



Civil Procedure

Discovering Connections

ACTIVITY (page 81)

1.

Lowest Court	Mid-Level Court	Highest Court
court of first instance	appellate court	highest appellate court
U.S. District Court	U.S. Courts of Appeal	supreme court (outside NY)
Supreme Court (NY)	Appellate Divisions (NY)	Court of Appeals (NY)
trial court	first appellate court	U.S. Supreme Court

2. Federal Court. The District Court is the trial court in the federal court system. Also, the appeal would be to the 6th Circuit Court of Appeals, which is the mid-level appellate court in the federal system.

Listening Script

John: Hi, Anna. I haven't seen you in awhile. What's going on?

Anna: Well, we've been busy with the latest motion in the Johnson lawsuit.

John: What's happening?

Anna: Well, Martin Corporation filed a motion to dismiss for failure to state a cause of action.

John: I thought there was a contractual breach due to failure to perform.

Anna: Yes, but Martin claims that we haven't proven failure to perform.

John: Has the District Court ruled on the motion yet?

Anna: Not yet. If they decide against us, we will appeal to the 6th Circuit Court of Appeals, of course.

John: Of course. Well, good luck. Let me know how it goes.

Anna: Will do. See you later.

John: Yeah. 'Til later.

Legal Listening

Putting the Terms to Use (page 83)

Listening Script

Dawn: Dawn Aurora speaking.

Adam: Hi, Dawn. This is Adam Shang.

Dawn: Adam, good to hear from you. What's up?

Adam: My crazy neighbor's at it again. He's filed another complaint. Of course, I want you to file the answer. That's the right term, isn't it?

Dawn: Yes, you're a quick learner, Adam. What's he alleging this time? I thought he would have given up after the last judge granted our demurrer and dismissed the case.

Adam: There you go again. Speak English.

Dawn: The judge dismissed the case because your neighbor didn't have sufficient grounds to sue.

Adam: Well, Dawn, this time the trial's going to be in Montana.

Dawn: Montana? What did he ask for—a change of venue because of that horrible newspaper article about him? Did he forget we live in Idaho?

- Adam:* Venue change? No, it was something to do with my ranch there.
- Dawn:* No, no. I can't believe he's trying for quasi in rem jurisdiction.
- Adam:* You know I don't speak French.
- Dawn:* Adam, that's Latin, and you know it. Don't worry. We may try to get it dismissed for lack of jurisdiction.
- Adam:* Whatever. He yelled over the fence this morning, "I've got you this time."
- Dawn:* We'll see what he's got in discovery. Fax the papers over, and I'll get started after I come back from court this morning.
- Adam:* OK, your fax number's 555-2226, right?
- Dawn:* Right. I'll call you back after I've had a chance to draft the answer, but it might be tomorrow.
- Adam:* Great. I'll be waiting for your call. Thanks. Bye.
- Dawn:* Bye.

Questions and Answers:

Instead of giving the students written questions, continue with a listening exercise by reading the questions to them.

- 1. Why is Adam calling his lawyer?**
Answer: To tell her that he is being sued again
- 2. What happened to the last case the neighbor began?**
Answer: It was dismissed.
- 3. In which state is the conversation taking place?**
Answer: Idaho
- 4. Did the neighbor ask for a change of venue?**
Answer: No, he didn't. He's hoping to establish that the court in Montana has jurisdiction over the case.
- 5. What might have been a reason for a change of venue?**
Answer: The bad publicity that might have prejudiced potential jurors against the plaintiff
- 6. For what reason does the attorney think the case may be dismissed?**
Answer: Lack of jurisdiction
- 7. How will the attorney see what new information the neighbor may have?**
Answer: Through pre-trial discovery

8. **How did Adam hear the news about the new lawsuit?**

Answer: The neighbor yelled over the fence and told him.

9. **How will Dawn get Adam's papers?**

Answer: He will fax them to her.

10. **When should Adam call the lawyer again?**

Answer: He shouldn't. Dawn will call him.

Legal Thumbnail

Exercise A. Case Hypotheticals and Pair Work

(page 84)

1. Exclusively federal—copyright
2. Concurrent
3. Exclusively state—divorce
4. Exclusively state—probate
5. Concurrent—diversity of citizenship

Exercise B. Reading for Details

(page 85)

1. a. New York City
b. Germany
c. Contracts
2. Perhaps, on the basis of diversity of citizenship. The following additional information is needed: The amount of damages the plaintiff, Bybee, is seeking. When Bybee first filed her suit, damages sought had to be greater than \$50,000 for a federal court to have subject matter jurisdiction. (The amount now has to be greater than \$75,000 to meet the test.)
3. Yes, in diversity of citizenship cases, both state and federal courts can have subject matter jurisdiction (concurrent jurisdiction).

Exercise C. Pair Work and Oral Presentations

(page 85)

2. Student opinions should be encouraged; the “correct” answer is given in the listening script of Exercise D.
 - a. The court thought so because the opera company is state funded. Bybee did not contest this issue.
 - b. The court thought so.
3. Give students the following instructions regarding the oral presentation.

Pay careful attention to pronunciation of numbers and letters in the statutes; mispronunciations could be very dangerous in actual oral arguments since they would be heard as the wrong sections by the listeners and the logic of the case would be shattered.

Exercise D. Listening

(page 87)

1. Answers are boldface and underlined.

FSIA provisions:

28 U.S.C. §1603 **(a)** **(b)** (1) (2) (3) (c) **(d)** (e)

28 U.S.C. §1604

28 U.S.C. §1605 **(a)** (1) **(2)**

Motion: Granted **Denied**

Listening Script

The FSIA provides that a foreign state, including “an agency or instrumentality of a foreign state,” is “immune from the jurisdiction of the courts of the United States” unless it comes within certain exceptions set forth within the FSIA. 28 U.S.C. §§1603(a), 1604.

Bybee does not challenge defendants’ assertion that they are an agency or instrumentality of a foreign state as defined in the FSIA. See 28 U.S.C. §1603(b). Instead, she claims that the activity in question is within the statutory exception to immunity which provides that a foreign state shall not be immune in any case “in which the action is based upon a commercial activity of the foreign state elsewhere. . . .” 28 U.S.C. §1605(a)(2). . . . Commercial activity is defined as “either a regular course of commercial conduct or a particular commercial transaction or act.” 28 U.S.C. §1603(d). . . .

The relevant conduct here, engaging an opera singer to perform personal services, constitutes commercial activity, as acknowledged by defendants’ counsel at the end of oral argument

of these motions. Accordingly, defendants' motion to dismiss the amended complaint insofar as it was predicated on a lack of subject matter jurisdiction is denied.

2. Student opinion

Exercise E. Information Gap

(page 89)

SUMMONS

Civil No. 6547/2006
 IN THE District Court of Provo (name of court)
Utah (county) STATE OF Utah

Margaret Acorn, CEO, Wholesale Imports, Inc.
 Petitioner/Plaintiff

vs.

Hamilton Jacobsen, CEO, Software Systems, Inc.
 Respondent/Defendant

THE STATE OF UTAH TO THE RESPONDENT:

Mr. Jacobsen (respondent)

You are hereby summoned and required to file an Answer to the attached Complaint for breach of contract on file with the Clerk of the above entitled Court at:

Provo District Court
214 North Main St.

Provo, UT 84601 (court address)

and to serve upon, or mail to Petitioner's/Plaintiff's attorney, at

Jacobs & Hall
1023 West Court St.

Provo, UT 84604 (attorney's address)

a copy of said Answer, within 20 days if you are served in the State of Utah or within 30 days if you are served outside the State of Utah, after service of this Summons upon you. If you fail to do so, judgment by default will be taken against you for the relief demanded in said Complaint, which has been filed with the Clerk of the above entitled Court and a copy of which is hereto annexed and herewith served upon you.

READ THESE PAPERS CAREFULLY. These papers mean that you are being sued for failure to meet the terms of your agreement with **Wholesale Imports, Inc.** to develop a new **order tracking software system** for her import business. The system was due **six months** ago and is not yet operable. (brief case description).

Rose Connors DATED: **July 23, 2006**

Attorney for Petitioner/Plaintiff

987 W. Court Ave. (street address)

Provo (city) UT (state) **84601** (zip)

Exercise F: Using the Casebook

(page 90)

1. Chapter 4, Section D
2. Chapter 4, Section K
3. Chapter 2, Subject-Matter Jurisdiction
4. Chapter 4, Section E
5. Chapter 4, Section F

Exercise G. Statutory Interpretation

(page 92)

1. purposeful contacts + balancing test = minimum contacts
Cerny knew or should have known that his actions (driving in an unlawful manner) could give rise to lawsuits. Additionally, since the accident occurred in Tennessee, the state has an interest in seeing that appropriate relief is granted (*World-Wide Volkswagen Corp. v. Woodson*).
2. Yes. According to Tenn. Code Ann. §20-2-223(a)(3) Cerny caused “tor-
tious injury by an act . . . ” and is therefore subject to service of process
under Tennessee’s long-arm statute.
3. A possible answer would be as follows.

Dear Mr. Cerny:

Under Tennessee law, Tennessee courts are permitted to hear cases involving citizens from other states, such as yourself, if an accident occurs in Tennessee. Because your accident occurred in Bucksnort, Tennessee, and involves a Tennessee citizen, it is highly unlikely that a Tennessee court would agree to dismiss the case for lack of jurisdiction.

You will need to respond to the complaint filed by Ms. Monterra by next week in order to avoid a default judgment. We will be happy to respond to the complaint for you and attempt to settle with Ms. Montera. Please call me when you get a chance so we can discuss your options.

Martina Holmes
Attorney-at-Law

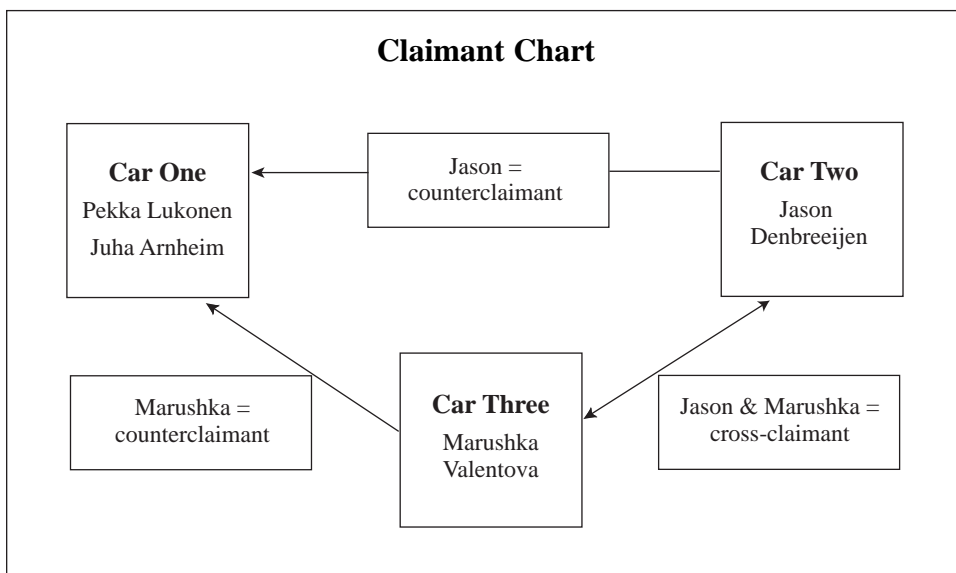
Exercise H. Reading for Details

(page 94)

1. Compuserve
2. Lack of personal jurisdiction
3. Compuserve
4. Note the three requirements from the court's decision: (1) purposefully doing business in a state; (2) cause of action arises from defendant's activities in the state; and (3) jurisdiction is reasonable. Patterson is an attorney who signed an agreement that stated that Ohio law applied. The electronic transmission of the distribution agreement for Compuserve to market his product was much more involved than simply contracting with Compuserve to act as his Internet provider.
5. He maintained that he had been damaged by Compuserve by their distributing a product similar to Patterson's.

Exercise I. Claimant Chart

(page 97)



Exercise J. Statutory Interpretation

(page 97)

2. Student opinion. Here is one sample. We've put parentheses around the parts that could be deleted at first and then added back in.

(A) **pleading** (may) **state as** (a) **cross-claim** (any) **claim by one party against** (a) **co-party arising out of** (the transaction or occurrence that is the) **subject matter** (either) **of** (the) **original action or** (of a) **counterclaim** (therein) **or** (relating to) **any property** (that is the) **subject matter of** (the) **original action**.

(Such) **cross-claim** (may) **include** (a) **claim that** (the) **party** (against whom it is asserted) **is** (or may be) **liable to** (the) **cross-claimant for** (all or part of a) **claim asserted in** (the) **action against** (the) **cross-claimant**.

Exercise K. Listening

(page 98)

Listening Script

Antonio Perez (attorney for Cherry)

Theda Cherry (client, injured in an auto accident)

Perez: Ms. Cherry, I want to go over the facts of the case one more time before I begin drafting the complaint.

Cherry: Okay, but I really don't understand why we have to do this again.

Perez: Because it is important that the facts are correct before we submit the complaint to the court. Why don't you just give me a brief overview of the facts?

Cherry: Well, I was driving to work. Guess it must have been about 9 AM when suddenly this car appeared out of nowhere in my lane and hit my car. I found out after the accident that Gary McCullough was driving that car. He told me he swerved to miss another car backing out of a pay parking lot and lost control of his car.

Perez: Who was driving the other car?

Cherry: I think her name was Janelle Stem.

Perez: Yes, that's right. I have her name from the police report.

Cherry: I never saw her either before or after the accident. It all happened so suddenly.

Perez: What lane of traffic were you in when the accident occurred?

Cherry: I was in the center westbound lane.

Perez: And since McCullough was driving in the opposite direction, he must have been going east. Was he in the center lane also?

Cherry: Yes. He was in the center eastbound lane.

Perez: Was the area congested?

Cherry: Yes, there was a lot of traffic. I just didn't see any cars in front of McCullough.

Perez: Let's go over the police report now. Your address is the same?

Cherry: Yes. 3156 Anchor Lane, Memphis, Tennessee, 38111. My telephone number is 901-555-0300.

Perez: Hmm . . . it says here that McCullough's address is 1397 W. Bank St. in Memphis and that Stem lives at 1974 Poplar Ave, also in Memphis. Which means all of you are from Shelby County.

Cherry: Whatever you say. I don't remember their addresses.

Perez: We are going to ask for \$5,000 for repair of your car and \$300,000 for your personal injuries. That appears to be fair considering the expenses you've incurred for your medical bills. Weren't your personal injuries a broken nose; pain in your knees, hip, and chest; and trauma to your sternum?

Cherry: Yes, that's right.

Perez: Were you able to go right back to work?

Cherry: No, I missed quite a few days of work the year after the accident. I would say about ninety days, in fact.

Perez: We'll have to get the exact figure later from your personnel file. An approximate number will do for now. Okay, I'll put this information together for the pleading so we can have a hearing as soon as possible.

Cherry: Thank you, Mr. Perez. This whole situation has been so traumatic, and you've really spent a lot of time on it.

Perez: That's no problem at all, Ms. Cherry. That is what I am here for—to help you recover for your injuries. Do you have any questions about the trial procedure?

Cherry: Not right now. I'll depend on you to keep me informed.

Perez: I'll do that. Thank you for coming in to see me.

Cherry: That's all right. I just want to get this settled.

Perez: I'll call you once I hear from the court or one of the other attorneys.

Cherry: Thank you. Have a good day.

Perez: You, too, Ms. Cherry. I'll be in touch. Good-bye.

Some blanks have been added to test pronoun or article usage, which students should fill in. Other blanks have been added to test the students' confidence in their listening and reading abilities. That is, some information is not provided on the tape or in Chapter 4 of the student book.

CIRCUIT COURT OF SHELBY COUNTY
MEMPHIS, TENNESSEE

Theda Cherry,

Plaintiff,

v.

}

Gary McCullough,

Defendant

and

Janelle Stem,

Defendant.

No. _____

[court docket number—a number
the court assigns to each case]

I

PLAINTIFF'S DOMICILE

Plaintiff **Theda Cherry**, is resident of **Shelby** County, State of **Tennessee**, residing at **3156 Anchor Lane** [street address], **Memphis** [city], **38111** [zip code], **(901) 677-0300** [telephone number].

II

DEFENDANTS' DOMICILE

Defendant **Gary McCullough**, resides at **1397 W. Bank St.** [street address] in the City of **Memphis, Shelby** County, State of **Tennessee**. Defendant **Janelle Stem**, resides at **1974 Poplar Ave.** [street address] in the City of **Memphis, Shelby** County, State of **Tennessee**.

III

FACTUAL ALLEGATIONS

Plaintiff **Theda Cherry** on **July 10, 20__**, at approximately **9 AM** was driving west on Jefferson Avenue in Memphis, Tennessee. She was proceeding at about **5 miles per hour** in the **center westbound** lane of the four-lane street when **Gary McCullough**, the defendant, driving **east** on Jefferson Avenue, went into a spin and swerved into her lane of traffic, striking the plaintiff's vehicle on the front driver's side. At no time did Plaintiff's car leave the **center**, westbound lane of traffic. Defendant, **Janelle Stem**, was backing out of a **pay parking** lot on Jefferson Avenue into Jefferson Avenue at the time Defendant **McCullough's** car was proceeding **east** on Jefferson Avenue. He alleges that he swerved to miss Defendant **Stem's** car and thereby lost control of his vehicle, spinning into Plaintiff's lane of traffic.

As a result of the negligence of defendants, Plaintiff **Cherry** was thrown forward sharply, striking various parts of **her** body, and causing serious and permanent injuries to the Plaintiff.

IV

CAUSES OF ACTION

The collision on **July 10, 20__**, resulted from the negligence of the Defendant, **McCullough**, in failing to keep **his** vehicle under control, in driving at excessive speed in a **congested** area, and in failing to guide **his** vehicle so as to avoid colliding with the vehicle of **Cherry** in violation of Tenn. Code Ann. §55-8-123 of the State of Tennessee, which provides:

Whenever any roadway has been divided into two (2) or more clearly marked lanes for traffic, the following rules, in addition to all others consistent herewith, shall apply:

(1) A vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety; . . .

And from the negligence of Defendant, **Stem**, by making an improper move into traffic in violation of Tenn. Code Ann. §55-8-150 of the State of Tennessee thereby causing Defendant, **McCullough**, to swerve into Plaintiff's lane of traffic, striking Plaintiff's vehicle. The statute provides as follows:

The driver of a vehicle within a business or residence district emerging from an alley, driveway or building shall stop such vehicle immediately prior to driving onto a sidewalk or onto the sidewalk area extending across any alleyway or driveway, and shall yield the right-of-way to any pedestrian as may be necessary to avoid collision, and upon entering the roadway shall yield the right-of-way to all vehicles approaching on the roadway.

V

INJURIES SUSTAINED

As a proximate result of the negligence of Defendants, Plaintiff, **Cherry**, suffered serious injuries, including a broken **nose**, pain in her knees, hip, and chest, and trauma to her sternum. As a result of such injuries, Plaintiff **Cherry** has incurred hospital and medical expenses and has sustained physical pain and mental anguish. **She** has been unable to attend to **her duties both at work and at home**. [Note: This information is included but not explicitly and not in this form, so it may be difficult for students to fill in this blank.] Plaintiff **Cherry** was employed at the time of the collision and, as a proximate result of the negligence of Defendants, is now unable to work and has been placed on long-term disability. **She** will sustain physical pain and mental anguish for the remainder of **her** life.

Plaintiff **Cherry** alleges that all charges sustained for medical services are the usual, reasonable, and **customary** charges for similar services rendered in **Shelby** County, State of **Tennessee**. **Her** injuries, and the effects thereof, are in all reasonable probability of a lasting nature and will handicap **Cherry** for the remainder of her life. By reason of the negligence of the Defendants, Plaintiff **Cherry** has been damaged in the sum of **\$300,000.00**.

VI

TOTAL DAMAGES SUSTAINED

Plaintiff's automobile was damaged and **depreciated** in the sum of **\$5,000.00**. Plaintiff's total damages are in excess of the sum of **\$300,000.00**.

Plaintiff avers that she is entitled to recover from Defendants the amount of **305,000.00** Dollars, and requests this court to grant such **award** [Note: **Not in listening exercise—legal terminology**], and demands a hearing [Note: **Not in listening exercise—legal terminology**] to try the cause, and further requests such other relief as this court deems proper.

Signature of Plaintiff

Attorney for _____

Attorney's Address

Exercise L. Juries through Moral Dilemmas

(page 104)

1. Many answers are possible, ranging from the most severe penalty (expulsion from the LL.M. program as the most appropriate response to an explanation of the cultural ramifications as the most appropriate cultural response. There is no right or wrong ordering here. The purpose of the exercise is to have students think about plagiarism and some of the consequences.

Our negotiated responses (but only ours) might be:

- 1 failing grade for the paper
- 2 failing grade for the class
- 3 expulsion from the class
- 6 expulsion from the LL.M. program
- 4 a reprimand and note in his file
- 5 an explanation of the cultural ramifications

Rankings 4 and 5 come before 6 only because it would be extremely rare for someone to be expelled from an LL.M. program.

2. Student response. Answers will vary by class.
3. Student response. Answers will vary by group.

Possible Jury Advantages	Possible Jury Disadvantages
Negotiated conclusion	Decision difficult to reach
Multiple viewpoints heard	Juror bias—one juror can hang the jury
Human rather than objective approach	Emotional rather than objective decision
Second review of the evidence	Non-legal review of evidence

Exercise M: Progression of a Lawsuit. Fill in the Chart

(page 108)

Date	Activity	Expected Result	Parties
May '05	Smith is "injured"—breach of contract	Something will have to be done about the breach of contract	Smith/Jenkins/ Metropolitan Opera (Opera)
June '05	Smith hires Pearson as her attorney	filing of lawsuit	Smith/her attorney
July '05	Pearson files lawsuit against the Metropolitan Opera Company (Met) and Jenkins	eventual damages	Pearson/court
July '05	Attorneys for Met and Jenkins file answers to the complaint	eventual resolution of the breach of contract action	Pearson/Opera and Jenkins's attorney (Morris)
Aug '05	Pearson (attorney for Smith) moves for a summary judgment	Summary judgment	Pearson/Morris
Sept '05	Court denies motion for summary judgment	Pre-trial discovery process begins	All parties
Nov '05	Discovery process begins	Obtain the information necessary to conduct the trial	All parties
Dec '05	Pearson to depose Jenkins	Obtain information about the alleged contract	Pearson/Jenkins/ Morris/court reporter
Jan '06	Morris (attorney for Jenkins) to depose Smith	Obtain information from the plaintiff, Smith	Morris/Pearson/ court reporter
Feb '06	Met's attorney to depose Smith	Obtain information from the plaintiff, Smith	Met's attorney/ Pearson/court reporter
Feb '06	Exchange of interrogatories	Obtain information in records or information not obtained during the depositions	All parties
Mar '06	Trial date set for August '06	No settlement has been reached; the parties will appear in court	Court/All parties
Aug '06	Trial begins	Someone will "win."	All parties and judge/jury
Aug '06	Verdict rendered	Jury makes a determination on whether or not there has been a breach of contract.	Jury
Aug '06	Judgment entered	Final determination of the rights of all involved parties	Judge
Sept '06	Post-trial motions filed	Appeal	"Losing" party