Instructor's Manual to Accompany

BUSINESS LAW

Text and Cases

George L. Hanna

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Jonathan M. Purver, LL.B.
William D. Farber, J.D., LL.M.
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Prepared by

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for

P.S. Associates, Inc.
Sterling, Massachusetts

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CONTENTS

CHAPTER 1
NATURE AND SOURCES OF LAW

1:1 What Is Law?

- A. Functions of Law
- B. Law as a Dynamic Process
- C. Law as an Instrument of Business

1:2 Common Law and Equity

- A. The Courts of Equity
- B. Adoption of English Common-law and Equity Systems in the United States

1:3 Statutory Law

- A. Uniform and Model Laws and the Restatement
- B. Ordinances
- C. Treaties

1:4 The Constitution and the Federal-State System

- A. Supremacy Clause
- B. Delegated Powers Doctrine
- C. Necessary and Proper Clause
- D. Commerce Clause
- E. Protection of Rights of the Individual
- F. Flexibility of Constitution

1:5 Preventive Law in Business

1:6 The Attorney-Business Relationship

- A. Selection of Attorney
- B. The Fee Arrangement
- C. Attorney-Client Communication
- D. Privileged Attorney-Client Communications

TEACHING STRATEGIES AND CASE BRIEFS

1:1 What Is Law?

The text in this area requires little explanation. However, the instructor may want to discuss some other concepts of law in order to give the student a broader historical and philosophical background to the nature of law and legal theories.

The following books will be helpful in preparing such a lecture: Oliver Wendell Holmes, Jr., *The Common Law* (Boston: Little, Brown, 1964) and Roscoe Pound, *An Introduction to the Philosophy of Law*, rev. ed. (New Haven, Conn.: Yale University Press, 1954). An outline for a lecture on concepts of law follows.

A. Natural Law

The concept of natural law originated with the ancient Greeks and ancient religions. These religions, primarily Hebrew in our case, drew their fundamental precepts from the word of God, the Mosaic Code, and Hammurabi's Code.

The fundamental premises were that God had created man and established immutable principles by which he should live, that the will of God is stable and unchanging, and that what is right is always right and what is wrong is always wrong.

The Greeks also viewed the fundamental principles of law as theistic because they had long accepted the idea of an ordered universe emanating from the eternal reason, or logos. Thus Plato described law as tending toward the discovery of the form of perfect law, which is the ultimate reality. As opposed to the rule of man, the rule of law is that of God and reason, for "law is reason unaffected by desire; Justice is an attribute of nature."

The Stoic philosophers provided a doctrine of universal natural law which was the foundation for the Roman system, Christian legal doctrine, and European and American legal philosophy. Law is the creation of an all-perfect God and, because governments and courts are inferior creations of man, we should, as the Apostle Peter later said, "obey God rather than men." But the Stoics coupled their theory with a respect for law and order. Governments may not correctly follow the natural law, but they are to be obeyed until the leaders may be enlightened.

Out of this belief in a high law grew the theory that man by nature possesses certain rights which he may assert in opposition to any man-made law. This militant doctrine of rights was advanced by the Sophists, who argued that there is no ethical content to nature and that natural law has factual connection with the realities of life. Laws are obeyed only because of the threat of penalty. Men are not just by nature. They are interested only in their self-interest, and it is out of fear of one another that they establish governments and laws. This contract that they make among themselves to protect one another is the foundation of the state.

Stoic doctrine of universal natural law served as the foundation of Roman law as the Empire grew, and Stoicism offered a satisfactory background for Christianity becoming the state religion in 325 A.D. under Constantine. But it was not until the thirteenth century that Saint Thomas Aquinas converted Greek and Roman legal philosophy into Catholic dogma.

1. The Christianization of Plato

2. Saint Thomas predicated law on will and reason.
   (a) Law is reason.
   (b) Will of the sovereign has force of law only when in accordance with reason.
   (c) Law is an ordinance of reason by the sovereign made for the common good.
   (d) Since the universe is governed by divine reason, the idea of His government has the nature of law, and since divine reason is timeless, His law is eternal.
   (e) Thus law becomes religion and religion becomes law.

Later humanistic philosophers--Rousseau, Hobbes, Locke--removed the theistic quality from natural law and provided the legal philosophy which underlies the American legal system. Natural law can be used to justify anything.

B. Historical Jurisprudence; Law as Custom and Tradition

Law is the unconscious creation of society. As members of a society are familiar with its customs and follow them, in following them they follow the law. Only in those cases where the customs are doubtful or conflicting are judges and legislatures necessary.

The role of the judge is, as an expert, to find and declare the law, not to make it. The role of the legislature is to declare the law in areas where society has grown and progressed and requires new usages, new customs.

The purpose of legislative enactments is to reinforce and furnish an additional motive for people to conduct themselves in accordance with established custom. Therefore, enactments in accordance with custom will be effective, but those that are in conflict with social custom (which is the real source of law) will be ineffectual.

Law is the product of experience rather than logic. As society evolves, so will the law necessarily evolve; law embodies the common spirit of a people. Examples include:

1. Prohibition
2. Marijuana
3. Automobile traffic
4. Rights to computer software and data
5. Pornography

C. Legal Positivism; Law as a Command from Political Superior to Political Inferior

Law is a rule laid down for the guidance of an intelligent being by an intelligent being having power over him. Law has nothing to do with concepts of good and bad or justice but is instead based on the power of a superior.

A command is distinguished from other significations of desire by the power to punish for a violation. The subject of the command has a duty to obey it, which arises from the threat of punishment.

Positivism was also called the Pure Theory of Law by its advocates because it seeks to remove all consideration of morality, justice, or the goal of law and simply to define what law is without asking what it ought to be.

D. Sociological Jurisprudence; Law as Social Engineering

Law is viewed as a social institution in which the judge is to regard legal precepts as guides to socially just results rather than as inflexible molds. Stress is placed on the social purpose of the law rather than on sanctions.

The judge becomes an active arbiter basing his decision on a consideration of the individual, public, and social interests involved in a case.

Analysis of a case would tend to terminate upon reaching the point of perceived practical usefulness.

This technique of making a judge the final arbiter of not only what is just, but also what is best, has been responsible for much public criticism of courts in recent years.

1. Does it place a judge in the position the framers of the constitution intended?
2. What are the guidelines?

E. Summary

Natural law emphasizes fundamental moral principles. Truth is truth because (1) it is God's will or (2) it is the nature of the universe. As a result, natural law can be used to protect and defend anything: freedom, war, slavery, family, discrimination, human rights, and so on.

Historical jurisprudence emphasizes custom and historical tradition, embodying the common spirit of a people. However, it tends to perpetuate outmoded institutions and obstructs change. Experience is one thing, but observance of custom and continuation of outmoded rules of law merely because they exist, without logical evaluation of their purpose, make no sense.

Legal positivism regards law as a command from a soverign to the subjects; compliance is due to the subject's desire to avoid punishment for noncompliance. Furthermore, it is unconcerned with right or wrong, taking the view that morality has no place in the law. That view of an amoral law that must be obeyed laid the foundation for the rise of the Third Reich.

Sociological jurisprudence emphasized balancing individual, social, and public interests via social engineering.

1. But how does a judge "weigh" freedom of speech? How can a decision serve as a guide for future conduct?
2. Law as a means to a social end and as a device for social development.

A. Functions of Law

1. Keeping the Peace All societies, ancient and modern, require the maintenance of a minimal level of order. Criminal law and tort law seek to maintain the public order by holding those who violate that order responsible--criminal law by punishing those who offend public order and tort law by holding financially accountable those who injure others or their property by reckless or negligent conduct.

   In this regard, the social purpose of maintenance of order will be regarded by the law to be superior to any individual desires. At the same time, it will encourage or coerce the submission of controversies to adjudication and limit the availability of self-help measures by the aggrieved.

2. Maintaining the Social Status Quo Greek philosophers began to conceive of general security in broader terms. They came to view the law as a device to keep each man in his place and thereby minimize friction with others.
   (a) In Plato's *Republic*, the concept is developed wherein men were to be reclassified and assigned to a class, be it Philosopher-King or artisan. Once each man was classified, the law would keep him there.
   (b) Aristotle defined justice as a condition which keeps each in his appointed sphere.
   (c) Saint Paul exhorted wives to obey their husbands, servants to obey their masters, and everyone to exert himself to do his duty in the class where the social order had put him.

   Roman lawyers made the Greek philosophical conception into a juristic theory. This led into a feudal social order in which stability was maintained by keeping everyone in his position and having his descendants follow him in it.

3. Maximizing Individual Free Self-Assertion As feudal society began to crumble with the growth of trade and commerce, importance of the individual grew. New fields of human activity were opening up, and men wanted mostly to be left alone so that they might achieve something for themselves.

The purpose of law was not to maintain the status quo, but to maintain the natural equality of men that was often impaired by restrictions on individual activity.

But the restrictions were necessary to respect the rights of others, as the natural man would do as a matter of reason. Men were to be left free; the atmosphere was very suitable for encouraging discoverers, colonizers, pioneers, traders, and entrepreneurs.

4. Promotion of the Social Goal Social utilitarianism began the focus on human wants rather than human wills. The owner of property could do on it whatever he wished, so long as it did not endanger the public health or safety.

Law is a social institution to satisfy social wants via social engineering.

B. Law as a Dynamic Process

Discuss the idea that the law is not a system of known rules applied by a judge but is more like a moving classification system. The best material available for a lecture on the growth of the law and the legal system is Edward H. Levi, *An Introduction to Legal Reasoning* (Chicago: University of Chicago Press, 1962).

C. Law as an Instrument of Business

1. Law Merchant Developed as the customs and traditions of merchants in trade and commerce, beginning with the ancient Hittites.

Commercial law today (UCC) is the evolutionary product of over 30 centuries of trade. The UCC is a codification of those evolving customs.

1:2 Common Law and Equity

The Common Law Following the Norman Conquest of England in 1066, William the Conqueror established the King's Court and the law courts, which were staffed by circuit-riding judges who were to write up their decisions when they returned to London and read their colleagues' decisions.

Those which they considered good decisions would be used as precedents to guide later decision making.

(a) Stare decisis
(b) Rules of law develop from the cases.

Juries were used not to determine issues of fact, but merely to squeal on their neighbors.

Show the rigidity of the common law by discussing the forms of action available under the common law: trespass, trover, replevin, and so on. If one could not bring his or her action within one of the highly structured forms of action, there was no remedy available. Even if he or she could, the remedies available were limited: money damages or the return of property.

A. The Courts of Equity

1. Equity The Court of Chancery and its lower courts grew out of the Chancellor's power as the King's chief executive officer to grant forms of relief not available in the King's Courts. The lack of a remedy under the common law brought about the development of the courts of equity.

(a) Injunctive relief, specific performance, punitive damages, partition, rescission, and restitution.

Equitable relief would be available only when the remedies available at law were inadequate. No jury was involved; the decision was solely the judge's.

B. Adoption of English Common-law and Equity Systems in the United States

England did and still does have two systems of court. Nearly all American courts have consolidated them, but a jury is still not available in an equitable action.

Note when your state adopted the common law and whether or not your state still has both courts of equity and courts of law. Further, explain what types of cases are still considered equitable.

You may want to discuss very briefly at this time Roman law and the law merchant.

Roman law is code-oriented; the law is what the enactments of the sovereign say.

(a) Statutes
(b) Executive orders
(c) Administrative regulations

The instructor might use *Lowe v Quinn* (1971) 267 NE2d 251. It is an excellent example of a court's use and consideration of the common law, equity, and statutory law in a single case.

1:3 Statutory Law

Most major changes in the law of a particular jurisdiction are brought about by statutes enacted by the various state legislatures or by the Congress of the United States. In the discussion and passage of legislation, all interested parties may be heard and may urge upon their legislator the changes they believe desirable. The legislature can set rules for governing a new situation, such as the disposal of radioactive waste. Legislation, then, is more flexible than the common law. The legislature can change the common law and can repeal outmoded laws.

A. Uniform and Model Laws and the Restatement

As a lead-in to the necessity for uniform laws, I like to use the example of a dog owned by a citizen of State A who wanders into State B where he bites a citizen of State B. State A has a statute which says that the owner of a dog is liable only if he knows that the dog has vicious propensities (a two-bite statute). State B, on the other hand, has a strict liability statute (a one-bite statute). Develop the conflict-of-law problem. This example demonstrates the need for uniform laws.

B. Ordinances

A state may by statute create lesser units. These may be countries, townships, and cities. These units of government may exercise certain legislative functions. Their legislative acts, called ordinances, are enforceable provided they do not exceed their legislative power.

Show the students a municipal code and go through one or two ordinances with them. As examples of ordinances that exceed the authority of the city, see *Cincinnati v Taylor* (1973) 303 NE2d 886 and *City of Columbus v Rogers* (1975) 324 NE2d 563.

C. Treaties

The President of the United States may enter into agreements with the heads of foreign states. These agreements or treaties, when ratified by the U.S. Senate, become law and are superior to both federal and state law. Treaties have on occasion been the basis for holding a federal or state statute invalid.

1:4 The Constitution and the Federal-State System

A. Supremacy Clause

The federal Constitution is the basic source of law for our country. If a state constitution or a federal or state statute is in conflict with the federal Constitution, it is unenforceable.

B. Delegated Powers Doctrine

The Constitution sets out the structure and form of our federal government. In addition, it distributes power among the branches of the federal government and allocates power between the federal and state governments by a delegation of power.

E. Protection of Rights of the Individual

The Constitution contains limitations on governmental powers and prohibits certain laws, thereby guaranteeing rights to the individual.

1:5 Preventive Law in Business

Business law students should learn that the lawyer should be consulted in order to help the businessperson steer a safe course, although the growth of business requires some decisions that, while lawful, may not always be safe. We don't want our leaders of business to abandon decision making to lawyers. What the businessperson needs is the safest course possible to achieve his or her objective.

(**Preventive** dentistry is good, but it should not make us give up all sweets.)

1:6 The Attorney-Business Relationship

A. Selection of Attorney

If the attorney is to be helpful to the businessperson, he or she must understand the nature of the client's business. What is it that the client wants to accomplish? Spend the necessary time to advise your lawyer concerning the nature of your business.

When the business has been sued, the house counsel is not the lawyer you want. You want a trial lawyer.

The *Martindale-Hubbell Law Directory* can help you learn something about the lawyers in your area. When looking for a trial lawyer, check the *Martindale-Hubbell Law Directory* for lawyers who are members of the American Trial Lawyers Association.

B. The Fee Arrangement

Arrange and discuss at your first meeting what the lawyer's fees will be. Avoid contingent fee agreements. Find out the hourly rate. Avoid paying fees for paralegals. (Your own staff can do much of the paperwork.) Make sure the attorney's hourly rate doesn't increase on weekends, holidays, or after a six-hour day. Sometimes lawyers will charge a flat fee per day but will calculate a day at six hours. Additional charges you can expect include telephone and duplicating charges.

C. Attorney-Client Communication

Arrange for periodic reports and find out what details are included in the bill. Get time records or bills periodically so that you know not only the progress of your case but also the cost of its preparation.

D. Privileged Attorney-Client Communications

Look at the statute for your particular jurisdiction and use it as a basis for your discussion of privilege. By showing the necessity for privileged communication in all areas mentioned by the statute, you will demonstrate that the privilege is not given to the business-person and the criminal in order that they may hide misdeeds.

ANSWERS TO TEXT QUESTIONS AND CASE PROBLEMS

1. American law is a system for bringing reason, fairness, and stability to the marketplace. In understanding business law, the businessperson becomes aware of the means to prevent disputes and to avoid lawsuits by anticipating the legal consequences of his or her actions.

2. An attorney's advice should be sought whenever there is an indication of possible legal complications. Counsel should be consulted when a businessperson receives any form of legal document, such as a subpoena, governmental order or request, demand by another company or private person for a particular legal action, or notification that a lawsuit has been filed or will be filed against the businessperson personally or against the company or organization.

An attorney does not need to be consulted when you are negotiating contracts; this is a matter for businesspeople. Dealings with agencies such as SEC, IRS, or OSHA can be handled by finance or accounting personnel of the firm, who could in turn report to the corporate lawyer.

3. The system of justice under the equity courts is much less rigid than that of the common-law courts. Remedies awarded by common-law judges were solely monetary, whereas equity decrees could take several forms, such as preventing or requiring performance of certain activities. An equitable action is tried only by a court, never to a jury.

4. The Uniform Laws were a result of the creation of the National Conference of Commissioners in 1891. Statutes proposed by the Commissioners in various areas of law might be adopted, in whole or in part, by the state legislatures to secure uniformity of laws among the states. Model laws have been drafted by various committees of the American Bar Association. Like the uniform laws, they do not become statutes until enacted by the states. Restatements of Law are written by the American Law Institute organized by law professors, judges, and practicing attorneys. They contain statements of what the ALI believes to be the proper rules of law in many ways. Although primarily concerned with nonstatutory rules of law, restatements are given weight by the court, which may decide matters in accordance with the principles set forth in them.

An example of a model law's significance to the business community can be seen in the Model Business Corporation Act, which was first drafted in 1960. It has gone through several revisions and has been adopted in substance in more than 35 states. Major portions of the act are being followed in many other states.

5. Express and implied limitations on the exercise of governmental power emanate from the Constitution. Principal among the express limitations are those contained in the Bill of Rights, the first ten amendments to the Constitution.

The Tenth Amendment to the Constitution states that the powers not delegated to the federal government by the Constitution, nor prohibited by the Constitution to the states, are reserved to the states or to the people.

The Fifth and Fourteenth Amendments prohibit the Congress and the states, respectively, from depriving any person of "life, liberty, or property without due process of law." Due process has been defined in many ways and variously described by the Supreme Court as "those principles implicit in the concept of ordered liberty" and as "the principles of liberty and justice so rooted in the traditions and conscience of our people as to be ranked fundamental."

6. The purpose of preventive law in business is to recognize and eliminate legal problems before the aid of legal counsel or court action is required. Examples of preventive law include keeping up-to-date on tax laws and operating regulations in industry and keeping attorneys aware of changes in the business.

CHAPTER 2
COURT SYSTEM

2:1 Judicial Functions

A. Judicial Review

2:2 The Judicial Structure

A. Federal Court System
B. State Court Systems
C. Small Claims Courts

2:3 Nature of a Lawsuit

A. Pleadings and Service of Process
B. Discovery
C. Pretrial Conference
D. Settlement Negotiation
E. Trial
F. Appeal

2:4 Anatomy of a Judicial Decision

A. Case Citation

2:5 Basic Judicial Concepts

A. Jurisdiction
B. Long Arm Legislation
C. Standing to Sue
D. Class Action
E. Justiciable Controversy
F. Declaratory Judgments
G. Res Judicata
H. Stare Decisis
I. Deviating from Precedent

2:6 Arbitration: The Growing Trend

TEACHING STRATEGIES AND CASE BRIEFS

2:1 Judicial Functions

A. Judicial Review

1. Supremacy of Constitution The United States Supreme Court ruling in *Marbury v Madison* established the principle that the Constitution rules over all lower legislative acts and that the Supreme Court has the power of determining the constitutionality of Congressional acts. The fundamental separation of powers doctrine and supremacy of judicial review resulted from this decision. *Marbury v Madison* (1803) 5 US 137, 2 L Ed 60

2:2 The Judicial Structure

A. Federal Court System

1. Specialized Federal Courts
   (a) Court of Claims--suits against the United States
   (b) Court of Customs and Patent Appeals
   (c) Bankruptcy Courts
   (d) In addition, federal agencies and departments have a quasi-judicial function at times.

2. District Courts
   (a) Jurisdiction
      (1) Criminal--violations of U.S. Criminal Code
      (2) Civil--(a) diversity of citizenship--amount must exceed $10,000; and (b) federal question--arises under the Constitution, laws, or treaties of the U.S.--amount need not exceed $10,000.
      (3) Admiralty, civil rights, U.S. as a party, and so on.
   (b) The district court is the court of general jurisdiction, where a trial would be held.

3. Circuit Court of Appeals There are twelve; one serves D.C. alone.
   (a) Entertain appeals from the District Courts within their geographical circuit and may review administrative orders.
   (b) They will review the record of proceedings and the briefs of the parties, may listen to argument, and will determine whether the trial court correctly decided the issues of the case. They may affirm, reverse, or do some of each, and they may remand the case for further proceedings.

4. Supreme Court
   (a) Has original jurisdiction in some cases, by the Constitution. Beyond that, most cases come up on a writ of certiorari which may or may not be granted.
   (b) Decides fewer than 200 cases per year.

B. State Court Systems

1. Trial Courts Courts of general jurisdiction; will hear all kinds of cases and may grant legal or equitable relief.

2. Intermediate Appellate Courts Not present in every state.

3. State Supreme Court On issues of state law, the decision of a state supreme court is final. But it may be possible to take a State Supreme Court decision up to the U.S. Supreme Court if a federal question is present.

C. Other Courts

Inferior courts: courts of limited jurisdiction.

1. Justice of peace, city, municipal, juvenile, domestic relations, small claims, traffic, and probate courts.

2. Many states have established County Courts in which the judge is a lawyer, but jurisdiction is usually limited to misdemeanors and civil cases less than $3,000. Further, the County Court has no equitable powers.

2:3 Nature of a Lawsuit

As a parallel to the student's reading about the nature of a lawsuit, I have found that taking a hypothetical case from start to finish, which may be

referred to as the journey of a case through the courts, helps the students grasp the entire process. The instructor may go through the pleadings and do a mock voir dire and trial. An outline covering all of the necessary parts of the trial is set forth below:

While driving on I-65 near his hometown of Columbus, Indiana, Lemuel Goya encounters a sudden storm of sleet and freezing rain. The road surface becomes extremely treacherous and traffic slows to 5 mph. Even so, Lemuel watches as the car immediately ahead of his slides broadside down the road and into the ditch. Afraid that he will not be able to get back on the road if he pulls onto the shoulder, Lemuel carefully brings his car to a stop in the right-hand lane and puts on his flashers. After 30 seconds of watching, he sees no one moving in the car in the ditch, so he decides to get out and try to help. As he is getting out, a car driven by 16-year old Amanda Swampsucker of Guansville, Tennessee, and owned by her father, Dewey Swampsucker, slides into Lemuel's car. In addition to the damages to his car, later estimated at $1,100.00, Lemuel suffers a serious concussion, facial lacerations, cervical sprain, and a shattered left ankle. After Lemuel undergoes a lengthy hospitalization, his lawyers agree to file suit on his behalf against Amanda and her father.

A. Pleadings and Service of Process

1. Complaint A statement of the claim showing that Lemuel is entitled to relief, along with a statement of the relief to which he believes he is entitled.
   (a) Filed with the clerk of the court
   (b) Summons--contains information informing the defendant that he has been sued, gives the name of court and cause number, and shows the time limits within which he may respond.

2. Service A copy of the summons and the complaint are served upon each defendant by the Sheriff or by certified mail.

3. Answer Will admit or deny each material allegation in the complaint. The answer will also set forth affirmative defenses such as contributory negligence.

4. Other Pleadings The defendant may move to dismiss for lack of jurisdiction, improper venue, or failure to state a cause of action.

5. Counterclaim Amanda and her father may also file a counterclaim against Lemuel for damages to their car or injuries to her. Or they may file a third-party complaint and seek to join a new party to the action.

B. Discovery

1. Interrogatories Written questions answered under oath.

2. Depositions Oral examination of a witness under oath.

3. Request for Production of Documents To permit inspection and copying of documents, photos, drawings, phonographs, or other data compilations, or to permit entry upon land or other property for the purpose of inspection.

4. Physical and Mental Examination of Persons

5. Summary Judgment If it is clear that there exists no genuine issue of material fact, the judge will grant judgment summarily in favor of one party or the other.

C. Pretrial Conference

1. The attorneys meet with the judge to consider:
   (a) Simplifying the issues
   (b) Amendments to the pleadings
   (c) Possibility of admission of facts and documents
   (d) Limitation on the number of expert witnesses
   (e) An exchange of the names of witnesses

2. Previously, the attorneys met to discuss:
   (a) Exhibits to be introduced
   (b) Stipulations as to exhibits and facts
   (c) Exchange lists of witnesses
   (d) Settlement

D. Settlement Negotiation

Obtain a good settlement brochure or brief in a complicated lawsuit so that the student may gain an appreciation of the amount of preparation necessary for effective negotiation.

E. Trial

1. Because this is an action at law, each party has a right to demand a trial by jury. The jury would be selected from a group randomly chosen from tax rolls or voter registration rolls. The process of selection is called voir dire.

2. Preliminary instructions to the jury on burden of proof, credibility of witnesses, manner of weighing the evidence.

3. Opening statements by the attorneys preview what they expect the evidence will show.

4. The plaintiff presents his evidence first.
   (a) All evidence comes from the witness stand by way of testimony or by having a witness identify exhibits.
   (b) Witnesses may be there voluntarily or pursuant to a subpoena, which commands them to attend.
   (c) Each witness is subject to cross-examination by opposing counsel.
   (d) The plaintiff bears the burden of proof. He has to prove by a preponderance of the evidence in a civil case (prosecution must prove guilt beyond a reasonable doubt in a criminal case) that the facts which entitle him to recover are true.

5. If, after presenting all of his evidence, the plaintiff has failed to make out his case as a matter of law, the judge may direct a verdict for the defendant. This is called a directed verdict.

6. The defendant then presents his evidence. The defendant has the burden of proof on the issue of contributory negligence.

7. Rebuttal evidence may be presented by the plaintiff.

8. Final instructions to the jury review the law on the issues raised by the evidence.

9. The verdict of the jury may or may not have to be unanimous, depending on state law.

10. The judge enters the judgment upon the verdict.

F. Appeal

1. Motion to Correct Errors Filed with the trial court, it sets forth every claimed error and asks the judge to correct them. An error not raised in the Motion to Correct Errors cannot be raised later.