APPENDIXES

APPENDIX A
THE PROCEDURAL HISTORY OF A SIMPLE CASE

Introduction. Appellate court cases are written for an audience that already understands the legal process. As a beginning law student you are trying to do (at least) two things at once: (1) understand the substantive doctrine (in this class, tort law) within a particular case; but to do so you must (2) learn how that doctrine gets expressed in the course of an appellate opinion. This Appendix is designed to help you quickly accomplish goal #2 so that you can do a better job with goal #1.

As noted in the introduction, appellate opinions are the bread and butter of this and most other casebooks. The key to understanding an appellate opinion is to recognize that it is based upon a claim of *error*. When the losing party appeals to a higher court to try to reverse the outcome of a case at trial, he must identify where along the line the trial court made its mistake(s). It is those mistakes that the appellate court is entitled to "correct" (if necessary by requiring the case to be retried). By understanding how a case proceeds from start to finish, you will have a better understanding of how the rights and obligations of the parties are enforced.

For the most part what follows assumes that something like the Federal Rules of Civil Procedure are in effect. Some states use different names for the procedures, but the general pattern is common to virtually all jurisdictions.

Background Facts and Investigation. Paula Prentice was driving down Oak Street in her red Oldsmobile convertible. She was observing the speed limit. A blue Ford, driven by Dennis Daniels, attempted to make a left turn onto Oak Street from Flag Drive, which has a stop sign. Dennis didn't see Paula coming. As Dennis came into view, Paula applied her brakes but could not avoid hitting him. Both cars were damaged extensively. Paula said she was in a lot of pain but managed to stay until the police arrived. The officer, Ophelia Orton, talked to all the witnesses and wrote up an accident report, finding Daniels at fault.

Both Paula and Dennis reported the accident to their insurance companies. Both had insurance that covered collision damage to their cars as well potential liability they might have to someone injured by their driving. Both insurance companies assigned **CLAIMS ADJUSTERS** to the case. The job of the claims adjuster is to work with the person making claims against the insurance company and attempt to get the case resolved.

Starting the lawsuit: The Pleadings.[1] Paula went to see a lawyer, Patricia Leonia, who said she would try to negotiate with the insurance company to get a favor-able settlement. To make a long story short, they could not agree, and so Patricia prepared a **COMPLAINT** against Dennis (*see* Figure 1). In the complaint Paula is listed as the **PLAINTIFF**, and Dennis, since he is the one against whom relief is sought, is named the **DEFENDANT**. The complaint contains the facts necessary to let the defendant know what the claim is all about and what kind of action the plaintiff wants the court to take against the defendant.[2]

After it was prepared and signed by the plaintiff's lawyer, the complaint was **FILED** at the County Courthouse in the county where the plaintiff wants the case to be heard, usually in the place where the plaintiff lives. When the complaint was taken down to the courthouse, a court clerk looked at it to see that it was ready for filing, then collected the filing fee and assigned the case a number. The plaintiff must also **SERVE** the complaint on the defendant,[3] along with a **SUMMONS** that re-quires the defendant to answer the complaint (*see* Figure 2). The filing of the complaint gets the case into the judicial system, but the defendant must be notified of other claim before he is obligated to respond to it.

Once the complaint has been served and filed, the defen-

COLUMBIA SUPERIOR COURT
COUNTY OF LINDEN

Paula Prentice, Plaintiff) Action No. _____
)
v.) COMPLAINT FOR PERSONAL
) INJURIES (MOTOR VEHICLE)
Dennis Daniels, Defendant)
_____)

Paula Prentice, for her claim against Dennis Daniels, alleges as follows:

1. Plaintiff is a resident of the State of Columbia, County of Linden.

2. On information and belief, plaintiff alleges that Dennis Daniels is a resident of the State of Columbia.

3. On June 1, 1990, plaintiff was driving northbound on Oak Street.

4. At approximately 1:30 p.m. a car driven by defendant DENNIS DANIELS negligently made a left turn into the path of Paula Prentice, causing the cars to collide.

5. As a direct and proximate result of the negligence of DENNIS DANIELS, Paula Prentice suffered physical injury, property damage, and economic loss, in amounts to be proven at time of trial.

WHEREFORE, Paula Prentice prays for the following relief:

1. For a judgment against defendant DENNIS DANIELS for damages sustained, in an amount to be determined at time of trial;

2. For costs of the action, including a reasonable attorney's fee; and

3. For such other and further relief as this court should deem just and proper.

DATED this 9th day of September, 1990.

/s/ Patricia Leonia

Patricia Leonia
Attorney for Plaintiff

1COMPLAINT

[1] **PLEADINGS** refer to the complaint(s) and answer(s) setting forth the parties who are suing, whom they are suing, and the facts upon which they base their claims and defenses.

[2] Note that in this case the complaint sets forth each of the elements of a negligence claim: the defendant was *negligent*, his negligence was a *proximate cause* of injury to the plaintiff, and the plaintiff suffered *compensable damages* as a result.

[3] Usually the service of process is done by a professional process-server, who is experienced in locating defendants and making sure that they personally receive a copy of the summons and complaint.

COLUMBIA SUPERIOR COURT
COUNTY OF LINDEN

Paula Prentice, Plaintiff	)	Action No. _____
v.	)	SUMMONS (20 DAY)
Dennis Daniels, Defendant	)	

TO THE ABOVE-NAMED DEFENDANT(S):

A lawsuit has been started against you in the above-entitled court by the above-named Plaintiff. Plaintiff's claim is stated in the written complaint, a copy of which is served upon you with this Summons.

In order to defend against this lawsuit, you must respond to the complaint by stating your defense in writing, and serve a copy upon the person signing this Summons within 20 days after the service of this Summons, excluding the day of service, or a default judgment may be entered against you without notice. A default judgment is one where plaintiff is entitled to what he asks for because you have not responded. If you serve a notice of appearance on the undersigned person, you are entitled to notice before a default judgment may be entered.

If you wish to seek the advice of an attorney in this matter, you should do so promptly so that your written response, if any, may be served on time.

This summons is issued pursuant to Rule 4 of the Justice Court Rules.

DATED this 9th day of September, 1990.

/s/ Patricia Leonia

Patricia Leonia
Attorney for Plaintiff

2SUMMONS

dant has a certain amount of time (in this case 20 days) in which to respond to the complaint. If the defendant does not respond to the complaint, the plaintiff may be ab-le to take a **DEFAULT** judgment,[4] which (as the name implies) means that the plaintiff wins simply be-cause the other side did not respond to the summons and com-plaint with an answer or appropriate motion.

However, Dennis Daniels took the summons and complaint immediately to his claims adjuster, who then hired a lawyer, Duane Ludlow, to represent Dennis.[5] A few days after receiving the com-plaint, and well within the time al-lowed, Duane filed an **ANSWER** on Dennis' behalf (*see* Figure 3).[6] The answer responds to each of the allegations of the complaint, and asserts any **AFFIRMATIVE DEFENSES** [7]

4 Frequently a default judgment will be entered because the defendant (or his attorney) did not get a response in on time. (This is a common source of malpractice claims.) The defendant may ask for the default judgment to be set aside if he can show that his failure to answer was excusable, if there appears to be some merit to the defendant's position (so that further proceedings might produce a different result), and if the plaintiff has not been prejudiced by the delay. It is discretionary with the judge whether to grant such motions, and even if she does, she may condition setting aside the judgment upon payment of substantial sanctions.

5 Part of the insurance coverage provided by Dennis' policy is an agreement by the insurance company to provide legal representation (a defense) against any legal action brought against the insured.

6 He will also send (serve) a copy of the answer to the plaintiff's lawyer. After the initial service of the complaint, the parties must give the other side copies of any papers that they file. The attorneys, rather than the parties themselves, are sent the papers.

7 An affirmative defense is one that will defeat (or reduce) the plaintiff's claim even if the plaintiff is able to establish all of the elements of her claim. For example, the statute of limitations bars claims that are not filed within the time permitted (in Washington, three years after a personal injury claim accrues). Even if the plaintiff is able to prove negligence, causation, and damages, she will lose if the defendant can prove that the claims was not filed within the limitations period.

that the defendant thinks might apply to the case, and then informs the court of what action the defendant wants the court to take.[8]

Pretrial motions and discovery. If nothing else were done by either party, eventually the case would be put on the trial calendar. However, in modern practice the lawyers use the time interval between initial pleadings and trial to conduct **DISCOVERY** and to file any motions that might help them prepare for trial. Discovery is the opportunity for each side to learn what evidence the other party has that might be relevant to the case. There are several different forms of permissible discovery. One is **INTERROGATORIES**, which are written questions addressed to the other party. For example, Duane Ludlow, the defendant's attorney, might send a set of interrogatories to the plaintiff asking for information about her work history, the nature of her medical complaints, the names of witnesses who have knowledge of the accident, etc. Another commonly used form of discovery is the **DEPOSITION**, which is testimony by a witness in front of a court reporter. Patricia Leonia, Paula's lawyer, might schedule the deposition of Dennis to find out why he is claiming that Paula was negligent in failing to avoid the accident. The lawyers ask questions, and the witness must answer them, and the testimony is taken down by a court reporter, who later transcribes it. The lawyers can also send a **REQUEST FOR PRODUCTION OF DOCUMENTS**, which requires the party to respond with any relevant documents such as photographs of the accident scene, medical records, etc.

COLUMBIA SUPERIOR COURT
COUNTY OF LINDEN

Paula Prentice, Plaintiff) Action No. 90-12345
v.) ANSWER
Dennis Daniels, Defendant)

DENNIS DANIELS, defendant, answers the plaintiff's complaint as follows:

1. Paragraph 1 is DENIED for lack of information and belief.

2. Paragraph 2 is ADMITTED.

3. Paragraph 3 is ADMITTED.

4. As to Paragraph 4, defendant admits that an accident occurred at ap-proximately 1:30 p.m. between plaintiff's and defendant's car, and DENIES the balance of the allegation.

5. Paragraph 5 is DENIED.

AFFIRMATIVE DEFENSES

1. Plaintiff was negligent in failing to avoid the collision, and her damages, if any, were solely and proximately caused by her own negligence.

WHEREFORE, defendant prays for the following relief:

1. For a judgment dismissing plaintiff's claim with prejudice;

2. For costs of the action, including a reasonable attorney's fee; and

3. For such other and further relief as this court should deem just and proper.

DATED this 25th day of September, 1990.

/s/ Duane Ludlow

Duane Ludlow
Attorney for Defendant

3Defendant's Answer

The parties may also bring pre-trial motions to test the sufficiency of the other party's claims, or to get a legal ruling on some issue. If the defendant doesn't think that the plaintiff has stated enough facts in the complaint — even assuming the facts were true —to justify the relief requested, then he may file a **MOTION TO DISMISS FOR FAILURE TO**

[8] The defendant also might assert other claims in his answer. For example, if Dennis had been injured (or if his insurance company wanted to collect the money paid out for the damage to Dennis' car), he might file a **COUNTERCLAIM** against Paula. The counterclaim is just like a complaint, except it is filed by a defendant in response to being sued over the same incident. Or Dennis might wish to file a **THIRD-PARTY COMPLAINT** against someone else. A third-party complaint allows a defendant to sue a third party who might be responsible for the injury, as part of the same lawsuit. In this case the Dennis might file a third-party complaint against Linden County for failing to design or maintain the intersection properly to give him sufficient visibility of oncoming traffic.

STATE A CLAIM. In older cases this motion was called a **DEMURRER**. The judge would look at the facts alleged in the complaint and determine whether (if proven) they would justify compensation by the defendant.[9] For example, suppose in this case Patricia had left out of her complaint the allegation that Dennis had driven *negligently*. Without this allegation the complaint would be legally insufficient, since a collision by itself doesn't require one party to compensate the other. Appellate cases dealing with motions to dismiss or demurrers are commonly found in first-year casebooks, since in such cases the court will frequently attempt to articulate the dividing line between a case that adequately states a claim for negligence (or some other theory) and one that does not.

Another way to get a court's ruling on the law to be applied to the case is through a **MOTION FOR JUDGMENT ON THE PLEADINGS**. This motion is similar to the demurrer, except that it can be made by plaintiff as well as the defendant. Finally, either party may ask for **SUMMARY JUDGMENT**. Modern rules of procedure allow either party to test whether their opponent has enough evidence to support the claims made in the pleadings. For example, Dennis denied that he was negligent. Patricia might file a motion attaching a copy of the police report citing Dennis as the party at fault, asking for the judge to grant summary judgment on the issue of liability. It would then be up to Dennis to show that he had enough evidence (such as his own testimony that Paula was going too fast) to require that the jury decide.[10]

Trial. Once the parties are ready for trial, the case will be scheduled on the trial calendar, and on the appointed day (unless there is a continuance or delay in the proceeding) the lawyers and their clients will appear before the trial judge. If either party has requested a jury, the potential jurors will be prepared for jury selection. The process by which the prospective jurors are questioned about their background and potential attitudes about the case is called **VOIR DIRE**. After the jurors have been selected and sworn in, the lawyers get a chance to make an **OPENING STATEMENT**. The lawyers outline the evidence that the jurors are going to hear, and while they are not permitted to *argue* (that is reserved for closing argument), they will emphasize the facts that put their client in the most favorable light.

Then the plaintiff's lawyer calls witnesses, in whatever order she chooses. In this case, Patricia might call the police officer, Paula herself, and perhaps a doctor who can explain the nature of her physical complaints. After a witness is sworn in, the lawyer who called the witness asks questions. This is called **DIRECT EXAMINATION**. If a question is asked improperly, or if the opposing lawyer doesn't believe the testimony is relevant, he will object — interrupting between the asking of the question and the answer. The trial judge must then rule on the objection, either **SUSTAINING** the objection, which does not permit the witness to answer, or else **OVERRULING** the objection, and permitting the testimony to be given. In older cases, the procedure required a lawyer to **EXCEPT** to a ruling by the trial judge in order to preserve it for appeal. In modern procedure, the only requirement is a timely objection. Frequently on appeal the issue is whether the **EXCEPTION** to the trial judge's ruling should have been sustained or overruled.

When all of the plaintiff's witnesses have testified, she **RESTS**, meaning that the case is then turned over to the defendant to present his witnesses. Before presenting witnesses, however, the defendant may ask the judge for a dismissal of the case, or a **NONSUIT**. As with the motion to dismiss for failure to state a claim, the request for a nonsuit assumes that the jury believes all of the evidence presented by the plaintiff, but claims that even so, there is no basis for a judgment in the plaintiff's favor. A similar procedure is a **MOTION FOR DIRECTED VERDICT**. The defendant may claim that the evidence is so one-sided that no reasonable jury could return a verdict for plaintiff. If the judge grants the nonsuit or directs a verdict in the defendant's favor, the trial is over, and the plaintiff

---

[9] A motion to dismiss (or a **MOTION TO STRIKE**, which is limited to asking the judge to remove or ignore part of a pleading) might also be used by the *plaintiff* to attack the legal sufficiency of some pleading by the defendant. For example, in this case the defendant included an affirmative defense based upon contributory negligence. If Patricia thought there was no basis in law for using this defense, she might file a motion to strike or dismiss.

[10] In a summary judgment motion, the key is showing the court that there is no genuine dispute over what the facts are, and that a trial to determine the facts is therefore unnecessary. Unlike a motion for a directed verdict, discussed below, a summary judgment motion does not allow the judge to weigh the facts; rather, she must determine whether the law requires a judgment based upon undisputed facts.

may then appeal if she thinks the trial judge made a mistake. For example, suppose that in our case no one had testified about the accident itself, and there was no evidence of any negligence on Dennis' part. Dennis could move for a directed verdict, because in the absence of any evidence of negligence, a reasonable jury could only return a verdict in favor of the defendant.

Frequently the issue is whether the plaintiff has presented a **PRIMA FACIE CASE.** A prima facie (literally, "at first blush") case consists of proof of the constituent elements which make up the cause of action under which the plaintiff is suing. In this case, for example, Paula is suing in negligence, and she must prove (1) negligence (which is breach of the duty to use reasonable care), (2) causation, and (3) damages. Usually the burden of proof is upon the plaintiff, and therefore the plaintiff must prove a prima facie case before the judge will even require the defendant to put on his own evidence. Failure to supply a critical element of the cause of action will result in failure to prove a prima facie case, and thus the plaintiff will have her case dismissed by a motion for a nonsuit or a directed verdict.

But in our case Patricia presented evidence of negligence, causation, and damages, and the judge denied motions for a nonsuit and/or for a directed verdict. Then the defendant had to call his witnesses, and this time *he* conducts the direct examination and the plaintiff ask questions on cross-examination. The defendant's lawyer called Dennis himself, and Bessy Brody, who claimed to be at the intersection when the accident took place. At the conclusion of the defendant's case, either party may request a directed verdict, if the evidence is such that a reasonable jury could only come out one way. For example, if Dennis has no evidence to contradict the police report, there might be a directed verdict of liability, leaving the jury to consider only damages. But in our case Dennis testified that the traffic was clear on Oak Street when he started his turn, and that Paula was driving so fast that she didn't allow him to complete the turn before she hit him. Thus, the judge denied both motions.

After the defendant rests, the plaintiff may call **REBUTTAL** witnesses, whose testimony is limited to new issues raised by the defendant. In this case, for example, Patricia might recall Paula to testify that Bessy had her back turned when the accident took place. After all the testimony is completed, the judge then **INSTRUCTS THE JURY** on the law that applies to the case.[11] (The jury instructions are included at the end of this summary.) **JURY INSTRUCTIONS** are one of the most important features of the trial from the perspective of the beginning law student. It is there that the judge summarizes the law that applies to the case. For example, in this case the judge assigns the **BURDEN OF PROOF** to each party; Paula has the burden of establishing negligence, proximate cause, and damages.[12] The defendant, on the other hand, has the burden of establishing any affirmative defenses, such as negligence on the part of the plaintiff. The jury instructions also contain definitions of terms like "negligence," "proximate cause," and so forth. Before the judge reads the instructions, she gives the parties an opportunity to submit proposed instructions. Some of the instructions are standard boilerplate, and the judge will simply use those that are customary in her jurisdiction. However, on other points each lawyer may propose instructions that favor his client, and the judge will have to decide which of the proposed instructions more accurately states the law. If a party believes that an instruction incorrectly states the law, he may object to it, and if he loses, he may appeal that mistake to an appellate court. Such cases are again excellent starting points for the law student, since the court is forced to articulate the subtle differences between a correct and incorrect statement of law.

After the judge instructs the jury, the lawyers make their **CLOSING ARGUMENTS**, in

---

[11] In most cases a jury decides the issues of fact. However, there are some cases where there is no jury, and the judge decides the issues of fact. These cases are called **BENCH TRIALS**, or may be referred to as the **JUDGE SITTING WITHOUT A JURY**. There is no jury verdict to decide the issues of fact, and so the judge will announce his **FINDINGS OF FACT**, and along with them the **CONCLUSIONS OF LAW**. For example, in this case, if there had been no jury the judge would issue findings of fact on the issues of whether Dennis negligently entered the intersection, whether that negligence caused injury to Paula, whether Paula was herself negligent, and what damages were incurred. The judge might then issue conclusions of law that determine liability for the injuries. At that point there will be the basis for entering a judgment, and then the case will parallel a case tried to a jury.

[12] As Instruction 11 states, a "preponderance" of the evidence on an issue simply means a finding that the proposition is more probable than not. This is the standard in civil cases (on most issues), and is a much lower standard than "beyond a reasonable doubt," which is required in most criminal cases.

which they summarize the evidence that was presented, and argue why their client should win. The jury then deliberates, and if they achieve sufficient unanimity (some courts require only 10 of 12 jurors[13] to agree on each point), they return a verdict. In older cases the jury was simply asked to return a verdict for one party or the other. Modern procedure sometimes permits the use of **JURY INTERROGATORIES** or **SPECIAL VERDICT FORMS**, which list the issues in the case and ask the jury to check off their decision on each issue. In this case, for example, the jury was asked to determine whether Dennis was negligent, whether his negligence proximately caused Paula's injuries, and so forth. (See the special verdict form at the end of the jury instructions.)

Once a verdict is rendered, the judge must then enter a **JUDGMENT**. The judgment is an order of the court that ends the case (unless someone appeals) by deciding who wins and who (if anyone) must pay, and how much.[14] Prior to entering the judgment, the lawyers may present motions to the judge. The losing party often files a **MOTION FOR A NEW TRIAL**, which attempts to convince the judge either that she made a serious mistake (for example, in admitting certain evidence, or in instructing the jury), or that he did not receive a fair trial (for example, because of jury or attorney misconduct). If the judge agrees, she may order a new trial; occasionally a party is permitted to appeal from that order to ask for a reinstatement of the jury's verdict.

Another post-trial motion is a **MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT (JNOV)**. This motion is essentially like the motion for a directed verdict, but it occurs after the jury has already deliberated. A judge will grant a JNOV if she believes that there was insufficient evidence for a reasonable jury to render the verdict it did.[15] However, in most cases there will be enough evidence to create a question about which reasonable minds could differ, and then the jury's verdict must be honored. If the verdict is for the plaintiff, the judge will then enter a judgment ordering the defendant to pay the amount of money awarded by the jury, plus **TAXABLE COSTS**. If the defendant wins, the judge will enter a judgment dismissing the plaintiff's claim, and awarding taxable costs to the defendant. Taxable costs are certain costs of litigation (usually not including the lawyer's fees), such as filing fees, witness fees, deposition transcript fees, and other miscellaneous expenses.

Appeal. Once the judgement is entered, the losing party has the right to appeal within a certain time period (usually 30 days).[16] There are a variety of different names for the party who is appealing and the party who is defending the court's judgment (*see* Figure 4).

---

[13] Some courts have juries of six; in such cases only 5 of 6 may be required to agree on any single issue.

[14] Most of the time the plaintiff seeks money damages. In some cases, however, the plaintiff may want **INJUNCTIVE RELIEF**, which asks the court to order the defendant to do something, for example, to stop construction activities threatening an endangered species.

[15] Although a trial judge may have denied a motion for a directed verdict, she may still grant the JNOV. Since they are based on the same standard (whether there is enough evidence to create a jury question), does this mean the

(continued...)

[15](...continued)
judge has changed her mind? Not necessarily. The trial judge may have actually been inclined to grant the motion for a directed verdict, but decided to allow the jury to deliberate, since it could eliminate an appeal. For example, if (as the moving party suggests) the evidence is so one-sided that it will support only one conclusion, then the jury may very well reach that conclusion. Then the prospect of appeal has been eliminated, since the losing party has had his day in court. On the other hand, if the jury reaches the "wrong" conclusion, the judge can "fix" it by granting a JNOV. Then the appellate court must decide whether there was indeed enough evidence to support the jury's verdict. If the trial court is found to be in error, the appellate court will reinstate the jury's verdict, and the case ends. Otherwise, if the trial judge doesn't let the jury deliberate, and the appellate court decides the trial judge was wrong, the case would have to be retried.

[16] Sometimes both parties will appeal; a defendant will claim that there was no basis for liability to be imposed, while the plaintiff will argue that the jury's verdict was inadequate, or the judge didn't permit the introduction of evidence which would have produced a more generous award. If both parties appeal, one party will be designated as the appellant, and the other party will be the **CROSS-APPELLANT**.

Appealing Party	Party Defending the Court' s Judgement
Appellant	Appellee
Petitioner	Respondent
Plaintiff in Error	Defendant in Error

Figure 4. Terms Used to Designate the Parties to an Appeal.

Sometimes the court will refer to the parties by their combined title, such as "plaintiff-respondent," or "defendant-petitioner." The name of the court that hears initial appeals depends upon the jurisdiction's court structure (*see* Figure 5). Many state courts and the federal court system have an intermediate court (a court of appeals) that hears appeals from a trial court decision.[17] Some smaller states have only a Supreme Court that hears appeals directly from the trial court judgment. In jurisdictions with an intermediate court of appeals, the Supreme Court will usually hear only those appeals that it chooses to. The U.S. Supreme Court, for example, agrees to hear only about 5% of the cases for which review is sought.

Type of Court	Federal	Typical State
Trial	District	Superior
Intermediate Appellate	Circuit	Court of Appeals
Highest Appellate	Supreme	Supreme

Figure 5. Structure of Appeals Courts.

The appeal is commenced by filing a notice of appeal. If the appellate court accepts review, it will then set up a timetable for the parties to submit the trial court record and file briefs. Each party must designate the portions of the trial court record (such as pleadings, transcripts of hearings or of court testimony, etc.) that will be needed by the appellate court to review the case. In his brief the appellant must explain to the appellate court what error he claims was committed by the trial judge. For example, he might cite an incorrect jury instruction, or the improper dismissal of a complaint that should have been allowed to go to trial. The respondent, on the other hand, will argue that the trial judge's decisions were based on a correct interpretation of the law. After the briefs have been received the court will schedule oral argument, at which time the lawyers will come to the appellate court and make brief presentations and answer the appellate judges' questions.

Some time later, the appellate court will deliver its **OPINION**, which announces the appellate court's judgment (who wins or loses) along with the explanation for its judgment. The appellate court can respond to the appeal in several different ways. If the appellate court finds no error by the trial judge, it will **AFFIRM** the judgment, and the losing party will have to pay the **COSTS ON APPEAL**, which are the filing fees, the costs of reproducing the record at trial, and so forth. In older cases the court will sometimes conclude an opinion affirming the trial court's judgment by saying "**EXCEPTIONS OVERRULED**," that is, the objection or exception taken by the appealing party has been denied.

On the other hand, the appellate court may find that the trial judge did make a mistake of sufficient gravity to require fixing, and will therefore **REVERSE** the judgment of the trial court. Reversal actually just means to take away the judgment that has been entered; it does not necessarily mean that the other party has won. The reversal may require that there be a new trial (for example, where the jury instructions were seriously defective), or it may result in a final judgment, either dismissing the plaintiff's claim or reinstating the plaintiff's judgment. The court will then **REMAND** the case (send it back) for further proceedings by the trial court in conformity to the appellate court's ruling. Older cases will sometimes use the terms "**EXCEPTIONS SUSTAINED**" in reversing a case, meaning that the appealing party properly objected to the trial judge's handling of the case.

Modern opinions usually begin with the

[17] The courts in New York are particularly confusing. The trial courts are called a "supreme court," and the intermediate courts are called the "appellate division." The highest court in New York is the Court of Appeals. Other jurisdictions have separate courts for criminal appeals. Some jurisdictions refer to the appellate court as the "court of errors," meaning the court in which losing parties can appeal for the correction of errors by the trial court.

name of the judge who wrote the **MAJORITY** opinion, followed by her opinion announcing the judgment of the court along with the facts and reasoning that support it. Then come the **CONCURRING OPINIONS** of any judges who agree with the outcome of the case but disagree with some part of the reasoning used by the majority. Finally come the **DISSENTING OPINIONS** of judges who disagree with the outcome of the case.[18]

Very old cases, particularly British cases, were reported only by private individuals (like news reporters) rather than in a written opinion by the court itself. Thus they contain only abbreviated accounts of the trial court procedure and the opinions delivered orally by the judges. You simply have to do the best you can to figure out the outcome of the case and the reasoning used by the judges.

[18] Occasionally the court will not produce a majority, but instead only a **PLURALITY OPINION**, with which less than a majority of the judges on the court agree. The plurality opinion plus the concurring opinions create a majority for a particular outcome, but do not represent a single view of why the case should come out the way it does. In the U.S. Supreme Court today, plurality opinions are quite common.

COLUMBIA SUPERIOR COURT
COUNTY OF LINDEN

Paula Prentice, Plaintiff	)	
	)	Action No. 90-12345
v.	)	
Dennis Daniels, Defendant	)	

COURT'S INSTRUCTIONS TO THE JURY

GIVEN: August 23, 1990

BY: THE HONORABLE ROBIN BEAN
JUDGE - DEPARTMENT 14

[*The references in brackets are to the Washington Pattern Instructions (WPI).*]

INSTRUCTION NO. 1

It is your duty to determine the facts in this case from the evidence produced in court. It also is your duty to accept the law from the judge, regardless of what you personally believe the law is or ought to be. You are to apply the law to the facts and in this way decide the case.

The order in which these instructions are given has no significance as to their relative importance. The attorneys may properly discuss any specific instructions they think are particularly significant. You should consider the instructions as a whole and should not place undue emphasis on any particular instruction or part thereof.

The evidence you are to consider consists of the testimony of the witnesses and the exhibits admitted into evidence. It has been my duty to rule on the admissibility of evidence. You must not concern yourselves with the reasons for these rulings. You will disregard any evidence which either was not admitted or which was stricken by the court.

In determining whether any proposition has been proved, you should consider all of the evidence introduced by all parties bearing on the question. Every party is entitled to the benefit of the evidence whether produced by that party or by another party.

You are the sole judges of the credibility of the witnesses and of what weight is to be given the testimony of each. In considering the testimony of any witness, you may take into account the opportunity and ability of the witness to observe, the witness's memory and manner while testifying, any interest, bias, or prejudice the witness may have, the reasonableness of the testimony of the witness considered in light of all the evidence, and any other factors that bear on believability and weight.

Counsel's remarks, statements, and arguments are intended to help you understand the evidence and apply the law. They are not evidence, however, and you should disregard any remark, statement, or argument that is not supported by the evidence or the law as given to you by the judge.

The lawyers have the right and the duty to make any objections that they deem appropriate. Such objections should not influence you, and you should make no presumption because of objections by counsel.

The law does not permit me to comment on the evidence in any way, and I have not intentionally done so. If it appears to you that I have so commented, during either the trial or the giving of these instructions, you must disregard the comment.

Jurors have a duty to consult with one another and to deliberate with a view to reaching a verdict. Each of you must decide the case for yourself, but only after an impartial consideration of the evidence with your fellow jurors. In the course of deliberations, you should not hesitate to reexamine your own views and change your opinion if you are convinced it is erroneous. You should not surrender your honest conviction as to the weight or effect of the evidence solely because of the opinions of your fellow jurors, or for the mere purpose of returning a verdict.

You are officers of the court and must act impartially and with an earnest desire to determine and declare the proper verdict. Throughout your deliberations you will permit neither sympathy nor prejudice to influence you. [WPI 1.02]

INSTRUCTION NO. 2

Evidence may be either direct or circumstantial. Direct evidence is that given by a witness who testifies concerning facts which the witness has directly observed or perceived through the senses. Circumstantial evidence consists of proof of facts or circumstances which, according to common experience, permit a reasonable inference that other facts existed or did not exist. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. One is not necessarily more or less valuable than the other. [WPI 1.03]

INSTRUCTION NO. 3

A witness who has special training, education, or experience in a particular science, profession, or calling may be allowed to express an opinion in addition to giving testimony as to facts. You are not bound, however, by such an opinion. In determining the credibility and weight to be given such opinion evidence, you may consider, among other things, the education, training, experience, knowledge, and ability of that witness, the reasons given for the opinion, the sources of the witness' information, together with the factors already given you for evaluating the testimony of any other witness. [WPI 2.10]

INSTRUCTION NO. 4

Ordinary care means the care a reasonably careful person would exercise under the same or similar circumstances. [WPI 10.02]

INSTRUCTION NO. 5

Negligence is the failure to exercise ordinary care. It is the doing of some act which a reasonably careful person would not do under the same or similar circumstances or the failure to do something which a reasonably careful person would have done under the same or similar circumstances. [WPI 10.01]

INSTRUCTION NO. 6

Contributory negligence is negligence on the part of a person claiming injury or damage which is a proximate cause of the injury or damage complained of.

If you find contributory negligence, you must determine the degree of such negligence, expressed as a percentage, attributable to the person claiming such injury or damage. The court will furnish you a special verdict form for this purpose. Your answers to the questions in the special verdict form will furnish the basis by which the court will reduce the amount of any damages you find to have been sustained by a party who was contributorily negligent, by the percentage of such contributory negligence. [WPI 11.01]

INSTRUCTION NO. 7

Every person using a public street or highway has the right to assume that other persons thereon will use ordinary care and will obey the rules of the road, and has a right to proceed on such assumption until he or she knows, or in the exercise of ordinary care should know, to the contrary. [WPI 70.06]

INSTRUCTION NO. 8

Every person has a duty to see what would be seen by a person exercising ordinary care. [WPI 12.06]

INSTRUCTION NO. 9

The term "proximate cause" means a cause which, in a direct sequence, unbroken by any new independent cause, produces the injury complained of and without which such injury would not have happened.

There may be one or more proximate causes to an injury. [WPI 15.01]

INSTRUCTION NO. 10

1. The plaintiff claims that the defendant was negligent in one or more of the following respects:

(a) Failing to keep a proper lookout.

(b) Entering an intersection before it was safe to do so.

The plaintiff claims that one or more of these acts was a proximate cause of injuries and damage to plaintiff. The defendant denies these claims.

2. In addition, the defendant claims as an affirmative defense that the plaintiff was contributorily negligent in traveling too fast. The defendant claims that plaintiff's conduct was a proximate cause of plaintiff's own injuries and damages. The plaintiff denies these claims.

3. The defendant further denies the nature and extent of the claimed injuries and damage. [WPI 20.01]

INSTRUCTION NO. 11

When it is said that a party has the burden of proof on any proposition, or that any proposition must be proved by a "preponderance" of the evidence, or the expression "if you find" is used, it means that you must be persuaded, considering all the evidence in the case bearing on the question that the proposition on which that party has the burden of proof is more probably true than not true. [WPI 21.01]

INSTRUCTION NO. 12

The plaintiff has the burden of proving each of the following propositions:

First, that the defendant acted, or failed to act, in one of the ways claimed by the plaintiff and that in so acting, or failing to act, the defendant was negligent;

Second, that the plaintiff was injured;

Third, that the negligence of the defendant was a proximate cause of the injury to the plaintiff.

The defendant has the burden of proving that the plaintiff was contributorily negligent. [WPI 21.02]

INSTRUCTION NO. 13

It is the duty of the court to instruct you as to the measure of damages. By instructing you on damages, the court does not mean to suggest for which party your verdict should be rendered.

If your verdict is for the plaintiff, then you must determine the amount of money which will reasonably and fairly compensate the plaintiff for such damages as you find were proximately caused by the negligence of the defendant.

If you find for the plaintiff, your verdict should include the following past economic damages elements:

The reasonable value of necessary medical care, treatment, and services received to the present time.

The reasonable value of earnings lost to the present time. [WPI 30.08.01]

The lesser of the following:

(1) The reasonable value of necessary repairs to any property which was damaged plus the difference between the fair cash market value of the property immediately before the occurrence and its fair cash market value after it is repaired; or

(2) The difference between the fair cash market value of the property immediately before the occurrence and the fair cash market value of the unrepaired property immediately after the occurrence. [WPI 30.10]

In addition, you should consider the following future economic damages elements:

The reasonable value of necessary medical care, treatment, and services with reasonable probability to be required in the future. [WPI 30.07.02]

The reasonable value of earnings with reasonable probability to be lost in the future. [WPI 30.08.02]

In addition, you should consider the following noneconomic damages elements:

The nature and extent of the injuries. [WPI 30.04]

The disability [and disfigurement] experienced and with reasonable probability to be experienced in the future. [WPI 30.05]

The pain and suffering both mental and physical plaintiff experienced and with reasonable probability to be experienced in the future. [WPI 30.06]

The burden of proving damages rests with the plaintiff and it is for you to determine whether any particular element has been proved by a preponderance of the evidence.

Your award must be based upon evidence and not upon speculation, guess, or conjecture.

The law has not furnished us with any fixed standards by which to measure noneconomic damages. With reference to these matters, you must be governed by your own judgment, by the evidence in the case, and by these instructions. [WPI 30.01.01]

INSTRUCTION NO. 14

Upon retiring to the jury room for your deliberation of this case, your first duty is to select a foreman to act as chairman. It is his or her duty to see that discussion is carried on in a sensible and orderly fashion, that the issues submitted for your decision are fully and fairly discussed, and that every juror has a chance to be heard and to participate in the deliberations upon each question before the jury.

You will be furnished with all of the exhibits admitted in evidence, these instructions and a special verdict form which consists of several questions for you to answer. It is necessary that you answer each of these questions unless the questions themselves specifically provide otherwise. You should answer the questions in the order in which they are asked as your answers to some of them will determine whether you are to answer all, or only some, or none of the others. Accordingly, it is important that you read the questions carefully and that you follow the directions set forth.

This being a civil case, ten of your number may agree upon a verdict. When ten of you have so agreed, fill in the verdict form to express the results of your determination. Whether the foreman is one of the ten or not, the foreman will sign the verdict and announce your agreement to the bailiff who will conduct you into court to declare your verdict.

_____

[WPI 1.11] JUDGE ROBIN BEAN

COLUMBIA SUPERIOR COURT
COUNTY OF LINDEN

Paula Prentice,)
Plaintiff)
)
v.)
)
Dennis Daniels,)
Defendant)
_____)

Action No. 90-12345

SPECIAL VERDICT FORM

We, the jury, make the following answers to the questions submitted by the court:

QUESTION NO. 1: Was the defendant negligent?

Answer: _____ (Yes or No)

QUESTION NO. 2: If your answer to Question No. 1 is "yes," then answer both of the following: Was the negligence of the defendant a proximate cause of injury or damage to the plaintiff?

Answer: _____ (Yes or No)

QUESTION NO. 3: Was the plaintiff negligent?

Answer: _____ (Yes or No)

QUESTION NO. 4: If your answer to Question No. 3 is "yes," then answer the following: What is the total amount of the damages to the plaintiff?

Answer: $_____

QUESTION NO. 5: Answer the following only if you answered "yes" to both Question 1 and Question 3. If you answered "no" to either of those questions, do not answer this Question No. 5: Using 100 percent as the total combined negligence of the parties which contributed to the injuries or damages to the plaintiff, what percentage of such negligence is attributable to plaintiff?

Answer: _____ percent

QUESTION NO. 6: Answer the following only if you answered "yes" to both Question 1 and Question 3. If you answered "no" to either of those questions, do not answer this Question No. 6: Using 100 percent as the total combined negligence of the parties which contributed to the injuries or damages to the plaintiff, what percentage of such negligence is attributable to the defendant?

Answer: _____ percent

_____
FOREMAN

[WPI 45.03]

INDEX OF KEY PROCEDURAL TERMS

[*In the preceding pages the key terms were indicated in* ***BOLD*** *type. Following is an index of each of these terms. During the year, when a procedural term crops up whose significance you have forgotten, use this index to point you to the section where the term was explained in context.*]

APPENDIX B
INSURANCE

The relationship between tort law and insurance is quite complex, and scholars (and in the age of tort reform, legislatures) debate vigorously over what is the proper function of each.[1] A separate course on insurance law is available in the law school curriculum, and this short treatment is not intended as a substitute for it. However, some understanding of the insurance mechanism is useful for the first-year law student.

1. First-Party and Third-Party Insurance

The term "insurance" describes two different kinds of arrangements. Of greatest importance in tort law is *liability* (also called *casualty* or *indemnity*[2] insurance), which protects the defendant in case he is sued by someone. This form of insurance is sometimes called *third-party* insurance as distinguished from *first-party* insurance, which compensates the insured directly from some kind of peril. Take automobile insurance as a typical example. One part of the automobile insurance consists of *liability* coverage.[3] If you get into an accident, liability coverage provides you with a defense in case you are sued, and will pay damages to the injured party up to the limits specified in the policy (typically $50,000 or $100,000). In addition to liability coverage, you may choose *property* or *comprehensive* coverage, which will reimburse you (minus a deductible[4]) if a tree falls on your car, or if you lose control of your car and strike a tree. The difference between liability (third-party) coverage and property (first-party) coverage is that in the latter you have the claim directly against the insurance company for your own damage; in the case of third-party coverage, on the other hand, you are simply protected against claims (damages suffered) by other individuals.

First-party coverage becomes relevant to tort law where the claimant is asking the defendant to pay for his injury, but already has his own insurance. For example, suppose *A*'s house burns down and *A* collects compensation from his fire insurance company. That is his first-party coverage. In the insurance policy there is usually an agreement that if the insurance company has to pay out on a claim, they have the right of *subrogation* against any party who might be responsible for the loss. For example, suppose the house was burned down by the faulty wiring in a toaster. The fire insurance company might sue the toaster manufacturer to recover the money they had to pay out on the claim. Similarly, if *A* was injured in an automobile accident by *B*, and *A*'s medical bills are paid by his health insurance company, the health insurance company may assert the right of *subrogation* to seek reimbursement from the person who caused the accident; thus *A* and his health insurance company will have a claim against the

---

1 Schwartz, *The Ethics and the Economics of Tort Liability Insurance*, 75 CORNELL L. REV. 313 (1990).

2 To *indemnify* means to make the other person whole; many insurance companies incorporate the word "indemnity" into their company name, signifying the fact that they are promising to make a person whole if they have an accident or suffer a loss.

3 More than 40 states require some form of third party liability insurance for autos.

4 To reduce their claims handling costs, most insurance companies offer substantial discounts if you will agree to claim only the amount above a certain "deductible" (typically $100 or $200), so that the insurance company won't have to pay for minor claims. You still have coverage for larger claims, but it saves the insurance company the cost of administering small claims—for which your insurance dollar is not as well spent.

defendant.

2. The Scope of Coverage

In the case of first-party coverage, there is usually a financial ceiling that is set in the policy. Health insurance policies typically cover only certain kinds of diseases, and contain exclusions for various kinds of ailments (dental work, for example). Life insurance policies have a "face value" ($50,000, for example) which specifies how much will be paid in the event of death. Third-party coverage policies vary considerably, not only in the amount of coverage (the dollar limits), but also in terms of what is insured against. A homeowner's policy, for example, will provide coverage if someone slips and falls on your porch, but doesn't cover you for automobile accidents. An automobile policy will protect you on your family vacation, but won't insure you if you provide a taxicab service. Business insurance policies are tailored to the kind of business, and can include or exclude such things as products liability coverage, malpractice, etc.

One thing that all insurance policies share in common is that they only apply to "occurrences," which include not only the typical accident such as an auto collision, but also gradual processes such as leakage, earth movement, etc. A person can be negligent and still receive insurance coverage; in fact, one of the key features of insurance coverage is that it will protect a person if he gets sued for negligently driving his car, manufacturing a defective product, missing the statute of limitations, etc.

On the other hand, insurance does not cover intentional acts, or acts so reckless that it would be offensive to public policy to indemnify the insured. Insurance policies vary on whether they cover punitive damages; some states prohibit coverage for punitive damages on the ground that it would run counter to the purpose for which punishment is sought.

3. The Interaction of Insurance and Tort Law

In theory, tort law is independent of insurance, since it is because of tort law that most people purchase insurance.[5] In a typical tort suit, the word insurance is never mentioned. In fact, lawyers are forbidden from even mentioning insurance (except in limited circumstances[6]) in the course of their presentation of evidence or argument to the jury. Nonetheless, the ubiquity of auto insurance has led some scholars to conclude that juries, without being instructed to do so, often include the assumption of coverage in their deliberations. *See* Kalven, *The Jury, the Law, and the Personal Injury Damage Award*, 19 OHIO ST. L. J. 158 (1958).

The availability of insurance has also affected courts' willingness to impose liability upon the defendant. Since insurance permits the spreading of the cost of an injury to all defendants within the insurance pool, not just the individual defendant, it is easier to base the decision on which party in the abstract is better situated to bear the loss. See, for example, Justice Traynor's concurrence in *Escola v. Coca Cola Bottling*, Chapter Nine (suggesting that strict liability for product defects would be desirable in view of the availability of insurance as a mechanism for transferring the cost of injury from the innocent purchaser to the manufacturer). But as Prosser points out, surprisingly little reference has been made to the impact of insurance on tort law and awards in court opinions. PROSSER & KEETON, § 82, at 593. The most noticeable effect of insurance has been to abrogate various immunities that once provided a defense from liability. Family and charity immunity are two such examples cited that have, in effect, been replaced by insurance. *Id.*, at 595.

Finally, much has been made in recent years of the so-called insurance crisis of the mid-1980s. Many scholars (and legislators) were convinced that rising insurance rates were attributable to a tort system which had expanded liability beyond sensible boundaries. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L. J. 1521

---

[5] Of course, people also purchase first-party insurance (health insurance, fire insurance, life insurance, (continued…)

[5](…continued)
etc.). However, automobile liability and property damage accounted for 42 percent ($73.4 billion) of the total premiums written. (Fire insurance premiums, for example, totaled only $7 billion and homeowners liability insurance was set at $15 billion.)

[6] For example, in some cases statutes permit the introduction of evidence that the plaintiff's damages have already been compensated, for example through disability insurance.

(1987) (suggesting that the desire to compensate plaintiffs has backfired, driving insurance costs beyond the means of most low-income people and reducing the amount of coverage available to society as a whole). A contrary view suggests that the steep rise in insurance rates in the early 1980s were more a function of investment cycles, and that rising rates were mostly attributable to the softening demand for investment money than to changes in tort liability rules.[7]

4. Practice Considerations Regarding Insurance

For tort lawyers, insurance coverage is of critical importance to both to the plaintiff and to the defendant. From the perspective of the plaintiff's lawyer, the availability of insurance may make the difference between a case that is worth taking and one that is not. If the plaintiff is injured in an automobile collision by an uninsured driver, there may be no point in suing the driver.[8] Similarly, if the other driver's policy has limits of $20,000, there may be little to recover. Remember that a plaintiff is not limited to the defendant's available insurance — the defendant is still obligated to pay, even if his insurance doesn't cover the accident — but in most cases the uninsured defendant doesn't have much to pay in damages. Typically the bankruptcy statutes will permit the defendant to declare bankruptcy and protect his personal possessions and even some equity in his home from the reach of creditors, including the tort plaintiff.

On the other hand, a defendant often depends upon insurance to protect him from the devastating effects of a lawsuit. Often the defendant's lawyer is initially hired by the insurance company when the insured reports the claim to his insurance company. Prior to hiring a lawyer, the company will often employ a claims adjuster to attempt to settle with the plaintiff. If there is no settlement and a lawsuit is filed, a lawyer will be hired to defend the claim. This often creates something of a conflict of interest, since the insurance company pays the lawyer's fees, and usually represents an ongoing source of business. On the other hand, the insured who is actually being represented may have interests contrary to those of the company. The defendant may want to settle for any amount within his insurance company, even if the company would like to gamble on a trial outcome that could exceed the insurance coverage but might also result in a defeat for the plaintiff or a very modest recovery. The law is clear that where a lawyer is hired pursuant to an insurance contract that requires the company to provide the insured with a defense, the lawyer's loyalty is *solely to the insured*, and that the lawyer must resolve any conflict in favor of protecting the insured. If the insurance company fails to live up to their obligations in the insurance contract, the insured may sue the company for "bad faith." Claims based upon the breach of the covenant of good faith and fair dealing are a major growth industry in law in the last fifteen years. Recent cases in California have cut back on bad faith in both insurance and employment cases. *See Moradi-Shalal v. Firemen's Fund Ins. Cos.*, 46 Cal. 3d 287, 250 Cal. Rptr. 116, 758 P.2d 58 (1988) (insurance); and *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 254 Cal. Rptr. 211 (1988) (employment).

---

7 *See The Manufactured Crisis, Liability-Insurance Companies Have Created a Crisis and Dumped It On You*, CONSUMER REPORTS (August 1986); *Mazzagatti v. Everingham*, 512 Pa. 266, 516 A.2d 672 (1986) (LARSEN, J., dissenting).

8 However, many automobile policies provide *uninsured motorist insurance*, which obligates the policyholder's insurance company to pay damages on behalf of the uninsured driver, if he cannot pay.

APPENDIX C
FORMS OF ACTION

Forms of action are ancient common law procedural devices which have had a great impact on the development of substantive tort law. At common law, pleading rules were much less flexible than they are today. Instead of pleading facts and then deciding what legal doctrine(s) would allow recovery on those facts, a plaintiff had to choose the "form of action" that fit his case, and then prove facts constituting that particular form. In torts, a plaintiff was relegated to bringing suit either for trespass or trespass on the case. In general, a writ for trespass required some harm to be caused by the defendant's use of force on the plaintiff's person or property. Trespass on the case was used in situations where the defendant's actions caused more indirect harms.

A classic example of the differences between the two writs was formulated in *Reynolds v. Clarke*, 1 Str. 634, 92 Eng. Rep. 410 (1726). If the defendant threw a log onto a highway and hit the plaintiff, the plaintiff could sue for trespass. If the log instead was negligently dropped on the highway and later the plaintiff tripped over it, the plaintiff could only sue for trespass on the case.

The procedural differences between the two writs were very important in bringing a plaintiff's case. Under trespass the plaintiff was allowed to seize the defendant's property to force the defendant into court. Under a writ of trespass on the case, however, the plaintiff had to use a summons and complaint. Another difference was that in some actions for trespass the plaintiff was entitled only to damages. Under trespass on the case damages and costs were available — the modern English rule today. *See*, *Savignac v. Roome*, 6 D.& E. (6 T.R.) 129, 101 Eng. Rep. 470 (1794). Other differences, such as differing statutes of limitations, were not resolved until much later. *See*, *Letang v. Cooper*, 1 Q.B. 232 (1965).

Since the plaintiff had to choose which writ to use, choosing incorrectly could be fatal to his action. At a minimum the differences created some confusion. In *Scott v. Shepherd*, 2 Wm. Bl. 892, 96 Eng. Rep. 525 (1773), the justices could not agree as to whether a squib (firecracker) thrown into a covered market by the defendant constituted trespass or trespass on the case. A merchant had picked up the lighted squib and threw it across the room. Another merchant then picked it up and threw it again, striking the plaintiff as it exploded and putting out his eye. Was the defendant's initial action the immediate cause of the plaintiff's injury, and trespass, or only a consequential result and trespass on the case? (All justices agreed the merchants were allowed to protect themselves and their wares by tossing the squib.) Two of three justices ruled in favor of the plaintiff, who had brought the suit in trespass.

Another complication caused by the division in forms of action concerned negligent employees. Their masters could only be sued on the case, as being indirectly liable for the injuries occasioned by their employees. Pity the plaintiff who sued on the case only to find out it was not an employee who actually injured him but the employer. *See*, *McManus v. Crickett*, 1 East 106, 102 Eng. Rep. 580 (1800). Much confusion was eliminated by *Williams v. Holland*, 10 Bing. 112, 131 Eng. Rep. 848 (1833), when the Court of Common Pleas ruled a plaintiff could sue on the case so long as the defendant's negligence caused the harm complained of.

For a history of trespass and case, see M.J. Prichard, *Trespass, Case and the Rule in Williams v. Holland*, 22 CAMB. L.J. 234 (1969).