Overview of a Civil Lawsuit

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Learning Outcomes

After reading this chapter, you should be able to:

- Understand what civil litigation is, as distinguished from other types of litigation.
- Know generally how a civil case proceeds in the Ontario Superior Court, including how the *Rules of Civil Procedure* work to take a case from commencement of proceedings to judgment.
- Describe the structure of the Ontario civil court system.
- Know the steps to be taken to commence a proceeding, and the documents that need to be prepared, served, and filed by plaintiffs and defendants.
- Understand the function of pleadings and the role of the discovery process in providing further details and information about each party's case.
- Have a general understanding of how a case is prepared for trial after discovery and how a trial proceeds.
- Understand the circumstances that determine when a case goes on appeal to the Divisional Court or the Court of Appeal.

Introduction

This chapter presents the "big picture" of how a civil proceeding unfolds. The balance of the book fills in the details. In order to help you see both the big picture and later the details, we start by setting out a fact situation involving Abigail Boar and her various difficulties. Using Abigail's story, we demonstrate how a civil case progresses from the initial stage of hiring a lawyer to the final stage of appealing a trial judgment.

As you are following this procedural trail you will see that it has many steps and is quite complicated. So as not to get lost in the details as you follow the trail, it helps to keep in mind the goals of the civil procedure process—to minimize the cost and delay in conducting a civil action. Ironically, in pursuit of these goals, those responsible for creating and administering the *Rules of Civil Procedure*[1] have created some very complex procedures; but keeping the main goals in mind will provide a context that will help you understand how the rules work.

Fact Situation: The Sad Tale of Abigail Boar

Introduction

It is now time to introduce you to the unfortunate Abigail Boar, who set out to buy a sports car and ended up with serious injuries resulting from the apparent negligence of others involved in what lawyers usually refer to as a "slip and fall case." We will follow Abigail's case from the time Abigail consults a lawyer, through the various pre-trial stages, to trial in the Ontario Superior Court.[2] As we proceed, we will discuss the steps that are taken, including the preparation of many of the documents that are required in a civil action. The facts set out here present a broad outline of what occurred. As we proceed, we will add more detail where it is required.

Facts

Abigail Boar is a 28-year-old securities analyst employed by Megadoon Investments Ltd. She is earning more money than she ever thought she would and decides the time has come to do some conspicuous consuming, so she buys her first car. After talking to friends, she decides that the right kind of car for her is a two-seater sports coupe. On September 14, year 0, she decides to go after dinner to look at the hot new line of sports coupes manufactured by the Skunk Motorcar Company Ltd, which are being sold at Rattle Motors Ltd. After work, she stops at Barbeerian's, a trendy bar frequented by financial types, where she has a quick dinner and two glasses of wine. She then walks over to Rattle Motors Ltd at 1240 Bay Street, Toronto.

At about 6:00 p.m., Fred Flogem, a salesperson employed by Rattle Motors Ltd, notices that there is some oil on the floor next to the Super Coupe model. He peers underneath the car and discovers oil leaking from underneath the engine. Because this

1 RRO 1990, Reg 194.

2 Civil cases where the remedy sought is $35,000 (expected to be increased to $50,000) or less may be tried in Small Claims Court. This court has its own rules of procedure, which are less formal and complex than those used in the Superior Court. This text is about the civil process in the Superior Court. For a discussion of the rules of procedure in Small Claims Court, see Laurence M. Olivo and DeeAnn Gonsalves, *Debtor–Creditor Law and Procedure*, 5th ed. (Toronto: Emond, 2018).

is hardly good advertising for a new car, Fred does not want to draw customers' attention to the problem by cleaning up the mess immediately. Instead, he shuts off two of the four spotlights that illuminate the Super Coupe, hoping that no one looking at the car will notice the mess on the floor. Fred intends to clean up the mess when there are no customers in the showroom, or when the showroom closes for the day.

Abigail walks in the front door of the showroom at about 7:30 p.m. There are several sports cars on display. On seeing her come in, two salespersons get up from their desks and make a beeline for Abigail. Linda Lucre gets there first, so the second salesperson, Fred Flogem, sits down again and busies himself with some paperwork. Abigail tells Linda what she is looking for, and Linda shows her the floor models. Abigail looks at one car and then walks over, with Linda behind her, to look at another. The second car is in an area of the showroom where two of the four spotlights meant to illuminate the car are off so that the side of the car nearest to the wall is in relative darkness. As Abigail walks around to the darker side of the car, she steps into some oil, slips, loses her balance, and falls, striking the left side of her head against the side of the car. Abigail is knocked unconscious. Her body twists as she falls heavily to the floor, with the result that she fractures her right wrist and several bones in her right arm.

Linda goes to her office and phones for an ambulance. Abigail is taken to Toronto Hospital, where she is treated. The broken bones in her wrist and right arm are set in a cast. Because of the head injury, Abigail remains for neurological observation and after four days, she is sent home, where she remains for six weeks until the cast is taken off her arm. After that, she goes to physiotherapy once a week for ten weeks.

After her release from the hospital, Abigail had no memory of slipping and falling. She continues to have chronic lower back pain and headaches. She is unable to walk long distances or sit at her desk at work for prolonged periods. Abigail, who is right-handed, has limited mobility in her right arm and is unable to work at her computer for more than ten minutes at a time without experiencing pain.

She returns to work on March 1, year 1, for a month. However, because of chronic pain and her difficulty using a computer, which is essential for her job, she is unable to continue working, so she then goes on long-term disability.

Before her accident, Abigail was an avid tennis player and a good amateur violinist. After her accident, she is unable to enjoy these activities and is far less active, both physically and socially, than she had been. She used to be a lively individual: cheerful, with a good sense of humour. She has, since the fall, become quieter and more withdrawn and has difficulty sleeping. Her family physician has begun treating her for depression, prescribing an antidepressant and painkillers.

At the time of the accident, Abigail was earning $80,000 gross per year. Her employer does not have a short-term sick leave plan but does have a long-term disability plan that pays Abigail 60 percent of basic monthly earnings after four months' absence from work resulting from illness or injury.

Abigail has consulted I.M. Just, a lawyer, and intends to sue Rattle Motors Ltd and Fred Flogem, because she believes they are responsible for the injuries she sustained.

An Overview of the Civil Litigation Process

Now that you have met Abigail and read about her situation, we can consider some preliminary matters and turn to a general description of what happens after she decides to sue.

What Is Civil Litigation?

By consulting and retaining a lawyer, Abigail is about to involve herself in what is called civil litigation. Civil litigation describes the court process that is used to resolve disputes and conflicts where one person claims that the acts of another have caused harm. If the harm is of a type that the law recognizes, then the party who caused the harm will be ordered by the court to compensate the party who was harmed, usually by paying money to the injured party. The general goal of civil litigation is to compensate a person for his or her injuries or losses—to restore a person to the position that he or she was in prior to harm being done—to the extent that the payment of money damages can accomplish this.

Civil litigation cases can take various forms. Debt collection cases, personal injury claims, wrongful dismissal, shareholder disputes, and disputes over property use or ownership are all examples of civil litigation cases. These disputes usually involve private rights and obligations, as opposed to public ones, although there may be public interest and public policy aspects to civil cases. In this context, the government can be a party to a civil litigation case. Consider, for example, a case in which several parents of autistic children sued the Ontario Government for failure to pay for a specific and expensive educational program. On the surface this was a private dispute where one party said the other was legally obliged to compensate it, but the outcome would also determine health and education funding obligations of the Crown, generally.

People are often more familiar with criminal litigation than they are with civil litigation. They often assume that what goes on in one process goes on in the other, but in fact they are very different. Criminal litigation involves the prosecution by the Crown of actions that have been legally defined as criminal and harmful to the public in general, so that the object of criminal law is to protect the public generally, rather than to protect the rights of those individuals who may have been harmed by criminal acts. While in some cases the criminal accused may be ordered to pay restitution, which is like paying civil damages, that is not the primary purpose of the criminal law. The goal of criminal law is to punish wrongdoing and maintain public order, usually by the imposition of fines payable to the Crown (and not the person harmed) or by the imposition of terms of imprisonment.

There are also vast differences between civil and criminal procedure. In a civil case, the plaintiff is obliged to make out a case and prove each factual and legal element on the balance of probabilities. This means that if the plaintiff is successful, his or her version is, more likely than not, the correct version. If the plaintiff fails to show this, the defendant wins, and the case is dismissed. In criminal cases, the accused is presumed to be innocent, unless the Crown can prove its case beyond a reasonable doubt, a much higher standard of proof and a much greater burden for the Crown than the one a plaintiff bears in a civil case. These differences also explain some of the differences in civil and criminal procedure. For example, because a criminally accused person is presumed to be innocent, he or she can sit back and say nothing and provide no information to the court. The Crown is obliged to prove its case on its own and is not permitted to extract information from the accused. In civil cases, both parties are obliged to make full disclosure of everything that is relevant to the issues in dispute, both helpful and harmful. So if you have some familiarity with criminal law and procedure, you may find civil litigation to be quite different, driven by quite different purposes and goals.

What Happens When Abigail Decides to Sue?

Generally, a civil proceeding can be divided into the following stages:

1. hiring of a lawyer;
2. preliminary investigations and research;
3. commencement of proceedings;
4. exchange of pleadings (statement of claim and statement of defence);
5. examinations for discovery of the parties, discovery of documents and, where relevant, other forms of discovery;
6. motions to determine pre-trial issues;
7. pre-trial conference and trial preparation;
8. trial; and
9. appeals.

While these are the procedural steps in a basic civil action, as we will see later, some civil proceedings follow, in whole or in part, procedural rules that supplement or substitute for the basic procedural steps outlined here. For example:

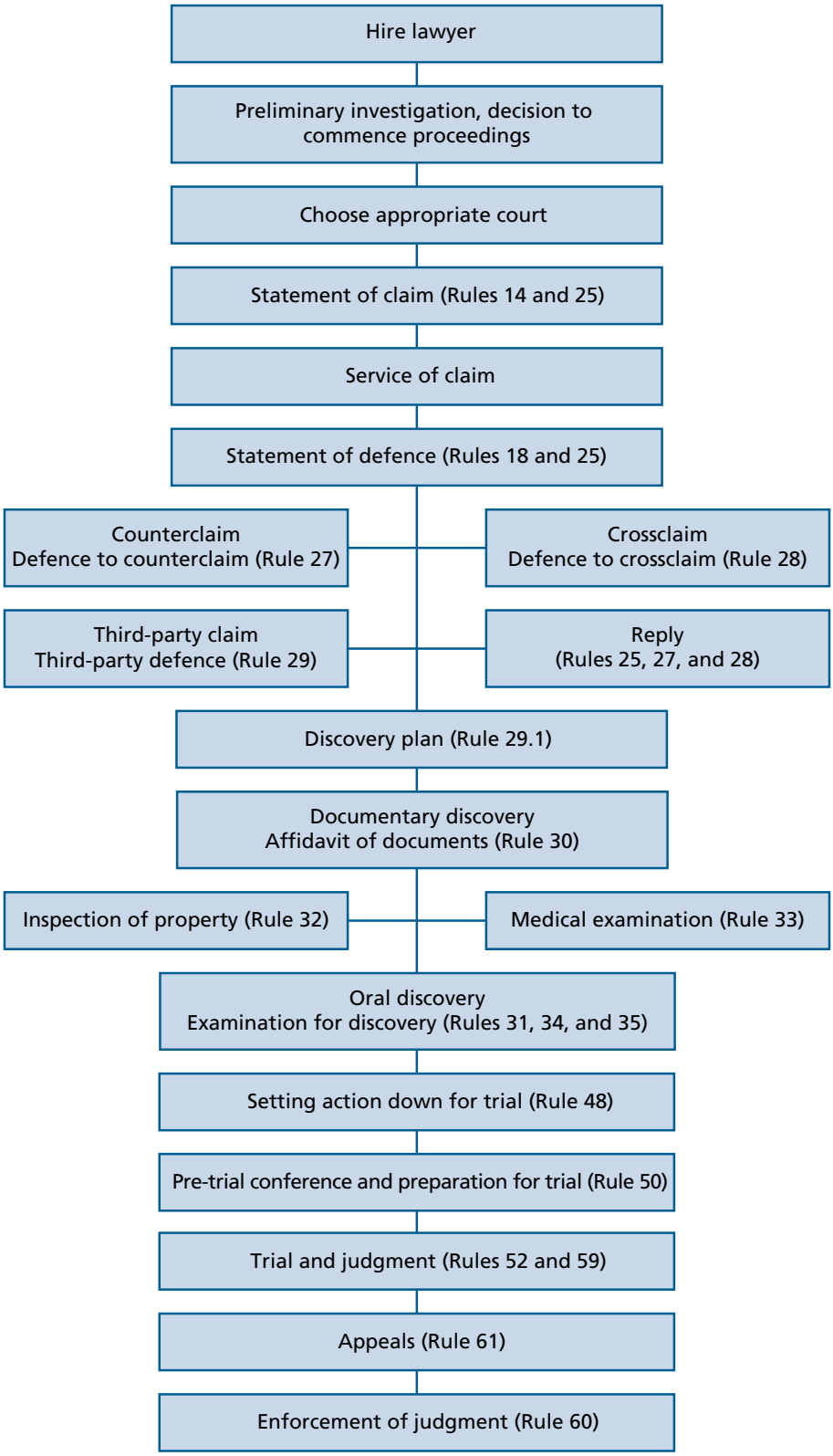
- *Mortgage actions*. There are separate procedural steps in actions for foreclosure or sale under a mortgage or redemption of a mortgage that are governed in part by Rule 64.
- *Estate administration*. The procedures used in various types of estate-related proceedings, as well as in the non-contentious administration of an estate, are governed in part by Rules 65, 67, 74, 75, 75.1, and 75.2.
- *Mandatory mediation*. Mandatory mediation is an extra procedure required in some civil actions and is governed by Rule 24.1.
- *Simplified procedure*. If a party is suing for less than $200,000 the case may be heard using a streamlined and less costly civil process under Rule 76.
- *Case management*. Cases that are very complex procedurally may be governed by the civil case management procedure outlined in Rule 77, allowing an assigned judge to intervene in and direct how the civil process is carried out.
- *The Commercial List*. Certain types of commercial cases, heard in or transferred to the Superior Court in Toronto, are governed in part by the Commercial List, which alters some of the requirements of ordinary rules of procedure.

For the moment, however, we will focus on Abigail Boar's ordinary civil action, which does not require us to use these special procedures.[3]

Figure 1.1 lists the principal rules in the *Rules of Civil Procedure* ("the Rules") that relate to these steps.

3 Mortgage and Estate proceedings are specialized proceedings and are not discussed in this text. However, later chapters will discuss case management, mandatory mediation, the simplified procedure, and the Commercial List, as ordinary civil actions may involve the application of the procedures and the rules that are governed by these specialized procedures. But we will cross those bridges when we come to them.

FIGURE 1.1 Steps in an Ordinary Civil Action



The Hiring of a Lawyer

Unless she is suing in Small Claims Court, where people often represent themselves or hire paralegals to do so, as a practical matter Abigail needs to hire a lawyer either to negotiate a settlement or to take her case to trial. Rattle Motors Ltd and Fred Flogem, the likely defendants in a personal injury case, are probably covered by insurance taken out by Rattle Motors Ltd to cover its own torts and those of its employees. If so, Rattle Motors Ltd's obligation is to notify the insurer immediately of a potential claim. The insurance company will then hire and direct lawyers to act for Rattle Motors Ltd and Fred because it is the insurance company that will have to pay Abigail if the case settles or if she wins at trial. For that reason, the insurance company controls the conduct of the case and instructs the lawyers even though Rattle Motors Ltd and Fred are the defendants. If Rattle Motors Ltd is not insured, it must hire and instruct its own lawyer to represent it and Fred. If there is a conflict between Fred and Rattle Motors Ltd concerning any issue in dispute, Fred must be separately represented. If not, one lawyer may act for both.

How does Abigail go about choosing a lawyer? She could seek a recommendation from friends or relatives, contact the lawyer referral service at the Law Society of Ontario (LSO) (<https://lsrs.lso.ca/lsrs/welcome>), or check the Ontario Court of Justice website for information about hiring a lawyer (<https://www.ontariocourts.ca/ocj/how-do-i/find-a-lawyer/>). Any lawyer can take her case, but she would be wise to choose one who practises personal injury law. Because many people are injured in circumstances that give rise to legal remedies, personal injury law is a high-volume area with many lawyers to choose from.

Once Abigail has made a choice, she should formally engage the lawyer's services by signing a retainer. A retainer is a contract between a lawyer and a client that sets out a description of the work to be done by the lawyer and the terms and conditions for the payment of **fees** and **disbursements** by the client. The lawyer may also ask Abigail to pay a deposit to be applied to future fees and disbursements. This deposit is also called a retainer.[4] Abigail and her lawyer may make other arrangements for the paying of legal fees. It is not uncommon for personal injury lawyers to take no fees or disbursements at the beginning of a case; instead, they are often paid what they are owed out of the trial judgment or settlement. A lawyer who loses a case is still entitled to be paid for services rendered. However, collecting fees from clients in these circumstances is not easy, particularly if clients do not have the resources to pay and feel that the lawyer's services have produced nothing of value. Note that a **contingency fee**, where a lawyer is paid a percentage of the judgment *only* if he or she wins the case, has been permitted in Ontario since 2003.[5] Contingency fees have long been permitted in most other Canadian provinces and in the United States.

fees
payment to lawyers for services rendered

disbursements
amounts lawyers pay on behalf of clients to third parties that lawyers can recover from clients

contingency fee
fee payable to a lawyer only if he or she wins the case for a client

4 The use of the word "retainer" to describe both the contract for services and the deposit paid by a client for services to be rendered is confusing. The reason for this usage is that the payment of a deposit serves to retain the services of a lawyer, even if there is no written contract of retainer. Hence, the deposit is often described as "the retainer" even where a separate "contract of retainer" is signed. To further the confusion, some retainers are not deposits to be set off against future accounts rendered by a lawyer, but are payments made directly to a lawyer for agreeing to be available to provide unspecified services for a given period of time. This practice is common in commercial law, where a company may have a law firm on an annual retainer.

5 For example, a contingency fee is permitted in a class action under the *Class Proceedings Act, 1992*, SO 1992, c 6, as well as in other civil actions.

In deciding what to charge Abigail, the lawyer may consider several factors:

- the amount of money at stake in the action,
- Abigail's ability to pay,
- the amount of time the lawyer will spend on the pre-trial stage and the trial,
- the degree of complexity of the legal and/or factual issues, and
- the degree of success the lawyer is able to achieve.

Once Abigail has retained a lawyer, she will be interviewed at some length by the lawyer or the law clerk to determine the facts of the case, who the witnesses are, and who the other parties are. From this information, the lawyer has to decide whether Abigail has a good **cause of action** or not.

cause of action
legal right to sue to obtain a legal remedy

Preliminary Investigations and Research

Determining the Cause of Action

In order for the lawyer to decide if there is a good cause of action, the lawyer has to ask whether the facts, as related by the client, identify a legal right or issue that gives rise to a legal remedy for the client. If there is a cause of action, the lawyer must then consider whether there is sufficient evidence to prove the facts. In the end, the evidence must lead the **trier of fact** to conclude that it is more probable than not that the facts set out by the client are correct. To put it another way, facts are conclusions that can be drawn by assessing the evidence.

trier of fact
judge or jury whose job is to determine the facts of the case from the evidence

If there is not enough evidence to prove the facts, the lawyer may have to advise the client to not continue with the case. The facts as Abigail relates them disclose that there is probably negligence on the part of Fred Flogem, for which Fred's employer, Rattle Motors Ltd, is vicariously liable and perhaps directly liable. Negligence is Abigail's cause of action.

Relationship Between Proof and Evidence

In a civil case, the burden of proof is on the plaintiff, who is obliged to prove their case on the balance of probabilities—that is, the plaintiff must show the court that it is more likely than not that their version of the case is true. The plaintiff establishes their version of the facts through the evidence of witnesses and other types of evidence. The facts, and the evidence that proves those facts, focus on two issues: who is liable or at fault and how much is to be paid to compensate the plaintiff for the damage done.

There are four main types of evidence:

1. *Testimonial evidence.* The lawyer will determine from Abigail who the likely witnesses are and will interview any witness who is willing to talk to him or her. It is unlikely that the defendants, Fred and Rattle Motors Ltd, would be willing to talk to Abigail's lawyer, and they certainly would be advised by their lawyer not to. If the lawyer can discover the identity of any bystanders who saw the accident, the lawyer will want to interview them. Abigail's doctors will be interviewed about the injuries she sustained. Any witness interviewed should be asked to sign a statement setting out what they said

in the interview. This statement can be used by the lawyer as a reference and in notes used to refresh the memory of a witness at trial. If a witness says that he or she saw nothing, a signed statement to that effect will prevent the witness from surfacing later with damaging information.

2. *Documentary and demonstrative evidence.* Any document, diagram, photograph, video, audio recording, or electronic database may contain relevant evidence. In Abigail's case, there may be accident reports written by Fred or Linda, medical emergency admission reports, and reports and emails from Abigail's physician, the rehabilitation staff, and Abigail's employer concerning her return to work. Tweets and entries from Abigail's Facebook page may also contain relevant information about the nature and extent of her injuries. Demonstrative evidence, such as a diagram of the car showroom, photographs of the showroom taken with the floodlights around the car turned on and off, and photographs of Abigail in her cast and showing her injuries can also be included. All of these documents are admissible in evidence once the person who made the record proves their authenticity. In some cases, such as a doctor's report or other expert reports, a document may be admissible without having its maker give oral evidence.
3. *Physical evidence.* This evidence consists of physical objects, such as the car's leaking engine or oil pan.
4. *Expert evidence.* This evidence usually consists of the reports and testimony of experts asked to comment on some aspect of the case where specialized knowledge and interpretation of evidence is required. Normally, a witness is restricted to evidence about what they actually observed. An expert can go beyond that and give opinions and offer speculation. The report of a lighting engineer on the lights in the showroom might constitute expert evidence.

Close of the Preliminary Investigation: Consideration of Whether and How to Proceed

At this point, Abigail has retained I.M. Just as her lawyer and he has found out the basic facts and made some preliminary investigations from which he can give Abigail advice on how to proceed. Abigail finds out that if she is successful in her action, she will obtain a judgment in her favour in which she will receive monetary compensation called **damages**. As a successful litigant, Abigail will also recover some of her legal fees and disbursements from the defendants because a judgment usually gives a successful litigant an order for payment of some legal costs (called an "award of costs"). However, if Abigail loses, she will not recover any money for her injuries, and she will have to pay some of the legal costs incurred by the successful defendant. She will also have to pay her own legal fees and disbursements in full. (In some cases, a lawyer might accept a case on a contingency-fee basis. *If the plaintiff wins*, the lawyer is paid a percentage of the judgment; if the plaintiff loses, the lawyer is paid nothing.)

damages
compensation awarded by a court for harm done

It is important that Abigail consider her options carefully. The outcome of her case may be uncertain for a variety of reasons. The legal issues involved may not be clearly resolved. There may be conflicting decisions on the point in issue. More usually, the problem lies with the facts: Is there convincing evidence that will prove the facts of Abigail's case? If, on the lawyer's advice, Abigail thinks she has a good case, she may elect to start a legal proceeding to recover the remedy she seeks.

The Concern with Cost and Delay

An additional concern for Abigail is how much this might cost her, and how long it will take to bring the case to a conclusion. Over the past 20 years, there has been increasing concern that civil litigation in the Superior Court has become slow and expensive. Civil case management (discussed in Chapter 22) and simplified procedure (discussed in Chapter 24) are two attempts to control cost and delay. The Civil Justice Reform Project made further recommendations, some of which were adopted by the Civil Rules Committee and which came into effect in 2014. Since then the Rules Committee has continued to amend and refine the rules, with an eye to further reductions in cost and delay and easier access to the justice system for litigants. While this is helpful to clients, it does, by creating what are additional or optional steps, at times increase the work for lawyers, law clerks, and other legal support staff, which in turn may increase costs to a client.

principle of proportionality requires that the time spent on and the expense of a lawsuit be in proportion to the value of the case that is at stake for the parties

The civil court rules now contain a general **principle of proportionality** to guide lawyers and the courts in applying the Rules, generally. The time and expense devoted to any step in a proceeding, and to the proceeding generally, now have to reflect what is at stake for the parties. Cases that are legally and factually straightforward and of lower value should not take as long or cost as much as large, complex cases or cases where much is at stake. While this has always been a rule of thumb, the principle of proportionality is now incorporated in the Rules (Rule 1.04(1.1)). For Abigail, this would mean that if her case were worth $250,000 rather than $75,000, her lawyer might hold more extensive and lengthy discoveries and bring motions that he otherwise might not bring. It might also determine the optional procedural routes that could be filed. For example, if the case is worth $75,000, her lawyer would probably use the simplified procedure.

Commencement of Proceedings

Court Jurisdiction

As a plaintiff in a civil proceeding, Abigail must choose between two possible courts: the Small Claims Court and the Ontario Superior Court of Justice. In order to decide which court Abigail should sue in, it is necessary to understand the basis for a court's jurisdiction—its power to hear a case and grant remedies.

There are three types of jurisdiction:

1. *Jurisdiction over the subject matter of the lawsuit.* Does the court have the power to hear this type of case and provide the remedies Abigail seeks? For example, if the court has jurisdiction over criminal law matters only, it does not have jurisdiction to hear Abigail's lawsuit. Similarly, if Abigail were seeking an injunction as a remedy, she could not do so in Small Claims Court because this court has no authority to grant this remedy. In Ontario, the Superior Court of Justice can hear civil cases dealing with any subject other than a subject over which Canada's Federal Court has exclusive jurisdiction or a subject that has been allocated by statute to a particular court or to an administrative tribunal. It can also grant any civil remedy known to law: injunctions, declarations of rights, orders for the return of property, and monetary damages. The Small Claims Court, by contrast, is restricted

to making orders for the return of personal property and the payment of money.

2. *Jurisdiction over the monetary amount claimed in the lawsuit.* The issue here is whether a court has the power to order payment of the amount of money being claimed. The Small Claims Court's monetary jurisdiction, as of January 2020, rose from $25,000 to $35,000. This means that the court may grant a judgment for the payment of money for any amount up to and including $35,000, exclusive of interest and costs. However, it has no authority to give judgment for more than that amount. The Superior Court, on the other hand, has an unlimited monetary jurisdiction. It can grant judgment for any amount of money, including an amount within the jurisdiction of the Small Claims Court.[6] Abigail's injuries are serious, so she will choose the Superior Court because her damages are likely to greatly exceed $35,000. The lawsuit will be more expensive to conduct than it would be in Small Claims Court, where proceedings are simpler and less formal.
3. *Territorial jurisdiction.* Does the court have the power to hear a case where the events that the case is based on took place outside its territorial jurisdiction or the parties' residence is outside its geographical jurisdiction? In general, courts in Ontario have territorial jurisdiction over cases where the event giving rise to the lawsuit took place in Ontario, the parties are in Ontario, or the parties agreed to give Ontario jurisdiction as a term of a contract. But questions will arise if some of the events took place in another jurisdiction or if one or more of the parties resides outside Ontario. For example, if Abigail had gone to Buffalo, New York, to buy her car and had been injured there, if events leading up to the injury occurred in Buffalo, or if the defendants resided there, could Abigail or should Abigail sue in Ontario or New York? The answers to questions of this type are often complicated. As issues of private international law, they are often determined on a case-by-case basis on a test of the balance of convenience to the parties.[7]

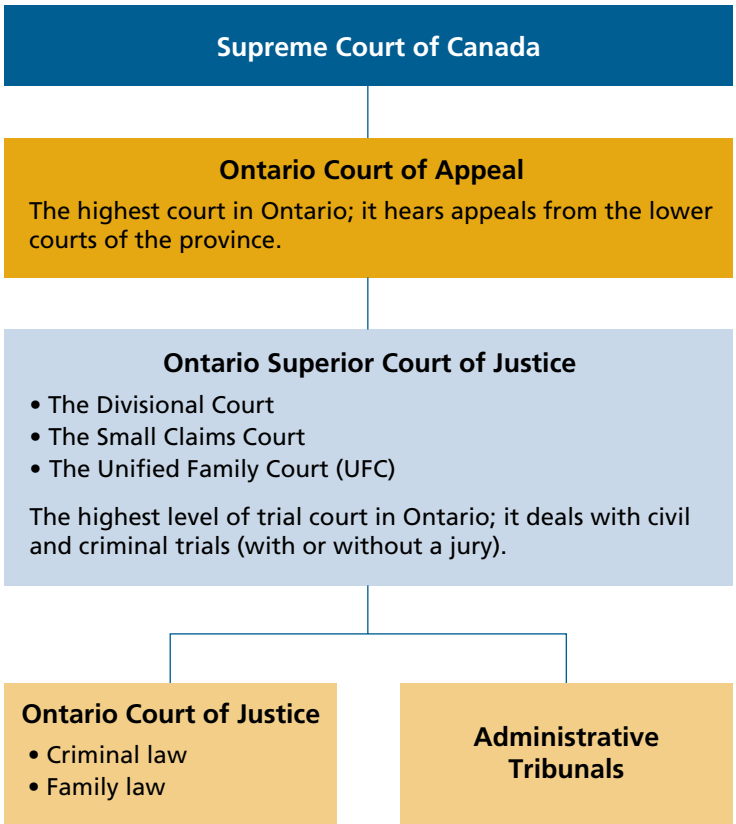
Even within Ontario, there can be issues of territorial jurisdiction that may arise as a result of the plaintiff's choice of place to sue, also referred to as the choice of forum. Abigail, as plaintiff, has the right to commence her proceeding in the Superior Court office in any county or region in Ontario, unless a statute requires that it be commenced in a particular county or region.[8] However, if her choice is much more inconvenient to other parties than to her, or it is impossible to get a fair trial in the chosen county, any party may apply to the court to have the case transferred to another county or region. For example, if she and the defendants were all in Toronto and

6 A claim within the monetary jurisdiction of the Small Claims Court usually goes there, and there can be cost penalties for suing in the Superior Court for a small amount of money. However, there are reasons for suing for small sums in the Superior Court that the court will recognize as appropriate: a test case on which many other similar cases depend or a novel cause of action that should be brought in the higher court.

7 "Balance of convenience" is a practical, fact-based test in which the court examines how difficult, expensive, or time-consuming it is for the parties to try a case in one location rather than another. If the plaintiff has chosen a location, a defendant who wishes to change the location needs to show that he or she is at a great disadvantage because of where the witnesses live, travel costs, and similar matters.

8 See Rule 13.1 generally on where to commence proceedings. One would think that the Rules Committee would put all rules about venue in one place. Unfortunately, that is not always the case. Under Rule 13.1.01(3), mortgage actions must be commenced in the county or district as designated by the Regional Senior Judge for the region where the mortgaged property is located.

FIGURE 1.2 Ontario Court System Structure



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The Ontario Courts website provides information about court services, jurisdiction, court locations, rules of procedure, and court forms, as well as other useful information: <https://www.ontariocourts.on.ca>.

she chose to start her proceeding in Thunder Bay, it is likely that the defendants would bring a motion to move the trial to Toronto on the balance of convenience. Note that her case will be tried in the county or region where it was commenced, unless the court orders otherwise.

Rules of Civil Procedure

In commencing proceedings, Abigail must use the appropriate court forms and follow the procedural rules for conducting a civil case. These rules are set out in the Ontario *Rules of Civil Procedure*. (We will refer to these henceforth as "the Rules," as lawyers do.) The rules are actually regulations made pursuant to the *Courts of Justice Act*.[9] The power to make the Rules is vested in the Civil Rules Committee, consisting of staff from the Ministry of the Attorney General, members of the judiciary, and lawyers. Supplementing the Rules are practice directions. Rule 1.07 provides a procedure for creating practice directions. Practice directions for the Court of Appeal may be created by the Chief Justice of that court, and by the Chief Justice of the Superior Court to cover the Superior Court generally. In addition, the Regional Senior Judge may create a practice direction for the region. This allows the senior judge in a judicial region

9 RSO 1990, c C.43.

to customize the application of the Rules and create additional procedures to deal with problems that are specific to that region and are not covered by existing rules. For example, because of difficulties in scheduling trials in the Toronto region, there is a practice direction that requires counsel to attend trial scheduling courts, and that trials are scheduled year-round. The additional procedures in this practice direction are presumably not necessary for the administration of justice in other judicial regions, where they do not apply. It is now clear that a practice direction carries the force of law and must be followed. Previously, the status and validity of practice directions were questioned because there was no clear authority for creating them, but now Rule 1.07 sets out a procedure for creating them. To bring some consistency and uniformity to practice directions, the power to authorize and approve a regional practice direction is vested in the Chief Justice of the Superior Court.

You should become familiar with the practice directions that operate in the judicial region where cases you work on are heard. When practice directions are created, they are posted online on the Ontario Court website at <https://www.ontariocourts.ca>. The *Ontario Annual Practice*[10] reproduces practice directions next to the rules to which they apply. It also contains an index of published practice directions, so you can easily locate the one you are looking for. Other commercially published versions of Superior Court practice materials also contain this information.

Motions

At first glance, it seems that all you need to do is read a rule and follow it. The rules appear to be clear but, like all legal rules, they require interpretation. Because the parties are in an adversarial position, both Abigail's lawyer and the defendants' lawyers may use the Rules to attempt to gain the upper hand or assert a position that will be helpful to them. Where one party seeks to use a rule against another party that is allegedly violating the rule, there is a procedural dispute that the court must sort out at the pre-trial stage. This is done when one party brings a motion. A motion is a proceeding brought within the main action to settle a procedural issue that has arisen at the pre-trial stage. A judge, or in some cases a junior judicial official called a master, will hear submissions from counsel on a motion, read submitted material, and decide the issue by making an order. An order on a motion usually does not dispose of a case on its merits, although this can happen. For example, if Abigail had made a claim not recognized by the law, the defendants could bring a motion to strike out her statement of claim and dismiss her action. If the court was persuaded by the defendants that Abigail did not have a legal reason for suing, the court could strike out her statement of claim, and that would be the end of her case. But this is most unusual. Motions are discussed in more detail later in this chapter and in Chapter 9.

Actions and Applications

Abigail's lawyer is now ready to start the case or, in the language of the Rules, to "commence proceedings." In Ontario, there are two ways for a plaintiff to commence proceedings. Abigail can start an **action** by issuing a statement of claim, or she can start an **application** by issuing a notice of application. Usually a party commences

action
one of the two procedures by which a civil matter is commenced in the Superior Court; the other such procedure is an application

application
one of the two procedures by which a civil matter is commenced in the Superior Court; the other such procedure is an action

10 James J Carthy, WA Derry Millar & Jeffrey G Cowan, *Ontario Annual Practice* (Aurora, ON: Canada Law Book, published annually).

an action. Applications are used when a statute or the Rules require them, or when it is unlikely that there will be any material facts in dispute and the matter turns on an interpretation of law. Otherwise, a plaintiff must proceed by way of an action. An action has a much longer and more complex pre-trial procedure than an application. It is largely devoted to giving the parties the opportunity to review evidence and determine facts before trial. In an application, where there is usually little in the way of factual disputes, and the dispute concerns the application and interpretation of law, we have a much simpler and less time-consuming pre-trial procedure. There is no need to conduct discovery or otherwise investigate the facts exhaustively. The trial is more like a hearing with no oral evidence. Each party's lawyer spends most of the hearing time on legal arguments, with the evidence introduced through the use of sworn written statements called affidavits.

The facts and issues in Abigail's case are complex and crucial to her proving negligence against the defendants. It is appropriate that her case proceed as an action rather than as an application.

Exchange of Pleadings: Statement of Claim and Statement of Defence

Statement of Claim

I.M. Just is now ready to commence proceedings by starting an action with a statement of claim. He prepares this document, which sets out:

- the remedies Abigail is asking for, referred to as the "claim for relief";
- the identification of the parties in terms of their legal status—for example, Abigail and Fred are individuals, and Rattle Motors Ltd is a corporation; and
- the facts on which Abigail relies, as well as statements of the laws that entitle her to a remedy.

With the statement of claim, he also files a form called "Information for Court Use," which provides the court with information about the causes of action and whether the case is using any special procedure (if the statement of claim is being e-filed, do not file the Information for Court Use form with it, as it is only required when filing hard copy in the court office). Once prepared, the documents are taken by a law clerk or office courier to the local office of the Superior Court to be issued. After the law office courier pays the prescribed fee for issuing a claim, the registrar opens a court file, assigns the case a court file number, which is placed on the document, and issues the statement of claim by sealing and signing the document on behalf of the registrar of the court. As the registrar is doing this to the original, the lawyer's clerk makes a **true copy** of the statement of claim. The lawyer's clerk does this by copying on a copy of the statement of claim the information the court clerk has put on the original. The true copy goes into the court file, and the lawyer's clerk brings the original back to the law office. The lawyer pays the prescribed fee of $220[11] to the court on Abigail's behalf. If Abigail's case were urgent and I.M. Just did not have time to draft a statement of

true copy
copy of an original document that is like the original in every particular way, including copies of alterations, signatures, and court file numbers; signatures or other handwritten parts of the original are usually inside quotation marks on the copy

11 $220 is the fee as of the time of writing; fees increase from time to time, based on a formula geared to the Consumer Price Index (CPI).

claim, I.M. Just could issue a notice of action and file the statement of claim later. This might happen if Abigail had not sued until the limitation period for her cause of action had almost run out. To preserve a client's rights before the limitation period expires, a lawyer can use a notice of action to start the lawsuit and "stop the clock" on the soon-to-expire limitation period.

While the process described here involves attending the court office with hard copies of documents, since 2014 the court has permitted the e-filing of various documents, including those that commence proceedings. As of January 2018, the province established a province-wide e-filing system, using the Civil Claims Online Portal, with procedures for filing a variety of court documents. Parties using the system are also required to agree to accept documents sent electronically from the court. Electronic filing and issuing of court documents is discussed in more detail in the boxed item titled "E-Filing Court Documents" below.

E-FILING COURT DOCUMENTS

As of 2018, the Ontario Superior Court finally made the leap from the 19th century to the 21st century, allowing for parties to file and issue many court documents online, without having to physically attend the local office of the Superior Court to file or have the court issue documents as hard copy. E-filing, using the Civil Claims Online Portal is now available for use in all offices of the Superior Court across the province.

An Overview of How to Use It:

1. In order to access the e-filing system you need to have a Justice Services online account. The system appears to assume that the account is held by a lawyer, in that you need a ONe-*key* account I.D. and password in a lawyer's name.

   If you need to create a Justice Services online account, go to <https://www.justiceservices.jus.gov.on.ca/MyAccount/screens/OneKey/login.xhtml>. Once you have created the account and are online, you need to read and check off your agreement to the "Terms of Use," and then provide your lawyer's contact information, including email address. That information will be retained in the system for future use.
2. Once you have created or have access to a ONe-*key* account, you can proceed to file documents online by going to the Civil Claims Online Portal at <https://www.ontario.ca/page/file-civil-claim-online>. It contains a useful instruction guide and allows you to enter your ONe-*key* account identification, and then proceed to e-file documents, and pay any filing fees using an Interac debit card or VISA or Mastercard credit card.

What You Can E-File and What You Can't

1. The documents you are permitted to e-file are set out in Rule 4.05.1(2):
   - Statement of Claim—Form 14A, Form 14B, or Form 14D;
   - Notice of Action—Form 14C;
   - Affidavit of Litigation Guardian of a Plaintiff under a Disability—Form 4D;

- Request for Bilingual Proceedings—Form 1;
- Consent to file documents in French;
- Statement of Defence—Form 18A;
- Notice of Intent to Defend—Form 18B;
- Consent or Court Order (Form 59A) required in support of filing a document online; and
- Proof of Service for documents filed online—Forms 16B, 16C, 17A, 17B, 17C, or any documents listed in Rule 16.09.

These forms are primarily used at the beginning of a proceeding. Until 2020, all other forms had to be filed in person using hard copies at the local court office. However, O. Reg 455/19 has expanded the list of what may be filed electronically to include jury notices, third or subsequent party claims, statements of defence, counter claims or crossclaims, defences to crossclaims or third or subsequent party claims, Certificates of Action under section 36 of the *Construction Act*, and notices of discontinuance and consents to discontinue a proceeding. Copies filed online must be submitted in PDF format; so, if a file is in Word format, it will have to be converted. Do not submit the Information for Court Use form (Form 14F) online, as it is only required when you use hard-copy documents to commence a proceeding.

2. You are not permitted to e-file a document in a civil case in the following circumstances:
   - A party requires a fee waiver. A fee waiver is issued by the court to parties who request one because they do not have funds to pay court fees. If they qualify for the waiver, the court issues a fee waiver certificate, and all documents filed by a party with a fee waiver are filed as hard copy. Hopefully, in time, the issuance of a fee waiver will be noted electronically, allowing for e-filing by a party with a fee waiver.
   - You are filing a Notice of Intent to Defend or a Statement of Defence in a civil case that:
     - is sealed, or partially sealed by the court;
     - is subject to a publication ban;
     - has been discontinued; or
     - involves more than 50 defendants.

After Filing

1. You cannot view the documents you have filed online. You will need to go to the court office to arrange to see the documents. However, if you filed a Statement of Claim or Notice of Action to commence proceedings, the court will send a confirmation of your filing by email, with a copy of the document you filed as an email attachment. You must also file hard copy of these documents with the next document filed, or if a request is made for hard copy.
2. If you file between 8:30 a.m. and 5:00 p.m. on any business day, the document is deemed to be filed on the same day. If you file outside of these hours, it is deemed to be filed on the next business day.
3. Once a document is filed, it cannot be changed or revised. If a document is to be revised—for example, if you wish to amend your statement of claim—you have to follow the normal procedural rules for doing that.

4. If a document is e-filed, and is to be relied on at a hearing, hard copy must also be produced for the hearing. In general, you should produce in your own file hard copy of any e-filed document.
5. If you e-file an affidavit or other signed document, hard copy must be retained for at least 30 days after the expiry of the appeal period, except where a party has been noted in default. Hard copy of a signed document that was e-filed must be provided for copying within five days of a request by a party or the court.
6. If there is an inconsistency in information in an e-filed document, and information provided later that is not in the original e-filed document, in accordance with Rule 4.05.1(5) the electronic version will prevail (except for the matter of the county or district where the matter is to proceed in accordance with Rule 13.1). If there is an apparent inconsistency, the Registrar may request an explanation of the inconsistency.

For more detailed information about technical and procedural aspects of e-filing, see:

- Rule 4.05.1, which sets out the basics of e-filing procedure in Superior Court proceedings.
- Guide for filing civil case documents, online: <https://www.ontario.ca/page/file-civil-claim-online>. This sets out a step-by-step procedure to be used for e-filing court documents.
- Guide to creating a Justice Services Online account, online: <https://www.advocates.ca/Upload/Files/PDF/Advocacy/BestPracticesPublications/AC_2017_588_enclosure_Guide_to_creating_a_MAG_Justice_Services_Online_nov27.pdf>. An account is required in order to use the online e-filing site and the related software.
- Practice Direction: The Guide Concerning e-Delivery of Documents in the Ontario Superior Court of Justice. (See the "Practice Directions" in the *Ontario Annual Practice*.) This focuses on technical requirements for filing supporting documentation (other than court documents) used in hearings in Commercial List cases, with directions about emailing documents and creating and converting documents from Word to PDF format.

Once the statement of claim is issued, all further filed documents must bear the appropriate **general heading** identifying the court, the court file number, and the names of the parties. The names of the parties and the status in which they are suing or being sued that appears within the general heading is referred to as the **title of proceedings**. If there are many defendants or plaintiffs, the case is generally referred to by the short title of proceedings, used on the **backsheet** of the court forms. In Abigail's case, the short form is *Boar v Rattle Motors Ltd et al.* Figure 1.3 shows the general heading of the statement of claim, including the title of proceedings, where Abigail sues Rattle Motors Ltd and Fred Flogem in the Superior Court. I.M. Just also includes his address and contact information, and if the email or fax numbers of those being served with the document are known, that information is included below I.M. Just's contact information.

general heading
heading on all court documents that identifies the court, the parties, and the status of the parties

title of proceedings
part of the general heading that identifies the parties and their status in a lawsuit

backsheet
part of every court document, it contains the name, LSO number, address, email and telephone and fax numbers of the lawyer who prepared the document, the short title of proceedings, the court and court file number, the fax number and email address of the person to be served (if known), and a large space reserved for court officials to make entries on

FIGURE 1.3 General Heading of Statement of Claim (Form 4A)

Court file no. 01-CV-1234

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N

ABIGAIL BOAR

Plaintiff

and

RATTLE MOTORS LTD. and FRED FLOGEM

Defendant

RCP-E 4A (November 1, 2005)

Figure 1.4 shows the backsheet for this statement.

Now that I.M. Just has issued the statement of claim, he must serve a copy of it on the defendants within six months from the date on which the claim was issued. Because defendants may not know they have been sued until they are served with the first document in the lawsuit against them, the Rules are strict about ensuring that they are properly served with the first or originating document.

Serving the Statement of Claim

The statement of claim, the originating document in this case, must be served personally on the defendants or must be served by a permitted alternative to personal service. Personal service means that the statement of claim must be handed directly to the defendant if the defendant is an individual. Service is effective even if the defendant refuses to take the document, tears it up, or throws it away. Therefore, a process server can simply hand a copy of the document to Fred. But what about serving Rattle Motors Ltd? There are special rules for serving individuals on behalf of a corporation. Here, a process server can serve the corporate defendant by handing a copy of Abigail's statement of claim to the manager of Rattle Motors Ltd, or to a director or officer.

It is also possible to use one of the three alternatives to personal service to serve an originating document:

1. If I.M. Just knows that Rattle Motors Ltd and Fred Flogem have lawyers acting for them in this lawsuit, he can serve the lawyers' office. This is valid service, provided that the lawyers sign a document stating that they accept service on behalf of the defendants. To do that, the lawyers should have instructions from the clients to accept service on their behalf.

FIGURE 1.4 Backsheet (Form 4C)

ABIGAIL BOAR Plaintiff(s)	and	RATTLE MOTORS LTD. ET AL. Defendant(s)

Court file no. 01-CV-1234

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT TORONTO

STATEMENT OF CLAIM

I.M. Just
LSO #12345R

Just & Coping
Barristers and Solicitors
365 Bay Street – 8701
Toronto, Ontario, M3J 4A9

tel. 416-762-1342
fax 416-762-2300
imjust@justandcoping.com

Lawyers for the Plaintiff*

RCP-E 4C (May 1, 2016)

NOTE: On all backsheets, if you know the fax number and/or email for the parties or legal representative being served, that information should be set out below the contact information of the party that is serving the document, as follows:
TO: Rattle Motors
fax: 416-882-1234
rattle@cars.com
AND TO: Fred Flogem
etc.

2. I.M. Just can send a copy of the claim to the defendants' last known addresses by ordinary mail with an acknowledgment of receipt form, prescribed under the *Rules of Civil Procedure*. Service is valid as of the date of service, if the form is returned by the recipient. But if the recipient does not return it, he or she will have to be served by another means.
3. If he has first attempted personal service, I.M. Just can deliver the statement of claim in an envelope to the defendant's residence and leave it with an apparently adult person who appears to be a member of the household. He can then mail a copy of the claim to the defendant the next day. This mode of service applies only when serving an individual, such as Fred Flogem.

It is now also possible to serve documents on other parties by email or by use of an electronic document exchange under Rules 16.01(4)(b), 16.05, and 16.06.1(1). But both the party serving and party served must consent to either mode of electronic service.

Substituted Service

All of the methods of service that we have discussed so far assume that I.M. Just knows or can find out the defendants' last known addresses and that the defendants are actually there. But what if Fred has moved and no longer works at Rattle Motors Ltd? Or what if he is evading service? I.M. Just may have tried personal service and the alternatives to personal service and failed to serve him. If I.M. Just does not know exactly where Fred is, the other modes of service will be ineffective. In these situations, plaintiffs can ask the court to permit them to use substituted service. I.M. Just must suggest a method of service that satisfies the court that there is a reasonable probability that Abigail's statement of claim will come to Fred's attention. Depending on what seems likely to be most effective, the court may order service by registered mail, or service on a close relative or friend with whom the defendant appears to be in touch, or service by an announcement in the newspaper. Whatever method is ordered by the court, once I.M. Just does what the order says, Fred is presumed to be served, even if he did not actually receive a copy of the statement of claim. Abigail can continue with her lawsuit. If substituted service will not be effective, a court may order that service be dispensed with altogether, although this is a rare occurrence.

Other Forms of Service

There are special rules for personally serving corporations and other legal entities, such as estate executors, trustees, mentally incompetent persons, and children. There is another set of rules for serving a party who does not reside or carry on business in Ontario. There are often special procedural rules that must be followed when serving someone who lives in a foreign country. Those who reside outside Ontario are given more time to respond to a lawsuit.

Once the originating document is served, the rules for service are relaxed, as those parties with an interest in the lawsuit are now presumed to know about it and about their obligations to respond. Subsequent documents may be served in a variety of ways:

- by mailing a copy to the opposite party's lawyer's office (this document is deemed to be served on the fifth day after it is mailed);

- by physically delivering a copy to the lawyer's office and leaving it with an employee, usually a receptionist;
- by depositing a copy at a document exchange of which the lawyer is a member if the copy is date-stamped as received by the document exchange (this document is deemed to be served on the day after the document exchange receives it);
- by faxing a copy to the lawyer's office, including a cover sheet setting out information that the document is being served by fax and showing who served it (some documents may not be served this way);
- by sending a copy to the lawyer's office by courier (this document is deemed to be served two days later); and
- by emailing a document to the lawyer's office, provided that the sender indicates in the email message who he or she is and provided that the lawyer served in this way emails back an acceptance of the document served (this document is deemed to be served on the day following the day the message is sent).

Proof of Service

Someone who is served with a document, whether originating or not and whatever the mode of service, may deny that he or she was served. If so, that person claims to have no notice of the lawsuit. This can be problematic. A defendant who does not respond to a claim will find that the plaintiff may still proceed in that defendant's absence.

A defendant who claims that he or she was not served and finds that he or she has been sued or that a judgment has been obtained, may move to set aside the proceedings or set aside the judgment. If the defendant is successful, the plaintiff may have to start all over from the beginning with added expense and delay. It is therefore important that I.M. Just is careful to ensure that he serves the defendants and can prove it. This is particularly important for originating documents, such as a statement of claim, which give notice to the defendant that he or she has been sued. It is less crucial with subsequent documents because a misadventure of service does not mean the action has to be restarted.

Proof usually consists of an affidavit of service, in which the person who served the document swears that he or she did so and describes the method of service, the date, and other details. The rules permit the affidavit of service to be written right on the backsheet of the originating or subsequent document. Where a lawyer accepts service, his or her endorsement is proof of service. Where service is through a document exchange, the document exchange's date stamp is sufficient evidence to prove service. For service by email, copies of the transmitting email should be retained and service may be proved by a Certificate of Service, but the person signing the certificate must provide a copy of the sworn affidavit of service if required. If service is effected using an electronic document exchange, a Record of Service provided by the exchange is proof of service. No additional affidavit is required for either type of electronic service.

E-service of documents is a relatively recent innovation, and it is still evolving as the court system adjusts to electronic document and data transmission. Also, as technology changes, you can expect the rules governing electronic service and filing of documents to continue to be amended to adapt accordingly.

Statement of Defence

Now that I.M. Just has served Fred Flogem and Rattle Motors Ltd with Abigail's statement of claim by personally serving the defendants or by using an alternative to personal service, the defendants must respond to the statement of claim by serving and filing a statement of defence. If they are served in Ontario, they have 20 days to serve and file a statement of defence. If they are served elsewhere in Canada or in the continental United States, they have 40 days. If they are served anywhere else on the planet, they have 60 days to serve and file a defence. If time is running out before they have finished preparing a defence, they may file a notice of intent to defend. This extends the time for filing the statement of defence for a further ten days.

Generally, plaintiffs in the same proceeding do not have conflicts of interest and are represented by the same lawyers. A plaintiff cannot be forced to have others join him or her as plaintiff. One lawyer may also represent multiple defendants, provided that their defences do not conflict. For example, if one defendant says the plaintiff's injuries were caused by the acts of the other defendant, there is a clear conflict if the other defendant denies liability. Fred and the manager of Rattle Motors Ltd will have to decide whether one lawyer can represent the both of them. In this case, Rattle Motors Ltd will be vicariously liable for the acts of its employee even if it did not itself commit separate acts of negligence. In cases like this, where both the employer and employee are sued, they are usually represented by one lawyer because it is likely that the employer or its insurer will end up paying any damages. If a conflict develops between the defendants, however, a lawyer is obliged to tell both defendants that he or she can no longer act for either of them and to help arrange for separate representation.

Let us assume that one lawyer represents both defendants. This lawyer reviews Abigail's claim, which sets out a concise statement of the facts but not the evidence by which these facts are to be proven. The claim should also identify the cause of action and set out the legal principles that Abigail relies on. Finally, the claim should set out the remedies sought. After reviewing this document, the lawyer may advise one of three possible responses to the claim:

1. *Do nothing.* In this case, Abigail will obtain a default judgment, after noting that the defendants have defaulted on their defence. A lawyer is very unlikely to do this, however, unless the client has no assets so that he or she would be **judgment-proof.** The defendants in this case appear to have assets so this is not a strategy they would use.
2. *Bring a motion to dismiss on the ground that the claim discloses no known cause of action or that it is frivolous and vexatious or an abuse of the court process.* This type of motion is rare and unlikely in our case because Abigail's claim is not unusual. Under Rule 2.1, the court now does not have to wait for a party to act, and may move to dismiss on its own initiative, although if it does so the parties are entitled to be heard.
3. *Serve and file a statement of defence.* In this statement, a lawyer sets out defences that, if proved, will result in Abigail's claim being dismissed. The defendants must admit those paragraphs in Abigail's claim with which they agree. They must then deny those paragraphs that contain statements with which they disagree. Then, if applicable, they must identify those paragraphs in the claim about which they have no knowledge. They must also set out

judgment-proof
a party against whom a judgment would be ineffective as the party has no assets against which the judgment could be enforced

their own version of the facts and the law they rely on. This last requirement is sometimes referred to as an affirmative defence because it consists of more than denials of the plaintiff's claim. The paragraphs in Abigail's claim that the defendants admit are deemed to be proved and need not be proved at trial. This is one of the ways in which the pleadings serve to narrow the issues before trial.

After the statement of defence has been served on Abigail's lawyer and filed in court, I.M. Just reviews it. If he finds that the statement of defence has raised an issue or facts related to that issue that were not dealt with in the statement of claim, Abigail may serve and file a reply to the statement of defence. For example, if the defence states that Abigail showed up at the showroom in an intoxicated state, the defendants may argue that there was contributory negligence on Abigail's part. Abigail may need to serve and file a reply denying that she was intoxicated if those facts and issues were not covered in the statement of claim. If the plaintiff simply wishes to deny the defendant's defence generally, there is no need to serve and file a formal reply.

Other Pleadings

In some cases, there are other types of legal issues that may result in other pleadings. Suppose Abigail sues Fred and Rattle Motors Ltd but not Skunk Motorcar Company Ltd, the manufacturer of the Super Coupe. If the two defendants think that it was not their negligence but the negligent manufacturing of the Super Coupe that caused Abigail's damages, they may issue a third-party notice to add Skunk Motorcar Company Ltd to the proceedings. This is a notice to the manufacturer that says that the defendants hold Skunk Motorcar Company Ltd wholly or partly responsible for Abigail's damages, so that if they are found liable, they will argue to have that liability transferred to the manufacturer, which they are adding as a third party. They must send Skunk Motorcar Company Ltd all the pleadings to date, and Skunk Motorcar Company Ltd may serve and file a defence against the claim made by the defendants against it. Skunk Motorcar Company Ltd is also entitled to raise any defence against the plaintiff's claim in the main action that the other defendants did not raise but could have raised. Thereafter, Skunk Motorcar Company Ltd is treated as a defendant in the main proceeding, and the third-party issues are part of the trial of the main action, although in some cases they may be tried separately. It is also possible for a third party to deny liability and claim that the fault, if any, is that of a fourth party. This would result in the issuing of a fourth-party notice with the fourth party having the same rights vis-à-vis other parties as the third party.

If one defendant has a claim against the other defendant that is related to events or transactions in the main action, the defendant with the claim should file a crossclaim against the other defendant. In a case like Abigail's, this is most likely to occur with respect to a claim for contribution by one defendant against the other under the *Negligence Act*.[12] That Act permits one defendant to have the degree of liability between the defendants assessed to determine how much each should pay, and it allows a defendant that settles the action to claim financial contributions from other defendants. In our case, Fred may wish to argue that if the defendants are liable to Abigail, Rattle

12 RSO 1990, c N.1, s 2.

Motors Ltd is 90 percent responsible for Abigail's injuries. If Fred seeks to pin most of the responsibility on Rattle Motors Ltd, he needs to do it by crossclaim against Rattle Motors Ltd. The recipient of a crossclaim may counterclaim against the crossclaimant or serve and file a defence to the crossclaim. A crossclaim is not dependent on the main action but is usually tried with it.

If either defendant can argue that Abigail acted in some way to cause them a legally recognized injury (unlikely in this case), the defendant can file a counterclaim with the statement of defence. Abigail would then have to respond with her own defence to counterclaim.

Once a reply has been made to every defence filed, or the time for replying has expired, the pleading stage is complete. Facts that are admitted do not have to be proved at trial. Facts that are not admitted must be proved. For example, if Rattle Motors Ltd and Fred admit that Abigail sustained the injuries and suffered the damages she claims but deny that the damages resulted from their negligence, damages are admitted and need not be proven at trial. However, Abigail will still have to prove negligence because liability is not admitted. Both parties will have to advance evidence to prove facts on the issue of negligence.

Because a party can only introduce evidence relevant to the facts as pleaded, evidence relating to facts that were not pleaded but should have been pleaded cannot be admitted. This happens rarely, but when it does happen it can be fatal to the party who forgot to plead a necessary fact to support his or her case. Sometimes the party can ask the judge to let the party amend the pleadings, but the other party will object, and the judge may decide that it is too late to permit amendments and reopen the pre-trial stage for discovery on these "new" facts if the case is already at trial. This is one of the reasons it is necessary to read statements of claim and defence carefully to ensure that the pleadings fit the theory of your case.

A Variation: Mandatory Mediation

If Abigail brings her case in Toronto, Ottawa, or the County of Essex (Windsor), or transfers it there from another county or region, unless a court orders otherwise, in most cases the parties are required under Rule 24.1, subject to exemptions set out in the rule, to participate in mandatory mediation in order to attempt a settlement. The first mediation session must be held within 180 days of the filing of the first defence. The purpose is to have the parties focus on trying to settle their case at a relatively early stage in the proceedings. If the mediation process is not successful, the mediator so reports, and the matter proceeds to trial. Mandatory mediation is discussed in Chapter 23.

Examinations for Discovery of Parties and Discovery of Documents

The pleadings should set out the case from each party's point of view. You should now know the basic facts in dispute, the legal issues, the case your law firm has to prove, and the case it has to meet. The pleadings are a concise statement of material facts—but a lot of the details are missing. For this reason, each party is entitled to have discovery of the other party's case to obtain more information about the supporting

evidence and details. There are a number of different types of discovery available, including medical examinations and inspections of places or property. For example, with regard to Abigail's neurological problems, Fred and Rattle Motors Ltd may request that she submit to a medical or psychological examination by a medical professional of their choice. The evidence from that examination can be received in the form of the doctor's ***viva voce* evidence** or the doctor's report. Abigail, on the other hand, may wish to have a lighting expert and an expert on flooring examine Rattle Motors Ltd's showroom. Discovery in the form of inspection of property is available to her because she does not have possession of the property or a right to enter it for the purposes of inspecting it. These types of discovery are used only in actions where they are helpful. The main types of discovery used in almost every civil case are discovery of documents and oral examination for discovery.

***viva voce* evidence**
oral evidence

Discovery of Documents

The vast changes in the creation, nature, type, and storage of electronic documents have resulted in a substantial increase in the volume of documents that could be relevant in a civil case. The rules now require that all parties meet and confer at the earliest opportunity to discuss the nature and extent of discovery and create a discovery plan in writing, under Rule 29.1, setting out the scope of discovery, dates for service of affidavits of documents, information on the cost, timing, and mode of production of documents, names of persons to be produced on discovery, and the time and length of examinations. They are also expected under Rule 29.2 to consider and apply the concept of proportionality to the discovery process as a control on the process becoming more complicated and expensive than is warranted by the nature of the case and what is at stake for the parties. The concept of proportionality set out generally for proceedings in Rule 1.04(1.1) is set out under Rule 29.2, to be used on any motions concerning discovery

So, I.M. Just and the defendants' lawyer are expected to use the concept of proportionality in Rule 29.2 as a guide, and to cooperate in drawing up a written discovery plan dealing with the range of discovery and the steps the parties are to take in order to complete the process and follow the expected schedule. If the parties cannot come to an agreement on a discovery plan, on a motion, the court can, as of January 2019, impose a discovery plan including the scheduling of examinations, with limits on discovery rights under Rule 29.1.05(2). Following the creation of a discovery plan, each party is to prepare an affidavit of documents in which each party discloses under oath the identity and nature of every document they now have or had previously that might be relevant to the action. Documents also include information stored electronically. In recent years, issues have arisen over how extensive a search of electronic files must be to discover relevant documents. Because of the great number and possible length of electronic files on disks, hard drives, networks, and the Internet, a thorough search can be daunting, particularly given the time, money, and effort required to conduct it. Fortunately, in Abigail's case there are unlikely to be voluminous electronic records to review. Abigail, for example, must disclose all of the subsequent medical records that underlie her claim that she suffered specific serious injuries. Rattle Motors Ltd must disclose any reports it has concerning leaking oil pans on the Super Coupe. The term "document" is given a broad interpretation and may include digital files, computer disks and thumb drives, audio and video tapes, photographs, and other media of

communication. All documents that a party has or had must be listed. If the document is still in existence and is obtainable, it must be produced for inspection by the other side. Usually, each side provides the other with copies of its own documents.

An exception to the disclosure rule exists with respect to documents for which a party claims legal privilege. For example, lawyer–client correspondence is routinely claimed as privileged based on lawyer–client privilege: the right to keep lawyer–client communications confidential. Similarly, documents or reports prepared specifically because of the litigation are also privileged and need not be produced. If privilege is claimed for a document, it must be listed but does not have to be produced at trial. If a party decides to waive the privilege and rely on the document for the party's own case at trial, then the privilege is lost, and the document must be disclosed. However, where a document is not privileged it must be listed in the affidavit of documents and produced.

Examination for Discovery

Once documentary discovery has taken place, the parties, following the discovery plan, usually arrange for an oral examination for discovery. Here, each party's lawyer is entitled to up to seven hours to question the other parties, under oath, about the case, the statement of claim or defence, and the documents disclosed in the discovery of documents process. Questions can be wide ranging. If a party does not know the answer to a question, he or she may be asked to undertake to provide an answer or produce a document later. On a lawyer's advice, the party either accepts or rejects the undertaking. If the undertaking is rejected, the party asking the question may bring a motion to compel the other party to re-attend at his or her own expense to answer the question, provided that the judge on the motion agrees that the question is a proper question.

These examinations are held outside court, usually in an office rented for the purpose. Abigail would be present with her lawyer to answer questions put to her by the lawyer for Rattle Motors Ltd and Fred. Fred and a representative of Rattle Motors Ltd may attend to observe and to advise their lawyer. Abigail may also be present when her lawyer questions the defendants in their lawyer's presence. Also present is a court reporter or stenographer to take down a record of the proceedings. This record can be used both in preparing for cross-examination of a party and for preparing a client for examination-in-chief at trial. Where a party gives different answers or tells a different story from the one given at discovery, the discovery transcript can be used to challenge the credibility of the evidence given by the party at trial. The transcript can also be used to "read in" admissions by the opposite party on issues and facts in the case, although this is more likely to be done on a "request to admit" before trial. We discuss "requests to admit" later in this chapter and in Chapter 16.

Motions

Thus far, we have been describing how a civil action proceeds. It appears to be orderly and without any procedural disputes. On occasion, we have made reference to one or the other of the parties applying to the court for an order concerning the conduct of the action. For example, if a lawyer omits an essential fact or legal issue from a statement of claim, he or she can ask the court for permission to amend the claim

to add the missing information. But how do you ask the court? The answer is that you bring a motion to obtain the relief or remedy you request. Motions are generally proceedings within an action and may be brought at any time during the proceedings, including at trial. Their purpose is to settle a dispute about some procedural point that the parties are unable to resolve themselves. On a motion, the court hears argument by the parties and then issues an order that resolves the problem. Such orders rarely decide the case on the merits and bring it to an end. Instead, the parties usually do as the order directs and get on with the case. Appeals from orders made on motions are rare. The right to appeal this kind of order is restricted, and it is usually too expensive and time-consuming since the issues are often procedural and not crucial to ultimate success. Examples of procedural motions include motions to extend the time for filing pleadings, motions for particulars (details) of allegations in a statement of claim or defence, and motions to compel a party to produce documents or attend discovery. Occasionally, a motion may decide the case without a trial: A motion for default judgment will do this where a defendant has failed to file a defence. A motion to strike out a statement of claim as disclosing no cause of action may do this as well.

Motions are usually made on notice to the other party. The party who brings the motion, called "the moving party" whether plaintiff or defendant, serves "the responding party" with a notice of motion. The notice of motion tells the responding party what the moving party wants the court to do and provides a brief statement of the reasons why the moving party is entitled to the order. The notice of motion also sets out the documents or sources of information relied on. Evidence on the motion is usually given by affidavit rather than orally. The affidavit sets out the facts that entitle the moving party to the relief claimed in the notice of motion. The responding party may also file an affidavit or other documents to support its case and may bring a cross-motion if it also has related issues that it wishes to resolve. Counsel then appears before a judge or master of the Superior Court and presents the motion orally. The judge or master decides the issues raised in the motion and issues an **order**. If a motion is made at trial, it is not necessary to use formal notices of motions because the parties are already before the court. While motions are generally made on notice, some motions may be made without notice to the other side. An example is a motion for substituted service of a claim when the other party cannot be located for service.

order
generic term used in the *Rules of Civil Procedure* to describe commands issued by courts on motions and at trials

Motions have, over the years, tended to become more complex and take more time, with more supporting documentation required, including legal case briefs. In some regions it can take weeks to schedule a motion, with the date not always fixed, and this has resulted in the development of supplemental rules governing motions set out in regional practice directions to try to control the motion process. There have also been recent changes to the rules and forms; the moving party is now also required to serve and file a Confirmation of Motion (Form 37B) confirming that there has been a discussion of the issues on the motion, and an attempt to narrow or resolve issues, and that the matter will proceed on the scheduled date, subject to any agreement or settlement of issues. Failure to do this will entitle the respondent to obtain an order for costs. Consequently, in preparing to bring a motion it is a good idea to carefully check the rules and forms affecting motions generally, and the practice directions in particular for the region in which the motion is being brought in order to determine if additional rules apply. As the courts attempt to gain greater control over an increasingly complex and time-consuming motion process, it is not unreasonable to expect further changes in future.

One motion that might occur when pleadings have been exchanged is a motion for summary judgment. While a default judgment may be obtained if the defendant files no statement of defence, a summary judgment is obtained when a party argues that the other party's pleadings disclose no genuine issue requiring a trial. If the motion is successful, a judgment should be issued—to dismiss the action if a defendant brings the motion, or to grant judgment if a plaintiff brings the motion. If the issue is one of law alone, the judge may decide it. If it involves questions of credibility or facts that are in dispute, the judge is more likely to use the motion to narrow the issues, establish facts, and order a speedy trial. If, for example, the defendants bring a motion for summary judgment to dismiss Abigail's action on the basis that the limitation period for tort actions has expired, they must file affidavits as to when the accident occurred and when the action was commenced, with reference to the pleadings and perhaps discovery transcripts. On a motion for summary judgment, the facts of a case must be simple and unambiguous. There are heavy cost penalties for a party that brings a futile and unnecessary motion.

Pre-Trial Conference and Trial Preparation

The parties have now exchanged pleadings, discoveries have been completed, and, usually, any motions necessary to ensure compliance with the Rules have been brought, heard, and determined. The parties need no more information before trial. At this point, lawyers and their clients often assess their chances for success at trial, weighing the pros and cons of their case. Most cases get this far because there is a dispute about the facts. No lawyer will tell a client with certainty that he or she will win or lose; when facts are disputed, much will depend on the credibility of witnesses, which is hard to assess.

In this atmosphere and at this stage, either side or both sides may attempt to settle the case. If the parties reach a settlement, they file a consent to dismiss the action on the basis of the terms of the settlement. If the settlement involves payments by one side to the other, the action is not dismissed until the payment is made in order to prevent the payer from reneging on the promise. The parties may pursue informal discussions, or they may make formal written offers—the latter have some important consequences if they are rejected. Briefly, if a formal offer to settle is made, it is made in writing to the other side, and a sealed copy is filed with the court. If the other side accepts the offer on its terms and within the time during which the offer is open for acceptance, the case is over. But if the offer is rejected and the party who rejected the offer does not do as well at trial as he or she would have done had he or she accepted the offer, there are negative cost consequences.

For example, if Abigail is offered $300,000 to settle but thinks she can get $500,000 at trial, she may reject the offer. However, if she recovers only $200,000 at trial, she will receive costs only to the date the offer was made, and she will be deprived of costs thereafter. Further, the defendant is entitled to the usual costs from the date the offer was made to the date of judgment. If Abigail made an offer to Fred and Rattle Motors Ltd and they rejected it, and if Abigail received a judgment that was equal to or better than the offer she made, Abigail will receive costs to the date the offer was made and a higher cost award from the day the offer was made to the date of judgment. In a long and complex lawsuit, legal costs can reach a significant amount. When they realize that a large part of the judgment will be eaten up by their obligations to pay their own and part of their opponent's legal costs, litigants may think twice about continuing on with a lawsuit.

Setting the Case Down for Trial

If the case does not settle on the close of discoveries, either party may signal that he or she has completed all necessary information-gathering steps and all necessary motions and is ready to go to trial. This is done by filing a trial record after serving it on the other party. Sixty days after that is done, the court registrar will put the action on the trial list by setting the case down for trial. If no party sets the matter down for trial, there are provisions for the registrar to force the action on for trial, or to dismiss the action for want of prosecution after giving notice to the parties. Cases are tried in the order in which they are placed on the trial list. There are three separate lists: one for jury trials, one for non-jury trials, and one for speedy trials.

Trial Record

The trial record is a booklet with grey cardboard covers. It is prepared for the use of the trial judge by the party who sets the action down for trial. It contains a table of contents, a copy of each of the pleadings filed, and a copy of any orders made at the pre-trial stage as a result of motions. The back cover of the record is set up as a back-sheet, with a large blank space in which the judge is to write his or her **endorsement**. An endorsement is a handwritten note that records the judge's decision, although not usually the judge's reasons for his or her decision.

endorsement
judge's handwritten order or judgment from which a successful party is expected to prepare a formal draft of the order or judgment

Pre-Trial Conference

After the matter has been set down for trial, either party may request a pre-trial conference within the next 180 days. A pre-trial conference is mandatory under the Rules, and if the parties do not schedule one within 180 days after the matter in action is set down, the registrar will schedule one for them. Each party serves on the other and files with the court a pre-trial conference brief that sets out the issues between the parties. The lawyers, with the parties, appear before a pre-trial conference judge. The role of the judge is to listen to the lawyers, review the issues with them, and give a frank assessment of the case. What may happen at this point is that an impartial judge may inject a dose of reality into the proceedings that could facilitate settlement, particularly where the parties are being obstinate. The judge's goal is to promote settlement and, failing that, to narrow the issues in order to speed up and simplify the trial. Unless the parties consent, the judge who conducts the pre-trial conference does not preside at the trial of the matter. In addition to the mandatory pre-trial conference, a party may request an additional conference, or a judge can order one on his or her own motion.[13]

Requests to Admit

As a means of speeding up the proof of facts at a trial, either party at any time may serve on the other a **request to admit**. The party served with a request to admit is being asked to admit the truth of a fact or the authenticity of a document. The party receiving the request must admit, deny, or refuse to admit, and explain any refusal to admit. Failure to respond leads to a finding that the fact is deemed to be admitted, or the document is deemed to be authentic. An admission, as noted earlier, eliminates the need to prove that fact at trial and can reduce the time it takes to try the case.

request to admit
document in which one party requires the other to admit the truth of a fact or the authenticity of a document

13 See Rules 50.02, 50.03, 50.05, and 50.07.

Assignment Court

After the pre-trial conference, the action is placed on a controlled list for trial. As the case gets closer to the top of the list, it goes to a weekly assignment court, where the lawyers appear and, with the judge, set a specific date for trial. However, if cases ahead of it on the list settle on the eve of trial, the list may collapse, and the parties may find that their trial date has suddenly moved up. Similarly, another trial may take longer than estimated, and the parties' case may be delayed. Note that the procedures for trial lists vary from one judicial region to another.[14]

Pre-Trial Preparation

Once you know your client is going to trial, there is much to do. I.M. Just needs to decide what witnesses he will call to provide the evidence that will prove the facts alleged. Abigail will obviously give evidence of what happened to her. In addition, I.M. Just will have to issue and serve a **summons to a witness** on each of the other witnesses to ensure that they will attend trial and give evidence. If a witness has relevant documents that he or she can speak about, the summons should direct the witness to bring those documents to court. Because Abigail's medical reports are important evidence on the issue of damages, I.M. Just must give notice of his intent to produce these records at trial. The records will be admitted in evidence unless the opposite party wishes to cross-examine the doctor or maker of the report. There are other notices that might have to be served, though perhaps not in this case; for example, one of the parties might serve a notice to introduce business records, such as invoices or an account record. As with medical reports, business records may be admissible without the maker of the record having to prove their validity and authenticity. I.M. Just and the defendants' lawyer may wish to prepare a trial brief. This brief includes a list of witnesses, what they will say, and what opposing witnesses are likely to say, and contains points about cross-examining witnesses. It may also include matters for opening and closing arguments and a guide for proving each fact necessary to the case.

summons to a witness
order of a court telling the person named on the summons to attend a trial and give evidence

Time must then be spent preparing witnesses for their examinations-in-chief and cross-examinations and preparing demonstrative and other physical and documentary evidence for trial.

Variations on the Civil Process: Simplified Procedure, Case Management, and the Commercial List

If Abigail were claiming less than $200,000, her case would proceed under the mandatory Rule 76 simplified procedure. Oral discovery is limited, notice periods for steps are shorter, and there is provision for a summary trial that permits trials to be considerably shorter than usual. Simplified procedure is discussed in Chapter 24.

In the County of Essex (Windsor), Ottawa, and Toronto, if the case is very complex and the parties are having difficulty in scheduling and cooperating on moving the case forward, a party or the court itself can intervene and place the action under case management under Rule 77. Under case management, a judge or master may impose a timetable for completing all pre-trial procedures and take other steps to reduce cost and delay. Case management is discussed in Chapter 22.

14 Current assignment court procedures have been subject to much criticism by the legal profession, as they are cumbersome and do not make actual trial dates certain or predictable. For a discussion of the problem of assignment courts scheduling for both trials and motions, see <https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/150_scheduling.php>

If this were a case involving certain commercial law issues, in Toronto the case might be commenced in the Commercial List Office, where it would follow the usual pre-trial procedures but would be tried by a Commercial List judge who has expertise in commercial law. The Commercial List is discussed in Chapter 25.

As noted earlier, certain other types of civil cases, such as estate disputes and family law disputes, may proceed under specialized rules and follow specialized procedures. These matters are not covered in this text.

Trial

Because Abigail is the plaintiff, her lawyer opens the case, perhaps with an opening statement to explain what it is about. The statement may be brief because it is presumed that the trial judge has read the trial record and knows that this is a "slip and fall" negligence case with issues concerning both liability and damages; however, if this were a jury trial it would be necessary to have a detailed opening statement because jurors know nothing about a case until they hear about it in an opening statement. I.M. Just then calls his witnesses, probably starting with Abigail. He examines Abigail in chief, and the defendants' counsel cross-examines her.[15] The same sequence is followed with the plaintiff's other witnesses. When I.M. Just has finished presenting Abigail's case through the testimony of witnesses, he closes the case. At this time, the defendants open their case. If their lawyers think that the evidence adduced from the plaintiff's witnesses does not prove the facts alleged by the plaintiff, they may move that the action be dismissed and elect not to call evidence. But it is more likely that they will not run this risk, because the court may then decide the case based on only the plaintiff's evidence, which could result in a judgment for the plaintiff. So, it is more likely that the defendant will present its case in full and start by calling the first witness. The case then proceeds with examination and cross-examination of the defence witnesses. When the defendants close their case, each side sums up, the plaintiff going first.

Having heard the evidence, read the documents, and heard counsel, the trial judge may then decide the case on the spot. But if the judge needs to think about the issues, he or she reserves judgment and gives judgment on a later date. If the judge reserves judgment, he or she may also issue written or oral reasons for judgment. These reasons may be reported in the law reports or be available through an online service such as Quicklaw® or CanLII.

Jury Trials

If Abigail had wanted a jury trial, she would have been required to issue a jury notice before the close of pleadings and discovery. The defendants could then have moved to have the jury notice struck out on the ground that the case was not appropriate for a jury. This usually happens when the evidence is technical or complex, although it is now harder to strike out a jury notice on these grounds than it once was.

If the matter proceeds before a jury, the trial takes longer than it does before a judge sitting alone. This is because juries are not experienced in trying cases, nor are they knowledgeable about the law. Lawyers may have to move more slowly in questioning witnesses and be more thorough in their summing up and in their opening

15 If a new issue arises in cross-examination that was not covered in examination-in-chief, I.M. Just may be permitted to re-examine Abigail on that issue, although this does not happen often.

remarks. At the end of the trial, the judge charges the jury, giving a neutral summing up of the evidence and explaining how the law is to be applied to whatever facts the jury finds. The judge carefully drafts the charge, bearing in mind suggestions made by the lawyers. It is up to the jury to assess the evidence to determine what facts have been proven from the evidence it has heard. The judge instructs the jury on what the law is in the charge to the jury that he or she has drafted. Unlike the situation in the United States, civil juries are relatively rare in Canada.

Judgment

At the end of the trial, the judge gives judgment. If there is a jury, it gives a verdict on which the judgment is based.[16] If Abigail is successful, she will be given a judgment requiring Fred and Rattle Motors Ltd to pay damages to her for her injuries. Each defendant may be ordered to pay a specific share if the judge assesses liability for each of them, or they may be jointly and severally liable to pay. Abigail is likely to receive general damages for her pain and suffering, and special damages for her out-of-pocket expenses, which cover her actual out-of-pocket expenses and other **pecuniary** losses caused by the defendants' negligence. She will receive prejudgment interest from the date that she was injured to the date of judgment, and she will also be awarded postjudgment interest on the amount of the judgment from the day of judgment to the day of payment of that judgment. If Abigail wins her case, she is likely to be awarded partial indemnity costs that amount to approximately one-third to two-thirds of her actual legal costs. If Abigail is not successful, her claim will be dismissed. She will not receive anything. The successful defendants will receive their partial indemnity costs, which Abigail will have to pay.

pecuniary
of monetary value

A judgment in Abigail's favour does not mean that she will simply receive a cheque. A judgment is a command to pay, but if the defendants choose not to pay up voluntarily, Abigail will have to take steps to enforce her judgment. Abigail can file **writs of seizure and sale** against Fred and Rattle Motors Ltd. She can then direct the sheriff of Toronto, or the sheriff of any county in which she has filed a writ and the defendants have property, to seize and sell the property under the authority of the writ. Abigail then satisfies her judgment from the proceeds of the sale. For example, the sheriff could seize Fred's bank account or sell his car or house. The sheriff could also seize the property on which Rattle Motors Ltd has its building, as well as its inventory of cars. Alternatively, Abigail could garnish Fred's wages or any amounts due to either defendant from third parties. A notice of **garnishment** is sent to third parties who owe money to either defendant, telling them to pay the funds due to the defendant to the sheriff to be held to satisfy the judgment.

writ of seizure and sale
order from a court to a sheriff to enforce the court's order by seizing and selling the defendant's property and holding the proceeds to satisfy the judgment debt to the plaintiff; also known as a writ of execution

garnishment
notice directed to a third party who owes money to a defendant as a means of enforcing a judgment

Effect of the Judgment

Once a judgment is given, it is final and may not be challenged unless it is appealed. The matter is then said to be ***res judicata***, which means that any issue tried and decided in a court proceeding cannot be relitigated in a subsequent proceeding.

res judicata
Latin phrase meaning that a matter decided by a court is final and incapable of being relitigated in a subsequent proceeding

16 The jury will give a verdict on which the judgment is based unless the verdict is completely against the weight of the evidence, in which case the judge will set the jury's verdict aside and substitute the verdict that should have been given. This is, however, an unusual occurrence.

Appeals

The rules and the *Courts of Justice Act* provide for an appeal from almost any trial court's decision. In some circumstances, appeals are heard by the Divisional Court, a branch of the Superior Court. In Abigail's case, which originated in the Superior Court, the appeal (if the damages are substantiated) would be heard in the Ontario Court of Appeal, the highest court in the province. If, for example, the defendants felt that the damage award for Abigail's pain and suffering was excessive and not supported by legal principle or the evidence, they could appeal by filing a notice of appeal in which they set out the grounds on which the appeal is based. Here the defendants are called the "appellants" in the title of proceedings because they are appealing the trial decision. Abigail will be called the "respondent" on the appeal.

The appellants are required to file with the court a statement of fact and law, which sets out the facts of the case, the legal issues raised on appeal, and a brief resumé of the law on which they rely. I.M. Just will file a statement of fact and law in reply. The appellants will also order those parts of the trial transcript that are required to support their factual and legal arguments. The transcripts and documents that were exhibits at trial are the only evidence. No witnesses are heard on an appeal.

The Court of Appeal has very broad powers, but it exercises them sparingly and with discretion. The court may affirm the trial decision, reverse it, or vary it. It may substitute its own decision for that of the trial judge, although this is unusual. More often, a new trial is ordered. In most cases, the appeal is dismissed and the trial decision affirmed. The major reason why most appeals fail is because the appeal court will not interfere with the findings of fact made by the trial court, even if the appellate judges would have come to a different conclusion if they had been adjudicating at trial. Appellate judges will not substitute their findings of fact for those of the trial judge if there was any reasonable basis for the trial judge's having drawn the conclusions that he or she did from the evidence at trial. The reasoning is that the trial judge saw and heard the witnesses and, from personal observation, was able to draw conclusions about credibility that the Court of Appeal, having only the transcripts of evidence, is not in a position to do. Therefore, errors of fact rarely give rise to a successful appeal, leaving major errors of law as the main basis of a successful appeal. If the trial judge misapplied the law, the appellate court can identify the error and vary the judgment without a new trial. If a jury was improperly charged on the law and reached an erroneous verdict, a new trial will be ordered because a jury's reasoning process is unknown.

If appealing to the Ontario Court of Appeal is difficult, appealing from that court to the Supreme Court of Canada is even more so. Anyone who can pay for it can appeal from a Superior Court trial judgment. You do not need the appellate court's permission. While your chances for success on appeal from a lower court decision may be poor, they worsen at the Supreme Court of Canada. In order to appeal from the provincial appellate court to this court, you need the Supreme Court's permission, which is called "leave to appeal." To get leave to appeal, you need to show that there are conflicting lines of case authority in different provinces or that the matter you are raising is a public policy issue of great importance.

You have had a broad overview of how a civil action proceeds through to trial and appeal. We will examine the process in more detail in subsequent chapters.

CHAPTER SUMMARY

In this chapter, using Abigail Boar's claim for negligence against the defendants Rattle Motors Ltd and Fred Flogem, we have followed the conduct of a civil action through the Ontario Superior Court of Justice to the Court of Appeal. The procedure began when Abigail hired I.M. Just to sue on her behalf. I.M. Just conducted preliminary investigations to determine whether there was a good cause of action against the defendants. Once the decision to sue was made, proceedings were commenced with the issuing of a statement of claim. The defendants answered with a statement of defence. When both sides exchanged pleadings, the pleading stage closed, and the parties proceeded to oral examinations for discovery and discovery of each other's documents. Until the end of discovery, the parties could bring motions to resolve disputes concerning the application of procedural rules in this case. Once discovery ended, the matter was set down for trial by filing a trial record, and a pre-trial conference was held. The parties then proceeded to prepare for trial. At the end of the case, the judge gave judgment, and the parties considered their options on appeal.

KEY TERMS

action, 15
application, 15
backsheet, 19
cause of action, 10
contingency fee, 9
damages, 11
disbursements, 9
endorsement, 31
fees, 9
garnishment, 34
general heading, 19
judgment-proof, 24
order, 29
pecuniary, 34
principle of proportionality, 12
request to admit, 31
res judicata, 34
summons to a witness, 32
title of proceedings, 19
trier of fact, 10
true copy, 16
viva voce evidence, 27
writ of seizure and sale, 34

REVIEW QUESTIONS

1. What are the principal steps in a civil lawsuit?
2. How does Abigail Boar go about retaining a lawyer?
3. What is a retainer?
4. What are the usual terms of a retainer?
5. What is a contingency fee? Can a lawyer in a civil action accept a contingency fee?
6. How are legal fees determined?
7. What does it mean to have a good cause of action?
8. What is the standard of proof in a civil matter, and what kinds of evidence meet this standard?
9. Give examples of the kinds of evidence in question 8 that may arise in Abigail's case.
10. What matters are considered in determining a court's jurisdiction?
11. What is the relationship between a practice direction and the *Rules of Civil Procedure*?
12. What are the two main types of civil proceedings and how do they differ?
13. How does an action commence, and what is the function of the first document?
14. How is a statement of claim issued?
15. What are originating documents and how are they served?
16. What happens if you cannot find a defendant for service because he or she has moved or gone on vacation?
17. What might happen if the defendant never saw the statement of claim and the plaintiff signed default judgment when no defence was filed?
18. What choices do Fred and Rattle Motors Ltd have when served with a statement of claim?
19. What other pleadings might one find in a civil case, and what is their function?
20. What is mandatory mediation?
21. What is discovery?
22. How do the Rules control the discovery process?
23. What is a motion, and what is its purpose?
24. When the parties have completed pleadings and discovery, how do they get on the list for trial?
25. What happens if both parties file pleadings but do not proceed with the case?

26. What is case management?
27. Could Abigail's case be tried as a Commercial List case?
28. If Abigail obtains a judgment in her favour, does she sit back and wait for the defendants to send her a cheque?
29. What does it mean when we say that the issue of liability in Abigail's case is *res judicata*?
30. Why would an appeal from a decision in Abigail's case based on an error of fact be unlikely to succeed?

DISCUSSION QUESTIONS

1. The primary purpose of the *Rules of Civil Procedure* is to reduce cost and delay. Discuss.
2. Suppose Abigail arrived drunk at the showroom and was staggering when she slipped on the oil. Suppose that she took a fancy to Fred and made unwelcome physical advances. Suppose Fred felt he had not been negligent in any way. And suppose that Rattle Motors Ltd discovered that there had been numerous incidents of leaking oil pans on the Super Coupe. How might these situations change the type of pleadings used?
3. Identify three pre-trial procedures that appear to be designed to reduce cost and delay in the civil process and explain how these procedures might have that effect.