Writs: Importance & History

From almost your first day of law school you will hear about writs. The writ was the first document filed in a lawsuit at common law. It was issued to a prospective plaintiff, for a fee, by one of the king's officials. The writ contained the names of the parties, a description of what the contention was, and a direction to a sheriff to serve it on the defendant and bring him into court. The plaintiff's lawyer would give the writ to the sheriff with instructions regarding details of service and pay the sheriff a designated fee plus an advance for expenses.

The history of writs starts in 1066 A.D. That is the big date in English law. In that year, King William of Normandy established his legal right to the English throne by defeating King Harold at the Battle of Hastings. After the victory, William divided the kingdom among his supporters and introduced a method of government known as the feudal system.

Feudalism was based on land ownership. Everyone in the kingdom owed allegiance to the king directly as well as through the landowner one served. Serfs, a cut above slaves, were bound to the land where they were born, and their allegiance was to the lord of their manor and, through him, to the king. The landowner's allegiance was to the king and the noble directly over him, that noble's allegiance was also to the king and to the noble above him, and so on. This centralization of allegiance brought strong centralization of government. Laws operative throughout the realm were proclaimed in the king's name. Taxes were collected and funneled into the central treasury. A system of royal courts evolved for the settlement of disputes between subjects in civil matters, and for the settlement of criminal disputes between king and subject in criminal matters.

Initially, the judicial structure was located at the seat of government and was literally "the king's court." Cases were heard before the king and the assembled nobles, and the king, acting as judge, decided the results after discussion with the nobles. As business grew, however, the king gradually referred the cases to his chancellor for determination. A bureaucracy rapidly developed in the chancellor's office (chancery) as it became necessary to screen the requests for hearing to determine what kind of case it was, what was necessary to give the defendant an opportunity to present the other side, how much time it would take, and so on. After the details were determined, a writ was composed and the case commenced. Eventually, the litigants throughout the kingdom persuaded the king to establish a system of branch courts. Members of the chancellor's staff were appointed judges and went out on circuit to hear cases in the provinces. A group of expert lawyers gradually developed to handle the cases presented before the courts.

William Blackstone, the great early English law writer, gives an excellent description of the court structure, the bar and the various types of cases in his monumental treatise, Commentaries on the Laws of England. It would not hurt, if you have the time, to browse through it. You will obtain some good background, not only on the court structure but on much of the law school work in pleading, property, contracts, torts, and crimes. (Incidentally, after you are in law school a while, you might enjoy spending a little time in the library stacks rummaging through the older books on the shelves. Such exploratory browsing will not only broaden your legal understanding but will make you aware of social customs and practices which you never suspected existed so many years ago.)

The spread of the court system led to the proliferation of writs covering every type of controversy. By the latter half of the 13th century, to make their jobs easier, the writ clerks persuaded the chancellor to stop the issuance of new writs and force litigants to fit the facts of their cases to one of the writs used in the past.

Here is a hypothetical example of how the writ system operated.

De pipa vini carianda, an actual writ described in "Black's Law Dictionary," was a writ which covered the situation where a wine cellar had engaged a person to transport his wine to a tavern in an adjacent town, and on the way, the "pipe," or container, broke, allowing the seller to sue the carrier. Because this writ had successfully stood up in court before the no-new-writ rule was adopted, it was on the list of known writs which could be used.
Let us suppose for a minute that six friends went into a tavern in those days, sat at a big, rough oaken table in the back near the fireplace, and ordered a round of drinks. In this place, the proprietor’s custom was to put a big jug of wine on the table. As the friends drank, they poured their own. The proprietor charged them by the glass—he observed and noted with a charcoal mark over the fire-place each time a glass was filled. In the revelry, one of the friends dropped the container; the big jug cracked and the contents were transformed into a mournful stain on the floor. The proprietor demanded that the friends pay for the undrunk beverage at what he estimated was the per glass rate. They refused. He sued.

His lawyer could not find any writ to cover this kind of case. But perhaps a colleague in the profession remembered that in another shire, or county, a writ of de pipa vini carianda had successfully been brought some years previously. The old file copy of the writ was obtained, names were changed, and the lawyer argued that breaking a jug at a table, when you did not own it or the contents, was the same as breaking it in transit when you were delivering it from maker to tavern owner. If the court hearing the case agreed with the analogy, the writ would be granted. However, in this hypothetical case, the strict construction prevalent at that time undoubtedly would have resulted in a verdict for the defense. The facts did not fit the writ.

The prohibition on issuance of new writs eventually reached a compromise. The lawyers got the rules changed, and about eleven writs, covering almost every situation, came to be used most of the time. The eleven writs developed into what was known as “causes of action.” In order to have a cause of action, the factual situation had to conform to certain principles, different for each type of cause. These principles became known as the elements of a cause of action.

Here is a list of the eleven common-law causes of action:

**COVENANT:** Action brought when a defendant failed to perform a contract under seal (a contract formalized by signature and a seal impressed in wax).

**INDEBITATUS ASSUMPSIT:** Action on an oral or written contract, not under seal, where the broken promise is implied from the terms of the contract.

**SPECIAL ASSUMPSIT:** Action on a contract, not under seal, where the defendant has breached a specific promise in the contract.

**DEBT:** Action to recover a specific sum of money, the amount being readily ascertained.

**TROVER:** Action for damages where someone has unlawfully taken another’s personal property.

**REPLEVIN:** Action to recover the personal property itself which was unlawfully taken.

**DETINUE:** Action to recover personal property originally rightfully possessed, but not returned when due, together with damages for the unlawful keeping.

**ACCOUNT:** Action on the balance of a series of transactions between the parties (sometimes called “common counts”).

**EJECTMENT:** Action for recovery of land, together with damages for the unlawful possession.

**TRESPASS:** Action for damages for direct injury to the plaintiff. **TRESPASS ON THE CASE:** Action for damages for indirect injury to the plaintiff (often referred to as “case”).

Modern pleading does not use these common-law divisions of causes of action. However, it is still important to know of their existence, and to have some understanding of their meaning, to fully comprehend the present-day system of code pleading. A lawyer still has to include the modern elements of a cause of action in the complaint or the case will be dismissed.