross-examination is in the record, and the restriction imposed by the trial court was not prejudicial.

It is argued that some courts predicate an infant's liability for tort upon the basis of the existence of an estate in the infant; hence it was error for the trial court to refuse to admit as an exhibit a policy of liability insurance as evidence that there was a source from which a judgment might be satisfied. In our opinion, the liability of an infant for his tort does not depend upon the size of his estate or even upon the existence of one. That is a matter of concern only to the plaintiff who seeks to enforce a judgment against the infant.

The motion for a new trial was also based on newly discovered evidence. The case having been tried to the court, the trial judge was certainly in a position to know whether that evidence would change the result on a new trial. It was not of a character that would make the denial of the motion an abuse of discretion.

The plaintiff complains, and with some justice, that she was not permitted to take a pretrial deposition of the defendant, Brian Dailey. While Rule of Pleading, Practice, and Procedure 30 (b), 34A Wn. (2d) 91, gives the trial court the right "for good cause shown" to prevent the taking of a deposition, it seems to us that though it might well have been taken under the supervision of the court to protect the child from leading, misleading, and confusing questions, the deposition should have been allowed, if the child was to be permitted to testify at the trial. If, however, the refusal to allow the taking of the deposition was an abuse of discretion, and that we are not prepared to hold, it has not been established that the refusal constituted prejudicial error. (Parenthetically we would add that the right to a review of the rulings on pretrial procedure or with respect to depositions or discovery or incidental procedural motions preceding the trial seems to be limited to an appeal from a final judgment (2 Barron and Holtzoff, Federal Practice and Procedure (rules ed.), § 803; 3 Id. § 1552) and realistically such a review is illusory for the reasons given by Prof. David W. Louisell. See 36 Minn. L. Rev. 654.)

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

Costs on this appeal will abide the ultimate decision of the superior court. If a judgment is entered for the plaintiff, Ruth Garratt, appellant here, she shall be entitled to her costs on this appeal. If, however, the judgment of dismissal remains unchanged, the respondent will be entitled to recover his costs on this appeal.

Remanded for clarification.