**VOSBURG, Respondent, vs. PUTNEY, Appellant.�**

**[NO NUMBER IN ORIGINAL]**

**SUPREME COURT OF WISCONSIN**

***78 Wis. 84;* *47 N.W. 99;* *1890 Wisc. LEXIS 276***

**October 20, 1890, Argued**

**November 5, 1890, Decided**

**PRIOR HISTORY:**

APPEAL from the Circuit Court for Waukesha County.

The facts are stated in the opinion. The defendant appealed from a judgment in favor of the plaintiff.�

**JUDGE:**

HARLOW S. ORTON, J.�

**OPINION:**

ORTON, J. The facts of this case are briefly as follows: The plaintiff was about fourteen years of age, and the defendant about eleven years of age. On the 20th day of February, 1889, they were sitting opposite to each other across an aisle in the high school of the village of Waukesha. The defendant reached across the aisle with his foot, and hit with his toe the shin of the right leg of the plaintiff. The touch was slight. The plaintiff did not feel it, either on account of its being so slight or of loss of sensation produced by the shock. In a few moments he felt a violent pain in that place, which caused him to cry out loudly. The next day he was sick, and had to be helped to school. On the fourth day he was vomiting, and Dr. Bacon was sent for, but could not come, and he sent medicine to stop the vomiting, and came to see him the next day, on the 25th. There was a slight discoloration of the skin entirely over the inner surface of the tibia an inch below the bend of the knee. The doctor applied fomentations, and gave him anodynes to quiet the pain. This treatment was continued, and the swelling so increased by the 5th day of March that counsel was called, and on the 8th of March an operation was performed on the limb by making an incision, and a moderate amount of pus escaped. A drainage tube was inserted, and an iodoform dressing put on. On the sixth day after this, another incision was made to the bone, and it was found that destruction was going on in the bone, and so it has continued exfoliating pieces of bone. He will never recover the use of his limb. There were black and blue spots on the shin bone, indicating that there had been a blow. On the 1st day of January before, the plaintiff received an injury just above the knee of the same leg by coasting, which appeared to be healing up and drying down at the time of the last injury. The theory of at least one of the medical witnesses was that the limb was in a diseased condition when this touch or kick was given, caused by microbes entering in through the wound above the knee, and which were revivified by the touch, and that the touch was the exciting or remote cause of the destruction of the bone, or of the plaintiff's injury. It does not appear that there was any visible mark made or left by this touch or kick of the defendant's foot, or any appearance of injury until the black and blue spots were discovered by the physician several days afterwards, and then there were more spots than one. There was no proof of any other hurt, and the medical testimony seems to have been agreed that this touch or kick was the exciting cause of the injury to the plaintiff. The jury rendered a verdict for the plaintiff of $ 2,800.

The learned circuit judge said to the jury: "It is a peculiar case, an unfortunate case, a case, I think I am at liberty to say, that ought not to have come into court. The parents of these children ought, in some way, if possible, to have adjusted it between themselves." We have much of the same feeling about the case. It is a very strange and extraordinary case. The cause would seem to be very slight for so great and serious a consequence. And yet the plaintiff's limb might have been in just that condition when such a slight blow would excite and cause such a result, according to the medical testimony. That there is great uncertainty about the case cannot be denied. But perfect certainty is not required. It is sufficient that it is the opinion of the medical witnesses that such a cause even might produce such a result under the peculiar circumstances, and that the jury had the right to find, from the evidence and reasonable inferences therefrom, that it did. We will refrain from further comment on the case, as another trial will have to be had in it.

There were two errors committed on the trial and in the admission of testimony, too important and material to be overlooked.

1. Dr. Philler, a witness for the plaintiff, was asked: "What, in your judgment, was the exciting cause of the condition of this leg as you found it?" This was objected to on the ground that the foundation had not been laid for such a question. The objection was overruled, and the witness answered: "Under the history I learned at the time, a certain *traumatism* --a certain injury received while at school, from the foot of another classmate; in other words, the blow upon the shin bone." The learned counsel of the appellant now contends further that the question was objectionable because it sought to obtain a conclusion of fact from the witness, which it was the province of the jury only to find. But we will consider only the ground of the objection then stated and found in the record. The learned circuit court ruled directly on the objection that the foundation for such a question had not been sufficiently laid. The witness had no personal or professional knowledge of the case until the 6th day of March, about two weeks after the injury. His answer shows his incompetency to answer the question. He answered it "under the *history he learned* at the time." What facts about the case did he learn, and from whom did he learn them? Were they true or false? He does not even give his opinion upon the testimony of other witnesses in court, and no hypothetical statement was submitted to him. No foundation recognized by any authority was laid for his answer to such a question, and he did not show himself competent to answer it. This was clearly error.� *Luning v. State, 2 Pin. 220; Noonan v. State, 55 Wis. 258, 12 N.W. 379;* *Bennett v. State, 57 Wis. 69, 14 N.W. 912.*

2. The father of the plaintiff, Seth B. Vosberg, as a witness on behalf of the plaintiff, was asked in relation to his circumstances and concerning his employment and the number of his children, and answered that his business was that of teamster for the Barker Lumber Company, and that he had three children. This was objected to by the learned counsel of the defendant. The learned counsel of the plaintiff stated that he wanted to show the situation of the family, and if the father was able to educate the plaintiff, his son, himself it would make quite a difference as to the amount of damages he should have, and if the plaintiff has a rich father who could take care of him and provide for and educate him he did not think the jury would be warranted to give as large a verdict. The court overruled the objection. This occurred in the presence of the jury, and the learned counsel of the respondent commented on it to the jury by permission of the court against the further objection of the defendant, so that the jury must have considered themselves instructed to give the plaintiff greater damages in consequence of the poverty of his father. He was a hired man, and therefore could not have been rich. This was not a case for exemplary or punitory damages, and the plaintiff was entitled only to strict compensatory damages in case he recovered in the action. In such a case it would not have been proper even to prove the *defendant* rich or poor.� *Hare v. Marsh, 61 Wis. 435, 21 N.W. 267.* It is sometimes proper to prove the pecuniary circumstances of the defendant, but I never heard of a case like this where it was deemed proper to prove the financial condition of the plaintiff or of his father. The plaintiff, if he recovered, was entitled to full compensation for his injury, no less and no more, whatever his pecuniary circumstances or those of his father. The learned counsel of the respondent say in their brief: "The court did not instruct the jury that this was an element of damage that they might consider, therefore we say that the alleged error is no error." We do not think that this court would be justified in saying this. We cannot but think that the verdict would have been for a less amount if this evidence had not been ruled in expressly in order to affect the damages.

On account of these two errors the judgment will have to be reversed.

*By the Court*.--The judgment is reversed, and the cause remanded for a new trial.

**VOSBURG, by guardian ad litem, Respondent, vs. PUTNEY, by guardian ad litem, Appellant.�**

**[NO NUMBER IN ORIGINAL]**

**SUPREME COURT OF WISCONSIN**

***80 Wis. 523;* *50 N.W. 403;* *1891 Wisc. LEXIS 234***

**October 26, 1891, Argued**

**November 17, 1891, Decided**

**PRIOR HISTORY:**

APPEAL from the Circuit Court for Waukesha County.

The action was brought to recover damages for an assault and battery, alleged to have been committed by the defendant upon the plaintiff on February 20, 1889. The answer is a general denial. At the date of the alleged assault the plaintiff was a little more than fourteen years of age, and the defendant a little less than twelve years of age.

The injury complained of was caused by a kick inflicted by defendant upon the leg of the plaintiff, a little below the knee. The transaction occurred in a school-room in Waukesha, during school hours, both parties being pupils in the school. A former trial of the cause resulted in a verdict and judgment for the plaintiff for $ 2,800. The defendant appealed from such judgment to this court, and the same was reversed for error, and a new trial awarded.� *78 Wis. 84.*

The case has been again tried in the circuit court, and the trial resulted in a verdict for plaintiff for $ 2,500. The facts of the case, as they appeared on both trials, are sufficiently stated in the opinion by Mr. Justice ORTON on the former appeal, and require no repetition.

On the last trial the jury found a special verdict, as follows: "(1) Had the plaintiff during the month of January, 1889, received ah 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.�

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WILLIAM P. LYON, J.�

**OPINION:**

LYON, J. Several errors are assigned, only three of which will be considered.

1. 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.

2. The plaintiff testified, as a witness in his own behalf, as to the circumstances of the alleged injury inflicted upon him by the defendant, and also in regard to the wound he received in January, near the same knee, mentioned in the special verdict. The defendant claimed that such wound was the proximate cause of the injury to plaintiff's leg, in that it produced a diseased condition of the bone, which disease was in active progress when he received the kick, and that such kick did nothing more than to change the location, and perhaps somewhat hasten the progress, of the disease. The testimony of Dr. Bacon, a witness for plaintiff (who was plaintiff's attending physician), elicited on cross-examination, tends to some extent to establish such claim.�Dr. Bacon first saw the injured leg on February 25th, and Dr. Philler, also one of the plaintiff's witnesses, first saw it March 8th. Dr. Philler was called as a witness after the examination of the plaintiff and Dr. Bacon. On his direct examination he testified as follows: "I heard the testimony of *Andrew Vosburg* in regard to how he received the kick, February 20th, from his playmate. I heard read the testimony of Miss More, and heard where he said he received this kick on that day." (Miss More had already testified that she was the teacher of the school, and saw defendant standing in the aisle by his seat, and kicking across the aisle, hitting the plaintiff.) The following question was then propounded to Dr. Philler: "After hearing that testimony, and what you know of the case of the boy, seeing it on the 8th day of March, what, in your opinion, was the exciting cause that produced the inflammation that you saw in that boy's leg on that day?" An objection to this question was overruled, and the witness answered: "The exciting cause was the injury received at that day by the kick on the shin-bone."

It will be observed that the above question to Dr. Philler calls for his opinion as a medical expert, based in part upon the testimony of the plaintiff, as to what was the proximate cause of the injury to plaintiff's leg. The plaintiff testified to two wounds upon his leg, either of which might have been such proximate cause. Without taking both of these wounds into consideration, the expert could give no intelligent or reliable opinion as to which of them caused the injury complained of; yet, in the hypothetical question propounded to him, one of these probable causes was excluded from the consideration of the witness, and he was required to give his opinion upon an imperfect and insufficient hypothesis,--one which excluded from his consideration a material fact essential to an intelligent opinion. A consideration by the witness of the wound received by the plaintiff in January being thus prevented, the witness had but one fact upon which to base his opinion, to wit, the fact that defendant kicked plaintiff on the shin-bone. Based, as it necessarily was, on that fact alone, the opinion of Dr. Philler that the kick caused the injury was inevitable, when, had the proper hypothesis been submitted to him, his opinion might have been different. The answer of Dr. Philler to the hypothetical question put to him may have had, probably did have, a controlling influence with the jury, for they found by their verdict that his opinion was correct.

Surely there can be no rule of evidence which will tolerate a hypothetical question to an expert, calling for his opinion in a matter vital to the case, which excludes from his consideration facts already proved by a witness upon whose testimony such hypothetical question is based, when a consideration of such facts by the expert is absolutely essential to enable him to form an intelligent opinion concerning such matter. The objection to the question put to Dr. Philler should have been sustained. The error in permitting�the witness to answer the question is material, and necessarily fatal to the judgment.

3. Certain questions were proposed on behalf of defendant to be submitted to the jury, founded upon the theory that only such damages could be recovered as the defendant might reasonably be supposed to have contemplated as likely to result from his kicking the plaintiff. The court refused to submit such questions to the jury. The ruling was correct. The rule of damages in actions for torts was held in *Brown v. C., M. & St. P. R. Co. 54 Wis. 342,* to be that the wrong-doer is liable for all injuries resulting directly from the wrongful act, whether they could or could not have been foreseen by him. The chief justice and the writer of this opinion dissented from the judgment in that case, chiefly because we were of the opinion that the complaint stated a cause of action *ex contractu*, and not *ex delicto*, and hence that a different rule of damages--the rule here contended for--was applicable. We did not question that the rule in actions for tort was correctly stated. That case rules this on the question of damages.

The remaining errors assigned are upon the rulings of the court on objections to testimony. These rulings are not very likely to be repeated on another trial, and are not of sufficient importance to require a review of them on this appeal.

*By the Court*.--The judgment of the circuit court is reversed, and the cause will be remanded for a new trial.