

COMMENTS

THE REVIVAL OF BILLS OF PARTICULARS UNDER THE FEDERAL RULES

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THE Federal Rules of Civil Procedure originally made that grudging provision for bills of particulars. In 1948 even that grudging provision was eliminated. I will make three inquiries: (1) whether recent decisions are not reviving bills of particulars, in form full-blown, although under another name; (2) whether such revival, if it is taking place, is warranted by the rules; and (3) whether it is a good or bad thing.

I

Soon after the rules went into effect the question arose whether a party could be compelled by interrogatories (under rule 33) or requests for admission (under rule 36) to state the details of his claim or contention of fact. Most of the early cases held he could not be;¹ but there has been a recent tendency on the part of courts and commentators to favor compelling such a statement.² Typical recent rulings require a party to specify the particulars of a claim of negligence,³ contributory negligence,⁴ assumption of the risk,⁵

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¹ E.g., *Ryan v. Lehigh Valley R.R.*, 5 F.R.D. 399 (S.D.N.Y. 1946); *Caggiano v. Socony Vacuum Oil Co.*, 27 F. Supp. 240 (D. Mass. 1939). *But cf.* *Bush v. Skidis*, 8 F.R.D. 561 (E.D. Mo. 1948) (more specific statement of negligence allegation ordered although discovery denied).

² 4 MOORE, *FEDERAL PRACTICE* ¶ 33.17 (2d ed. 1950); 2 BARRON & HOLTZOFF, *FEDERAL PRACTICE & PROCEDURE* § 768, at 437 n.88 (1950). *But see* Cleary, *The Uses of Pleading*, 40 KY. L.J. 46, 49-50 (1951).

³ *Robinson v. Tracy*, 16 F.R.D. 113 (W.D. Mo. 1954); *Gerber v. United States Lines Co.*, 15 F.R.D. 500 (S.D.N.Y. 1954).

⁴ *Kyker v. Malone Freight Lines, Inc.*, 17 F.R.D. 393 (E.D. Tenn. 1955); *Prescan v. Aliquippa & So. R.R.*, 16 F.R.D. 272 (W.D. Pa. 1954); *Forsythe v. Baltimore & O.R.R.*, 15 F.R.D. 191 (W.D. Pa. 1954); *Furmanek v. Southern Trading Co.*, 15 F.R.D. 405 (E.D. Pa. 1953).

⁵ *Furmanek v. Southern Trading Co.*, *supra* note 4.

and estoppel.⁶ In the case of *Alaska v. The Arctic Maid*⁷ the plaintiff, seeking to recover back taxes, propounded the following interrogatory to the defendant, who was alleging the invalidity of the tax:

Indicate by specific factual situations connected with any or all of your operations in waters north of Dixon Entrance between 1949 through 1954, how the tax . . .

. . . .

(b) abridges, impairs, and/or denies your right to take or preserve fish in waters in which fishing is permitted by the Secretary of the Interior,

. . . .

(d) constitutes an attempted taking of your property and a denial of your right to fish and preserve fish.

The district judge, concluding that the defendant's answer would "limit the subjects of controversy, or narrow and clarify the basic issues between the parties . . ." overruled the defendant's objection to the interrogatory.

Let us compare such recent rulings with orders for bills of particulars. The substance of what is sought is the same. These rulings do not call for facts as a witness would give them, from observation or knowledge, but for the contentions or claims of fact selected, combined, and stated in terms of their legal consequences, as a pleader would set them forth. Contentions need not rest on a party's personal knowledge or observation,⁸ nor reflect the party's own selection or judgment. Indeed they will often represent instead the work product of his lawyer.⁹ Of just such stuff are bills of particulars made.¹⁰

⁶ *Gagen v. Northam Warren Corp.*, 15 F.R.D. 44 (S.D.N.Y. 1953). *But see Tobacco and Allied Stocks, Inc. v. Transamerica Corp.*, 16 F.R.D. 537 (D. Del. 1954).

⁷ 135 F. Supp. 164 (D. Alaska 1955).

⁸ *Cf. Clark, The Bar and the Recent Reform of Federal Procedure*, 25 A.B.A.J. 22, 23 (1939).

⁹ Disclosure of specifications of defendant's claims was denied on this ground in *Tobacco and Allied Stocks, Inc. v. Transamerica Corp.*, 16 F.R.D. 537 (D. Del. 1954). See also the statement of Judge Clark, "When you ask for questions under Rule 33 you are asking them of the man who knows. [Pleadings are] . . . simply the process of sounding off by the other man, the man who has some hopes that he is going to show a case." AMERICAN BAR ASSOCIATION, PROCEEDINGS OF THE INSTITUTE ON FEDERAL RULES OF CIVIL PROCEDURE 44 (1939) (hereinafter cited as INSTITUTE). "I think that as to these preliminary papers—the lawyer's papers, not the parties—it is really a waste of time to try to bolster them with these preliminary proceedings." *Id.* at 242.

¹⁰ See *Green v. Delaware, L. & W.R.R.*, 211 Fed. 774 (D.N.J. 1914); Hayhurst

Interrogatories or requests for admission which are directed to the contentions set forth in a pleading may be filed at any time after the pleading itself has been filed.¹¹ These devices do not delay the closing of the pleadings and will often be resorted to after the issues are closed. In this respect these discovery devices do differ from the bill of particulars provided for in rule 12(e) as it stood originally.¹² But they do not differ from the practice which prevails in some states and which did prevail in the federal courts before the rules. Under this practice requests for bills of particulars ordinarily come after issue closed, and do not prolong the pleading stage.¹³

Answers to interrogatories or admissions do not become part of the pleadings, while bills of particulars did so under rule 12(e) as it was originally framed.¹⁴ Under the practice in some states, however, including New York, the bill of particulars does not become part of the pleadings.¹⁵ Moreover the practical significance for present purposes of any difference there may be in this regard is not great, since presumably such answers will be just as effective to limit proof as a bill of particulars would be.

It is true that the rules governing depositions and discovery do not forbid variance between the pretrial answer and what is shown at trial. In the nature of things, however, a man who describes

v. O'Rourke, 155 N.Y.S.2d 421 (Sup. Ct. 1956) (contributory negligence); Holmes v. Cook, 156 N.Y.S.2d 171 (Sup. Ct. 1956) (rules, regulations, and ordinances claimed to have been violated); N.Y.R. CIV. PRAC. 116.

¹¹ Rule 33 allows interrogatories to be served "after the commencement of the action and without leave of the court," with an exception if service is made by the plaintiff within ten days after such commencement. Since plaintiff's interrogatories would be directed to claims made in the answer, this exception would have little, if any significance here. Rule 36 contains similar provisions governing requests for admission.

¹² Under the original provisions, a motion for a bill of particulars was to be filed "before responding to a pleading." Rule 12(a) provided that the filing of such a motion would postpone the time for filing an answer until ten days after the denial of the motion or, if the motion is granted, until ten days after service of the bill of particulars.

¹³ See *United States v. Union Metallic Cartridge Co.*, 265 Fed. 349, 354 (D. Conn. 1920); *Gross v. Price*, 208 Misc. 899, 148 N.Y.S.2d 375 (Sup. Ct. 1955); *Ilsen*, *Recent Cases and New Developments in Federal Practice and Procedure*, 16 ST. JOHN'S L. REV. 1 (1941).

¹⁴ The last sentence of rule 12(e) originally read: "A bill of particulars becomes part of the pleading which it supplements."

¹⁵ 3 CARMODY, *NEW YORK PRACTICE* § 1115, at 2446 (2d ed. 1931); see *Harmon v. Alfred Peats Co.*, 243 N.Y. 473, 154 N.E. 314 (1926); *Loprieno v. Rudich*, 172 Misc. 116, 14 N.Y.S.2d 587 (N.Y. City Ct. 1939).

facts on trial differently from the way he described them before trial will have to explain the change in description and may be charged with having committed perjury on one of the occasions. But claims or contentions are not true or false in the same sense; and the sanctions which impel a man to tell the truth and, thus, usually deter him from changing his testimony, do not have as strong a tendency to keep him from changing his contentions. Yet if a man is free to change his contentions, little is to be gained from compelling their statement. Those who favor such compulsion have in view the narrowing of issues and limiting of proof.¹⁶ This aim can be attained only if the answers to interrogatories are binding upon the parties unless amended just as in the case of bills of particulars. This is in effect the proposal of Professor Moore.¹⁷

The answers to interrogatories and admissions are obtainable without court order unless the party from whom they are sought files objections to them.¹⁸ Substantially the same thing has been true of the bill of particulars under the New York practice since 1936, two years before the federal rules went into effect.¹⁹

In all essentials, then, the practice of eliciting detailed contentions of fact by discovery devices is the same as the practice of eliciting such contentions by bills of particulars after the closing of issue.

II

Is such a practice consistent with the spirit and framework of the rules?

One of the great battles of modern procedure has been over how much detail to require in pleadings.²⁰ From the beginning the

¹⁶ See, e.g., *Kyker v. Malone Freight Lines, Inc.*, 17 F.R.D. 393 (E.D. Tenn. 1955); *Interborough News Co. v. Curtis Pub. Co.*, 14 F.R.D. 408 (S.D.N.Y. 1953).

¹⁷ 4 MOORE, *FEDERAL PRACTICE* ¶ 33.29, at 2344-46 (2d ed. 1950). In *Kendall v. Tetley Tea Co.*, 81 F. Supp. 387 (D. Mass. 1948), the court refused to allow plaintiff to amend its answer to an interrogatory specifying its claim in a patent suit. In *Gerber v. United States Lines Co.*, 15 F.R.D. 500 (S.D.N.Y. 1954), however, the court allowed the defendant to seek particulars of negligence by means of interrogatories in order to give it "some indication of plaintiff's present information about the cause of the accident without foreclosing plaintiff from relying on any additional information which may be uncovered later." *Id.* at 501.

¹⁸ See FED. R. CIV. P. 33, 36.

¹⁹ See N.Y.R. CIV. PRAC. 115-16; 2 N.Y. JUDICIAL COUNCIL ANN. REP. 150-52 (1936); CLARK, *CODE PLEADING* § 54, at 341 n.152 (2d ed. 1947).

²⁰ 35 CORNELL L.Q. 888, 890 (1950). Compare *Dioguardi v. Durning*, 139 F.2d

Federal Rules of Civil Procedure have been committed to the notion that pleadings should be short, plain, and general.²¹ This notion was implemented by the broad provisions of rule 8, by the studied omission from that rule of words and phrases occasionally associated with detailed pleadings,²² and by illustrative forms appended to the rules.²³

With this end in view, the Advisory Committee in drafting the rules rejected the existing federal and prevailing state practice (including the New York practice) of bills of particulars after issue closed, and assimilated bills of particulars to the motion for more definite statement to be made *before responding to a pleading*.²⁴ The purpose of the motion was "to enable [movant] . . . properly to prepare his responsive pleading or to prepare for trial."²⁵

Almost at once controversy arose among the lower federal courts about the meaning of this rule. A few courts ordered particulars freely,²⁶ but the majority "rigorously refused to grant particulars . . . and in effect eliminated the words 'to prepare for

744 (2d Cir. 1944), with *Kramer v. Kansas City Power & Light Co.*, 311 Mo. 369, 383, 279 S.W. 43, 47 (1925).

The case for general pleading is developed in CLARK, CODE PLEADING § 38, at 231-45 (2d ed. 1947); 2 MOORE, FEDERAL PRACTICE ¶¶ 8.02, 8.03 (2d ed. 1948); Cook, *Statements of Fact in Pleading Under the Codes*, 21 COLUM. L. REV. 416 (1921). The case for more detailed pleading is developed in *Claim or Cause of Action*, 13 F.R.D. 253 (1953) (discussion of amendment of rule 8(a)(2) recommended by Judicial Conference of the Judges of the Ninth Circuit); McCaskill, *The Modern Philosophy of Pleading: A Dialogue Outside the Shades*, 38 A.B.A.J. 123 (1952).

²¹ *Conley v. Gibson*, 355 U.S. 41 (1957); see INSTITUTE 41.

²² The typical language of the earlier codes required the pleader to set forth "the facts constituting the cause of action." See CLARK, CODE PLEADING § 35, at 210 (2d ed. 1947). Rule 8(a) "was deliberately drafted to avoid this terminology because of the gloss of technical decisions that have grown up in New York and some other code states around the words 'facts' and 'cause of action'." Tolman, *Advisory Committee's Proposals To Amend the Federal Rules of Civil Procedure*, 40 A.B.A.J. 843, 844 (1954). The Advisory Committee rejected a proposal to reintroduce this language into rule 8(a). ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS 8-9 (1954). See also Wright, *Amendments to the Federal Rules: The Function of a Continuing Rules Committee*, 7 VAND. L. REV. 521, 549-51 (1954).

²³ See FED. R. CIV. P. 84.

²⁴ See Ilsen, *Recent Cases and New Developments in Federal Practice and Procedure*, 16 ST. JOHN'S L. REV. 1, 2 (1941).

²⁵ Fed. R. Civ. P. 12(e), 308 U.S. 678 (1939).

²⁶ See 1 MOORE, FEDERAL PRACTICE § 12.07, at 286-94 (1st ed. Supp. 1946) (collecting cases); 2 MOORE, FEDERAL PRACTICE ¶ 12.17, at 2279 (2d ed. 1948).

trial'"²⁷ In 1946 the Advisory Committee recommended an amendment eliminating the bill of particulars and the controversial words "to prepare for trial." The amendment was adopted, and became effective in 1948.²⁸

From this brief history it looks very much as though the essence of the currently emerging practice was carefully weighed and rejected by the Committee and the Court.

Against such a conclusion it might be urged that while the framers of the rules chose general pleadings, they did provide for disclosure of factual details through the deposition-discovery practice in the post-pleading stages of a case; that full discovery was thought necessary to complement general pleading;²⁹ and that the emerging practice simply carries out this policy. But if anything so nearly identical in function and operation with a rejected device was meant to survive, surely there should be some rather clear indication of that intention. There is not; what indications there are point the other way. For one thing, answers to interrogatories or denials of matters of which an admission is requested must be made under oath. This is appropriate enough for facts which a person thinks he knows or has observed. As to such facts he will either lie or tell the truth as he believes it. A claim which does not rest on the claimant's personal knowledge stands in a different position. The relevant concept here is good faith rather than veracity. The claimant can know at most only whether he intends in good faith to present the claim at trial, and even this may be largely a matter for his lawyer's judgment. No question of the party's veracity may be present.³⁰ The rules reflect this difference; generally they do not require pleadings to be verified, and this includes more definite statements and included bills of particulars before they were eliminated. The guarantee of good faith in setting forth contentions is quite appropriately the attorney's signature rather than the party's oath.³¹

Again, rule 36 permits a request to admit the genuineness of relevant documents or the truth of relevant matters of fact. This language does not aptly describe a device to make a party specify the details of his claim though it may justify calling on him indi-

²⁷ CLARK, CODE PLEADING § 54, at 342 (2d ed. 1947).

²⁸ 2 MOORE, FEDERAL PRACTICE ¶ 12.17, at 2292 (2d ed. 1948).

²⁹ See 2 *id.* ¶ 8.13, at 1652; Clark, *Simplified Pleading*, 2 F.R.D. 456, 468 (1943).

³⁰ See INSTITUTE 44, 242.

³¹ See FED. R. CIV. P. 11.

rectly to abandon a claim which depends upon the truth or falsity of the document or fact in question.

All this suggests that the deposition-discovery devices were intended to reach information and not claims or contentions.³²

It is true, of course, that a principal purpose of discovery procedure is to narrow the issues at trial. But it does not follow that discovery devices were meant to do everything which will narrow issues. Clearly, for example, discovery may not be used to compel an election of remedies.³³ Discovery will narrow the issues by affording full disclosure of facts and, perhaps, by requiring abandonment of issues which a pleader does not intend in good faith to contest. But there is no indication that discovery was meant to narrow the issues through bringing in by a side door a device which in everything but name so nearly duplicates the rejected New York bill-of-particulars practice.

It is also true that at the pretrial hearing the court is expressly invited to get the parties to consider "the simplification of the issues."³⁴ It may be urged that this shows the rules were designed to compel detailed statements of claim on the eve of trial, and that, if such statements are desirable then, the sooner the better; so that the rules should be construed to authorize the compulsion of such statements at an early stage by some appropriate device.³⁵ To this, two things should be said: (1) The word "simplification" is not apt to describe the process of going into greater detail; indeed it suggests quite the opposite.³⁶ It is scarcely clear therefore that rule 16 contemplates the compelling of particulars. (2) Even if rule 16 is to be construed as justifying insistence on detailed statements of claim shortly before trial and after full opportunity for the discovery of information, it by no means follows that

³² Judge Clark has referred to discovery devices as being designed to elicit "material . . . in the field of evidence," INSTITUTE 245, from "the man who knows," *id.* at 44. See also Clark, *The Bar and the Recent Reform of Federal Procedure*, 22 A.B.A.J. 22, 23 (1939); 35 CORNELL L.Q. 888, 892 (1950) (discovery devices "of little assistance in discovering the *contentions*—the theories—of the parties").

³³ The rules have jettisoned the doctrine of election of remedies. See FED. R. CIV. P. 8(e)(2), 18(a), 20(a); *Walla v. Sinclair Oil and Gas Co.*, 17 F.R.D. 506 (D. Neb. 1955); 2 MOORE, FEDERAL PRACTICE ¶ 2.06[3] (2d ed. 1948).

³⁴ FED. R. CIV. P. 16.

³⁵ See 4 MOORE, FEDERAL PRACTICE ¶ 33.17, at 2312 (2d ed. 1950).

³⁶ It may, however, be claimed that general allegations, by their very breadth, conceal complexity; that detailed allegations, while having the superficial appearance of greater complexity, in fact, simplify the claim by narrowing it. I suggest that this would be a strained use of language, but do not rest heavily on the proposition,

parties are to be tied down to detail virtually at the pleading stage as bills of particulars would do. Often, perhaps usually in accident litigation, a pleader's claims will concern his adversary's conduct.³⁷ Especially in such cases there is a substantial difference between compelling particulars before and after an opportunity to probe the adversary's sources of information.³⁸

III

Whether or not the federal rules as they now stand warrant using discovery devices to compel detailed statements of claim, the question remains whether there should be some device for doing this, be it called interrogatory, request for admission, or bill of particulars.

Before we get to the merits of this question, a false objection to such devices should be noted and disposed of. It is that discovery devices are unavailable for this purpose because they may not be used to compel a party to give his opinions.³⁹ We need not inquire whether parties may probe each other's opinions. We are suggesting a distinction between the use of discovery devices to secure information and their use to ascertain contentions; and the contentions which a party's lawyer will urge in court are a different sort of thing from opinions which that party or his witnesses may hold as individuals.⁴⁰

Half truth lies in another objection, namely that particulars of the movant's own conduct are unnecessary because the movant knows what his conduct was. A partial answer to this is that the movant is seeking not information about his own conduct but rather the pleader's contentions about his conduct.⁴¹ But the an-

³⁷ This is true, for example, of all the cases cited in notes 3 and 4 *supra*.

³⁸ Thus, some courts refused to require bills of particulars when the movant himself had much of the relevant information until after opportunity for discovery. *Meehan v. Schenley Distillers Corp.*, 27 F. Supp. 989 (S.D.N.Y. 1939); *Graham v. New York & Cuba Mail S.S. Co.*, 25 F. Supp. 224 (E.D.N.Y. 1938) (dictum); see *CLARK, CODE PLEADING* § 54, at 342 n.154 (2d ed. 1947).

³⁹ Some early cases sustained objections to interrogatories on this ground. *E.g.*, *Ryan v. Lehigh Valley R.R.*, 5 F.R.D. 399 (S.D.N.Y. 1946); *Doucette v. Howe*, 1 F.R.D. 18 (D. Mass. 1939); *cf. Babcock & Wilson Co. v. North Carolina Pulp Co.*, 25 F. Supp. 596, 598 (D. Del. 1938).

⁴⁰ *Webster Motor Car Co. v. Packard Motor Car Co.*, 16 F.R.D. 350 (D.D.C. 1954); *Tinker & Razor v. Pipeline Inspection Co.*, 16 F.R.D. 465 (W.D. Mo. 1954); *Dugan v. Sperry Gyroscope Co.*, 35 F. Supp. 902 (E.D.N.Y. 1940).

⁴¹ See *O-So-Ezy Mop Co. v. Channell Chemical Corp.*, 230 Fed. 469 (S.D.N.Y. 1915); *Caskey & Young, The Bill of Particulars—A Brief for the Defendant*, 27 VA. L. REV. 472, 476 (1941).

swer does not wholly meet the objection. The movant in such a case should be compelled to give discovery of his information before he may tie the pleader down to a detailed statement of claim.⁴² This will add extra steps to the discovery process and invite "shadow boxing" and "Fabian tactics," designed not to elicit more information from the parties but only to perfect the lawyers' "paper" statements.⁴³ But this objection, though not wholly answered, does not go to the heart of the matter.

The real objection to requiring detailed statements of contentions is that they tie a party down in such a way that he may be deprived of his substantive rights.⁴⁴ This is so because even astute counsel are unable always to forecast the vicissitudes of litigation. Time and again some evidence, or some combination of evidence, will emerge for the first time on trial, or will be perceived in its full significance for the first time on trial by the party concerned, or by the tribunal.

True, the discovery devices will and should reduce the possibility of surprise, but they cannot eliminate it. At the trial all the witnesses and evidence are brought together for the first time, and this fact itself may act as a catalyst for eliciting new information and (probably more often) for revealing new insights into the significance and the relationship of things already known. Moreover, at the trial a fresh and most important point of view is brought into play for the first time — that of the tribunal, which is to find and evaluate the facts in terms of the legal theories it finds applicable.⁴⁵

⁴² See note 38 *supra*.

⁴³ CLARK, CODE PLEADING § 54, at 341-42 (2d ed. 1947). Examples of such shadow boxing may be seen in *Bloom v. Bush Terminal Co.*, 164 N.Y. Supp. 895 (Sup. Ct.), *aff'd mem.*, 180 App. Div. 883, 166 N.Y. Supp. 1087 (1917); *Losie v. Royal Indemnity Co.*, 179 App. Div. 439, 165 N.Y. Supp. 999 (1917); *Zecchini v. Mayer*, 195 App. Div. 423, 186 N.Y. Supp. 459 (1921).

⁴⁴ Cf. Clark, *Simplified Pleadings*, 2 F.R.D. 456, 458 (1943) ("often leads to a denial of justice to the client for the mistake of his lawyer"); Wood, *Bills of Particulars in Actions Based Upon Negligence*, 49 CENT. L.J. 362, 363 (1899).

⁴⁵ One of the premises — usually unstated — of the practice of holding the parties to detailed statements of contentions is that the role of the judge in an adversary system is that of an umpire to pass upon the contentions put to him by the parties. A different view perceives in the judge's role a responsibility to take some initiative to see that parties get their substantive rights. This view may be perfectly consistent with the principle and many of the limitations of the adversary system. It need not put on the court the job of initiating investigation or litigation. It may confine the court to controversies put before it by the parties. But it would not require a court to stultify itself by responding only to the contentions

The question, then, is how to resolve the problem of the uncertainty which is inseparable from litigation. Shall its risks be put upon the party who has not had detailed notice of the new possibility, or on the party whose substantive right it unexpectedly supports? ⁴⁶

The case for giving judgment according to the substantive law and the facts found to be true by the trier need not be labored. The proponents of detailed particulars would concede it. But they urge that their proposal will narrow the issues and thereby promote administrative efficiency and minimize possible unfairness to the adversary.⁴⁷ And they suggest that the danger of substantive injustice can be avoided by amendment.⁴⁸ Let us examine these arguments.

Administrative efficiency is of course an important objective of procedure. But it must never be forgotten that the ultimate aim of all procedure should be to secure people their just deserts under the true facts and the appropriate substantive law. The course of law reform is strewn with discarded rules that offered efficiency by narrowing the issues at the cost of justice — witness election of remedies ⁴⁹ and the common-law rules that demanded production of a single issue on which a case had to stand or fall without opportunity to repair the errors of counsel.⁵⁰ Rules which tie a party down to detailed statements of claim would have this vice even if they were efficient; but it is not at all clear that they have the virtue of efficiency.

Administrative efficiency will, to be sure, be promoted by the narrowing of issues, at least if they stay narrow. When discovery devices or a pretrial conference elicit the testimony which will be given at the trial, or an admission that a party intends to abandon contest of an issue made by the pleadings, this purpose will no doubt be served. But experience has shown two reasons why detailed statements of claim fail to promote efficiency to the same

of counsel of varying degrees of competence. It is submitted that the latter is the better view.

⁴⁶ See 35 CORNELL L.Q. 888, 893 (1950) (concluding, "Neither way dispenses equal justice.").

⁴⁷ See, e.g., *Alaska v. The Arctic Maid*, 135 F. Supp. 164 (D. Alaska 1955).

⁴⁸ See 4 MOORE, FEDERAL PRACTICE ¶ 33.17, at 2312 (2d ed. 1950); cf. 2 *id.* ¶ 33.29[2] (2d ed. 1948).

⁴⁹ See note 33 *supra*.

⁵⁰ See CLARK, CODE PLEADING § 4 (2d ed. 1947). See generally STEPHEN, PLEADING *136-49, *285-316, *491-99.

extent: (1) The pleader will seek to protect himself by specifying all the details which his imagination suggests as possibilities under the facts which he thinks will or may appear at trial.⁵¹ Thus the detailed statement of contentions may be just as broad as the general pleading, and much more cumbersome. (2) If, however, the pleader has failed to specify some particular contention which would have been within the compass of a generalized pleading and which finds unexpected support or appreciation at trial, then the court is frequently put in a dilemma: It must either refuse to decide the case on the true facts and applicable law, or it must disrupt administrative efficiency to allow a continuance.⁵² Either resolution of the dilemma represents an evil. Does fairness to the adversary require this price?

Under the federal rules each party has general notice from the pleadings of the limits of controversy, and full access through discovery devices to all the information and sources of information available to both sides. Each party then knows the framework within which he has to work, and he knows that his adversary may urge his claims and the tribunal may derive its conclusions only from permutations and combinations of facts and legal theories within that framework. A plaintiff, for instance, is entitled to know whether he is charged with contributory negligence and to know the nature of all the sources of information about his conduct and the surrounding circumstances. He is also entitled to have that information. This will narrow the issues a great deal since the nature of the facts themselves will impose severe limits on what may plausibly be claimed.

⁵¹ See INSTITUTE 44-45; MORGAN, *SOME PROBLEMS OF PROOF UNDER THE ANGLO-AMERICAN SYSTEM OF LITIGATION* 27 (1956). It may be urged that the requirement of answering interrogatories under oath will prevent such a practice. But since the kind of interrogatory in question seeks the lawyer's claims rather than his own knowledge, the oath is inappropriate. *Cf.* p. 1478 *supra*. All that can be required here is the lawyer's good faith, and historically this has not kept lawyers from making shotgun allegations.

⁵² 35 CORNELL L.Q. 888, 893 (1950); *cf.* INSTITUTE 46. It is not contended that a continuance will always be needed when an amendment is called for, or that a continuance would never be needed when amendment is unnecessary. Certainly, even under a system of general pleading, the trial court should have discretion to prevent prejudice resulting from genuine surprise, without regard to the technical rules of variance. It is submitted, however, that genuine surprise will more often exist, and a claim of surprise—whether or not genuine—will more often seem plausible to the court under a system that entitles parties to rely on specific detailed pleadings than under a system in which they are entitled only to broad notice of the issues.

Further, full discovery of information puts both parties (or their lawyers) in the same position to see what contentions are warranted by the facts. This equalization of the parties enhances the effectiveness of the adversary system to administer justice. In the ordinary case dealing with a single occurrence or transaction like an accident or a breach of contract, where the issues lie within a reasonably narrow compass, it is submitted that fairness to the pleader's adversary requires no more than this.

It may be urged that the adversary should have particulars so as to save him from the unreasonable burden in pretrial preparation of collecting facts upon which no issue will be made. But in many contexts this contention is unrealistic. In accident cases particularly, the adversary's burden will not be alleviated very much by particulars, even when they are not of the shotgun variety. Defendants are nearly always insured or large self-insurers.⁵³ Those who conduct their defense are familiar with the applicable substantive law and seek to have the accident thoroughly investigated as quickly as possible, well before suit is begun, with a view to careful appraisal of the claim's settlement value as well as to the more remote possibility of litigation.⁵⁴ On the other side

⁵³ This is obviously true in Massachusetts and New York where there is compulsory liability insurance for automobiles. It is also true in other states. Studies have shown that those persons who have no insurance seldom make any significant payment for the injuries they have caused. COLUMBIA UNIVERSITY COUNCIL FOR RESEARCH IN THE SOCIAL SCIENCES, REPORT BY THE COMMITTEE TO STUDY COMPENSATION FOR AUTOMOBILE ACCIDENTS 53-96 (1932); James & Law, *Compensation for Auto Accident Victims: A Story of Too Little and Too Late*, 26 CONN. B.J. 70, 75 (1952).

⁵⁴ [W]hat actual difference can it make to a defendant who has prepared his case as it should be, whether or not the plaintiff specifies that defendant failed to sound a horn? . . . The actual preparation for each side will be the same, however such details are finally to be understood

Comment, 32 YALE L.J. 483, 489 (1923).

For detailed practical accounts of how an accident should be investigated, see STEVENSON, *INVESTIGATION OF NEGLIGENCE CASES SIMPLIFIED* (1949); GORTON, *AUTOMOBILE CLAIM PRACTICE* (1940); Heyl, *What a Trial Lawyer Should Find in an Investigation File*, 21 INS. COUNSEL J. 56 (1954); Vogel, *Preparation and Trial of a Personal Injury Case by the Defendant*, 3 J. PUB. L. 537 (1954). All of these accounts stress the paramount importance of prompt and thorough investigations. See GORTON, *op. cit. supra* at 22, 38-39; STEVENSON, *op. cit. supra* at 4; Heyl, *supra* at 57.

Also emphasized is the need for full detailed statements from all available witnesses covering all relevant aspects of the case. See STEVENSON, *op. cit. supra* at 2; Heyl, *supra* at 66; Vogel, *supra* at 537 (stressing also the importance of complete investigation for settlement purposes).

plaintiffs' attorneys can scarcely afford to neglect a prompt and thorough investigation of their clients' conduct.

The adversary would like, of course, to tie the pleader's contentions down to fine detail.⁵⁵ The plaintiff in our illustration, for instance, would like to have the defendant specify the alleged conduct on plaintiff's part which the defendant will contend was negligent. But once the parties have been put on an equal footing, the appeal is less one for fairness than for tactical advantage. The requirement of further particulars of a claim would enable the adversary to prevent the tribunal from giving judgment on the substantive merits whenever the pleader has failed accurately to forecast the course of trial. This carries the implications of the adversary system too far.

It is urged, however, that substantive injustice may be avoided by allowing particulars to be amended at trial.⁵⁶ If they were freely amendable, this objection would be met, but the right of amendment would also take away whatever value particulars might have in promoting efficiency or fairness. If on the other hand conditions are to be put on amendment, then the additional protection for the adversary will frequently have to be bought at the cost either of injustice or of inefficiency.

On balance it seems that the judgment made by the architects of the federal rules was a sound one, at least in the ordinary case. The strongest argument for particulars can be made in litigation which calls into controversy a long and complicated course of conduct.⁵⁷

⁵⁵ Comment, 32 YALE L.J. 483, 489 (1923).

⁵⁶ See 4 MOORE, FEDERAL PRACTICE ¶ 33.17, at 2312 (2d ed. 1950).

⁵⁷ See generally Caskey & Young, *The Bill of Particulars—A Brief for the Defendant*, 27 VA. L. REV. 472 (1941).