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Every procedural system makes policy choices about how hard or how easy it should be to file and pursue a legal claim. Some of these choices are reflected in the pleading rules: how much information does the system require a plaintiff to aver before she is allowed to file suit, and how much assistance will the system give her in acquiring needed information outside her control? The proposed Transnational Rules of Civil Procedure, in an effort to win global acceptance, require detailed fact pleading.[1] The notice pleading rules of the Federal Rules of Civil Procedure currently provide great freedom and flexibility, but there are rumblings of a return to more restrictive pleading requirements. Some scholars, concerned that the American system provides too little focus (and hence generates excessive expense and delay), have suggested that greater emphasis on matching causes of action with factual allegations would help control excessive discovery.[2] The Private Securities Litigation

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1. ALI/UNIDROIT PRINCIPLES AND RULES OF TRANSNATIONAL CIVIL PROCEDURE, Council Draft No. 1 at 8–9; Principle 12.3; Rule 12; Comment 12.1 (Nov. 16, 2001).

2. Stephen N. Subrin, *David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision*, 6 LAW & HIST. REV. 311, 340–43 (1988) (arguing for the centrality of "elements" and "causes of action" to rational and predictable procedure). *But see* Stephen N. Subrin, *Uniformity in Procedural Rules and the Attributes of a Sound Procedural System: The Case for Presumptive Limits*, 49 ALA. L. REV. 79, 90–91 (1997) ("I do not think we can find a serviceable way of requiring specificity of allegation at an early stage of the litigation process . . . as long as all cases are treated alike.").

Reform Act[3] requires greater detail in pleading in an effort to deter and control securities fraud claims. Some courts adopt heightened pleading requirements in order to make certain kinds of litigation more difficult.[4] In addition, the Advisory Committee on the Federal Rules has discussed the possibility of enhancing the requirements of the pleading rules.[5]

It therefore is a good time to examine a system that uses fact pleading as a way to structure litigation in order to analyze the potential consequences of such a choice. Scotland, with its interesting history as a mixed civil law/common law country, provides such a model. It is also an adversary system, so that its pleading regime functions in an environment sufficiently similar to U.S. procedure to make a fruitful comparison.

This article looks at the Scottish pleading requirements in context, and argues that such a system goes too far in preventing the litigation of legitimate claims. A system of detailed fact pleading affects not only how much a plaintiff needs to know before filing suit but also everything that happens in the suit from the complaint forward. The pleading rules in Scotland, as they shape the nature and scope of litigation, over-deter plaintiffs.[6] They allow the requirements of pleading specificity to serve as too fine a filter to the progress of a dispute: if a plaintiff doesn't know something from the outset, she can't plead it. If she can't plead it, she can't discover related documents. In addition, if she didn't plead it, she is not allowed to introduce evidence about it, because evidence must correlate quite precisely with the pleadings.[7] Nor can a judgment be based on proof of a cause of action that varies from the one pleaded. In short, Scotland's pleading requirements serve as the enforcers of an underlying requirement that a plaintiff must have pre-suit access to detailed facts and evidence sufficient to prove a claim or that claim should not be filed.[8] This predictably skews the procedural system in favor of repeat institutional defendants and against individual plaintiffs in ways that can both prevent suits from being filed and prevent persons with legitimate claims from winning at trial.

This article will focus on the effect of detailed pleading requirements on personal injury claims in ordinary actions in the Court of Session, Scotland's highest general jurisdiction civil court.[9] Section 1 will begin by outlining the basic steps in a civil lawsuit in Scotland,

3. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104–67, 109 Stat. 737 (1995) (codifying pleading requirement at various sections of 15 U.S.C., with the particularity pleading provisions codified at 15 U.S.C. § 78j–l).

4. *See, e.g.*, Cash Energy, Inc. v. Weiner, 768 F. Supp. 892, 895–900 (D. Mass. 1991). *See generally* Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433 (1986); Richard L. Marcus, *The Puzzling Persistence of Pleading Practice*, 76 TEX. L. REV. 1749 (1998).

5. *See* Judicial Conference of the United States, Minutes of the Advisory Committee on Civil Rules 17–18 (May 3–5, 1993) (discussing the possibility of heightened pleading requirements for certain types of cases); Judicial Conference of the United States, Advisory Committee on Civil Rules, Draft on Particularized Pleading (Sept. 17, 1993) (suggesting a variety of possible amendments to Rules 8 and 9 to magnify their requirements); Judicial Conference of the United States, Minutes of the Advisory Committee on Civil Rules 5–8 (Oct. 21–23, 1993) (continuing the discussion of possible amendments to restore heightened pleading requirements); Judicial Conference of the United States, Minutes of the Advisory Committee on Civil Rules 17–18 (Apr. 20, 1995) (discussing but rejecting at that time heightened pleading requirements).

6. In Scotland, plaintiffs are referred to as "pursuers" and defendants as "defenders."

7. "Averments give notice of facts which the pursuer will attempt to prove, and he is not entitled to prove other facts not averred by him." Ward v. Coltness Iron Co. Ltd., 1944 S.L.T. 409 (May 25, 1944).

8. "One should only put in one's written pleadings those facts about which one has evidence, or which could be reasonably be inferred from other facts about which one has evidence." CHARLES HENNESSY, CIVIL PROCEDURE AND PRACTICE 38 (2000) [hereinafter HENNESSY].

9. Although the Court of Session does have an additional optional procedure for personal injury claims, that procedure comes with significant strings attached: the pursuer must give up the right to trial by jury, and must

including the general function and requirements of written pleadings. Section 2 will then discuss the theoretical benefits of the Scottish system of pleading. Sections 3 and 4 analyze the impact of the pleading rules on discovery and trial, while section 5 looks at the way defendants can use the pleading system to gain procedural advantages. These sections highlight the ways in which information imbalances outside the procedure rules, party incentives in using the rules, and certain policy decisions inherent in the rules themselves result in a dysfunctional system. Section 6 notes that even in Scotland, all of the recent rule changes have moved away from detailed pleadings. In addition, recent practice in Scotland has also allowed more disclosure before the pleadings are finalized, and more amendments as cases proceed toward settlement or trial.

The article concludes by arguing that the use of detailed fact pleading as a litigation filter is an undesirable, non-neutral device for limiting litigation scope and expense. Knowledge is indeed power, and in any society in which knowledge is unevenly dispersed, a court system that requires near-complete advance knowledge has tipped the balance too far in favor of protecting defendants from non-meritorious claims. Neither the Advisory Committee on the Federal Rules of Civil Procedure nor Congress should start U.S. courts down this path.

I. Anatomy of a Scottish Lawsuit

A. Overview

Scotland has two types of courts that hear civil litigation: the sheriff courts and the Court of Session.[10] There are sheriff courts in most cities (there are forty-nine altogether), but only one Court of Session, which is located in Edinburgh.[11] There are nine sets of procedure rules in the two courts; in the interest of clarity this article will focus on ordinary actions in the Court of Session.[12]

The lawsuit begins when the pursuer's (plaintiff's) solicitor drafts the summons (complaint) and has it served on the defender (defendant). The defender receives a copy of the

agree to limit the use of expert witnesses to a point that could put the success of the claim at risk. Old habits requiring detailed notice of claims have also insinuated their way into the system so that even under optional procedure, pursuers' pleadings are required to provide significant detail. *See* Coulsfield Report on Court of Session Procedure § 6 (1998), *available at* http://www.scotcourts.gov.uk/session/report/coulreport6.htm [hereinafter Coulsfield Report]. It has also been noted that different judges have taken inconsistent approaches to the requirements of the optional procedure, thus creating an unappealing uncertainty. *Id.* For these reasons, pursuers (plaintiffs) do not often choose the optional procedure.

10. For excellent discussions of these courts and their procedures, *see generally* I.D. MacPhail, Sheriff Court Practice (C.G.B. Nicholson & A.L. Stewart eds., 2d ed. 1998) [hereinafter MacPhail]; Ronald E. Conway, Personal Injury Practice in the Sheriff Court (1999) [hereinafter Conway]; and Hennessy, *supra* note 8. This overview is greatly indebted to all three books.

11. Both hear general civil cases, but the Court of Session does not have jurisdiction over claims for £1500 or less. There are thus few differences in the original jurisdiction of the two courts, but each has its own sets of procedure rules. The committee that drafts rules for the sheriff courts deliberately attempts, where possible, to make sheriff court practice conform to the procedures of the Court of Session. *See* Hennessy, *supra* note 8, at 85.

12. The other sets of rules are small claim, summary cause, summary applications and ordinary cause (sheriff court) and petitory action, commercial cause, optional procedure, and judicial review (Court of Session). *Id.* at 14. The ordinary cause rules in the Court of Session and the sheriff courts are not identical, but their treatment of pleadings and their consequences are sufficiently similar that discussing both sets of rules would add terminology without contributing helpful information.

summons along with a warrant and a form of citation. The defender has a twenty-one day notice period following service, after which time the pursuer files the summons along with a certificate of service. The case is then placed on the "calling list," which means that the defender has three more days in which to indicate that it intends to defend the suit (enter an appearance) and seven days to file written defenses.

The defenses are supposed to respond to the summons specifically, admitting, noting lack of knowledge, denying, or offering explanations or additional facts. The defender may also raise preliminary pleas, i.e., complaints about the pleadings that should be resolved before the case goes any further. They are roughly the equivalent of the pre-answer motions in Rule 12 of the Federal Rules of Civil Procedure. The most common preliminary pleas complain that the summons is "irrelevant" (fails to state a legal claim) and "lacks specification" (requires more detail).[13]

The pursuer next files an "open record," a document that combines the terms of the summons and the defenses into one document. The parties then engage in a process called "adjustment" for at least eight weeks. During the adjustment period, the parties send the open record back and forth so that everyone can make alterations in their allegations in response to what other parties have pleaded.[14] The court is not involved in this process. At the end of the adjustment period, the pursuer is responsible for preparing and filing (within four weeks of the end of the adjustment period) a "closed record," which contains the pleadings as adjusted (plus any court orders that have been entered).

At this point, a decision must be made about the procedure that will be appropriate for the remainder of the case.[15] If there are preliminary pleas that need to be determined, they will be set for "debate" (hearing) on the "procedure roll." If not, the case can be set for "proof" (non-jury trial) or jury trial. If the parties agree, or the court orders, that the preliminary pleas should be reserved until after a hearing on the merits, that type of trial is called a "proof before answer."

Scotland also has certain non-pleading devices that operate to exchange information. Before the case goes to trial, parties may ask the court to allow recovery of documents, if those documents are directly relevant to pleaded facts and can be identified with a fair degree of specificity.[16] Also, after the judge decides that trial will be proper ("proof is allowed"), parties can serve on each other a "notice to admit," calling on the opponent to

13. These are generally raised through the stock plea that reads: "The Pursuer's averments being irrelevant *et separatim* lacking in specification the action should be dismissed." Other issues commonly raised by preliminary plea include "no title to sue" (standing); "all parties not called" (absence of indispensable parties); no jurisdiction; forum non conveniens; and arbitration clauses. *Id.* at 59–66.

14. Traditionally these changes were actually written on the open record or attached to it. *See* DAVID MAXWELL, THE PRACTICE OF THE COURT OF SESSION 201 (1980) [hereinafter MAXWELL]. In the modern technological age, they may instead be emailed back and forth and changes indicated by underlines or strike-throughs created by word processing.

15. The pursuer files with the closed record a "motion for further procedure," which can be agreed or can require the court to rule. "Arguments about whether a case would be appropriate for proof, [proof before answer], or debate occupy a considerable amount of court time and procedure." HENNESSY, *supra* note 8, at 254.

16. Absent consent of the person with control of the document (the "haver"), this will require a somewhat cumbersome process called "commission and diligence," which involves asking the court to appoint a special commissioner to retrieve the documents in question and file those documents and a report with the court. For detailed information about this process and the limits of discoverability, *see* ARCHIBALD MACSPORRAN & ANDREW R.W. YOUNG, COMMISSION AND DILIGENCE 1–86 (1995) [hereinafter MACSPORRAN & YOUNG].

admit certain facts averred in the pleadings. At least twenty-eight days prior to trial, all parties must file a list of the witnesses they intend to call,[17] and copies of all documents they intend to introduce.[18]

Parties who wish to amend their pleadings after the record is closed may request the court to allow them to do so; such permission may or may not be granted. The party who needs the amendment will often be required to pay both parties' attorney fees caused by the filing of the motion requesting leave to amend and by any extra procedure required by the amendment.[19]

If the case has not settled it will finally go to trial, and that trial will be circumscribed by the procedure that preceded it. "[T]he whole purpose of procedure and adjustment of the written pleadings from the commencement of the action to the date of the proof is to focus the matters which are in dispute between the parties and to assist the parties in determining what evidence to place before the court in order to justify the case."[20] A judgment will not be based on a cause of action that differs from what was pleaded.

B. The Requirements of Written Pleadings

The actual rules of the Court of Session do not require factual detail. Rule 13.2 provides for "a statement, in the form of numbered articles of the condescendence, of the averments of fact which form the grounds of the claim; and appropriate pleas-in law."[21] It is, rather, judicial gloss and professional practice that has led to the need for detail. It is often said that the summons must give each party "fair notice" of the opponent's claim.[22] Even this language does not tend to alert the American reader to the degree of detail required in order to give fair notice. Nor does the usual explanation: "fair notice means giving the opponent sufficient detail of the essential features of one's case to enable the opponent (and the court) to understand what the case is, to investigate the allegations made, and to give him an opportunity to contradict it with his own allegations, if appropriate."[23] It is said that a party must plead facts, but need not plead evidence. This also sounds familiar. When one begins to read the cases applying the test, and to look at the sample pleadings contained in Scottish formbooks, however, the difference between U.S. and Scottish pleadings becomes clearer.

An example may make the normal Scottish degree of detail more apparent. What follows is a formbook version of what is required of the summons in an asbestos case.[24]

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17. Court of Session Practice Note 8 of 1994, cited in Hennessy, *supra* note 8, at 264. This includes any reports of expert witnesses the party intends to call. *Cf.* Conway, *supra* note 10, at 133 (sheriff court parallel rules).

18. Rules of the Court of Session, Act of Sederunt (S.I. 1994 No. 1443), Rule 36.4, *available at* http://www.scotcourts.gov.uk/index/asp [hereinafter RCS].

19. Hennessy, *supra* note 8, at 248.

20. *Id.* at 250.

21. RCS, *supra* note 18, at 13.2(3). A "condescendence" is a statement of fact. In actions for personal injury, RCS 43.30 also requires the pursuer to make averments naming every doctor and hospital from which the pursuer received treatment.

22. *See, e.g.*, McMenemy v. James Dougall & Sons Ltd, 1960 S.L.T. 84, 85 (Oct. 12, 1960); Gunn v. M'Adam & Son, 1949 Sess. Cass. 31, 40 (Nov. 10, 1948). *See generally* Hennessy, *supra* note 8, at 39; Maxwell, *supra* note 14, at 173; Conway, *supra* note 10, at 61–65.

23. Hennessy, *supra* note 8, at 39. *Cf.* Fed. R. Civ. P. 12(e) (when more definite statement required).

24. Charles Kemp Davidson, Colin Sutherland, & Roger Craik, Greens Litigation Styles (The Hon. Lord Davidson, ed. 1994) (looseleaf, updated through Jan. 2002), Form A04-36B, Reparation—Personal Injury—Asbestosis—Provisional Damages, at A3080/4 through A308019.

From about [date] to [date], . . . the pursuer was employed initially as an apprentice and laterally as a qualified welder by the . . . defenders. He worked on their shipyard in [specify location]. He worked on board ships being built, repaired or refitted in the yard. His duties required him to work in all parts of a ship's hull. He was engaged in both construction of the hull and in fitting out of ships. He worked beside laggers or insulating engineers who applied insulation material based on asbestos to almost the whole of the inside of a ship's hull. The material was applied to boilers, heat exchangers, silencers, generators and exhausts, within the engine and boiler rooms, and to bulkheads, underdecks, cabins, passages and other areas within the hull. The laggers worked with insulation material: in powder form, which they mixed by hand into a paste; in board or block form, which they sawed and filed into shape; in the form of cloth or twine, which they cut or tore into lengths; and in the form of mats, which they beat into shape. They sprayed the material on to underdecks and bulkheads. All of these operations resulted in considerable amounts of asbestos dust being given off into the atmosphere in the pursuer's workplace.

Throughout his working life with the defenders the pursuer was exposed, frequently in confined spaces, to particles of asbestos. The particles were in the air and gathered on machinery, plant and equipment, floors, benches, ledges, staging and other internal surfaces of the ships and yards. Asbestos dust settled on his clothes and on his person. The dust was frequently disturbed by other workmen, causing it to rise again into the surrounding atmosphere. No proper and efficient ventilation was provided for the pursuer's workplaces. No efficient exhaust appliances were provided and maintained to extract dust containing asbestos particle from the air. No efficient masks or respirators were provided for use by the pursuer while he was working in the vicinity of the laggers. Floors, benches, ledges, staging and other internal surfaces were not cleaned regularly, and were not damped down effectively to prevent dust arising therefrom. No suitable protective clothing was provided to the pursuer. No warnings were given to him on the dangers associated with exposure to asbestos. From at least prior to the pursuer's employment with the defender it was well known within industry, including the shipbuilding industry, that inhalation of particles of asbestos dust carried a risk of injury or disease to the lungs or respiratory system. Consequently, during his said periods of employment, the pursuer was exposed to breathing an atmosphere impregnated by particles of asbestos dust. He breathed in large quantities of asbestos dust which lodged in and around his lungs. As a result the pursuer suffers from the loss, injury, and damage hereinafter condescended upon.

The pursuer's condition was caused by the fault of the defenders. It was their duty to take reasonable care for the safety of the pursuer, and not to expose him to unnecessary risk of injury. It was their duty to take reasonable care to protect the pursuer against the risk of his suffering injury or contracting disease caused by the inhalation of dust containing asbestos. They knew, or ought to have known, that exposure to asbestos dust carried a risk of injury or disease to the lungs. In the circumstances it was their duty to provide and maintain proper and efficient ventilation of the pursuer's workplace in order to provide and maintain proper and efficient exhaust appliances to extract asbestos dust from the air. It was their duty to provide and maintain suitable masks or respirators for use by pursuer to protect him against the inhalation of such dust. It was their duty to maintain a system whereby floors, benches, ledges and other internal surfaces were cleaned regularly or damped down to prevent dust arising therefrom. It was their duty to provide the pursuer with suitable protective clothing. It was their duty to warn the pursuer of the dangers associated with exposure to asbestos dust and the inhalation of same. In each and all their duties the defenders failed and by their failure caused the pursuer's condition. Had they fulfilled the duties incumbent upon them, the pursuer would not have contracted that condition.[25]

25. Similar allegations regarding statutory causes of action follow, as do descriptions of the injuries of the pursuer.

The Court of Session rules require the defender to respond to the summons in numbered answers corresponding to the articles of the condescendence and pleas-in-law.[26] In doing so, the defender generally has four options. First, it can admit those things it knows to be true. Second, matters that the defender does not know but believes to be true, and which it does not intend to force pursuer to prove, will be said to be "believed to be true."[27] This has the effect of an admission. Third, if there are things that the defender does not know but wishes the pursuer to prove, these things will be "not known and not admitted."[28] Finally, many allegations will be denied. The defender may then go on to give its own explanations of any facts it believes to be relevant.[29] Rather than respond in these ways, defenders may file what are called "skeletal [or skeleton] defences." These "deny most, if not all, of the averments in the pursuer's [summons] without giving any substantive explanation of the defender's position."[30] Defenders generally also raise preliminary pleas, discussed above.

II. The Theory Behind the System

The use of detailed pleading to define the scope of a lawsuit is based on policies of fairness and efficiency. In theory, each side will get sufficient notice of the opponent's contentions to allow adequate trial preparation, and no time will be wasted on matters that are not genuinely contested.

> A requirement that each party should formulate its position in writing at the outset has fundamental advantages, not only as a means of giving fair notice to the other side and helping to focus and cut down the issues in dispute, but also, and fundamentally, as an encouragement to each party to analyse the substance of the case, before trying to give it expression in writing. In my opinion, if a high quality of written formulation can be achieved at the outset, much expensive and time consuming oral procedure can often be avoided.[31]

A lawyer drafting pleadings correctly is forced to think about the elements of her client's cause of action or defense, and to match the alleged facts with those elements. If there is something missing, there is no cause of action and no claim should be filed. Further, the lawyer will not carelessly fail to offer evidence of a provable but forgotten element. Thus, pleadings can be a good exercise in clear thinking and preparation.

Similarly, in theory the initial drafting and the adjustment of pleadings will narrow the issues in the case. The defenders will admit those things they know to be true and will volunteer alternate accounts of events or missing bits of information. The pursuers will respond by limiting their claims or responding to the inferential rebuttals or affirmative defenses. By the end of the adjustment period, the parties and the court will have the benefit of a case that has been dramatically narrowed to the precise factual disagreements involved.

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26. RCS, *supra* note 18, 18.1.

27. HENNESSY, *supra* note 8, at 44.

28. *Id.*

29. *Id.*

30. *Id.* at 49.

31. ERDC Constr. Ltd. v. H.M. Love & Co (No. 2), 1997 S.L.T. 175 (Sept. 1st Div.) (Lord Prosser). Immediately following this comment, however, Lord Prosser went on to say, "That said, I am quite satisfied that pleadings of the type currently used in ordinary court procedure are frequently, and indeed normally, ill suited to their true function, failing to put essentials in sharp focus, and often putting in sharp focus inessential matters of detail, which then become the subject of pointless procedural scrutiny." *Id.*

This exchange of information that theoretically occurs during the adjustment period also, in theory, avoids the need for an American-style discovery system. Rather than provide information through sworn answers to interrogatories, sworn testimony at a deposition, or production of relevant documents (helpful or hurtful), the pleadings provide the necessary information at substantially less cost in time and money. The pursuers plead in considerable detail their version of facts; the defenders respond in kind. All that is required is candor and fully informed parties. Such, at any rate, is the theory.[32]

I suspect that there is also a certain professional pride and satisfaction involved. Mastering this system of pleading is quite an accomplishment. Years are spent learning exactly how to frame pleadings, how to identify flaws in the pleadings of opponents, and how to lay traps for the unwary.[33] Those who have the intelligence and the perseverance to have learned this system must be reluctant to abandon it for something unknown.

III. 'If You Can't Plead It, You Can't Lead It': Pleadings as a Barrier to Proof

The relationship between pleading and proof is an art form. One can state the principles of what is required and what is not, but these principles are not particularly helpful in application. They represent a label slapped on at the end rather than a method of reasoning. First, the pleader must state all "essential facts." But which facts are essential? Those that the pleader needs to have pleaded in order to be allowed to "lead" (introduce) evidence of each element of a cause of action—the test is thus circular. Second, the pleader should not plead "evidence" —excessive detail about those facts that need to be pleaded. The incentives within this system, however, lead the pleader (at least the pleader who will have the burden of proof) inexorably toward pleading more rather than less.[34] "[T]he cardinal sin for a litigator is to have evidence which is otherwise admissible, but cannot be led because there is no notice on record. . . . [T]he prudent practitioner might prefer to be criticised for verbosity, than run the risk of crucial evidence being excluded."[35] Detailed pleadings are also required to support requests for the recovery of documents.[36]

32. From an American perspective, it looks like Scotland does have something like a discovery system. Detailed pleadings function something like interrogatories and admissions. There are procedures for production of documents, for learning the identities of potential parties and witnesses, and for taking the sworn testimony of unavailable witnesses. While there are no depositions in the American sense, all persons with knowledge are expected to grant interviews to the lawyers in the case, resulting in summaries called "precognitions." There are notices to admit that function like requests for admission; before the trial parties are supposed to file lists of witnesses and copies of documents and expert reports. Judges can order parties to submit to medical examination. MACSPORRAN & YOUNG, *supra* note 16, at 10–11. Parties are supposed to file the documents on which they rely that are mentioned in the pleadings as soon as those pleadings are filed. Clearly, even in Scotland, the exchange of information goes beyond the contents of the parties' pleadings.

33. COULSFIELD REPORT, *supra* note 9, § 6.

34. "In a reparation action involving the running down of a pedestrian by a motorist, you can state a case which is relevant in law without mentioning that the driver was as drunk as a lord or that he was later convicted of nineteen road traffic offences. But if you intend to lead evidence that he was drunk and that he was later convicted . . . you must give notice of this in your pleading." ROBERT BLACK, INTRODUCTION TO WRITTEN PLEADING 15 (1982) [hereinafter BLACK].

35. CONWAY, *supra* note 10, at 62.

36. BLACK, *supra* note 34, at 16 ("A call in a specification of documents will not be approved unless you have averred facts which lay a foundation for the recovery of the documents in question."). *See also infra* section III.

A high degree of specificity is not based purely on paranoia, but on existing case law applying the tests for relevancy and specification.[37] For example, in one case the pursuer ultimately needed to prove that the defender had knowledge of a particular matter. The pursuer averred that a representative of the defender had knowledge of a conversation about this matter. The Lord Ordinary held that pursuer needed to plead the exact way in which the defender's representative knew of the discussion, whether as a participant, an eavesdropper, or through hearsay:

> [A]s a matter of fair notice it would be proper for the pursuer to clarify the point in his condescendence. While counsel for the pursuer correctly submitted that matters which are simply of evidential significance do not require to be set out in the pleadings, it seems to me that the condescendence as it presently stands does not give sufficient notice of the way in which Mr Simms and through him the defenders came to acquire the knowledge which is the critical element in the dispute.[38]

Similarly, the pleading of duty requires extreme particularity. In a case in which pipes burst and flooded the defender's property, a claim that the pipes had not been properly maintained was held to be insufficient. "[T]here is no averment as to what kind of maintenance would have been appropriate or even possible, with the result that the court is provided with no canon for judging what falls short of 'proper'. The pursuers do not offer to prove what is meant by 'proper'."[39] A look at the suggested forms in *Greens Litigation Styles*, a respected formbook for pleadings in the Court of Session and Sheriff Court, discloses the kind of narrowness and detail required in pleading, particularly in pleading particularized duty, breach, and causation in personal injury cases.[40]

If the pursuer has access to the required information, she has been forced to reveal a considerable amount of her case and her evidence and to limit that case to a narrow set of particularized claims.[41] If the pursuer does not have access to the required information, even if that information exists, she will not be able to go forward, because the pleading will fail the test of relevance.[42] The pleading requirements can thus stop a case dead in its tracks. It is not that the pursuer has no valid claim—she may or may not—but that the system will not help her find out.[43] This evidences a decision that it is more important to protect

37. The Scottish challenge to a pleading for lack of "specification" resembles the U.S. motion for more definite statement (except that it is far more likely to be granted and to require considerable detail). The Scottish challenge to a pleading's "relevancy" is like the U.S. motion to dismiss for failure to state a claim or the old general demurrer. It argues that even if all of the detailed facts alleged are taken as true, the pursuer has not made out a valid cause of action. This allows merit decisions to be based on written pleadings rather than on evidence offered at trial.

38. Kennedy v. Norwich Union Fire Ins. Soc'y Ltd., 1994 S.L.T. 617, 619 (Scot. Ex. Div.).

39. Argyll & Clyde Health Bd. v. Strathclyde R.C., 1988 S.L.T. 381, 384 (Scot. OH).

40. *See, e.g.*, *supra* section I.B. *See generally* the sections on Condescendences and Pleas in Law in GREENS LITIGATION STYLES, *supra* note 24.

41. MACPHAIL, *supra* note 10, § 8.40 (noting that the closed record "restricts both the scope of any inquiry by means of evidence and the issues for discussion by oral argument").

42. *See, e.g.*, Rae v. Glasgow City Council, 1997 Outer House Cases, Scot. Sess. (Lord Bonomy) (case claiming injury due to passive smoking dismissed because *pursuer* could not aver how and when the risks of passive smoking and the materiality thereof were or ought to have been known by the *defenders*).

43. In certain cases the rules require early disclosure, but this tends to come especially from pursuers. In personal injury actions in the Court of Session, for example, the pursuer must state in the summons the name of the hospital or medical practice in which he was treated. RCS, *supra* note 18, at 43.30. The pursuer also must lodge with the summons all available medical reports on which he may rely. *Id.* at 43.31.

defenders against potentially meritless claims than to help an information-poor pursuer litigate a potentially valid one.

Once pleadings become mired in detail, their ability to bar evidence increases. The pleader has only given fair notice of what is in the pleadings, and it is only precisely those things that one can try to prove. A pleading that a defender was negligent in driving at an excessive rate of speed provides far more significant limits on evidence than does a pleading that a defender drove negligently. The more specific a pleading is required to be, then, the more the pleader's knowledge at the outset of the case has limited the course of any ensuing proof.

It is possible to prove a proper cause of action, but for the pursuer to lose because it differed too much from what was plead. Consider the case of *Hook v. Brown*.[44] The pursuer was injured when a saw blade broke and a piece of the blade became detached. The factual allegations of the summons read: "It was their duty to take reasonable care to . . . provide a guard or fence over the blade and pulleys of the said band-saw which could be adjusted so that only that part of the blade which was actually being used for cutting would be exposed."[45] The pursuer argued after proof that the saw was inherently unsafe because it broke, but the court rejected this claim as outside the pleadings. "[T]he charge against the defenders in the present case is, that they ought to have provided a guard or fence over the blade and pulleys which could be adjusted, and that they failed to do so. . . . [N]o other charge can legitimately be spelled out of the proof."[46] Had the duty condescendence been permitted to simply allege that defenders had a duty to take reasonable care to provide and maintain safe plant and equipment, there would have been no issue of a fatal variance between pleading and proof.

Viewed in this light, pleading specificity is not primarily about giving notice. There is no question in *Hook v. Brown*, for example, that the defenders knew that the pursuer was claiming to have been injured by a defect in the band saw and that they had the opportunity to investigate any possible way in which their saw could have caused that injury. They owned the saw. They could have it examined by experts. They could have a list of the pursuer's witnesses and exhibits, and the report of the pursuer's expert. Instead, the defenders claimed the right to limit the pursuer's case. This kind of pleading specificity functions not to provide information but to put limits on pursuers.

It may be that actual practice in some Scottish courts does not confine parties to their initial pleadings, but instead routinely allows broader disclosure and amendments very shortly before or even during trial. If this is the case, then the pleading system has not limited the issues as severely. However, if this is the case, then the emphasis on pleading and the time spent on adjustment and on hearing motions about pleadings serves primarily to waste time and run up costs, as three recent studies by prominent authorities have pointed out.[47]

44. Hook v. Brown, 1963 S.L.T. (Notes) 52 (Scot. OH).

45. *Id.*

46. *Id.*

47. The Hon. Lord Gill, *The Case for a Civil Justice Review*, 40 J. LAW SOC. SC. 129 (1995); THE HON. LORD CULLEN, REVIEW OF THE BUSINESS OF THE OUTER HOUSE OF THE COURT OF SESSION (1995) (on file with author) [hereinafter CULLEN REPORT]; COULSFIELD REPORT, *supra* note 9.

IV. No Fishing: Pleadings as a Barrier to Discovery

What if information exists that might help the pursuer prove liability, but the pursuer does not have access to that information? It is quite possible that the information will remain hidden. "[E]ach party must collect his own evidence independently and can only compel his opponent to divulge information if specific rules of procedure require this."[48] Will the court help her get it? Traditionally, the court's power to order production of documents is limited to documents that would help a party prove a case she had already pleaded, and only then after proof has been allowed (in other words, in cases in which the party has already survived challenges to the relevancy and specificity of the pleadings).[49] Once again, therefore, the pursuer needs to have information at the outset. Until the record is closed, the court will only order production of documents that will help the pursuer make "more pointed or more specific that which is already averred."[50]

Any attempt to discover documents that go beyond the pleadings (and remember that those pleadings are quite specific) may be rejected as an improper "fishing diligence."[51] Diligence will be refused (the court will not order production) if "there are no averments to support a call."[52] For example, recovery of reports will not be allowed if the summons does not allege that reports were prepared.[53] In another case, when the summons did not contain allegations about the circulation of a newspaper in Birmingham, the pursuer was not allowed to recover the publisher's books in order to prove the wide circulation.[54]

If the pleadings are thought to be too vague, they can also fail to support the production of documents. The case of *Scott v. Portsoy Harbour Co.*[55] is a good example. The pursuers were the owners of a ship who claimed that the ship had been damaged at defender's port.[56] The defenders alleged that the ship was "in a state of disrepair, and had been strained and damaged before she arrived at that port."[57] This allegation was said to be "of the vaguest possible character" and therefore insufficient to support the discovery of all communications

48. MACSPORRAN & YOUNG, *supra* note 16, at 1. The traditional method for discovering documents is called "commission and diligence." *Id.* There is now also an optional procedure (requiring the consent of the discovered party), which is less cumbersome, and some document production is provided by the Administration of Justice (Scotland) Act 1972. *Id.*

49. *Id.* at 26. While on its face the Administration of Justice (Scotland) Act 1972 allows more and earlier disclosure, the courts have "reduced the scope of the statutory provisions by reading into the Act the pre-existing common law rules relating to the recovery of documents." MACSPORRAN & YOUNG, *supra* note 16, at 25.

50. Moore v. Greater Glasgow Health Bd., 1979 S.L.T. 42, 45 (Scot. 1st Div.). There may be a general trend toward more disclosure and earlier disclosure. However, "it would be a mistake to assume that there is any automatic entitlement to recover any information which might be thought to be relevant to the case." HENNESSY, *supra* note 8, at 216–17. *See also* MACPHAIL, *supra* note 10, § 15.52, for a discussion of the relationship between the pleadings and the relevance of documents.

51. MACSPORRAN & YOUNG, *supra* note 16, at 53–56 (discusses the meanings of "fishing diligence," and notes, "it is seldom that the courts hear an opposed motion for commission and diligence in which the phrase does not feature."). *Id.* at 53. *Cf.* Hickman v. Taylor, 329 U.S. 495, 507 (1947) (Murphy, J.) ("No longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case.").

52. MACSPORRAN & YOUNG, *supra* note 16, at 54.

53. Burgh of Ayr v. British Transp. Comm'n, 1956 S.L.T. (Sh. Ct.) 3, 8–9.

54. British Pub. Co. Ltd. v. Hedderwick & Sons, 19 R. 1008 (1892).

55. Scott v. Portsoy Harbour Co., 8 S.L.T. 38 (1900) Scot. OH.

56. *Id.*

57. *Id.*

passing between the ship's master and its owners regarding its condition over a twelve month period.[58]

There are other tools that could, but often do not, fill the gap. The defenders could plead their defensive theories with specificity, and immediately file supporting documents, but often they do not.[59] In theory a party has an opportunity to interview all persons with knowledge (except parties) and to take a precognition from those witnesses. There is, however, no way to compel a person to speak to the pursuer's lawyer. While it is thought to be better practice for a defender to tender witnesses and make interview facilities available, no witness can be forced to provide a statement by court order.[60] Expert reports will eventually be filed, but all communications between an expert and solicitor are confidential and treated as privileged.[61] Similarly, lists of fact witnesses and documentary exhibits will eventually be filed,[62] but this occurs (if it occurs) immediately before trial. By then those detailed pleadings have long been in place, and convincing the court to exercise its discretion to allow an amendment may be extremely difficult and would bring about additional delay. In addition, these lists will provide only information that *supports* the *opponent's* theory of the case. There is no device to compel the defender to list documents that support the pursuer's claim absent the ability to plead a theory with specificity. Liability that lies beyond the edges of what the pursuer has been able to plead will likely remain unknown and hence unprovable.[63]

V. Defenders' Pleadings: Of Skeletons and Preliminary Pleas

The pursuers, then, have every incentive to plead in considerable detail. If the defenders have similar motivation, the nature of information sharing will at least be balanced.[64] The defenders, in theory, are required to admit those matters that are not genuinely contested, thus decreasing the pursuer's burden of proof and saving the court's time.[65] Unfortunately,

58. *Id. See also* MACSPORRAN & YOUNG, *supra* note 16, at 54–55 (discussing Scott v. Portsoy Harbour Co.).

59. *See infra* section IV. *See also* MACSPORRAN & YOUNG, *supra* note 16, at 4 ("In practice, parties are notoriously lax at lodging such documents timeously.").

60. The incentive to make witnesses available for precognition is supposed to be the air of dishonesty that might result at trial if the refusal to speak were revealed. *See* CONWAY, *supra* note 10, at 132 ("If he [the witness] refuses, it will always furnish matter of comment to a jury on the evidence which he eventually does give; for if he gives to one litigant what he withholds from the other it savours of partisanship, and will be easily thought to tinge his evidence."). Given the extremely small percentage of cases that actually go to trial, however, it is not clear that this serves as a meaningful motivation.

61. This thereby deprives the cross-examiner of important information about the ways in which the expert's opinion might have been shaped by communications with the opponent's solicitor. *Cf.* FED. R. CIV. P. 26 (allowing deposition of expert witnesses, and making discoverable information available to the testifying expert in arriving at his opinion, including information that would otherwise be privileged).

62. Hennessy reports, however, that these rules are rarely applied in practice. HENNESSY, *supra* note 8, at 266.

63. In the United States, part of the defendants' opposition to a duty of automatic disclosure is about cost, but the more important motivation is a desire to be allowed to suppress damaging documents unless plaintiff has managed to request it (in Scottish terms, to draft the specification) in exactly the right words. When the disclosure rules were to be amended, defendants lobbied successfully for the production requirement to be limited to documents *supporting* their claims and defenses. *See* Elizabeth G. Thornburg, *Giving the "Haves" a Little More: Considering the 1998 Discovery Proposals*, 52 SMU L. REV. 229, 234 (1999).

64. However, since the defender need only respond to the pursuer's detailed claim, even a defense that fairly meets the averments of the summons will not disclose other possible claims or provide further information that might support an averment that is denied.

65. Even when they do so, however, they do not share the same incentive to elaborate in order to increase the scope of disclosure or to allow more evidence at proof. Evidence that tends to rebut the pursuer's claims

it appears that this is often not done.[66] Instead, the defenders file skeletal defenses that deny most, if not all, of the averments in the pursuer's summons. Each article of condescendence is met merely with "denied."[67] This "lack of candour"[68] does not provide fair notice and it does not limit the issues to be tried. Yet "it is not possible for the court or the other party to go behind a basic denial of this kind and ask the defender to say anything more. If he denies it, then the pursuer must prove it and can only do so after proof."[69]

Why do the defenders not feel the same pressure to plead in detail in order to guarantee the admissibility of evidence at trial? The answer lies in the allocation of the burden of proof. In order to prevail, the pursuer will need to prove her case by a balance of probabilities. The defender, absent an affirmative defense, does not need to prove anything. A great deal of the defender's needs can be accomplished under the umbrella of the general denial. Certainly a straight contradiction of the pursuer's claims is safely covered. Potentially even alternative versions of events ("we deny that it happened this way because it happened that way") may be admissible under a denial.[70] All a defender needs is for the pursuer to fail to prove her claim, and this rests not on the defender's pleadings but on those of the pursuer. Further, few cases actually make it to trial. Approximately 95 percent of all civil cases settle,[71] so the prospect of a trial with a defense based only on denials is not a daunting one.

Nor is the defender likely to need specific pleading as a basis for discovering documents. Often in personal injury actions, most of the relevant information is already in the hands of the defender. In employment injury cases, the defender owns the premises and equipment and employs the witnesses. The defender also employed the pursuer, thus giving it access to documents relevant to wage loss. In claims involving defective products, the defender designed and manufactured the product and has access to plans, tests, and people. What the defender might lack is information about the pursuer's own actions, which must be pleaded by pursuer, and about the basis for pursuer's claim for damages. Conveniently, the pursuers are required to describe their damages in great detail, and must aver the name of

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is admissible under a denial. Thus defenders are advised: "[D]o not go around putting in explanations if you do not have to. Do not volunteer information. If your defence is simply that the pursuer has got his facts wrong, content yourself with denying his version. Do not be lured into explaining why this version cannot be right." BLACK, *supra* note 34, at 24.

66. "In fact this rule is routinely ignored in sheriff court personal injury actions. Defenders can shelter behind general denials with relative impunity." CONWAY, *supra* note 10, at 85. CULLEN REPORT, *supra* note 47, § 3.26. The same principle apparently holds in summary cause actions in the sheriff courts. *See* Richard Mays, *Barest of Bones*, 1993 S.L.T. (News) 137.

67. What the Scots refer to as "skeleton" defenses thus function like American general denials. A more sophisticated, but equally useless, defense will use formulas such as, "Admitted that certain duties of care were incumbent upon the defenders under explanation that they fulfilled all said duties," or "The Factories Act 1961 is referred to for its terms, beyond which no admission is made." CONWAY, *supra* note 10, at 85.

68. CULLEN REPORT, *supra* note 44, § 1.2. It may be that lodging skeleton defenses merely to delay decree being pronounced against a defender or in order to gain procedural advantage is unethical. BLACK, *supra* note 34, at 25. It is nevertheless said to be common, and there does not appear to be an effective tool to enforce such an ethics requirement.

69. HENNESSY, *supra* note 8, at 49.

70. This strategy would run the risk, however, that the judge would find that the pursuer had not been given fair notice of a line of defense that strays too far from negating the pursuer's averments. BLACK, *supra* note 34, at 24.

71. Rachel Wadia, *Judicial Case Management in Scotland—Indecision and Indigestion*, 1997 S.L.T. (News) 255, 258.

every doctor and hospital from whom they received treatment, and must file with the summons all medical reports on which they might wish to rely.[72] The information that the defenders might need is either within their possession or automatically provided by the rules.

In the meantime, the skeletal defense can bring a number of advantages to the defender. In addition to keeping the pursuer in the dark, it allows several bonuses:

1. *Delay.* As noted above, the only way for a pursuer to combat denials is by proving her claim. The trial will take place at least a year, probably longer, after the defenses are filed. Since the lack of meaningful information makes settlement more difficult, skeletal defenses can also bring about delay in settlement. Additionally, since delay generally works to the benefit of defenders (who profit from the status quo because they retain the sums in controversy and because evidence can weaken as time passes), the filing of skeletal defenses creates a procedural advantage for defenders.
2. *Avoiding or minimizing interim damages.* In personal injury cases, pursuers are often disadvantaged by being forced to bear the interim costs of their injuries. For that reason, the Scottish rules allow the recovery of an interim award of damages where liability is probable and the defender can afford to pay them.[73] Where the defenders have candidly admitted liability, these damages can be awarded. However, when generic denials are routinely filed, it may make the recovery of interim damages difficult or impossible, increasing the pressure on the pursuer to settle the case for a smaller amount of money.
3. *Requiring more time and out of pocket costs from pursuers and their lawyers.* Since the defender has denied everything, the pursuer must be prepared to prove everything. This will require more in the way of informal preparation (such as precognitions, location of documents, and witness preparation) and more in the way of formal preparation (such as discovery of documents, requests for admission, filing of witness and exhibit lists, and preparation of expert reports). It may also require the hiring of more expert witnesses.
4. *Avoiding jury trial.* Scotland does provide for jury trial of civil cases in the Court of Sessions, but jury trial is only available if the case has been reduced to fairly narrow and isolatable factual issues.[74] Because the skeletal defense fails to identify what is actually disputed, it makes it more difficult for the case to be in a posture in which proper jury issues can be identified. A closed record containing only the pursuer's averments met with inspecific denials may leave the issues too broad, thus depriving the pursuer of the right to a trial by jury.

The skeletal defense is not the only pleading device providing an advantage to the defenders. The practice of raising preliminary pleas to the relevance and specification of the pursuer's summons is routine.[75] The pleas may arise out of flaws in the pursuer's factual

72. RCS, *supra* note 18, at 43.30; 43.31. "A similar rule is likely to be brought in for written pleadings in sheriff court actions for personal injury." HENNESSY, *supra* note 8, at 43 n.19.

73. RCS, *supra* note 18, at 43.8–43.9.

74. *See generally* ANDREW M. HAJDUCKI, CIVIL JURY TRIALS 27–83 (1998).

75. "In almost every reparation action except the most straightforward running-down accident (and very often even there) a plea to the relevancy will be taken along with a complaint about lack of specification." BLACK, *supra* note 34, at 27.

allegations. More likely, however, they are asserted because there is again a procedural reward for the defenders in raising these complaints. First, they can again bring about delay. The case will not be allowed to go to trial or even assigned a trial date until all disputes about the pleadings have been resolved. Second, given the courts' tendency to require great detail, the plea may succeed in forcing the pursuer to narrow her claims. Third, the pleas require very little effort on the defender's part. In many cases, the pleas to the relevance and specification do not reveal the basis for the complaint. Even with the more recent practice of requiring a "note" explaining the argument, the note provides little information and takes little time.[76] The plea can also be abandoned just prior to the hearing, securing the delay without any associated cost. Fourth, even if the plea is unsuccessful the defender has forced the pursuer to allocate the time and effort available to the case to a diversion that does not forward the pursuer's cause. Finally, "in order to avoid the trouble and delay which a procedure roll debate would entail [the pursuer] will agree to a proof before answer instead of insisting on a jury trial."[77] This has the double disadvantage of forfeiting a jury trial and of going to trial without real notice of the alleged flaws in the pleadings, even though those flaws may still be asserted by the defender at the close of the evidence.

The pleading system in practice has become lopsided. Pursuers are not supposed to file a suit unless they have in their possession the detailed information necessary to plead and prove fault. Their initial state of knowledge will limit the development of the claim. Defenders, properly or improperly, will do their best to divulge as little as possible and to require a very narrow claim to be pleaded. Documents can be recovered only as to theories already pleaded, and the tendering of witnesses for informal interviews is strictly voluntary. Those who have information can keep it. Those who benefit from delay have delay within their grasp. Finally, those with the resources to bear the cost of legal fees of accomplished counsel will benefit in the long run from the ability to apply pressure that will discourage litigation, increase the incentive to settle for less, and make pursuer success less likely in those rare cases that make it to trial (which in turn decreases the settlement value of cases to come).

VI. Trends in Scotland

Despite the power of the traditional system of written pleading, the trend, even in Scotland, is to the contrary. Every major reform of civil procedure in recent years has been toward subject-specific systems that loosen the pleading requirements. Since problems were perceived in personal injury cases, the optional procedure (in theory) requires only general pleading. Since problems were perceived in commercial cases, the commercial cause rules require only general pleadings unless the trial judge finds that greater detail would be helpful in the specific case. In sheriff court ordinary actions, the 1993 amendments decreased (in theory) the ability of quibbles about pleadings to slow the case down, and put the power to allow a motion hearing about pleadings in the hands of the sheriff. In summary cause and small injury cases, the pursuer's pleadings are allowed to be general, and the defenders' pleadings are almost non-existent.

76. A note does not much resemble an American brief. It is rather a very short statement of the gist of the argument being raised, and may list a citation or two. The note is just a "concise note of argument stating the basis of [the] preliminary plea." HENNESSY, *supra* note 8, at 240. RCS, *supra* note 18, at 22.4.

77. *Id.* This choice can be risky if the pursuer, failing to understand the nature of the defender's complaint, fails to introduce evidence of an important matter even though such evidence was available.

Even in cases governed by the ordinary cause rules in each court, the trend is away from the straightjacket of traditional pleading. Courts have begun to allow disclosure while the parties are still adjusting their pleadings.[78] Amendments after the pleadings have been finalized, even close to trial, have become more and more common.[79] Parties can send their opponents notices to admit in an effort to overcome the inability of pleadings to secure helpful admissions. Exchanges of lists of witnesses and documentary exhibits shortly before trial provide more notice of the case to be met than do the pleadings. All of these developments reflect an understanding of the exchange of information in a lawsuit as a *process* that continues throughout the dispute rather than as a formal exchange of notifications, over and done at the outset.

Recent studies of the Scottish procedure system by eminent jurists focus on wasted time rather than premature limits, but they too recognize that the pleading system on the books is not serving the people of Scotland well. In 1995, Lord Gill, in his speech to the Law Society of Scotland back, noted:

> I can only express my impatience with the tiresomely clever pleading points taken in debates—for example, where in strict accordance with our rules defenders are able neither to know nor to admit that which, with no great effort, they could know full well; or where time is spent arguing as to the appropriate circumstances in which pleading formulae such as 'believed and averred' may be used and minatory 'calls' may be administered by one pleader to the other.[80]

Lord Cullen (now the Lord President of the Inner House),[81] in his 1995 Review of the Business of the Outer House of the Court of Session, also criticized the pleading system. "[T]he parties' averments, and in particular the averments of the party on whom the burden of proof lies, tend to become encumbered by detail which is unnecessary as a matter of averment, as opposed to evidence . . . [and] the defender's averments may lack candour . . ."[82] Similarly, Lord Coulsfield's committee on personal injury actions reported in 1998 that:

> [T]he task of identifying precisely the issues which require to be decided can only be carried out once the work necessary to enable the parties to identify those issues has been done. It is also immediately obvious that the job of stating the cases in the written pleadings must be precisely and expertly carried out if it is to succeed in its object without prejudicing the position of one party or the other. Daily experience confirms both of these points. It is, and has for many years been, normal that a party's true case is only made precise in a minute of amendment lodged relatively shortly before the date fixed for a proof. It is equally well known that the courts have repeatedly—perhaps more often in Sheriff Court cases but not exclusively so—drawn attention to the fact that blunders in pleadings have prevented the true issue in a litigation from being properly determined.[83]

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78. MacSporran & Young, *supra* note 16, at 49.

79. Gill, *supra* note 47, at 130.

80. *Id.* at 129. Lord Gill is now the Lord Justice Clerk, head of the second division of the Inner House of the Court of Session, which is the second highest judicial position in Scotland. (The Inner House is the appellate branch of the Court of Session.) Since 1996 he has also been the Chair of the Scottish Law Commission. *See* Hon. Lord Gill, Lord Justice Clerk, *at* http://www.scotcourts.gov.uk/biographies/gill.htm (last visited June 2, 2002).

81. This is roughly equivalent to being Chief Justice of the U.S. Supreme Court, except that cases from the Court of Session can be appealed to the House of Lords.

82. Cullen Report, *supra* note 47, §§ 3.22–3.23.

83. Coulsfield Report, *supra* note 9, § 6. Lord Coulsfield is also a justice of the Inner House. He chaired the committee that led to the creation of a special set of procedures for commercial actions, as well as the

These diagnoses, made by respected judges who are extremely familiar with the workings of the system, should be taken most seriously.

VI. Conclusion

Heightened pleading specificity isn't just about putting a few extra details in plaintiff's original complaint. It isn't just a handy mental discipline for organizing allegations of fact and law. Pleading specificity requirements are about limiting the scope of lawsuits from beginning to end. The drafters of the Federal Rules of Civil Procedure understood this in 1938 when they rejected common law and code pleading.[84] Groups representing defendants and their insurers understand this today when they lobby for limits on pleading, or for limits on discovery tied to pleadings.[85] Now is not the time to return to the nineteenth century straightjacket.

Fairness is important, and lawsuits need focus. The mantra of 'fair notice' does not, however, answer the questions of fair notice of *what*, fair notice *when*, or fair notice *by what means*. Fair notice does not have to, and should not, come from stylized detailed pleadings completed at the outset of a lawsuit. Fair notice does not require confining plaintiffs to their pre-suit information. Scotland's courts are already evolving away from this model. As long as lawsuits remain a primary means through which citizens assert their rights, and the primary means by which the civil law is enforced, justice requires a more evenhanded set of rules.

committee on procedure in personal injury actions. *See* Rt. Hon. Lord Coulsfield (John Taylor Cameron) PC, *at* http://www.scotcourts.gov/uk/biographies/coulsfield.htm (last visited Oct. 7, 2002).

84. Charles Clark, for example, was aware that detailed pleadings could be used to confine the plaintiff to the facts pleaded. *See* Charles E. Clark, *Trial of Actions under the Code*, 11 CORNELL L.Q. 482, 483 (1926); Charles E. Clark, *Pleading Negligence*, 32 YALE L.J. 483, 489 (1923), cited in Stephen N. Subrin, *How Equity Conquered the Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 964 (1987).

85. Regarding the most recent change in the discovery rules, tying the scope of discovery to pleaded "claims and defenses," *see* Jeffrey W. Stempel, *Politics and Sociology in Federal Civil Rulemaking: Errors of Scope*, 52 ALA. L. REV. 529, 566 (2001). For discussions of various defense-led attempts to limit discovery, *see generally* Paul D. Carrington, *Learning from the Rule 26 Brouhaha: Our Courts Need Real Friends*, 156 F.R.D. 295, 306, 308 (1994) (noting opposition to automatic disclosure rule from products liability defense interests); Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393, 1400–24 (1994) (tracing sources and history of groups urging curtailment of discovery); Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 538 (1986) ("many defendants (and their attorneys) in products liability and antitrust cases have championed the curtailment of discovery"); Stephen N. Subrin, *Uniformity in Procedural Rules and the Attributes of a Sound Procedural System: The Case for Presumptive Limits*, 49 ALA. L. REV. 51, 89 (1997) (referring to "intensive lobbying efforts of segments of the business community"); Paul R. Sugarman & Marc G. Perlin, *Proposed Changes to Discovery Rules in Aid of "Tort Reform": Has the Case Been Made?* 42 AM. U. L. REV. 1465, 1479 (1993) (identifying President's Council on Competitiveness as source of proposals to limit discovery).