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Chapter 10: Trial Courts: How Civil Cases Begin

Judicial Process: Law, Courts and Politics in the United States

Chapter Topics

The Disputing Pyramid Resolution Without Filing a Lawsuit The Litigation Explosion Argument Tort Reform

The Complex World of Torts Alternative Dispute Resolution

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The Disputing Pyramid

- litigation signals the arrival of disputes that happened elsewhere—lawsuits/ disputes are a process
- the vast majority of disputes will never result in a lawsuit 50 out of 1000
- the disputing process has a number of stages: 1) grieving, 2) claiming, 3) disputing, 4) hiring a lawyer, and 5) deciding to sue

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Grieving

- all civil disputes start as grievances
- the belief by one party that it has been "wronged" by someone else
- grievances are common events, nearly 40% of households experience a serious grievance each year
- most grievances will not become lawsuits – they are "lumped"

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Claiming

- communicating a sense of entitlement to the party perceived as responsible
- about 70% of grievances will turn into claims
- claiming varies by type of grievance e.g. property cases often lead to claims

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Disputing

- if the other party accepts responsibility and agrees to redress claim then there is no dispute
- disputing occurs when a claim is rejected, 2/3 of claims are rejected
- tort claims are least likely to be rejected
- rejection does not necessarily lead to court—alternative means of resolving the case may be pursued∞

Hiring a Lawyer

- less than 25% of those suffering a grievance will hire a lawyer
- post divorce and tort claims are most likely to hire a lawyer
- lawyers are important part of disputing pyramid—they define the law, and explain how the system works
- hiring a lawyer does not necessarily lead to court—lawyers work to settle

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Lawyers and Clients

- lawyers engage in "law talk" with clients—explaining the law
- sometimes there is conflict—as clients tell lawyers about problems, but lawyers tell clients about the law
- lawyers focus on the business of settling disputes

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Deciding to Sue

- suing is a last resort, when other methods of dispute resolution fail
- lawyers are very important in the decision to sue
- non-lawyers often misunderstand the law
- civil court is not like criminal court • compensates but does not punish

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Deciding to Sue

- is suing worth the money, time , effort, hassle, etc.
- litigation creates stress between the parties (who often know each other)
- the potential of losing causes many lawyers to urge their clients to settle– both

∞

Resolution Without Filing a Lawsuit

- only 50 out of 1,000 disputes will result in a lawsuit
- filing a lawsuit does not necessarily result in a trial
- the vast majority of cases are resolved before a lawsuit is filed
- courts are an important threat– dispute resolution happens under the "shadow of the law"

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The Litigation Explosion Argument

- many American believe we are suffering from a litigation explosion
- high profile cases encourage this view (McDonald's coffee spill)
- trends: increasing federal filings, growing legal profession, publicity for extravagant filings
- but: not all cases filed go to court, all lawyers do not practice law, more publicity

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Probing Caseload Growth

- Marc Galanter is a critic of the litigation explosion argument
- some studies actually show that litigation rates now are lower than in the early 19th century
- much of the increase corresponds to an increasing population
- case filings have increased but not "exploded"

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Shifts in Business

- the kinds of cases is also an important feature of the civil court caseload
- early 20th century–market related cases dominated (property, contract)
- today non-market cases predominate (auto accidents, child custody, divorce)
- more lawsuits challenging governmental action

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Public Perceptions of the Litigation Explosion

- much of the public furor is over what not how much of it courts are doing
- disadvantaged groups often use the legal system to redress grievances
- some argue this led to a "legalization" or "judicialization" of disputes
- policy lawsuits are particularly contentious

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Public Perceptions

- the public largely believes that there is a litigation explosion
- views are nuanced, factors such as race, class, and community norms play a role in determining views

- some individuals are seen as “quick to sue”, while others see these individuals as pursuing their “legal rights”

∞

Public Perceptions

- a “frivolous lawsuit” is in the eye of the beholder
- political ideology is a helpful guide to views about litigation—with political liberals favoring the use of the legal system to balance competing interests— and conservatives opposing such use
- many countries are more hostile to lawsuits than the U.S.

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~~Tort Reform~~
~~• business groups charge greedy lawyers with driving up the cost of business, lawyers counter that businesses try to cheat citizens out of their rights to sue~~
~~• lawyer bashing is common and trial lawyers are a popular target in elections~~
~~• tort reform debate often follows patterns of litigation~~
~~∞~~

~~Tort Tales~~
~~• moralistic parables that drive home the point that something needs to be done about “a legal system that is out of control”~~
~~• are short, therefore easy to retell~~
~~• emphasize the stupidity of the victim • the defendant is always blameless~~
~~• a focus on the greedy plaintiff~~
~~∞~~

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Chapter 11: How Civil Cases End

Judicial Process: Law, Courts and Politics in the United States

Chapter Topics
Civil Procedure Steps in a Civil Lawsuit
Negotiations, Settlements, and Dispositions
Dynamics of Trial Court Dispositions Negotiating Small Claims Bargaining Divorce Cases
Winners and Losers

∞

Civil Procedure

- governs how noncriminal lawsuits are handled
- the rules of civil procedure are very different from criminal procedure
- covers more legal matters
- less extensive due process guarantees
- during trial plaintiff must only ~~proved defendant guilty~~ [prove liability] on the preponderance of evidence (not beyond a reasonable doubt)

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English Practices

- English civil procedure during the initial development of American law was very formal
- encouraged lawyers to include every possible allegation
- a heavy focus on the procedures to follow in a case—so much so that cases were sometimes lost because of technical mistakes

∞

American Adaptations
- initially Americans rejected the formalism of English practice, but over time the American system also became cumbersome
- modern U.S. civil procedure began in 1938 with the adoption of the Federal Rules of Civil Procedure
- requires notice pleading—which focuses on sharing information with defendants

∞

American Adaptations
- the facts of a case are determined by discovery
- issues in the case are narrowed by a pretrial conference
- The Federal Rules of Civil Procedure are short (86) but there have been many judicial interpretations (100 volumes)
- 35 states have adapted the federal rules for local use

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Steps in a Civil Lawsuit
- purpose of civil procedure is the just and efficient resolution of disputes
- based on the guiding premise of due process of law:
- notice must be given to an individual being sued
- there must be an opportunity to respond

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Complaint
- A civil case begins when a plaintiff files a complaint—a notification to the defendant that he or she is being sued and for what reason
- states why the court has jurisdiction • provides statement of the facts
- states a cause of action (legal theory about why the plaintiff is entitled to recovery) • specifies a remedy

∞

Service
- the formal notification of the defendant —referred to as service and often involves a summons: a notice informing the person that a lawsuit has been filed and that he/she should appear in court at a certain time.
- often delivered by the local sheriff or a authorized private process server
- can sometimes be difficult to deliver— defendant may go into hiding

∞

Answer
- the answer is the defendant's written account responding to the complaint
- Federal Rules allow 20 days for an answer
- failure to respond may result in a motion for default judgment—which is a victory for the plaintiff
- common responses include denial, affirmative defense, or counterclaim

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Answer
- the complaint and the answer together make up the pleadings—the formal written statements about a case
- the pleadings can be amended during the course of a lawsuit as new information becomes available

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Discovery
- discovery involves the formal and informal exchange of information between the two sides in a lawsuit
- rests on the philosophy that before trial, every party is entitled to the disclosure of all relevant information, regardless of its source
- counter to the idea that information should be privileged
- designed to equip both sides fairly ∞

Discovery
Privileged Information
- reflects the idea that some information should be kept confidential
- courts recognize the lawyer-client relationship, husband-wife, doctor-patient, clergy-penitent, and journalist-source
- all except lawyer-client are considered to be qualified, not absolute

∞

Discovery
Tools of Discovery
- deposition—the sworn testimony of a witness taken out of court. If a person refuses to appear for a deposition a subpoena might be issued. Provides information to both parties.

- production of documents—the voluntary sharing of all documents related to the case. If a party refuses a subpoena duces tecum can be issued—which is a court order requiring the production of documents in case

∞

Discovery

Tools of Discovery

- interrogatory—a series of written questions from one side in a lawsuit to another. Lawyers use interrogatories to get answers to factual questions or to get an explanation of the other side's legal contentions
- the tools of discovery are intended to allow both parties in a case to share information and to guarantee that a decision will be made based on the merits of the case

∞

Motions

- a motion is a request that a judge make a ruling
- there are a variety of motions
- dispositive motions grant a victory to one party without a trial
- one type is a summary judgment which says a party should win even if the allegations by the other party are true

∞

Pretrial Conference

- the judge and lawyers for the parties use a pretrial conference to discuss matters associated with the pleadings, issues of fact and law, etc.
- may also be used to get the parties to try and reach an early settlement (avoiding a costly trial)

∞

Enforcing Judgments

- the court's official decision in a lawsuit is called a judgment, court order, or decree
- if a defendant does not voluntarily comply with a judgment the plaintiff must take further steps
- permission to seize property • garnish wages

∞

Negotiations, Settlements and Dispositions

- approximately 95% of all civil cases filed in federal district are settled before trial—voluntary settlements are the norm for case disposition
- negotiation is where the parties in a civil suit are able to reach a settlement
- settlements benefit the litigants and save the system money

∞

Intensity of Negotiations

- evidence suggests that there are relatively few offers and counteroffers
- the intensity varies by type of civil case—more in torts, less in divorce
- the entire system expects parties to settle
- one study showed that lawyers spend approximately 10% of case time on settlement issues

∞

Types of Negotiations

Best Results Negotiations

- lawyers focus on obtaining the best possible settlement for their clients

Appropriate Results Negotiations

- lawyers focus on getting an appropriate results given the alleged facts
- less adversarial—used where evidence and liability are agreed upon

∞

Types of Negotiations

Ritualistic Negotiations

- lawyers for the parties go through the motions of negotiations (offers/counter- offers) but the disposition of the case appears obvious but the system expects negotiating behavior
- settlement is obvious in a civil case— or plea bargaining negotiating in a criminal case (normal penalties)

∞

Dynamics of Trial Court Dispositions

- the disposition of cases varies greatly by the substance of the claim raised

Settling Tort Cases

- one million tort cases are filed in state courts every year
- only a few tort cases will be high profile
- tort cases focus on liability ∞

Settling Tort Cases

- areas of liability include:
- manufacturer's liability for defective products
- negligence of service providers (amusement parks, day care centers)
- liability decreased for plaintiffs who have not caused damage
- lower standard for proving defendant caused damages

∞

Settling Tort Cases

- some believe the expansion of liability has led to a litigation explosion
- most tort claims never become cases
- tort cases reflect procedural adjudication involving a lot of pretrial activity—as if preparing for trial
- trial delay is common
- negotiations are conducted by experts

∞

Settling Tort Cases

- jury trials are exceptionally rare
- jury verdicts do set the parameters for negotiations and settlements— negotiation happens in the shadow of the law
- trials represent substantial costs which all parties work to avoid
- the typical defendant is a large insurance company

∞

Negotiating Small Claims

- small claims cases constitute the largest category of civil cases
- involve debt collection, nonpayment for goods, landlord-tenant disputes
- do not attract public attention
- reflect routine admin.—many defendants never bother to appear in court

∞

Negotiating Small Claims

- many cases are settled before an actual trial
- some cases will go to at trial—usually a bench trial where the parties make brief presentations, the judge asks some questions and then makes a judgment
- these trials reflect decisional adjudication

∞

Negotiating Small Claims

- enforcing small claims judgments is a real problem

- one study found that in 50% of cases the defendant never paid the plaintiff the damages owed
- the law is typically clear once the facts are established and trials tend to be very quick—one study showed less than 10 minutes

∞

Bargaining Divorce Cases
- more than 1.3 million couples legally dissolve their marriages every year
- results in a large number of family law cases (divorce, child custody, paternity, adoption, child support, etc.)
- family law has changed drastically over the years
- no-fault divorce does not require bad behavior by one spouse

∞

Bargaining Divorce Cases
- standards for custody have changed– the law used to assume that women would be the better custodian for children
- most property today is considered shared–rather than going to the man
- unique because a legal judgment must be secured
- most are routine administration ∞

Bargaining Divorce Cases
- most divorce agreements will come to a judge after the parties have arrived at a settlement
- diagnostic adjudication often occurs when the judge has to get involved in settling issues relating to children and custody
- enforcement of support is problematic one study showed 1/3 of women received no payment

∞

Winners and Losers
- there has been a great deal study focused on “who wins” in civil court
- repeat players are more likely to win
- but is that because of their expertise or because of the law on which they base their claims
- in divorce cases men come out better than women

∞

Winners and Losers
- small claims cases benefit businesses who use them regularly
- in tort cases, big insurance companies have more resources and win more than the defense lawyers
- there are real economic and social consequences of who wins and loses in civil cases

∞

Conclusions
- civil procedure was adapted from English practices
- the steps of a civil lawsuit help us analyze what happens during a dispute
- negotiation occurs in all lawsuits • the goal is settlement
- understanding who wins and loses and why is important

∞

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Chapter 12: Trial and Juries

Judicial Process: Law, Courts and Politics in the United States

Chapter Topics

History and Function
• judge the facts in a case
• modeled after the British experience as described in the Magna Carta 1215
• American colonists believed very strongly in the right to trial by jury
• primary purpose is to safeguard citizens against arbitrary governmental actions
∞

History and Function
• protected in three areas of the Constitution
• Article III, Section 2 addresses “trial by jury”
• Sixth Amendment addresses “speedy and public trial with impartial jury”
• Seventh Amendment addresses the general importance of trial by jury
∞

Scope of the Right
• not all litigants are entitled to a jury trial
• exempt are juvenile offenders, adults charged with petty offenses—crimes for which authorized punishment is less than six months in jail
• some states offer wider guarantees
• not all civil litigants are entitled to a jury trial
∞

Jury Size
• English juries became fixed at 12 in the fourteenth century
• practice was adopted in the U.S.
• Supreme Court has ruled that 12 is a historical accident
• less than 12 is allowed: a) noncapital criminal cases, and b) civil cases
∞

Jury Size
• some argue that 6 member juries reduce court backlog
• social science finds:
• small and large juries spend equal time deciding cases
• small juries do not exclude important points of views
• jury size does not affect criminal cases
• some evidence that 12 member juries are less able to reach verdict
∞

Unanimity
• colonies followed the English practice of requiring unanimity
• Supreme Court has upheld nonunanimous verdicts criminal (noncapital) trials
• 2 states permit nonunanimous verdicts in criminal felony trials (LA, OR)
∞

Jury Selection
• juries are chosen through random processes and deliberate choice
• three steps: a) compiling a master jury list, b) drawing the venire, and c) conducting the voir dire
• do these steps produce fair and impartial juries?
∞

Master Jury List
• a master list of names is compiled for the community where the trial will be held (must be representative)

• common sources include, voter registration, motor vehicle records, telephone directories, driver's license lists, utility customer lists
• historically some groups have been excluded: women, African-Americans
∞

Venire
• the venire is the jury pool
• names are drawn from the master jury list and they are asked to report for jury duty (the venire)
• some exemptions are made: doctors, lawyers, ministers, etc.
• compliance with jury duty summonses is a major concern (many people do not report or ask for exemptions)
∞

Voir Dire
• voir dire is the examination of a prospective juror to determine if they can be fair and impartial
• process varies tremendously– sometimes only a judge is involved in other places lawyers participate too
• scope and intensity of the questioning varies too
∞

Voir Dire
• each side in the case can excuse potential jurors
• challenge for cause – is when a juror is removed because the lawyers and judge agree the individual cannot be fair
• peremptory challenges – when lawyers excuse jurors without giving a reason
∞

Voir Dire
• lawyers have wide discretion to use peremptory challenges – but may not exclude jurors because of race or gender
• lawyers use voir dire for other reasons:
• educating citizens about the role of juror
• trying to influence how the juror views their client
∞

Jury Consultants
• jury selection has taken a scientific turn
• used in high profile/expensive cases
• use public opinion polls, focus groups to help write questions for lawyers to use during voir dire
• used more by defense attorneys than prosecutors
∞

Jury Duty
• jury duty is the only time when citizens perform direct service for their government *??*
• many citizens appear frustrated with having to perform jury service
• most jurors report being satisfied with the process
• government is trying to ease the burden -- to get greater compliance
∞

Moving Party Presents Case

• at the beginning of the trial each side makes an opening statement – presenting a version of the facts that supports their side of the case
• the moving party (prosecutor/plaintiff) presents its case in chief
• the moving party has the burden of proof
∞

The Burden of Proof
• the burden of proof varies depending on if the case is civil or criminal
• in civil cases: preponderance of the evidence – evidence that is of greater weight than that presented by the opposition
• in criminal cases: beyond a reasonable doubt – certainty that excludes all other reasonable explanations
∞

Rules of Evidence
• evidence refers to information presented at trial
• real evidence includes objects (e.g., guns)
• testimony – statements by witnesses
• expert witnesses – possess special knowledge or expertise
• direct evidence refers to proof of a fact without other information
• circumstantial evidence indirectly proves a point
∞

Rules of Evidence
• witnesses go through three stages
• direct examination – questioning by the attorney that called the witness
• cross-examination – involves questioning by the opposing counsel
purpose is to test the credibility of the witness
∞

Rules of Evidence
• two criteria for judging evidence
• trustworthiness –the most reliable and credible information should be used
• relevance – evidence must be related to an issue at trial
Effort is to avoid immaterial or irrelevant evidence
∞

Scientific Evidence
• common evidence today (blood, hairs, firearms, fingerprints) – have been controversial in the past because of the science behind their collection
• courts are constantly faced with new technology to generate evidence
• the judge has a responsibility to determine the validity of “scientific evidence” (Daubert v. Dow 1993)
∞

Scientific Evidence
• the most significant recent controversy involves DNA evidence
• DNA evidence is now widely accepted and viewed as reliable
• being used to open past convictions and has resulted in numerous exonerations
• CSI effect – jurors now expect DNA in every case
∞

Objections to Evidence
• during trial attorneys are constantly objecting to the admission of evidence

• the judge may rule on the spot or ask the attorneys to present arguments on why/why not the evidence should be admitted
• inadmissible evidence does get presented – the judge will instruct the jury to ignore the evidence or call a mistrial
∞

The Defense Presents its Case
• defense attorneys carefully evaluate the prosecutor/plaintiff's case and decide how to react
• one early decision is to decide on whether to have a jury or bench trial (only a judge)
• two common strategies: a) burden of proof, or b) denial
∞

The Defense Presents its Case
• Burden of Proof
• asserts that the moving party did not provide sufficient evidence to convict
• the defense is not required to call any witnesses or present evidence
• can use cross-examination to raise doubts about the quality of the evidence
• many experienced attorneys avoid this strategy unless they must use it because it does not give the jurors an "explanation"
∞

The Defense Presents its Case
• Denial
• the other strategy is to deny the facts the moving party presented and offer evidence and testimony to back up this view
• jurors are naturally curious about the defendant's case (reason, explanation, etc.)
• in criminal cases the defendant often needs to testify (but is not required to per the 5th Amendment)
∞

Rebuttal
• after the defense rests its case the moving party may call a rebuttal witness
• used to show the defendant's explanation cannot be accurate
• the rules for rebuttal are complex – the moving party must show that it could not have been used during their case in chief
∞

Closing Arguments
• after both sides have rested (presented their evidence) each party can make a closing argument – allow each side to sum up the facts and indicate why the jury should decide in their favor
• put a favorable light on their case
• require considerable skill by the lawyers (emotion is often used)
∞

Jury Instructions
• after closing arguments the judge instructs the jurors in the meaning of the law that is applicable to the facts
• jury instructions include: a) discussions of general legal principles, b) specific instructions regarding the case at hand, c) information about legal standards, d) information about possible verdicts
∞

Jury Instructions
• the judge and lawyers each prepare drafts of instructions
• jury instructions are written out, signed by the judge read to the jury
• judges are careful in their wording but many believe that jurors do not fully understand the instructions
• studies suggest that jurors often need clarification of instructions
∞

What Motivates a Jury?
• jury deliberations are secret so research on jury deliberations must be conducted indirectly
• research is mixed on what jurors discuss during deliberations—most deliberations are short and focused on the trial
• votes are taken almost immediately upon entering the deliberation room
∞

What Motivates a Jury?
• a lone juror rarely produces a hung jury
• some argue that discussions "do not so much decide cases as bring about consensus"
• if the jury cannot decide the trial ends with a hung jury
• the moving party may decide to try the case again
∞

The Verdict
• the jury foreperson announces the verdict – the decision of a trial court
• after the announcement either party can ask for the jurors to be polled
• juries convict in criminal cases 2/3 of the time and in civil cases find for the plaintiffs about 50%
• studies show that juries and judges would frequently agree on outcome
∞

Prejudicial Pretrial Publicity
• in criminal cases the defendant is entitled to a trial by impartial jury
• the jury should not be influenced by pretrial publicity
• pretrial publicity does bias juries
• most trials go unnoticed so bias is extremely unlikely
• voir dire is designed to find any jurors that might be biased
∞

Limited Gag Orders
• in notorious or high profile cases, selecting a jury may be difficult - the judge may issue a gag order – an order forbidding those involved in case from talking to the press
• in theory gag orders can be enforced by contempt of court citations, but in practice they are very problematic because reporters refuse to reveal their sources
∞

Change of Venue
• venue is the local area where the trial is being heard
• a change of venue can be requested to help pick an impartial jury
• defense attorneys must weigh the benefits of a change of venue with the likelihood of getting a jury with different values, beliefs, etc. than the one from where the defendant is from
∞

Sequestering the Jury
• to mitigate the impact of the press on the jury the judge can decide to sequester the jury
• the jurors may live in a hotel and be carefully monitored
• this affects who can serve as a juror
• sometimes the judge will allow the jurors to go home but may instruct them not to watch tv, read newspapers, etc.
∞

Trials as Balancing Wheels
• juries are democratic institutions
• represent a deep commitment to the role of citizens in the admin. of justice
• juries resolve disputes that individuals are unable or unwilling to resolve
• the settlement of most cases is directly related to past jury verdicts in similar cases
∞

Trials as Balancing Wheels

• juries introduce community norms into the legal process
• there is wide variation in verdicts
• in federal criminal cases, juries convict at different rates depending on the type of crime
• Juries introduce considerable uncertainty in the legal process
∞

Conclusion
• trials--protected in the Constitution: significant part of our legal history
• jury trials are an essential part of the legal system
• issues surrounding jury size, unanimity, selection and decision making are frequent topics of study
• an important conclusion is that there is considerable discretion in the trial process