New York University School of Law
Admitted Students Days
Reading Material for Mock Torts Class
Friday, March 8, 2024, 12:10pm—1:00pm
Professor Daniel Hemel

Vosburg v. Putney
80 Wis. 523, 50 N.W. 403 (1891)

[On February 20, 1889, Andrew Vosburg (age 14) and George Putney (age 11) were sitting across the aisle from each other in a seventh-grade classroom at Union School in Waukesha, Wisconsin, when Putney reached across the aisle with his foot and lightly kicked Vosburg's right shin. Vosburg did not initially feel the kick. A few moments later, Vosburg felt a violent pain in his shin and cried out loudly. Vosburg was sick the next day. On the fourth day after the incident, Vosburg vomited repeatedly. His leg swelled up so much that on March 8, he underwent surgery on the limb. After a second unsuccessful operation, doctors concluded that Vosburg would never recover the use of his right leg.]

On the last trial the jury found a special verdict, as follows:

> (1) Had the plaintiff during the month of January, 1889, received an injury just above the knee, which became inflamed, and produced pus? Answer. Yes.
>
> (2) Had such injury on the 20th day of February, 1889, nearly healed at the point of the injury? A. Yes.
>
> (3) Was the plaintiff, before said 20th of February, lame, as the result of such injury? A. No.
>
> (4) Had the tibia in the plaintiff's right leg become inflamed or diseased to some extent before he received the blow or kick from the defendant? A. No.
>
> (5) What was the exciting cause of the injury to the plaintiff's leg? A. Kick.
>
> (6) Did the defendant, in touching the plaintiff with his foot, intend to do him any harm? A. No.
>
> (7) At what sum do you assess the damages of the plaintiff? A. $ 2,500.

The defendant moved for judgment in his favor on the verdict, and also for a new trial. The plaintiff moved for judgment on the verdict in his favor. The motions of defendant were overruled, and that of the plaintiff granted. Thereupon judgment for plaintiff for $2,500 damages and costs of suit was duly entered. The defendant appeals from the judgment.

LYON, J.

. . .

The jury having found that the defendant, in touching the plaintiff with his foot, did not intend to do him any harm, counsel for defendant maintain that the plaintiff has no cause of action, and that defendant's motion for judgment on the special verdict should have been granted. In support of this proposition counsel quote from 2 Greenl. Ev. § 83, the rule that "the intention to do harm is of the essence of an assault." Such is the rule, no doubt, in actions or prosecutions for mere assaults. But this is an action to recover damages for an alleged assault and battery. In such case the rule is correctly stated, in many of the authorities cited by counsel, that plaintiff must show either that the intention was unlawful, or that the defendant is in fault. If the intended act is unlawful, the intention to commit it must necessarily be unlawful. Hence, as applied to this case, if the kicking of the plaintiff by the defendant was an unlawful act, the intention of defendant to kick him was also unlawful.

Had the parties been upon the play-grounds of the school, engaged in the usual boyish sports, the defendant being free from malice, wantonness, or negligence, and intending no harm to plaintiff in what he did, we should hesitate to hold the act of the defendant unlawful, or that he could be held liable in this action. Some consideration is due to the implied license of the play-grounds. But it appears that the injury was inflicted in the school, after it had been called to order by the teacher, and after the regular exercises of the school had commenced. Under these circumstances, no implied license to do the act complained of existed, and such act was a violation of the order and decorum of the school, and necessarily unlawful. Hence we are of the opinion that, under the evidence and verdict, the action may be sustained. . . .