Nuts and Bolts Law for Beginning Law Students:

*A slightly irreverent introduction to the law’s majesty for those who have a ticket to law school but haven’t boarded yet …*

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# READ THIS FIRST

**CHAPTER ONE**

## WHAT IS “THE LAW,” AND WHERE DOES IT COME FROM?

When a lawyer thinks of what law is, he or she thinks about it in very different terms than a lay person. To the lawyer, law is a complex, web-like structure that includes what lay people typically think of as laws—that is, acts of a legislature, like Congress. But “the law” has a number of other components as well, many of which no legislature ever enacted (a fact for which you might become thankful).

The Anglo-American legal system is thought of as a “common law” system, rather than a “civil law” or (“code”) system. Since Biblical times, and probably even before then, societies have had written precepts to preserve social order. These started out as simple codifications of the basic rules that most humans feel reflect elemental concepts of morality, such as the Ten Commandments. By Roman times, the exigencies of running a vast empire demanded more and more detailed, written codes (ultimately collected in the time of Justinian as the *Corpus Juris Civilis*)to handle increasingly complex social problems and to furnish the stability and predictability of outcome that are necessary to sustain commercial trade. It’s probably fair to say that most Western legal systems still incorporate some fundamental law handed down from the Romans and even from the Ten Commandments. After all, it is universally criminal to murder or to steal. In fact, most continental European legal systems today are recognizably descended from the Roman code system, in which decisions of courts are governed by codified statements of legal principle and scholarly commentary that are applied to the pending case, with relatively little regard for prior judicial decisions.

In at least one outpost of the former Roman Empire, however, things turned out differently, in part due to a wave of invasions that culminated in 1066 when William the Bastard, Duke of Normandy, prevailed at Hastings and became William the Conqueror. (He had a great publicist, no?) Lawyers think of the law of England, which we pretty much inherited lock, stock, and barrel in the United States as it stood in England in 1776, as a “common law” system, rather than a "civil" or code system. Of course, common law systems also have codes, which are laws passed by the legislature, but the essence of the common law is not the work of any legislature. Like the English constitution itself, it just sort of “is.” In fact, it is called the common law precisely because it binds members of the community to know and to follow rules of behavior held in common. The common law is, in other words, the customary law of the land. Over many hundreds of years in England, judges had occasion to observe their countrymen and discern a set of fundamental principles about how English people were expected to behave towards one another, and, as they announced these principles in their decisions in various cases, the “common law” was solidified and compiled. In deciding a particular dispute, judges would pronounce (literally) the governing rule of law and go on to apply it to the dispute before them. Lawyers sat in on sessions of courts and took heed of what the judges were saying in their decisions, often writing down more-or-less what was said. As time went on, some made money by collecting and publishing volume called “reports” of what the judges had said in their pronouncements. The reports themselves began to be viewed as authoritative repositories of what the common law is, with lawyers and judges resorting to them to discern the principles from earlier cases that seemed most apt to work justice in the case then before them. Thus arose the Anglo-American practice that lawyers call *stare decisis* – to stand by what has been decided. The basic principle is very simple: once the common law has been declared in a decision the facts of which are the same as those of a later case, then the law as stated in the earlier decision should stand to govern the later case. This, then, helps fulfil the fundamental goals of stability and predictability of outcome. When a lawyer advises a client on “the law,” a large part of the job is to predict the outcome of a particular dispute on the basis of precedent, much as a doctor forecasts a prognosis based on what she knows about the course of a disease.

The problem, of course, is that very few cases in law, as in medicine, are exactly alike. Thus, lawyers and judges in a common law system see their jobs as arguing (lawyers) or judging (judges) how the present dispute should be decided in light of the closest reported precedents. The trick, of course, is “Which one is closest?” This is what they spend lots of time doing, but it is only a part of what lawyers think of as “law.”

From early days, the English sovereign and his principal advisory body, the *curia Regis* (which became the Parliament in the 13th Century) – essentially an assembly of feudal society’s nobility and other upper class members – shared lawmaking authority. This came in handy for taking care of problems that couldn’t await the slow evolutionary process of the common law. This power was also useful for squeezing more money out of the populace by enacting taxes to fund the many English dynastic wars of the Middle Ages, which were fought hardly without cessation for centuries. (If you were lucky, you were made to read Shakespeare’s historical plays and already know all about this.) Laws passed by Parliament and assented to by the king were (and still are) called “statutes.” Over many years, Parliament became less an advisory council and more a purely legislative body, while the king became less a law giver than one who executed the laws of Parliament and ran the government from day to day. Meanwhile, judges continued to discern common law and increasingly had to interpret and apply statutes, although they construed them skeptically if they conflicted with common law. Which more or less brings us to today. Just read “President” for king and “Congress” for Parliament, and there you sort of have it in a nutshell.

I should mention the role of constitutional and regulatory law. If you think of the whole body of American law as a sandwich, with the meat consisting of common and statute law, the United States Constitution is the piece of bread on the bottom. It may be thin, but it is the sandwich’s foundation, a *sine qua non*. (Yes, you do need to learn some Latin in law school, so look up *sine qua non* and other Latin phrases you run across if you don’t know what they mean. Not to scare you, but you might even have to learn some Law French, which is a *patois* – that’s French – of French, English, and Latin, but don’t worry about that just now.) Resort to the constitution is usually not needed in everyday law practice. We tend to think of it mostly as a document that establishes the basic rules that organize our government and bind it to act fairly and decently in its interactions with the citizenry. Of course, thousands of pages could be devoted to political and legal expositions of the Constitution, but my simplified explanation is all you really need to know about it now. (Each state has a constitution, all differing from each other, as well as from the United States Constitution, which causes problems, but that’s for another course.)

You can think of administrative or regulatory law as the piece of bread on top of the sandwich. You can make a perfectly edible sandwich without it and save about 75 calories, but it comes in handy to keep the sandwich from getting sloppy. Regulatory law is a vestige of the king’s lawmaking power, and its place in today’s system is this: when the legislature thinks something should be governed by the state but is too arcane to be dealt with in detail by statutes—which are almost impossible to amend or repeal once they get on the books—it can delegate rule-making power to the executive. For example, medical licensing boards can prescribe regulations governing licensure.

Regulations are usually much more detailed than statutes and, believe it or not, they often make more sense. This is the result of the difference between how statutes and regulations are created.

Statutes (called “bills” before enactment) are crafted by legislative staffers (sometimes barely out of school), often from drafts handed to them by lobbyists. The members of Congress for whom the staffers work usually know absolutely nothing about the subject-matter of the bill. No matter how complex its content, the bill will be given a simple name, like “The Truth in Medical Care Act” which few members of Congress could afford to vote against with any hope of re-election. Then, the bill’s sponsors will set up a committee hearing, which is usually a scripted event, to build a record justifying the legislation. After a period of in-house give-and-take (remember learning about “logrolling” in civics class?), the bill works its way through Congress, often bearing little resemblance to how it started out, the President signs it, and there you have it as a statute, more-or-less forever. There is a famous remark, usually attributed to Otto Fürst von Bismarck, which sums it all up: “No man should see how laws or sausages are made.”

On the other hand, a regulation is usually crafted by executive branch employees who are experts in the field and who put out a draft for public comment (frequently more-or-less ignored) before adopting a final regulation. Most lawyers and judges feel regulations are usually more cogent and comprehensive than most legislation, and they have the additional benefit of being much quicker and easier to promulgate or change than statutes, but they don’t win any votes at Congressional reelection time. Sponsorship of the “The Truth in Medical Care Act,” on the other hand, does.

And that’s the story of about 1,000 years of Anglo-American law in a couple of pages. That didn’t hurt too much, did it?

# CHAPTER TWO

# *ORGANIZATION AND JURISDICTION OF COURTS*

Even to an English lawyer, the fact that the United States has a dual system of federal and state courts seems a bit hard to digest. It shouldn’t, really, because it is a direct result of the fact that, in Colonial days, most of the statute law that bound the colonists was enacted by Parliament, where the colonies had no voice. So, whatever the British Parliament thought was good law for the colonies, they got. The colonists did not like this. Remember “Taxation Without Representation”? All the while, though, each of the colonies had its own mini-sovereign (the colonial governor or proprietor) and its own mini-parliament (usually called the House of Burgesses or some such thing) dealing with peculiarly local problems, like where to build roads and ports and forts and how to pay for them. Colonial courts enforced and interpreted the laws enacted both by Parliament and the colony’s legislature, as well as the common law, but judges, by and large, had little security of tenure.

When the Revolution succeeded, the transition from colony to statehood was not as easy as you might think. Remember the Articles of Confederation and the long process leading to the adoption of the Constitution that Ms. Schmidlapp droned on and on about while you were in eleventh grade, daydreaming of doing gastrectomies? The result was the creation of a federal government that more-or-less inherited the role of Mother England in very weakened form, while the new states were supposed to be the principal repositories of legislative, executive, and judicial power. That’s not the way it has turned out, is it? The New Deal changed American government fundamentally and forever, but more about that later.

Anyway, there are two systems of justice operating side-by-side in every state. Let’s start with the federal one. At the top of the federal judicial heap sits the Supreme Court. It has nine Presidentially-appointed justices, but a President who could get away with it could ask Congress to expand it to any number of justices who, presumably, would look more favorably upon his agenda than the majority of its incumbents. When the Court junked much of his New Deal legislation, Franklin D. Roosevelt threatened to “pack the Court.” In the event, he didn’t, because the Court, rather than see itself ruined, suddenly reversed course and started upholding Roosevelt’s legislative agenda. (For you history buffs, this was not an original idea of Roosevelt’s. British Prime Ministers Earl Grey and Asquith had successfully made similar dilution threats against the House of Lords to get it to reform itself in 1832 and 1911, respectively. They worked.) Although the Supreme Court has the power to review certain state court decisions that implicate federal issues, like interpretation of the Constitution, most of its work is reviewing the decisions of the lower federal courts. It has the discretion, by and large, to decide what its workload will consist of in a particular term, so it can concentrate on the really important stuff.

Under the Supreme Court sit the federal appellate courts, called Circuit Courts of Appeal. They have jurisdiction over appeals coming out of the federal trial courts in their geographic areas. They are numbered. So, for example, the Fourth Circuit has jurisdiction over appeals coming out of federal trial courts in Maryland, the two Virginias, and the two Carolinas. A federal Circuit court must decide every appeal taken to it, so it is a much busier court than the Supreme Court. Circuit courts may have close to, or over, 20 judges. They sit in panels of three, which, as you might imagine, sometimes makes for inconsistent decisions among different panels of the same court, not to mention among the different circuits. Most laypeople find it hard to believe that federal law can be different in, say, Wyoming from Maryland. Yet, it happens all the time; that’s part of the reason why people need to hire lawyers. When the situation gets bad enough, these conflicts can be squared away by the Supreme Court, but it doesn’t have time to do so nearly often enough, so we just sort of muddle through.

At the bottom of the federal heap are the judicial combat troops, district judges, sitting in the federal trial courts, known as District Courts. All states have at least one district. Geographically small ones, like Delaware, have only one, with a handful of judges; large ones can have four, some with 20 or more judges each. Again, the jurisdiction of these courts is territorial. They must decide every federal case within their jurisdiction, civil and criminal. This works out to many hundreds of cases per judge per year. Of course, not every case requires a trial; if it did, we’d still be working on cases from the 1980s. The fact is that most criminal defendants plead guilty and most civil cases settle before trial. Nonetheless, there is plenty for the district judges to do. There are also Magistrate Judges and Bankruptcy Judges who perform distinct roles within the district court system, but you needn’t be too concerned with their functions now.

All federal district and circuit judges, and Supreme Court justices, are appointed by the President, with the advice and consent of the Senate. What this means in real life is, first, that they usually have to be of the same political party as the sitting President and, second, that the senators of a particular nominee’s state either make the nomination in practice or else have a lot to say about it, including blocking it by refusal to sign a paper of approval called a “blue slip.” Once appointed, these judges have tenure for life unless impeached by the House and convicted by the Senate, which does happen, but only very rarely. So, they pretty much get to do what they think is right without worrying about the repercussions, career-wise (unless they thirst for promotion, but that’s another story). This is good, unless you get a bad apple who should be impeached but is smart enough to avoid it. Impeachments, thankfully, happen only rarely, primarily because the pre-appointment vetting process is very thorough and usually weeds out the real stinkers.

What kinds of cases do federal trial courts hear? There are two general categories, civil and criminal. Keep in mind that the federal courts are courts of “limited jurisdiction,” which means that unless a case fits with one of the subcategories of criminal or civil cases that the Constitution and federal statutes give them the power to hear, it must be brought in a state court.

In the criminal realm, the theory is that the federal government’s jurisdiction is limited, and that the states are the repositories of the general police power. That’s the theory. The reality is that sponsoring and voting for anti-crime bills are very good for a Congressman’s reelection prospects, so, especially in election years since the 1980s, many things that have historically been viewed as state-law crimes have been “federalized” by Congress. How does a legislature with limited powers get away with that? It’s a little clause in the Constitution that gives Congress the power to regulate interstate commerce. It was intended to keep, say, Maryland from protecting its farmers by prohibiting the importation of wheat from Virginia. Starting during the New Deal, around 1937, however, the concept was stretched to the point where, today, Congress can regulate almost everything, the only test being whether it “affects” interstate commerce. Thus, it can pass a bill regulating, say, aspects of doctor discipline, because many patients cross state lines to be treated and good medical care is necessary in order for commerce to flourish. In one extreme case, a federal appellate court said that burning down a neighbor’s house in a fit of jealousy over a love affair could amount to the federal crime of burning a structure in interstate commerce (designed to stop Mafia arsons), because the required “interstate nexus” was supplied by the fact that the lover’s house – as are virtually all houses – was connected to the interstate power grid. Three allegedly smart adults, all of whom had graduated from law school, made that decision. I am not making this up!

When it comes to federal civil jurisdiction, the Constitution limits the federal courts to two categories of cases. The first is those involving “federal questions,” such as the constitutional right of a public employee to criticize her boss on issues of public concern without fear of reprisal, or cases in which a federal statute, like the Truth in Lending Act, gives an aggrieved party the right to sue. The second is a remnant of the past, called “diversity of citizenship” jurisdiction. Remember the colonies? When the United States was being formed, Virginia’s and Maryland’s citizens, for example, were not sure that they would get a fair shake in the courts of the other new state. In other words, there was a fear that Marylanders suing a Virginian in a Virginia court would be home-teamed. So, the Constitution provides that where there is a civil dispute between citizens of different states (involving a minimum amount of money (now $75,000)), the case can be heard in a federal court. For example, if a Delaware resident were to sue for malpractice committed in Maryland by a Maryland provider, the suit could be brought in federal court, so long as more than $75,000 in damages was sought. The federal court uses the same principles of law that would be applied by the state court in its district, but defendants especially like federal courts for trials in urban areas, because the federal jury is typically selected from a geographically larger area than a state court jury, and will often tend to have a higher level of education and income. This can lead to a more favorable result for defendants than for plaintiffs. Many judges and academics have tried to get rid of diversity jurisdiction, because it is anachronistic (after all, do you really distrust the denizens of your neighboring state?) and wastefully duplicative, but corporate America and its lobbyists and lawyers like it, so it persists.

And that’s just about all you need to know now about the federal courts.

State courts handle the vast majority of cases, criminal and civil, initiated in the United States. At one level or another, they have what is called “general jurisdiction,” which means that they must adjudicate any dispute where a person has a right to legal redress, whether under the common law, state statutes, most federal statutes, or the federal or state constitution. Typically, the state courts are organized as follows: at the lowest level, there is a small claims court or other court of limited jurisdiction, which handles things like misdemeanors, traffic violations, and small civil suits (disputes under, say $15,000), and where there are usually no jury trials. These may be called district courts, small claims courts, or any one of a number of other labels. Next is the court of general jurisdiction, where serious (felony) criminal cases and any civil case (other than small claims) may be tried, usually with a jury. These may be called anything from circuit court (Maryland) to supreme court (New York) – the label is not important. From there, cases may be appealed to an intermediate appellate court, which, like the federal appellate courts, usually hears cases in panels of three judges. Then, the case can be petitioned for review in the state’s highest court, which, like the United States Supreme Court, usually has discretion to decide which cases to review, and sits as a body of justices, often from five to nine in total. As in the U.S. Supreme Court, a majority carries the day. These courts have varying names, from supreme court to court of appeals, and others in between. From there, a few cases may be petitioned for review by the U.S. Supreme Court, but they must involve a very important federal issue, such as the right to abortion or the like. (It is important to remember that, as to most issues affecting everyday life, like contracts and negligence, the highest courts of the state make the substantive law applicable even to cases that are brought in the federal court of that state, under the so-called *Erie* *Railroad* doctrine.) Unlike federal judges, very few state court judges are appointed, and even fewer have life tenure. Most of them serve for a term of years and have to run for election. And, running for election involves money, often millions of dollars, which means campaign contributions are accepted, which means . . .. Well, you can figure it out. This is not to imply that all, or even a large number of, elected judges are open to political pressure, but it does happen. Fortunately, the vast majority are honorable and conscientious.

And that’s about all you need to know about state court organization.

We’ll conclude with a few words about the relationship between the state and federal court systems. Lawyers usually think of them as parallel systems, not competing ones, although, as mentioned, the Supreme Court of the United States does hear a very few cases raising federal issues that come up through the state courts. Nonetheless, many laypeople think that, if they lose a case in the state court system, they can start over again in, or appeal to, the federal courts. No such thing. There is, however, a provision whereby, if a case that could have been filed in a federal court is filed in a state court, certain defendants (the person being sued) can “remove” it to the federal court for trial, which has judges with life tenure, who do not need to worry about re-election, and juries drawn from both urban and rural areas covering many counties.

You might wonder why state court juries are drawn only from the county in which the court sits. The answer is that the form of Latin writ which instituted a civil suit in England started off by directing the Sheriff of the county to assemble a jury from that county to hear a case at the next sitting of the royal courts in that county. And all across America to this very day, Sheriffs remain in charge of juries in their counties, and cases are heard in the courts of a county only by juries from the county. The voice of the community will pronounce the verdict. The word “verdict” stems from the Latin phrase *vere dictum*, to say the truth, as juries have been sworn to do since time immemorial. The Statute of Westminster 1275 essentially fixed that as *ex prima Coronatione regis Richardi primi* (don’t bother to translate it – it was any time prior to July 6th, 1189). Our common law has deep roots, indeed.

Now, on to your introduction to the world of litigation.

# CHAPTER THREE

# *LITIGATION IN GENERAL*

Keeping in mind that the following is very general, and that state and federal procedural rules differ from each other and that state rules differ from state to state, I’m now going to give you a very general orientation to the world of litigation.

Litigation begins when a person (or corporation or other body with the right to sue) called the plaintiff feels aggrieved by another’s (the defendant’s) conduct. Hard as this might be to believe, not everything that annoys, or even injures, another person may be made the subject of a lawsuit. If your neighbor has a large dog on a chain that frightens you, because you are afraid the chain might break and the dog might run over to your yard and attack you, the law probably will not recognize that you have any right to sue if you suffer a heart attack or acquire PTSD attributable to fear of the nasty dog. But, if the dog does break loose and bites you, you might well have a right to sue (although the law in some jurisdictions allows a dog and its owner “one free bite”).

Lawyers are trained to look at the facts told to them by their clients and to discern whether the law gives them the right to sue, what lawyers call a “cause of action.” This is roughly comparable to what a doctor does in taking a history and making a diagnosis. The competent lawyer will consult federal, state, and local statutes and regulations, as well as the common law of his or her jurisdiction. Sometimes, there is no real precedent on point, so the lawyer must convince a court either to recognize a new cause of action (which used to hardly ever happen, happens more often now, and yet remains very rare) or to extend a recognized cause of action to fit the facts at hand. As an example of the latter, consider lawsuits by various state and local governments against handgun manufacturers to recover the “costs” associated with handgun violence, which can range from the cost of ER care of gunshot victims to the costs of policing crime-ridden neighborhoods. So far, it has been very difficult for their lawyers to convince courts to allow such suits to proceed on recognized (mostly common law) theories of liability, such as negligence or products liability. But, one must remember that the law is an evolving, living thing, and nobody thought tobacco litigation along these lines would ever yield a penny. Eventually, it yielded zillions.

In identifying a “cause of action,” the lawyer will look to the two historic categories of civil actions. They are contract and tort.

Contracts are conveniently thought of as “a promise or set of promises that the law will enforce.” That is, a contract is “private law” in the sense that the subject of – and the norms for performing – the contract are determined by the parties’ voluntary agreement. But, if one party “breaches” the contract (and there are a number of ways to do so), suit can be brought in a civil court to obtain appropriate relief, which usually is in the form of a money judgment. The law “enforces” the judgment, because the power of the government – personified by the Sheriff – can be used to enforce the judgment by seizing and selling the defendant’s assets if she doesn’t pony up cash or have insurance that pays the judgment.

Torts, on the other hand, are breaches of duties that members of our society owe to each other, even where there is no formal, contractual relationship between them. For example, if I am a pedestrian carefully crossing at an intersection, I have no contract with you that obliges you not to run a red light and mow me down, yet you have the tort duty to refrain from such negligent conduct. Things that amount to torts are also often criminal or violations as well, such as the tort of conversion (dispossessing someone of his property) and the crime of larceny. This is, in part, because in the early days of English law, the line between what we today regard as criminally and civilly culpable conduct was very indistinct.

Torts can be thought of as falling into two camps, intentional and unintentional. Examples of intentional torts are things like assault, battery, and defamation. There are also a number of business torts, like fraud and harmful interference with someone’s economic prospects, such as spreading false information that his product is tainted or other types of unfair competition. When it comes to unintentional torts, the primary one is the tort of negligence, which is simply the failure to use reasonable care in the performance of an activity where one owes a duty to another person, whether it is a driver operating a motor vehicle, a manufacturer making a product, a surgeon performing an operation, or a dermato-pathologist analyzing a biopsy sample. And the definition given a jury for it to use in deciding whether the plaintiff has proved negligence is remarkably nebulous: Negligence is the failure to use that degree of care which a reasonably prudent person would use under the circumstances, either by doing something that a reasonably prudent person would not do, or by failing to do something that a reasonably prudent person would do under similar circumstances. That’s all, folks. Yet, on this rubric, billions of dollars a year are awarded in courts across the country.

A few words about damages would be helpful here. In contract cases, damages are usually strictly limited to the economic “benefit of the bargain,” *i.e.,* to give the aggrieved party the financial benefit he would have had, had the contract been properly performed. For example, you have ordered a limited edition BMW, but the dealer fails to deliver it, usually because he can get more for it elsewhere. You may purchase the car (at its higher market price) elsewhere, and recover the price differential as damages in a contract suit. In tort, although economic damages (usually called actual damages), such as cost of medical care, lost wages, and the like are recoverable, noneconomic damages, such as pain and suffering and “recompense” for other sorts of emotional trauma, can also be awarded. In cases of intentional wrongdoing (and what that is can get complicated), punitive damages can be sought, on the theory that such awards deter others from like misconduct, but punitive damages are, in real life, seldom awarded. That’s why you read about the big ones in the newspaper. In most cases, huge jury awards are never collected as awarded, but are often capped by a statute or reduced after trial, sometimes drastically, either by judicial action or settlement.

Once a cause of action (or, in some case, multiple ones) can be identified, the lawyer must decide (and advise the client) whether it is worth it to sue. This is a very difficult decision. Many factors go into it, including whether the client will likely be able to prove his case to a jury, whether any recovery will have the plaintiff’s lawyer’s fee deducted from it (the usual rule in American courts), what the range of damage awards is likely to be, how strong the other side’s case is, and, last but not least, whether any damages are collectible. That is, is there insurance to pay a judgment, or, if not, are there assets of the defendant that can be seized by the Sheriff to be auctioned off to pay the judgment, or – worst case – will any judgment obtained vanish into the abyss of bankruptcy? This is why, except for the litigious wacko (of which there are many thousands out there), the decision to sue is not undertaken lightly.

Let’s suppose the decision is made to file suit. What happens?

We’ll use a simple example. Suppose the case involves a car crash at an intersection controlled by a traffic light. Each driver maintains that he or she had the green light, and there are some serious orthopedic injuries suffered by one of the drivers, Mr. Able. Ms. Baker, the other driver, has insurance, so it’s worthwhile for Mr. Able to sue, and the law, of course, recognizes a cause of action for traffic collision injuries where the offending driver was negligent, *i.e.,* failed to drive with reasonable care. Running a red light is, you might not be surprised to learn, a violation of the duty of reasonable care.

Mr. Able’s lawyer drafts and files in the appropriate court a complaint, which should be a short and simple statement of the facts identifying the parties and the facts that show that the court has jurisdiction (e.g., that the accident happened in the county in which the suit is filed), as well as the facts forming the cause of action. The complaint also usually has a demand for relief, let’s say, here, $250,000, for past and present pain and suffering and medical expenses

After the complaint is filed and served (and that can get complicated, too) on Ms. Baker, the defendant, she must do something within a set time frame, which may be very short (sometimes as short as 20 days). If she doesn’t, she risks a “default judgment,” which means she loses without any hearing or trial, which can lead to a really big mess. It’s like forfeiting a tennis match by not showing up. So, there must be no dilly-dallying after notice of a lawsuit has been served. What must be done by the defendant is either to file an answer or to move to dismiss or for summary judgment, so he must get timely notice (usually around 30 days) to his insurance company, and get with a lawyer (whether retained on your own or furnished by the insurer) right away. Remember that failure to give an insurer timely notice could result in denial of coverage. And, while we’re on the subject of lawyers, once someone is represented, it is unethical for an opposing lawyer to contact her without going through her attorney. It is not a good idea for a lay person to talk directly to opposing lawyers. There’s very little chance of charming or threatening them out of filing suit and it could lead to a disaster in the courtroom called a party admission. You’ll learn about that little gem in evidence class.

What’s an answer? It is, essentially, a paper that says “We deny the allegations of your complaint, so prove them at a trial.” We’ll pick up that thread in a minute.

But first, what about a motion to dismiss or for summary judgment? A motion to dismiss is usually premised on a technical matter, such as a defect in the complaint. One such defect is that it has been filed in the wrong court. Another is that, even if the facts stated in the complaint are assumed to be true, the law does not recognize any cause of action for their redress. As you can imagine, such motions are rarely in order in the case of a simple car crash, where everybody knows the injured party has a cause of action if injured by another’s stupid driving trick, such as running a red light. Let’s review here: Technically, the cause of action is for “negligence,” an extraordinarily broad catchall for any conduct that violates the duty of reasonable care. As noted above, it is part of the common law that people undertaking activities posing a risk of harm to others – from driving to practicing medicine – must use such care as an ordinarily reasonably prudent person would use under all the circumstances. For drivers, this means not running red lights; for doctors, it means adhering to the “standard of care,” another nebulous concept which is hotly debated by medical experts hired by the opposing litigants. (They are expensive.)

The motion for summary judgment is subtly – but importantly – different. It says that, yes, you might have identified the right cause of action, but you don’t have the facts to support it. Suppose Ms. Baker’s lawyer has been able to get the affidavits of witnesses, perhaps including a couple of attendees at a Bishops’ convention, who swear that the traffic light in question was malfunctioning that day, because it was stuck and showing green for all directions, and Mr. Able’s lawyer cannot find a witness to say otherwise. Then, there is no disputed fact that needs a trial, because Ms. Baker obviously can’t be faulted for going through the intersection on a green light. It’s just one of those things that really doesn’t have a legal remedy. If a client is sued and the case is not dismissed, his lawyer will probably try to file a summary judgment motion, but many judges are reluctant to grant them, because most appellate courts (especially state courts) frown upon them and want cases to be tried before a jury. Those courts will often scrutinize the record to try to find any arguable dispute of fact and send the case back for trial.

Suppose no motions are filed (or granted). What happens then? Once an answer is filed, the case moves into the “discovery” or “disclosure” stage. This is a “You show me yours, and I’ll show you mine” exercise, in which both sides must disclose all the evidence they have to the other side (with a very few exceptions). Before the late 1930’s, there was almost no discovery in common law cases, which led to a lot of very entertaining trials, as lawyers often had little idea what the other side had in the way of evidence and were frequently surprised. This resulted in lots of creative verbal footwork, dignified in the trade as “oral advocacy.” Trials were much more fun in those days, at least for the audience.

Now, discovery or disclosure is universally required, at least above the small claims level. Disclosure simply denotes an obligation on each lawyer to hand over essentially all his evidence to the other. Discovery is more formal, and it is triggered by a request for information in one form or another from one litigant to the other (actually from one lawyer to the other). It can be tedious, but it keeps many big law firms busy much of the time (read “profit center”), which allows them to pay your college pals who went to Yale or Harvard Law School $175K to start, and the partners a million a year or more. It also frequently puts an end to litigation, by showing that the case is hopeless or that there is a good reason to settle rather than have the case adjudicated in a public forum. (Remember that once any paper is filed in court, it almost always becomes a matter of public record and the media can get it for 50 cents a page.)

Discovery normally starts with written discovery, called interrogatories. Each party may call upon the other to file written answers to written interrogatories, under oath. In our car-crash case, for example, typical interrogatories might call upon the other party to identify his witnesses or to document his claims for lost wages or medical bills. Although nominally the statements of the party answering the interrogatories, they are most often drawn up by the party’s lawyer(s).

Then, there is that instrument of legal torture called the deposition. Depositions come in several flavors.

First, and easily discussed, is the *de bene esse* deposition, which is usually recorded on video, and which is intended to be used as a substitute for live testimony at the trial. In a case utilizing experts (and most big dollar ones do), the parties will often agree to this sort of deposition, which is watched by the jury at trial without the necessity of the expert coming from far away or having to give up a golf game to show up in court in person. Needless to say, this is usually cheaper and much more convenient than having to schedule an expert to appear in court. It is also useful if the witness is likely to die before the trial.

Sooner or later, you will encounter the other, much more common type of deposition, the discovery deposition. It is essentially cross-examination before the trial even starts, designed to let the lawyer taking the deposition grill the witness like a 4th of July hamburger. Let’s take the case of an expert medical witness. He will almost surely have prepared a written report of some sort before the discovery deposition. You can bet that the lawyer conducting the deposition will have reviewed the report and discussed it with her own experts, and will be especially keen to find something in the written record to use to discredit the deponent’s report or testimony.

What is a discovery deposition like? No judge is present. The deposition is usually taken in the office of one of the lawyers. The deponent will be placed under oath by the stenographer or video operator (who is a notary public), and, yes, he can go to jail for lying at a deposition. But, if we were to charge everybody who lied at a deposition or trial with perjury, we would have to colonize the Moon to have enough jails to hold them. The principal thing to remember about a discovery deposition is that it is cross-examination. There’s no way to sugar-coat this. The other party’s lawyer will be probing, in excruciating detail, everything the deponent has done, sometimes going back years, to find something that he or his expert can use to show that the deponent is lying or otherwise to discredit her. The lawyer can use the deposition to impeach the deponent’s credibility when she testifies at trial. In fact, impeachment by inconsistencies between trial and deposition testimony is a very effective, and surprisingly common, trial tactic. Experienced lawyers will tell you that the expert’s deposition (and almost all trials these days involve expert testimony) is often the key to the whole case, because, artfully conducted, it will clearly expose both the weaknesses and strengths in the expert’s testimony, thus allowing a sober assessment of prospects for the outcome at trial.

What happens after discovery is concluded?

The first thing that frequently happens is that one side or the other (but most often the defendant) may move for summary judgment, which is judged by the standards I’ve already mentioned. In short, if the evidence developed in discovery is so one-sided that no reasonable fact-finder could find in the plaintiff’s favor, the defendant wins summary judgment, and a trial is not held. Most state judges are very hesitant to grant summary judgment, because, as mentioned, state appellate courts by and large won’t tolerate it. Federal courts are often more receptive.

If summary judgment is denied, the case will go to a pretrial conference, which is usually a lawyers-only conference with the judge. One thing the judge will likely try to push hard for is “ADR,” alternative dispute resolution, either through arbitration, mediation, or a settlement conference with a neutral judge. In most jurisdictions these days, pre-trial ADR is required by the rules of the court.

If ADR fails, the case eventually comes to trial. This can take quite a while, as criminal cases take priority in most court systems. Although both sides may waive a jury and proceed to trial to the judge alone, this rarely happens, for a whole constellation of reasons, including the perceived skepticism of judges as compared to jurors. Judges usually have broad experience in trial work and are less easily persuaded by skillful advocacy. It takes a lot to overcome the skepticism many judges have acquired over the years, and most trial attorneys prefer to work with jurors, whose minds are perceived as easier to influence with crafty advocacy.

Assuming both sides have not waived a jury, the first thing that happens is the jury selection, still known by its old name, *voir dire*, which translates more-or-less “to see and hear.” Depending on the jurisdiction, the lawyers may be given minutes, hours, days, or even weeks to interrogate the jurors to discover any possible bias. That’s the theory. In practice, skilled lawyers use this period to try to sell themselves and their case to prospective jurors and to “read” the potential jurors’ reactions. In the end, each lawyer gets to challenge jurors for “cause,” i.e., racial bias or the like, or “peremptorily,” *i.e*., for no stated reason. Needless to say, the lawyers strive mightily to shape the jury panel in a way that they think favors their side. Very few plaintiff’s lawyers would be happy with a juror with an executive-type job (especially vice president of an insurance company), whereas most defense lawyers would not want social workers on the jury.

What you need to understand about a jury is that the primary qualification for service is a blank mind – one that is free from any acquaintance with the parties, the lawyers, or the subject matter of the trial. You can bet that a medical malpractice case will not have any health care professionals (or even their spouses) on the jury, not only because of potential pro-defense bias, but also because a juror who knows too much is a very difficult target for a trial lawyer’s persuasive skills.

After the jury is sworn, the trial begins with opening statements. Then, counsel for the plaintiff will call witnesses for their direct examination, whom the defense counsel will cross-examine, which is where the discovery deposition is used at trial, to try to impeach the witness. Counsel will also, usually through a witness’s testimony authenticating them, introduce documents and other exhibits, like models, papers, and X-rays. After all the plaintiff’s evidence is in, the defense may request a “directed verdict,” which is sort of like a summary judgment motion, but based on all the evidence the plaintiff has put in, rather than simply on the discovery. These are usually denied. Then, the defendant calls witnesses, whom the plaintiff may cross-examine, and the plaintiff may be given an opportunity to call rebuttal witnesses, especially if any surprises have come up in the defense case. Then, the lawyers and the judge confer about the legal instructions to give the jury, and the jury hears the closing arguments of the lawyers and then the judge’s instructions on the governing law, retires to deliberate and vote, and returns to the courtroom to render its verdict. Later, the judge enters a formal judgment consistent with the jury’s verdict, either for the plaintiff awarding the damages fixed by the jury, or for the defendant. In the vast bulk of cases, the judgment does not award attorney’s fees, because it is the general American rule that each party pays his or her own attorney, win or lose, but “fee shifting” is commonly required by law when a plaintiff wins a case involving consumer complaints or prohibited discrimination in employment. This encourages lawyers to take cases that would be prohibitively expensive to bring to trial if there were no prospect of having their fee paid upon winning the case, and allows the client to keep all the money awarded without having to pay a percentage of it to the lawyer.

Collecting a judgment is the job of the successful plaintiff’s attorney. Having a judgment and turning it into money are two different things. There is no cashier’s office where you stop on your way out of the courthouse to cash in your judgment. Unless there is insurance to pay the judgment, the plaintiff’s attorney must find assets of the defendant that are not “exempt from execution” and have the local Sheriff seize them. The levied assets are auctioned off, and the net proceeds (minus costs and fees, including the attorney’s fees), are given to the plaintiff. This sounds simple. It is not. Many assets are exempt from execution, including a certain amount of equity in the defendant’s home (in some states, the entire home, regardless of value, is exempt), tools of the trade, jointly-owned property, property already subject to a “secured interest” (*i.e*., being used to collateralize a loan) and on and on. Some people are very adept at concealing their assets from creditors, including those holding a judgment. And if that’s not bad enough, almost any judgment in a civil case can be rendered worthless by the defendant going into bankruptcy.

The key to understanding the trial process is understanding the division of responsibility between the judge and the jury. In our system, the judge essentially referees the trial, calling the balls and strikes (that is, ruling on objections), and deciding what to tell the jury about the statutory or common law principles that it should use in arriving at its verdict. The jury is to apply the law, as explained to it by the judge, to the facts as it finds them. Here is the beating heart of the system: the jury, and only the jury, is the judge of the facts. The judge does not decide facts. Appellate courts do not decide facts. In any case, there is only one body and one time for deciding facts, and that is the jury at the trial. Appellate courts only very, very rarely will disturb a jury's resolution of a disputed factual issue.

What’s the difference between a question of fact for the jury and an issue of law for the judge? Let’s go back to the intersection accident, and assume that the light was in proper working order. At the trial, the jury will listen to Mr. Able and his witnesses, who will testify that the light was green in his favor, as well as to Ms. Baker and his witnesses, who will testify that the light was green in her favor. The jury then decides which witnesses to believe, and which not to, in deciding the fact in issue, that is, Who had the green light? Then, the judge will instruct the jury on the law – not surprisingly, that the party with the green light was privileged to travel through the intersection, and the party with the red light was obliged to stop. The jury will then reach its verdict, for Able or Baker, based on its fact finding as to who had the green light. An important factor here is which party has the “burden of proof.” Usually, it is the plaintiff, which means that, unless Able convinces the jury by a preponderance of the evidence (i.e., that it is more likely than not) that he had the green light, he loses. If it decides Able has proved he had the green light, the jury will go on to determine the amount of damages that should be awarded to him, because the law treats that as a fact as well.

Does it work the same way in, say, a medical malpractice case or a bioengineering patent case? You bet! That means that a lay jury – whose members don’t know a ventricle from a clavicle – might be deciding, as a question of fact, whether a thoracic surgeon adhered to the standard of care in performing, say, a pulmonary thromboendarterectomy. (Look it up. There will be a quiz.) They will be deciding this largely on the basis of whose expert was more convincing, based on credentials, clarity of testimony, performance on cross-examination, and perhaps on his suit and tie.

The process remains essentially shielded from review and second-guessing, as the jury’s verdict on questions of fact can only very rarely be challenged on appeal. This is why you want to get the best trial lawyer you can. It’s very much like medicine – generally, you’re better off with the one that does the most procedures, not necessarily the one with the most impressive-looking papers adorning his walls. In fact, sometimes jurors take a dislike to the academic lawyer and positively like the down-home lawyer who can keep it simple for them, hammering away at the one or two crucial issues of fact that virtually every trial comes down to.

What about appeals? Aren’t they there to right an injustice at trial, like a wacky jury verdict? The answer, surprisingly, is usually no. An appeal is primarily a request to the appellate court to correct an error on the law that the judge has made, with very little leeway to revisit a jury’s finding of fact. There is no jury at the appeal, only a panel of judges. They hear no witnesses, only argument from the attorneys. And, the bottom line is that the vast majority of appeals result in affirmance of the trial judgment; they only very rarely result in reversal or a new trial in a civil case. Which is why I have coined a saying that was printed on a T-shirt all my Evidence students wore one day, “Appeals are for losers.”

The funny thing is that you are about to be taught for three years by what is called the Langdell method, which consists of your reading many books in which are reprinted hundreds of appellate decisions and then discussing them in class to try to figure out what “the law” is. About a month or two after you are pronounced a Juris Doctor, you will have to take the bar exam, which covers almost every single thing you learned, and a lot you probably didn’t, in law school. And when you pass (which the great majority of students do), you will have a license that, believe it or not, lets you take money from an unsuspecting public just for giving advice. If you mess up a client’s case, guess what? It is usually very difficult for a client to win a legal malpractice case against his attorney. Now I wonder how that came to be?