

HOW TO BRIEF A CASE

By Richard B. Cappalli

Temple Law School

Overview

During your years in law school you will be learning the law, how to find and understand the law, and how to use the law in practice. To accomplish this your professors will be assigning readings of different types of legal and sometimes non-legal materials. A constant companion of yours will be the "case." This is one of the very many multi-faceted words you will encounter in your legal studies. It would be a good idea for you to use your legal dictionary at this point to see the various meanings of "case."

The full "case," meaning all events from pleadings (see legal dictionary) through final disposition, may include a trial and jury verdict. In a nutshell, trials take place to determine controversies about the facts that gave rise to the plaintiff's claims. Juries are the American institution which settles these fact arguments by listening to witnesses and viewing documents. To speed up the process, however, many parties are opting for a "bench trial," which means a trial before a judge without a jury. When there is a jury it determines the facts, it tries to understand the controlling legal norms as recited to it by the judge, and it determines how the law should be applied to the

facts it finds. The jury's verdict is usually in the form of a "general verdict" which reveals nothing of the jury's thought processes. "Judgment for defendant" or "Judgment for plaintiff for \$10,000" are examples of general verdicts and you can see that nothing is learned about how the jury arrived at these conclusions. Increasingly, juries are required to fill in "special verdict" forms which ask specific questions, such as: "Was defendant negligent?" and "Did defendant's negligence cause plaintiff's harm?" Special verdicts control jury irrationality somewhat because the final verdict must be consistent with the jury's answers to the several questions. A party may get a new trial by pointing out the inconsistency to the judge.

Many cases end prior to a jury verdict. At trial, for instance, a party may successfully argue that the evidence is so one-sided that the judge should take the case away from the jury and decide it "as a matter of law." What this means is that a rationale jury could decide the case only one way, so the judge may avoid irrationale jury behavior by entering judgment himself or herself. This is called a "directed verdict," or, after a jury verdict, a "judgment notwithstanding the verdict." In federal practice both types are called "judgment as a matter of law."

"Summary judgment" (see legal dictionary) is a common ending to a case without trial. By documentary proof the facts are so conclusively proved that no "genuine issues" remain for trial. To the set of facts so proved the judge applies the law to reach judgment. The process is "summary" because it's done before the judge on affidavits and other documents. Even if the facts are established beyond genuine doubt, a judge may deny summary judgment when the legal standards are so unclear that a rationale jury could conclude for either plaintiff or defendant when it applies the facts to the law.

Another common early ending to a case is when the law provides no relief to the plaintiff for the incidents related in the plaintiff's initial pleading, the complaint. The defendant "demurs" to the complaint, which in modern procedural language is called a "motion to dismiss for failure to state a claim." For purposes of the motion the facts alleged in the complaint are

presumed to be true. The relevant statutory and judicial law is surveyed to see if, on these facts, it affords relief to the plaintiff. If not, no reason exists to continue with the case, so it is dismissed.

The **"case" that you will be briefing** is just one piece of the larger process described above. It is the written opinion of a judge explaining why the judge decided one or more legal issues the way he or she did. Because the judge embodies the authority of the judicial institution called a "court," it is common practice to say "the court decided" even when it's the decision of a single judge. You will usually be reading the "cases" decided by an appellate court comprised of 3, 5, 7 or 9 judges. The appeal is brought by the appellant or petitioner to try to change the outcome below. It is critical for you to understand that the appellate court reviews only the legality of the actions of the trial judge who conducted the trial below or otherwise finally disposed of the controversy below by some summary disposition before trial. This idea is captured in the aphorism "the trial judge tries the case, the appellate court tries the trial judge."

The appellant will bring the record of events below (the "record") up to the appellate court and will point to one or more actions by the trial judge the appellant considers erroneous in law. Every action of the trial judge, indeed every official action of every judge at every level, is governed by law.

Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the Court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the... law.

The appellant will claim not only that error, meaning legal error, was committed, but also that it was "prejudicial." This means that the result below might well have turned out differently had the judge not committed the error. You will encounter appellate decisions which find that error was committed

by the trial judge but that it was "harmless." This is the opposite of "prejudicial" and means that the appellate panel believes that even if the trial judge had acted correctly, the final result would most likely have been the same. For example, a trial judge may misapply the rules of evidence (what testimony can be given and what documents may be entered into the record) and let in a piece of evidence which should have been excluded. Still, the appellate court may look at the evidence which was properly admitted and conclude that the result favoring appellee or respondent (the party defending the lower court's action) would have been the same without the piece of wrongly admitted evidence.

In the "Proceedings Below" part of your brief, you will be precisely identifying what trial judge action or actions are claimed by the appellant to be "prejudicial" or "reversible" error. This is a critical part of your brief because it helps identify the precise question(s) brought before the appellate court and thus the scope of its duty. You'll want to know if the higher court is determining a pure question of law. That would be the case, for example, if appellant challenges the statement of law read to the jury by the judge ("jury instructions" or "charge to the jury"). Sometimes the issue requires the appellate bench to review the evidence, such as when the appellant, claiming the jury verdict was "against the weight of the evidence," was denied a new trial by a judge who disagreed.

For each issue brought above the appellate court has to determine what was the correct law to apply and how it should be applied to the case facts. In the common law method, the written decision and explanation by an appellate court on these litigated issues constitute binding law. Chapters 1-5 of Richard Cappalli, *The American Common Law Method* (1997) ("ACLM") explains, hopefully in a way understandable to a beginning law student, how cases create law in the common law system. **You must study these chapters carefully before attempting to write your first brief in this course and in your other courses.** If you find anything in these chapters very difficult to understand, you can start questioning your professor in class or by e-mail <rcappali@vm.temple.edu> . You must be patient with yourself, however. It will take the whole semester for you (yes, even you) to grasp the main ideas and techniques fully.

In most of your courses you will be assigned a "casebook." This will be a collection of cases (again, almost all being appellate opinions) which you will read and brief and discuss during the course of the semester. A problem is that, for reasons of space and cost, these cases are severely edited by the authors (when you see three dots or asterisks, e.g., ... ***, this means material has been cut from the original). Many times the authors will summarize the facts for you and many times the authors will cut out the part of the appellate opinion where the court discusses the authority of its judicial precedents. Thus, what you are really reading, briefing and discussing is a case fragment and you will rarely have time to go to the library (or the legal research tools, Westlaw or Lexis,) to study the whole case. At some point you may want to consult my fuller views on this topic. You can access <<http://www.angelfire.com/pa4/cappalli/whatis1.htm>> and read Part IV-A. In the course of your studies you will have some opportunity to read full cases. You will read some in Legal Research and Writing, when you do a "guided research" project in the second and third years, when you write briefs for moot court, and when you write for one of our several law reviews.

Some schools like Temple have instituted a basic course, here Legal Decision-Making, to acquaint you with a lawyer's basic methods of understanding and utilizing, in a professional way, basic legal sources like cases and statutes. Your other courses are too busy with other priorities to do this. You will find that you will bring your LDM learnings into these other classes and thus enrich your studies there. When we have done our LDM job well, what we have taught you will become so deeply embedded that you will feel no gratitude for this course. We LDM teachers don't mind that at all!

Why Brief?

I recommend that you brief every case in every course, at least during your first year of studies, even if briefing is not required by your professors. These are my reasons.

1. The Brief Is Analysis

The most valuable role of a brief is the least obvious: to help

you read cases carefully and intelligently. Case law, which means the law created by judicial precedents, requires deep study to understand what the court has done, why it has done it, and what law has emerged from the decision-with-opinion. The brief organizes the pattern of your thinking about the case and forces you, point by point, to consider all the important elements of the judicial decision.

Certainly underlining or making marginal notes on what seem to be the important passages in the opinion is faster and easier. It may also be the way you read your college texts. Like most short-cuts, however, it poorly serves your understanding. You miss: the structure of the opinion; an appreciation of the key case facts and the role they played in the decision; the process of professionally formulating *your view in your language* of the law created by the court; an understanding of the strengths and weaknesses of the court's reasoning, as well as the different types of reasons the courts advance; and an understanding of the procedural incidents which have resulted in appellate issues.

In sum, you will carry away at best superficial knowledge (quickly forgotten!) and at worst wrong ideas. If you keep in mind that judicial law is created by what the court *does* and not by what it *says* (see ACLM), you will yourself conclude that underlining words in a court's opinion is not the way to understand case law.

Now the record reads that Ptolemy I, satrop of Egypt, desiring lore but not labor, demanded from his prize subject some shorter way in geometry than The Elements. Whereupon, so the record runs, Euclid replied: "There is no royal road to geometry." (Unknown author)

2. Brief As Classroom Crutch

The professor's syllabus and oral instructions will inform you which cases will be covered in which classes. The class will be mostly questions from the professor about those cases. These questions are geared to inculcate a deep understanding of the legal material, often dense and difficult, under study. In many classes professors will require your participation, that is,

answering the professor's questions; in others they will take volunteers. Even if you are not the one called on, you will mentally follow the dialogue (understand the professor's question, mentally form your response, evaluate the called-on student's response, observe and learn from the professor's reaction, etc.) while you are fast-writing intelligent notes. Phew!

Your briefs will serve you well in surviving the classroom ordeal. They will help you do a fast 10-minute review before stepping into class. This review will enable you follow the proceedings and to take good notes. The class will be both boring and a mystery if you haven't prepared or have forgotten what you read some days ago. Even when lecturing, law professors always assume that their students have read the assigned materials and professors structure their lectures accordingly.

Should you be called on, the brief will be your Sancho. One part of the brief, you'll see, is a list of the court's reasons for the rule it creates or adopts to decide the case. *The court decides on the appropriate legal rule and the legal rule decides the appellate issue.* You may be asked "Why did the court decide this way?" or "Was this decision fair?" You'll have the court's reasons, summarized in your brief, to help you respond to questions like these. Keep in mind that the question "Was the decision right?" or "fair" or "just" always brings into play the rule used by the court. You can respond by criticizing or commending the rule or the rule's application to these facts.

Oftentimes case discussion starts when a student is asked to recite the case facts. You can respond by simply reading from the "facts" section of your brief. If the question is the "rule" of the case (also known as its "holding"), meaning the legal norm created or applied by the court to decide the issue before it, your prior briefing will pay off because you have already constructed the rule of the case and written it into your brief.

3. Briefs and Exams

Typically you will have but one exam, the "final." Here I will show you how your briefs will be critical to your preparation.

First I will talk about the structure of casebooks, your principal material of study. Most casebooks are essentially detailed outlines of the legal subject being taught. The chapter headings and sub-headings provide a logical ordering of the materials and often follow the organization of legal treatises and textbooks on the subject. Students never pay enough attention to these headings. When you are doing a course outline in preparing for the final exam, do not hesitate to use the organizational structure of the book as your framework. This will help you have a "bird's-eye" view of the subject matter and where the different themes fit.

Your briefs and class notes will enable you to prepare quickly your own "mini-treatise" of the particular legal subject. More importantly, your hard analytical work in briefing and in following and recording classroom discussion will give you a solid understanding of the *real meaning of the rules as they were created and applied in specific factual settings*. General expressions in a court's opinion must always be considered in light of the case's specific facts. *Id.* at 399-400 (Marshall, C.J.).

(An aside for Legal Decision-Making students.)

LDM is different because it is a course which focuses not on any set of substantive rules but on methods of analysis used by judges and lawyers in all substantive fields. See "Goals of Legal Decision-Making." You learn the best techniques and approaches for reading cases and statutes and applying them to new situations. LDM uses substantive law, of course, because legal methods do not exist in the abstract but only as deployed to create, interpret and apply substantive law. Think of legal methods as the "meta" or "super" principles and practices which enable substantive law to come to life: to be created well, understood deeply, and applied well. For example, the doctrine of judicial precedent known as *stare decisis* (see legal dictionary) is a rule about rules. It instructs courts either to follow or "overrule" (see legal dictionary) its "on point" precedents. The doctrine is accompanied by a set of understandings, techniques and practices for determining when a precedent is controlling or, instead, is "distinguishable" (see legal dictionary), and when it is proper to overrule a judicial precedent. *Stare decisis* can only be learned in the context of its use in real cases.

The above comments should make it clear that your LDM professors have

little interest in the substantive law within which method is found and taught. Chapter 2 of our coursebook, *On Law in Courts*, uses privacy as a subject matter where the judicial development of doctrine can be taught well. It is the ways of courts in creating and expanding case law that is important, not the privacy rules themselves. Chapter 4 contains different kinds of statutes which are interpreted and applied by a variety of courts. The goal is to teach the methods used by judges to understand statutes and to try to apply them correctly in specific cases. The goal is not to teach you the rules contained in the statutes. Indeed, statutes may have been repealed and cases may have been overruled but the methodological lessons found in *On Law in Courts* remain valid.

For the above reasons, LDM does not lend itself to an outline, although good class notes will help you understand and learn the fundamentals described, in part, in ACLM. You will learn proper methodology mostly by repetition, like learning to swing a golf club. Repetitive exercises include: spotting "material facts" (see ACLM, pp. 23-25, 27-30); formulating issues; identifying dicta; distinguishing precedents; reading statutory texts; interpreting statutes; identifying the different forms of lawyer logic and reasoning; critiquing court rationales; and synthesizing a line of cases.

When you take your LDM exam (mine at least), a new set of materials will challenge you to apply those techniques, by now ingrained, in applying new statutes and cases to solve the problem presented.)

Brief Structure

1. Tips on Reading Cases

When you read cases you should look for the opinion's structure. This will help you brief, understand, and critique the case. Look at the first case we brief, *Gumperz*.

¶ 1 Procedures below leading to the appeal (This part is prepared by the West Reporter System)

¶ 2 Relevant facts

Action of the lower court

Summary of upper court's decision

¶ 3 Relevant law

(Note: Paragraphs 2 and 3 set up the legal syllogism, which is the principal form of legal reasoning. In syllogistic reasoning, specific facts are applied to general norms (in legalese, the facts are "subsumed under the law") to reach a conclusion. E.g.,

Service of process achieved by fraud is invalid.

Service by misrepresenting the identity of a process server is a fraud.

Service here is invalid.)

¶ 4 First sentence. Statement of the correct rule to apply in the *Gumperz* situation (and implicit conclusion of the syllogism)

Sentences 2,3,4. Justifications for the rule

¶ 5 Further reasons supporting the rule.

¶'s 6 & 7 Disposition of appeal (Note. This is the "decision" which the rule produces.)

Another necessity is to read thoughtfully and with a sharply critical mind. First year law students think everything a court says is "gospel." It isn't. Particularly when evaluating a court's justification for its decision, be ready to evaluate its soundness.

Try to understand the techniques used by the writing judge to convince readers (not only the affected parties, but also future users of the precedent) of the "rightness" of the decision. These are the same techniques you will use some day to get judges to rule in your favor. What classes of argument does the judge deploy? Rhetoric? Appeals to tradition? Appeal to authority ("I have no choice. The law requires")? Logical extension of rules? The rule is needed (social policy)?

2. How Courts Organize Opinions

Judges are not bound to write in any particular way, but they generally follow the American traditions of opinion-writing. They, like you, learned by studying cases and find those time-tested patterns valuable.

The legal issue(s) presented will often be stated up front, along with a statement of the facts of the case: the events which precipitated the dispute and the claims. Within the statement of facts or ahead of them the court will explain the proceedings below relevant to the appeal and the actions of the trial judge claimed to be error by appellant.

Keep in mind that at the time of writing the question is no longer open. The judges have voted already and the writing judge has been assigned the task of writing for the majority. The writing judge knows the conclusion when he or she sets down the first word. This means that the goal of the writer is to convince the parties and those who consult the precedent in the future that the rule applied is the best one and the decision is just. Judges often strongly slant the statement of the issue and even the presentation of the case facts to "condition" the reader to believe in the edict. See *On Law in Courts*, pp. 34-36. This partially explains why, in the course of your legal studies, you will read a majority opinion and conclude that it is absolutely, unequivocally right, and then read the dissent and conclude that it is absolutely, unequivocally right! The judges are playing with your head. But further understand that competent lawyers will have done the same (within ethical bounds, of course) in their briefs to the court and in their oral arguments. That is why lawyers' techniques and judges' techniques of advocacy are essentially the same, although judges enter consideration of a case with open minds.

After issue, facts and proceedings, the court will typically turn its attention to the relevant legal rules derived from statutes and precedents. The law will be stated in a way conducive to the outcome. Again, however, lawyers in their briefs and judges in their opinions cannot ethically misstate the law but only in minor ways rephrase the legal norms favorably to the outcome. If a court construes the judicial precedents in a distorted way, it

will distort the future path of the law. So, judges are usually honest in their rendition of the body of law applicable to the appeal.

The critical next part of the opinion is the "punch line," the end of the legal syllogism where facts are applied to law to create the outcome. Here the court will oftentimes reveal which facts it has thought particularly important and, usually implicitly, which facts it has treated as unimportant. This is where the student has to be particularly alert because the process of subsuming the specific facts under the general norm is often an imprecise and debatable step in syllogistic logic. Each element of the rule (for an example of elements of a rule, see ACLM at p. 71) has to be matched to one or more specific case facts. Some matches are easy, others problematic.

Finally, good courts will try to summarize the rule they have created in a sentence which starts "We hold ..." or "Our holding is" For an example, see *On Law in Courts*, p. 177, lines 4-7. If the court has done a good job in stating the rule it created, you can comfortably copy this into your brief.

3. Sections of Your Brief

After a description of what each section should contain, I will "brief" the *Baxter* case which appears in full at the end of this writing. The *Baxter* case can be found at volume 425 of the Pacific Reporter, 2d edition, at p. 462. Pacific is one of the West Group (a private company) regional reporters and contains cases from several western states. West also has state and federal cases (plus much, much more) in a data base. What you find at the end I downloaded from a Westlaw data base. West has given law professors a general permission to use its cases in teaching materials. **You must read the case twice before studying the brief below.**

The "synopsis" under the date and the bolded blocks of material are prepared by the West editors. What appears under the letters and numbers are called "headnotes." These are statements of law extracted from the precedent by West editors (not by the court!) and slotted into the appropriate cubicals of law by a West system called "key numbers." This system attempts to categorize all

American law. For example, "211k61" means Topic, Infants (211), and Sub-topic, Negligence (key number ["k"] 61). Computer research has reached the point where each key-number headnote in each case is hyper-linked to all other headnotes under the same key number.

You cannot use these headnotes as "law" either for purposes of case briefing or when writing the other kind of brief, the lawyer's written argument to an appellate court. Headnotes are prepared by anonymous West editors whose competence cannot be ascertained. Headnotes indiscriminately mix holdings and dicta (see legal dictionary). Their purpose is **not** to provide lawyers with law. Their use is to help lawyers gather potentially useful precedents but not to substitute the lawyers' tasks of reading, analyzing and constructing the holdings of the precedents to which the headnotes are attached.

Finding relevant precedents has never been easier but the job of understanding them has never been harder. You will see in your years in law school that the boundaries of "law" have exploded not only in quantity of law but also in the knowledge thought by modern legal scholars to be necessary to understand law fully (economics, psychology, literature, logic, semiotics, and other "affiliated" disciplines).

I.

Title. The head of your brief should note the parties' names, the court deciding the appeal, and the year. Use just the last names of the first appellant and the first appellee. You can ignore the citation for class briefs, but you must carefully jot down the cites if you might use the case in an appellate brief or paper you are writing. The court is important. It tells you geographically (state, or federal circuit, or all of the U.S. in cases of U.S. Supreme Court precedents) where the case is a precedent and which courts are "bound" by the precedent under the doctrine of stare decisis. The year may be important to classroom discussion for various reasons. If the precedent is very old, social circumstances may have changed so much that the precedent no longer makes sense and should be overruled. Or it may be

argued that the precedent has "stood the test of time" or that people have depended upon the rule in structuring their affairs.

Baxter Title: Baxter v. Fugett, Okla Sup Ct, 1967

II.

Facts. Don't start by copying the court's recitation of facts. Read the case twice, slowly and carefully, before starting your brief, then write the facts down as you remember them. Leave some space to insert facts that later seem important.

Only when you've understood the issues do you understand the relevance of facts. In *Baxter*, for instance, most of the case facts turn out to be irrelevant to the issue presented on appeal. If you started writing facts down "out of the chute," you would have wasted time and space and unnecessarily complicated your brief. Pay particular attention to the facts the court emphasizes when it applies facts to law.

Start creating your own shorthand. This will be invaluable for taking class notes and for speeding up briefing.

P = plaintiff

D = defendant

Apt = appellant

Ape = appellee

ct = court

J = judge

Ask around if you can't think of a good symbol for a word you encounter repeatedly.

Baxter Facts: P, a 12 year old, sued D, a 16 year old when he suffered injuries when his bike collided with D's car. D had just come through a stop sign and P ran bike into side of car.

III.

Proceedings. Here you will note what procedural events below occurred to make the matter appealable and what particular errors of the trial judge are claimed to be reversible error.

Baxter Proceedings. Jury verdict and jdgmt for D. On appeal, P claims lower ct. erred in instruction it gave to jury. J gave minor's std of care to D even though D was driving a car.

IV.

Issue. Now frame the issue ("question" is a synonym) before the court as a question of law. A good example of this type of issue formulation appears in *Warshauer*, one of the cases to be briefed, at the top of the third paragraph of the Swan opinion. Appellate courts require the issues on appeal to be stated at the beginning of the brief in this form. Pa. R. App. P. 2116 says, for example, "The statement of the questions involved must state the question or questions in the briefest and most general terms, without names, dates, amounts, or particulars of any kind. It should not ordinarily exceed 15 lines, must never exceed one page, and must always be on a separate page, without any other matter appearing thereon."

In cases involving the interpretation of statutes, you will be taught to quote the precise words which created the ambiguity the court must resolve. For complicated issues you may use more than one sentence to resolve them. The example below comes from a brief I submitted to the U.S. Court of Appeals for the Third Circuit:

First Issue: Statutory Violation

During the course of processing Federal Employee Compensation Act claims, differences of opinion often arise between doctors representing claimants and those representing the government. The Office of Workers Compensation Programs has a "weighing of the medical evidence" policy which requires the appointment of a third doctor, the "medical referee," only when the conflicting medical opinions are "supported almost equally." Does this policy violate the statute's requirement in 5 U.S.C. §8123(a) (1994) for the appointment of a "third physician who shall make an examination" when there is "**any disagreement** between the physician making the examination for the United States and the physician of the employee ... " (emphasis added)?

If a case involves several issues, but only one is relevant to the subject you are studying, just deal with that one and ignore the rest. Should you be studying privacy, for example, and a case also discusses an evidence question, ignore it.

When the issue is answered and the question mark removed, this is the case's rule of law or holding. You don't have to rewrite it, though you may find it convenient and helpful to do so.

Notice below how the specific case facts are generalized so that a *legal* issue is created. A 16-year-old named Fugett becomes "a minor," driving a car becomes "an adult activity which exposes others to hazards," the bike and car collision becomes "causes" Baxter's specific injuries become "harm," Baxter becomes "another," and proceeding through the stop sign as Fugett did becomes "allegedly negligent conduct." Law requires generality to have future applicability. This generality is created when the case facts are brought to higher levels of generality by a process of "abstraction." The modern U.S. Supreme Court typically starts its opinions with a statement of the issue before the Court. You can consult these if you want more examples of issue formulation.

Baxter Issue. When a (1) minor is (2) engaged in an adult activity which exposes others to hazards and (3) causes (4) harm to (5) another (6) due to allegedly negligent conduct, should he be judged under the standard of care ordinarily applied to adults?

Decision/Disposition. Answer the question as the court did and record the rule's effects in disposing of the appeal. You don't need a separate section for this. Notice that your answer takes away the question mark and implicitly forms a holding: "he should be judged ...".

Baxter Issue. When a (1) minor is (2) engaged in an adult activity which exposes others to hazards and (3) causes (4) harm to (5) another (6) due to allegedly negligent conduct should he be judged under the standard of care ordinarily applied to adults? **Yes. Trial J gave wrong instruction. Jdgmt rev'd. Case remanded for new trial.**

V.

Reasons. Here you summarize the reasons the court gives to justify its rule of law (which is used to decide the appeal). Common reasons may be categorized as follows:

1. **Authority.** These include: judicial precedents the court considers binding or extendible by logic; the direct commands of statutes; the indirect commands of statutes.
2. **Practicality.** The alternatives are rules which will be difficult to understand or administer in practice.
3. **"Parade of Horrors."** The alternatives will lead to horrible consequences when employed in other cases which the court imagines will arise.
4. **Morality.** The court believes the rule to be morally required or justified.
5. **Good policy** (of various types -- economic, social, political, etc.) calls for the rule. Here the court and the reader (you) must estimate whether the rule will advance the welfare of the people subject to it or deter harms.

Keep in mind the modern view that courts create law. That being true, courts should concern themselves with creating law that

will advance the welfare of those under the court's rule. In the "reasons" section of your brief, you will inventory the reasons why the court believes the rule it establishes is required (the court will make the result seem inevitable), and in class you and your teacher will pick apart these reasons.

Baxter Reasons. (1) *Dellwo*, Minnesota case, is persuasive. When minor is exposing others to hazards by engaging in an adult activity, minor should be held to adult std of care. (2) Child standard is "impractical" (Query? Why? Juries can't or won't draw the distinction?) And "contrary to the circumstances of modern life" (Query? Why? I suppose ct means modern 16-year-olds engage in lots of different hazardous "adult activities" like sex, drugs, guns.) (3) Adult std applied in Ark, Kan, Tex, Mo --states surrounding Okla. I guess court wants regional uniformity. (4) Some legislative direction in that Highway Code has only one set of rules for drivers, suggesting legislature wants just one std of care for drivers.

VI.

Other. You may want to add some personal observations, like "stinko case!" or "Cardozo!" I put some queries in among the list of reasons. You can put doubts about the case here too.

(Cite as: 425 P.2d 462)

Robert BAXTER, a minor, by and through Freda B. Baxter, his mother and next friend, and Freda B. Baxter, individually, Plaintiffs in Error,

v.

**Ocie FUGETT, as Guardian Ad Litem of William M. Fugett, and Ocie Fugett,
individually, Defendants in Error.**

No. 41262.

Supreme Court of Oklahoma.

March 21, 1967.

Action by minor bicycle rider against minor automobile driver for injuries sustained by bicyclist in automobile-bicycle collision. The District Court for Oklahoma County, W. R. Wallace, J., rendered judgment in favor of the automobile driver and the bicyclist appealed. The Supreme Court, McInerney, J., held that instruction imposing child's standard of care rather than standard required of adult on 16-year-old automobile driver was reversibly erroneous.

Reversed and remanded with directions to grant a new trial.

[1] INFANTS k61

211k61

Generally, when a minor is charged with common law negligence, his conduct is to be measured by a child's standard of care under which consideration is given to his age, mental capacity, and judgment.

[2] AUTOMOBILES k157

48Ak157

A minor, when operating an automobile, must exercise the same standard of care as an adult. 47 O.S.1961, §§ 11-403(b).

[3] APPEAL AND ERROR k1064.1(4)

30k1064.1(4)

Formerly 30k1064(1)

Instruction imposing child's standard of care rather than standard required of adult on 16-year-old automobile driver was reversibly erroneous in action arising out of automobile-bicycle collision. 47 O.S.1961, §§ 1-101 et seq., 1-114, 1-140, 1-144.

[3] AUTOMOBILES k246(2.1)

48Ak246(2.1)

Formerly 48Ak246(2)

Instruction imposing child's standard of care rather than standard required of adult on 16-year-old automobile driver was reversibly erroneous in action arising out of automobile-bicycle collision. 47 O.S.1961, §§ 1-101 et seq., 1-114, 1-140, 1-144.

[4] AUTOMOBILES k157

48Ak157

Legislative policy of Oklahoma is to prescribe only one standard of care upon person operating a motor vehicle, regardless of the age of the person, and that is an adult standard of care. 47 O. S.1961, §§ 1-101 et seq., 1-114, 1-140, 1- 144.

[5] AUTOMOBILES k157

48Ak157

Adult standard of care should be applied to negligent acts committed by a minor while driving an automobile, even though negligent act is not specific violation of statute.

[6] AUTOMOBILES k157

48Ak157

Activity of operating motor vehicle on public highway is basis for imposing standard of care, rather than age of person engaged in the activity.

***462** Syllabus by the Court

In the operation of an automobile, a minor is required to exercise the same standard of care as an adult.

Appeal from the District Court of Oklahoma County; W. R. Wallace, Judge.

Action by plaintiffs, Robert Baxter, a minor, by and through his mother and next friend, Freda B. Baxter, and Freda B. Baxter individually, against the defendants, Ocie Fugett as Guardian Ad Litem of William M. Fugett, a minor, and Ocie Fugett individually, for damages for negligence. From verdict and judgment for defendants, plaintiffs appeal. Reversed and remanded to trial court for new trial.

Berry & Berry, Howard K. Berry, Jr., Oklahoma City, for plaintiffs in error.

*463 Jake Hunt, Oklahoma City, for defendants in error.

McINERNEY, Justice.

This is an appeal by plaintiff from verdict and judgment for defendant in a negligence action arising out of a collision, at an Oklahoma City street intersection, between a bicycle ridden by a 12 year old plaintiff and an automobile driven by a 16 year old defendant. The mothers of the two boys were made parties plaintiff and defendant respectively, but in view of the single proposition argued on appeal, it will not be necessary to notice their respective interests in the case.

In the petition, the 16 year old defendant was charged with specific acts of negligence; in the answer, defendant pleaded contributory negligence, unavoidable accident, and the defense of sudden emergency.

No detailed summary of the evidence is necessary to an understanding of the single question raised on appeal. Plaintiff was riding his bicycle north on a through street. He could not recall any facts pertaining to the cause of the accident. Defendant testified, as a witness for plaintiff, that he was driving his automobile west toward an intersection where the through street was protected by a stop sign. After stopping and observing plaintiff about fifty feet away, defendant proceeded into the

intersection and his automobile was struck at a point just behind the driver's seat on the left side by plaintiff's bicycle.

In his 'statement of the case and pleadings' the trial judge informed the jury that plaintiff alleged that the defendant automobile driver was negligent in two particulars: (1) failure to keep a proper lookout, and (2) failure to yield the right of way. From the language in the petition, and from uncontradicted circumstances shown in evidence, it is clear that the allegation of failure to yield the right of way was based upon the requirement of 47 O.S.1961, s 11-- 403(b) that 'every driver' approaching an intersection protected by a stop sign shall stop, and 'after having stopped shall yield the right of way to any vehicle which * * * is approaching so closely on said highway as to constitute an immediate hazard'. The trial judge also told the jury, among other things, that the defendant alleged that the 12 year old plaintiff was guilty of contributory negligence. No objection to the court's statement of the issues and pleadings was made by either party.

From verdict and judgment for defendant, plaintiff appeals.

The precise argument made on appeal, and the only one, is that the court erred in giving the following instruction:

'You are instructed that the plaintiff Robert Baxter at the time of this accident was 12 years of age and the defendant William M. Fugett was 16 years of age. In determining whether or not the defendant William M. Fugett was guilty of negligence and whether or not the plaintiff Robert Baxter was guilty of contributory negligence as heretofore defined in these instructions, you are instructed that by the term 'ordinary care' as applied to children is meant that degree of care and caution which would usually and ordinarily be exercised by children of the age of 12 and 16 years under the same or similar circumstances. The conduct of children 12 years of age and 16 years of age is not necessarily to be judged by the same rules which would apply to an adult. The degree of care and caution required of a child is according to and commensurate with his age and mental capacity and his power to exercise such degree of care as a child of his age may be fairly presumed capable of exercising. Insofar as Robert Baxter and William M. Fugett may be presumed to do so it was their duty to take into consideration the fact that each was attempting to cross a public street upon which vehicular traffic could ordinarily be expected and in crossing the street to exercise ordinary care for his own safety and to watch out for traffic proceeding along the street.

***464** 'It was the duty of each to take into consideration all the circumstances and conditions surrounding the place of the accident and the possibility of injury which might result in crossing or attempting to cross the street at the time and place in question.'

[1] This instruction follows the general rule that when a minor is charged with common law negligence, his conduct is to be measured by a 'child's standard of care' under which consideration is given to his age, mental capacity, judgment, etc. *Davis v. Bailey*, 162 Okl. 86, 19 P.2d 147; *Witt v. Houston*, 207 Okl. 25, 246 P.2d 753; *Morris v. White*, 177 Okl. 489, 60 P.2d 1031; *Bready v. Tipton*, Okl., 407 P.2d 194. These cases, however, involve the standard of care required of a child while engaged in activities commensurate with his age.

We are asked to approve the above standard of care for a 16 year old minor engaged in an adult activity. We decline to do so. The better reasoning is expressed in *Dellwo v. Pearson*, 259 Minn. 452, 107 N.W.2d 859, 97 A.L.R.2d 866. The Minnesota Supreme Court, in disapproving a similar instruction, and distinguishing between the contributory negligence and primary negligence of minors, said as follows:

'However, this court has previously recognized that there may be a difference between the standard of care that is required of a child in protecting himself against hazards and the standard that may be applicable when these activities expose others to hazards.' (Emphasis supplied)

[2][3] The instruction complained of permits a minor to engage in adult activities which expose others to hazards, while imposing only a child's standard of care on the minor so engaged. This legal sanction is impractical and contrary to the circumstances of modern life. We hold that a minor, when operating an automobile, must exercise the same standard of care as an adult. Jurisdictions surrounding Oklahoma generally follow the rule announced in this case. See *Harrelson v. Whitehead*, 236 Ark. 325, 365 S.W.2d 868; *Allen v. Ellis*, 191 Kan. 311, 380 P.2d 408; *Wilson v. Shumate*, Mo., 296 S.W.2d 72; *Renegar v. Cramer*, Tex.Civ.App., 354 S.W.2d 663.

[4][5][6] The Highway Safety Code, Title 47, Motor Vehicles, makes no distinction between minors and adults in defining 'person', s 1--144, 'driver', s 1--114, and 'operator', s 1--140. No statute or rule of the road prescribing the operation of a motor vehicle makes any such distinction, but refers to 'every person', when reference is made to the person, operating a vehicle and the duties required in the operation of a vehicle. It is the announced legislative policy of this state to prescribe only one standard of care upon a person operating a motor vehicle, regardless of the age of the person, and that is an adult standard of care. There is no reason to apply a different standard of care

to negligent acts committed by a minor while driving an automobile, even though the negligent act is not a specific violation of a statute, since the activity of operating a motor vehicle on a public highway is the basis for imposing the standard of care, rather than the age of the person, and that is an adult standard.

Having determined that the giving of the instruction was error, and being of the opinion that this error was prejudicial to the plaintiff, the judgment of the trial court is reversed and the cause is remanded with directions to grant a new trial.

JACKSON, C.J., IRWIN, V.C.J., and WILLIAMS, BLACKBIRD, BERRY, HODGES and LAVENDER, JJ., concur.