

CIVIL PROCEDURE  
PRACTICE EXAM  
ESSAY QUESTION (50%/90 MINUTES)

Old Zealand (O.Z.) is an island country whose people are physically distinctive by virtue of their unusual ear shape and unique dress. A radical faction of O.Z., tired of its country's lack of international recognition, began to spray paint their national symbol on public buildings throughout the world. In the United States, the graffiti spree provoked a backlash in which some vigilante motorists randomly ran down O.Z. pedestrians.

Congress responded by passing the Old Zealand Anti-Discrimination Act (OZADA). The OZADA created a federal right of action for "O.Z. citizens and American citizens of O.Z. descent, who are victims of vehicular violence intentionally directed at them by virtue of their national origin." The Act provides that suits must be filed exclusively in federal court, that successful plaintiffs may receive damages and attorney's fees, and that losing defendants shall forfeit their vehicle to defendant and lose their driver's license, as a civil penalty.

Your firm has been hired to represent Dizzy in the case described below. A reasonable inquiry on your part has revealed the following information:

Pell Mell Plumbing is a plumbing service that depends for its success on its promise to respond to emergency service requests in fifteen minutes or less. Dizzy is a plumber/driver for Pell Mell who is uniquely skilled by virtue of his exceptional driving ability and the specially modified truck he owns and drives when making calls.

One snowy evening in December, Dizzy collided with a group of four pedestrians, three of whom were of O.Z. descent. The fourth, Pam, may or may not have been of O.Z. descent, but looked and dressed as if she were. Pam, who was gravely injured, told Dizzy at the time that she would "get even" with him. Dizzy concedes that he was driving too fast in order to make his next appointment, but credibly insists that he did not intend to strike the pedestrians—a contention contradicted by one eye witness who thought that Dizzy appeared to be aiming his car at the pedestrians.

It is unclear whether Pam will survive. Her lawyer advised Dizzy of the lawyer's plans to depose Pam now, and to seek a preliminary injunction to prevent Dizzy from operating a motor vehicle pending resolution of the suit. You accompanied your partner to Pam's deposition. Your partner asked Pam whether she was of O.Z. descent; on advise of counsel, Pam declined to answer on the grounds that this issue had been the subject of a privileged communication between Pam and her lawyer.

Shortly after the deposition, Dizzy was served with a copy of Pam's Complaint and a notice of her motion to seek a preliminary injunction. The properly signed and captioned complaint alleged federal question subject matter jurisdiction under the OZADA in paragraph 1, and made a demand for monetary judgment in paragraph 5, a forfeiture of Dizzy's truck to Plaintiff, and the loss of his driver's license. The remainder of the complaint provided as follows:

2. Pam bears the characteristic features, and dresses in the manner, of an O.Z. citizen.
3. On December 2<sup>nd</sup>, Defendant Dizzy did intentionally drive his vehicle into Pam, who was walking along a public street, accompanied by three O.Z. friends.
4. As a consequence, Pam sustained life-threatening injuries.

A week after suit was filed, Dizzy's home was burned, causing fifty thousand dollars in damages. The arsonist cannot be found but the police have recovered evidence to suggest that the arsonist was hired by Pam. Additional investigation reveals:

- The OZADA may be unconstitutional because Congress lacks the power to federalize intentional torts directed at citizens of Old Zealand descent.

- One who intentionally causes the property of another to be damaged by fire has committed the state common law tort of trespass and is liable for damages.
- Pell Mell Plumbing has told Dizzy that his services are uniquely important and that it will not hesitate to enforce its contract with Dizzy if he declines to honor it.
- Pam's O.Z. friends—all of whom were also injured—have each threatened to sue Dizzy separately under the OZADA for damages, and each has indicated an intention to seek forfeiture of Dizzy's truck to them.
- Pell Mell Plumbing is not subject to service of process in the jurisdiction in which Pam's suit against Dizzy has been filed.
- Pam, Dizzy, and Dizzy's friends are Indiana citizens, for jurisdictional purposes.
- Dizzy has no claims against Pell Mell Plumbing.
- The OZADA provides that by seeking relief under the Act, plaintiffs relinquish any common law tort claims they might otherwise have. You should therefore assume Pam's only claim against Dizzy is under the OZADA.

**Question:**

**Devise a litigation strategy for Dizzy that responds to Plaintiff's motion and the complaint, and seeks to end the litigation before trial begins and without the expense of protracted discovery. Discuss all non-frivolous options available to you and address all non-frivolous counter-arguments that Pam could raise. In your memo, consider the non-frivolous options you could employ to avoid having the other pedestrians file separate lawsuits against Dizzy under the OZADA, and consider how, in the context of Pam's suit against Dizzy, you might address Dizzy's concern that Pell Mell may later sue Dizzy if Dizzy loses his driver's license and is unable to drive for Pell Mell. You should assume that subject matter jurisdiction requirements are satisfied.**

**Here is my answer key to the practice exam question:**

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|---|-----|-----|-----|------|
| # | /48 | /60 | /60 | /120 |
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- 
- XX **Rule 65 preliminary injunction**
  - X likelihood of success on merits: all turns on whether Pam is from OZ
  - X irreparable harm to plaintiff: absolutely none
  - X balance of hardships: defendant may lose his job or be sued
  - XX **Preanswer motion (consolidated) 12g**
  - XX 12b6 failure to state claim
  - X assume facts true/test facial sufficiency of complaint
  - X complaint fails to allege that D hit P because P was from OZ
  - X complaint doesn't allege that P is from OZ
  - X complaint is unconstitutional
  - XX 12b7/19 dismiss for failure to join Pell Mell as an indispensable party
  - X Pell Mell's contract for D's services would be impaired if D's license is revoked; D subject to potentially conflicting obligations if he loses his license to Pam and is ordered to drive for Pell Mell
  - X Joinder infeasible because Pell Mell can't be served;
  - X Pell Mell indispensable b/c loss of Pell Mell's services may be grave
  - X 12h2: 12b6 and 12b7 may be raised in answer/jop/trial
  - XX **Answer complaint per rule 8**
  - XXX Admit 2; admit collision but deny intent in 3; admit injury
  - XX 13a Compulsory counterclaim
  - X fire arose out of same transaction: crash motivates arson—same evidence
  - X counter: two events utterly separate; no real overlapping evidence
  - XX **Rule 37 motion to compel deposition answer to q re: Pam's OZ descent**
  - X Info not subject to attorney-client privilege
  - X question doesn't seek what she told her lawyer but the underlying facts
  - XX **56 Summary judgment**
  - X no genuine issue of material fact; judgment for defendant
  - X if deposition answer is that P is not from OZ, move for SJ
  - XX **Rule 11 sanctions**
  - XX Plaintiff hiding her origin—may be frivolous as to law and facts
  - XX **Rule 22/1335 defensive interpleader to add pedestrians**
  - X D possesses limited stake in his truck
  - X multiple conflicting claims by Pedestrians on his truck
  - XX **Rule 19/21 joinder of pedestrians**
  - X D subject to conflicting claims to his car unless pedestrians joined
  - X joinder feasible

**Here is an actual student answer to the exam question that received among the highest grades on the essay portion :**

Civ. Pro. Exam #17

First, I would test the sufficiency of the Complaint with a Rule 12 Motion (several Rule 12 Motions consolidated in it as per 12(g) . In it, I would have a 12(b)(6) Motion for Failure to State a Claim on which relief can be granted for purposes of this motion we must assume all facts alleged in the complaint are true. Plaintiff fails to plead two essential elements of the cause of action under OZADA.

- 1.) That Pam is an O.Z. citizen or American citizen of O.Z. decent.
- 2.) That Dizzy struck her BECAUSE of said citizenship/decent.

Also, in this consolidated Rule 12 Motion I would include a 12(b)(7) defense of failing to join an indispensable party. I would argue that Pell Mall (hereinafter P.M.) Is an indispensable party who must be joined under Rule 19 Compulsory joinder. Under (19(a)(2)(i) the action would impede P.M.'s ability to protect its interest by depriving it of its star driver, Dizzy and his special truck. Under 19(a)(2)(ii) Dizzy (already a party) may be subject to multiple/inconsistent liability, that is forfeiting his D.L. and his truck while being required under K to drive said truck for P.M. Joinder is infeasible because of a venue problem if [sic] P.M. objects (which it will to keep its star driver). (Rule 19(a)). Plaintiff will argue that Defendant can simply breach his K with P.M., and P.M. can easily hire another driver. The court will consider whether there will be prejudice to P.M. and Defendant (yes), whether judgment without P.M. will be adequate (no), and whether Plaintiff will have an adequate remedy if dismissed (maybe not). Since more factors lean toward dismissal, Ct will likely do that.

As to the 65(a) request for a preliminary injunction, the ct. will consider 3 factors:

- 1.) Probable success on the merits. This one seems to lean slightly in our favor. Pm cannot succeed if she does not claim to be OZ. Or O.Z. American.
- 2.) Irreparable injury to movant. This leans heavily in our favor. There can be no irreparable injury to Pam through Dizzy retaining his D.L., especially if P remains in the hospital and off the sidewalks. But, Plaintiff could argue she will live in fear as long as D drives. Any "injury" to P thru not having the truck can be repaired with monetary damages.
- 3.) Balance of hardships. It would be a tremendous hardship for Defendant to give up his driver's license because he would have to give up his livelihood. Plaintiff may argue he could get a desk job. Plaintiff suffers almost no hardship thru D retaining his D.L. (See #2), since 2 of 3 factors clearly go our way, the preliminary injunction will likely be denied.

If our Rule 12 Motions fail to get Plaintiff's case dismissed, we might pursue alternative dispute resolution. We could haggle with Plaintiff to settle (negotiation), invite a trusted third person to make suggestions on how to settle our dispute (mediation),

or submit our dispute to a trusted third person to make a binding or non-binding resolutions (arbitration).

To keep from being subjected to multiple suits we could seek to join the injured O.Z.'s in the present action. We could use interpleader, because our limited state (the truck) may be the subject of inconsistent/multiple liability/forfeiture to other injured O.Z.s

If the truck is worth more than \$75,000.00 we would want to use Rule 22 Interpleader, because Dizzy wouldn't have to give over the truck to the court during the litigation. (The complete diversity requirement is not a problem, because we have federal question jurisdiction). Otherwise, if the truck is worth over \$500.00, we could use §1335 interpleader. We would have to give court the truck. (Again, the minimal diversity requirement is no problem.) We could also join the other O.Z. potential Plaintiffs with Rule 19, since 19(a)(2)(ii) separate actions might subject D to multi/incon. Liability. Joinder would be feasible here, no venue, service, etc. probs. Rule 23 (Class Action) would be inappropriate because numerosity is lacking.

If our 12(b)(6) and ADR fail to resolve the situation, we must file an answer within 20 days of the filing of the complaint. Under 8(b) we must respond to the allegations of the complaint. For paragraph 2, Dizzy could admit or deny, depending on how O.Z. Pam looks. We, the lawyers, would need to conduct a reasonable inquiry into whether or not Defendant intentionally hit Plaintiff, to avoid (1)(b)(4) problems, ("denials of factual contentions are warranted on evidence".) Then we should deny the "intentionally part of paragraph 2. If we know whether or not Plaintiff sustained life threatening injuries as a result of Defendant hitting her, we could admit (if so) or deny (if not), otherwise saying "insufficient info" is good enough.

Also in our answer we could assert a Rule 13 Counterclaim for trespass (arson) against Plaintiff (after investigation to avoid 11(b) (3). I would include a 8(a)

- 1.) short plain statement of jurisdiction
- 2.) s.p.s. of claim Pam said "get even" Pam torched place.
- 3.) Demand for judgment (at least \$50,000 in damages).

Dizzy would be named (10(a), he's the real party in interest 17(a), I would sign it per 11(a)

This is probably not a compulsory counterclaim, because it results from a different transaction/occurrence (that is, the case law says this claim uses different evidence from the first). If it is a permissive counterclaim, we cannot bring it in federal court because there is no diversity and it is not a federal question.

Att client privilege is irrelevant:

We weren't asking for the communications themselves. The information itself doesn't magically become privileged by being communicated to an attorney. I would also file a 37B2 Motion to Compel Discovery of whether or not Pam is O.Z., if I cannot get that out of her another way. (Such as Rule 33 Interrogatories or Rule 36 Request for Admission.)

Then, I would file a Rule 11 Motion under 11(b)(2) for a frivolous claim and seek sanctions against her lawyer.

If none of this worked, I would depose (Rule 30) the eyewitnesses, and try to impeach him or her. I would use a private investigator to find out Plaintiff's O.Z. origins (or lack thereof). We need not worry about any other tort claims under the accident victims, since they are waived under OZADA.

While our PI is at it, let's have him investigate the arson further.

**Here are some sample multiple choice questions from old exams:**

1. Plaintiff is about to file suit to evict a tenant from a rental property that plaintiff owns. Defendant threatens to set fire to the property if plaintiff files suit. What would be the most effective step for plaintiff's counsel to take in order to prevent the defendant from following through on his threat?

- a. Seek a preliminary injunction
- b. Seek a temporary restraining order
- c. Seek a protective order under 26 (c)
- d. File a motion to compel
- e. b and c

2. Defendant files a preanswer motion to dismiss for lack of venue. Defendant could have included a defense of failure to join an indispensable party in that motion but declined to do so. The motion to dismiss is denied. May defendant now raise the plaintiff's failure to join an indispensable party in another pre-answer motion?

- a. no, because the defense was then available to defendant when the first motion was filed
- b. yes, because the motion to dismiss for failure to join an indispensable party is a favored defense
- c. no, because you may never file more than one pre-answer motion raising rule 12 defenses
- d. yes, because the defense was not then available to defendant when the motion was filed.

3. If a prospective defendant is in possession of a parcel of land and is being threatened with suit by five different people who claim to own the entire parcel, by what procedural device may the prospective defendant force a resolution of those competing claims in a single action, before the prospective defendant is sued?

- a. impleader
- b. intervention
- c. interpleader
- d. permissive joinder
- e. compulsory joinder

4. Pete is a dockworker who sues co-worker Dave for battery, for injuries arising out of a fight in a local bar. Pete decides not to hire a lawyer. He conducts his own investigation into the facts and writes a memo to himself detailing the facts he has assembled in support of his case. Dave's counsel makes a document discovery request seeking all documents in Pete's possession that relate to the fight. Must Pete Turn the memo over?

- a. no, because the memo is relevant to the subject matter but not the claim

b. yes, because the memo was not prepared by an lawyer and so does not qualify as attorney work product

c. no, unless there are exceptional circumstances that make it impracticable for Dave to obtain the facts contained in the memo by other means

d. yes, because the memo was not a communication between lawyer and client

e. no, unless Dave can show that he has a substantial need for the memo and cannot obtain the substantial equivalent of the information it contains without undue hardship.

**Here are the answers to the multiple choice questions:**

1. B

2. A

3. C

4. E