Kentucky Law Journal

Volume 40 | Issue 1 Article 4

1951

The Uses of Pleading

Edward W. Cleary
University of Illinois

The Uses Of Pleading

By Edward W Cleary*

At the outset I would like to make the following assumptions: That the only virtue of method lies in its ability to produce results accurately, inexpensively and expeditiously That the purpose of rules of procedure in litigation is to provide a method of ascertaining facts and attaching appropriate results to them. That the place to preserve antiques is a museum. That no member of the bar has a vested interest in any rule of procedure. That even plumbers work better with good tools. That common sense and experience must furnish the yardsticks for evaluating procedure, since litigation has not in general proved susceptible to statistical measurement. And that the lawyers of Kentucky are not prepared to fall in behind the first Salvation Nell who comes down the pike beating the drum of procedural redemption. In short, the whole judicial process is subject to continuing critical re-evaluation.

The Orderly Disposition of Litigation

Regardless of the means employed to achieve them, these factors seem to inhere inescapably in the concept of an orderly judicial process:

1. Notice to the opponent which is adequate to enable him to prepare and present his side of the case effectively;
2. Determination of the elements which are relevant to the ultimate decision and allocating between the parties the responsibility for bringing them into the litigation;
3. Isolation of the area of actual controversy;
4. Ascertaining the governing substantive principles.

Without them, litigation has no apparent origin or discernible destination.

---

* A.B., Illinois College; J.D., University of Illinois; S.J.D., Yale University. Professor of Law, University of Illinois College of Law, Urbana, Illinois. Chairman, Committee on Civil Practice and Procedure, Illinois Bar Association, 1947-1950, Reporter, Joint Committee on Illinois Civil Practice.

In the conventional process of litigation, the exchange of written pleadings between the parties, with intervention by the court when necessary to enforce the "rules", has been relied upon to furnish these factors. Yet for over a hundred years pleading has been set upon and belabored for sloth and inefficiency Dead legal institutions continue to move their tails until sundown, and the apparent survival of pleading may be no more than that. Again, the survival may be real, a testimonial to the basic nature of the objectives sought to be accomplished, if not of pleading itself.

This article proposes to make some examination of the potentialities of pleading in the disposition of litigation.

Notice to the Opponent

Reference may be made to God's calling out to Adam "Where art thou?" before expelling the latter from the Garden.[1] Wholly aside from and long antedating the constitutional notion of due process, common decency requires notice and opportunity to be heard. Notice is meaningless in itself and assumes meaning only in terms of opportunity to defend. Opportunity to defend, in turn, becomes meaningful only as translated into "defend effectively"

An attorney preparing to defend is substantially handicapped unless he knows not only the identity of the transaction to be litigated but in addition the opponent's version of the transaction and the legal character sought to be attached to it. The task of investigating as simple an occurrence as a traffic accident is greatly expedited by the knowledge that the client is accused, not merely of being legally responsible for a collision, but of being responsible because he drove through a stop sign, either negligently or recklessly The information at hand should be sufficient to lend direction and purpose to investigation and preparation for defense, both as to the facts and as to the law since the relevance of facts will depend upon the applicable law

At common law the amount of actual notice contained in pleadings varied in marked degree among the different forms of action. A declaration in trover or general assumpsit disclosed the

---

[1] Genesis III, 9. Used for purposes of illustrating the basic character of notice and opportunity to defend by Fortescue, J. In King v. Chancellor etc. of Cambridge, 1 Strange 557, 567, 93 Eng. Rep. 698, 704 (1723), which appears in turn in GELLHORN, ADMINISTRATIVE LAW CASES AND COMMENTS, (2nd ed., 1947) 231.

identity of the transaction and the character of the litigation only in highly generalized terms. By way of contrast, a declaration in an action on the case or in special assumpsit contained information substantially more detailed. The draftsmen of the Field Code revolted against the fictitious aspects and lack of information in some of the common-law forms and as a corrective measure laid down the requirement that pleadings contain "facts" The ensuing century of litigation over the nature of facts produced a considerable amount of metaphysical nonsense and has led to the assertion that this aspect of the codes was a failure.[2] Nevertheless, a considerable illumination of the problem of notice resulted, although the price at times paid by litigants for the information seems to have been high. The suspicion lurks that, if the expression "facts" had not already been tried as a standard of measurement for pleading and found to necessitate an inordinate number of decisions essentially arbitrary in character, those now advocating its abandonment would be urging its adoption.

In terms of semantics, notice involves levels of abstraction. The word "structure", for example, is highly abstract, while "the house at 702 Pennsylvania Avenue, Urbana, Illinois" is specific. So notice of litigation becomes a question roughly of whether the information conveyed should (1) merely disclose the pendency of litigation of an undisclosed origin or nature, (2) be limited to bare identification of the transaction giving rise to the litigation, (3) indicate only the character of the litigation without reference to the originating transaction, or (4) recite in detail the party's version of the occurrence in such fashion as to identify the transaction and indicate the legal significance which he attaches

---

CLARK, CODE PLEADING (2nd ed., 1947) 226. "Code Pleading and Hilary Rules pleading require the facts essential to constitute a cause of action, the facts which must be proved at the trial, to be alleged in the pleadings. It is this fundamental principle of our present system that seems to me erroneous It is a fruitful source of the delay in litigation which is so commonly condemned; it causes a great waste of time on the part of appellate courts; it no doubt wastes much time in the trial courts, though proof of this is harder to obtain; and occasionally it leads to an improper conclusion of a particular litigation." Whittier, *Notice Pleading*, 31 Harv. L. Rev. 501, 506 (1918).

Compare Vanderbilt, C.J. in Grobart v. Society for Establishing Useful Manufactures, 2 N.J. 136, 147, 65 A. 2d 833 (1949). "While the names of modern pleadings have changed, among other reasons to indicate that we have outgrown the legal technicalities and absurdities which under the name of special pleading brought disgrace on the common law in the nineteenth century the essentials of good pleading remain, and necessarily so, because the human mind has not been able to find over the centuries any other methods of dealing on the merits with questions of law and fact, express or implicit, in an initial pleading"

thereto. Before justices of the peace, the usual notice is limited to (1) Under so-called notice pleading, the information given may be (2) or perhaps (3) Under conventional written pleadings something approximating (4) is ordinarily found.

Pleadings need not be permitted to bog down in a mass of detail. The information given in a pleading should be designed to give direction and purpose to investigation and preparation, not to substitute for them. As details in pleadings increase, the hazards of variance increase in almost geometrical proportion. Moreover, there is a point at which the notice-giving function of pleadings collides with the issue-forming function. If the pleadings serve as a basis for the formation of issues, it must be by denying matters asserted or by bringing forward additional matters to avoid their legal effect, and so on. As the detail in pleadings increases, issues which can be formed by denials become correspondingly minute and the necessity of confessing and avoiding correspondingly greater. Carrying the process to an extreme renders the submission of reasonably broad isues to the trier of fact a substantial impossibility Hence injunctions are encountered against the pleading of "evidence", actually preventing a party from pleading minute details even though he is willing to disclose them and to incur the increased risk of possible claims of variance at the trial.[3]

An answer to the question whether pleadings are the best means for affording the kind of notice envisioned herein will to a large extent depend upon what alternative procedures are available for the purpose. None comes to mind save some species of discovery procedure. Although extremely useful in ferreting out detailed facts and in committing witnesses to particular stories, discovery is often expensive and time-consuming.[4] It ought not to be made a requisite for intelligent preparation in practically every case. Moreover, discovery is designed to elicit facts and not legal theories evolved by counsel whose client is being examined.[5]

[3] DeCordova v. Sanville, 165 App. Div. 28, 150 N.Y.S. 709 (1914), reversed on basis of dissenting opinion in 214 N.Y. 662, 108 N.E. 1092 (1915), illustrates the point.

[4] The seamy side of deposition practice is discussed ably in a note, *Tactical Use and Abuse of Depositions Under the Federal Rules*, 59 YALE L.J. 117 (1949). See also Dike, *A Step Backward in the Federal Courts: Are We Returning to Trial by Deposition?* 37 A.B.A. JOURN. 17 (1951).

[5] The difficulties of ascertaining the underlying theory of an opponent's case under the one form of action are pointed out in Note, 35 CORNELL L.Q. 888 (1950).

At some stage of the proceeding, a litigant must take a stand as to the facts and the law Requiring him to do so at a preliminary stage of the litigation by a written statement of his position places upon him no undue burden, provided sufficient flexibility is retained to enable him to contend with unforeseen developments at later stages. Nor does this seem to be beyond the competence of the run-of-the-mill lawyer.

Allocating the Case Between the Parties

Every case involves the necessity of determining the elements which properly will have a bearing upon the result. Under the adversary theory of litigation the responsibility for bringing these elements into the case is placed upon the parties. Since as a practical administrative problem a plaintiff cannot be expected to deal with every element which might conceivably affect the result, some process of allocating burdens between the parties is required. This involves an initial determination as to what constitutes a prima facie case ("cause of action") for plaintiff, sufficient to justify a decision in his favor if nothing else appears. The determination may be made by ruling on a motion for a nonsuit or directed verdict, purely on the basis of the evidence produced. Occasionally it is found being made by nonsuit or directed verdict upon the opening statement. If, however, the determination is deferred until after the actual trial has been entered upon, plaintiff is likely to be caught short by a difference between his idea and the judge s idea of what constitutes a prima facie case. This pitfall is avoided by a preliminary decision on the point prior to trial, when counsel can more readily prepare to conform to the views of the court.[6]

Since a prima facie case does not encompass everything which may conceivably have a bearing on the decision, after the determination of what constitutes a prima facie case there will perhaps remain still further elements pertinent to a decision. Their relevance must be determined, and a corresponding decision is required as to which party is responsible for injecting them into the litigation.

[6] Serious consideration should be given to permitting attacks upon the substantive adequacy of a case to be made only at the pleading stage. This would entail the abolition of the present general practice of permitting failure to state a cause of action to be raised for the first time by motion in arrest or on appeal.

Providing for a preliminary decision of what is a prima facie case or defense serves a further purpose in affording the basis for a preliminary screening process whereby, without a full dress trial, the wheat of seemingly worthy actions and defenses may be separated from the chaff of those obviously not meriting further consideration. While the proportion of cases thus finally disposed of may be relatively small, the availability of the screening procedure seems bound to have a healthy deterrent effect and disposition to clarify in all cases.[7] Added thought and care in preliminary design are calculated to improve the finished structure.[8]

The aspect of pleading just discussed obviously possesses important notice aspects. If the fundamental task of giving the opponent notice is to be delegated to the pleadings, no great additional extension is involved in making the pleadings further serve as a basis for determining the factors relevant to the case and allocating responsibility for them among the parties.

Isolating the Area of Actual Controversy

Although frequently described as "issue pleading", a prominent weakness of pleading at common law was its approach to the formation of issues. This weakness stemmed from two sources: (1) lack of machinery for compelling truthfulness in pleadings, and (2) failure to define issues with clarity

If pleadings are to serve to eliminate false issues and to define the area of actual controversy, some means must be provided for making them at least reasonably truthful, thereby disclosing whether there is present in the case any genuine issue of fact requiring a trial on the facts. The Field Code sought to achieve

---

"It is possible to continue allowing accident cases, for example, to be brought at no greater risk than that of filing fees, to continue the possibility of any case, however uncertain of merit, surviving till trial, and to continue to dump masses of substantially unanalyzed issues into the over-filled trial machine; but to do so means growing congestion with a search for solution outside the courts." Oliphant's introduction to GREENBAUM AND READE, THE KING'S BENCH MASTERS AND ENGLISH INTERLOCUTORY PRACTICE, 1932, xv.

"We no longer insist upon technical rules of pleading, but it will ever be difficult in a jury trial to segregate issues which counsel do not separate in their pleading, preparation or thinking. Pleadings will serve the purpose of sharpening and limiting the issues only if claims based on negligence are set forth separately from those based on violation of the appliance acts." Jackson, J., O'Donnell v. Elgin, J. & E. Ry. Co., 338 U.S. 384, 392, 70 S. Ct. 200, 205, 94 L.Ed. 187, 193 (1949).

this end by providing for the verification of pleadings. The result was far from a complete success. The general character of statements commonly found in pleadings renders charges of perjury difficult to substantiate, thus depriving the procedure of much of its effectiveness. Nevertheless, the practice has its useful aspects, and a modern system of procedure may well include a provision whereby verification at any stage calls for verification of all subsequent pleadings unless excused by the court for cause.

Summary judgment procedure has proved to be a more effective means of eliminating false issues. Unfortunately it has been set up as a proceeding separate from although auxiliary to the pleadings. No reason is apparent why the aspects of summary judgment cannot be incorporated directly in the pleadings. Under present practices, plaintiff asks for judgment in his complaint. Then he files a motion for summary judgment, again asking for judgment, and in effect saying that this time, he really means it. Under an integrated procedure, if plaintiff chose to attach to his complaint affidavits or other duly authenticated documents containing sufficient competent evidence to establish each element of his prima facie case at a trial, he would be entitled to a speedy judgment unless defendant with his answer presented similar evidence raising a genuine issue of fact. Defendant in his turn could initiate the process by similarly supporting his answer and would be entitled to a speedy judgment in the event plaintiff failed to file counter-affidavits raising a genuine issue of fact. In the event of trial, the affidavits would not be evidence for the party filing them but would be available as admissions if made by a party-opponent and for impeachment.

Penalties for unfounded allegations or denials perhaps have some deterrent effect,[9] and demands to admit facts of an evidentiary nature or the genuiness of documents, particularly the latter, possess great utility [10]

In order to clarify issues, the general denial should be abol-

[9] As in Illinois Civil Practice Act, § 41. "Allegations and denials, made without reasonable cause and not in good faith, and found to be untrue, shall subject the party pleading the same to the payment of such reasonable expenses, to be summarily taxed by the court at the trial, as may have been actually incurred by the other party, by reason of such untrue pleading."

[10] As in Illinois Supreme Court Rules 17 and 18 and Federal Rules 34 and 36.

ished and specific denials required.[11] The persistence of the general denial is a fantastic anachronism in the Federal Rules.[12] It is calculated to encourage capricious denials and frequently raises problems as to precisely what is put in issue. Specific denials require serious piece-by-piece consideration of the allegations in the complaint and leave small room for doubt as to what plaintiff is called upon to prove. To be effective they must really be specific, by denying in the language of the complaint itself, with proper attention to avoiding conjunctive denials and negatives pregnant. Blanket denials of the allegations of an entire paragraph are only a general denial on a lesser scale and ought not to be tolerated. The use of specific denials possesses a further advantage in furnishing a clearer basis for the infliction of penalties for unfounded denials.

With adequate provisions for summary disclosure of the absence of genuine issues of fact and for clear-cut definition of the scope of issues which do exist, pleadings seem to constitute a sensible means for ascertaining the area within which actual controversy exists.

Ascertaining the Applicable Substantive Rules

A decision must at some time be made as to whether facts advanced by plaintiff are a sufficient basis for recovery and whether facts advanced by defendant are a sufficient defense. This is a decision to be made in terms of substantive law What constitutes a prima facie case or defense, although often purportedly solved in procedural terms, is in fact a problem of substantive law Hence it seems to be apparent that the principles of substantive law upon which the rights of the parties depend ought to be ascertainable at an early stage of the litigation.

Since conventionally substantive rules are not alleged in pleadings, the rule which the pleader seeks to invoke can only be determined by inference from the facts pleaded. In the mine-run cases the theory of the complaint, or defense, can easily be determined from inspection of the pleading. In other cases the

[11] For example, Illinois Civil Practice Act, § 40 (1) provides, "General issues shall not be employed, and every answer and subsequent pleading shall contain an explicit admission or denial of each allegation of the pleading to which it relates."

[12] F.R. 8 (b).

substantive theory may be elusive and obscure, and determination whether the elements alleged are adequate under the rule runs into a barrier.

A possible solution lies in requiring that a pleading actually state the substantive theory upon which it is drawn, as in the Scottish pleas in law,[13] but this step seems to be calculated to introduce a further complicating factor probably destined to acquire the hardening of the arteries more or less inherent in procedural forms. Nevertheless, some means of clarification of substantive theory seems definitely to be desirable, without the painful and time-consuming process of step-bystep demurrer.[14]

The Problem

These, then, are the capabilities of pleading. Yet the sad truth is that in practice they are too frequently unrealized, and therefore a large measure of modern procedural reform has been directed to supplementing the deficiencies of the traditional pleading pattern. Unfortunately the attack has generally been piecemeal, leading to the introduction of a proliferation of supplementary procedures designed to accomplish specific limited objectives. As a result, practice before trial has grown by a process of accretion to resemble a contraption pictured in a Rube Goldberg cartoon. Onto conventional demurrer practice have been engrafted demands to admit, motions to make more definite and certain, motions for judgment on the pleadings, motions to strike pleadings as sham, motions for summary judgment, demands to admit, interrogatories to parties, discovery of documents and other items, plus depositions upon oral or written interrogatories. Despite this impressive array, no one seems to be prepared to abandon pleading entirely[15] The confusion does not seem to be calculated to make litigation cheap and expeditious. Most of the auxiliary devices possess great utility as auxiliary devices, but they were not designed to furnish the central theme

[13] Millar, *Civil Pleading in Scotland*, 32 MICH. L. REV. 545, 562-565, 577-581 (1932).

[14] Note, 35 CORNELL L.Q. 888 (1950).

[15] For example, a reading of Moore's discussion of the purposes of pleadings under the Federal Rules leaves the reader with the impression that pleadings are still necessary but ought to be gotten over with as easily and painlessly as possible. Just what they are for is left in considerable doubt. 2 MOORE'S FEDERAL PRACTICE 1606.

and framework which are indispensable to orderly litigation. Hence pleading ought not to be abandoned but efforts ought to be directed to increasing its effectiveness.

A fundamental attack upon the deficiencies of pleading and pretrial procedures generally seems to require a move in the direction of integrating the participation of the trial judge. The pretrial conference, while designed to introduce an element of informal flexibility, too frequently has proved to be merely one more thing to go through prior to trial. Notions as to the purpose of the pretrial conference ought radically to be revised, changing the name if that seems likely to encourage a different approach.[16] If the lawyers of Kentucky can accomplish a sufficiently fundamental revision to retain the useful characteristics of the auxiliary procedures and at the same time incorporate them with pleading into one reasonably integrated pretrial mechanism, they will have to their credit an outstanding accomplishment.

Basically pleading encounters difficulty at two points: failure to keep its objectives in view and delay in accomplishing them. It seems very likely that the source of both troubles to a great extent lies in the piecemeal and painful character of demurrer practice and its lineal descendants. Some mechanism is necessary in order to coerce the unwilling pleader in the direction of ultimate pleading objectives. Traditionally the means employed has been the demurrer, with its counterparts of today not greatly dissimilar in nature, painstakingly hammering out each step before the next could be taken. Delay is not only engendered,—it is invited. In fact the word demurrer means "to pause." Furthermore, fragmentary treatment seems inevitably calculated to detract attention from broad objectives. Deferring any consideration of the sufficiency of any pleading until all pleadings have been filed may well be the answer.

Under this proposal the parties would be required to file all pleadings, including complaint, answer and reply, within rather brief specified times. Then for the first time would pleading questions be considered. Certain difficulties at once become ap-

[16] Judge Fee deplores the decline of pleading under the Federal Rules but admits its inadequacy to deal with complex modern transactions. He envisions the pretrial conference as a projection of the pleading process. *The Lost Horizon of Pleading Under the Federal Rules of Civil Procedure*, 48 COL. L. REV. 491 (1948).

parent: unnecessary answers would be filed in cases where plaintiff could not state a cause of action; the inadequacy of a preceding pleading would at times render the framing of an adequate responsive pleading difficult or impossible. Others no doubt will be raised. The prospective gains, however, which would accrue from proceeding with dispatch and with the whole warp and woof of the case at hand when problems of preliminary design are considered seem calculated more than to offset any apparent disadvantages.[17]

A Suggested Formula

1. Pleadings shall disclose the elements of the claim or defense in sufficient detail to inform the opposing party of the nature of the case which he is called upon to meet and to enable the court to ascertain whether there is probable merit in the claim of the pleader.[18]

2. Every allegation not specifically denied shall be deemed to be admitted.

3. No objection to any pleading shall be filed until all pleadings have been filed.

4. No interrogatories shall be put and no demands to admit shall be made, except with leave of court.[19]

5. After all pleadings have been filed, the case shall upon

[17] The approach suggested bears some similarity to the proposals of the late Professor Simpson in *A Possible Solution of the Pleading Problem*, 53 HARV. L. REV. 169 (1939). However, Professor Simpson and I differ rather radically in our basic analyses. While he sees the desirability of greater integration of proceedings before trial, he would use notice pleading as the basis and place far more authority in the hands of the court. My own feeling is that the traditional degree of control over the actual drafting of the pleadings and framing of issues ought to be left in the hands of the lawyers and that the pretrial hearing ought to be a means for making the participation of the lawyers more effective rather than a means of undermining the adversary theory of litigation. I do not adhere to the Great-White-Father theory of the trial judge.

[18] "General propositions do not decide concrete cases." Holmes, J., Lochner v. New York, 198 U.S. 45, 76, 25 S.Ct. 539, 547, 49 L.Ed. 937, 949 (1905). The gloss which has been accumulated by the code "cause of action" seems to require the abandonment of the phrase if objectives are to be kept in view. The weasel wording of Federal Rule 8 (a), that a complaint shall contain "a short and plain statement of the claim showing that the pleader is entitled to relief" has undoubtedly had considerable effect upon the attitude of the federal judges. If we are to paraphrase "cause of action" I would spell it out in somewhat more detailed objectives.

[19] See Caskey and Young, *Some Further Comments Upon Rule 33 of the Federal Rules of Civil Procedure*, 33 VA. L. REV. 125 (1947).

motion of either party be placed upon the pretrial docket and a pretrial hearing shall be held.

6. At the pretrial hearing the following matters shall at the request of either party be considered.

a. Objections that pleadings do not conform with the requirements of paragraph 1 above, that the theory of substantive law upon which the pleader relies is insufficient or not apparent, or that the pleadings contain matter irrelevant to the merits of the controversy

b. Preliminary rulings upon the admissibility of evidence proposed to be introduced at the trial.

c. Proposals to submit interrogatories or demands to admit.

d. The extent to which genuine issues of fact exist, as disclosed by the pleadings, affidavits and depositions.

e. Other matters which may aid in the disposition of the case.

7 The pretrial hearing may from time to time be continued as appropriate.

8. During the pretrial hearing the court may enter order or orders:

a. Permitting or requiring the amendment of pleadings.

b. Requiring the clarification of the substantive law upon which a pleader relies.

c. Striking from pleadings matter irrelevant to the merits of the controversy

d. Permitting the submission of interrogatories or demands to admit.

e. Determining the extent to which genuine issues of fact exist in the case.

f. Entering final judgment for any party entitled thereto as a matter of law, upon the uncontroverted facts of the case.

g. Reciting any agreements reached between the parties aiding in the disposition of the case.