Part Two

The Practicing Paralegal: Developing Skills for the Legal Professional

Chapter 4

Finding and Reading the Law of Court Opinions

CHAPTER OBJECTIVES

The materials presented in this chapter will provide students with information on:

- The various classifications of law and the hierarchy of legal authorities.
- Sources of law as an introduction to legal research.
- The system of citations for court opinions.
- Analyzing court decisions and the legal principles involved.
- Distilling and defining the holding of a case.
- How to brief a case.

One of the most basic and important skills for a legal professional to develop is a thorough knowledge of the various sources of law and the ability to locate them. These are the first steps in developing the skill of performing legal research. Because research can be very time consuming and solitary, many lawyers delegate this crucial task to paralegals. In doing so, they rely upon the paralegal to be thorough and accurate. The task of having precise, up-to-date information is essential to providing competent legal representation. This chapter presents the information and techniques to develop the basic skills that a paralegal will need to perform legal research effectively and efficiently. Beginning with a review of the classifications of legal materials, this chapter will provide instruction on how to read court decisions and write a specialized form of note taking known as **case briefs**. This instruction will provide you with a necessary introduction to legal research, which, at its most basic, is a technique for finding a specialized form of information known as the law.

case brief
An objective summary of the important points of a single case; a summary of a court opinion.

CLASSIFICATION OF LAW AND LEGAL MATERIALS

Previous chapters have discussed the various sources of law. Beginning with the constitutions of the United States and the several states, we saw that official sources of law emanate from the three branches of government that these constitutions create: the legislature, the executive, and the judiciary. Each of these branches of government

produces laws that vary greatly in form as well as content in the world of legal materials.

As we begin our examination of these materials, a review of the traditional organization of law into specific areas provides a helpful overview of the range of legal authority. By legal authority, we mean that the specific legal materials represent various points of law. A legal professional working in the field—paralegals as well as lawyers—perform legal research by systematically wading through legal materials to find the legal authority that might affect a client's legal position.

Within the law office, a legal professional examines each client's situation and gives it careful consideration in light of the existing legal authority. This examination must consider the client's facts as well. Whether the client is seeking to contest a government agency's decision, planning his or her estate for a family, developing a parcel of land, or defending an eviction or a criminal prosecution, the legal professional's first task is to identify the legal authority that directly or even indirectly governs the client's facts and thereby determines the client's legal position. Thus, the first step in evaluating a case is to identify the area of law applicable to the client's specific facts. Once having identified this area, the legal professional must probe further by identifying which part of that applicable law applies. The world of legal materials is vast and constantly growing. The landscape of law is classified into several different categories and subcategories. Thus, a beginning student in law must be aware of these classifications to identify that area pertaining to the client's matter at hand.

State and Federal Law

The last chapter identified one of the major classifications in American law, the distinction between state and federal laws. Specifically, the United States originated and still exists as a nation composed of several different quasi-sovereign states. Although all of the states operate in a similar fashion, each has its own form of government and laws. Each state also has its own constitution, which often mirrors the federal Constitution. At the same time, we saw that the federal Constitution is a document that each of the states has ratified as a condition for their admission to the United States, and by doing so, they ceded some of their sovereignty in the interest of a forming a single nation. Thus, the federal Constitution is different from the state constitutions, in that the federal Constitution specifically provides for the supremacy of federal government law over all state laws. As a result, federal law preempts or overrides any conflicting state laws.

At the same time, the states have the major role of governing and regulating our day-to-day lives. Often, state laws can legislate the same subject matter as existing federal

A DAY IN THE LIFE OF A REAL PARALEGAL

Paralegals often occupy the front line of a law office, particularly in the offices of small law firms and solo practitioners. As such, a paralegal may be the first person that a prospective client will meet. In an interview known as an initial consultation, paralegals will take down the information about the prospective client's situation and answer questions about the office, taking care not to give any legal advice. To be able to discuss the client's matter, a paralegal must be aware of a substantial amount of law. After taking down basic information, the paralegal discusses the client's matter with an attorney in the office. Once the paralegal and the attorney have identified the legal ramifications of the client's situation, the attorney takes over and completes the initial consultation, giving the client a legal evaluation. In this way, the paralegal and the attorney work as a team. With knowledge of the law, the paralegal is able to conduct the consultation efficiently by asking for pertinent information from the client and then discuss the matter with the attorney. From this information, the attorney can assess the situation and give the client an evaluation.

law. For instance, many if not most states have consumer laws that protect consumers from unscrupulous business practices. There are also a number of federal consumer protection laws that do the same. Another example are the state and federal antidiscrimination laws that outlaw discriminatory practices based on race, color, religion, sex, or national origin. In these and many other instances, the federal government has not declared that federal laws are exclusive and there is no preemption. Therefore, a person who feels he or she has been harmed by unsavory business practices or unlawful discrimination may seek protection under either or both federal and state laws. As noted in Chapter 3, federal law often appears to play a larger role than state law. However, state laws primarily govern our lives on a daily basis, because states are free to legislate on any matter not reserved to the federal government by the Constitution.

Civil and Criminal Law

Both the federal and state governments make the distinction between **civil law** and **criminal law**. Essentially, the difference between civil law and criminal law lies in the harm involved, the parties involved, the procedures employed, and the remedies or punishment imposed. Generally, civil laws concern themselves with the harm, whether personal, property or monetary, suffered by an individual or business entity due to the action or inaction of another party. With criminal laws, the state or federal government seeks to punish an individual (or business entity) for certain types of behavior, whether or not any harm may have resulted. In criminal law, the theory justifying the government's role as prosecutor is that the public has suffered harm.

civil law
The legal rules regarding offenses committed against the person.

criminal law
The legal rules regarding wrongs committed against society.

The Parties

A simple example of how civil law operates would be a simple automobile accident in which an individual accidentally drives his or her motor vehicle into another's. If one of the parties had caused the collision, he or she would be liable to the other civilly. Here, **liability** means that the person was found at fault and has to pay monetary damages to the other party for any injuries or damage caused to his or her property. In a civil action between the parties over the automobile collision, the harmed party—the plaintiff—would invoke the civil law of negligence against the party alleged to have been at fault—the defendant.

liability
A jury's or judge's determination that one party is responsible for injuries to another party; the basis for an award of damages.

As will be discussed at length in a subsequent chapter, the civil law known as negligence permits redress for unintentional harm in cases in which the party alleged to have caused the harm acted without the proper care under the circumstances. The harmed party could elect not to file a civil lawsuit, perhaps if the parties decided to settle the matter before a lawsuit is filed in court. In either event, the government would not become involved, as this dispute is purely a civil matter between private parties.

In a criminal matter, the government, whether state or federal, becomes very much involved. In fact, the government occupies the same position as a plaintiff in a civil action. However, in criminal cases, the government acts as a prosecutor in the criminal proceeding. The person accused of having committed a crime is the defendant. The name of the prosecuting entity is used first in the title of a criminal case, followed by the defendant's name. Thus, a criminal proceeding brought against Mary Jones by the federal government would be entitled *United States v. Jones*. State criminal cases vary in name. Sometimes the prosecutor is called "People" or "State." States that regard themselves as "commonwealths" for mere historical reasons would name the case against Jones *Commonwealth v. Jones*.

The Differences in Civil and Criminal Cases

In both civil and criminal cases, the final outcome is known as a **judgment**. Strictly speaking, a judgment merely consists of a court-issued document stating the final result of a

judgment
The court's final decision regarding the rights and claims of the parties.

case. Often, a judge's signature or a certification by the clerk of court appears on the document as an indication of the document's official entry in the court's file. In civil cases, the judgment consists of a finding that the defendant is liable or not liable to the plaintiff for either a certain amount of money or subject to a court order, such as an injunction. However, in a criminal case, a judgment states whether the defendant has been found guilty or not guilty of having committed the crime of which he or she was accused. Notice that the notion of innocence is absent. In criminal cases, a judgment entered against the defendant is followed by a punishment meted out by the government.

burden of proof
Standard for assessing the weight of the evidence.

preponderance of the evidence
The weight or level of persuasion of evidence needed to find the defendant liable as alleged by the plaintiff in a civil matter.

clear and convincing evidence
Having a high probability of truthfulness, a higher standard being preponderance of the evidence.

verdict
Decision of the jury following presentation of facts and application of relevant law as they relate to the law presented in the jury instructions.

beyond a reasonable doubt
The requirement for the level of proof in a criminal matter in order to convict or find the defendant guilty. It is a substantially higher and more-difficult-to-prove criminal matter standard.

alibi
A defense to a criminal proceeding stating the defendant was elsewhere when the alleged crime was committed.

Judgments in either type of case, civil or criminal, come about as the result of the evidence submitted by the parties. The amount and quality of the evidence varies with the type of case. In civil cases, the plaintiff must prove that his or her version of what happened was more likely than not. Thus, the plaintiff must carry the **burden of proof** in civil cases to prove his or her version of the case by a **preponderance of the evidence**. In civil cases, there can be conflicting evidence, all from credible sources. However, the judge or the jury hearing the evidence needs only to determine which version was *more likely* when reaching a final conclusion regarding what they believe actually happened. Some civil cases, such as those alleging fraud, require proof according to a higher standard known as **clear and convincing evidence**. The difference between the two burdens of proof involves both the quantity and the quality of the evidence. Clear and convincing evidence convinces a judge or jury that the plaintiff's version was *substantially more likely than not*. A jury's finding, whether in a civil case or criminal case, is called a **verdict**, which becomes the basis for a judgment.

In criminal cases, the stakes for the defendant are much higher. With a guilty verdict, the judge may impose a fine, imprisonment, or worse on the defendant. For these reasons, the amount and quality of the evidence that the government must present to support a guilty verdict at a criminal trial is much greater than in civil cases. The government must carry the highest burden of proof, that is, **beyond a reasonable doubt**. Under this standard, the government must prove its case so convincingly and conclusively that there cannot be any reasonable possibility that the defendant is anything but guilty. If, for example, there is credible evidence that there is a mistaken identity or that the defendant had an **alibi**, proving that he or she was elsewhere when the crime was committed, there is the possibility for reasonable doubt. To many, the burden of proof creates a paradox in criminal trials. Ultimately, the trial is not about whether the defendant actually committed the crime but whether the government can prove the charges beyond a reasonable doubt. The distinction between civil and criminal law is easily discernible. However, the subcategories within each area of law can present a bewildering array of legal classifications.

Figure 4.1 summarizes the more salient distinctions between criminal and civil cases.

Crimes and Their Variations

misdemeanor
A lesser crime punishable by less than a year in jail and/or a fine.

felony
A crime punishable by more than a year in prison or death.

element
The constituent parts of a crime or civil cause of action that must be proved by the prosecution or plaintiff to establish the defendant's liability.

Certain laws describe crimes and what behavior constitutes punishable behavior. Crimes are almost always defined by statutes enacted by the legislature. Almost all criminal laws set up two levels of crimes: **misdemeanors** and **felonies**. Misdemeanors are crimes that involve offensive yet petty behavior, such as disorderly conduct or shoplifting, punishable by a small fine or imprisonment for less than a year. Felonies, such as robbery, drug trafficking, kidnapping, and murder, stand for a class of more serious crimes that are punishable by imprisonment for more than a year, together with a fine assessed by the court.

Court decisions often interpret criminal statutes in a fashion that may establish precedent as to how the criminal statutes should be read. However, the statutes themselves set out the elements of what constitutes a crime. An **element** is one of several items,

Type of Case	Parties	Legal Representative	Stakes	Standard of Proof	Result or Remedy
Criminal	Government vs. individual or business entity	Prosecutor vs. defense counsel	Punishment: Fine, imprisonment, or worse	Beyond a reasonable doubt	Guilty or not guilty (if trial held)
Civil	Individuals, business entities, or government	Plaintiff and defendant, each with own counsel	Money or court order, e.g., TRO	Preponderance of evidence, sometimes clear and convincing evidence	Judgment to pay plaintiff money or court order; judgment for defendant

FIGURE 4.1 Distinctions Between Criminal and Civil Cases

all of which the government (the **prosecution**) must prove in court to show that the defendant has committed the crime. By presenting sufficient evidence to support each and every element for a certain crime, the government has established what is known as a ***prima facie*** case. The failure to establish a *prima facie* case will result in a dismissal of the criminal case. However, if faced with a *prima facie* case, the defendant is obliged to offer his or her own evidence to counter the government's *prima facie* case. The defendant may do so in several different ways.

Initially, the defendant may present evidence that conflicts with the government's *prima facie* case. For instance, evidence as to a mistaken identity would attempt to show that the defendant had been confused with the actual perpetrator. Other evidence to counter the government's case might attack the credibility of the government's witnesses or the authenticity of a piece of evidence. When a defendant offers no new facts and primarily disputes the government's *prima facie* case, it is known as a **rebuttal**. That is, the defendant is not presenting any explanation or excuse that is recognized by the law. The defendant's case merely rebuts the government's proof, thereby attempting to establish reasonable doubt and nothing more.

More **defenses** are available to a defendant in the form of a legally recognized justification or excuse that presents evidence that can establish additional facts. For example, an alibi attempts to prove that the defendant was elsewhere by presenting additional evidence to prove that fact. The type and quantity of proof required to establish an alibi is also prescribed by criminal laws, known as defenses. Other types of defenses to crimes constitute a form of justification, such as self-defense or insanity. Both of these types of defenses do not dispute the fact that the defendant may have committed the offense. However, the law recognizes the right to take measures of self-protection and that a person of insufficient mental capacity should not be held responsible for his or her acts. Thus, the law offers what are known as **affirmative defenses** to allow criminal defendants to either negate the criminal act or show that they did not have the requisite intent to commit the crime.

Most crimes require the government to prove, as an essential element of a *prima facie* case, that the defendant possessed the intent or ***mens rea*** to commit the crime. Like the statutes that define crimes themselves, criminal statutes also define crimes in terms of required acts and required states of mind, or "intent" to commit the crime. Thus, the prosecution must convince a judge or jury that the defendant had intended to violate the criminal statute. For example, in most states, the crime of assault and battery is committed when one person (1) tries to or does physically strike another, (2) with the intent (*mens rea*) to cause fear of harm or offensive physical contact. Once the government has presented sufficient proof to support both elements, the government has established a *prima facie* case.

A defendant accused of assault and battery would then have the choice of disproving the government's case (rebuttal). Alternatively, the defendant may wish to show

prosecution
Attorney representing the people or plaintiff in criminal matters.

prima facie
(Latin) "At first sight." A case with the required proof of elements in a tort cause of action; the elements of the plaintiff's (or prosecutor's) cause of action; what the plaintiff must prove; accepted on its face, but not indisputable.

rebuttal
Refutes or contradicts evidence presented by the opposing side.

defense
Legally sufficient reasons to excuse the complained-of behavior.

affirmative defense
An "excuse" by the opposing party that does not just simply negate the allegation, but puts forth a legal reason to avoid enforcement. These defenses are waived if not pleaded.

mens rea
"A guilty mind"; criminal intent in committing the act.

mistaken identity through evidence by establishing an alibi. Using an affirmative defense, the defendant could show the physical act was done in self-defense, meaning he or she was in fear of imminent physical harm and took action to defend him- or herself. Finally, the defendant could show that he or she did not possess the requisite *mens rea* by proving that the touching was accidental, occurred while the defendant was insane, or took place with the victim's consent. Thus, criminal statutes define the crime—behavior that is offensive to the state—and allow for legally recognized excuses for such behavior. The government must address the elements of the crime, and the defendant has the opportunity to rebut or offer an excuse recognized by law.

cause of action
A personal, financial, or other injury for which the law gives a person the right to receive compensation.

damages
Money paid to compensate for loss or injury.

remedy
The means by which a court, in the exercise of civil law jurisdiction, enforces a right, imposea penalty, or makes some other court order.

The Nature of Civil Cases

Civil cases follow the same pattern. Instead of a criminal statute that prescribes the elements of a crime, the elements for civil cases traditionally derive from common law or court decisions. More recently, statutes have become a major source of law to prescribe the elements necessary to prove in civil actions. Instead of constituting a crime, the elements of a civil matter make up a **cause of action** or claim for relief. Whether prompted by statute or common law, lawsuits invoking civil law are private disputes. The government may also appear in the lawsuit as one of the parties, either the plaintiff or defendant. However, the government stands on an equal footing with private parties in civil matters. Like any other party to a civil lawsuit, the government seeks to redress or acts to defend against a civil lawsuit.

Civil wrongs differ from crimes, in that the nature of the injury alleged in a civil case is a private concern. Crimes are offenses to society at large, whereas civil wrongs are usually not of public or governmental concern. Both crimes and civil wrongs can arise from the same set of facts. The act of committing the crime of assault and battery may result in the filing of criminal proceedings by the government against the perpetrator, the defendant. The same act of assault and battery could also constitute a civil wrong against the victim, who could proceed as a plaintiff against the same defendant in a civil proceeding.

As in criminal cases, a civil case consists of any number of elements, depending upon the type of case. Similarly, a plaintiff who has submitted enough evidence regarding each element in a civil case has established a *prima facie* case. The defendant in the civil action may offer counterevidence to rebut the plaintiff's *prima facie* case or negate it by proving any number of affirmative defenses available, depending on the cause of action. For instance, the crime and the civil cause of action for assault and battery may be countered by the defendant in both types of cases with the affirmative defense of self-defense.

For every civil cause of action available to plaintiffs, there are various affirmative defenses possibly available to the civil defendant. As in criminal cases, affirmative defenses in civil cases are forms of legal recognition or justification for the defendant's action. In some cases, the affirmative defense acts as a shield that reflects social policy. For instance, a contract to perform an illegal act could not be enforced by a civil action because of social policy prohibiting illegal behavior. Thus, a bet or wager is a contract that is unenforceable by a civil action in states that prohibit gambling.

As mentioned previously, the biggest differences between criminal and civil proceedings are, of course, the consequences. A criminal conviction may result in a fine, a term of imprisonment, or worse. In civil actions, a judgment may take on many different forms. People sue each other usually for **damages**—a term that generally describes judgments that award money to the victor or prevailing party. In civil lawsuits, there are a variety of monetary damages as well as nonmonetary judgments. In formal legal parlance, the judgments sought by parties to a lawsuit are known as forms of relief. You can now see why a legal basis for a civil lawsuit is known as a claim for relief. A form of relief is also known as **remedy**.

COMMUNICATION TIP

Throughout your legal studies, you will be acquiring a whole new vocabulary in legal terminology. To laypersons, these terms are often meaningless legalese. However, to a coworker in the law office, legal terms have precise meanings and are, like all forms of technical terms, a shorthand way of conveying information. Nothing betrays a novice in law more than the careless use of legal terminology. By taking care in using this newly acquired vocabulary, you will be able to communicate effectively with other legal professionals.

In civil actions, these forms of relief or remedies break down into two classifications known as legal relief or **equitable relief**. These classifications come to us as a result of historical developments. The classification between law and equity, often characterized as the difference between monetary damages (legal remedies) and court orders (equitable remedies), is actually far more complex. In England, the interest afforded the highest legal protection was land ownership, and then personal possessions, usually family heirlooms. For that reason, large estates remained within certain families for many centuries. Thus, the King's Court could grant a writ of ejectment, which ordered someone to leave or vacate the plaintiff's land. Although the writ of ejectment does not necessarily involve a monetary award, it was considered a legal remedy in the King's Court of Law. The same is true of the writ of replevin, by which the King's Court of Law ordered the return of a possession or heirloom to its rightful owner. With these minor exceptions, the King's Court otherwise granted monetary awards to the prevailing party.

equitable relief
A remedy that is other than money damages, such as refraining from or performing a certain act; nonmonetary remedies fashioned by the court using standards of fairness and justice. Injunction and specific performance are types of equitable relief.

Today, there are three types of monetary damages that may be awarded in a lawsuit: **Compensatory damages** are awarded for the actual loss suffered by the plaintiff. The concept is that the award is intended to compensate for the loss suffered by the plaintiff as a result of the defendant's civil wrongdoing. Thus, the award of compensatory damages restores the plaintiff back to the position he or she was in before the defendant's wrongdoing. This remedy is known as making the plaintiff "whole." There are two subcategories of compensatory damages. **Special damages** consist of lost wages or earning potential, medical expenses, property damage, and out-of-pocket expenses. Then there are **general damages** that compensate for harm for which only a subjective value may be attached. General damages would include pain, physical suffering, emotional trauma or suffering, disfigurement, loss of spousal companionship, loss of reputation, loss or impairment of mental or physical capacity, and loss of enjoyment of life.

compensatory damages
A payment to make up for a wrong committed and return the nonbreaching party to a position where the effect or the breach has been neutralized.

special damages
Those damages incurred beyond and in addition to the general damages suffered and expected in similar cases.

general damages
Those that normally would be anticipated in a similar action.

Punitive damages penalize or make an example of particularly offensive behavior by a defendant. Also known as exemplary damages, such awards are meant to make an example of the defendant as a deterrent to others. Punitive or exemplary damages are awarded only in special cases in which the conduct was especially oppressive or egregiously invidious, and they are over and above the amount of compensatory damage. Finally, there are **incidental** or **nominal damages**, which award a successful plaintiff only a token amount of damages, usually $1. Even though the plaintiff has won, the award of nominal damages represents a vindication of the plaintiff's claim, as well as disapproval of the defendant's conduct. However, due to the lack of provable loss, the plaintiff awarded nominal damages has won the war but gained only a Pyrrhic victory.

punitive damages
An amount of money awarded to a nonbreaching party that is not based on the actual losses incurred by that party, but as a punishment to the breaching party for the commission of an intentional wrong.

incidental or nominal damages
Damages resulting from the breach that are related to the breach but not necessarily directly foreseeable by the breaching party.

CYBER TRIP

Punitive damages have generated controversy. On the Internet, view the debate by visiting the following sites:

1. www.atra.org/show/7343
2. www.law.upenn.edu/bll/archives/ulc/mpda/MPDAFNAL.htm
3. www.acsblog.org/economic-regulation-employment-leading-conservative-activist-seeks-punitive-damages.html

What position do you take on punitive damages?

CASE IN POINT

PUNITIVE DAMAGES AWARDED FOR OUTRAGEOUS CONDUCT

DIXON V. INT'L BROTHERHOOD OF POLICE OFFICERS, 2007 U.S. APP. LEXIS 22891 (1ST CIR. 2007)

At the age of 23 years, Vanessa Dixon joined the Lowell Police Department in 1994, when there were fewer than 10 female police officers in a force of nearly 300. Early evaluations of her work were extremely positive, and she received special awards from her unit for her work with young people.

The day Dixon joined the police department, she automatically joined the police officers' union, the International Brotherhood of Police Officers ("IBPO"). On October 26, 1998, Dixon joined seven of her fellow officers and six corrections officers on a hired bus to travel to Boston for a union event. She was the only woman on the trip, other than the bus driver. From the outset of the trip, Dixon was subjected to gender-based criticisms by the other officers regarding what she was wearing and her presence on an all-male trip. John Leary—a police officer whom Dixon had once dated and who was sitting directly across the aisle from her—started yelling at Dixon. The shouting escalated as other people at the back of the bus joined in. The comments, directed at Dixon and a male police officer, turned offensively sexual. The male officer described the barrage as "totally inappropriate conversation, verbally abusive, threatening." Throughout all of this, the president of the local union did not intervene to stop the abuse or try to reassure Dixon when she wanted to flee.

On November 20, the very next day, Leary sought and received a temporary restraining order ("TRO") against Dixon. Leary alleged that Dixon had made threatening comments to him the evening of the bus incident. He did not explain why he had waited a month to seek protection from Dixon in the form of a TRO. Leary knew the TRO would have the result, under department policy and Massachusetts law, of forcing the police department to put Dixon on administrative leave and confiscate her weapon while the TRO was in effect. Although Dixon hired a lawyer and went to court to deny the allegations, Leary never returned to court to support his TRO or seek continued protection, allowing the TRO to expire after its initial 15-day coverage. Dixon testified she was humiliated when she had to explain her month-long absence, caused by the TRO, to the teachers, students, and parents with whom she worked at Rogers Middle School. Because of the TRO, she had to get special permission to renew her firearms permit, and she also avoided participating in outreach programs that required a background check.

After a number of other incidents, Dixon brought suit in October 2001 in the District of Massachusetts alleging discrimination and retaliation under both state and federal statutes, as well as assault, intentional infliction of emotional distress, and defamation. After an 11-day jury trial in the fall of 2005, the jury found for Dixon on the discrimination and retaliation claims. In addition to compensatory damage awards totaling $1,205,000, the jury awarded punitive damages of $1,000,000. The defendants appealed.

In affirming the award of both compensatory damages as well as punitive damages, the Court of Appeals noted that punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or reckless indifference to the rights of others. Vanessa Dixon has since left the police force and now teaches Criminal Justice at Middlesex Community College in Lowell, Massachusetts.

QUESTIONS ABOUT THE CASE

1. Do you think that the verdict was justified in this case?
2. What social policy aims are met by the award of punitive damages?
3. Why was this lawsuit brought to federal court? What was the basis for the federal court's jurisdication?

injunctive relief
Court order to cease or commence an action following a petition to enter such an order upon showing of irreparable harm resulting from the failure to enforce the relief requested.

temporary restraining order (TRO)
A court order barring a person from harassing or harming another.

Equitable relief, steeped in religious and canonical traditions, varies greatly in the forms of relief available. The most prevalent forms are **injunctive relief**, or court orders commanding a party to the lawsuit to cease and desist from a certain activity. Modern-day variations of these injunctions include **temporary restraining orders** that occur frequently in domestic relations matters. In most cases that request injunctive relief, a court order may come in three stages. First, the court may grant a temporary restraining order at the outset of the action. Second, usually 10 days afterward, a court may grant a preliminary injunction, which will last during the pendency of the lawsuit. Third, there is the permanent injunction, which constitutes the final judgment of the lawsuit. Originally, common law courts fashioned these forms of equitable relief to protect landowners. Use of one's land was thus within the jurisdication of equity courts that became authorized to issue orders of abatement against a landowner who was using his or her property in a way that interfered with neighbors' use of their land.

Legal Remedies	**Compensatory—Monetary Damages**	**Losses recognized**
	Special Damages	Earnings potential Medical expenses Property damage
	General Damages	Pain and suffering Reputation Trauma Physical or mental capacity
	Punitive or Exemplary Damages	To punish extreme behavior
	Ejectment	Orders trespassers off land
	Replevin	Orders return of personal property
Equitable Remedies	**Injunctive Relief**	**Types**
		Temporary restraining order Preliminary injunction Permanent injunction Abatement—land use
	Contract Remedies	
		Specific performance Rescission Reformation

FIGURE 4.2 Remedies in Civil Actions

In actions for breaches of contracts, equity can play a large part in fashioning various non-monetary remedies for the wronged party in a transaction that has gone sour. A court sitting in equity may have a party perform its obligations under the contract by issuing an order for **specific performance**, particularly if the object of the transaction involves real estate or a unique object. If there has been a mutual misunderstanding as to the contract terms, a court may issue the equitable remedy of **rescission**, which nullifies the contract. In other cases, a court may order **reformation**, altering the contract to conform to the legal principles of fairness or justice.

To invoke the equity court's powers, a plaintiff needs to show that the available remedies at law (monetary damages, ejectment, or replevin) are insufficient and provide inadequate relief for a particular injury. Thus, the imposition of equitable relief applies to situations for which there is a showing of uniqueness or compelling need. Nevertheless, because of its overarching nature as the conscience of the law, equity touches every aspect of civil law. Figure 4.2 summarizes the available remedies or forms of relief in civil actions.

specific performance
A court order that requires a party to perform a certain act in order to prevent harm to the requesting party.

rescission
A decision by the court that renders the contract null and void and requires the parties to return to the wronged party any benefits received under the agreement.

reformation
An order of the court that "rewrites" the agreement to reflect the actual performances of the parties where there has been some deviation from the contractual obligation; changed or modified by agreement; that is, the contracting parties mutually agree to restructure a material element of the original agreement.

property law
Rights a person may own or be entitled to own, including personal and real property.

Civil Law: Substantive Subject Areas

Today, civil law covers an enormously vast area and grows with the passage of each new legislative year. Civil law is more ample and complex than criminal law. Beginning with the common law decisions from England, civil law has continued to expand through judicial decisions as well. Three major areas of law have provided the original sources for the branching areas of civil law. They are **property law**, contract law, and torts. From these three subject areas, almost all of Anglo-American civil law has developed. In future chapters, we will discuss these areas of law, among others, in great depth.

Property Law

Property law consists of rules regarding the ownership of land and personal possessions, which includes modern forms of property, such as shares of stock, patents, and copyrights. Land as a primary interest was afforded high protection under English

law. Thus, property rules have taken on significant meaning in American law. Property law breaks down into two types of property. Land and those items that were intended to be attached permanently to the land are called fixtures. Thus, buildings and other permanent items, or fixtures, on the land are governed by the law regarding **real property**. Anything else that is not land or affixed to it is covered by the rules for **personal property**, which is also referred to as personalty or chattels. Caution must be taken, for the rules of property law are different depending on the type of property involved. With the growth of corporations and technology, personal property also includes **intangible property** for the legal protection of property interests in songs, computer programs, shares of stock, inventions, and financial instruments, all of which are ideas—that is, things that we cannot touch and therefore are, for obvious reasons, called intangible.

real property
Land and all property permanently attached to it, such as buildings.

personal property
Movable or intangible thing not attached to real property.

intangible property
Personal property that has no physical presence but is represented by a certificate or some other instrument, such as stocks or trademarks.

Property law also covers how interests in property are transferred. For instance, property law employs the common law concept of **title**. A person who owns a certain property, in whatever form, as a matter of law, also has title. Title is transferred to another through transactions that require certain formalities for the new owner to gain title and therefore legal ownership. Transactions such as gifts, sales contracts, and inheritance are just a few of the types of ways that transfer title. **Possession** is another concept in property that overlaps title yet often imparts different meanings. Possession applies to both land and personalty. Probably the most utilized, and certainly the most important, common law writ was for **trespass**, by which the true title holder of the property was able to enforce the most important aspect of property ownership: the legal ability to exclude others from the possession or use of property.

title
The legal link between a person who owns property and the property itself; legal evidence of a person's ownership rights.

possession
Having or holding property in one's power; controlling something to the exclusion of others.

trespass
Intentional and unlawful entry onto or interference with the land of another person without consent.

A person may have or be in possession, and even have use of, the property in question but not have title. Common examples of these scenarios include legally defined situations, such a leases or a bailment. In a lease of an apartment or a car, the lessee is paying for the legal right to use the property that the lessor owns and for which it has title. The lessee has the right of possession but does not have title. Property law rules govern the rights and obligations of the lessee and lessor with respect to each other and their relationship to the property.

A bailment is a similar situation but covered by different property law rules. Like a lease, a bailment is a legal relationship created when a person gives property to someone else. However, the person receiving the property does not have the right to use the property but is responsible for the property's care or safekeeping. Checking your coat at a restaurant or a museum or parking your car in a lot or garage may create a bailment in which you are the bailor, and the person or entity receiving the item is the bailee. The property law governing bailments imposes the obligation of taking care of the property upon the bailee. Thus, many coat checkrooms and parking garages will take steps to disclaim a bailment situation by notifying you that they are not responsible for any damage on the receipt or a sign or a written contract. Whether the law will still impose the obligation of care if the property is damaged will depend upon the circumstances. Nevertheless, you can see that the awareness of impact of property laws affects how people view the relationships created by the law. Ultimately, property laws classify property and provide for rules that describe our relationships to various forms of property.

Contract Law

contract
A legally binding agreement between two or more parties.

Common law provided for a means to enforce a **contract**. Originally, contracts consisted merely of the undertaking of a promise. In early common law, promises were considered, at times, solemn undertakings that required enforcement as a matter of moral or ethical compulsion. However, with the rise of mercantilism and trade among the European nations, the idea of enforcing a mere promise without a mutual undertaking

from the other side became obsolete. The legal elements necessary for the creation of enforceable contracts included the notion of a bargained exchange in which there was both give and take on both sides. Soon, the idea that contracts should be supported by notions of benefit and detriment from both of the parties engaged resulted in the requirement of **consideration**, or the exchange of value from both sides, as an essential element to the formation of all enforceable contracts.

consideration
An essential element of a contract consisting of benefit or right for each of the contracting parties.

Contract law also required that the parties understood that they had indeed entered into a form of enforceable agreement, the terms to which they had agreed. The existence of an offer and acceptance also became necessary elements to the formation of a contract. Social policy concerns then came into play, so that persons of tender age or impaired mental capacity could not legally enter into contracts. Larger social policy issues also propelled the development of contract law from its common law origins. If you think about it, enforceable and cohesive contract laws are essential for trade and economic growth. If contracts were not defined by the law and could not be enforced, few would enter into business agreements. Business depends on the law's backing to be able to engage in trading and exchanges, which are the entire basis for businesses. Enforceable transactions such as extending credit, installment sales, and secured interests have given birth to commonplace devices we now take for granted, such as credit cards, mortgages, and layaway plans. Contract law is an outgrowth of a law and economics point of view. Allowing for the enforceability of contract agreements, contract law has contributed much to society's economic development.

Torts

Torts is the third of the big three areas of civil law that evolved from property law concepts. The writ of trespass was a common law remedy for the civil law violation of a person's property rights. Later, the common law courts needed to invent another writ to cover cases in which the issue was not possession or ownership of property but damage done to a person's property, including his or her physical being and reputation. The writ of trespass was developed to cover almost any wrongful damage done to a person's body, land, or personal property and, later, feelings. Now, this writ is known as a **tort**, a civil law cause of action to remedy an injury. Torts include a wide variety of civil law situations known as actionable wrongs. Unless the situation directly involves property or a contract, chances are that it is covered by tort law. Today, tort law has grown so extensively that some ideas from torts have spilled over into property and contract law.

tort
A civil wrongful act, committed against a person or property, either intentional or negligent.

Torts are divided into intentional torts, unintentional torts, and strict liability torts. Intentional torts involve actionable wrongs such as assault and battery, discussed previously. Defamation, fraud, and invasion of privacy are other forms of intentional torts in which the person committing the wrong, known as the **tortfeasor**, intended to do the harm. Such cases are actually rare in comparison to the unintentional torts, or negligence.

tortfeasor
Actor committing the wrong, whether intentional, negligent, or strict liability.

Unintentional torts, or negligence cases, make up the largest number of tort cases filed each year in the United States. As a subdivision of tort law, negligence consists of cases involving injury caused by accidents. Accidents result from the unreasonable behavior of the tortfeasor. By unreasonable, we mean that the tortfeasor did not exercise due care under the circumstances, whether it was the failure to stop at a red light or to use the proper materials in the construction of a building. The failure to use reasonable care constitutes a breach of that duty that was the cause of the injury suffered by the plaintiff. That connection is known as proximate cause. Thus, negligence has been defined as the lack of due care, which causes an injury.

Strict liability cases are torts of relatively recent creation. Strict liability cases are civil causes of action against the tortfeasor, who is engaged in an unreasonably or inherently dangerous activity. The concept of strict liability may also apply to manufacturers of products that cause injury. For either situation, the plaintiff does not have to show that the defendant was negligent. The doctrine of strict liability reflects social policy concerns over product safety and public protection from unreasonable harm. Thus, the use of explosives or radioactive materials or keeping of wild animals are examples of inherently dangerous activities for which an injured plaintiff need not show that the defendant was negligent. Similarly, for cases in which an injury results from a defective product, the plaintiff need not show that the defendant manufacturer was negligent.

The legal doctrine of strict liability furthers the social policy concerns of protecting the public from harm and encourages manufacturers to test their products rigorously. From a law and economics point of view, the strict liability doctrine balances the harm suffered by the plaintiff against any hardship to the defendant or manufacturer. By placing the economic burden on the manufacturer to compensate the injured plaintiff, the law places the responsibility on the party economically more able to absorb the costs. Placing the economic costs on the manufacturer actually passes the costs onto other consumers in the form of higher prices. As such, the manufacturer becomes the insurer of consumers who are injured by its defective products, with premiums paid by consumers.

SUBSTANTIVE LAW AND PROCEDURAL RULES

Beyond the major classifications of property, contract, and tort, other civil matters include constitutional law, domestic relations, bankruptcy, corporations, tax, and numerous other legal topics. In fact, the several types of civil law greatly outnumber criminal law. Civil laws are more pervasive because the scope of legal regulation covers almost every aspect of American life. Criminal law, in contrast, deals with a smaller but nonetheless significant aspect of human activity. Yet one constant classification shared by both criminal and civil law consists of the division between the laws that directly affect our lives and activities and the rules designed to enforce or pursue those laws.

substantive law
Legal rules that are the content or substance of the law, defining rights and duties of citizens.

procedural law
The set of rules that are used to enforce the substantive law.

Substantive laws are those laws that declare our rights, duties, and obligations. Our review of criminal law and of the several classifications of civil law present some examples of substantive laws. **Procedural laws**, however, cover the manner in which the legal system operates. Procedural rules also may be considered the rules of the game. That is, for a criminal or civil action to proceed, parties to either type of proceeding must follow procedural rules to enforce their rights under the substantive law.

Procedural rules may greatly affect substantive rights. The statute of limitations governs the time during which an action may be filed in court, whether civil or criminal. In civil cases, the time limitations to file a lawsuit for certain types of cases vary greatly from state to state. Tort actions must be filed in court within one year or up to three years depending on the type of tort. Lawsuits concerning contract matters are generally for longer periods, from four to six years. Lawsuits over property ownership have the longest statute of limitations period, some extending for more than ten years.

Although all civil causes of action are held to the statute of limitations, some crimes do not have a statute of limitations. Misdemeanors and many felonies have a three- to seven-year statute of limitations, which begins to run when the crime is either committed or discovered. Some other felonies do not have any statutes of limitations at all. Crimes such as arson, murder, and war crimes are too heinous for society to forget. However, the basic philosophy underlying statutes of limitations is known as one of repose, meaning that statutes of limitations provide closure or finality. After all, time is the great healer, and society will eventually forgive and forget. As a practical matter, statutes of limitations make sense, because over time, memories fade,

evidence is lost or never found, and people prefer to get past these events and get on with their lives.

Other types of procedural rules include the rules of court procedure. In 1938, Congress enacted the Federal Rules of Civil Procedure (FRCP), a comprehensive modernization of the rules used in all the federal courts in the country. After years of in-depth study and debate by a national commission of legal experts, the adoption of FRCP for the federal court system represented a milestone in court reform. Prior to their adoption, the federal courts had been mired in hypertechnical rules that had much to do with common law forms of writs and the division between law and equity. However, these ancient procedural rules had little regard for fairness or the efficient administration of justice. With the advent of the new FRCP, law and equity were merged, and clear, succinct rules streamlined the progression of cases through the federal courts. Since 1938, almost all of the states' court systems have, with some variations, adopted the FRCP as a model for procedural rules in civil cases.

In criminal law, procedural rules play an entirely different role. Because of the severe consequences that may result and society's keen interest in maintaining public safety, criminal procedure stands sharply apart from its civil counterpart. You will recall that the burden of proof is much more strenuous in criminal cases than in civil cases. Moreover, the prominent role of the United States Constitution in criminal cases gives rise to complex issues such as the Fifth Amendment privilege against self-incrimination and other rights, as you will see later. There are also other important principles, such as the Fourth Amendment right against unreasonable search and seizure, and a host of other Constitutional issues. In fact, criminal procedure is a subject that is taught in law schools as a separate, upper-level course because of the highly specialized nature of the procedural rules involved in criminal cases.

THE HIERARCHY OF LEGAL LITERATURE

With the publication of court opinions and the enactment of new statutes every year, all 50 states and the federal government produce vast amounts of legal information. This information accumulates and builds on itself because of the tradition of precedent. In the last chapter, we described the various sources of law and described their nature and effect. We also noted that assembled together, these materials fall into a hierarchy of what is known as legal authority. By authority, we mean that these sources of law have binding effect and are the basis for decisions by courts and, more generally, behavior in our society. That hierarchy consists of an order in which these sources of legal authority should be followed. We already understand that federal law preempts or supersedes state law. Thus, sources of federal law, or federal legal authority, is almost always above state law. At the same time, both realms mirror the other in their types of legal authority. Moreover, the federal and state systems have identical regard for sources of law, in the following order of importance:

Constitution
  Statutes & Treaties
    Administrative Regulations
      Court Opinions

Court opinions actually occupy a unique position in the constellation of legal authority. Under our system of checks and balances, the courts interpret the statutes enacted by the legislature and signed into law by the executive (president or state governor). Because of the practice of using precedent, court opinions become an important source of law, particularly because of the common law traditions that were imported to the United States

CASE IN POINT

CASE SUMMARY

MARBURY V. MADISON, 5 U.S. 137 (1803)

The idea that a court's interpretation of a constitution or statute is binding on the other branches of government is known as judicial review. The power to act as the last word also includes the power to declare federal (and state) laws unconstitutional and therefore unenforceable. Events taking place early in the country's history shaped the way our legal system functions today. In the case of *Marbury v. Madison*, 5 U.S. 137 (1803), one of the most important decisions in American legal history, the United States Supreme Court established the idea of judicial review.

In 1800, the Jeffersonian Republicans defeated the Federalists and gained control of the Congress and the presidency. Outgoing Federalist President John Adams granted William Marbury a "midnight" appointment as Justice of the Peace in the last days of the presidential term. Upon gaining control, the Jeffersonians attempted to block Adams's judgeship appointments to spread their influence over the judiciary as well. Even though the outgoing Federalist-controlled Senate had approved Marbury's appointment, the commission for his judgeship remained undelivered.

Marbury sued the new Jeffersonian Secretary of State, James Madison, claiming that Madison was unlawfully withholding the commission, bringing his case directly to the U.S. Supreme Court, as allowed by a section of the Judiciary Act of 1789. John Marshall, a Federalist whom Adams had been appointed Chief Justice of the Court, foresaw that the Jeffersonians would ignore a court order in Marbury's favor. In doing so, the newly established Supreme Court's authority would be severely weakened as a coequal branch of government. Yet, at the same time, ruling against Marbury would make it appear that the Court was fearful of the new Congress and president. Either way, Marshall felt that the rule of law would be subverted.

In *Marbury v. Madison*, Marshall ruled that Marbury was entitled to the commission as a matter of law. However, Marshall also ruled that the section of the Judiciary Act that Marbury was proceeding under was an unconstitutional grant of power by Congress, because it allowed the Court to act beyond the powers granted to it under Article III of the Constitution. In doing so, Marshall censured the Jeffersonians as having acted illegally and maintained the dignity of the Court and the rule of law.

Historians and legal scholars have praised the decision as a brilliant maneuver out from a sticky spot. By saying that the Court did not have power to decide, Marshall's decision actually invested the Court with greater power. Marshall firmly established the power of the Supreme Court as the final arbiter of the meaning of the Constitution—a role that has since been respected by everyone.

The Court did not declare another act of Congress unconstitutional until 1857 and has rarely exercised its power to do so. Nevertheless, Marshall's decision established the Supreme Court as a true coequal branch of government. Later, the Court's power to act as the last word on Constitutional issues became the basis for declaring our fundamental rights.

QUESTIONS ABOUT THE CASE

1. What role does judicial review play in our governmental system of checks and balances?
2. Do you think that the Supreme Court should have the last word on how the Constitution should be interpreted?
3. Do you think that the Supreme Court should have the power to declare fundamental rights?

from England. Under common law tradition, the courts wielded considerable power in pronouncing the law as they saw fit. Even in their interpretations of statutes passed by Parliament, Congress, or a state legislature, common law courts have ended up having the final say when they apply the laws. As a result, many believe that much of our law comes to us as the result of court opinions. This belief is why judicial appointments to the U.S. Supreme Court and even state supreme courts can generate great public controversy.

What made court opinions unique in the grand scheme of things was, again, the historical development of the judicial branch. Although the court opinions appear at the bottom of all the sources of law, a court's power to make binding interpretations of constitutions and statutes commands the attention of the legal universe. The power of precedent that comes from the common law traditions we inherited from England has kept court opinions at the forefront regarding the status of a law. The meaning of any part of a constitution or a statute first comes from its own language. However,

even though the meaning may be clear, a court may have something to say about that constitution or statute.

When a court has published an opinion in a case involving a constitutional provision or statute, the precedential value of the opinion affects how the statute should be interpreted in future cases. This value also applies to the way that courts interpret treaties and administrative regulations. Thus, a professionally competent technique of researching the law means reading the constitutional, statutory, or regulatory provision involved, and then seeing if any court has published an opinion that interpreted the provision. All of these sources of law—constitutions, statutes, treaties, regulations, and court opinions—declare the law and indeed are the law incarnate, so to speak. As such, they are all are referred to as **primary authority**. Primary authority is the law itself.

primary authority
The original text of the sources of law, such as constitutions, court opinions, statutes, and administrative rules and regulations.

Another form of legal materials may pertain to a source of primary authority or even to legal philosophy. Known as **secondary authority**, materials such as legal encyclopedias, legal dictionaries, scholarly works including treatises and law review articles, and even legal trade magazines, just to name a few types, have some weight as a form of legal authority. The biggest difference between primary and secondary authority is that secondary authority is not binding. Usually, the authors of secondary authority are respected practitioners, judges, scholars, and even law teachers, such as the one teaching you this course. Oftentimes, secondary authority is regarded as a source of information about what the law ought to be, as in a discussion of jurisprudence.

secondary authority
Authority that analyzes the law such as a treatise, encyclopedia, or law review article.

Secondary authority can also help a researcher learn about an unfamiliar area of law. Legal encyclopedias and treatises are materials that teach the reader, whether the reader is a student, practitioner, or judge. Legal encyclopedias explain the law in a general manner and may provide highly specific details, depending on the depth of a certain publication. Most encyclopedias consist of several volumes. Treatises usually cover one specific topic in the law. There are treatises for every area of the law, from admiralty (law of the sea) to zoning, usually written by a law professor or prominent practitioner in the field of their specialty. There are also law review articles that are published by law schools. A dozen or more varieties of secondary authority exist. Some are scholarly in their approach, whereas others are practical and expository. Again, because of the respect accorded to experts and academics, treatises, like other sources of secondary authority, may be highly influential or even forceful but certainly are not binding upon a court, which may feel free to adopt or ignore their ideas.

For the practitioner, secondary authority has some highly practical uses. When confronted with primary authority that runs against your client's situation, you might be able to find some secondary authority that criticizes the primary authority and suggests a change. Citing such secondary authority may make a good showing on behalf of your client in the face of adversity from existing primary authority. Thus, scholarly or expert opinions provided in treatises may persuade a court to find exceptions or even a new path. By the same token, the persuasiveness of secondary authority may serve the purpose of bolstering a legal position that already has the backing of primary authority, lending greater credibility and demonstrating a rock-solid position.

EYE ON ETHICS

Look up the ABA Model Rules of Professional Conduct, Rule 3.1, at www.abanet.org/cpr/mrpc/mrpc_toc.html. Is it a violation of the ethical rules to argue a legal position that is contrary to existing law? You will see that Rule 3.1 permits a legal professional to make a good faith argument to modify, extend, or even abandon existing law. In this way, the ethical rules permit legal professionals to advocate changes in the law. However, the same rule guards against taking a position that is frivolous or groundless.

FIGURE 4.3
Classification of Primary and Secondary Authority

Source	Primary Authority	Secondary Authority
	Constitutions	Legal encyclopedias
	Statutes	Treatises
	Regulations	Law review articles
	Court opinions	Legal periodicals

Certainly in the absence of primary authority on a certain point of law—and it happens frequently—using secondary authority may convince a judge to rule in your favor. Finally, secondary authority is highly useful as an educational tool. If unfamiliar with an area of law, a legal encyclopedia or a treatise can instruct a newbie within a relatively short amount of time. Moreover, the wide range of available encyclopedias and treatises provide the practitioner with various ways to self-educate, either in great detail or as a general overview. Figure 4.3 summarizes the classifications of primary and secondary authority.

COURT OPINIONS

Reading Court Opinions

Since their inception in England hundreds of years ago, published court opinions have been the bedrock of the common law system, as an essential if not central element of the tradition of precedent. As judges made law, court opinions have established themselves as not only the major source for law but also the essential explicator of the law. You will recall that the primary purpose of issuing a court opinion is to resolve the dispute before the court. Thus, court opinions are issued only on a case-by-case basis. They differ from legislative acts (statutes), in that the opinions give an explanation for the decision to the parties and their lawyers. The opinion uses a form of logic known as legal reasoning or **rationale** that is carefully examined by the parties (particularly the losing party) to see if the trial court made appropriate findings of fact and applied the correct legal principles in the correct fashion. Not all cases decided by a court result in an opinion, and not all court opinions get published. In fact, only a minuscule percentage of court cases appear in publications. Most cases are so mundane or offer so little by way of legal reasoning that an opinion or publication is not necessary or even helpful.

rationale
Stated reasoning by a court's ruling.

Court opinions that are published usually come from appellate courts, that is, the intermediate appellate courts and the highest courts. The federal system and some states also publish opinions from their trial courts. Ohio and Connecticut officially publish a few trial court opinions. New York is the only state that regularly publishes opinions of its trial courts as a matter of policy and practice. However, by and large, the opinions from the intermediate appellate courts and highest courts of the states and the federal system command the most attention and are regarded as one of the most important forms of law making. Thus, the decision to publish the opinion in a given case depends on the issues presented and the precedential value of the case. Whether an opinion should be published depends on several factors, such as the overall importance of the case or whether the case offers a new direction or modification to existing law, among other factors.

We understand that the precedent created by published court opinions constitutes a form of law and therefore primary authority. The law created by court opinions contrasts sharply with the sources of law created by other branches of government. As discussed, court opinions function to resolve a dispute between the parties before it, as well as explain how the law applies to that particular dispute. Thus, when a court issues an opinion designated for publication, law has been made. At that

moment, the legal world, or at least part of it, pauses to examine the explanation or the court's rationale, because the decision will become precedent-setting law, to be followed in future cases with similar facts. Keep in mind that the precedent created by court-made law is confined to the facts of the case. Often, the facts of a particular case shape the law that is ultimately created by the court's opinion.

The biggest difference between law declared by legislative statutes and the law made by courts is the specific context of court decisions. As we noted, the rule of law made by court opinions is restricted to the facts presented in the controversy, whereas the law made by legislatures in a statute covers a wide range of general situations. Thus, when a court is deciding a case that involves a statute, or even a common law principle, the resulting decision is an interpretation of the statute or common law only with regard to the facts of the case. A close examination of a court opinion will help you understand how courts make law and, more important, how to read the form of primary authority known as court opinions, or **case law**. Case law is also known as common law, a term that is also understood to mean the law America inherited from England.

case (common) law
Published court opinions of federal and state appellate courts; judge-created law in deciding cases, set forth in court opinions.

Dissecting Court Opinions

Although there may be some variations, most court opinions fall into general patterns and share a similar structure. Cases have names identifying the parties involved. In a case name, the party that initiated the lawsuit or appeal is listed first, and the opposing party is listed second. At the trial level, the plaintiff's name comes first, and the defendant's is second. In criminal cases, the governmental entity is listed first, because it is the party bringing the case to court. At the appellate level, the party appealing ("appellant" or "petitioner") comes first, and the other party ("appellee" or "respondent") comes next. Between the two names is the abbreviation "v." or "vs." for versus. If there are more than two or more parties involved on either side, the case name indicates their presence with the Latin abbreviation, "et al.," which stands for "and others."

Usually an opinion will start by stating the facts of the case. Sometimes, preceding the facts, there may be an introductory paragraph or two in which the court summarizes the legal context of the case. Sometimes, courts may begin with an introduction that is even poetic or philosophical. Because most published opinions come from appellate courts, the next part of the opinion describes the manner in which the case had been appealed to the court, a description known as the procedural history of the case. The procedural history of a case describes how the case came to the appellate court. As you will see subsequently, the procedural history of a case may affect the questions that the appellate court will address.

Court opinions next delve into an analysis of the law and how the law applies to the facts of the case in a part known as the discussion or analysis section. The analysis is usually the longest part of the opinion and explains in detail the applicable law as part of its discussion, using a form of inductive reasoning. This part of the opinion is referred to as the rationale. Eventually, the court comes to a conclusion based on its apparent analysis of the law. The conclusion is known as a **holding** and is shaped as a legal proposition that applies to the facts of the case and sets a precedent for future cases with similar facts. The appellate court's holding is the precedent-setting law.

holding
That aspect of a court opinion that directly affects the outcome of the case; it is composed of the reasoning necessary and sufficient to reach the disposition.

More often than not, an appellate court will assemble a panel of three or more appellate judges or justices to hear a case. Each judge on the panel has one vote. Thus, opinions that are precedent setting represent the opinion of a majority of the judges hearing the case. A judge who agrees with the result and not the reasoning may write a concurring opinion, and those who disagree write dissenting opinions explaining their own views of the law. Because case law teaches and informs the reader about the latest way that a statue should be read or how the common law may affect a client's case, reading court opinions is frequently the first step in performing legal research.

In the following pages, you will read two cases—excerpts from published court opinions—that discuss the common law principle of family immunity. From these cases, you should be able to learn about this common law principle and its history in the state of California and elsewhere. These opinions use both primary and secondary authority to support their position. The Court cites Blackstone and Prosser, two secondary authorities. You may recall that Blackstone wrote the *Commentaries,* which became the primary vehicle for importing English common law into the United States. The late William L. Prosser was a law professor and author of a famous treatise, *Prosser on Torts,* universally recognized as perhaps the most respected secondary authority on tort law. His treatise is still widely used today.

As you read the *Self v. Self* opinion, see if you can identify those parts that would be considered the (1) facts, (2) procedure, (3) rationale, and (4) holding.

CATHERINE SELF, PLAINTIFF AND APPELLANT, V. ADRIAN SELF, DEFENDANT AND RESPONDENT, 376 P.2d 65 (CAL.1962)

. . .

The sole problem involved in this case is whether California should continue to follow the rule of interspousal immunity for intentional torts first announced in this state in 1909 in *Peters v. Peters*. Because the reasons upon which the *Peters* case was predicated no longer exist, and because of certain legislative changes made in recent years, we are of the opinion that the rule of the *Peters* case should be abandoned. In other words, it is our belief that the rule should be that one spouse may sue the other in tort, at least where that tort is an intentional one.

In the instant case, the problem arises under the following circumstances: The complaint for assault and battery was filed on May 5, 1961. It charges that the defendant husband on July 14, 1960, "unlawfully assaulted plaintiff and beat upon, scratched and abused the person of plaintiff," and that as a result plaintiff "sustained physical injury to her person and emotional distress, and among other injuries did receive a broken arm." As an affirmative defense, it is alleged that at the time the injuries occurred the parties were married. Thereafter, defendant filed a notice of motion for a summary judgment on the ground that a wife cannot sue a husband for tort in California. The motion for summary judgment was granted, and judgment for defendant entered [without a trial].

The common-law rule of interspousal immunity for either intentional or negligent torts is of ancient origin. It was fundamentally predicated on the doctrine of the legal identity of husband and wife (1 Blackstone, *Commentaries;* 2 Blackstone, *Commentaries* 433). This rule precluded actions between the two as to either property or personal torts. As long as this doctrine existed, the rule prohibiting a tort action between the spouses was logically sound. As Prosser points out (*Prosser on Torts* (2d ed. 1955): "If the man were the tort-feasor, the woman's right would be a chose in action which the husband would have the right to reduce to possession, and he must be joined as a plaintiff against himself and the proceeds recovered must be paid to him; and if the tort involved property, the wife had no right of possession to support the action. If the wife committed the tort, the husband would be liable to himself for it, and must be joined as a defendant in his own action." But the social order upon which this concept was predicated no longer exists.

Early in the 19th century married women's emancipation acts were passed in all American jurisdictions. These were designed to confer upon women a separate legal personality, and to give them a separate legal estate in their own property. They conferred upon a wife the capacity to sue or be sued without joining the husband, and generally, as far as third persons were concerned, made the wife separately responsible for her own torts.

From an early date it was recognized that a primary purpose of these statutes was to free the wife's property from the control of her husband. As a result, most American jurisdictions agreed that inasmuch as these statutes destroyed the legal identity of husband and wife, one spouse could recover against the other for a tort, intentional or negligent, committed against his or her property.

But this emancipation was not generally extended to the field of personal torts, most of the courts rationalizing that personal tort actions between husband and wife, if permitted, would destroy the peace and harmony of the home,

(continued)

and thus would be contrary to the policy of the law. As Prosser aptly points out: "This is on the bald theory that after a husband has beaten his wife, there is a state of peace and harmony left to be disturbed; and that if she is sufficiently injured or angry to sue him for it, she will be soothed and deterred from reprisals by denying her the legal remedy—and this even though she has left him or divorced him for that very ground, and though the same courts refuse to find any disruption of domestic tranquility if she sues him for a tort to her property, or brings a criminal prosecution against him."

In 1910 Justice Harlan in the case of *Thompson v. Thompson, 218 U.S. 611* in a dissent, in which Justices Hughes and Holmes concurred, pointed out that the old doctrine was outmoded, that the arguments in support of it were specious, and that the married women's act of the District of Columbia had so emancipated women that, properly interpreted, they should permit a tort action by one spouse against the other. Since then, the number of "majority" states adhering to the old rule has steadily dwindled, until today at least 18 jurisdictions have followed the reasoning of this dissent. Practically every legal writer in this field agrees that the old rule is archaic and outmoded, and that the minority rule is the better rule.

California has several cases adhering to the old rule. The first case to discuss the problem in California was *Peters v. Peters,* (1909), in which the action was by the husband against the wife for assault and battery. The wife, without justification, seriously wounded her husband by willfully shooting him in the leg. The court held that ". . . we are satisfied that, under the law in this state as it is, an action cannot be maintained by one spouse against the other for a battery committed during the continuance of the marriage relation. . . . The question is entirely new in this state and such cases are rare in other jurisdictions, but there is no case in favor of the right to maintain such an action."

The court squarely based its conclusion upon the reasoning that California had adopted the common law, and that at common law no such action existed. The court recognized that under the married women's emancipation acts "it is now generally held that an action at law concerning property may be maintained between them." It cited several out-of-state cases adopting the common-law rule of spousal disability as to personal torts, and particularly cited the early New York case of *Longendyke v. Longendyke,* and quoted with approval the statement in that case that "to allow such actions is 'contrary to the policy of the law and destructive of that conjugal tranquility which it has always been the policy of the law to guard and protect.'" The court went on to hold that the various code sections as they then read did not change the common-law rule in California.

None of the reasons which have been suggested in support of the common law view apply to this action. As this litigation demonstrates, any conjugal harmony of this quasi-marriage has long since been disrupted. Certainly there can be no thought of collusion between these parties.

From this analysis of the California cases it appears that the basic reasons given by the Peters case for adopting the rule no longer exist, that subsequent cases have simply cited the earlier case without analysis, and that several cases have limited the rule. The rule of the Peters case is definitely out of line with the general policy of the law of this state.

Of course, the general rule is and should be that, in the absence of statute or some compelling reason of public policy, where there is negligence proximately causing an injury, there should be liability. Immunity exists only by statute or by reason of compelling dictates of public policy. Neither exists here. That being so, these are sufficient reasons alone to justify this court in overruling the Peters case and in adopting the more modern, intelligent, and proper rule.

As already pointed out, the contention that the rule is necessary to maintain conjugal harmony—one of the reasons given in the Peters case—is illogical and unsound. It would not appear that such assumed conjugal harmony is any more endangered by tort actions than by property actions—yet the latter are permitted. For these reasons alone the old common law rule should be abandoned.

The judgment appealed from is reversed.

As you can see from the opinion in *Self v. Self,* the California Supreme Court made a somewhat momentous decision and discarded a long-held common law principle in favor of a more modern rule. In doing so, the Court's opinion offers a glimpse into legal reasoning and how the law can transform from its medieval common law origins to conform to modern-day social norms. Keep in mind that common law principles, such as interspousal immunity, had been made by English judges as they saw fit during their times. The same is true of the California Supreme Court's decision here.

Interspousal immunity was a rule adopted by the judges of the California Supreme Court in a case decided almost 100 years ago.

Since then, statutes enacted by the legislature modernized the status of married women, giving them the legal right to own property in their own name, among many other rights, to the point of becoming equals with their husbands in the eyes of the law. Although the legislation did not directly change the rule of interspousal immunity, the reasons underlying the rule were seriously eroded by these modern statutes. You may recall that statutes altering the common law have the effect of derogating or abrogating the common law, which is to say that the common law was changed or rendered obsolete by modern statutes.

The legal analysis employed in this decision is very typical of modern era court decisions involving the common law. Notice that the court first identified the common law rule, defining it and then describing the social norms or assumptions underlying the rule. These norms and assumptions provided the basis for the rule's existence. Once the Court reflected upon the modern status of women and marriage relationships, the reason for the rule's existence evaporated. Without a reason to exist, there was no necessity to apply the rule, particularly in light of modern California statutes. The Court was particularly honest in its approach, admitting that it had adopted the common law rule in the 1909 case of *Peters v. Peters,* which was the precedent case for interspousal immunity in California. Notice that subsequent reference to that precedent case was made by the use of only one of the first names of the case. This common shorthand reference applies to the same case after its first mention in the opinion. For cases in which the first party is the government, such as the state or the United States government, the other party's name is used as a short reference.

The holding or the court-made law from this case can be distilled into a single legal proposition. Stated as a rather long-winded sentence, the case law principle (that is, the holding) announced in *Self v. Self* might appear as follows: In light of the change in the status of married women, as altered by modern statutes, which emancipated their property ownership rights from their husbands' control, among other legal rights, and where no conjugal harmony remains to be preserved, the doctrine of interspousal immunity should be abandoned in cases of intentional torts, because the common law doctrine is now incompatible with modern concepts of marriage and contemporary social norms. This precedent was created by *Self v. Self*.

Reasonable people will disagree as to how the holding should be worded, and that disagreement will be the fodder of future interpretations of the case and its precedential effect. In law, almost anything is debatable. In any event, it is important to note that the holding, or the case law, must be stated as a limited proposition framed by the specific facts of the case. For instance, the California Supreme Court did mention negligence in *Self v. Self*. However, the facts in that case involved an incident of domestic violence committed by the husband—an intentional tort of assault. On the same day, the California Supreme Court decided the case of *Klein v. Klein,* 376 P.2d 70 (Cal.1962). In that case, the Court was faced with the principle of interspousal immunity in a lawsuit for negligence filed by a wife against her husband for injuries she suffered on her husband's pleasure boat. Predictably, the Court similarly discarded the doctrine of interspousal immunity applied to negligence actions between spouses for similar reasons. Although the cases are certainly related, they should be read as standing for two separate and distinct legal propositions or holdings.

PRACTICE TIP

Because the law is always changing and adapting to modern conditions, it is essential for every legal professional to perform legal research thoroughly. This requirement means that the legal professional must find the latest word on the point of law involved, whether it be a recently enacted statute or a recent court opinion hot off the press.

Legal Note Taking: The Case Brief

Reading court decisions to find relevant case law in practical life requires the specialized skill of understanding the effect of precedent and legal reasoning. Dissecting and analyzing court opinions can be a tedious and confusing task. Moreover, note taking for the purpose of studying can present a daunting assignment, particularly for working professionals who must research and carefully review several court opinions to assess a client's situation.

Both students of law and practitioners in the profession use a note-taking format known as a case brief. A case brief is to be distinguished from a trial brief or an appellate brief, which are formal and oftentimes lengthy written documents submitted to a trial or appellate court to persuade the court of the correctness of a client's legal positions. Case briefs instead serve the purpose of providing an easy-to-read formatting of the most essential elements of the court opinion. Typically, a case brief consists of one or two pages that act as a quick reference guide. As a internally prepared document in the research folder of a client's file, the case brief is an important part of a legal professionals' work for the client that can be easily read and understood by other coworkers in the office who are also working on the case. Preparing a solid and readable brief is an example of the teamwork that makes for effective and efficient legal representation.

Briefing a Court Opinion

Like any note-taking technique, the style and format of a case brief can vary depending upon personal preferences. However, most people agree on the following formulation:

1. *Title and Caption*. At the top of the brief appears the title or name of the case, consisting of the names of the parties. In documents prepared for formal submission, the name of the case is usually underlined or italicized. Following the parties' names is the case's **citation**. As you will learn in the next chapter, a citation is generally an address indicating where certain legal material may be located. There are citations for every type of legal material, both primary and secondary. You have seen these citations in this and the preceding chapters, and they may appear as mysterious numbers and letters. These are, quite simply, indications of the volume number, books, and pages on which the legal authority may be found. The citation noted for the *Self* case is 376 P.2d 65 (Cal.1962). The number 376 is the volume number of the book within the set of volumes known as the Pacific Reporter, as indicated by the "P." The "2d" is the series, indicating the second series. There is a set of volumes known as the first series that were numbered up to a certain point, after which a second series started. The number 65 is the page number where the *Self* case begins. The information in the parentheses (Cal. 1962) indicates the state and year of the decision. The Pacific Reporter covers several states within a region of the country, which is why the reference to California is necessary. The year is needed to put the case into a temporal context, because precedent is important. As we all know, precedent changes. Citing a case that is old or recent may indicate its precedential value. More recent cases may indicate current thinking that changed earlier cases; older cases that have not been overturned may show a long-held and sound legal principle.

citation
Information about a legal source directing you to the volume and page in which the legal source appears.

Self v. Self,	376	P.2d	65	(Cal.1962)
Case name	volume	Reporter	page	state & year

2. *The Facts*. Case law precedent is shaped by the facts of each case. The facts of a case are those that affect the court's ultimate decision. Courts often start off reciting the facts of the case and, unfortunately, may state many more facts than those shaped by the opinion. Thus, the task of briefing the case requires extracting the essential facts of the case—those facts that were operative in the court's decision. Fortunately, in the *Self* case, the Court stated the facts with merciful brevity. Elements of a case citation:
3. *The Procedure*. Because published court opinions come from appellate courts, the way in which the case is appealed can shape the resulting opinion, as is also true of opinions from the trial courts. Either court will state the procedural context of the case. In the *Self* case, Mr. Self was the defendant at the trial level and then the appellee before the California Supreme Court. He had filed a motion for

summary judgment with an attached affidavit stating that the couple was married when the alleged assault occurred. "Summary" in law means fast. A motion for summary judgment means that the lawsuit cannot go any further because of the existence of certain undisputed facts. Here, the undisputed fact presented was that the couple was married during the alleged events, which suggested no trial was possible because the doctrine of interspousal immunity said that husbands and wives could not sue each other for torts.

The trial court agreed with Mr. Self and entered judgment in his favor. Mrs. Self appealed directly to the California Supreme Court, bypassing the intermediate appellate court, as is possible in some situations due to the importance or novelty of the case. She was thus the appellant, and Mr. Self became the appellee. On appeal, Mrs. Self challenged the doctrine of interspousal immunity as outmoded and argued that a trial should go forward, because the doctrine was the only thing that blocked the lawsuit. This sequence of events is how the case presented the issue of interspousal immunity to the California Supreme Court.

4. *The Issue*. Every published court opinion can be distilled into a single legal proposition. Putting the legal proposition into the form of a question can be easily accomplished just by starting the issue with the word "whether." Again, people will differ as to how an issue should be stated. Generally, the issue should be stated as neutrally and narrowly as possible. For instance, as pointed out in the *Self* case, the Court's opinion did not totally discard the doctrine of interspousal immunity. It did so only with reference to the facts of the case—an intentional tort—even though the Court discussed, at some length, the issue of negligence. Many people find framing the issue the most challenging part of preparing the brief.
5. *Holding*. A "holding" is a legal term used to describe the rule of law or legal proposition established by the court's decision. Because court-made law is shaped by the facts of the case before the court, the holding is a distillation of the rule of law according to those particular facts. Courts also use the verb "to hold" synonymously with the verb "to rule." Thus, courts hold and rule, as well as make holdings and rulings.
6. *Rationale*. Also known as the reasoning, the court's rationale is the explanation part of the opinion. Notice that in the *Self* case, the reasoning appears in the form of steps that the Court took in arriving at the decision. At first the Court stated the rule, then the reasons for the rule, the statutory changes, recent trends in society and the law, and, finally, the incompatibility of the doctrine with current mores. A case brief records the major logical steps taken by the Court in short form, perhaps a sentence or two for each step, each in separately numbered parts.
7. *Comments or Critique*. Optionally, the case briefer may include his or her thoughts about the court opinion. This section will differ depending on the person and the reason the brief is being prepared. Students may wish to make comments of an academic, intellectual, or personal nature. Working professionals would comment in the case brief about how the case helps, hurts, or otherwise relates to their client's situation. Furthermore, because working professionals may use the case in papers to be filed in court, their case briefs may quote important passages from the opinion, along with the exact page on which these quotations appear. As you will see in the next chapter, the page reference to a quotation is an important matter because it provides the court with the precise location of the quoted passage. Passages from court opinions themselves are pronouncements of primary sources of law. Figure 4.4 provides a sample version of a student's brief of the case. The important thing to remember is whether the brief contains a sufficient amount of information while remaining concise—hence the use of the word "brief."

Case Brief
SELF v. SELF
376 P.2d 65 (Cal.1962)

Facts: Plaintiff ("P") wife sued husband for the intentional tort of assault resulting in personal injuries and emotional distress to her. Although a divorce was later filed, the wife's complaint alleged the assault took place while the couple was still married.

Procedure: Defendant ("D") husband filed an answer and alleged as an affirmative defense that the events took place while the couple was still married and that therefore he could not be sued for a tort in California. D moved for summary judgment, attaching an affidavit attesting to the fact that the couple was married at the time of the incident. Trial Ct. granted motion dismissing case in favor of D. P appeals directly to Cal. Sup. Ct.

Issue: Whether in light of the change in the status of married women, which has been altered by modern statutes, which emancipated their property ownership rights from their husbands' control, among other legal rights, and where no conjugal harmony remains to be preserved, the doctrine of interspousal immunity should be abandoned in cases of intentional torts as a common law doctrine now incompatible with modern concepts of marriage and contemporary social norms.

Holding: The assumptions underlying the common law doctrine of interspousal immunity have become obsolete, and the doctrine of interspousal immunity is no longer available as a defense in actions between spouses in tort actions.

Judgment: Reversed and remanded back to Tr. Ct.

Rationale:

1. Ct. states rule of Interspousal Immunity ("II") adopted as common law ("C.L.") in *Peters v. Peters* (1909), prevents suits between spouses. Reason for II was law putting Wife's ("W") property under Husband's ("H") control during marriage and idea of marriage being one unity. Thus suit by one against the other was the H suing himself, or unity suing itself.

2. Modern emancipation statutes freed W from H's control of her property as well as other rights. Still, II persisted because of idea that suits between H & W would destroy marital harmony.

3. Modern trend began w/1910 U.S. Sup. Ct. doubting propriety of II. Prosser also doubted fitness of II in modern society. Other states (N.Y.) began abrogating II.

4. Logically, reason for II no longer exists, where W is now emancipated by statute and the H & W are or will be divorced. Esp. true with policy of law should remedy an injury suffered by negligence. Immunities in general driven by public policy. Here no reason exists for keeping II, since now illogical and unsound given modern society norms. *Peters* case of 1909 overturned.

Comments: Should this be a legislative concern or should the courts take matters into their own hands? Legislature emancipated women by statue and should eliminate II by statute. On the other hand, the CL is court made and in Cal., court adopted in 1909, therefore it's appropriate for court to abrogate its own previous case law.

FIGURE 4.4 **Student Brief of *Self v. Self***

As is the situation for any note-taking technique, everyone has his or her own personal style for case briefs, complete with special abbreviations and symbols. For instance, legal professionals and students frequently use the Greek letter pi (π) to indicate plaintiff and the letter delta (Δ) to indicate defendant, because these symbols are distinctive enough to stand apart, unlike using the abbreviations P and D. More important, a well-done case brief presents a clear and succinct synopsis of the court opinion. As part of the research for a client's case or as a study guide for a student, the case brief allows the reader to understand almost the entire court opinion virtually at a glance and thereby quickly grasp the pertinent case law on a particular point. Thus, your own legal research for a client, reduced to case briefs of several opinions, can provide a coworker with a quick grasp of the status of the law.

COMMUNICATION TIP

Whenever you are speaking or writing as a legal professional, particularly to colleagues, be succinct and to the point. Avoid extraneous matters or personal opinions that do not help or assist in the understanding of your communication. Similarly, avoid the use of colloquial language or slang. Every communication you make is a reflection of your professionalism. Thus, case briefs or reports on the law to coworkers should be written as professionally as possible.

JAMES A. GIBSON, a Minor, etc., Plaintiff and Appellant, v. ROBERT GIBSON, Defendant and Respondent, Supreme Court of California

479 P.2d 648 (Cal. 1971)

OPINION: We are asked to reexamine our holding in *Trudell v. Leatherby (1931)* that an unemancipated minor child may not maintain an action against his parent for negligence. That decision, announced 40 years ago, was grounded on the policy that an action by a child against his parent would "bring discord into the family and disrupt the peace and harmony of the household." If this rationale ever had any validity, it has none today. We have concluded that parental immunity has become a legal anachronism, riddled with exceptions and seriously undermined by recent decisions of this court. Lacking the support of authority and reason, the rule must fall.

James A. Gibson, plaintiff herein, is the minor son of defendant, Robert Gibson. James' complaint alleges in substance as follows. In January 1966 he was riding at night in a car which was being driven by his father and which was towing a jeep. His father negligently stopped the car on the highway and negligently instructed James to go out on the roadway to correct the position of the jeep's wheels. While following these directions, James was injured when another vehicle struck him.

Defendant filed a general demurrer on the theory that a minor child has no right of action against his parent for simple negligence. Judgment of dismissal was entered on an order sustaining the demurrer without leave to amend. This appeal followed.

The doctrine of parental immunity for personal torts is only 80 years old, an invention of the American courts. Although the oft-compared rule of interspousal immunity reached back to the early common law, English law books record no case involving a personal tort suit between parent and child.

In 1891, however, the Mississippi Supreme Court laid the egg from which parental immunity was hatched. Citing no authorities, the Mississippi court barred a minor daughter's false imprisonment action against her mother who had wrongfully committed her to an insane asylum. The court declared that the "peace of society, and of the families composing society, and a sound public policy, designed to subserve the repose of families and the best interests of society" would be disturbed by such an action and concluded that a child's only protection against parental abuse was to be found in the criminal law. This "compelling" logic soon led the Washington Supreme Court to conclude that family peace and harmony would be irreparably destroyed if a 15-year-old girl were allowed to sue her father for rape.

Other states quickly adopted the rule, applying it to actions for negligence as well as for intentional torts, occasionally with more emotion than reason.

For example, the North Carolina Supreme Court declared of parental immunity: "If this restraining doctrine were not announced . . . it was unmistakably and indelibly carved upon the tablets of Mount Sinai."

Recently there has grown a general trend to restrict parental immunity, however, we believe that a trilogy of recent California cases in the area of intra-family tort immunity has weakened, if not eroded, the doctrinal underpinnings of the rule. For instance, in *Self v. Self,* we abrogated interspousal immunity for intentional and negligent torts. We think that the reasoning of those decisions has totally destroyed two of the three grounds traditionally advanced in support of parental immunity: (1) disruption of family harmony and (2) fraud or collusion between family "adversaries." The third ground, the threat to parental authority and discipline, although of legitimate concern, cannot sustain a total bar to parent–child negligence suits. We shall examine these arguments one by one.

The danger to family harmony was the only rationale for immunity mentioned in *Trudell*. In *Self,* however, we termed this argument "illogical and unsound." Observing that spouses commonly sue each other over property matters, we concluded that "It would not appear that such assumed conjugal harmony is any more endangered by tort actions than by property actions . . ." Indeed, as we shall discuss, infra, the risk of family discord is much less in negligence actions, where an adverse judgment will normally be satisfied by the defendant family member's insurance carrier, than in property actions, where it will generally be paid out of the defendant's pocket. Since the law has long allowed a child to sue his parent over property matters, the rationale of *Self* is equally applicable to parent–child tort suits.

We found the family harmony argument similarly unpersuasive in *Emery* when

(continued)

advanced to bar a suit between a minor sister and her minor brother. We said: "Exceptions to the general principle of liability ("For every wrong there is a remedy.") . . . are not to be lightly created, and we decline to create such an exception on the basis of the speculative assumption that to do so would preserve family harmony. An uncompensated tort is no more apt to promote or preserve peace in the family than is an action between minor brother and sister to recover damages for that tort."

Arguments based on the fear of fraudulent actions are also adequately answered. While some danger of collusion cannot be denied, the peril is no greater when a minor child sues his parent than in actions between husbands and wives, brothers and sisters, or adult children and parents, all of which are permitted in California. But we do not deny a cause of action to a party because of such a danger. . . . It would be a sad commentary on the law if we were to admit that the judicial processes are so ineffective that we must deny relief to a person otherwise entitled because in some future case a litigant may be guilty of fraud or collusion. Once that concept were accepted, then all causes of action should be abolished. Our legal system is not that ineffectual."

Moreover, we pointed out in *Emery* that concern with collusion is entirely inconsistent with the dire predictions of familial discord. The collusion argument assumes that the suit is in reality aimed not at the defendant family member but at his insurance carrier. In such case, the tort action poses no threat whatever to family tranquility; in fact, domestic harmony will not be disrupted so much by allowing the action as by denying it. The interest of the child in freedom from personal injury caused by the tortious conduct of others is sufficient to outweigh any danger of fraud or collusion.

The threat to parental authority and discipline is the only one of the traditional arguments for immunity which was not fully answered. "Preservation of the parent's right to discipline his minor children has been the basic policy behind the rule of parental immunity from tort liability."

In our view, the possibility that some cases may involve the exercise of parental authority does not justify continuation of a blanket rule of immunity. In many actions, no question of parental control will arise. Thus, the parent who negligently backs his automobile into his child or who carelessly maintains a lawnmower, which injures the child, cannot claim that his parental role will be threatened if the infant is permitted to sue for negligence. To preserve the rule of immunity in such cases, where the reason for it fails, appears indefensible.

We agree with this approach in its recognition of the undeniable fact that the parent-child relationship is unique in some aspects, and that traditional concepts of negligence cannot be blindly applied to it. Obviously, a parent may exercise certain authority over a minor child which would be tortious if directed toward someone else. For example, a parent may spank a child who has misbehaved without being liable for battery, or he may temporarily order the child to stay in his room as punishment, yet not be held responsible for false imprisonment.

Since the law imposes on the parent a duty to rear and discipline his child and confers the right to prescribe a course of reasonable conduct for its development, the parent has a wide discretion in the performance of his parental functions, but that discretion does not include the right willfully to inflict personal injuries beyond the limits of reasonable parental discipline.

We find intolerable the notion that if a parent can succeed in bringing himself within the "safety" of parental immunity, he may act negligently with impunity.

Secondly, we feel that we cannot overlook the widespread prevalence of liability insurance and its practical effect on intra-family suits. We can no longer consider child-parent actions on the outmoded assumption that parents may be required to pay damages to their children.

By our decision today we join 10 other states which have already abolished parental tort immunity. We think it is significant that since 1963, when the Wisconsin Supreme Court drove the first wedge, other jurisdictions have steadily hacked away at this legal deadwood. Of particular interest from our viewpoint is where the Alaska Supreme Court relied in part on our decisions in *Self* and *Klein*.

Applying what we have said above to the case at bench, we hold that the trial court erred in sustaining the defendant's demurrer, and hold that an unemancipated minor child may maintain an action for negligence against his parent. Consequently, plaintiff's complaint stated a cause of action and was not vulnerable to demurrer.

The judgment is reversed and the cause is remanded to the trial court with directions to overrule the demurrer and to allow the defendant a reasonable time within which to answer.

Gibson v. Gibson presents another situation in which the California Supreme Court continued to abrogate the common law doctrine of family immunity. In this civil lawsuit for negligence, the defendant filed a demurrer in response to the plaintiff's complaint. Demurrer is derived from the French and is now more commonly known as a motion to dismiss. Like the motion for summary judgment, a demurrer responds to the plaintiff's complaint by requesting that the trial court end the lawsuit before trial in the defendant's favor. Technically, a demurrer questions the legal sufficiency of the complaint at the very beginning stages of the lawsuit. Thus, courts first address preliminary questions, such as whether the lawsuit is in the correct court or, as here, whether the law allows a certain type of lawsuit. In a manner of speaking, when a defendant files a demurrer, the defendant is saying, "So what? You cannot sue me for that."

Nine years after deciding to abrogate the common law doctrine of interspousal immunity in *Self,* the California Supreme Court was faced with the related issue of parental immunity. Notice that in deciding the *Gibson* case, the California Supreme Court built upon its earlier precedent in the *Self* and *Klein* cases. At the same time, the Court acknowledged some differences. The relationship between spouses and that between parent and child stands out as an important distinction. Unlike its decision in the *Self* case, the *Gibson* Court acknowledged the role of insurance companies as available sources of compensation for injuries. At the same time, the Court actually kept a part of the doctrine of parental immunity intact.

For this case, try writing a brief on your own, keeping in mind the differences between interspousal immunity and parental immunity. As a matter of practical application, imagine that you are writing the case brief on the *Gibson* case as part of your research on behalf of a client. Imagine that your client is an insurance company that has issued an insurance policy for the parent of a child who has injured herself on the front walk of the parent's home. Would your case brief be any different if you were representing an injured child who may pursue a civil action against a parent?

RESEARCH THIS

Go onto the Internet to the site www.findlaw.com. Once there, roam around and see if you can find any cases in your jurisdiction on interspousal immunity or parental immunity. What is the current status of either form of immunity in your state?

Summary

To serve the legal needs of clients, all legal professionals possess the knowledge of the various classifications of the law. The classifications are well embedded in the training of legal professionals so that they may determine the law that affects their clients. For the beginning student in law, training in the various classifications as part of proper training provides an introduction to legal research and how to read the law. Law exists in various formats. The format that expresses legal authority is primary. Secondary authority is scholarly and may sometimes be persuasive.

An already familiar classification is the difference between state and federal laws. We understand this classification as a matter of the constitutional history of the United States. Within both the federal and state systems, there is a division between

civil and criminal law. Each of those in turn contains two separate subdivisions of substantive and procedural rules, each with its own concerns and ways of declaring rights and enforcing them. Criminal law comprises a discrete area of governmental oversight of the public safety to protect the morals and welfare of the general public with laws that punish behavior regarded as harmful or dangerous. Civil law involves the rights and obligations of the entire population. Both criminal and civil law have their own variations, including standards of proof.

Much of the business of legal professionals consists of protecting or seeking to enforce client's rights. In civil law, the courts can vindicate a client's rights through the issuance of remedies, whether orders to pay monetary amounts or perform a certain act, as a result of the historic division between law and equity. To obtain a certain remedy, legal professionals resort to procedural law, which provides the means to enforce rights declared in substantive laws.

Although most laws exist ostensibly by way of constitutions and statutes, court opinions are the hidden backbone of the law. From common law traditions and historical developments in the United States, court opinions occupy an authoritative position, in which they interpret both constitutions and statutes. Thus, to determine or assess a client's legal position, court opinions provide an immediate source for legal professionals to research. Reading court opinions is a matter of training. The case brief is a professional's way to take notes on court opinions that can be easily shared with others working with the client.

Key Terms

Affirmative defense
Alibi
Beyond a reasonable doubt
Burden of proof
Case (common) law
Case brief
Cause of action
Citation
Civil law
Clear and convincing evidence
Compensatory damages
Consideration
Contract
Criminal law
Damages
Defense
Element
Equitable relief
Felony
General damages
Holding
Incidental or nominal damages
Injunctive relief
Intangible property
Judgment
Liability
Mens rea
Misdemeanor
Personal property
Possession
Preponderance of the evidence
Prima facie
Primary authority
Procedural law
Property law
Prosecution
Punitive damages
Rationale
Real property
Rebuttal
Reformation
Remedy
Rescission
Secondary authority
Special damages
Specific performance
Substantive law
Temporary restraining order (TRO)
Title
Tort
Tortfeasor
Trespass
Verdict

Review Questions

1. What is the difference between primary authority and secondary authority? Would it be possible to use secondary authority persuasively against existing primary authority?
2. Why is the government involved in criminal matters in a way that is different from the government's involvement in civil matters?
3. What is the difference between criminal and civil law?
4. How can a procedural rule affect the enforceability of a substantive right?
5. Name the component parts of a court opinion.
6. What is a *prima facie* case?
7. What is the difference between a misdemeanor and a felony?
8. What are the two forms of legal remedies that do not involve money?
9. What are the classifications of different forms of property?
10. What is the purpose of a case brief?

Exercises

1. Look up the applicable ethical rules from any of the paralegal organizations (NALA, NFPA, or others) or the ABA Model Rules of Professional Conduct to see what responsibilities are imposed upon a legal professional with respect to legal research. In what circumstances is a legal professional obligated under any of the ethical codes? Would the failure to perform research be a violation of any of those rules or codes?
2. Review the *Gibson v. Gibson* case and list the acts by parents that would still receive protection under the doctrine of parental immunity, as now defined by the California Supreme Court. Keep in mind that the parental acts receive protection because of the parent–child relationship. If the relationship did not exist, the same conduct could be the basis of a civil suit.
3. Both the *Self* and the *Gibson* cases are reported in the Pacific Reporter, Second Series. Take a trip to a law library and locate these volumes. Can you find either of these cases? List the other states that are covered in the Pacific Reporter.
4. Exchange your case briefs on the *Self* and *Gibson* cases with a fellow student. Imagine that you are both working legal professionals, working together on a case that involves the doctrine of family immunity. Do you find your fellow student's case brief understandable? Is his or her case brief an accurate and complete synopsis of the case?
5. Visit a law library and make a list of the types of secondary authorities that exist there.

Discussion Questions

1. Having laws that enforce contracts efficiently is important to societies that value commercial dealings. What would the various jurisprudence theories, such as economics and law or critical legal studies, say about this?
2. How have the courts, which are dispute resolution institutions, become a coequal law-making branch of government?
3. Viewing the types of causes of action and remedies available, what role do courts play in our government?

4. Why did the California Supreme Court think that the existence of insurance companies played an important part in the abrogation of parental immunity? Why do you think that insurance was not mentioned as a factor in the *Self* case?
5. What do you suppose happened in either the *Self* case or the *Gibson* case after the California Supreme Court's decision remanding the cases back to the trial court?
6. Our property laws are inherited from England and reflect certain social views and values. Can you think of different types of property laws from other countries or cultures that are different from ours?

PORTFOLIO ASSIGNMENT

On the basis of your research into the status of interspousal immunity in your state, prepare a report on the status of either interspousal immunity or parental immunity in your state. Address the report to a fictitious supervising attorney who has inquired into the status of the law you are addressing. Be sure to trace the common law origins and the extent to which either doctrine has been modified or abrogated by a more recent court opinion. Include as an attachment to your report briefs of any such court opinions.