Chapter 3
DISPUTE RESOLUTION

Suggested Additional Assignments

Research: Class Actions

Students should find a current article on a pending class action against a large pharmaceutical, tobacco, automobile, or other company. Students should answer these questions:

1. What is a class action?
2. How long has this class action been going?
3. How does a class action change the stakes for the parties?
4. What are the plaintiffs' claims?
5. Have developments in the class action favored the plaintiffs or defendants?
6. What are the long-term business, legal, and social consequences of class actions such as this one? Do those consequences support class actions as a valid form of litigation?

Voir Dire

Divide students into three groups, and then each group into two sides. Each group is assigned a high profile case: the O.J. Simpson murder case, the Martha Stewart obstruction of justice case, and the Michael Jackson child abuse case (the professor may need to educate the students about these cases). One side in each group is the prosecution and the other side is the defense. Ask each side to explain to the class what type of juror it thinks would be most beneficial to its side, and why.

Martha Stewart was found guilty in March 2004 of conspiracy, obstruction of an agency proceeding, and making false statements to federal investigators and sentenced in July 2004 to serve a five month term in a federal correctional facility and a two year period of supervised release (to include five months of home confinement). Prosecutors showed that Peter Bacanovic, Stewart's broker at Merrill Lynch, ordered his assistant to tell Stewart that the CEO of ImClone, Samuel Waksal, was selling all his shares in advance of an adverse Food and Drug Administration ruling. The FDA action was expected to cause ImClone shares to decline. [1]

Michael Jackson was charged with four counts of lewd conduct with a child younger than 14; one count of attempted lewd conduct; four counts of administering alcohol to facilitate child molestation; and one count of conspiracy to commit child abduction, false imprisonment or extortion. On June 13, 2005, the jury found Jackson not guilty on all charges.[2]

Chapter Overview

Chapter Theme

The process of litigation may influence the outcome of a dispute as strongly as the substantive law. That is all the more reason to use preventive law, and stay out of court.

Quote of the Day

"Facts are ventriloquists' dummies. Sitting on a wise man's knee they may be made to utter words of wisdom; elsewhere, they say nothing, or talk nonsense, or indulge in sheer diabolism." –Aldous Huxley (1894-1963), British author, Time Must Have a Stop (1944).

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[1] "Stewart Convicted on All Charges," CNN.com, March 5, 2004.
[2] "Jackson Not Guilty," CNN.com, June 14, 2005.

Proof versus Right

Students often confuse whether a person can prove her case at trial with whether she suffered a legal wrong and has a cause of action. For instance, suppose students are considering a simple oral contract, in which Manny offers David $50 to shovel Manny's driveway, and David accepts. There are no witnesses. David shovels the driveway and Manny refuses to pay. In considering whether Manny's obvious breach has violated David's rights under the contract some students will say "no, because David cannot prove there was a contract—it was not in writing and there were no witnesses." The instructor must explain the difference between whether Manny violated David's contract rights—he has—and whether David can prove the terms of the contract at trial. Since class discussion more often involves substantive legal rights than burdens of proof, the instructor should make the point that hearing evidence and finding facts is the job of trial courts and then move the discussion to the substantive issue.

Three Fundamental Areas of Law

The case used in this chapter is a fictionalized version of several real cases based on double indemnity insurance policies. In this chapter we follow Beth's dispute with Coastal from initial interview through appeal, using it to examine three fundamental areas of law: the structure of our court systems, and civil lawsuits, and alternative dispute resolution.

Litigation vs. Alternative Dispute Resolution

There are two methods of dispute resolution: litigation and alternative dispute resolution. Litigation refers to lawsuits, the process of filing claims in court, and ultimately going to trial. Alternative dispute resolution is any other formal or informal process used to settle disputes without resorting to a trial, and it will be the focus of the last part of this chapter. It is increasingly popular with corporations and individuals alike because it is generally cheaper and faster than litigation.

Court Systems

The United States has over 50 systems of courts. One nationwide system of federal courts serves the entire country. In addition, each individual state – such as Texas, California, and Florida - has its court system. The state and federal courts are in different buildings, have different judges, and hear different kinds of cases. Each has special powers and certain limitations.

State Courts

The typical state court system has a single superior court over the lower trial and appellate courts. A few states have two courts at the top level, each with a different purpose.

Trial courts

Determine the facts of a particular dispute and apply to those facts the law given by earlier appellate court decisions.

Jurisdiction

A court's power to hear a case.

Subject matter jurisdiction means that a court has the authority to hear a particular type of case.

- **Trial Courts of Limited Jurisdiction** -- may hear only certain types of cases.
- **Trial Courts of General Jurisdiction**-- can hear a very broad range of cases.

Personal jurisdiction is the legal authority to require the defendant to stand trial, pay judgments, and the like. A **long-arm statute** gives a state jurisdiction over non-residents in certain situations.

Landmark Case: *International Shoe Co. v. State of Washington* [3]

Facts: Although International Shoe manufactured footwear only in St. Louis, Missouri, it sold its products nationwide. It did not have offices or warehouses in the state of Washington, but it did send about a dozen salespeople there. The salespeople rented space in hotels and businesses, displayed sample products, and took orders. They were not authorized to collect payment from customers.

When the State of Washington sought contributions to the state's unemployment fund, International Shoe refused to pay. Washington sued. The company argued that it was not engaged in business in the state, and, therefore, that Washington courts had no jurisdiction over it.

The Supreme Court of Washington ruled that International Shoe did have sufficient contacts with the state to justify a lawsuit there. International Shoe appealed to the United States Supreme Court.

Issue: Did International Shoe have sufficient minimum contacts in the state of Washington to permit jurisdiction there?

Excerpts from Chief Justice Stone's Decision: Appellant insists that its activities within the state were not sufficient to manifest its "presence" there and that in its absence the state courts were without jurisdiction, that consequently it was a denial of due process for the state to subject appellant to suit. Appellant [International Shoe] refers to those cases in which it was said that the mere solicitation of orders for the purchase of goods within a state, to be accepted without the state and filled by shipment of the purchased goods interstate, does not render the corporation seller amenable to suit within the state.

[D]ue process requires that [a defendant] have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."

Since the corporate personality is a fiction, its "presence" without can be manifested only by those activities of the corporation's agent within the state which courts will deem to be sufficient to satisfy the demands of due process.

"Presence" in the state in this sense has never been doubted when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on, even though no consent to be sued or authorization to an agent to accept service of process has been given. Conversely it has been generally recognized that the casual presence of the corporate agent or even his conduct of single or isolated items of activities in a state in the corporation's behalf are not enough to subject it to suit on causes of action unconnected with the activities there. To require the corporation in such circumstances to defend the suit away from its home or other jurisdiction where it carries on more substantial activities has been thought to lay too great and unreasonable a burden on the corporation to comport with due process. But to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations.

Applying these standards, the activities carried on in behalf of appellant in the State of Washington were neither irregular nor casual. They were systematic and continuous throughout the years in question. They resulted in a large volume of interstate business, in the course of which appellant received the benefits and protection of the laws of the state, including the right to resort to the courts for the enforcement of its rights. The obligation which is here sued upon arose out of those very activities. It is evident that these operations establish sufficient contacts or ties with the state of the forum to make it reasonable and just, according to our traditional conception of fair play and substantial justice, to permit the state to enforce the obligations which appellant has incurred there. The state may maintain the present suit to collect the tax.

Affirmed.

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[3] 326 U.S. 310 Supreme Court of the United States, 1945

Question: What part of the U.S. Constitution requires minimum contacts?
Answer: The Due Process Clause.
Question: Did the Court find that International Shoe conducted regular business activities in Washington?
Answer: Yes; salespeople rented space, displayed sample products, and took orders.

Appellate Courts

Generally accept the facts given to them by trial courts and review the trial record to see if the court made errors of law.

Court of Appeals

The party who loses at the trial court may appeal to the intermediate court of appeals. This court allows both sides to submit written arguments on the case, called briefs. Each side then appears for oral argument, usually before a panel of three judges.

State Supreme Court

This is the highest court in the state, and it accepts some appeals from the court of appeals. In most states, there is no absolute right to appeal to the Supreme Court. If the high court regards a legal issue as important, it accepts the case.

Federal Courts

As discussed in Chapter 1, federal courts are established by the United States Constitution, which limits what kinds of cases can be brought in any federal court. Two kinds of civil lawsuits are permitted in federal court: federal question cases and diversity cases.

Federal Question Cases

A claim based on the United States Constitution, a federal statute, or a federal treaty is called a federal question case.4 Federal courts have jurisdiction over these cases.

Diversity Cases

Even if no federal law is at issue, federal courts have diversity jurisdiction when (1) the plaintiff and defendant are citizens of different states and (2) the amount in dispute exceeds $75,000. The theory behind diversity jurisdiction is that courts of one state might be biased against citizens of another state. To ensure fairness, the parties have the option to use a federal court as a neutral field.

Trial Courts

United States District Court

This is the primary trial court in the federal system. The nation is divided into about 94 districts, and each has a district court**.**

Other Trial Courts

There are other, specialized trial courts in the federal system. Bankruptcy Court, Tax Court, and the United States Court of International Trade all handle name-appropriate cases.

Judges

The President of the United States nominates all federal court judges, from district court to Supreme Court. The nominees must be confirmed by the Senate.

Appellate Courts

United States Courts of Appeals

These courts are the intermediate courts of appeals. They are divided into "circuits," which are geographical areas. There are 11 numbered circuits, hearing appeals from district courts.

United States Supreme Court

This is the highest court in the country. The Supreme Court has the power to hear appeals in any federal case and in certain cases that began in state courts. Generally, it is up to the Court whether or not it will accept a case.

Role Play: Finding Facts versus Reading Transcripts

Students must understand the critical differences between trial and appellate courts, between hearing evidence and finding facts on the one hand, and determining whether a lower court applied the law correctly on the other. To demonstrate, use the role play script later in this manual. Can the class determine who is telling the truth and who is lying? How did they decide which was which? Students will mention body language, tonal inflection, eye movement, and other factors. Students should note that this is the function of trial courts, to hear evidence and find facts. After this exercise, the instructor should ask students if they could determine the truth merely by reading a transcript of the testimony. The point, of course, is that people rely primarily on non-textual clues to determine truth and falsehood, clues that are not present in an appellate court's review of a trial court's decision.

Litigation

Pleadings

The documents that begin a lawsuit are called the pleadings. These consist of the complaint, the answer, and sometimes a reply. In addition to the answer, there may be a counter-claim or a class-action suit may be filed. Finally, a party can ask the court for a judgment on the pleadings, by filing a motion to request the court to dismiss the case based solely on the pleadings. Assuming the case continues, the next step is discovery, during which both sides gather information on their opponent's case.

Discovery: Missing Facts

Discovery in civil litigation is rarely the subject matter for legal dramas on television or in the movies, so the discussion of discovery will be unfamiliar to many students. Students should understand its role in our adversary system as defined in the text: "the best way to bring out the truth is for the two contesting sides to present the strongest case possible to a neutral factfinder." The purpose of discovery is to enable the parties to understand their opponent's case as clearly as possible in order to encourage settlement—by allowing objective appraisal of the strengths and weaknesses of each side—and to allow a trial to uncover all relevant facts with a minimum of surprises. To emphasize these points, students might consider the case of *Smiles v Coastal Insurance Company* that is woven throughout the chapter.

Question: In *Smiles v Coastal Insurance Company,* what critical discovery ruling helps Coastal Insurance?

Answer: The judge denies plaintiff's Interrogatory 18, which sought information concerning other claims that Coastal had denied.

Question: Why is the ruling so important?

Answer: It ends the plaintiff's hope for a class action. Without discovery on other claims that the insurer has denied based on alleged suicide, the plaintiffs will never establish the elements of numerosity and commonality essential for class certification.

Question: What critical ruling helps plaintiff Beth Smiles?

Answer: The judge reduces Coastal's depositions to only ten. Coastal's attorney decides not to depose Craig Bergson, who in fact had a discussion with Tony Caruso that may have indicated

suicide. If Coastal never learns of that fact through discovery, it is (for legal purposes) as though it never occurred.

Question: If Coastal learned of Bergson's story after it settled the case or lost at trial could it re-open the lawsuit on the grounds it had new information?

Answer: Not if the new information was discoverable during discovery, which this was.

Case: *Stinton v. Robin's Wood, Inc.*[4]

Facts: Ethel Flanzraich, 78 years old, slipped and fell on property owned by Robin's Wood and broke her left arm and left leg. Flanzraich sued, claiming Robin's Wood employee, Anthony Monforte, had negligently painted the stairs on which she fell. Robin's Wood denied the allegations.

The parties agreed to hold depositions on August 4. Flanzraich appeared for the deposition but Robin's Wood did not furnish Monforte or any other Robin's Wood representative. The court ordered the deposition of Monforte and Robin's Wood for April 2. Again Robin's Wood did not produce Monforte or any other representative. On July 16, the court ordered Robin's Wood to produce its representative within 30 days. Again, no one showed for the deposition.

On August 18, Flanzraich moved to strike Robin's Wood's answer, meaning she would win by default. The company argued that it had made diligent efforts to locate Monforte and force him to appear, but that Monforte no longer worked for Robin's Wood. The trial judge granted the motion to strike. The only remaining issue was damages: Robin's Wood owed $22,631 for medical expenses, $150,000 for past pain and suffering, and $300,000 for future pain and suffering. Robin's Wood appealed.

Issue: Did the trial court abuse its discretion by striking Robin's Wood's answer?

Holding: No. The court found no merit to Robin's Wood's claim that the trial judge abused his discretion in striking its answers. Although cases should be heard on the merits whenever possible, a court may invoke a drastic remedy such as striking an answer when a parties' failure to comply with discovery is willful.

The willful nature of Robin's Wood's conduct can be inferred from the company's failure to comply with three court orders and to explain why it did not produce Monforte or any other representative. Had it produced another representative at the deposition, Flanzraich could have questioned the representative about the whereabouts of Monforte, and would have learned information regarding his location because the record indicates that Robin's Wood had such information. This conduct is especially flagrant here where Flanzraich is elderly. Any delay in the proceedings would have a particularly detrimental affect on her. Moreover, Robin's Wood failed to explain why they did not produce Monforte for deposition when he was still employed with them.

Question: What standard does the appellate court use to review the trial court's striking of Robin's Wood's answer?

Answer: The appellate court asks whether the trial court abused its discretion in striking the answer. It does not ask whether it would have itself stricken the answer on the facts of the case.

Question: Why doesn't the appellate court ask itself that question?

Answer: Our legal system grants considerable discretion to trial court judges. It is their job to oversee trials from start to finish. They deal closely with the litigants and counsel and thus the appellate court should be wary of overturning decisions.

Question: What is the result of striking Robin's Wood's answer?

Answer: Flanzraich wins.

Question: Is it fair that Robin's Wood does not get a chance to defend itself based on the actions of one employee?

Answer: Robin's Wood's loss was the result of more than just the actions of Monforte. Robin's Wood should have produced Monforte for deposition while he still worked for them. In Monforte's

[4] 45 A.D. 3d 203, 842 NYS2d 477, New York App. Div., 2007.

absence, Robin's Wood could have produced another representative from the company for the deposition, but failed to do so. By failing to produce anyone for the depositions, Robin's Wood denied Flanzraich an opportunity to enforce her rights against the company. Moreover, Robin's Wood consistently ignored the trial court's orders to comply with the deposition requests. The trial judge gave Robin's Wood many "last chances" but the company continued to be uncooperative.

Question: This is still a harsh result. Why didn't the trial judge order Robin's Wood to pay for the costs of delay, or something else less drastic than striking its answer?

Answer: While the court might have opted for such a remedy, it did not. As noted above, it is not the job of the appellate court to substitute its judgment unless the trial judge abused his discretion. Moreover, the delay in this case caused by Robin's Wood was particularly egregious given Flanzraich's age.

Summary Judgment

Summary judgment can be difficult to grasp. It is important because many cases in the text are appellate rulings on summary judgments entered by trial courts. Summary judgment makes the court focus on legal questions, not factual disputes. If there are essential facts in dispute summary judgment is not appropriate, and there must be a trial.

To illustrate, suppose that Bob and Susan meet at a church pancake breakfast, chat about Bob's Ferrari, and end up signing an agreement that Susan can buy it at the extraordinarily low price of $30,000. Bob refuses to honor the agreement, claiming he was intoxicated when he signed. Susan has 35 witnesses who swear that Bob was sober; Bob has only himself testifying that he was drunk.

Question: Susan moves for summary judgment. The ruling?

Answer: Summary judgment denied. The parties have a key factual dispute: whether Bob was drunk. It makes no difference how many witnesses are on each side. If there is *some* evidence on both sides of an essential fact question, a trial court must deny summary judgment.

Question: Suppose Bob and Susan orally agree that she can buy the car for $30,000. Bob refuses to honor the deal and she sues. Discovery indicates that Susan has 30 witnesses who will testify that the parties orally agreed to the deal. Bob has five witnesses who will testify that the parties never even orally agreed. Bob moves for summary judgment, based on the statute of frauds provision of the Uniform Commercial Code: this kind of contract (for the sale of goods over $500) must be in writing to be enforceable. The ruling?

Answer: Summary judgment granted. There is no need to decide which of the witnesses is telling the truth. Even if Susan's witnesses are convincing, she still loses. As a matter of law, the contract is unenforceable.

Case: Jones v. Clinton[5]

Facts: In 1991, Bill Clinton was Governor of Arkansas. Paula Jones worked for a state agency, the Arkansas Industrial Development Commission (AIDC). When Clinton became President, Jones sued him, claiming that he had sexually harassed her. She alleged that, in May 1991, the Governor arranged for her to meet him in a hotel room in Little Rock, Arkansas. When they were alone, he put his hand on her leg and slid it toward her pelvis, and later he lowered his trousers, exposed his penis, and told her to kiss it. Jones claimed that she was horrified, jumped up, and left. Jones remained at AIDC until February 1993, when she moved to California because of her husband's job transfer. President Clinton denied all of the allegations. He also filed for summary judgment, claiming that Jones had not alleged facts that justified a trial. Jones opposed the motion for summary judgment.

Issue: Did Jones make out a claim of sexual harassment?

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[5] 990 F. Supp. 657, 1998 U.S. Dist. LEXIS 3902 United States District Court East. Dist Ark. 1998

Holding: Summary judgment for Clinton. Jones had failed to demonstrate any tangible job detriment. She had never been downgraded in her job, and in fact had been reclassified upward. She received every merit increase for which she was eligible. A mere change in job responsibilities, with no loss of status or pay, is not a job detriment. The facts that her work station was changed, that she sometimes had nothing to do, and that she did not receive flowers on Secretary's Day do not add up to a federal claim of sexual harassment.

Note: As Jones's appeal of this decision was pending, the parties settled. Without acknowledging any of the allegations, Clinton agreed to pay Jones $850,000 to drop the suit.

Question: The court seems to regard Jones's allegations as trivial. In fact, hasn't she alleged disgusting behavior by her employer? How can the court regard her claims so lightly?

Answer: This gets to the essence of summary judgment. The judge does indicate that the alleged behavior, if it occurred, was crude and revolting. *That is not the issue*. The judge is saying that it is not her job to decide whether this behavior–assuming it occurred–was offensive. It is the judge's job to decide something else.

Question: What *is* the judge obligated to decide?

Answer: Whether the alleged behavior constituted sexual harassment. Nothing more.

Question: Doesn't summary judgment mean that there will be no trial?

Answer: Yes, that is exactly what it means.

Question: How can a judge decide whether there was sexual harassment without holding a trial? We do not know whether Clinton did these things or not.

Answer: Summary judgment means that *it does not matter whether he did them, because even if did, plaintiff loses.* The purpose of a trial is to find the facts. The judge is telling us there is no need to do that, because even if Jones proved everything she alleged, she still would fail to make out a case of sexual harassment.

Question: What is missing from Jones's allegations?

Answer: A claim of a significant job loss. If she had claimed that following the alleged encounter with Clinton she had been fired, demoted, or denied normal benefits, she would have made out a claim of harassment and could have proceeded to trial. Without such an allegation, she has no case.

Trial

Adversary System

Our system of justice assumes that the best way to bring out the truth is for both sides to "go at" the various witnesses, enabling a neutral factfinder (judge or jury) to detect the truth. A full demonstration of examination and cross-examination in the classroom may take up too much class time. The following exercise permits an interesting glimpse at one vital part of the process.

Role Play: Who Is Telling the Truth?

Have a dozen students (the jury) leave the room. Then ask two students to read this dialogue:

Jack: So, Kate, I understand you're thinking of hiring a computer consultant for your travel business?

Kate: Yeah, we probably need somebody. It's beyond us. We want someone to come in, give some advice on systems, software, all that stuff.

Jack: I did a project two months ago for another travel agency. Just about your size. They love it.

Kate: Really?

Jack: Here's what I can do. I'll come in, interview everybody, figure out what you need, recommend the hardware, set it up, install all software, and teach you how to use it. Flat fee: $20,000.

Kate: Sounds good, but it's too high for us. We couldn't go higher than $15,000.

Jack: I'll tell you what: $17,500.

Kate: I like it. I think we might do it. I'll call you for sure tomorrow.

Jack has now sued Kate, claiming that they had a deal for $17,500. Kate claims she never agreed to hire him. Prepare six students to "testify" to the jury (without any lawyers). They will simply make ad-libbed statements, but some will be lies. Jack will start by explaining the conversation; he will accurately describe the beginning but will conclude with a lie, saying that they made a firm deal for $17,500. Kate will accurately relate the conversation, and mention that the following day she decided not to hire Jack. Then four other students will briefly speak, two on behalf of Jack, and two on behalf of Kate. The two who speak for Jack will be supporting his claim that the parties had a firm deal. The two speaking for Kate will tell the truth, accurately describing what Kate and Jack said. Permit everyone a few minutes to prepare his or her statements. Then ask the "jury" to return, and hear the "evidence." See if they can tell who is speaking the truth.

Voir Dire

If students completed the **Voir Dire** research assignment, now would be a good time to discuss their conclusions as to whom they would want on a jury and why.

Question: When impaneling a jury, lawyer cannot take race, gender, ethnicity, and religion into account. What are some characteristics, other than race, gender, ethnicity, and religion, which might be important when impaneling a jury for the examples given?

Answer: Some possible answers: O.J. Simpson: whether potential jurors are football fans; whether any are graduates of U.S.C.; whether any potential jurors are themselves, or know someone who is, a victim of domestic abuse. Martha Stewart: whether potential jurors watch her show/read her magazine/own her cookbooks or other books; whether potential jurors have started their own businesses. Michael Jackson: whether potential jurors like his music or that style of music; whether potential jurors have been themselves, or know someone who has been the victim of child abuse.

During **voir dire**, the court's goal is to select an impartial panel; each lawyer, by contrast, is striving to obtain the most favorable jury possible.

Question: Is it good to allow lawyers to challenge jurors?

Answer: The theory behind **voir dire** is that it will result in an unbiased jury and the fairest possible trial. However, of course, the lawyers are there to win, and each will attempt to create a jury that is biased in favor of her client.

Question: What is the important difference between challenges for cause and peremptory challenges?

Answer: A challenge for cause is based on bias. A judge will allow a challenge for cause only when the lawyer can demonstrate that the juror will not be fair and impartial. A peremptory challenge, however, requires no showing of bias. Each lawyer is entitled to a given number of peremptories and will use them to eliminate jurors he perceives as partial to the other side.

Question: The British developed the jury, and **voir dire,** but over the past several decades they have nearly eliminated both. In Britain, there are no juries in any civil case except one of libel or police misconduct. In over 90 percent of criminal trials, there are also no juries. In the few cases that do include a jury, **voir dire** is extremely brief. A judge will typically ask potential jurors if they know or are related to either party, or perhaps if they own stock in a company that is involved. There are no other questions from the bench and none at all from the lawyers. In most cases, this results in the first 12 people being seated as jurors. Is this better or worse than the American system?

Answer: It is certainly faster. In complex American trials, it may take several days to impanel a jury; in Britain, it usually takes minutes. Those who favor the British approach also regard it as fairer. They say that the American system unfairly benefits those with enough money to research the "best case" and "worst case" juror. British juries are truly random, not "designed" by counsel. Opponents claim that British juries are neither random nor unbiased. For example, a racial bias suit heard in an all-white section of London will have an all-white jury. Some of those on the jury may

be avowed racists, yet that fact would not disqualify those jurors. They also claim that a large budget is not required to detect a hostile juror–only some common sense and a few questions.

Case: *Pereda v. Parajon*[6]

Facts: Maria Parajon sued Diana Pereda for injuring her in a car accident. During *voir dire*, Parajon's lawyer asked potential jurors: "Is there anybody sitting on this panel now that has ever been under the care of a physician for personal injuries, whether you had a lawsuit or not? In other words, you may not have had any sort of lawsuit, but you slipped and fell- you had any accidents?"

Several prospective jurors raised their hands; however, Lisa Berg, a lawyer, did not. Berg and others were seated as jurors and awarded Parajon $450,000 for medical damages and pain and suffering.

After the trial, during questioning by the judge, Berg admitted that she had been injured in a car accident, sued, and settled out of court for $4,000.

Parajon moved for a new trial but was denied. Parajon appealed.

Issue: Is Parajon entitled to a new trial based on Berg's failure to disclose her own personal injury lawsuit?

Holding: Yes. According to the court, a juror's nondisclosure warrants a new trial if (1) the information is relevant and material to jury service in the case; (2) the juror concealed the information during questioning; and (3) the failure to disclose the information was not attributable to the complaining party's lack of diligence.

Both party's lawyers may have been influenced to challenge Berg as a juror had they known about her personal injury history. Her involvement in the matter may have influenced her point of view as a juror in this case. Her failure to disclose her personal injury history precluded both counsels from examining her further on this point.

Berg is a lawyer. It is clear that she concealed this information despite Parajon's lawyer's diligent inquiry.

Question: If Parajon won the trial and was awarded $450,000 why would she move for a new trial?

Answer: In this case, Parajon was sitting on a bench at a bus stop when Pereda, who was driving a van for her employer, swerved to miss another car making a U-turn, and hit Parajon. The jury did not find Pereda's employer liable, nor the driver making the U-turn; it found Pereda solely liable for Parajon's injuries. Although it is not clear in the case, one possible reason Parajon moved for a new trial was to try again to impose liability on the other driver and the employer. With more defendants liable for her damages, there is a greater likelihood they can pay the damage amount than Pereda alone. Pereda joined in Parajon's motion for a new trial based on juror nondisclosure.

Question: Does that mean because one juror did not answer a question truthfully, both parties have to pay to try the case again?

Answer: Yes it does.

Question: Is there anything the parties can do to the juror? Can they sue her for lying during *voir dire*?

Answer: The parties cannot sue Berg for lying during *voir dire*. But, potential jurors are under oath when they answer *voir dire* question, so presumably, if a juror lied she could be charged with perjury.

[6] 957 So.2d 1194, Florida Court of Appeals, 2007.

Appeals

Additional Case: Hernandez v Montville Township Board of Education[7]

Facts: Victor Hernandez had worked for more than 20 years as a custodian at a public power plant and had received training in health and safety rules from the Occupational Safety and Health Administration (OSHA). He took a second job as night custodian at an elementary school. Shortly after he started work, the school board fired him for alleged poor job performance. Hernandez sued, claiming that the board fired him in retaliation for reporting health and safety code violations. The jury awarded Hernandez damages for lost wages and emotional distress but the trial judge granted judgment notwithstanding the verdict (JNOV). The trial judge stated:

> "Talk about trivial. By the time the jury went out, I should have concluded that the plaintiff simply had not made out a case, under the CEPA law, because he never disclosed or threatened to disclose to his supervisor an activity, policy, practice of an employer that the employee reasonably believed was in violation of law or a rule. There simply was none. In addition to that, there isn't any other evidence adduced by anyone in the case that these things that he's complaining about ever occurred. I didn't believe anything [plaintiff] said. [This is] trivialization beyond belief."

Hernandez appealed.

Issue: Did the trial court err by rejecting punitive damages, or by granting the JNOV?

Holding: Judgment NOV reversed and jury's verdict on compensatory damages reinstated. Plaintiff knew there were regulations and policies against exposing schoolchildren to urine and feces and against unlit exit signs, particularly in an elementary school setting. Contrary to the court's finding in granting JNOV, it is irrelevant to plaintiff's CEPA claim whether there was independent corroboration of the overflowing toilets. Under the JNOV standard the court must accept as true plaintiff's testimony, which the jury clearly found credible.

There was ample evidence in the record for the jury to conclude defendant's proffered reason for termination was a pretext and that the whistleblowing itself was a substantial factor in the termination. It was error for the court to substitute its judgment for that of the jury and reverse the jury verdict.

There was sufficient evidence to submit the punitive damage claim to the jury. Based upon the compensatory damage verdict, it appears that the jury agreed.

Question: What did the jury think about Hernandez's claim?

Answer: The jury ruled in favor of Hernandez, awarding him almost $200,000 in damages.

Question: Then why did the trial judge conclude that Hernandez was entitled to nothing?

Answer: The trial judge thought there was no substance to Hernandez's claim because he introduced no evidence that he reported health and safety violations to his supervisors.

Question: Why does a trial judge have the power to ignore a jury's decision?

Answer: The rules of civil procedure give a trial judge to enter a judgment NOV, or a judgment notwithstanding the verdict. The purpose of this rule is to give trial judges the power to ignore jury verdicts that are not based on the evidence.

Question: Did the jury's verdict in this case fail to rest on the evidence?

Answer: Not according to the appellate court. It stated that the trial judge ignored the standard for viewing evidence in a judgment NOV?

Question: What is that standard?

Answer: In considering the judgment NOV the trial judge should have accepted Hernandez's testimony as true. Instead, the trial judge concluded that Hernandez was not believable.

Question: Isn't this appeals court substituting its own judgment for that of the trial judge?

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[7] 354 N.J.Super.467, 808 A.2d 128, Superior Court of New Jersey, Appellate Division, 2002

Answer: No. The appellate court is insisting that the jury's verdict be reinstated. A trial court should use its power to enter judgment NOV sparingly. Juries have great latitude in assessing credibility and damages and courts should respect their decisions unless they have no basis on the evidence.

Alternative Dispute Resolution

Types of ADR

Negotiation

The parties discuss the issues directly or through lawyers; the parties remain in control of the outcome.

Mediation

A neutral third party guides the disputing parties toward a voluntary settlement. The use of mediation may be court-ordered or voluntary.

Arbitration

A neutral third party guides the disputing parties to discuss their cases, then renders a decision which is binding on both parties. The use of arbitration may be court-ordered or voluntary.

Example: Mandatory Arbitration

This exercise examines the risks and benefits of mandatory alternative dispute resolution (ADR) in an employment contract for a hypothetical company, FacTree. Students should consider these facts and discuss the benefits and risks for the company and for employees.

FacTree manufactures artificial trees and flowers. There are about 100 workers who do the routine assembly work for pay ranging from $8 per hour to $15 per hour. They work in two shifts. There are about a dozen supervisors who oversee their work. In the past few years there have been five employment lawsuits: three concerned sexual harassment and two concerned discrimination in promotion. All five settled before trial. For three of the suits the company's attorney fees were over $50,000 per suit. For one of the claims, the company paid $250,000 in damages to the employee. The company is considering mandatory ADR for all employment disputes. What are the benefits for each side?

From the Company's Perspective:

- Quicker decisions. Managers will spend less time in discovery and trial preparation. Employees *may* have less ability to sustain vexatious litigation (though they may be able to *file* such claims even more easily).
- Reduced attorney fees.
- Reduced discovery. Unhappy employees will be allowed to see very few company documents concerning internal investigations of supervisors; other related claims of harassment or discrimination; employment statistics concerning gender, race, age, etc., and intra-company memoranda.
- No class actions. The stakes may rise dramatically in a class action because the defendant faces with much greater exposure. This in turn may give the plaintiff class greater bargaining leverage.

From the Employees' Perspective:

- Reduced cost of bringing claims. In a lawsuit, the plaintiff must first convince an attorney to accept the case on a contingent-fee basis, or else pay a large hourly rate. With ADR, the employee can either perform the work herself, or hire a lawyer whose hours will be greatly reduced.

- Quicker decisions. A lawsuit may drag on for several years, including discovery, trial, and appeal. Before the decision is final, the employee may abandon the case and the job. With ADR, management will have less opportunity to "club" an employee into settlement by dragging out a lawsuit.
- Amicable settlement. ADR may increase the chance of an informal, amicable decision. The parties *may* stop thinking in terms of "win-lose," and strive for a rational compromise.
- Less bargaining power. The inability to bring class actions, engage in pre-trial discovery, or obtain orders enforceable by a court decreases the ability of employees to change the employment relationship.

Multiple Choice Questions

1. The burden of proof in a civil trial is to prove a case _____. The burden of proof rests with the _____.

   (a) beyond a reasonable doubt; plaintiff
   (b) by a preponderance of the evidence; plaintiff
   (c) beyond a reasonable doubt; defendant
   (d) by a preponderance of the evidence; defendant
   Answer: B

2. Alice is suing Betty. After the discovery process, Alice believes that no relevant facts are in dispute, and that there is no need for a trial. She should move for a…

   (a) judgment on the pleadings
   (b) directed verdict
   (c) summary judgment
   (d) JNOV
   Answer: C

3. Glen lives in Illinois. He applies for a job with an Missouri company, and he is told, amazingly, that the job is only open to a white applicant. He will now sue the Missouri company under the Civil Rights Act, a federal statute. Can Glen sue in federal court?

   (a) Yes, absolutely
   (b) Yes, but only if he seeks damages of at least $75,000. Otherwise, he must sue in a state court.
   (c) Yes, but only if the Missouri company agrees. Otherwise, he must sue in a state court.
   (d) No, absolutely not. He must sue in a state court.
   Answer: A

4. A default judgment can be entered if which of the following is true?

   (a) A plaintiff presents her evidence at trial and clearly fails to meet her burden of proof
   (b) A defendant loses a lawsuit and does not pay a judgment within 180 days.

(c) A defendant fails to file an answer to a plaintiff's complaint on time

(d) A citizen fails to obey an order to appear for jury duty

Answer: C

5. Barry and Carl are next door neighbors. Barry's dog digs under Carl's fence and does $500 damage to Carl's garden. Barry refuses to pay for the damage, claiming that Carl's cats "have been digging up my yard for years."

   The two argue repeatedly, and the relationship turns frosty. Of the following choices, which has no outside decision maker and is most likely to allow the neighbors to peacefully coexist after working out the dispute?

   (a) Trial

   (b) Arbitration

   (c) Mediation

   Answer: C

Essay Questions

1. You plan to open a store in Chicago, specializing in rugs imported from Turkey. You will work with a native Turk who will purchase and ship the rugs to your store. You are wise enough to insist on a contract establishing the rights and obligations of both parties and would prefer an ADR clause. But you do not want a clause that will alienate your overseas partner. What kind of ADR clause should you include, and why?

   Answer: Yes. Try blending ADR mechanisms. Have the ADR clause state that in the event of a dispute, the parties will negotiate it in good faith, and take no further steps for 30 days. If negotiation fails, an additional 30-day cooling-off period follows. The next step could be a mini-trial in front of three people, two of whom represent the parties, respectively, and the third acts as a neutral mediator. Finally, if the mini-trial fails to produce a settlement, the parties will hire an arbitrator. You might require that the arbitrator be a national of neither Turkey nor the United States. You must specify the law to be applied and where the arbitration will take place. List any claims that are not arbitrable, such as antitrust or securities claims. This should preserve a working relationship while ensuring that disputes will be settled rapidly.

2. Which court(s) have jurisdiction as to each of these lawsuits – state or federal? Explain your reasoning with each.

   (a) Pat wants to sue his next-door neighbor, Dorothy, claiming that Dorothy promised to sell him the house next door.

   (b) Paula, who lives in New York City, wants to sue Dizzy Movie Theatres, whose principal place of business is Dallas. She claims that while she was in Texas on holiday, she was injured by their negligent maintenance of a stairway. She claims damages of $30,000.

   (c) Phil lives in Tennessee. He wants to sue Dick, who lives in Ohio. Phil claims that Dick agreed to sell him 3,000 acres of farmland in Ohio, worth over $2 million.

   (d) Pete, incarcerated in a federal prison in Kansas, wants to sue the United States government. He claims that his treatment by prison authorities violates three federal statutes.

   Answer:

(a) The state trial court of general jurisdiction may hear the case. There is no federal court jurisdiction.
(b) The general trial court of Texas, only. There is no federal court diversity jurisdiction because the money sought is less than $75,000.
(c) Ohio's general trial court has jurisdiction. United States District Court has concurrent jurisdiction, based on diversity. The parties live in different states and the amount in question is over $75,000.
(d) United States District Court has federal question jurisdiction, based on the federal statutes at issue. The general trial court of Kansas has concurrent jurisdiction.

3. British discovery practice differs from that in the United States. Most discovery in Britain concerns documents. The lawyers for the two sides, called solicitors, must deliver to the opposing side a list of all relevant documents in their possession. Each side may then request to look at and copy those it wishes. Depositions are rare. What advantages and disadvantages are there to the British practice?

   Answer: Discovery is more efficient in Britain, since the solicitors are honor-bound to notify of relevant documents. The fighting over discovery motions that drains time and money in the United States is uncommon there. However, the absence of depositions means that the parties go into court with less information about the opponent's case, making trials more open to surprise.

4. Trial practice also is dramatically different in Britain. The parties' solicitors do not go into court. Courtroom work is done by different lawyers, called barristers. The barristers have very limited rights to interview witnesses before trial. They know the substance of what each witness intends to say but do not rehearse questions and answers, as in the United States. Which approach do you consider more effective? More ethical? What is the purpose of a trial? Of pre-trial preparation?

   Answer: The purpose of a trial is to learn the facts, and apply the law to them. Because the Anglo-American trial system is adversarial, both sides certainly need some opportunity to prepare. However, at some point, trial preparation may turn into the scripting and rehearsal of a "show," designed to manipulate the factfinder. In the American system, the greatest danger is that the trial attorneys, who know the law and understand how juries often react, will simply tell the witnesses what to say. Legally and ethically, they are not entitled to do so, but realistically there is a fine line between rehearsing direct examination and writing dialogue. The British system prevents the barristers from preparing the witnesses and may reduce the opportunity for dishonest "script writing." Advocates of the American system might respond that putting on effective direct examination is so difficult that the parties deserve every opportunity they can get to prepare a cohesive, comprehensible series of questions.

5. Claus Scherer worked for Rockwell International and was paid over $300,000 per year. Rockwell fired Scherer for alleged sexual harassment of several workers, including his secretary, Terry Pendy. Scherer sued in United States District Court, alleging that Rockwell's real motive in firing him was his high salary.

   Rockwell moved for summary judgment, offering deposition transcripts of various employees. Pendy's deposition detailed instances of harassment, including comments about her body, instances of unwelcome touching, and discussions of extramarital affairs. Another deposition, from a Rockwell employee who investigated the allegations, included complaints by other employees as to Scherer's harassment. In his own deposition, which he offered to oppose summary judgment, Scherer testified that he could not recall the incidents alleged by Pendy and others. He denied generally that he had

sexually harassed anyone. The district court granted summary judgment for Rockwell. Was its ruling correct?

Answer: Yes. The court of appeals affirmed. *Scherer v. Rockwell International Corp.*, 975 F.2d 356, 1992 U.S. App. LEXIS 22080 (7th Cir. 1992). "When questioned about the specific instances of sexual harassment, he did not deny that the incidents occurred, but instead stated that he could not recall. In other sections of his deposition, he stated that he generally denied having sexually harassed any coworker. . . Scherer may not defeat Rockwell's properly supported summary judgment motion without offering any evidence from which a jury could determine that the alleged sexual harassment did not actually occur and by merely asserting that the jury might disbelieve Rockwell's witness because of Rockwell's motive and desire to get out of the contract."

Discussion Questions

1. In the Tony Caruso case described throughout this chapter, the defendant offers to settle the case as several stages. Knowing what you do now about litigation, would you have accepted any of the offers? If so, which ones? If not, why not?

Answer: Answers will vary.

2. The burden of proof in civil cases is fairly low. A plaintiff wins a lawsuit if he is 51% convincing, and then he collects 100% of his damages. Is this result reasonable? Should a plaintiff in a civil case be required to prove his case beyond a reasonable doubt? Or, if a plaintiff is only 51% convincing, should he get only 51% of his damages?

Answer: Answers will vary.

3. Large numbers of employees have signed mandatory arbitration agreements in employment contracts. Courts usually uphold these clauses. Imagine that you signed a contract with an arbitration agreement, that the company later mistreated you, and that you could not sue in court. Would you be upset? Or would you be relieved to go through the faster and cheaper process of arbitration?

Answer: Answers will vary.

4. Imagine a state law that allows for residents to sue "spammers" – those who send uninvited commercial messages through email - for $30. One particularly prolific spammer sends messages to hundreds of thousands of people.

   John Smith, a lawyer, signs up 100,000 people to participate in a class action lawsuit, According to the agreements with his many clients, Smith will keep 1/3 of any winnings. In the end, Smith wins a $3,000,000 verdict and pockets $1,000,000. Each individual plaintiff receives a check for $20.

   Is this a lawsuit reasonable use of the court's resources? Why or why not?

Answer: Answers will vary.

5. Higher courts are reluctant to review a lower court's factual findings. Should this be so? Would appeals be more fair if appellate courts reviewed everything?

Answer: Answers will vary.