

# CIVIL PROCEDURE

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Our casebook (hereinafter CB) is Friedenthal, et al., *Civil Procedure: Cases and Materials* (13<sup>th</sup> ed.). The page references below are to that casebook. We will often refer in class to constitutional provisions, statutes and rules, all of which are in the 2022 - 2023 supplement. You may wish to purchase the supplement. Alternatively, you can look these provisions up on line. A full syllabus, as well as powerpoints for class, is posted on Canvas.

Below are the assignments for the first four days. On each day, you are asked to read subsections from the Survey along with the relevant cases.

## **Class One:**

I. Read and absorb the introduction and subsections 1 and 2 in the first chapter of the casebook, CB 1-11 (in the chapter entitled Survey of a Civil Action).

II. Read carefully **Capron v. Van Noorden, (page 29 of the CB) and Tickle v. Barton, (page 31 of the CB).**

## **Class Two:**

- I. Read and absorb the textual material beginning with subsection 3 (Pleading and Parties) through subsection 4 (The Response). (This material is on pp. 11-14 in the CB)
- II. Read **Temple v. Synthes, (p. 40 of the CB)**

## **Class Three:**

- I. Read and absorb the textual material beginning with subsection 5 (Obtaining Information Before Trial) through Subsection 6 (Summary Judgment).
- II. Read **Alderman v. Baltimore & Ohio, (p. 46 of the CB)**

## **Class Four:**

- I. Read and absorb the textual material from the Survey beginning with Subsection 7 through Subsection 14, The Conclusiveness of Judgments).
- II. Read **Rush v Maple Heights, (page 1262 of the CB).**

# A SURVEY OF THE CIVIL ACTION

This chapter provides a thematic and doctrinal framework for studying civil procedure. The materials examine how adversarial assumptions about party autonomy influence the design of judicial procedures. They also explore the ways in which adversarial decision-making differs from other methods of resolving disputes. Another theme we consider is that of federalism: the relation between the federal government and its national court system, and that of the states and their separate judicial systems. The materials then offer a nuts-and-bolts picture of a civil action, tracing a lawsuit from its commencement and the service of the summons to the entry of judgment and subsequent appeals. As you read these materials, keep in mind the historical context of your studies. Procedural doctrine dates back to medieval times, and its evolution reflects changes in social, economic, and political conditions. Likewise, changes in procedure have influenced public expectations about important concepts such as fairness, participation, and justice. The materials invite you to take a critical view of civil procedure and to ask how the rules and doctrine that you are studying can be improved.

## A. THE CONCERN AND CHARACTER OF CIVIL PROCEDURE

Courts exist to provide a decision “by an agent of state power, [of] a controversy existing between two individuals (or the State and an individual), by rational (not merely personal) considerations, purporting to rest on justice and law (i.e. the community’s general sense of order).” Wigmore, *The Judicial Function*, in *Science of Legal Method* xxvi, xxviii (1917). Although this definition contains some question-begging elements that need definition themselves, it provides a starting point for understanding the United States judicial system. For now, it will suffice to recognize the following points about courts:

- (1) The judicial process deals with actual controversies between real parties and also helps to express abstract values for society.
- (2) Courts draw on public power to resolve controversies.
- (3) This resolution proceeds not arbitrarily but according to some standards of general application.

- (4) These standards are applied in a proceeding that follows some fixed lines set out by a system of rules known as procedure.

In resolving the legal disputes that are presented, courts apply two types of law—*substantive* and *procedural*. Other courses (such as Torts and Contracts) deal with the substantive rights and duties that regulate everyday relationships. This course, by contrast, will explore the procedures used by courts to resolve disputes about those substantive rights and duties. Our focus will be on how attorneys in the United States frame their cases in order to bring them properly before a particular court, and how the case proceeds from its commencement until a judgment is reached and enforced.

It is interesting but sometimes frustrating that the line separating the substantive law from the procedural law is not clear in every instance. Certainly a requirement that all papers filed with a particular court be on 8½ by 14-inch paper is a procedural rule. Equally certain is that the elements of the law of assault and battery are substantive. But not every legal rule can be so easily classified. For example, a statute of limitations (which determines the length of time a party has to sue on a claim) may appear at first glance to be purely procedural. But upon closer examination, it becomes clear that the length of a jurisdiction's statute of limitations is as much a product of public policy, and will affect the plaintiff's ability to recover, as any purely "substantive" provision of the jurisdiction's law. As a student of civil procedure, keep your eye on the substance-procedure dichotomy, but also remain wary of its rigid application.

This course deals with the procedural questions presented in civil suits; the aspects of criminal suits will not concern us. The principal difference between civil and criminal suits is that the former generally are initiated and litigated by private parties attempting to vindicate their legal rights vis-à-vis other private parties. The community thus is seeking to provide a method for resolving the disputes that arise out of private relations, which include commercial and personal interactions. Criminal suits are instituted and prosecuted by the government (on behalf of "the People") in an effort to punish those individuals whose conduct has violated the community's moral judgments as expressed in its penal law. Government involvement, however, is not always an indicator of a criminal suit since the government often is a party to civil suits (for example, when an agency brings an action to enforce regulations), and can be either a plaintiff or a defendant.

The most distinctive element of our procedure for resolving legal controversies is the *adversary system*. The central feature of this system is the almost total responsibility placed on the parties to the controversy for beginning suit, for shaping the issues, and for presenting evidence. The judge who presides over the proceeding is conceptualized as that of a passive umpire. By contrast, the courts in civil law countries employ what

traditionally was known as an *inquisitorial system*, although that term has fallen out of use as obscuring, rather than clarifying, important features. Under this model, the court conducts an active and independent inquiry into the merits of each case, which may include having the judge question and examine witnesses, as well as order certain fact finding.

It has been argued that the trend in the United States is toward increasing the affirmative or active functions of the court. This is evidenced by the participation of the judge as an active case manager with respect to such matters as pretrial discovery and the settlement process. Nonetheless, primary responsibility for and control of almost all phases of the adversarial proceeding still remain with the parties.

Despite criticisms of the adversary system, this mode of decision-making continues to exist in many parts of the world. Four explanations typically are put forward to explain its perseverance:

- (1) A truer decision is reached as the result of a contest directed by interested parties.
- (2) The parties, who after all are the ones principally interested in the controversy's resolution, should bear the major burden of the time and energy required.
- (3) Although impartial investigation may be better when no final decision need be reached, setting up sides makes easier the type of yes-or-no decision that is thought to be necessary in most lawsuits.
- (4) Since resort to law has replaced the resort to force that characterized primitive ages, the atavistic instinct to do battle is better satisfied by a means of settling disputes that is very much in the hands of the parties.

When one reflects on the fact that the adversary system often means that victory will turn on considerations other than the justice or true merits of the cause, there is reason to believe that we have permitted it to assume an exaggerated place in our civil dispute resolution scheme. But the system remains and its presence will color every facet of this course. Full understanding of the materials in this book will require your constant attention to its existence, as well as critical analysis of its shortcomings.

What is the test of a good system of procedure? One answer is: *Does it tend to lead to the just and efficient determination of legal controversies?* In this regard, recognize that although this course is only an introduction to United States civil procedure, do not assume that your function is to digest uncritically the law you read. Instead, this course will play an integral part in your process of learning to examine, to question, and “to wash in cynical acid” each rule, each form, and each principle you learn. While doing so,

keep in mind that the values informing a system of procedure are many, diverse, and complex.

### NOTES AND QUESTIONS

1. What are the values that ought to guide a system of civil procedure? The passages that follow offer different views on this issue.

**(a) Solum, *Procedural Justice*, 78 S.Calif.L.Rev. 181, 321 (2004).**

The Participation Principle requires that the arrangements for the resolution of civil disputes be structured to provide each interested party with a right to adequate participation. The Accuracy Principle requires that the arrangements for the resolution of civil disputes be structured to maximize the chances of achieving the legally correct outcome in each proceeding. Together, the two principles provide guidance where guidance is needed, both for the architects of procedural design and reform and for judges who apply general procedural rules to particular cases.

**(b) Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights—Part I*, 1973 Duke L.J. 1153, 1172–73 (footnotes omitted).**

*Dignity values* reflect concern for the humiliation or loss of self-respect which a person might suffer if denied an opportunity to litigate. *Participation values* reflect an appreciation of litigation as one of the modes in which persons exert influence, or have their wills “counted,” in societal decisions they care about. *Deterrence values* recognize the instrumentality of litigation as a mechanism for influencing or constraining individual behavior in ways thought socially desirable. *Effectuation values* see litigation as an important means through which persons are enabled to get, or are given assurances of having, whatever we are pleased to regard as rightfully theirs.

**(c) Posner, *Economic Analysis of Law* § 22.1 (9th ed. 2014).**

The objective of a procedure system, viewed economically, is to minimize the sum of two types of cost. The first is the cost of erroneous judicial decisions. Suppose the expected cost of a particular type of accident is \$100 and the cost to the potential injurer of avoiding it is \$90 (the cost of avoidance by the victim, we will assume, is greater than \$100). If the potential injurer is subject to either a negligence or a strict liability standard, he will avoid the accident—assuming the standard is administered accurately. But suppose that in 15 percent of the cases in which an accident occurs, the injurer can expect to avoid liability because of erroneous factual determinations by the procedural system. The expected cost of the accident to him will fall to \$85, and since this is less than the cost of avoidance to him

(\$90), the accident will not be prevented. The result will be a net social loss of \$10—or will it?

We must not ignore the cost of operating the procedural system. Suppose that to reduce the rate of erroneous failures to impose liability from 15 percent to below 10 percent that would require an additional investment in procedure of \$20 per accident. Then we should tolerate the 15 percent of probability of error, because the cost of error (\$10) is less than the cost necessary to eliminate it (\$20).

The author goes on to ask, “What if the purpose of the substantive rule in question is not to improve efficiency? In what sense could we still speak of the goal of procedure as being the minimization of the sum of error and direct costs?” *Id.*

Is it clear that all of the values identified can be incorporated in a single procedural system? Will accommodation inevitably lead to tradeoffs? See Morrison, *The Necessity of Tradeoffs in a Properly Functioning Civil Procedure System*, 90 Or.L.Rev. 993 (2012). If there must be tradeoffs, how should they be determined and by whom? By the legislature? The parties? The courts? See Sward, *Values, Ideology and the Evolution of the Adversary System*, 64 Ind.L.J. 301, 303 (1988/1989). And should these tradeoffs be done on a case-by-case basis or through a formal process of rulemaking? See Mulligan & Staszewski, *The Supreme Court’s Regulation of Civil Procedure: Lessons from Administrative Law*, 59 UCLA L.Rev. 1188 (2012).

2. Judicial decision-making often is said to serve two distinct but interrelated social goals. The first goal is that of conflict resolution—“in the interests of preserving the peace, society offers through the courts a mechanism for the impartial judgment of personal grievances, as an alternative to retaliation or forcible self-help.” The second goal is that of behavior modification—“courts and civil process [serve] as a way of altering behavior by imposing costs on a person. Not the resolution of the immediate dispute but its effect on the future conduct of others is the heart of the matter.” Scott, *Two Models of the Civil Process*, 27 Stan.L.Rev. 937, 937–38 (1975).

3. Studies show that a losing party’s acceptance of an unfavorable judgment often turns on a perception that the court reached its decision through a fair process. A leading commentary links the concept of fair process (sometimes called procedural fairness) with four principles: “voice,” or the opportunity to present one’s own side of a story; “neutrality,” or the decision-maker’s lack of bias and adherence to rules; “respect,” or the system’s treatment of the participants as important and valued, regardless of their social or economic status; and “trust,” or the view that the court system is serving a public function and is committed to its mission. Tyler, *Procedural Justice and the Courts*, 44 Ct.Rev. 26, 28–31 (2007–2008); see Thibaut & Walker, *A Theory of Procedure*, 66 Calif.L.Rev. 541 (1978). Should the court’s process differ depending on the substantive law underlying the dispute? See West, *The Limits of Process*, in *Getting to the Rule of Law: Nomos L*, 32–51 (Fleming ed. 2011).

4. In *Avista Mgmt., Inc. v. Wausau Underwriters Ins. Co.*, 2006 WL 1562246 (M.D. Fla. 2006), the parties could not agree on where to hold a deposition and sought the court's intervention. In response, the judge ordered the parties to meet on the front steps of the courthouse and to "engage in one (1) game of 'rock, paper, scissors.'" The winner would select the deposition's location and the loser could appeal the decision to the court. Was it appropriate to use a children's game to resolve the parties' disagreement? What if the court had ordered the parties to draw lots? See Brown, *Casting Lots: The Illusion of Justice and Accountability in Property Allocation*, 53 *Buff.L.Rev.* 65 (2005).

## B. AN OUTLINE OF THE PROCEDURE IN A CIVIL ACTION

Lawsuits do not begin by themselves. Someone must first decide to sue someone else. If this decision is made intelligently, the person choosing to sue must have weighed several matters, among which at least three are basic. These three considerations are first, whether legal relief is available; second, what the probability of winning a lawsuit is; and third, whether what would be won is worth the burden of litigating.

A potential litigant obviously feels aggrieved or would not be thinking of a lawsuit, but before litigating must first consider whether the grievance is one for which the law furnishes relief. There are a great many hurts a person may feel that the law will not redress. A home owner is offended by the paint on a neighbor's house; a manufacturer has worked for weeks to persuade a distributor to buy a brand of software and sees the sale go to a competitor; a property owner has been holding a plot of ground for speculation, expecting industry to move in, and the area is zoned for residential use; a visitor slips on a spot of grease in the county courthouse but the county is immune from suit. A potential litigant often must consult an attorney before deciding whether there is a case to be litigated.

Even if the grievance is one for which the courts will grant relief, a potential litigant secondly must consider the probability of winning a lawsuit. The answer turns on a number of factors: whether the person who has caused the injury can be found and brought into court; whether witnesses and documents will be available to support the claims being sued on; whether this proof will be believed; whether the potential adversary can justify its conduct or establish any defenses to the action; and whether an accurate assessment of the law can be made ahead of time.

Thirdly, and perhaps most importantly of all, a potential litigant must consider whether what is won will be worth the time, the effort, and the expense that litigating it will cost. Most significantly, this includes the payment of fees to an attorney who provides representation in the case. In the United States, each litigating party typically bears the full costs of these attorney's fees—this is called the American Rule. These fees are calculated in several ways: by time (at an hourly rate); fixed (the attorney

sets the fee prior to providing the services); task-based (the attorney charges a fee based on the nature of the tasks provided to the client); or on contingency (the attorney is paid a portion of the ultimate judgment awarding money damages or settlement). By contrast, the more widely accepted “English Rule” requires the losing party to pay the attorney’s fees of the prevailing party. Congress has enacted “fee-shifting” statutes that require the losing party to pay the attorney’s fees of the prevailing party in certain kinds of cases, such as antitrust and civil rights, and many states have enacted similar provisions. The purpose of these statutes is to create incentives for individuals to initiate lawsuits in a role described as that of “private attorneys general.” See Maxeiner, *Cost and Fee Allocation in Civil Procedure*, 58 Am.J.Comp.L. 195, 201 (2010). A prospective litigant must weigh the costs of a lawsuit against other possibilities, among them settlement, arbitration, self-help, and letting matters rest.

Further, attention must be given to the form that the relief will take. Most frequently it will be restricted to a judgment for damages. The potential litigant thus needs to consider whether the injury is one for which a monetary payment will be satisfactory. Assuming it is, will defendant be rich enough to pay? How difficult will a judgment be to collect? How expensive? Will the recovery be enough to pay the lawyer’s fees and the other litigation expenses that undoubtedly will be incurred? Even in a context in which the court may grant specific relief—for example, an order directing the opposing party to do something or to stop doing something—will compliance by defendant be possible? Worthwhile? Sufficient? In the same vein, a potential litigant must consider whether there are risks not directly tied to the suit. Will filing a lawsuit antagonize people whose goodwill plaintiff needs? Will the action publicize an error of judgment on plaintiff’s part or open private affairs to public gaze?

Only after considerable thought about the utility and expense of litigation will the prospective plaintiff be ready for the steps that must be taken to bring a lawsuit. Let us now consider these steps in the light of a relatively uncluttered hypothetical case:

Aikin, while crossing the street in front of her private home, was struck and seriously injured by an automobile driven by Beasley. On inquiry, Aikin found that the automobile was owned by Cecil and that Beasley apparently had been in Cecil’s employ. Beasley was predictably without substantial assets and a judgment against him for Aikin’s injuries promised little material compensation. But Cecil was wealthy, and Aikin was advised that if she could establish that Beasley had indeed been working for Cecil and had been negligent, she then could recover from Cecil. Aikin decided to sue Cecil for \$500,000.

## 1. SELECTING A PROPER COURT

Aikin initially must determine in which court to bring the action. She might have some choice between filing her lawsuit in a state or a federal court, but her choice is not open-ended. This is because the court selected must have *jurisdiction over the subject matter* (that is, the constitution and statutes under which the court operates must have conferred upon it power to decide this type of case) and also must have *jurisdiction over the person* of Cecil (that is, Cecil must be subject or amenable to suit in the state in which the court is located so that a judgment may be entered against him).

Aikin probably will bring suit in a state court, for the subject-matter jurisdiction of the federal courts is severely limited. If the court organization of Aikin's state is typical, there will be courts of original jurisdiction in which cases are brought and tried, and one court of appellate jurisdiction that sits, with rare exceptions, only to review the decisions of lower courts. (In most states, there also will be a group of intermediate courts of appellate jurisdiction.) The courts of original jurisdiction probably consist of one set of courts of general jurisdiction and several sets of courts of inferior jurisdiction. "General" in this sense refers to a court's power to decide any type of dispute that comes before it, as distinguished from jurisdiction that is limited to specific kinds of disputes.

Typically, a state's courts of general jurisdiction are organized into geographic districts comprising for the most part several counties, although the largest or most populous counties each may constitute single districts. These district courts hear cases of many kinds and are competent to grant every kind of relief, but usually are authorized to hear claims for which the relief requested exceeds a statutorily fixed dollar amount. The courts of inferior jurisdiction include municipal courts, which have jurisdiction resembling that of the district courts except that the claims are of smaller financial significance; justice-of-the-peace courts, which hear very minor matters; and specialized tribunals such as traffic courts. Since Aikin's injuries are quite serious and her claim is correspondingly large, she will, if she sues in a state court, bring the action in one of the district courts.

The federal government also operates a system of courts. The principal federal courts are the United States District Courts, courts of original jurisdiction of which there is at least one in every state; the United States Courts of Appeals, each of which reviews the decisions of federal District Courts in the several states within its circuit (with the exception of the Courts of Appeals for the District of Columbia Circuit and the Federal Circuit); and the Supreme Court of the United States, which has discretionary authority to review the decisions of federal courts and decisions of state courts that involve an issue of federal law.

The jurisdiction over the subject matter of the United States District Courts extends to many, but by no means all, cases involving federal law, and also to many cases, similar to Aikin's, that do not involve federal law; the latter are cases in which there is *diversity of citizenship* (the parties are citizens of different states or one of them is a citizen of a foreign country) and the required *amount in controversy* (currently more than \$75,000) is at stake. Diversity jurisdiction, in common with jurisdiction to hear cases arising under federal law, is not exclusive to the courts of the federal system. Rather, the state courts also are competent to hear these cases and have concurrent jurisdiction with the United States District Courts unless Congress has made jurisdiction exclusive to the federal courts. If Cecil is not a citizen of Aikin's state, Aikin may bring an action for \$500,000 in a federal court even though it asserts only state law claims. Indeed, in these circumstances, if Aikin sued Cecil in a state court in Aikin's home state, Cecil could "remove" the action from the state court in which it was commenced to the federal District Court in that state.<sup>a</sup>

It is not enough for the court selected by Aikin to have jurisdiction over the subject matter. That court, whether state or federal, also must be one in which Cecil can be required to appear so that it is appropriate for the legal system to enter a judgment against him. Traditionally, a court could enter a judgment only against a defendant who resided in the state or was physically in the state, even if temporarily. However, constitutional restrictions on a court's jurisdiction over the person have diminished in recent decades. If Cecil is not present in Aikin's state but he directed Beasley to drive there, Aikin probably will be able to bring the action in that state because of Cecil's prior contact with the state and the benefits that those contacts have brought him, assuming that a statute authorizes the court to exercise personal jurisdiction in these circumstances.

Not every court that has jurisdiction over the subject matter and jurisdiction over the person of the defendant can hear the case. It also is necessary that an action be brought in a court having proper *venue*, which refers to where within the state or district the original proceeding is to be located. Thus, although every court in Aikin's state could assert personal jurisdiction over Cecil if he was within its boundaries, that state's statutes typically will provide that the case should be brought in a court in a district that includes the county in which either Aikin or Cecil lives. Similarly, if Aikin decides to sue in federal court based on diversity of citizenship, she must bring suit in a district that has venue as defined by federal statute (currently, the district in which Cecil resides, or in a district where a substantial part of the events giving rise to the claim occurred, or in a

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<sup>a</sup> If Cecil is not a citizen of Aikin's state but Beasley is, then one of the considerations Aikin will have in deciding to join Beasley as a defendant is the effect on the availability of subject-matter jurisdiction in the federal courts. If Aikin wants to be in the federal court, she should not join Beasley; if Aikin wants the lawsuit to begin and stay in a state court, she should join him. In the latter case, there will not be complete diversity of citizenship between plaintiff on the one side and defendants on the other.

district where Cecil is subject to personal jurisdiction, if there is no district in which the action otherwise may be brought).

A defect in a court's jurisdiction over the subject matter cannot be waived by the parties. If Aikin and Cecil are both citizens of the same state, a federal court must refuse to hear the action even though both are anxious that it do so. By contrast, the court's jurisdiction over the person and venue essentially are protections for defendant, who may waive them if he wishes.

## 2. COMMENCING THE ACTION

Aikin must give Cecil notice of the commencement of the action by service of process. The process typically consists of a summons, which directs defendant to appear and defend under penalty of default; that is, unless defendant answers the summons, a judgment will be entered against that party. Service refers to the delivery of the process. Service of process generally is achieved by personal service, meaning, the summons is physically delivered to defendant or is left at defendant's home, sometimes by plaintiff or her attorney, sometimes by a public official such as a sheriff or a United States marshal. If Cecil lives in another state, but the circumstances are such that a court in Aikin's state may assert personal jurisdiction over Cecil, the summons may be personally delivered to him, or some form of substituted service, such as sending the papers by registered mail or delivering the summons to Cecil's agent within Aikin's state, may be employed. Even if Cecil cannot be located, service in yet another form, usually by publication in a newspaper for a certain length of time, may be allowed, although the validity of this kind of service in the type of case Aikin is bringing against Cecil is unlikely to be upheld. The Supreme Court repeatedly has emphasized that service must be of a kind reasonably calculated to bring the action to defendant's notice.

## 3. PLEADING AND PARTIES

With the summons, Aikin usually will serve on Cecil the first of the pleadings, commonly called the complaint. This is a written statement that will contain Aikin's claim against Cecil. What should be required of such a statement? Obviously, it may vary from a simple assertion that Cecil owes her \$500,000, to a second-by-second narration of the accident, closely describing the scene and the conduct of each party, followed by a gruesome recital of Aikin's medical treatment and her prognosis for recovery. No procedural system insists upon either of these extremes, but systems do vary greatly in the detail required in the pleadings. The degree of detail required largely reflects the purposes that the pleadings are expected to serve. Three objectives are particularly relevant, and to the extent that a procedural system regards one rather than another as crucial, we may expect to find differing amounts of detail required.

First, the system may desire the pleadings to furnish a basis for identifying and separating the legal and factual contentions involved so that the legal issues—and hopefully through them the entire case—may be disposed of at an early stage. Thus, suppose that Cecil's liability for Beasley's driving depends upon the degree of independence with which Beasley was working at the time of the accident. A dispute on this issue might exist on either or both of two elements. The parties might disagree as to what Beasley's duties were, and they might disagree as to whether those duties put Beasley so much under the control of Cecil that the law will impose liability on Cecil for Beasley's actions. The first disagreement would be a question of fact, and there would be no alternative to trying the suit and letting the finder of fact (usually the jury) decide the truth. But if there was agreement on that first element, a question of law would be presented by the second issue, which could be determined by the judge without a trial. The objective of identifying the legal questions is served in such a case only if the pleadings set forth exactly what Beasley's job required him to do. It would be served very inadequately if the complaint stated only that "Beasley was driving the car on Cecil's business."

Second, the pleadings may be intended to establish in advance what a party proposes to prove at trial so that the opponent will know the factual contentions and prepare to meet them. If this objective is regarded as very important it will not be enough for the complaint to state that Beasley was negligent, or that Aikin suffered serious bodily injuries. It must be more specific and say that Beasley was speeding, or was not keeping a proper look-out, or had inadequate brakes, or describe some other act of negligence and say that Aikin suffered a concussion, or a broken neck, or fractures of three ribs, or other injuries.

Third, the pleadings may be intended to give each party only a general notice of the opponent's contentions, in which event the system would rely upon subsequent stages of the lawsuit to identify the legal and factual contentions of the parties and to enable each to prepare to meet the opponent's case. If notice is the goal, then in a suit involving a car accident, it would be sufficient for the pleading to state the date and place of the incident; to describe the incident generally (for example, "defendant negligently drove a car into plaintiff"); and, to allege injury and a demand for relief.

It seems that each of the first two objectives is desirable. It is a waste of everybody's time to try lawsuits when the underlying legal claim is inadequate to support a judgment, and it is only fair that a person called upon to defend a judicial proceeding should know what the defendant is alleged to have done. But to achieve the first objective fully may require pleading after pleading in order to expose and sharpen the issues; if detail is insisted upon, a long time may be consumed in producing it. Moreover, a single pleading oversight may eliminate a contention necessary to one

party's case that easily could have been proven, but that will be held to have been waived. To achieve the second objective through the pleadings will mean that the parties must take rigid positions as to their factual contentions at the very beginning of the case when they may not know what they will learn by the time trial begins. It also assumes that plaintiff knows most if not all of the important facts pertinent to the claim at the time of filing the complaint, which is not always the case or even possible. Either the first or second objective, if fully pursued, requires that the parties adhere to the positions taken in the pleadings. They could not be permitted to introduce evidence in conflict with the pleadings or to change them. To the extent that variances between pleading and proof or amendments to the pleadings are permitted, the objectives will be lost. The court frequently will find itself forced either to depart from these objectives or to tolerate lawsuits turning on the skill of the lawyers rather than on the merits of the controversy.

The third objective, insofar as it allows the parties to use the later stages of the lawsuit to identify and flesh out the issues in the case, avoids the problems created by trying to decide the case based only on the pleadings. However, simple notice pleading potentially may be used to harass defendant when plaintiff has no real claim. More often, though, plaintiff will use notice pleading to subject defendant to pretrial discovery (discussed more fully below), and in the process, to reveal information so that plaintiff can determine whether a bona fide claim actually exists. Lawyers often refer to such use of the pleadings as a "fishing expedition" or as a "springboard into litigation." However, if defendant controls access to the information that plaintiff needs to establish the claim, discovery may be essential for a meritorious complaint to be drafted and to avoid dismissal. One way that courts have dealt with these problems is to sanction parties and lawyers who bring baseless claims.

#### 4. THE RESPONSE

Following the service of Aikin's complaint, Cecil must respond. He may challenge the complaint by a *motion to dismiss*. This motion may challenge the court's jurisdiction over the subject matter or Cecil's person, the service of process, or venue. It also may be a *motion to dismiss for failure to state a claim or cause of action* (the older term for this motion is a demurrer). For the purpose of this motion, the facts alleged in the complaint are accepted as true, and the court considers whether, on this assumption, plaintiff has shown that she is entitled to legal relief.

There are three general situations in which such a motion might be granted. First, the complaint may clearly show that the injury is one for which the law furnishes no redress (for example, when plaintiff simply alleges that "defendant has made faces at me"). Second, plaintiff may have failed to include an allegation necessary to a part of the case (for example,

Aikin might have alleged the accident, her injuries, and Beasley's negligence, and have forgotten to allege that Beasley was Cecil's servant). Third, the complaint may be so general or confusing that the court finds that it does not give adequate notice of what plaintiff's claim is (for example, a complaint in which Aikin merely alleged, "Cecil injured me and owes me \$500,000," although complaints far more specific have fallen on this ground). The extent to which motions to dismiss will be granted on the second and third grounds will vary with the degree of detail that the particular system requires of its pleadings. A court generally has power to allow the plaintiff an opportunity to amend the pleading to cure certain kinds of defects.

If the motion to dismiss is denied, or if none is made, Cecil must file an *answer*. In this pleading, he must admit or deny Aikin's factual allegations in the complaint. Moreover, if Cecil wishes to rely on certain legal contentions called *affirmative defenses*, he must plead them in the answer. Thus, if he wishes to contend that Aikin was negligent in the manner in which she tried to cross the street and that this negligence was also a cause of the accident, he must in many states plead this in the answer; if the answer only denied the allegations in Aikin's complaint, Cecil may not advance at trial the contention that Aikin's negligence caused the accident.

There may be further pleadings, particularly a *reply* by Aikin. But the tendency today is to close the pleadings after the answer, and if Cecil has raised new matters in his answer, they automatically are taken as denied by Aikin. There is one major exception: if Cecil has a claim against Aikin, particularly one that arises out of the same occurrence being sued upon by Aikin, Cecil may plead this claim as a *counterclaim* as part of the answer. This is in essence a complaint by Cecil, and Aikin will have to respond to it just as Cecil had to respond to the original complaint.

The original action between Aikin and Cecil may expand in terms of the number of parties, and this frequently will occur at the pleading stage. For example, although Aikin decided not to sue Beasley, Cecil might *implead* Beasley, asking that Beasley be held liable to him for whatever amount he may be found liable to Aikin, since his liability depends upon Beasley having been at fault. Cecil will decide whether to do this in light of a number of practical concerns, including the effect Beasley's presence will have on the jury in Aikin's suit against Cecil.

## 5. OBTAINING INFORMATION PRIOR TO TRIAL

Pretrial discovery is the procedure currently designed to allow the parties to exchange information about their claims and defenses and to prepare for trial. At earlier periods, the pleadings served this purpose. Currently, the federal system requires the parties, without a court order or a request from the opponent, to exchange certain types of information. The

parties also then may initiate requests for information from the opponent and, in some situations, from persons who are not parties to the litigation. The chief method is to take *depositions* of parties and witnesses. In this procedure, the person whose deposition is to be taken is questioned by lawyers for each side through direct and cross-examination; the *deponent's* statements are taken down and transcribed. The device is useful in finding information that is relevant to the case, including unearthing leads as to other witnesses or documents; it also is useful in laying a basis for impeaching a witness who attempts to change his or her story at trial. The two parties almost certainly will want depositions taken of each other, as well as of Beasley; the depositions of Aikin and Cecil will be particularly important because they are treated as admissions and can be used by their adversaries as evidence at trial. In some circumstances, even the deposition of a nonparty witness who will be unavailable at trial may be used in place of live testimony.

Another device especially adapted to probing the content of an opponent's case is the written *interrogatory*, which usually may be addressed only to a party to the suit. (The availability of interrogatories may be one reason Aikin might wish to join Beasley as a defendant with Cecil or Cecil might wish to implead Beasley.) These interrogatories are answered by the party, presumably with counsel's aid, and the answers will not be as spontaneous as they would be on a deposition; on the other hand, interrogatories will require Cecil to supply some information that he does not carry in his head but can obtain, and may be even more valuable than the deposition in finding out what he will try to prove. Thus, information regarding Beasley's employment that Cecil cannot be expected to remember may best be exposed in this way.

Other discovery devices include the *production of documents*, such as the service record of Cecil's automobile, and requests for admissions, which will remove uncontested issues from the case. A particularly useful device for Cecil will be a court order directing Aikin to submit to a *physical examination* by a physician of Cecil's choice to determine the real extent of Aikin's alleged injuries.

The availability of discovery enables the parties to prepare for trial better than the pleadings ever did. Moreover, if a legal system permits broad discovery, the role of the pleadings will change. In particular, it may be senseless to make parties take rigid positions with respect to the issues at the very beginning of the lawsuit before they have had the chance to utilize these very useful devices for obtaining information. In addition, the availability of discovery does much to make summary judgment, which is discussed below, a viable and fair procedure, since it enables a party to ascertain those issues on which the opposing party has no evidence, while giving the opponent a chance to develop such evidence. On the other hand, if the costs of discovery are excessive, a defendant may be motivated to

settle a lawsuit that satisfies a weak pleading standard yet would lack sufficient proof to prevail at trial.

## 6. SUMMARY JUDGMENT

One of the basic difficulties with attempting to resolve cases at the pleading stage is that the allegations of the parties must be accepted as true for the purpose of ruling on a motion to dismiss. Thus, if the plaintiff tells a highly unlikely but plausible story in the complaint, the court cannot dismiss the action even though it does not believe the allegations or think that the plaintiff will be able to prove the tale. The pleading stage is not the time to resolve questions of fact.

However, in some cases it will be possible to supplement the pleadings with additional documents to show that an apparently decisive issue is spurious. This is done by a motion for *summary judgment*. This motion can be supported by demonstrating that the crucial issue will have to be resolved in the movant's favor at trial, because the opposing party will be unable to produce sufficient admissible evidence in support of her position on the issue. For example, suppose that it is Cecil's position that prior to the accident he had fired Beasley, but that Beasley had secretly acquired keys to Cecil's automobile and taken the car without permission shortly before the accident. On the face of the pleadings, we have only an allegation that Beasley was Cecil's employee and a denial of that allegation; thus, the pleadings seem to present a question of credibility that cannot be resolved at this stage. Cecil now moves for summary judgment, alleging that this issue is not a genuine one. He accompanies his motion with affidavits of his own and two other witnesses that he had fired Beasley; a deposition of the garage attendant indicating that he had been instructed not to allow Beasley to have the car, and that it was taken without Cecil's knowledge; and a deposition of Beasley to the effect that he had been fired, but wanted to use the car once more for his own purposes. It is now incumbent upon Aikin to show that the issue is genuine; Aikin cannot rely simply upon her own assertion that all this is not so; after all, she has no personal knowledge of the facts. Aikin must convince the court that she has admissible evidence that Beasley still was acting as Cecil's employee in driving the car at the time of the accident. If Aikin fails to do so, summary judgment will be entered against her.

It should be noted that in ruling on a summary judgment motion, the judge does not decide which side is telling the truth. If Aikin presents an affidavit of a witness who claims to have been present when Cecil allegedly fired Beasley, and says that Cecil told Beasley that this was only a subterfuge and that he wanted him to continue to work for him but to pretend to steal the car, summary judgment will not be appropriate even though the judge is firmly convinced that Aikin's affiant is lying.

## 7. SETTING THE CASE FOR TRIAL

After discovery is completed, and if the case has not been terminated by dismissal, summary judgment, or settlement, it must be set for trial. Most cases already will have been disposed of prior to trial. If Aikin's lawsuit has not yet been resolved, typically either party may file a note of issue, at which time the case will be given a number and placed on a *trial calendar*. These calendars have become extremely long in many courts, and the case may have to wait a year, three years, or more before it is called for trial, especially if a jury trial has been requested.

## 8. THE JURY AND ITS SELECTION

In most actions for damages, the parties have a right to have the facts tried by a jury. This right is assured in the federal courts by the Seventh Amendment to the United States Constitution, and is protected in the courts of most states by similar state constitutional provisions. If there is a right to a trial by jury, either party may assert it, but if neither wishes to do so, a judge will try the facts as well as the law. Largely for historical reasons growing out of a division of authority in the English court structure, there are many civil actions in which neither party has a right to a jury trial; these include most cases in which plaintiff wants an order directing or prohibiting specific action by defendant rather than a judgment for damages—a so-called equitable remedy.

If a jury has been demanded, the first order of business at trial will be to impanel the jurors. A large number of people, selected in an impartial manner from various lists, tax rolls, or street directories, will have been ordered to report to the courthouse for jury duty at a given term of court. The prospective jurors will be questioned—usually by the judge but sometimes by the lawyers—as to their possible biases. If one of the persons called has prior knowledge of the case or is a personal friend of one of the parties, he or she probably will be successfully challenged for cause and excused. But suppose Aikin is an architect and her lawyer finds that one of the jury panel has recently constructed a house and believes that he was greatly overcharged for its design and construction; this will likely not be enough to persuade the judge to excuse him. However, fearing the juror might be prejudiced against her client, Aikin's lawyer probably will exercise one of the small number of peremptory challenges allowed for which no reason need be given. Ultimately, a panel of between six and 12 hopefully unbiased jurors will be selected.

## 9. THE TRIAL

After the jurors have been sworn, plaintiff's lawyer will make an *opening statement*, describing for the jury what the case is about, what contentions will be made, and how plaintiff plans to prove them. Defendant's lawyer also may make an opening statement at this time, but

may reserve the right to do so until later when it is time to present defendant's case. Following the opening statement, plaintiff's lawyer calls her witnesses one by one. Each witness is first questioned by the lawyer who has called that witness—this is the *direct examination*; then the lawyer for the other side has the opportunity to *cross-examine* the same witness; this may be followed by *re-direct* and *re-cross* examination, and even further stages. The judge maintains some control over the length and tenor of the examination, and in particular will see to it that the stages beyond cross-examination are not prolonged.

Just as the primary responsibility for introducing evidence is on the lawyers, so too is the responsibility for objecting to evidence that is thought to be inadmissible under the rules of evidence. Suppose that Aikin's lawyer asks: "What happened while you were lying on the ground after the accident?" To which Aikin replies: "The driver of the car came over and said that he had been going too fast and he was sorry." Aikin's answer is objectionable because it contains hearsay evidence; that is, it repeats what someone else has said for the purpose of proving the truth of what was said. It is up to Cecil's counsel to object, and then the judge must rule on the objection. This particular issue is not an easy one, for Aikin's answer may well come within one of the exceptions to the rule excluding hearsay evidence. This kind of issue will recur continually throughout the trial and the judge must be prepared to make instantaneous rulings if the trial is to proceed with dispatch. Evidentiary rulings form a major source of the errors raised on appeal, but at the same time appellate courts are very reluctant to disturb the trial judge's ruling on the point. If the judge rules that Aikin's answer is inadmissible, the judge will instruct the jury to disregard the testimony. Can a juror who has heard such an important confession totally put it to the side?

Documents, pictures, and other tangible items may be put into evidence, but unless their admissibility has been stipulated to in advance, they will be introduced through witnesses. For example, if Aikin's lawyer has had pictures taken of the accident scene and wishes to get them to the jury, she will call the photographer as a witness, have him testify that he took pictures of the scene, and then show them to the photographer who will identify them as the pictures he took. At this point they may be formally introduced into evidence.

When plaintiff's lawyer has called all of her witnesses and their examinations are over, plaintiff will *rest*. At this point, defendant's lawyer may ask for a *directed verdict* (in federal practice now called a judgment as a matter of law) for defendant on the ground that plaintiff has not established a *prima facie* case. The thrust of the motion is that plaintiff has not introduced enough evidence to permit the jury to find in plaintiff's favor. If the motion is denied, defendant may rest and choose to rely on the jury's agreeing with him, but in almost all cases he will proceed to present

witnesses of his own and these witnesses will be exposed to the same process of direct and cross-examination. When defendant has rested, plaintiff may present additional evidence to meet any new matter raised by defendant's witnesses. In turn, defendant, after plaintiff rests, may meet any new matter presented by plaintiff. This procedure will continue until both parties rest. Again, the trial judge will maintain considerable control to prevent the protraction of these latter stages.

When both parties have rested, either or both may move for a directed verdict, asking the trial judge to rule that under the evidence presented, viewed most favorably to the nonmoving party, there is no basis for a reasonable jury to find for that party with respect to that issue. If these motions are denied, the case must be submitted to the jury.

## 10. SUBMITTING THE CASE TO THE JURY

At this stage the judge and the lawyers will confer out of the jury's hearing with regard to the content of the judge's *instructions* or *charge* to the jury. Each lawyer may submit proposed instructions, which the trial judge will grant or deny, but the judge is under a duty to charge the jury on the basic aspects of the case in any event. If a party's lawyer has neither requested a particular instruction nor objected to the judge's charge, a later argument that the charge was erroneous generally will not be upheld on appeal.

Ordinarily, the lawyers will make their final arguments to the jury before the judge delivers the charge. The lawyers will review the evidence from their own points of view, and may suggest how the jury should weigh certain items and resolve specific issues, but it is improper for the lawyers to discuss a matter that has been excluded or has never been introduced. In other words, they are arguing, not testifying.

In the instructions the judge will summarize the facts and issues, tell the jury about the substantive law to be applied on each issue, give general information on determining the credibility of witnesses, and state who has the *burden of persuasion* on each issue of fact. The burden of persuasion in a civil case ordinarily requires that one party prove its contention on a given issue by a preponderance of the evidence. On most issues, Aikin will carry this burden, but on an affirmative defense such as contributory negligence, the burden probably will be on Cecil. The burden means that if a juror is unable to resolve an issue, then a finding on that issue should be made against the party who has the burden. In the federal courts and in some states, the judge may comment on the evidence, as it is clear that the judge's opinions are not binding on the jurors. However, judicial comment is rare, and in many states it is not permitted at all.

Following the charge, the jury retires to reach its decision, called a *verdict*. The verdict will be of a type chosen by the judge. There are three types, of which by far the most common is the *general verdict*. This verdict

permits the jurors to determine the facts and apply the law on which they have been charged to those facts; it is simple in form in that only the conclusion as to who prevails, and the amount of damages, if that party is a claimant, is stated. A second type is the *general verdict with interrogatories*, which combines the form of the general verdict with several key questions that are designed to test the jury's understanding of the issues. Suppose that the accident occurred five miles away from Beasley's appointed route. Aikin's evidence is that Beasley detoured to have the vehicle's brakes fixed; Cecil's is that Beasley was going to visit his friend. The judge might charge the jury that in the former event, but not in the latter, Beasley was acting within the scope of his employment and Cecil would be liable for his negligence, and she might direct the jury, in addition to rendering a verdict for Aikin or for Cecil, to answer the question, "Why did Beasley depart from his route?" If the general verdict was for Aikin, but the jury's answer was that Beasley was driving to his friend's home, the judge would order judgment for Cecil, for if the answer is inconsistent with the verdict, the answer controls. The third type of verdict is the *special verdict*, in which all of the factual issues in the case are submitted to the jury as questions without instructions as to their legal effect; the judge applies the law to the jury's answers and determines which party prevails.

Traditionally, only a unanimous jury verdict has been effective. However, in many states, and by consent of the parties in the federal courts, a nonunanimous verdict by the jurors may stand in a civil action. If the minimum number of jurors required for a verdict cannot reach agreement, the jury is said to be hung, and a new trial before a different jury is necessary.

## 11. POST-TRIAL MOTIONS

After the jury has returned its verdict, judgment will be entered thereon, but the losing party will have an opportunity to make certain post-trial motions. There may be a motion for a *judgment notwithstanding the verdict* (commonly called a motion for a *judgment n.o.v.*, from the Latin *non obstante veredicto*, but in federal practice now called a renewed motion for judgment as a matter of law). This motion raises the same question as a motion for a directed verdict. The losing party also may move for a *new trial*; the grounds for this motion are many, and may include assertions that the judge erred in admitting (or excluding) certain evidence, that the charge was defective, that attorneys, parties, or jurors have been guilty of misconduct, that the damages awarded are excessive, or that the jury's verdict is against the clear weight of the evidence. Should these motions fail, it is sometimes possible to reopen a judgment, even several months after the trial, on the grounds of clerical mistake, newly discovered evidence, or fraud, but the occasions on which such relief is granted are very rare.

## 12. THE JUDGMENT AND ITS ENFORCEMENT

The *judgment* is the final determination of the lawsuit, absent an appeal. Judgment may be rendered by default when the defendant does not appear; or following the granting of a demurrer, a motion to dismiss, or a motion for summary judgment; or based on a settlement agreement of the parties; or upon the jury's verdict, or the findings of fact and conclusions of law of the trial judge in a non-jury case. The judgment may be in the form of an award of money to plaintiff, a declaration of rights between the parties, specific recovery of property, or an order requiring or prohibiting some future activity. When defendant has prevailed, the judgment generally will not be "for" anything or order anything; it simply will provide that plaintiff takes nothing by her complaint.

In most cases a judgment for plaintiff will not order defendant to do anything; typically it will simply state that plaintiff shall recover a sum of money from defendant. This does not necessarily mean that defendant will pay. It is up to plaintiff to collect the money. Execution is the common method of forcing the losing party to satisfy a money judgment, if the loser does not do so voluntarily. A *writ of execution* is issued by the court commanding an officer—usually the sheriff—to seize property of the losing party and, if necessary, to sell it publicly and use the proceeds to satisfy plaintiff's judgment.

When plaintiff's recovery takes the form of an injunction requiring defendant to do something or to stop doing something, the judgment (in this context typically called a *decree*) is said to operate against defendant's person (in personam). Its sanction is direct, and if defendant fails to obey, he may be held in *contempt of court* and punished by fine or imprisonment.

*Costs* provided by statute and certain out-of-pocket disbursements are awarded to the prevailing party and included in the judgment. Usually these costs are nominal in relation to the total expense of litigation and include only such items as the clerk's fee and witnesses' mileage. As previously mentioned, in the United States, attorney's fees are not recoverable as costs in ordinary litigation.

## 13. APPEAL

Every judicial system provides for review of a trial court's decisions by an appellate court. Generally a party has the right to appeal any judgment to at least one higher court. When the system contains two levels of appellate courts, appeal usually lies initially to one of the intermediate courts; review at the highest level is only at the discretion of that court except in certain classes of cases. Under current practice in the federal courts, District Court decisions are reviewed by the appropriate Circuit Court of Appeals, but review in the Supreme Court generally is discretionary and sought by a *petition for a writ of certiorari* (in a few cases,

a direct appeal lies from the District Court to the Supreme Court). The discretion of a higher-level appellate court generally is exercised so that only cases with legal issues of broad importance are taken.

The record on appeal will contain the pleadings, at least a portion of the *transcript of the trial* (the court reporter's verbatim record of the trial), and the orders and rulings relevant to the appeal. The parties present their contentions to the appellate court by *written briefs* and, in most cases, also by *oral argument*. The appellate court may review any ruling of law by the trial judge, although frequently it will limit the scope of its review by holding that particular matters were within the trial judge's discretion or that the error, if any, was not prejudicial, that is, it did not substantially affect the outcome of the case. There are constitutional limits to the review of a jury's verdict, but even when these limits do not apply—for example, when the judge has tried the case without a jury—it is unusual for an appellate court to re-examine a question of fact, because a cold record does not convey the nuances of what the trier observed, notably the demeanor of the witnesses.

The appellate court has the power to *affirm*, *reverse*, or *modify* the judgment of the trial court. If it reverses, it may order that judgment be entered or it may *remand* the case to the trial court for a new trial or other proceedings not inconsistent with its decision. The decision of an appellate court usually is accompanied by a written opinion, signed by one of the judges hearing the appeal; there is always more than one judge deciding an appeal. Concurring and dissenting opinions also may be filed. The opinions of a court are designed to set forth the reasons for a decision and to furnish guidance to lower courts, lawyers, and the public.

Keep in mind an important distinction between the *reviewability* of a particular ruling of a trial judge and its *appealability*. For example, a trial judge's ruling excluding certain evidence at trial as hearsay is reviewable; that is, when the judgment is appealed, that ruling may be assigned as error and the appellate court will consider whether it was correct. But trial would become excessively protracted if an appeal could be taken from every ruling at the time it is made. Thus, appeals lie only from judgments and from certain orders made in the course of litigation when immediate review is deemed so important that a delay in the action during appeal can be tolerated. Judicial systems differ in the extent to which interlocutory orders can be appealed. In the federal system, very little other than a final judgment can be taken to the courts of appeals; however, in some state systems, many kinds of interlocutory orders can be appealed before a final judgment is entered.

A good example of the contrast between the two approaches can be seen by looking at the consequences of an order denying a motion to dismiss. Suppose that Cecil moves to dismiss Aikin's complaint on the ground that even on Aikin's view of the facts, Cecil is not responsible for

the conduct of Beasley, and this motion is denied. In the federal courts such an order would not be appealable since it does not terminate the lawsuit. Indeed, the disposition of the motion means that the action will continue. In some states, however, this question could be taken immediately to a higher court for a ruling, while the other stages of the litigation wait.

The question of which system is better is not easy to answer. One may argue in favor of the federal practice that everything should be done at one level before going to the next, that too much time is taken in waiting for appellate courts to decide these questions serially, and that no appeal may ever be necessary, since Cecil may prevail anyway. But on the other hand, if the appellate court holds at this early stage that Aikin has no claim against Cecil, the time necessary for discovery and trial will be saved.

One point worth noting is that the resolution of the question of the appealability of interlocutory orders has an important bearing on the procedural developments within a given system. In the case of motions to dismiss, for example, if denials are not appealable, the law on this subject will be made largely in the trial courts. A trial judge who is in doubt may tend to deny such motions rather than to grant them, and the decision generally will not be disturbed. Although the ruling theoretically is reviewable after final judgment, by that time the significance of the ruling on the pleadings may have been displaced by more substantive questions. If the denial is appealable, a tactical consideration is added and such motions will be resorted to more frequently, inasmuch as they will afford defendant an additional opportunity to delay trial and thus to wear down the opponent. With respect to other procedural rulings—as in the discovery area—the absence of an interlocutory appeal will strengthen the hand of the trial judge, who will in fact if not in theory exercise a wider range of discretion because fewer rulings will come before the appellate courts and when they do they will be enmeshed in a final judgment, making it easier to conclude that any error was not prejudicial.

#### 14. THE CONCLUSIVENESS OF JUDGMENTS

Generally, a judgment becomes final after the appeal and whatever further proceedings may take place, or, if no appeal is taken, when the time for appeal expires. With very rare exceptions, the judgment cannot be challenged in another proceeding. It is *res judicata*, a thing decided, and now the matter is at rest. The concept of *res judicata* includes claim preclusion and issue preclusion, the latter traditionally known as collateral estoppel. Defining the scope and effect of this finality principle is one of the most complex tasks in the entire law of procedure.

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### C. ILLUSTRATIVE CASES

The cases that follow have been selected to illustrate many of the basic concepts, doctrines, and devices about which you have just read in the order discussed in the preceding text. Three factors have dominated the choice of the cases. First, each focuses on a specific issue that is typical of a range of problems involving a particular principle and at the same time throws some light on the policies that underlie the principle itself. Second, none of the cases is a “sitting duck”; in each instance strong reasons can be advanced for and against the court’s result. Third, each case arises in a context that you can understand and presents an issue about which you should be able to form an opinion, however hesitant it may be. Another purpose of these cases is to help you develop a familiarity with procedural language and a feeling for procedural problems. You must, of course, consider the cases from the perspective of the courts that decided them, seeking to understand their rulings and the reasons that support them. However, also consider the other options that the court had, and think through the consequences of those possibilities. For the full pedagogical objectives of these cases to be achieved, regard each case as a practical lawyer’s problem—or rather a problem presenting difficulties and opportunities to opposing counsel. Inquire why the parties acted as they did and what else they might have done. Finally, consider the position in which the decision leaves the parties and what, if anything, they should do.

## 1. THE AUTHORITY OF THE COURT TO PROCEED WITH THE ACTION

Plaintiff, having decided to sue, must determine the court in which to bring the action. A court must be chosen that has jurisdiction over the subject matter of the suit and jurisdiction over the person of the defendant. In the following case, a lawsuit filed in federal court, consider which of these two types of jurisdiction the Supreme Court is addressing. In reading the case, notice that the word “jurisdiction” is used without a modifier. But, from the context and information given above, you should be able to identify the kind of jurisdiction involved.

### CAPRON V. VAN NOORDEN

Supreme Court of the United States, 1804.  
6 U.S. (2 Cranch) 126, 2 L.Ed. 229.

Error to the [United States] Circuit Court of *North Carolina*. The proceedings stated *Van Noorden* to be late of *Pitt county*, but did not allege *Capron*, the plaintiff, to be an alien, nor a citizen of any state, nor the place of his residence.

Upon the general issue, in an action of trespass on the case, a verdict was found for the defendant, *Van Noorden*, upon which judgment was rendered.

The writ of Error was sued out by *Capron*, the plaintiff below, who assigned for error, among other things, first, “That the circuit court aforesaid is a court of limited jurisdiction, and that by the record aforesaid it doth not appear, as it ought to have done, that either the said *George Capron*, or the said *Hadrianus Van Noorden*, was an alien at the time of the commencement of said suit, or at any other time, or that one of the said parties was at that or any other time, a citizen of the state of *North Carolina* where the suit was brought, and the other a citizen of another state; or that they the said *George* and *Hadrianus* were for any cause whatever, persons within the jurisdiction of the said court, and capable of suing and being sued there.”

And secondly, “that by the record aforesaid it manifestly appeareth that the said Circuit Court had not any jurisdiction of the cause aforesaid, nor ought to have held plea thereof, or given judgment therein, but ought to have dismissed the same, whereas the said Court hath proceeded to final judgment therein.”

*Harper*, for the *plaintiff in error*, stated the only question to be whether the plaintiff had a right to assign for error, the want of jurisdiction in that court to which he had chosen to resort.

It is true, as a general rule, that a man cannot reverse a judgment for error *in process or delay*, unless he can shew that the error was to his

disadvantage; but it is also a rule, that he may reverse a judgment for an error of *the Court*, even though it be for his advantage. As if a verdict be found for the debt, damages, and costs; and the judgment be only for the debt and damages, the defendant may assign for error that the judgment was not also for costs, although the error is for his advantage.

Here it was the duty of the Court to see that they had jurisdiction, for the consent of parties could not give it.

It is therefore an *error of the Court*, and the plaintiff has a right to take advantage of it. \* \* \*

The defendant in error did not appear, but the citation having been duly served, the judgment was reversed.

### NOTES AND QUESTIONS

1. The Supreme Court regarded the defect in this case as extremely serious. Does the fact that it was the plaintiff who sought review in the Supreme Court make this particularly clear? Did the defect in *Capron* concern subject-matter jurisdiction or jurisdiction over the person of the defendant? Why is such significance attached to this error?

2. Read Article III, § 2 of the United States Constitution, which is set out in the Supplement. What specific language in that Section is pertinent to the Supreme Court's opinion in *Capron*?

3. In what court was the *Capron* suit commenced? Under the First Judiciary Act of 1789, Congress established two levels of courts below the Supreme Court: the district courts and the circuit courts. The circuit courts exercised both original and appellate jurisdiction, and had original jurisdiction over diversity cases when the amount in controversy exceeded \$500.

4. The Supreme Court reversed the judgment of the lower court. What was the effect of this reversal? Does it mean that *Capron* won the lawsuit? If not, why had he sought review in the appellate court?

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Unlike the federal courts, state courts of general jurisdiction have jurisdiction over the subject matter of a very broad spectrum of lawsuits. Indeed, questions of the competence of those courts to decide a particular kind of case rarely arise. However, before any court may proceed, it also must have the power to require the defendant to appear in the action. In the next case, the court must decide whether it has that power, and whether it will exercise it.

**TICKLE V. BARTON**

Supreme Court of Appeals of West Virginia, 1956.  
142 W.Va. 188, 95 S.E.2d 427.

HAYMOND, JUDGE.

The plaintiff, Richard Tickle, an infant, who sues by his next friend, instituted this action of trespass on the case in the Circuit Court of McDowell County in March, 1955, to recover damages from the defendants, Raymond Barton, a resident of Austinville, Virginia, and Lawrence Coleman, for personal injuries inflicted upon him by a motor vehicle, owned by the defendant Raymond Barton and operated by his agent the defendant Lawrence Coleman, on private property instead of a public highway, in that county which the plaintiff alleges were caused by the negligence of the defendants.

\* \* \* [A first attempt to serve Barton had been made under a statute relating to actions by or against nonresident drivers involved in accidents on a public highway, and the validity of this service was still undecided at the time the instant decision was rendered.]

On December 5, 1955, one of the attorneys for the plaintiff caused an alias process to be issued against the defendants \* \* \* and delivered it to a deputy sheriff for service upon the defendant Barton in McDowell County; and in the evening of December 6, 1955, that process was served by the deputy upon the defendant Barton in person at the War Junior High School in the town of War in that county where he appeared to attend a banquet which was held there at that time.

By his amended plea in abatement \* \* \*, the defendant Barton challenged the validity of the service of the alias process upon him on the ground that he had been induced to come to that place in McDowell County by trickery, artifice and deceit practiced upon him by the attorney for the plaintiff.

The circuit court overruled the demurrer of the plaintiff to the amended plea in abatement and \* \* \* certified its ruling upon the demurrer to this Court on the joint application of the plaintiff and the defendant Barton.

\* \* \* [T]he amended plea in abatement alleges in substance that after procuring alias process for the purpose of causing it to be served upon the defendant Barton in McDowell County, and inducing him to come to the Junior High School in the town of War in that county, an attorney representing the plaintiff in this action, in the evening of December 5, 1955, called by telephone the defendant Barton at his home in Austinville, Virginia, and wrongfully and deceitfully represented that, in behalf of the sponsors of a banquet honoring a championship high school football team to be held at the Junior High School in the town of War, in McDowell County \* \* \*, he extended an invitation to the defendant Barton, whose son

had been a member of an earlier football team of that school, to attend the banquet; that during that telephone conversation between them the attorney, though requested to do so by the defendant Barton, did not disclose his identity except to say that he called him in behalf of the sponsors to extend the defendant Barton a special invitation to attend the banquet; that the defendant Barton before being so invited did not know that the banquet would be held and did not intend to attend it; that he did not know or suspect the identity of the attorney, or realize that the telephone call was a trick or device to entice, induce and inveigle him to come into McDowell County to be served with process in this action; that the attorney was not connected with any of the sponsors of the banquet and was not authorized by them to invite the defendant Barton to attend it; that the attorney called the defendant Barton and invited him to the banquet solely for the purpose of tricking, deceiving and inveigling him to come to the town of War in order to obtain personal service \* \* \* upon him \* \* \*; that the defendant Barton, believing that the invitation was extended in good faith, by a person authorized to extend it, and not suspecting the real purpose of the telephone call, accepted the invitation and informed the attorney that he would be present at the banquet and on December 6, 1955, left Austinville, Virginia, and went to the town of War with the intention of attending it; that, when he entered the high school where the banquet was held \* \* \* he was served by the deputy sheriff with the alias process \* \* \*; that the service of the alias process upon the defendant Barton, having been procured by trickery, deceit and subterfuge which was not realized or suspected by him, is, for that reason, null and void and of no force or effect and does not confer upon the Circuit Court of McDowell County jurisdiction of the person of the defendant Barton in this action.

The amended plea in abatement also alleges, on information and belief, that after the defendant Barton had left his home \* \* \* the attorney for the plaintiff \* \* \* made a telephone call to the residence of the defendant Barton, or caused some other person to make such call, and inquired of the wife of the defendant Barton if he intended to attend the banquet and was informed by her that he had left his home to attend it and was then on his way to the town of War for that purpose.

The amended plea in abatement further avers that after the defendant Barton had been served with the alias process his attorney inquired of the attorney for the plaintiff if he had made either of the two telephone calls or had procured some person to make the second telephone call and that the attorney for the plaintiff denied that he had made, or procured any person to make, either of the foregoing telephone calls, and denied that he had any knowledge whatsoever of either of them.

The question certified to this Court for decision is whether the allegations of the amended plea in abatement, which insofar as they are material and are well pleaded must be considered as true upon demurrer,

are sufficient to render invalid the personal service of process upon the defendant Barton in McDowell County because his presence in that county at the time of such service of process was induced or procured by trickery, artifice, or deceit practiced upon him by an attorney representing the plaintiff in this action.

The precise question presented by the certificate of the circuit court has not been determined in any prior decision of this Court. It has, however, been discussed in authoritative texts and treatises and considered and determined by appellate courts in other jurisdictions.

\* \* \* In 42 Am.Jur., Process, Section 35, the general principle is stated thus: "Personal service of process, if procured by fraud, trickery, or artifice is not sufficient to give a court jurisdiction over the person thus served, and service will be set aside upon proper application. Relief is accorded in such cases not because, by reason of the fraud, the court did not get jurisdiction of the person of the defendant by the service, but on the ground that the court will not exercise its jurisdiction in favor of one who has obtained service of his summons by unlawful means. Thus, if a person resident outside the jurisdiction of the court and the reach of its process is inveigled, enticed, or induced, by any false representation, deceitful contrivance, or wrongful device for which the plaintiff is responsible, to come within the jurisdiction of the court for the purpose of obtaining service of process on him in an action brought against him in such court, process served upon him through such improper means is invalid, and upon proof of such fact the court will, on motion, set it aside." \* \* \*

The foregoing principle applies to the party when such service is procured by his agent or by someone acting for and in his behalf. \* \* \*

In *Economy Electric Company v. Automatic Electric Power and Light Plant*, 185 N.C. 534, 118 S.E. 3, the court, discussing service of process by fraudulent means, used this language: "Where service of process is procured by fraud, that fact may be shown, and, if shown seasonably, the court will refuse to exercise its jurisdiction and turn the plaintiff out of court. The law will not lend its sanction or support to an act, otherwise lawful, which is accomplished by unlawful means. \* \* \* Such a fraud is one affecting the court itself and the integrity of its process. \* \* \* The objection, strictly, is not that the court is without jurisdiction, but that it ought not, by reason of the alleged fraud, to take or to hold jurisdiction of the action. \* \* \*"

\* \* \*

This Court approves and adopts the view supported by the above cited text, treatise and case authorities, which appears to be generally recognized as the law, and accordingly holds that when a person who resides outside the jurisdiction of a court and, for that reason, is beyond the reach of its process, is inveigled, enticed, or induced by fraud, trickery,

artifice or wrongful device for which a party is responsible, by virtue of the action of his attorney or of any other person for and in his behalf, to come within the jurisdiction of the court for the purpose of enabling such party to obtain service of process upon such nonresident person in an action brought against him in such court, service of process which results from such fraud, trickery, artifice or wrongful device, is invalid and does not justify the exercise of jurisdiction by such court over the person so served with process; and upon proof that service of process has been so obtained, it will be vacated and set aside.

Under the material allegations of the amended plea in abatement which, as already indicated, must be considered as true upon demurrer, the defendant Barton was induced or enticed to come into McDowell County by the unauthorized invitation extended to him by the attorney for the plaintiff whose purpose at the time was to obtain personal service upon the defendant Barton \* \* \*; the defendant Barton knew that the present action against him was pending in the circuit court by reason of the service of the original process upon him \* \* \* but he did not suspect or realize that he would be served with process while present in McDowell County to attend the banquet; he was induced to come into that county by the invitation to the banquet; and he would not have come into that jurisdiction if the attorney for the plaintiff had disclosed his identity and his real purpose in extending the invitation, all of which he concealed from the defendant Barton.

\* \* \*

The amended plea in abatement is sufficient on demurrer and the action of the circuit court in overruling the demurrer was correct.

It should perhaps be emphasized that, as the factual allegations of the amended plea in abatement have not been denied at this stage of this action by any pleading filed by the plaintiff, the question of the truth or the falsity of those allegations is not before this Court \* \* \*.

Ruling affirmed.

GIVEN, JUDGE (dissenting).

My disagreement with the majority is not as to the rule of law laid down. I think the rule a salutary one, and masterfully stated. I do not believe, however, that the facts properly pleaded, and the inferences which may be rationally drawn therefrom, bring the facts of this case within the influence of the rule.

Stripped of all explanatory language, and of many allegations of conclusions of fact, \* \* \* the plea in abatement charges no more than that the attorney, by telephone, inquired at defendant's home whether defendant intended to attend a certain social function to be held in McDowell County, to which defendant was then invited by the attorney;

that the attorney, though requested to give his name, did not do so; that the attorney later, or someone for him, again by telephone, inquired whether defendant had decided to attend the social function, and was advised that defendant had made arrangements to attend; and that the attorney caused process to be served on defendant while attending the social function. \* \* \* The principal, if not only, fact of wrongdoing, if wrongdoing, alleged against the attorney was his failure to inform defendant of the identity of the telephone caller. \* \* \* It seems to me that the facts properly alleged can not be held to establish fraud or wrongdoing. At most, they would simply show that the attorney took advantage of an opportunity, the holding of the social function in McDowell County and the interest of defendant's son in the holding of the function, to try to obtain proper service of process, which was no more than a duty owed his client. In considering the questions arising, it should be kept in mind that defendant had full knowledge of the institution of the action against him in McDowell County, of the fact that he had questioned the validity of the service of other process issued in that action, and of the fact that the alleged cause of action arose in McDowell County, where ordinarily it would have been triable.

\* \* \*

An examination of the cases cited by the majority discloses that, though they fully support the rule laid down, not one of them, in my opinion, requires, or even permits, the application of the rule in a case wherein the facts are comparable, in effect, with the facts alleged in the plea involved in the instant case. The majority opinion points out no such case, and I find none. \* \* \*

\* \* \*

Being of the views indicated, I respectfully dissent. I am authorized to say that Judge RILEY joins in this dissent.

### *NOTES AND QUESTIONS*

1. Did the appellate court in this case decide that West Virginia courts did not have jurisdiction over the person of defendant (assuming defendant's story as true), or that those courts should not exercise jurisdiction in these circumstances even though they had it?

2. When should a court be able to demand that a person appear before it and defend an action? In what circumstances should this demand be permitted against a person who is not a resident of the state in which the court is located? Why should a nonresident be subject to suit if he is served with process within the state? Insofar as these reasons are concerned, should it make any difference why he is present in the state?

3. In thinking about the cases you read, try to consider how the court might approach the problem if certain facts were different. For example, should

service in West Virginia in the following situations be treated the same as under the facts alleged in the principal case?

- (a) Tickle had asked Barton to appear as a witness in a suit against a third party involved in the accident;
- (b) Tickle had asked Barton to come to West Virginia to discuss settling the case;
- (c) Tickle had telephoned Barton and falsely told him that his son lay critically injured in a West Virginia hospital;
- (d) Tickle (like the Sheriff of Nottingham) had scheduled a football banquet in West Virginia that he knew Barton (like Robin Hood) would be unable to resist attending, although he did not personally invite him.

4. When the case is reconsidered by the West Virginia Circuit Court on remand, Barton's lawyer must prove his allegations if Barton is to avoid trial in West Virginia. What problems do you foresee in his being able to prove them, and how should he proceed to do so?

### **TEMPLE V. SYNTHES CORP.**

Supreme Court of the United States, 1990.  
[498 U.S. 5](#), [111 S.Ct. 315](#), [112 L.Ed.2d 263](#).

Certiorari to the United States Court of Appeals for the Fifth Circuit.

PER CURIAM.

Petitioner Temple, a Mississippi resident, underwent surgery in October 1986 in which a "plate and screw device" was implanted in his lower spine. The device was manufactured by respondent Synthes, Ltd. (U.S.A.) (Synthes), a Pennsylvania corporation. Dr. S. Henry LaRocca performed the surgery at St. Charles General Hospital in New Orleans, Louisiana. Following surgery, the device's screws broke off inside Temple's back.

Temple filed suit against Synthes in the United States District Court for the Eastern District of Louisiana. The suit, which rested on diversity jurisdiction, alleged defective design and manufacture of the device. At the same time, Temple filed a state administrative proceeding against Dr.

LaRocca and the hospital for malpractice and negligence. At the conclusion of the administrative proceeding, Temple filed suit against the doctor and the hospital in Louisiana state court.

Synthes did not attempt to bring the doctor and the hospital into the federal action by means of a third-party complaint, as provided in Federal Rule of Civil Procedure 14(a). Instead, Synthes filed a motion to dismiss Temple's federal suit for failure to join necessary parties pursuant to Federal Rule of Civil Procedure 19. Following a hearing, the District Court ordered Temple to join the doctor and the hospital as defendants within twenty days or risk dismissal of the lawsuit. According to the court, the most significant reason for requiring joinder was the interest of judicial economy. The court relied on this Court's decision in *Provident Trademans Bank & Trust Co. v. Patterson*, 390 U.S. 102, 88 S.Ct. 733, 19 L.Ed.2d 936 (1968), wherein we recognized that one focus of Rule 19 is "the interest of the courts and the public in complete, consistent, and efficient settlement of controversies." When Temple failed to join the doctor and the hospital, the court dismissed the suit with prejudice.

Temple appealed, and the United States Court of Appeals for the Fifth Circuit affirmed. The court deemed it "obviously prejudicial to the defendants to have the separate litigations being carried on," because Synthes' defense might be that the plate was not defective but that the doctor and the hospital were negligent, while the doctor and hospital, on the other hand, might claim that they were not negligent but that the plate was defective. The Court of Appeals found that the claims overlapped and that the District Court therefore had not abused its discretion in ordering joinder under Rule 19. \* \* \*

\* \* \* Temple contends that it was error to label joint tortfeasors as indispensable parties under Rule 19(b) and to dismiss the lawsuit with prejudice for failure to join those parties.<sup>b</sup> We agree. Synthes does not deny that it, the doctor, and the hospital are potential joint tortfeasors. It has long been the rule that it is not necessary for all joint tortfeasors to be named as defendants in a single lawsuit. \* \* \* The Advisory Committee Notes to Rule 19(a) explicitly state that "a tortfeasor with the usual 'joint-and-several' liability is merely a permissive party to an action against another with like liability." \* \* \* There is nothing in Louisiana tort law to the contrary. \* \* \*

\* \* \*

\* \* \* [N]o inquiry under Rule 19(b) is necessary, because the threshold requirements of Rule 19(a) have not been satisfied. As potential joint tortfeasors with Synthes, Dr. LaRocca and the hospital were merely permissive parties. The Court of Appeals erred by failing to hold that the

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<sup>b</sup> In 2007, the term "indispensable party" was deleted from Rule 19(b) and the term "required party" was substituted.

District Court abused its discretion in ordering them joined as defendants and in dismissing the action when Temple failed to comply with the court's order. For these reasons, we grant the petition for certiorari, reverse the judgment of the Court of Appeals for the Fifth Circuit, and remand for further proceedings consistent with this opinion.

*It is so ordered.*

### NOTES AND QUESTIONS

1. Why do you think Temple did not name Dr. LaRocca and the hospital as defendants in his federal suit? Why would Temple seek to duplicate his time and effort by litigating a suit in federal court at the same time that he is litigating one in state court with respect to precisely the same injury?

2. Although the Supreme Court failed to specify the citizenship of Dr. LaRocca and the hospital, they were in fact citizens of Louisiana, and so all plaintiffs were citizens of states different from those of the three defendants. See *Temple v. Synthes Corp.*, 130 F.R.D. 68, 69 n.1 (E.D.La. 1989). Does this information change your answers to the questions in Note 1, above?

3. What do you make of the Fifth Circuit's concern with the potential for inconsistent judgments? Does the Supreme Court find that this concern is not warranted? Or does it find that there are other more important considerations? If so, what are they?

4. When this case returns to the District Court, could the court order Synthes to file a third-party complaint against the doctor and the hospital under Federal Rule 14(a)? Should a court ever have the power to order that parties be added to a lawsuit? Why?

5. Suppose that both Temple and Synthes do not want the doctor and the hospital to be added as parties and the court does not order that they be added. Could the doctor and the hospital join the federal suit of their own accord? See Federal Rule 24. Should Temple and/or Synthes be able to stop them from intervening?

When defendant files an answer denying the allegations of the complaint, the denials are only that party's assertions and do not demonstrate whose story is correct. The motion for summary judgment enables a party to show whether there is admissible evidence to support the allegations made and to call for a showing by the opposing party. The judge's role is not to try to decide a factual dispute when each party has presented competent evidence on an issue and there is a conflict. But if it becomes clear that one party cannot possibly prove his allegations, there is no "genuine issue" and a futile trial may be avoided by granting the motion.

**ALDERMAN V. BALTIMORE & OHIO R. CO.**

United States District Court, Southern District of West Virginia, 1953.  
[113 F.Supp. 881.](#)

MOORE, CHIEF JUDGE.

Plaintiff \* \* \* brings this action \* \* \* to recover for personal injuries sustained by her as a result of the derailment of one of defendant's trains near Adrian, West Virginia, on February 14, 1952.

Plaintiff was not a fare-paying passenger. She was traveling on a trip pass, which afforded her free transportation \* \* \*. The following conditions were printed on the pass: "In consideration of the issuance of this free pass, I hereby assume all risk of personal injury and loss of or of damage to property from whatever causes arising, and release the company from liability therefore, and I hereby declare that I am not prohibited by law from receiving free transportation and that this pass will be lawfully used."

Plaintiff in her original complaint charged defendant with negligence in the maintenance of its tracks and the operation of its train. After a pre-trial conference, at which the legal effect of the release from liability contained in the pass was discussed, plaintiff filed an amended complaint charging defendant with wilful or wanton conduct.

On the basis of the amended pleadings and supporting affidavits filed by defendant, defendant moved for summary judgment under Rule 56 \* \* \*.

It is undisputed that the derailment was caused by a break in one of the rails as the train was passing over the track. It is also shown by defendant's affidavits, and not denied, that the break in the rail was due to a transverse fissure inside the cap of the rail, which broke vertically under the weight of the train; that such a fissure is not visible upon inspection; that such defects occur in both new and old rails; and that a visual

inspection was in fact made of this particular rail the day preceding the accident and the defect was not discovered.

Since plaintiff was an intrastate passenger, and since the accident occurred in West Virginia, the law of West Virginia governs both the effect to be given to the release and the degree of care which defendant owed plaintiff. \* \* \*

However, counsel have been unable to direct the Court's attention to, and the Court has not found, any West Virginia decision which has determined the effect which a release from liability contained in a pass has upon the carrier's duty to the holder of such a pass. \* \* \*

Since the Federal statute and the West Virginia statute authorizing the issuance of free passes are similar, 49 U.S.C.A. § 1(7), and W.Va.Code, Ch. 24, Art. 3, § 4, it is pertinent to examine the United States Supreme Court decisions construing the Federal statute. The Supreme Court has held that a carrier may contract against liability for negligent injury to one who accepts a free pass \* \* \*; but that for reasons of public policy it cannot relieve itself of liability for wilful or wanton acts. \* \* \*

I am therefore of opinion that the sole duty imposed upon defendant under the facts of this case was to refrain from wilfully or wantonly injuring plaintiff.

In *Kelly v. Checker White Cab, Inc.*, 131 W.Va. 816 at page 822; 50 S.E.2d 888 at page 892, the West Virginia court, quoting from 29 Cyc. 510 said: " "In order that one may be held guilty of wilful or wanton conduct, it must be shown that he was conscious of his conduct, and conscious, from his knowledge of existing conditions, that injury would likely or probably result from his conduct, and that with reckless indifference to consequences he consciously and intentionally did some wrongful act or omitted some known duty which produced the injurious result." " \* \* \*

The substance of plaintiff's contention that defendant wilfully injured her is that defendant used old and obsolescent rails in its tracks, knowing that the use of these rails made derailments reasonably probable. It is charged that defendant used old rails because the cost of derailments was less than the cost of replacing the old rails, and that for this reason defendant was willing to take the risk of derailments.

I am of opinion that the complaint fails to state sufficient facts to substantiate a charge of wilfulness, as that term is defined by the West Virginia court. It is clear that plaintiff has stated a charge of negligence; but that is not the test in this case. To establish wilfulness it would be necessary to charge that defendant knew of this particular defect in the rail; that the defect would probably result in a break in the rail if the train were run over it, causing a derailment of the train; and that defendant, with this knowledge of existing conditions, and the likelihood or probability of an injury resulting from its conduct, intentionally drove its train over

the defective rail with an indifference to the consequences. The undenied affidavits of defendant show clearly that plaintiff cannot establish these facts.

At the hearing of this motion, counsel for plaintiff moved for a continuance of the hearing to enable him to substantiate a newspaper report to the effect that defendant was using old and obsolescent rails in its tracks because the cost of derailments was cheaper than the cost of replacing the rails. The motion was denied since this contention, even if it were true, merely has a bearing on an issue of negligence, and not upon the question of wilful conduct. Plaintiff does not contend that she can establish that defendant knew of the particular defect in the rail that caused the derailment.

For the reasons stated above, defendant's motion for summary judgment will be sustained. \* \* \*

### NOTES AND QUESTIONS

1. If very specific allegations of all of the facts giving rise to plaintiff's cause of action were required to be set forth in the complaint, would it have been possible to handle the *Alderman* case by a motion to dismiss or a demurrer rather than waiting for the summary judgment phase? To the extent that this would have been possible, does the case present a strong argument for more specific pleading of facts? Consider whether the court should have ruled as it did if the motion for summary judgment had been made immediately upon the service of the complaint and before plaintiff had an opportunity to utilize the discovery process. What provision does Federal Rule 56 make for this contingency? Analytically, the motion for summary judgment can be thought of as a demurrer-plus. However, do you agree that for summary judgment to be fair and effective, it must be preceded by discovery so that each party will have an opportunity to disclose the gaps in the opponent's case and to cure any defects in the party's own?

2. A motion for summary judgment may be useful even though the moving party believes it will be unsuccessful. What advantage did defendant in *Alderman* gain by moving for summary judgment, rather than moving to dismiss? Reread the third paragraph of the case. See p. 45, supra. Should plaintiff be able to amend a complaint in this situation? Was her amendment made merely to prolong the litigation in the hope of forcing a settlement?

## 5. CONCLUSIVENESS OF JUDGMENTS

Lawsuits are designed to settle disputes. An idealist might argue that nothing should be considered settled until it is settled correctly. A pragmatist could counter that nothing is settled at all unless it is settled finally. Cosmic questions may be debated endlessly, but controversies between individuals that are expected to result in enforceable judgments for damages or orders that must be obeyed under penalty of contempt must come to an end if the judicial process is to work at all. *Res judicata* requires that occasionally the legal system will let a judgment stand even if it

becomes convinced that it was wrongly decided. A doctrine that only correct decisions have res judicata effect would furnish no finality at all.

**RUSH V. CITY OF MAPLE HEIGHTS**

Supreme Court of Ohio, 1958.

[167 Ohio St. 221](#), [147 N.E.2d 599](#),

cert. denied, [358 U.S. 814](#), [79 S.Ct. 21](#), [3 L.Ed.2d 57](#).

HERBERT, JUDGE.

[Plaintiff was injured in a fall from a motorcycle. She brought an action in the Municipal Court of Cleveland for damage to her personal property; that court found that defendant city was negligent in maintaining its street and that this negligence was the proximate cause of plaintiff's damages,

which were fixed at \$100. Defendant appealed and the judgment was affirmed by the Ohio Court of Appeals and Supreme Court. Plaintiff also brought this action in the Court of Common Pleas of Cuyahoga County for personal injuries she incurred in the same accident; her motion to set trial on the issue of damages alone was granted on the ground that the issue of negligence was barred by res judicata because of the Municipal Court action; judgment was entered on a verdict for \$12,000, and the Court of Appeals affirmed.]

The eighth error assigned by the defendant is that “the trial and appellate courts committed error in permitting plaintiff to split her cause of action \* \* \*.”

\* \* \*

In the case of Vasu v. Kohlers, Inc., 145 Ohio St. 321, 61 N.E.2d 707, 709, 166 A.L.R. 855, plaintiff operating an automobile came into collision with defendant’s truck, in which collision he suffered personal injuries and also damage to his automobile. At the time of collision, plaintiff had coverage of a \$50 deductible collision policy on his automobile. The insurance company paid the plaintiff a sum covering the damage to his automobile, whereupon, in accordance with a provision of the policy, the plaintiff assigned to the insurer his claim for such damage.

In February 1942, the insurance company commenced an action \* \* \* against Kohlers, Inc., \* \* \* to recoup the money paid by it to cover the damage to Vasu’s automobile.

In August 1942, Vasu commenced an action in the same court against Kohlers, Inc., to recover for personal injuries which he suffered in the same collision.

In March 1943, in the insurance company’s action, a verdict was rendered in favor of the defendant, followed by judgment.

Two months later an amended answer was filed in the Vasu case, setting out as a bar to the action \* \* \* the judgment rendered in favor of defendant in the insurance company case. A motion to strike that defense \* \* \* [was] sustained \* \* \*. A trial of the action resulted in a verdict for plaintiff, upon which judgment was entered.

On appeal to the Court of Appeals the defendant claimed that the Court of Common Pleas erred in sustaining plaintiff’s motion to strike from the defendant’s answer the defense of *res judicata* claimed to have arisen by reason of the judgment in favor of the defendant in the action by the insurance company.

The Court of Appeals reversed the judgment of the Court of Common Pleas and entered final judgment in favor of defendant.

This court reversed the judgment of the Court of Appeals, holding in the syllabus, in part, as follows:

\* \* \*

“4. Injuries to both person and property suffered by the same person as a result of the same wrongful act are infringements of different rights and give rise to distinct causes of action, with the result that the recovery or denial of recovery of compensation for damages to the property is no bar to an action subsequently prosecuted for the personal injury, unless by an adverse judgment in the first action issues are determined against the plaintiff which operate as an estoppel against him in the second action.

\* \* \*

“6. Where an injury to person and to property through a single wrongful act causes a prior contract of indemnity and subrogation as to the injury to property to come into operation for the benefit of the person injured, the indemnitor may prosecute a separate action against the party causing such injury for reimbursement for indemnity monies paid under such contract.

“7. Parties in privity, in the sense that they are bound by a judgment, are those who acquired an interest in the subject matter after the beginning of the action or the rendition of the judgment; and if their title or interest attached before that fact, they are not bound unless made parties.

“8. A grantor or assignor is not bound, as to third persons, by any judgment which such third persons may obtain against his grantee or assignee adjudicating the title to or claim for the interest transferred unless he participated in the action in such manner as to become, in effect, a party.”

\* \* \*

\* \* \* The sixth, seventh and eighth paragraphs deal with the factual situation which existed in the Vasu case, i.e., a prior contract of indemnity and subrogation. Although, as discussed *infra*, it was not actually necessary to the determination of the issue in that case, attention centers on the fourth paragraph.

\* \* \*

\* \* \* [Subsequent] cases, distinguishing and explaining the Vasu case, have not changed the rule established in paragraph four of the syllabus  
\* \* \*

However, it is contended here that that rule is in conflict with the great weight of authority in this country and has caused vexatious litigation.  
\* \* \*

\* \* \*

Upon examination of decisions of courts of last resort, we find that the majority rule is followed in the following cases in each of which the action was between the person suffering injury and the person committing the tort, and where insurers were not involved, as in the case here. \* \* \* [The court cited cases from 20 states forming the majority and five states forming the minority.]

The reasoning behind the majority rule seems to be well stated in the case of *Mobile & Ohio Rd. Co. v. Matthews* \* \* \* [115 Tenn. 172, 91 S.W. 194 (1906),] as follows:

“The negligent action of the plaintiff in error constituted but one tort. The injuries to the person and property of the defendant in error were the several results and effects of one wrongful act. A single tort can be the basis of but one action. It is not improper to declare in different counts for damages to the person and property when both result from the same tort, and it is the better practice to do so where there is any difference in the measure of damages, and all the damages sustained must be sued for in one suit. This is necessary to prevent multiplicity of suits, burdensome expense, and delays to plaintiffs, and vexatious litigation against defendants. \* \* \*

“Indeed, if the plaintiff fail to sue for the entire damage done him by the tort, a second action for the damages omitted will be precluded by the judgment in the first suit brought and tried.”

The minority rule would seem to stem from the English case of *Brunsdon v. Humphrey* (1884), 14 Q.B. 141. The facts in that case are set forth in the opinion in the *Vasu* case \* \* \*, concluding with the statement:

“The Master of the Rolls, in his opinion, stated that the test is ‘whether the same sort of evidence would prove the plaintiff’s case in the two actions,’ and that, in the action relating to the cab, ‘it would be necessary to give evidence of the damage done to the plaintiff’s vehicle. In the present action it would be necessary to give evidence of the bodily injury occasioned to the plaintiff, and of the sufferings which he has undergone, and for this purpose to call medical witnesses. This one test shows that the causes of action as to the damage done to the plaintiff’s cab, and as to the injury occasioned to the plaintiff’s person, are distinct.’”

The fallacy of the reasoning in the English court is best portrayed in the dissenting opinion of Lord Coleridge, as follows:

“\* \* \* [I]t seems to me a subtlety not warranted by law to hold that a man cannot bring two actions, if he is injured in his arm and in his leg, but can bring two, if besides his arm and leg being injured, his trousers which contain his leg, and his coat-sleeve which contains his arm, have been torn.”

There appears to be no valid reason in these days of code pleading to adhere to the old English rule as to distinctions between injuries to the person and damages to the person's property resulting from a single tort. It would seem that the minority rule is bottomed on the proposition that the right of bodily security is fundamentally different from the right of security of property and, also, that, in actions predicated upon a negligent act, damages are a necessary element of each independent cause of action and no recovery may be had unless and until actual consequential damages are shown.

Whether or not injuries to both person and property resulting from the same wrongful act are to be treated as injuries to separate rights or as separate items of damage, \* \* \* a plaintiff may maintain only one action to enforce his rights existing at the time such action is commenced.

The decision of the question actually in issue in the Vasu case is found in paragraphs six, seven and eight of the syllabus, as it is quite apparent from the facts there that the first judgment, claimed to be *res judicata* in Vasu's action against the defendant, was rendered against Vasu's insurer in an action initiated by it after having paid Vasu for the damages to his automobile. \* \* \*

Upon further examination of the cases from other jurisdictions, it appears that in those instances where the courts have held to the majority rule, a separation of causes of action is almost universally recognized where an insurer has acquired by an assignment or by subrogation the right to recover for money it has advanced to pay for property damage.

\* \* \*

In the light of the foregoing, it is the view of this court that the so-called majority rule conforms much more properly to modern practice, and that the rule declared in the fourth paragraph of the syllabus in the Vasu case, on a point not actually at issue therein, should not be followed [and must be overruled].

\* \* \*

Judgment reversed and final judgment for defendant.

STEWART, JUDGE (concurring). \* \* \* If it had been necessary [in *Vasu*] to decide the question whether a single tort gives rise to two causes of action as to the one injured by such tort, I would be reluctant to disturb that holding. However, neither the discussion in the Vasu case as to whether a single or double cause of action arises from one tort nor the language of the fourth paragraph of the syllabus was necessary to decide the issue presented in the case, and obviously both such language and such paragraph are obiter dicta and, therefore, are not as persuasive an authority as if they had been appropriate to the question presented.

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\* \* \* [T]his court is justified in departing from the obiter dicta of the Vasu case.

ZIMMERMAN, JUDGE (dissenting). I am not unalterably opposed to upsetting prior decisions of this court where changing conditions and the lessons of experience clearly indicate the desirability of such course, but, where those considerations do not obtain, established law should remain undisturbed in order to insure a stability on which the lower courts and the legal profession generally may rely with some degree of confidence.

\* \* \*

### ***NOTES AND QUESTIONS***

1. The *Rush* case illustrates the important and by now familiar concept of stare decisis. Although neither party in *Rush* had been a party to *Vasu v. Kohler's, Inc.*, both of the lower Ohio courts as well as the dissenting judge in the Supreme Court of Ohio regarded that case as controlling in *Rush*. Of course, as *Rush* itself demonstrates, the binding force of stare decisis is not absolute, and the parties to a later action are free to argue that the law announced in an earlier case should be changed. But a court will not lightly depart from precedent even though the parties who are before it were not represented in the case that established the precedent.

Stare decisis is a judicial doctrine that helps the courts fashion and preserve a system of laws based upon rational principle. The Supreme Court has explained:

The obligation to follow precedent begins with necessity, and a contrary necessity marks its outer limit. With Cardozo, we recognize that no judicial system could do society's work if it eyed each issue afresh in every case that raised it. See B. Cardozo, *The Nature of the Judicial Process* 149 (1921). Indeed, the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable. \* \* \* At the other extreme, a different necessity would make itself felt if a prior judicial ruling should come to be seen so clearly as error that its enforcement was for that very reason doomed.