**Protocols for Annotating Cases**

**Iteration #5, 12 March 2021**

**Coding Protocols for Iteration #4**

We will tag six types of text in the judgements, and add two elements.

**#1 Facts**: these should be stated comprehensively early on in the judgement. Tag only text about facts that happened “in the world” before the litigation began (ie the facts alleged to have give rise to the legal consequences in the plaintiff’s suit). Highlight these in yellow. Include any assumed/conceded “facts” as we are interested in all assumed facts on which the reasoning is based.

**#2 Procedural history**: highlight in pink statements about the procedural status of the case (“this is an appeal ….”) and (“plaintiff succeeded at first instance”) and what standard of review is applied (“de novo” vs “review”) etc, and (where available) what the lower court’s reasons for its decision were.

Turning to the actual decision in the case, we will focus on three *specific* aspects:

**#3 Application of law to facts**: highlight in green the minimum necessary statements of the application of law to the facts to get the court to the decision. (Exclude discussion of points which are not necessary to the conclusion). *Include contextual statements from the text that help to explain the application of the law to the facts. Include “judicial cues” for application of the law.*

**#4 Relevant precedents** – highlight in blue the names of relevant prior cases (precedents) referred to which are salient *for the application of law to facts in this case*. The scope of this will be driven by the scope of what is tagged in green as “application of law to the facts”. Include the citation information (court, year, law report). This annotation can exclude cases cited by way of background, or in relation to issues which are not determinative. Please also include relevant pieces of legislation, including section numbers. (But no need to highlight statutory text)

**#5 Outcome:** highlight in red at the end the court’s statement of the outcome (“I find for the defendant..”) Fine to highlight multiple times if it appears more than once.

In addition, we will also code a seventh factor, once we have completed the breakdown of rules of the restatement:

**#6 Plain English summary** – account in plain English of what happened in the case.

**#7 Restatement**: indicate which rule(s) of the Restatement of Torts are applicable to the decision in the case. This will be based on a comparison of a table of Restatement provisions and our reading of the case.

**Additional Protocols Agreed During RA Meetings**

1. Our focus is on the following elements of tort law: **existence/scope of duty**, **breach of duty** (i.e., whether the defendant was negligent), and the **existence of contributory negligence** (i.e., whether the claimant was negligent) (the ‘**Relevant** **Issues**’).[[1]](#footnote-2)
2. Pink and green highlights should only relate to the Relevant Issues. For example, if the appeal concerns (i) whether there was a duty; (ii) matters of causation; and (iii) damages, we should only highlight the procedural facts and any applications of the law to the case which relate to issue (i).[[2]](#footnote-3)
   * Moreover, if the case primarily concerns issues (ii) and (iii), but issue (i) is mentioned very briefly (and what is mentioned would be useful to our model), annotate the case anyway, but mark it in the tagging sheet as a ‘**Marginal case**’ and add a comment to explain why you have marked it as such.[[3]](#footnote-4)
3. Contributory negligence: [[4]](#footnote-5)
   * We are interested in whether the court finds the claimant to be guilty of contributory negligence. However, if the court goes on to discuss whether the claimant’s contributory negligence *caused* his/her injury, then this does not need to be highlighted.
   * Similarly, we can highlight by what percentage the court finds the claimant to have contributed to his/her injury, but we do not need to highlight any discussion of damage reduction on account of the claimant’s negligence.
4. Special liability rules:
   * Where a case concerns occupiers’ liability, employer’s liability, strict liability, or other special rules governing liability, the discussions relating to these issues need only be highlighted if they are generalizable to common law negligence. For example:
     1. If the case exclusively concerns an employee’s attempt to claim under the New Mexican Workers' Compensation Act, then this should not be highlighted.
     2. If, however, the case discusses an occupier’s duty of care to visitors and does so in general tort law of negligence terms, this should be highlighted (even if the case refers to some specific rules under the Restatement).
   * In the case (b), we should mark the column ‘**Potentially other sections of the Restatement relevant**’ in the tagging sheet.[[5]](#footnote-6)
5. If the claim is against a state entity, and the discussion of the court merely concerns whether that state entity is immune from liability under the Tort Claims Act, this should not be highlighted.[[6]](#footnote-7)
6. We do not highlight the cases related to the standard of review.[[7]](#footnote-8)
7. If the court makes it clear that through its judgment it is making ‘new law’, mark the ‘**Makes new law**’ column in the tagging sheet.[[8]](#footnote-9)
8. Mark the column ‘**special concurrence**’ in the tagging sheet if the case includes a special concurrence after the judgment. The contents of the special concurrence should not be annotated.[[9]](#footnote-10)
9. Do not annotate dissenting opinions.[[10]](#footnote-11)
10. Treat witness testimony which is relied on by the court for its reasoning as fact.[[11]](#footnote-12)
    * Where some witnesses disagree, but the court makes it clear that a majority of witnesses agree on particular facts, do not treat ‘minority’ witness testimony as fact.
11. Highlight the whole case name, including all the citation references after it (so the blue highlights will sometimes be very long).[[12]](#footnote-13)
12. The various tort law Restatements should be highlighted blue even though they are not technically statutory.[[13]](#footnote-14)
13. If the court mentions claims made by the claimant against parties that are not party to the case at hand, this information does not form part of the procedural facts and therefore should not be highlighted pink.[[14]](#footnote-15)
14. Square brackets and other characters/symbols can be deleted or ignored (the model will delete them anyway).[[15]](#footnote-16)
15. Add any other comments in the ‘**Comments’** section of the tagging sheet that you think are necessary.
16. Where *new* factual information is recounted by the court in the course of its application of the law to the facts, tag that information as (yellow) fact notwithstanding that it is part of the court’s reasoning, to ensure that all facts are captured.[[16]](#footnote-17)
17. Where the judgement includes a detailed factual description of the life, behaviour or practices of one of the parties (such as psychiatric or employment history) that occurs prior to the factual situation in which the tortious acts are alleged to have occurred, this should be annotated as (yellow) fact.[[17]](#footnote-18)
18. Where facts are recounted by the court that pertain exclusively to issues that are out of scope, they should nonetheless be annotated.[[18]](#footnote-19)
    * For example, see the case of [**Trujillo v Chavez**](https://cite.case.law/nm/76/703/). In this case, the court recounts facts that relate exclusively to the question of whether or not the plaintiff was a fare-paying passenger (in which case the plaintiff would not be statutorily barred from seeking compensation). Notwithstanding that those facts do not go to the negligence of the defendant, they should be annotated.
19. Where a case is heavily based on State-specific law (for example Delgado Claims in New Mexico), it should still be tagged if it is a duty and breach case.

1. Where the court’s statement of facts takes the form of **(a)** restatement of witness testimony (apparently uncontradicted, and ostensibly in support of conclusions that such testimony *establishes* the facts); or **(b)** a claimthat ‘the evidence establishes’ the facts recounted, **exclude prefatory remarks** that refer to the *basis* for the court’s conclusion such as, ‘*The evidence establishes that …*’, and ‘*The plaintiff testified that …*’.
   * Where the court’s statement of facts includes an excerpt from examination-in-chief or cross-examination of a witness, the useful, unambiguous portions of those excerpts (that is, excluding exclamations such as, ‘oh’ and ‘um’ which accompany verbatim records of witness examination) should generally be annotated as (yellow) fact, **EXCEPT** where necessary to give proper meaning to the court’s application of law to the facts on the point in support of which the excerpt is included, in which case such testimony should be highlighted as (green) application of the law to the facts.
2. Where the court’s *application of law to the facts* refers to a relevant case name or statute, highlight that case name or statute in blue (keeping the rest of the statement in green).
   * If, however, the *procedural facts* refer to a case name or statute, do not highlight this blue: the procedural facts should be highlighted pink only.
3. Where the court states that a piece of evidence included in an affidavit and excerpted in the judgement is not admissible, and therefore that it does not form a basis for the court’s decision, that evidence should not be highlighted as fact.
   * **EXAMPLE:** Consider the case of **[Cowan v. Ellison Enterprises, Inc.](https://cite.case.law/ark-app/93/135/)**, in which the court states the following in relation to part of the plaintiff’s affidavit:

*In reviewing the motion for summary judgment, we do not consider appellant’s statement, “friends and relatives . . . have seen loose grapes on the floor in the produce section.” That statement was not based on personal knowledge, and it is nothing more than inadmissible hearsay. As such, it should not be accepted as the basis for finding a genuine issue of material fact to deny entry of summary judgment.*

1. Where the court discusses whether a particular piece of evidence has probative value as regards the tort elements of duty or breach, and the discussion provides a signal as to the court’s reasoning on those elements, this discussion should be annotated.
2. Where facts appear in a dissenting opinion, those facts should ordinarily **not** be annotated unless there is no effective statement of the facts in the majority opinion.
3. Where facts appear in a specially concurring separate opinion that do not appear in the majority opinion, they should be annotated.
4. Cases dealing with damage to property should be annotated where they turn on the same elements of negligence considered for the purposes of cases involving physical injury **and** they do not concern pure economic loss.[[19]](#footnote-20)
5. Where possible, do not annotate references to the party type (such as ‘defendant’, ‘plaintiff’, or ‘appellant’) in the court’s restatement of the facts.
   * **For example:** if the court refers to ‘defendant John’ in its statement of the facts, highlight only ‘John’ in yellow.

1. 5 February 2021. [↑](#footnote-ref-2)
2. 19 February 2021. [↑](#footnote-ref-3)
3. 5 March 2021. [↑](#footnote-ref-4)
4. 19 February 2021. [↑](#footnote-ref-5)
5. 9 April 2021. [↑](#footnote-ref-6)
6. 12 March 2021. [↑](#footnote-ref-7)
7. 29 January 2021. [↑](#footnote-ref-8)
8. [26 March 2021]. [↑](#footnote-ref-9)
9. 9 April 2021. [↑](#footnote-ref-10)
10. 19 March 2021. [↑](#footnote-ref-11)
11. 5 March 2021. [↑](#footnote-ref-12)
12. 12 March 2021. [↑](#footnote-ref-13)
13. 26 March 2021. [↑](#footnote-ref-14)
14. 9 April 2021. [↑](#footnote-ref-15)
15. 9 April 2021. [↑](#footnote-ref-16)
16. 19 March 2021. [↑](#footnote-ref-17)
17. 9 April 2021. [↑](#footnote-ref-18)
18. 16 April 2021. [↑](#footnote-ref-19)
19. 14 May 2021. [↑](#footnote-ref-20)