

## ALL RIGHT, RETIRED JUDGES, WRITE!

Ruggero J. Aldisert\*

If I would suggest a single thesis for the question before the House, it would be: Find the time to do all the things you never had time for during your active years on the bench.

Some obvious activities come to mind: Traveling with your spouse is a good idea. Get on the golf course on weekdays. Become really acquainted with your grandchildren. Pick up some how-to books, buy state-of-the-art electric power tools and become a real “Mr. Fix It.” With your own hands, take up the home improvement projects you always wanted to have done, but were in no mood to pay \$90.00 an hour for a carpenter to complete.

But all this is for openers.

As judges, you have been using your brains during your entire professional careers, as well as in your lives as lawyers before putting on the robe. But the brain is a muscle, and one thing is beyond cavil: You cannot allow that muscle to get flabby, and there is the tendency in retired people to do just that. To be sure, you can join a prestigious law firm as counsel or participate in mediation and arbitration if that is your inclination. These are fine choices all, but I encourage you to take a path slightly less traveled.

Technically, I have been “retired” since 1987, but as a senior judge I have opted to work part-time, filling up the void by doing the thing that I always wanted to do during my eight years as an active Pennsylvania state trial judge and nineteen years as an active United States Circuit Judge—I have found the time to write.<sup>1</sup>

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1. I started my judicial career as an Allegheny County (Pittsburgh) Common Pleas Court judge in 1961. In 1968 I was appointed a United States Circuit Judge. Since

And this is the recommendation that I make for every retired judge—trial or appellate, state or federal: Make yourselves heard on scholarly issues.<sup>2</sup> One of the most serious deficiencies in legal literature today is the paucity of books and articles written by judges. It is melancholy that academia has preempted a field once invigorated by the perspective of judges and practitioners. There is a reason for this sea change: the sheer increase of the caseload of the state and federal judiciary.

Look for a moment at the paper storm that has descended on the West Publishing Company. In the thirty-five years between 1929 and 1964, West published approximately 28,000 opinions every year. Yet by 1981, the volume had almost doubled to 54,104. By 1991, the number of published opinions peaked at 65,333.<sup>3</sup> Drawing on my own experience, when I began as a member of the Third Circuit in 1968 each judge was responsible for deciding on the merits ninety appeals a year. But now, each active judge in the Third Circuit decides 400 cases every 365 days.

The more opinions that have to be written by state and federal judges, the less time judges have to write books and articles on the law. In my mind, “After the Bench” is the time for retired judges to finally do some serious writing on the law. A vast landscape of topics stretches out before you, and these are topics that should command your attention. You have seen firsthand the warts and blemishes upon the law and its practice;

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“retiring” I have written a number of law review articles and the following books: Ruggero J. Aldisert, *Opinion Writing* (West Publ. Co. 1990); Ruggero J. Aldisert, *The Judicial Process: Readings, Materials And Cases* (West Publ. Co. 1996); Ruggero J. Aldisert, *Logic For Lawyers: A Guide To Clear Legal Thinking* (3d ed., Natl. Inst. for Trial Ad. 1997); Ruggero J. Aldisert, *Winning On Appeal: Better Briefs and Oral Argument* (2d ed. Natl. Inst. for Trial Ad. 2003); Ruggero J. Aldisert, *Road To The Robes: A Federal Judge Recollects Young Years & Early Times* (Authorhouse 2005).

2. The Federal Judiciary has a category of judges that should be a model for State systems—the Office of Senior Judge. Upon obtaining the age of 65, with fifteen years of service, or upon reaching the age of 70 with ten years of service, a judge of the Third Article (United States District judges and United States Circuit judges) may take senior status. This is technically retirement but with a fundamental difference from the State systems. A senior judge has the option of working full-time, part-time or not at all—while receiving the same salary as an active judge. To be sure, if a judge is going to pack it all in and still retain Senior Judge status, he is under the same restraints as an active judge. He cannot participate in commercial work or practice law.

3. Letter from Kate MacEachern, Manager, West Group, to Ruggero J. Aldisert 1 (Nov. 15, 2002) (on file with author).

now is the time to raise a mirror to the public to present what you have witnessed and think should be changed. With that said, I would argue that no problem is more pressing than the high cost of delivering legal services today. In plain speak, it simply costs too much to bring a lawsuit and, as a result, many valid claims aren't being adjudicated. My goal in this article is to spur discussion amongst my fellow "retired" judges on this issue. I defend the thesis that the primary cause for the explosion of fees and costs has been the states' wholesale adoption of the federal pleading rules, especially those dealing with unlimited discovery.

### THE DISASTER OF FEDERAL NOTICE PLEADING RULES

First, let's talk about the mess in the federal district courts. We can begin with the astronomical cost of trying a case there. Let's take a case that involves \$75,000.00. I select this figure because it's the minimum amount required for diversity jurisdiction.<sup>4</sup> Assume the following: The facts are disputed, the case must go to trial, no statutory fees are available, and the subject matter is not conducive to a contingent fee arrangement. What would it cost to obtain a competent federal court practitioner to represent you? I'm suggesting that it's going to cost you at least \$75,000.00 to prosecute a claim for \$75,000.00, or a like amount to defend it.<sup>5</sup> The main culprit is the pleading regime established by the Federal Rules of Civil Procedure. Our current system of notice-pleadings-cum-expensive-discovery requires lawyers to jump through so many hoops that it's not economically feasible for firms to work on anything but the most lucrative cases. As I will explain, I find special fault with the I've-got-a-secret-and-I-won't-tell-you-what-I-want-or-have-until-I'm-forced-to-do-it-philosophy that lies at the heart of the federal rules.

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4. See 28 U.S.C. § 1332(a) ("The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs.") (2005) (available at <http://www.uscode.house.gov>).

5. But there is also an assumption within the assumption—this example assumes that you can get a competent firm to represent you at this cut rate. The ABA-type law firms where my law clerks end up (those firms that meet the high starting salaries) would not touch a trial-bound federal court case for less than a \$100,000.00 fee.

But first, how did we ever end up in such a tangle?

The early roots of our current predicament lie in England. After the Norman Conquest of 1066, strict pleading rules developed in the English common law system. Formalism reigned. The plaintiff's complaint and the defendant's response had to be exact. The pleader, moreover, had to shoehorn the facts of his case into one of the limited forms of action, such as trespass, covenant, and assumpsit.<sup>6</sup> If a claimant was unable to meet these rigid requirements, the judge dismissed the suit at the pleading stage without the benefit of a trial on the merits. Under such a system, justice was ill-served; judges frequently tossed out worthy claims because of minor missteps in the pleadings.

Despite serious flaws, common law pleading endured for centuries. Not until the late nineteenth century did state governments in the United States move to adopt more flexible rules. New York acted first, enacting a code-based system to govern procedure in its state courts. Dubbed the Field Code, New York's system eliminated much of the unneeded formalism of common law pleading. Under the new doctrine, the emphasis shifted to making a detailed statement of facts that, if true, merited legal relief. Code pleading muted many of the controversies associated with the common law but it also

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6. At common law, pleading was technical and was designed to resolve a single issue. The parties pleaded back and forth until one side either demurred, resulting in a legal issue, or traversed, resulting in a factual issue. Joseph H. Koffler & Alison Reppy, *Common Law Pleadings* 13 (West Publ. Co. 1969):

The functions of pleading at Common Law are six in number and may be listed as follows:

- (I) The first or Primary Function of Pleading is to reduce the controversy between the Parties to a single, clear cut, well-defined Issue of Fact or Law;
- (II) To reduce Questions of Fact to clear-cut Issues by eliminating immaterial and incidental matter, thus narrowing the case to one or more specific prepositions on which the controversy turns, thus operating as an aid to the Court in admitting or rejecting offers of evidence;
- (III) To notify the Parties and the Court of the respective Claims, Defenses, and Counter-Demands of the adversaries;
- (IV) To serve as an index to the respective Counsel as to the Points to be Proved at the Trial and as a Guide to the Court in Apportioning the Burden of Proof and Rebuttal as between the plaintiff and the defendant;
- (V) To serve as a Formal Basis for the Judgment;
- (VI) To preserve a Record of the Controversy Litigated and to create a foundation for the Plea of Res Judicata, thus preventing a relitigation of the same controversy between the same Parties at a later date.

spawned new problems. Most notably, lawyers complained that it was often difficult to research all of the facts needed to write a complaint before the statute of limitations expired.

In 1906, Roscoe Pound became the main proponent of further reform; he pushed for procedural changes that would increase flexibility and reject the more confining common law and Field-like procedures that attempted to deliver substantive law in a predictable manner.<sup>7</sup> Pound's ideas found favor with Yale Law School Dean Charles E. Clark, who was in 1935 appointed Reporter of the Supreme Court Advisory Committee and tasked with drafting the Federal Rules of Civil Procedure.<sup>8</sup> He sold the committee on the philosophy he preached in his 1928 treatise,<sup>9</sup> sounding the theme that procedural technicality should not stand in the way of reaching the merits or applying substantive law. The committee's work revolutionized procedure; pleading under the Federal Rules only requires that a party make "a short and plain statement of the claim showing that the pleader is entitled to relief."<sup>10</sup> Few, if any facts, are required to file a lawsuit, and according to Professor Clark:

[T]he more general pleadings are amply sufficient. Let me say that if any of you feel you need more information to develop your own case, if you need more information from your opponent, we have provided for that, and I think have provided for that much more directly and simply than ever you will obtain by attempting to force the correction of the pleadings. *That is in the section on Deposition and Discovery. I think that is the device you should use to secure that information.*<sup>11</sup>

The idea sitting at the core of the Federal Rules is that a plaintiff with a reasonable but incomplete claim can file a complaint and then flesh out the details of the case by compelling the defendant to turn over evidence during the

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7. Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. Pa. L. Rev. 909, 944 (1987).

8. *Id.* at 961-962.

9. Charles E. Clark, *Handbook of the Law of Code Pleading* (West Publ. Co. 1928).

10. Fed. R. Civ. P. 8(a)(2) (available at <http://uscode.house.gov>).

11. See Stephen N. Subrin, Martha L. Minow, Mark S. Brodin, & Thomas O. Main, *Civil Procedure: Doctrine, Practice, and Context* 254 (2d ed. Aspen L. & Bus. 2004) (emphasis added) (quoting Charles E. Clark, *Comments in Proceedings of the Institute at Washington, D.C., on the Federal Rules of Civil Procedure* (ABA Oct. 6, 1938)).

discovery and deposition phase. Notwithstanding the drafters' good intentions to simplify procedural rules—remember the mantra of Rule 1: “to secure the just, speedy, and inexpensive determination of every action”—it hasn't worked out that way. Instead we have discovery rules anchored on a glorious Catch-22: You may discover only that which is relevant, *but you can't tell what is relevant until you complete discovery.*

It simply is not “inexpensive” when the lawyer is required to expend more time in discovering what the case is all about than in preparing for the actual trial itself. Indeed, Judge Bridlegoose would have chuckled at the work of the modern-day federal court practitioner. Only after

having well and exactly seen, surveyed, overlooked, reviewed, recognized, read and read over again, turned and tossed about, seriously perused and examined the preparatories, productions, evidences, proofs, allegations, depositions, cross speeches, contradictions . . . and other such like confects and spiceries, both at the one and the other side,<sup>12</sup>

do today's federal litigators finally get to know what exactly is the claim and defense.

I do not believe that the original drafters ever anticipated that their efforts to simplify and streamline would backfire so tragically. Their intentions were noble. The revolutionary concept they dreamed up sounded good on the drawing board—to knock out all the complications and limitations of common law pleading and Field Code fact pleadings. But the language they chose purposely avoided the “facts” and “cause of action,” requirements of the codes.<sup>13</sup> This concept was faulty from the get-go.

From the very beginning, the most populous states in the country, whose courts handle America's most important litigation, had the prescience to anticipate the difficulties and said no thank you to the invitation to jettison fact pleadings. When you consider the illustrious pedigree of those who sired the federal rules, it is significant that the subsequent adoption of

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12. Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the “Hunch” in Judicial Decisions*, 14 Cornell L.Q. 274, 277-278 (1929) (quoting 2 F. Rabelais, *Gargantua and Pantagruel* 39-40 (Everyman's Ed. 1929)).

13. Subrin, *supra* n. 7, at 976.

their brainchild by the states has varied inversely with the state's population. Nixing the idea are California, New York, Texas, Pennsylvania, Illinois, Florida, and New Jersey.<sup>14</sup>

That was foresight on the part of those states. Let's try some hindsight.

The most damning evidence of the failure of the rules to live up to their promise to deliver a "just, speedy and inexpensive determination of every action"<sup>15</sup> is that it has taken over two hundred bound volumes of reported district court

14. Thomas O. Main, *Procedural Uniformity and the Exaggerated Role of Rules: A Survey of Intra-State Uniformity in Three States that Have Not Adopted the Federal Rules of Civil Procedure*, 46 Vill. L. Rev. 311, 322-23 (2001) (discussing differences among states); John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 Wash. L. Rev. 1367, 1378, 1429, tbl. II (1986) (indicating that these states did not follow federal pattern).

California: "A statement of the facts constituting the cause of action, in ordinary and concise language." Cal. Civ. Proc. Code § 425.10(a) (West 2001).

New York: "Statements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense." N.Y. Civ. Prac. L. & R. § 3013 (McKinney 2001).

Texas: "a short statement of the cause of action sufficient to give fair notice of the claim involved." Tex. R. Civ. P. § 47(a) (Vernon 2001). Oakley & Coon explained "Rule 47(a)'s requirement of stating a 'cause of action' undercuts its liberal language about 'fair notice' with an apparent requirement of pleading facts beyond those required for mere notice of claim." Oakley & Coon, *supra* this note, at 1418 n. 339. Case law in Texas supports their characterization of this state as one that requires fact pleading:

In determining whether a cause of action was pled, plaintiff's pleadings must be adequate for the court to be able, from an examination of the plaintiff's pleadings alone, to ascertain with reasonable certainty and without resorting to information aliunde the elements of plaintiff's cause of action and the relief sought with sufficient information upon which to base a judgment.

*Stoner v. Thompson*, 578 S.W.2d 679, 683 (Tex. 1979) (citations omitted).

Pennsylvania: "The material facts on which a cause of action or defense is based shall be stated in a concise and summary form." Pa. R. Civ. P. § 1019(a) (West 2001).

Illinois: "All pleadings shall contain a plain and concise statement of the pleader's cause of action, counterclaim, defense, or reply." 735 Ill. Comp. Stat. Ann. 5/2-603(a) (West 2001).

Florida: "a short and plain statement of the ultimate facts showing that the pleader is entitled to relief." Fla. R. Civ. P. 1.110(b)(2) (West 2001).

New Jersey: "a pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim or third-party claim, shall contain a statement of the facts on which the claim is based, showing that the pleader is entitled to relief." N.J. Ct. R. 4:5-2 (West 2000).

15. Fed. R. Civ. P. 1 (available at <http://uscode.house.gov>).

opinions to tell us what these rules mean.<sup>16</sup> And this does not include (1) unreported district court opinions, (2) reported and unreported opinions of the Courts of Appeals, and (3) opinions of the Supreme Court.

I think that it is a mess, and this is precisely why we need the expertise of retired state judges to suggest how to clean it up.

In short, if ever a wheel needs re-inventing, it is the concept of notice pleading. There can be little debate that the cost of the delivery of legal services has become obscene and that, examining the anatomy of the system, it can be traced to the excessive costs of discovery and the new cottage industry of excessive depositions. Unfortunately for any judge who decides to take up this cause, state courts have largely gotten out of the business of generating procedural reforms. For years states had been the laboratory of new ideas in procedure, but regrettably, most of them they have fallen in lock-step with the Federal Rules of Civil Procedure. Until state courts announce a renewed intention to innovate, I hope all retired judges will take some time to think about how our legal system could benefit from lessons learned abroad.

#### LET'S LOOK AT OTHER COUNTRIES

For some time I have looked upon the German system of pleading as an efficient way to let it all hang out and end some of these abuses.<sup>17</sup> The German complaint names the parties, the plaintiff's demands, the redress sought—either actual (equity) or substituted (money damages)—and a distinct statement and object of the claim (fact pleading). In Germany, information that we learn in the United States through expensive discovery is contained in the complaint: names and addresses of witnesses, and references to documents or physical copies thereof.<sup>18</sup>

I find myself looking with admiration upon another role model as well. And here I go back to England, the motherland of

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16. These cases are collected in the West Group publication known as Federal Rules Decisions, and as we go to press, the latest volume is 237 F.R.D. (2006).

17. See Ruggero J. Aldisert, *Rambling Through Continental Legal Systems*, 43 U. Pitt. L. Rev. 935, 954-55 (1982).

18. Arthur Taylor Von Mehren & James Russell Gordley, *An Introduction to the Comparative Study of the Civil Law System* 164 (2d ed. Little, Brown & Co. 1977).



the American legal tradition, where the new Civil Procedure Rules 1998 (CPR) for England and Wales became effective April 28, 1999. This wholesale revision of the civil procedure system in England came about when the Lord Chancellor appointed Master of the Rolls, Lord Woolf, to review the existing rules. Re-inventing the wheel, Woolf and his team of judges reduced paper work to twenty-first century standards by designing a whole new system.<sup>19</sup> The new rules are designed

- a) to improve access to justice and reduce the cost of litigation;
- b) to reduce the complexity of the rules and modernise terminology; [and]
- c) to remove unnecessary distinctions of practice and procedure.<sup>20</sup>

Lord Woolf jettisoned existing *pleading* practice and substituted in its stead a set of *forms* to be used by the litigants. Even the name of party who makes a claim has been changed. The term “plaintiff” is relegated to the Old Curiosity Shop. The new term is “claimant.” Lord Woolf identified a range of defects in the civil justice system, concluding that the system was

- a) too expensive, in that the costs often exceed the value of the claim.
- b) too slow in bringing cases to a conclusion;
- c) too unequal, in that there was a lack of equality between the powerful wealthy litigant and the under-resourced litigant;
- d) too uncertain, causing difficulty in estimating cost and direction; [and]
- e) too fragmented in the way the system was organised.<sup>21</sup>

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19. Links to the various sections of Lord Woolf’s report are available at <http://www.dca.gov.uk/civil/final/contents.htm> (accessed March 21, 2007; copy on file with Journal of Appellate Practice and Process).

20. *Blackstone’s Guide to the Civil Procedure Rules 1* (Charles Plant ed., 1999) [hereinafter “*Guide*”].

21. *Id.* at 3-4.

Under the new rules, the claimant and defendant fill in the blanks of prepared forms, known as “statements of case.” The Claimant must clearly set out the *facts alleged* and the *grounds* on which the remedy is sought. The original statement of case is entitled “Claim Form,” and when completed, the first page of the general “N1 Claim Form (CPR Part 7)(4.99)” sets forth the name of the claimant and defendants, brief details of the claim, the value of the case, and the defendant’s address.<sup>22</sup> In addition, the reverse of the form prompts the claimant to set forth the facts in detail by including a section titled “Particulars of Claim,” and indicating that these particulars must be attached to the claim form or follow within fourteen days after it is served. The claimant or claimant’s solicitor must sign the Claim Form and its “Statement of Truth,” indicating the claimant’s or solicitor’s—as the case may be—belief that “that the facts stated in these particulars of claim are true.”

In their “statements of case” the parties may name witnesses, refer to any point of law, and attach or serve copies of documents necessary to the claim or defense.<sup>23</sup> The new code also directs claimants to include copies of any contracts relied

22. *Id.* at 927-28. For an example of this form, see the appendix to this essay.

23. *Id.* at 420 (reproducing Part 10.3 of Practice Direction 16—*Statements of Case*):

A claimant may:

- (1) refer in his particulars of claim to any point of law on which his claim is based,
- (2) give in his particulars of claim the name of any witness whom he proposes to call, and
- (3) attach to or serve with the particulars of claim a copy of any document which he considers is necessary to his claim (including any expert’s report to be filed in accordance with Part 35).

See also *id.* at 421 (reproducing Part 16.3 of Practice Direction 16—*Statements of Case*):

A party may:

- (1) refer in his statement of case to any point of law on which his claim or defence, as the case may be, is based,
- (2) give in his statement of case the name of any witness he proposes to call, and
- (3) attach to or serve with this statement of case a copy of any document which he considers is necessary to his claim or defence, as the case may be (including any expert’s report to be filed in accordance with Part 35).

You will notice that these citations are to the Practice Directions that accompany the CPR; nearly every rule is accompanied by a Practice Direction containing this sort of useful advice.

upon along with the particulars of claim.<sup>24</sup> Getting further into the nuts and bolts of the system, the Practice Directions also set forth “MATTERS WHICH MUST BE INCLUDED IN THE PARTICULARS OF CLAIM IN CERTAIN TYPES OF CLAIM,”<sup>25</sup> and specifically identify what information must be included with filing claims for personal injury, fatal accidents, recovery of land, hire purchase, and defamation.<sup>26</sup> It is the

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24. *Id.* at 419 (reproducing Part 9.3 of Practice Direction 16—*Statements of Case*):

Where a claim is based upon a written agreement:

- (1) a copy of the contract or documents constituting the agreement should be attached to or served with the particulars of claim and the original(s) should be available at the hearing, and
- (2) any general conditions of sale incorporated in the contract should also be attached (but where the contract is or the documents constituting the agreement are bulky this practice direction is complied with by attaching or serving only relevant parts of the contract or documents).

25. *Id.* at 417.

26. *See e.g. id.* (reproducing Parts 4 and 5 of Practice Direction 16—*Statements of Case*):

Personal injury claims

4.1 The particulars of claim must contain:

- (1) the claimant’s date of birth, and
- (2) brief details of the claimant’s personal injuries.

4.2 The claimant must attach to his particulars of claim a schedule of details of any past and future expenses and losses which he claims.

4.3 Where the claimant is relying on the evidence of a medical practitioner the claimant must attach to or serve with his particulars of claim a report from a medical practitioner about the personal injuries which he alleges in his claim.

4.4 In a provisional damages claim the claimant must state in his particulars of claim;

- (1) that he is seeking an award of provisional damages [under certain statutes],
- (2) that there is a chance that at some future time the claimant will develop some serious disease or suffer some serious deterioration in his physical or mental condition, and
- (3) specify the disease or type of deterioration in respect of which an application may be made at a future date.

Fatal accident claims

5.1 In a fatal accident claim the claimant must state in his particulars of claim:

- (1) that it is brought under the Fatal Accidents Act 1976,
- (2) the dependents on whose behalf the claim is made,
- (3) the date of birth of each dependent, and
- (4) details of the nature of the dependency claim.

philosophy of CPR that real issues between the parties should be identified at an early stage, and with greater precision.

Obviously recognizing the past financial abuses and delays in discovery, CPR also provides that

[g]reater control will be exercised over discovery, which will be considerably limited in many cases. The fresh approach to this part of the litigation process has probably contributed to it being given the new name of “disclosure.”<sup>27</sup>

Freewheeling deposition-taking, the major cause for increased litigation costs in American courts, is no longer available in England and Wales. You must get a court order for cause shown to obtain a deposition, and when permitted, it must be conducted under strict supervision. Rule 34.8 CPR provides that a party may apply to the court for a person to be examined before the hearing.<sup>28</sup> The person is described as a “deponent” and evidence is referred to as a “deposition.” The deposition must be taken before (a) a judge, (b) an examiner of the court, or (c) such other person as the court appoints. Moreover, if the party intends to introduce the deposition in evidence at the hearing, he or she must serve the notice twenty-one days before the day fixed by the hearing.<sup>29</sup> These are all salutary developments, and I can’t resist pointing out that what our moribund federal rules really need is a good dose of CPR.

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5.2 A fatal accident claim may include a claim for damages for bereavement.

5.3 In a fatal accident claim the claimant may also bring a claim under the Law Reform (Miscellaneous Provisions) Act of 1934 on behalf of the estate of the deceased).

You get the idea. The provisions addressing recovery of land, hire purchase, and defamation are similar. *See id.* at 417-19 (reproducing Parts 6, 7, and 8 of Practice Direction 16—*Statements of Case*).

27. *Id.* at 5.

28. *Id.* at 556-58 (reproducing CPR Part 34—*Depositions and Court Attendance by Witnesses*).

29. For an example of the form ordering the examination of a deponent, see the appendix to this essay.

## SUMMING UP

In apologizing for dwelling on the revolutionary new rules of England and Wales, I must emphasize that my purpose was two-fold: (1) to provide an example of a topic on which other retired judges might express their views in writing “After the Bench,” and (2) to show how judges in England and Wales have already met the overarching problem facing courts in this country. In Lord Woolf’s words, trying civil cases is “too expensive, in that the costs often exceed the value of the claim.”<sup>30</sup> Because our active judges are totally overburdened with day-by-day caseloads, the leadership in writing serious articles on court matters must come from retired judges.

My invitation to retired judges—especially state judges—to examine your trial procedures is only one topic that would open an important dialogue. For example, I have not mentioned needed reforms in appellate practice. In particular, consider how we should process that type of appeal described by Cardozo in 1921 when he was Chief Judge of the State of New York, presiding on its Court of Appeals:

Of the cases that come before the court in which I sit, a majority, I think, could not, with semblance of reason, be decided in any way but one. The law and its application alike are plain. Such cases, are predestined, so to speak, to affirmance without opinion.<sup>31</sup>

These are but suggestions. All of you retired judges—state or federal, trial or appellate—can remember rules, customs, or practices that caused you to grind your teeth and mutter during your tenure on the bench. Act on this feeling. Choose your pet peeve and write about it. Begin your article or book with, “Our way of doing things is not right. If I had my druthers, this is what I would do.”


Happy writing.

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30. *Guide, supra* n. 17, at 3.

31. Benjamin N. Cardozo, *The Nature of the Judicial Process* 164 (Yale Univ. Press 1921).

APPENDIX




**Claim Form**

In the

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Claim No.

Claimant



Defendant(s)

Brief details of claim

Value

Defendant's name and address

	£
Amount claimed	
Court fee	
Solicitor's costs	
Total amount	
Issue date	

The court office at

is open between 10 am and 4 pm Monday to Friday. When corresponding with the court, please address forms or letters to the Court Manager and quote the claim number.

NI Claim form (CPR Part 7) (4.99) Printed on behalf of The Court Service

Claim No.	
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Particulars of Claim (attached)(to follow)

Statement of Truth

\*(I believe)(The Claimant believes) that the facts stated in these particulars of claim are true.

\* I am duly authorised by the claimant to sign this statement

Full name

Name of claimant's solicitor's firm

signed

position or office held

\*(Claimant)(Litigation friend)(Claimant's solicitor) (if signing on behalf of firm or company)

\*delete as appropriate

Claimant's or claimant's solicitor's address to which documents or payments should be sent if different from overleaf including (if appropriate) details of DX, fax or e-mail.

### Notes for claimant on completing a claim form

Further information may be obtained from the court in a series of free leaflets.

- Please read all of these guidance notes before you begin completing the claim form. The notes follow the order in which information is required on the form.
- Court staff can help you fill in the claim form and give information about procedure once it has been issued. But they cannot give legal advice. If you need legal advice, for example, about the likely success of your claim or the evidence you need to prove it, you should contact a solicitor or a Citizens Advice Bureau.
- If you are filling in the claim form by hand, please use black ink and write in block capitals.
- Copy the completed claim form and the defendant's notes for guidance so that you have one copy for yourself, one copy for the court and one copy for each defendant. Send or take the forms to the court office with the appropriate fee. The court will tell you how much this is.

### Notes on completing the claim form

#### Heading

You must fill in the heading of the form to indicate whether you want the claim to be issued in a county court or in the High Court (The High Court means either a District Registry (attached to a county court) or the Royal Courts of Justice in London). There are restrictions on claims which may be issued in the High Court (see 'Value' overleaf).

Use whichever of the following is appropriate:

'In the ..... County Court'  
(inserting the name of the court)

or

'In the High Court of Justice.....Division'  
(inserting e.g. 'Queen's Bench' or 'Chancery' as appropriate)  
'.....District Registry'  
(inserting the name of the District Registry)

or

'In the High Court of Justice.....Division,  
(inserting e.g. 'Queen's Bench' or 'Chancery' as appropriate)  
Royal Courts of Justice'

#### Claimant and defendant details

As the person issuing the claim, you are called the 'claimant'; the person you are suing is called the 'defendant'. Claimants who are under 18 years old (unless otherwise permitted by the court) and patients within the meaning of the Mental Health Act 1983, must have a litigation friend to issue and conduct court proceedings on their behalf. Court staff will tell you more about what you need to do if this applies to you.

You must provide the following information about yourself and the defendant according to the capacity in which you are suing and in which the defendant is being sued.

When suing or being sued as:-

##### an individual:

All known forenames and surname, whether Mr, Mrs, Miss, Ms or Other (e.g. Dr) and residential address (including postcode and telephone number) in England and Wales. Where the defendant is a proprietor of a business, a partner in a firm or an individual sued in the name of a club or other unincorporated association, the address for service should be the usual or last known place of residence or principal place of business of the company, firm or club or other unincorporated association.

##### Where the individual is:

**under 18** write '(a child by Mr Joe Bloggs his litigation friend)' after the child's name. If the child is conducting proceedings on their own behalf write '(a child)' after the child's name.

**a patient within the meaning of the Mental Health Act 1983** write '(by Mr Joe Bloggs his litigation friend)' after the patient's name.

##### trading under another name

you must add the words 'trading as' and the trading name e.g. 'Mr John Smith trading as Smith's Groceries'

##### suing or being sued in a representative capacity

you must say what that capacity is e.g. 'Mr Joe Bloggs as the representative of Mrs Sharon Bloggs (deceased)'

##### suing or being sued in the name of a club or other unincorporated association

add the words 'suing/sued on behalf of' followed by the name of the club or other unincorporated association.

##### a firm

enter the name of the firm followed by the words 'a firm', e.g. 'Bandbox - a firm' and an address for service which is either a partner's residential address or the principal or last known place of business.

##### a corporation (other than a company)

enter the full name of the corporation and the address which is either its principal office or any other place where the corporation carries on activities and which has a real connection with the claim.

##### a company registered in England and Wales

enter the name of the company and an address which is either the company's registered office or any place of business that has a real, or the most, connection with the claim e.g. the shop where the goods were bought.

##### an overseas company (defined by s744 of the Companies Act 1985)

enter the name of the company and either the address registered under s691 of the Act or the address of the place of business having a real, or the most, connection with the claim.



**Brief details of claim**

Note: The facts and full details about your claim and whether or not you are claiming interest, should be set out in the 'particulars of claim' (see note under 'Particulars of Claim').

You must set out under this heading:

- a concise statement of the nature of your claim
- the remedy you are seeking e.g. payment of money; an order for return of goods or their value; an order to prevent a person doing an act; damages for personal injuries.

**Value**

If you are claiming a fixed amount of money (a 'specified amount') write the amount in the box at the bottom right-hand corner of the claim form against 'amount claimed'.

If you are not claiming a fixed amount of money (an 'unspecified amount') under 'Value' write "I expect to recover" followed by whichever of the following applies to your claim:

- "not more than £5,000" or
- "more than £5,000 but not more than £15,000" or
- "more than £15,000"

If you are not able to put a value on your claim, write "I cannot say how much I expect to recover".

**Personal injuries**

If your claim is for 'not more than £5,000' and includes a claim for personal injuries, you must also write "My claim includes a claim for personal injuries and the amount I expect to recover as damages for pain, suffering and loss of amenity is" followed by either:

- "not more than £1,000" or
- "more than £1,000"

**Housing disrepair**

If your claim is for 'not more than £5,000' and includes a claim for housing disrepair relating to residential premises, you must also write "My claim includes a claim against my landlord for housing disrepair relating to residential premises. The cost of the repairs or other work is estimated to be" followed by either:

- "not more than £1,000" or
- "more than £1,000"

If within this claim, you are making a claim for other damages, you must also write:

"I expect to recover as damages" followed by either:

- "not more than £1,000" or
- "more than £1,000"

**Issuing in the High Court**

You may only issue in the High Court if one of the following statements applies to your claim:-

"By law, my claim must be issued in the High Court. The Act which provides this is .....(specify Act)"

or "I expect to recover more than £15,000"

or "My claim includes a claim for personal injuries and the value of the claim is £50,000 or more"

or

"My claim needs to be in a specialist High Court list, namely.....(state which list)".

If one of the statements does apply and you wish to, or must by law, issue your claim in the High Court, write the words "I wish my claim to issue in the High Court because" followed by the relevant statement e.g. "I wish my claim to issue in the High Court because my claim includes a claim for personal injuries and the value of my claim is £50,000 or more."

**Defendant's name and address**

Enter in this box the full names and address of the defendant receiving the claim form (i.e. one claim form for each defendant). If the defendant is to be served outside England and Wales, you may need to obtain the court's permission.

**Particulars of claim**

You may include your particulars of claim on the claim form in the space provided or in a separate document which you should head 'Particulars of Claim'. It should include the names of the parties, the court, the claim number and your address for service and also contain a statement of truth. You should keep a copy for yourself, provide one for the court and one for each defendant. Separate particulars of claim can either be served

- with the claim form or
- within 14 days after the date on which the claim form was served.

If your particulars of claim are served separately from the claim form, they must be served with the forms on which the defendant may reply to your claim.

**Your particulars of claim must include**

- a concise statement of the facts on which you rely
- a statement (if applicable) to the effect that you are seeking aggravated damages or exemplary damages
- details of any interest which you are claiming
- any other matters required for your type of claim as set out in the relevant practice direction

**Address for documents**

Insert in this box the address at which you wish to receive documents and/or payments, if different from the address you have already given under the heading 'Claimant'. The address must be in England or Wales. If you are willing to accept service by DX, fax or e-mail, add details.

**Statement of truth**

This must be signed by you, by your solicitor or your litigation friend, as appropriate.

Where the claimant is a registered company or a corporation the claim must be signed by either the director, treasurer, secretary, chief executive, manager or other officer of the company or (in the case of a corporation) the mayor, chairman, president or town clerk.



**Order for Examination  
of Deponent  
(before the hearing)**

To

In the	
Claim No.	
Claimant <small>(including ref)</small>	
Defendant <small>(including ref)</small>	
Date	

Upon the application of the [claimant][defendant],[Master][District Judge]  
has ordered you to attend

at [am][pm] on of

at

to be examined on oath.

[and] to produce the following document(s)

[£ to cover your travelling expenses to and from the place of examination and compensation for your loss of time is attached]

[Sum to be offered or handed to deponent £ for travelling expenses to and from the place of examination (and compensation for loss of time)]

**Do not ignore this order**  
If you were offered money for travel expenses and compensation for loss of time at the time it was served on you and you

- fail to attend or produce documents as required by the order: or
- refuse to take an oath or affirm for the purpose of the examination or to answer any lawful question or produce any document at the examination

you may be liable to fine and may in addition be ordered to pay any costs resulting from your failure to attend or refusal to take an oath or affirm.

The court office at

is open between 10 am and 4 pm Monday to Friday. When corresponding with the court, please address forms or letters to the Court Manager and quote the claim number.  
N21 Order for Examination of Deponent (before the hearing)

<b>Certificate of service</b>	<b>Claim No.</b> <input type="text"/>
<p>I certify that the order of which this is a true copy, was served by posting to _____ (the deponent) on _____ at the address stated in the order.</p> <p>I enclosed a P.O. for £ _____ for the deponent's expenses and compensation for loss of time.</p> <p>Signed _____ Officer of the Court</p>	

