

CONTROLLING DISCOVERY ABUSE: A MICROCOSM OF PROCEDURAL REFORM

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This article examines a recent judicial attempt to prevent irrelevant questions in oral examinations for discovery, in response to perceived problems of abuse. It suggests that this response—a microcosm of procedural reform—is unlikely to work, and may make the problems worse. The article considers that the role of the oral examination for discovery in civil litigation may, in many respects, be unsatisfactory. It suggests that any approach to the problems must be directed by adequate empirical knowledge of the effects of change in practice, and fully articulated ideals of the purposes of civil lawsuits.

Dans cet article, l'auteur examine une tentative récente des tribunaux de supprimer les questions hors de propos dans les interrogatoires sur faits et articles pour réagir contre ce qui est conçu comme des abus. L'auteur allègue que cette réaction—microcosme de la réforme de procédure—a peu de chances de réussir et créera peut-être des difficultés plus grandes encore. L'auteur soutient que le rôle de l'interrogatoire oral sur faits et articles dans les procès civils est probablement peu satisfaisant sous de nombreux aspects et suggère que toute solution devrait se baser sur une connaissance empirique appropriée des effets du changement dans la pratique et de modèles précis de l'objectif des procès civils.

Introduction

This article begins with what, I conceive, many would regard as a trivial case—an interlocutory motion, calling for a minor procedural adjustment in a civil action which, after all, was largely the private affair of the litigants. In the balance of the article, I hope to show that this was not really the case at all.

The article is divided into six parts. The first part analyses a series of British Columbian cases concerning disputes over the relevance of questions put during oral examinations for discovery. This analysis may seem, at first blush, to be excessively close. It will be pursued in order to demonstrate that there has been a change in practice in the application of the concept of relevance, in response to perceived problems of discovery abuse. In a brief, second part I explain why I regard this process of change as a “microcosm” of procedural reform. In the third part, reasons are suggested for supposing that the change can be expected either not to work or, in fact, to make matters worse. The fourth part examines some of the possible causes of discovery abuse, and will suggest

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(admittedly, somewhat unhelpfully) that, in fact, any attack on them would have effects on our civil proceedings reaching far beyond the "disease". In the fifth part several questions concerning the role of discovery in civil litigation are entertained and it is suggested that, at the very least, its role is in many respects unsatisfactory. It will, however, have been demonstrated that the role of discovery, as of procedure generally, necessarily reflects partly, and determines partly, the social purpose of civil litigation. In the conclusion it is suggested that, in the absence of fully articulated ideals of what civil litigation should achieve, the day-to-day efforts to improve civil procedure (however necessary and commendable they may be) should be expected to be a haphazard process.¹

1. *A Problem is Detected, and a Change in Practice is Made*

*Allarco Broadcasting Ltd. v. Duke*² was a motion to compel witnesses on examinations for discovery to answer a number of questions, many of which had been objected to on the ground that they were not "relevant" to the pleaded issues. The action itself arose out of a fight between rival shareholders for the control of a company which operated a television broadcasting station in Vancouver. The claim for relief was based upon the "oppression" sections of the Canada Business Corporations Act.³ It was high stakes, complex litigation—of the sort lawyers can really get their teeth into.

It is not necessary to review the details of the court's close, question-by-question analysis of the motion. What is of interest is that the case provided, as McEachern C.J.S.C. put it, "...an opportunity to express the concern that many of the members of this court have about the increasing length of examinations for discovery. . .".⁴ A useful procedure "for removing surprise, defining and clarifying the issues, and simplifying the proof of many matters" was proving its potential as an instrument of oppression "in the hands of some counsel who seem to have unlimited time and resources".⁵ It was often being overdone.⁶ It was being abused.⁷

¹ Cf., R. Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice* (1906), 40 Am. L. Rev. 729 (reprinted in 35 F.R.D. 273 (1964)); J.A. Jolowicz, 'General Ideas' and the reform of civil procedure (1983), 3 Legal Studies 295.

² (1981), 34 B.C.L.R. 7 (B.C.S.C.).

³ S.C. 1974-75-76, c. 33, Part XIX.

⁴ *Allarco Broadcasting Ltd. v. Duke*, *supra*, footnote 2, at p. 12.

⁵ *Ibid.*, at p. 10. The similarity of these remarks to concerns expressed about discovery abuse in the United States is discussed in footnote 21, *infra*.

⁶ *Ibid.*, at p. 11: "Often transcripts of interminable examinations for discovery are never looked at during the trial. This expense should be saved if litigation, as we know it, is to survive the dangerous escalation of the costs of the trial process."

⁷ I use the expression "abuse" to refer to any use of the examination for discovery which is inefficient, or inconsistent with its contemplated purposes. Specific instances

Allarco Broadcasting Ltd. v. Duke was also an opportunity for the Chief Justice to express his views on what was to be done about all this. The time had arrived to prevent "irrelevant" inquiries. This, said the Chief Justice, would be in accordance with the rule that only questions "regarding any matter . . . relating to a matter in question"⁸ were proper on discovery: any misunderstanding on this point, however understandable, should be corrected. He said:⁹

It was stated in *Cominco Ltd. v. Westinghouse Can. Ltd.* (1979), 11 B.C.L.R. 142 (C.A.), at p. 148, that although matters in question are defined by the pleadings, there should not be a fine scrutiny of the pleadings because they (and particulars) may be amended. It may be implicit also that, while pleadings may determine the scope of a trial, there should be more leeway at discovery. I should have thought, with great respect, that it should be the other way around, insofar as "a matter in question" is concerned, as a trial judge has a discretion to control the course of a trial. There is no corresponding restraint at discovery.

It is often said, inaccurately, that *Cominco*, *supra*, authorizes a fishing expedition. That is not what [the court] said. . .

Subsequently, the Court of Appeal considered the scope of discovery again in *Belzberg v. B.C. Television Broadcasting Systems*, 31 B.C.L.R. 140 (sub nom. *Jackson v. Belzberg*) [1981] 6 W.W.R. 273 (C.A.). Hinkson J.A., speaking for the court, said. . .

"The scope of examination for discovery is governed by the issues raised by the pleadings. I cannot see that the answer to the question is relevant to the pleadings in the form they were at the time the application was made. . .

. . . the outcome of this appeal must be governed by the pleadings as they stood at the time of the examination for discovery and of the application. . ."

The difference between the two judgments of the Court of Appeal, if there is a difference, relates mainly to the effect of amendments, or possible amendments. Both judgments make it clear that the scope of discovery is limited by the pleadings. In view of what I regard as a serious developing problem, I propose to

are discussed below. Most everyone would agree that the procedure is for "removing surprise, defining and clarifying the issues, and simplifying the proof of many matters", and many would add, for promoting settlements. Discovery ought to promote "the just, speedy, and inexpensive determination of every proceeding on its merits", which is how the British Columbia Supreme Court Rules, Rule 1(5) states the object of civil procedure generally. (There is no doubting Sir Maurice Amos' observation that there is "inner warfare which eternally severs" those words but the object is there). I imagine that McEachern C.J.S.C. would use "abuse" in much the same way. *Cf.*, *Allarco Broadcasting Ltd. v. Duke*, *supra*, footnote 2:

Examinations for discovery which go on for endless days often indicate a lack of appreciation about what is relevant, and what is important.

Unfortunately, it has become the practice in this court for counsel to indulge themselves in interminable examinations before they decide what the case is about. It has become, in many cases, a learning experience for counsel about the case in which he is engaged. (at pp. 10-11).

. . . some counsel [apparently fail] to recognize that in many cases—particularly cases where the documents tell the story—that much of what is done on discovery is unnecessary, and will not be useful upon the trial. (at p. 12).

⁸ British Columbia Supreme Court Rules, Rule 27(22).

⁹ *Allarco Broadcasting Ltd. v. Duke*, *supra*, footnote 2, at pp. 12-13.

consider the law settled by the later decision [*Belzberg*]. . . I shall attempt to determine the matters in question on this application solely by reference to the existing pleadings.

It is of interest that, proceeding on this basis, the Chief Justice sustained all but one of the objections that had been made to the questions on discovery.

*Cominco Ltd. v. Westinghouse Canada Limited et al.*¹⁰ was also a motion to compel answers to be given on discovery to a number of questions, many of which again had been objected to on the ground that they were not relevant. The action itself arose out of a fire, originating in an electrical switch room in a Cominco zinc smelting plant. The plaintiff and the six defendants were all huge companies. The allegation against the defendants was that electrical cables, manufactured and supplied by them, had a propensity to burn and this made the fire much worse than it would otherwise have been. The claims made were based on contract and negligence. The damages claimed went into the millions of dollars. In the lawyers' jargon, it was like *Allarco*, another "big case".¹¹

Again, it is not the court's decision on any given question which interests us here. What concerns us is what Seaton J.A. had to say by way of general observations on the scope of the examination for discovery:¹²

The matter in question in an action is defined by the pleadings. It does not follow that there ought to be a fine scrutiny of the pleadings. We heard an interesting argument of that nature, but it is an inappropriate exercise. Pleadings are amended; particulars are amended. . . We are not interpreting a contract or a statute; we are looking at pleadings to determine the scope of a trial that is going to take place at some time in the future.

Later, Seaton J.A. observed:¹³

Rigid limitations rigidly applied can destroy the right to a proper examination for discovery.

It is also of interest that the court overruled virtually every one of the objections taken to the questioning on discovery. There is a differ-

¹⁰ (1979), 11 B.C.L.R. 142 (B.C.C.A.).

¹¹ There were many interlocutory motions; several were appealed to the Court of Appeal; no fewer than five were reported. Because of the complexities of the case the unusual (I believe) step was taken, on the plaintiff's motion, of assigning one judge to hear all interlocutory motions and to try the case. It was not an entirely successful experiment; at one stage the plaintiff moved to have that judge disqualify himself from trying the case on the ground of bias formed during the interlocutory stages of the action: see *Cominco Ltd. v. Westinghouse Canada Limited et al.* (1979), 18 B.C.L.R. 286 (B.C.S.C.).

¹² *Supra*, footnote 10, at p. 148.

¹³ *Ibid.*, at p. 151. (Emphasis added). It was accepted that discovery is meant to be a cross-examination, and it has been generally held that it could not therefore be leashed in too closely by attempts to maintain exacting standards of relevance. This idea was put in a fine brace of metaphors by Hunter C.J. in *Hopper v. Dunsmuir* (1903), 10 B.C.R. 23, at p. 29 (B.C.C.A.) (quoted in *Cominco* at p. 148):

ence between the *Cominco* and the *Jackson v. Belzberg*¹⁴ decisions after all. The difference is in the court's attitude towards the application of what is, undeniably, an inexact legal standard.¹⁵ *Cominco* was very much a part of a conventional wisdom that the judges should be stoutly unwilling to disallow questions as beyond the permissible scope of an examination for discovery.¹⁶ *Belzberg*, *Allarco* and a subsequent decision of the Brit-

It is also obvious that useful or effective cross-examination would be impossible if counsel could only ask such questions as plainly revealed their purpose, and it is needless to labour the proposition that in many cases much preliminary skirmishing is necessary to make possible a successful assault upon the citadel, especially where the adversary is the chief repository of the information required.

It was argued by the learned counsel for the respondent that only a sort of cross-examination was allowed by the rule; that it consisted in asking leading questions bearing *directly* on the issues, and, if thought proper, in a loud tone of voice. I cannot agree. I think that the function of the cross-examiner is not to play the role of the ass in the lion's skin, but to extract information that will be of use in the decision of the issues, and by the most circuitous routes if it shall appear necessary to do so.

McEachern C.J.S.C. was not unaware of this view (indeed, he quotes this same passage from *Hopper v. Dunsmuir*) but his response is quite different. He said Hunter C.J. "... was not there considering examinations for discovery which went on, in some cases, for many days". (*Supra*, footnote 2, at p. 11). McEachern C.J.S.C. did caution counsel to act reasonably and warned that "overly-sensitive objections, particularly at the early stages of an examination, may be irresponsible and professionally improper"; but he urged: "Counsel must try to avoid both the ambush and the avalanche." (*Supra*, footnote 2, at p. 12). See further footnotes 16, 29, 59, 60 and accompanying text, *infra*.

¹⁴ [1981] 6 W.W.R. 273, *sub nom. Belzberg v. B.C. Television Broadcasting Systems* (1981), 31 B.C.L.R. 140 (B.C.C.A.).

¹⁵ *Cominco* and *Belzberg* were both considered by the Court of Appeal in *Rogers v. Hunter* (1982), 37 B.C.L.R. 321 (B.C.C.A.), decided shortly after *Allarco*. Lambert J.A., at p.324, stated that the two were, "[p]roperly understood, . . . consistent with each other and . . . both correctly set out the law with respect to the scope of examinations for discovery". Seaton J.A., who wrote the *Cominco* judgment, said, at p. 323: "If the chambers judge thought that he was bound by that decision [*Cominco*] to permit irrelevant evidence I think, with respect, that he was wrong. I do not understand that case to exclude relevance as a consideration. *It does reject an examination of the pleadings as though they were a statute and thereby narrowly defining a precise issue and then restricting each question to a restatement of that issue in question form.*" (Emphasis added). He did not refer to the *Belzberg* decision. He did, however, dissent in part on the substance of the motion. I do not mean to dispute what the Court of Appeal says is the legal effect of its own decisions but the difference, I maintain, is there, and can no more readily be seen than by reading the majority and minority opinions in *Rogers*. To make my point, I invite the reader to compare Seaton J.A. (minority), at p. 324: "The evidence about the prostitute at the stag party I find much more difficult. I think it has some connection. . .", with the terse statement of Hutcheon J.A., at p. 325: "... I agree with Mr. Justice Lambert that the plaintiff has failed to show that incident to be relevant. . .".

¹⁶ As indicated above (see footnote 13) the *Cominco* decision itself quotes extensively from the judgment of Hunter C.J. in *Hopper v. Dunsmuir*, *ibid*. Part of the passage quoted read (*supra*, footnote 10, at p. 148):

ish Columbia Court of Appeal, *Rogers v. Hunter*,¹⁷ depart from that wisdom.¹⁸ The departure may seem ever so slight and, to the extent that it may be effective to solve the problems the *Allarco* decision sets about to tackle, it may seem attractive. But even slight adjustments in civil procedure seem inevitably to raise substantial issues concerning the administration of civil justice.

II. *Microcosmography of Procedural Reform*

I mean no disrespect by citing *Allarco Broadcasting Ltd. v. Duke* as a familiar example of procedural reform. The almost continuous need for modification of procedure is a responsibility necessarily, and perhaps best, left to the judges and lawyers who work it every day. It is both unsurprising and desirable that the changes will generally be moderate. Nevertheless, the process has certain characteristic qualities to it. A problem is noticed here, a screw is turned there, perhaps a nut is tightened elsewhere. The problems get better, or they get worse, or nothing happens at all. Some go away, some others appear, yet some others reap-

No doubt some of the questions propounded and refused to be answered seem at first sight to be somewhat remote from the matter in hand, *but I think it is impossible to say that the answers may not be relevant to the issues*, and such being the case they are within the right given the cross-examining party by the rule. (Emphasis added).

In Ontario, reference may be made to *Fetherstonhaugh v. The Royal Trust Co.*, [1949] O.W.N. 257, at p. 259 (Ont. H.C.), per McRuer C.J.H.C.: "... [The court is not] called upon to conduct a minute investigation as to... relevancy...". And see *Brennan v. J. Posluns & Co. Ltd.*, [1959] O.R. 22 (Ont. H.C.). In the United States, the infatuated view of the discovery provisions of the Federal Rules of Civil Procedure was that their "genius" lay in confining the examination only broadly by a standard of "relevancy" applied with "imagination both by the litigants and the courts" and placing the restrictions on the use to which answers can be put at the trial: D.W. Louisell, *Discovery Today* (1957), 45 Calif. Law Rev. 486, at p. 490; J.A. Pike and J.W. Willis, *The New Federal Deposition-Discovery Procedure: II* (1938), 38 Col. Law Rev. 1436, at p. 1442.

¹⁷ *Supra*, footnote 15.

¹⁸ Enough has been noted of the *Belzberg* and *Rogers* cases to make any more detailed reference to them in support of this proposition unnecessary. After *Rogers* the issue vanished from the British Columbia Law Reports, as one would have expected, but strangely only for a time. It made an appearance again in *Bank of British Columbia v. Pickering* (1984), 53 B.C.L.R. 318, an application before a local judge of the Supreme Court. The court referred (at p. 321) to *Cominco* for the proposition that "[w]hile a question may at first seem remote from the matter in question, it is within the right given the cross-examining party unless it is obvious the answer could not be relevant to an issue... rigid limitations can destroy the right to a proper examination for discovery...", and ordered that the disputed questions be answered. As the judge was not referred to any of *Allarco*, *Belzberg* and *Rogers*, I would not venture to say that *Bank of British Columbia* marks a return to the conventional wisdom. In any event, it would not be possible to say that the questions were irrelevant by any other standard. (It might, however, be permissible to speculate that the trilogy offered their encouragement to the objections in the first place. See footnotes 25, 26 and accompanying text, *infra*).

pear. There may be good reasons to expect any of these things to happen. Perhaps another screw will be turned; perhaps a more "radical" overhaul will be suggested, and adopted. Either form of change, as well as, possibly, solving more or less some of the perceived ills of the day, will have other more and less predictable effects on the administration of justice. "Dissatisfaction with the administration of justice is as old as law."¹⁹ Lurking somewhere under the surface of all of this activity is an obvious, but important, question. Just what is it that we want "to survive the dangerous escalation of the costs [and delays] of the trial process?"²⁰

III. *Why The Solution May Be Expected Not To Work*

The complaints about discovery abuse, and the response, voiced by McEachern C.J.S.C. in *Allarco* would be widely familiar in the United States.²¹ And if American experience is anything by which to judge, it is

¹⁹ Pound, *loc. cit.*, footnote 1, at p. 729.

²⁰ Cf., Jolowicz, *loc. cit.*, *supra*, footnote 1; A.R. Miller, *The Adversary System: Dinosaur or Phoenix* (1984), 69 Minn. L. Rev. 1.

²¹ Throughout the balance of this article, I will make extensive reference to American experience with the discovery provisions of the Federal Rules of Civil Procedure. I am aware of, and not unsympathetic to, those arguments which can be made against too readily equating Canadian litigation experience with American. I suspect that there are many Canadian lawyers who would maintain, as axiomatic, that the Americans have most of *their* problems because "they don't have the award of costs", and we, of course, do not have those problems, because we do. Nevertheless, the overall similarities in the conduct of litigation between the two countries are far too great to justify dismissing, out of hand, the idea that there may be something to learn in all that vast American literature (and they do *know something* about their problems). Both countries have fused professions, and large, diffuse and highly competitive bars. The two countries are closer to each other in educational traditions than, for example, would the Canadian legal profession now claim to be to England. It is simply undeniable that, in the last forty years or more, the impact of American ideas on Canadian law (and therefore, Canadian lawsuits) has been significant. Nowhere is this any more palpable than in the case of our procedural laws: one could not compare the discovery provisions of the British Columbia Rules, the Canadian Federal Court Rules, the Nova Scotia Supreme Court Rules or the new Ontario Rules, and imagine other than that they were consciously modelled on the American Federal Rules of Civil Procedure. It just cannot be believed that American civil litigation is different because it is so typically American. The fact is, and here I will rest my case, that McEachern's C.J.S.C.'s concerns echo, virtually word-for-word, expressions of concern over discovery abuses made repeatedly during the last two decades in the United States: see, for example, A. Doskow, *Procedural Aspects of Discovery*, 45 F.R.D. 498, at p. 504 (1968): "There is a great temptation on the part of the wealthy litigant—and also of the not so wealthy lawyer with plenty of time on his hands—to wear down his opponent. . ."; J.A. Stanley, *President's Page* (1976), 62 A.B.A.J. 1375: "We depose and discover forever, with the end result that the lawsuit is tried twice—and at enormous expense. . . Investigation of matters remotely related to the subject matter of the suit is permitted. . ."; N. Katzenbach, *Modern Discovery: Remarks from the Defense Bar* (1982-83), 57 St. John's L. Rev. 732, at pp. 733-734: "The problem of abusive discovery is likely to be much more a problem of the individual incompetence and ineptitude of the lawyers involved. . . Quite simply, it

unlikely that cracking down on "irrelevant" inquiries can, by itself, satisfactorily solve the problems. It ought to be said first that when the problem is that often "much of what is done. . . is unnecessary" (in the sense that it merely duplicates what is already known from, say, discovery of documents²²) we must, surely, go looking for another cure. This is a problem of discovery which is "too deep rather than too broad".²³ It is, of course, no less abusive. There is reason to believe, however, that tightening up on the standard of relevance could be quite the wrong thing to do.

For one thing, attempting to regulate the scope of the examination too closely may produce more than its share of other difficulties. The burdens of having what is, essentially, an unsupervised proceeding may only be replaced by what are (it is likely) the even greater burdens of attempting to supervise the examination more closely. At least, it is not too cynical to suggest, this was the conventional wisdom. The conduct of an oral examination for discovery is entirely in the hands of the litigants and is supervised by the court only in the sense that the court may be asked to intervene in a dispute. It has been a tradition of the adversary method that ideally the court will not be involved in a proceeding until the trial, and, indeed, the judiciary has tended to view interlocutory disputes as a waste of its time.²⁴ It seems that a less restrictive application of the standard of relevance by the court may encourage litigants, despite any differences, to get on with the examination.²⁵ Of course, this approach does nothing to discourage, and may in fact encourage, "interminable examinations". On the other hand, narrow limits on the scope of discovery may, in fact, encourage disputes far more often requiring the court's intervention.²⁶ "Relevance to the dispute" is by

seems that they are not as conscientiously prepared as they should be. . . This. . . combined with the fact that money can be made in the bargain, has created a climate of enormous inefficiency."

²² *Allarco Broadcasting Ltd. v. Duke*, *supra*, footnote 2, at p. 12.

²³ M. Rosenberg and W.R. King, *Curbing Discovery Abuse in Civil Litigation: Enough is Enough*, [1981] *Brigham Young L. Rev.* 579, at p. 586.

²⁴ *Cf.*, Professor (later Judge) Weinstein's thesis that the mark of good procedure is that it saves "judicial time": J.B. Weinstein, *Standing Masters to Supervise Discovery in the Southern District*, New York, 23 *F.R.D.* 36, at p. 39 (1959).

²⁵ *Cf.*, W.H. Speck, *The Use of Discovery in United States District Courts* (1951), 60 *Yale L.J.* 1132, at p. 1153; Comment, *Tactical Use and Abuse of Depositions under the Federal Rules* (1949), 59 *Yale L.J.* 117, at p. 127; M. Rosenberg, *Changes Ahead in Federal Pretrial Discovery*, 45 *F.R.D.* 481, at p. 490 (1968).

²⁶ This was precisely the American experience under the provisions of the New York "Field" Code: E.R. Sunderland, *Scope and Method of Discovery Before Trial* (1932-33), 42 *Yale L.J.* 863, at p. 876. *Cf.*, Weinstein, *loc. cit.*, footnote 24, at p. 38: "... one of the fundamentals of the federal practice is the concept of control of. . . [the pretrial] stage by the lawyers themselves. . . Use of notice provisions in deposition-discovery practice and the absence of narrow limits on what information can be obtained

any standard inexact,²⁷ and inevitably opinions on some questions will legitimately differ.²⁸ However, hopeful exhortations to reasonable and professional behaviour are unlikely to prevent some counsel from asking too many questions which, properly, should not be asked, or from taking too many objections to questions which, properly, should be answered.²⁹ It is simply a fact that there are very real incentives to both forms of abuse.

Fine-tuning, if it does succeed at all in solving one type of problem, may nonetheless simply create others. More to the point, however, is that when discovery is abused, the boundaries of its scope are not the cause of the difficulty.³⁰

IV. Causes of Discovery Abuse, Suggesting Other Hazards

What we do know, or can easily guess, about some of the incentives in an adversary system to abuse the procedure may go some way to explaining why the problems are so intractable; and it is convenient in doing so to consider why it may be that "costs" do not seem to control abuses effectively. The answers may in fact lie partly with the nature of the abuses; and partly with several qualities of the award of costs itself. Presently the sanction, or the threat, of costs is insufficient to overcome the incentives to abuse discovery, and it is unlikely that costs can be

requires relatively little judge time, and has made it possible for the system to become the success that it is." Thus it would seem that the conventional wisdom was founded upon the theory that strict enforcement of rules tends only to enhance their importance, and that the only way to diminish their importance was effectively to do away with them. Cf., C.E. Clark, *Simplified Pleading*, 2 F.R.D. 456, at p. 467 (1943), who argued that one of the virtues of the simple "general notice" pleading rules of the Federal Rules was that they "substantially eliminate motion practice dealing with pleading forms and force adjudication upon the merits. . .".

²⁷ This is not doubted even in the *Allarco* decision: "In the ultimate analysis, it is impossible definitively to furnish guidelines on what is permissible on discovery."; *Allarco Broadcasting Ltd. v. Duke*, *supra*, footnote 2, at p. 12. Cf., Rosenberg, *loc. cit.*, footnote 25, at p. 490: "Relevance. . . is by far the most elusive and disputed question in the whole gamut of discovery problems. . . My theory is that the concept of relevance is, in effect, a depository for most of the tensions that develop between adversaries in a lawsuit. Arguing over relevance may be the simplest way for one lawyer to assert his disagreements of any and every kind. If that is so, there is no set of words that will encapsulate the concept of relevance, and the task of defining it will prove impossible."

²⁸ Cf., the majority and minority opinions in *Rogers v. Hunter*, *supra*, footnote 15.

²⁹ Cf., McEachern C.J.S.C.'s plea in *Allarco*, quoted, *supra*, footnote 13.

³⁰ They are of course where much of the trouble manifests itself: cf., Rosenberg, *loc. cit.*, footnote 25, and F.F. Flegel and S.M. Umin, *Curbing Discovery Abuse in Civil Litigation: We're Not There Yet*, [1981] *Brigham Young U. Law Rev.* 597, at pp. 602-603: ". . . the empirical evidence, from judges and lawyers alike, puts scope disputes near the top of the list of discovery abuses." A good deal of what is said here about "relevance" could be applied with equal force to other limits on the examination, such as the "fact"—"evidence" and "fact"—"law" distinctions.

made an effective deterrent without working very significant changes in the roles of the advocate and the court in civil litigation.

The gravest concerns do not lie with blatant instances of oppressive or obstreperous examinations. These are not unknown, but they seem rare, and probably they are relatively easy to deal with.³¹ What has gone wrong, in fact, is that the examination for discovery has become bloated, in expense and importance, as a stage in the prosecution of civil disputes. The procedure, operating even as it should, would be rather elaborate and expensive, and often the problems with it are manifestations of only rather subtle forms of tactical abuses.³² It is not easy to detect when the procedure is being used illegitimately and, indeed, illegitimate and legitimate uses may often coincide. For now, the point is that judicial pursuit of a policy either of permitting considerable leeway, or of making close calls, will justify the corresponding practices pursued (for whatever reasons) by the profession. If the court will allow questions

³¹ Cf., D.L. Shapiro, *Some Problems of Discovery in an Adversary System* (1979), 63 Minn. L. Rev. 1055, at p. 1057. *Shapiro v. Freeman*, 38 F.R.D. 308 (S.D.N.Y., 1965) is an example. In that case plaintiff's counsel objected to nearly all of the questions put during a deposition and instructed the witness not to answer. Ruling on the motion to compel answers, the court stated (at p. 312) that "[i]t is clear to us that plaintiffs' attorney. . . appears to be bent on concealing vital facts, or at best, waging a war of delay, expense, harassment and frustration", and ordered that the subsequent examination be supervised by a special master with full authority to rule on objections. The plaintiff's attorney was ordered to pay the costs of the motion and the special master's fees and expenses in the subsequent examination *personally*. However, the converse of the point made in the main text can also be easily shown: cf., the remark of Judge Renfrew: "My experience as a participant in and observer of civil litigation has convinced me that [discovery] abuse. . . while difficult to detect and prove, is widespread": C.B. Renfrew, *Discovery Sanctions: A Judicial Perspective* (1979), 67 Calif. L. Rev. 264; so also, although Fed. R. Civ. P. Rule 26(c) provides for the making of "protective" orders from harassing or oppressive discovery, the courts have been loath to issue protective orders absent both harassment as "a particular and specific demonstration of fact" and a showing that the information sought is "fully irrelevant and could have no possible bearing on the issues". Cf., *Kiblen v. Retail Credit Co.*, 76 F.R.D. 402 (E.D. Wash., 1977); *Grinnell Corp. v. Hackett*, 70 F.R.D. 326 (D.R.I. 1976); *United States v. IBM*, 66 F.R.D. 180 (S.D.N.Y., 1974); and see generally T. Joyce, *Preventing Abuse of Discovery in Federal Courts* (1981), 30 Catholic U.L. Rev. 273.

³² By "tactical abuse" I mean every conscious activity pursued in discovery from considerations other than simply obtaining or providing information which may be obtained under the discovery provisions. This of course covers many "sins", many of which are described in the main text below, and not all of which, it is likely, many practitioners would regard as illegitimate. Cf., W.D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change* (1979), 31 Vanderbilt L. Rev. 1295 (hereafter cited as *Vanderbilt Study*); W.D. Brazil, *Civil Discovery: Lawyers's Views of Its Effectiveness, Its Principal Problems and Abuses*, [1980] A.B.F. Res. J. 789 (hereafter cited as *Chicago Study*). Brazil's *Chicago Study*, which was based upon detailed surveys of 180 Chicago practitioners concluded (at p. 848) that it was "a rare case in which tactics play no role during the discovery stage". Readers with practical experience may consider for themselves how often tactical considerations figure in their own discovery practices.

when "it is [thought] impossible to say that the answers may not be relevant",³³ then how is counsel who asks many such questions to be faulted? If the court will conduct minute examinations into the relevance of questions,³⁴ then how is counsel of a similar, querying disposition to be faulted? Being altogether too thorough and altogether too precise are sins which it would be most hazardous to punish.

The expense of much procedural wrangling must be regarded as an inevitable part of placing responsibility for the prosecution of civil disputes with opposing advocates who are, moreover, charged foremost with the duty to act in the best interests of their own clients. Hence, it is the usual practice to make the costs of successful parties to interlocutory disputes payable in the cause and, while orders of "costs in any event" are by no means rare, they are not, evidently, lightly considered.³⁵ It must be clear that, here again, even the slightest tinkering with this practice could have significant effects on the conduct of civil litigation.

There are other qualities of the award of costs itself which may make it an ineffective sanction against abuses. There are, it seems, a great array of discovery tactics—that is, abuses—which are pursued in order, as it is euphemistically put, "to create an atmosphere for settlement".³⁶ All of these work by, in one way or another, increasing the "settlement value" of a case to the opponent (or decreasing that value, depending on whether the opponent is a defendant or a plaintiff). The trick is to do so without producing a corresponding decrease (or increase) for oneself.³⁷ However the end is achieved, the risk of attracting a sanction of costs, which will actually be paid, for tactical abuses is probably regarded by the profession as largely theoretical. Certainly the risk seems to bear taking—for one thing, the tactics may work. Moreover, the odds are strongly in favour of any case settling and those costs which a litigant might expect to recover from an award would not, in any event, figure wholly into the settlement value of the action to that litigant. The risk of actually having to pay an opponent's *real* costs is not even theoretical.

³³ Cf., *Hopper v. Dunsmuir*, *supra*, footnote 12, at p. 148.

³⁴ Cf., *Fetherstonhaugh v. The Royal Trust Company*, *supra*, footnote 16, and recall *Rogers v. Hunter*, *supra*, footnote 15.

³⁵ Cf., *Ford v. C.N.R.*, [1937] 2 W.W.R. 216 (Sask. C.A.) and the order made in *Cominco Ltd. v. Westinghouse Canada Limited et al.*, *supra*, footnote 10 (costs "in any event" of a successful appeal in interlocutory proceedings are more readily allowed).

³⁶ *Speck*, *loc. cit.*, footnote 25, at p. 1152.

³⁷ For this reason, *Speck*, *ibid.*, among others, held the view that discovery abuse would be by and large "self-defeating" and would not, therefore, prove a serious problem. That view, it is now obvious, was naive. For a somewhat ponderous economic analysis of discovery abuse see Note, *Discovery Abuse Under the Federal Rules: Causes and Cures* (1982), 92 Yale L.J. 352. The "settlement value" of a case to a litigant can, of course, be influenced by factors which are not purely economic.

Just the direct, economic costs which may be imposed on an opponent by the tactics so charmingly described as "pushing" and "tripping".³⁸ would not be covered by a final award of costs "taxed as between party and party". Of course, the tariffs are only a fraction of the real costs between lawyer and litigant—even costs "taxed as between solicitor and client" do not reach those dizzying heights.³⁹ Other costs, such as those arising from business disruptions and delays,⁴⁰ are not included at all. In other words, the tactical end of these abuses may be amply realized, because the award of costs will not completely reallocate the real economic burdens they produce.

"Shaping" (to employ another euphemism) the settlement value of a case for one's opponent by imposing economic burdens at least carries some risk that some of those burdens may be revisited upon oneself in the form of costs; and (who knows?) that risk may be a deterrent, although it seems not a very effective one. Many tactical abuses of discovery, however, have other less tangible effects which are nevertheless undoubtedly pursued as means of forcing favourable settlements. There are thought to be, for example, psychological advantages to taking what may be described as a "tough fight stance".⁴¹ Certainly, aggressively "putting the witness through the wringer" during an examination can be a form of deliberate psychological harassment.⁴² Judging by the squabbles that

³⁸ The terms were evidently coined by W.A. Glaser, *Pretrial Discovery and the Adversary System* (1968), p. 117, the first to refer to excessive discovery demands and the second to refer to obstruction of reasonable discovery demands. In the case of the oral examination, of course, pushing will take the form of asking too much, and tripping the form of objecting too much.

³⁹ Costs awarded on this basis are regarded as somewhat punitive (*cf.*, *Foulis et al. v. Robinson* (1978), 8 C.P.C. 198 (Ont. C.A.)) and we have already considered the difficulties in determining when the abuses are sufficiently manifest to merit a punitive sanction. See further footnote 45 and accompanying text.

⁴⁰ Provision for interest payable on money judgments is meant to compensate for costs flowing from delays. The provision for interest will not, however, figure wholly into the settlement value of a plaintiff's case, in any case because of uncertainty, and in some cases because of the plaintiff's need. This is probably significant in litigation in which the plaintiff is financially weak, and the defendant financially robust. (This is but one instance where it may be supposed that discovery has a substantial, systematic, yet unintentional effect on the litigation process. See further footnote 94 and accompanying text). There is, therefore, even in purely economic terms still some tactical advantage in producing delays. There are other tactical advantages as well. Of course, the provision for interest on money judgments does nothing for a defendant who is affected by tactical delays. I have no idea how often plaintiffs actually pursue it as a strategy, but it is well known that some corporations will settle lawsuits in preference to continuing to show large contingent liabilities on their financial statements.

⁴¹ *Cf.*, Rosenberg, *loc. cit.*, footnote 25, at p. 489. This, of course, may cover a multitude of sins.

⁴² *Cf.*, Brazil, Chicago Study, *loc. cit.*, footnote 32, at p. 859.

nominating representatives for corporate litigants tends to produce, the "inconvenience value" of the choice is not ignored.⁴³ Other tactics may be pursued to avoid producing, or to obscure, damaging information about one's own case, before a settlement can be reached.⁴⁴ Some of these practices would probably not even be regarded as illegitimate by all. In any case, they could only be deterred by an award of costs if "costs" were to become literally a form of fine. That, quite conceivably, could exacerbate procedural wrangling between advocates. It would certainly drastically alter the role of the court in supervising civil proceedings.⁴⁵

Some of the problems with discovery abuses, then, lie with tactical incentives which are obviously difficult to control in adversary proceedings. There are other features of the structure and character of the legal profession which are also likely sources of trouble, and these could be even more difficult to tackle. Certainly, the implications of attempting to do so run very deep indeed.

⁴³ *Ibid.*

⁴⁴ Tripping is one tactic which may be pursued to this end; *cf.*, Brazil, Chicago Study, *loc. cit.*, footnote 32, at pp. 856-857. Another, pursued in discovery of documents, might be described as "burying", that is, deliberately producing a mass of unimportant material with critical documents. Both of these tactics can, of course, also be pursued to impose economic burdens. Then, there is "woodshedding" a witness, which many lawyers regard as a refined art: *cf.*, Duskow, *loc. cit.*, footnote 21. Duskow's paper is a transcript of an address delivered to the Columbia Law School Alumni Association. The transcript records "the task of preparing one's own witnesses for their examinations. . . I like to describe as subornation of veracity [laughter]. . .". (at p. 501).

I am bound to disclose that the Canadian Bar Review's anonymous reviewer has not encountered in his or her own practice any of the tactical abuses I have described as pushing, tripping, burying or woodshedding. I feel some surprise at this experience. There are a few possible explanations but any that I might make would be guesses. I can only reiterate that all are notorious in American practice, and add that I met them all during my very short time in practice in Ontario. The reviewer does allow that "some discoveries today are. . . too long and aimless". I turn in the succeeding paragraphs to other possible sources of this problem.

⁴⁵ Discovery abuse produces serious social costs, in addition to the costs which it imposes on litigants—it is, for example, cited as a significant factor affecting the efficiency of Federal Courts administration: *cf.*, Renfrew, *loc. cit.*, footnote 31; A.D. Sofaer, Sanctioning Attorneys for Discovery Abuse Under the New Federal Rules: On the Limited Utility of Punishment (1983), 57 St. John's Law Rev. 680, at p. 697; W. Burger, 1979 Year-end Report (1980). The Americans have now moved towards greater use of extreme monetary and other sanctions (such as dismissal) of discovery abuse, and the Supreme Court has explicitly authorised their use as a general deterrent: *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976). Renfrew and Sofaer (both Federal Court judges) discuss extensively the serious institutional problems sanctions inevitably raise. See also Katzenbach, *loc. cit.*, footnote 21; P.M. Fishbein, New Federal Rule 26: A Litigator's Perspective (1983), 57 St. John's Law Rev. 739; Note, The Emerging Deterrence Orientation in the Imposition of Discovery Sanctions (1978), 91 Harv. Law Rev. 1033 (hereafter cited as Note, Discovery Sanctions).

Some suggest that the inefficient use of discovery may be attributable to "meter running".⁴⁶ It would be difficult to conjure up some more gentle way of putting the point than did the then Mr. Henry Brougham M.P. when he said "It is the practitioners generally, that determine how the matter shall proceed, and it may be imagined that their own interests are not the last attended to".⁴⁷ It may well be that tactical abuses would, in any event, be pursued in a competitive profession—they may, after all, produce "satisfaction for one's clients". Where, however, there is competition among many, there is that much more reason to be concerned that "satisfaction for oneself" has a not inconsiderable influence on professional habits, and that the interests of the lawyer and the client will not always coincide. Just as troublesome is that the fee padding lawyer may also be an indolent or, worse still, incompetent lawyer.⁴⁸ That discovery abuse should be attributed on occasion to rather energetic manoeuvres, and on other occasions to slothful preparation is, in fact, an obvious possibility—although not particularly suggestive of some obvious solution to the problem. There is some reason to believe that if there is some economic incentive for lawyers to engage in tactical brawling in big cases,⁴⁹ the lack of that incentive may encourage languid, and therefore inefficient, lawyering in smaller cases.⁵⁰ (It hardly needs to be said that where discovery abuses may be attributed to the selfish lawyer, the usual award of costs will not be a deterrent.)

⁴⁶ This was perhaps the intent of the reference in *Allarco Broadcasting Ltd. v. Duke*, "to counsel who seem to have unlimited time"; quoted in the text, *supra*, footnote 5. Rosenberg and King, *loc. cit.*, footnote 23, have suggested that the emergence of "over use" of discovery as a serious problem of abuse is attributable in part to a shift in lawyers' billing practices from "piece work" to hourly billing. That suggestion has been widely accepted by other practitioners and judges. See also some of the American references cited in footnote 21, *supra*. Brazil's Chicago Study, *loc. cit.*, footnote 32, found that a very high number of practitioners thought this was a problem among (not surprisingly) other lawyers.

⁴⁷ February 7, 1828, Hansard Parl. Deb. 2d series, xviii. 188. Ironically, Brougham was speaking to the profession's opposition to pretrial discovery, which he thought would reduce the amount of litigation.

⁴⁸ *Cf.*, the reference of McEachern C.J.S.C. to his "learning experience" and the "lack of appreciation about what is relevant": *Allarco Broadcasting Ltd. v. Duke*, *supra*, footnote 2, at p. 11. It may be suggested that little preliminary preparation (and hence little thought of need) given to discovery may both encourage, and be encouraged by, routine (and hence inefficient) use of the procedure. See further, footnote 52 and accompanying text, *infra*.

⁴⁹ *Cf.*, Brazil, Chicago Study, *loc. cit.*, footnote 32, at pp. 790, 812.

⁵⁰ *Cf.*, H. Kritzer, W. Felstiner, A. Sarat and D. Trubek, *The Impact of Fee Arrangement on Lawyer Effort* (1985), 19 *Law & Soc. Rev.* 251. Brazil's Chicago Study, *loc. cit.*, footnote 32, found that lawyers in small cases expressed overall greater satisfaction, and reported fewer problems with the way discovery was working. This was explained (at p. 790) "in part because discovery plays a lesser role in small cases, in part because the predictability of issues and evidence leaves fewer opportunities for and less to be

Some difficulty in controlling abuses should possibly be attributed just to the importance which the profession now attaches to the examination for discovery.⁵¹ The fact alone that discovery is regarded as "essential" to the proper conduct of litigation must lead to some inefficient use.⁵² That it should be seen as—indeed, can be—a *decisive* stage in many, particularly larger, cases must itself tend to make tactical abuses, and disputes, a deeply rooted part of regular discovery practice.⁵³ There is, however, more to the point. The conviction that discovery is good, and more is better, has been firmly entrenched, and it is likely that the suggestion that litigation ought to be conducted with rather less would be indignantly resisted by the profession.⁵⁴ The provisions for pretrial discovery in both Canada and the United States are such that, in any action in which a trial is seriously (perhaps faintly) contemplated as the final stage, it is both possible and probable that the litigants will have already "played-out" most, or all, of the material on which the court would be asked to adjudicate.⁵⁵ The arguments for maintaining that this is exactly as should be are well known.⁵⁶ There is, however, something

gained by adversarial machinations, and in part because there simply is not enough money involved to justify major commitments to tactical subtlety". However, complaints about *delay* were actually more frequent in small, rather than larger cases and an equally significant number of lawyers complained about "lawyering deficiencies" in both big and small cases (at pp. 827, 832).

⁵¹ Cf., the British Columbian practitioner who said:

While all steps are important in the building of a case, it is the view of many trial lawyers that the most important, single contribution to the success of litigation is the Examination for Discovery. It is not that the technique of Examination for Discovery is so terribly important, it is that on Examination for Discovery you will quickly find out whether or not you have a case, . . . how good a case. . . . In actions that are going to trial, Examination for Discovery should be done in almost every instance.

See R.F. MacIsaac, *Examination for Discovery* (1967), 10 Can. Bar J. 224, at pp. 224-225.

⁵² Cf., M.A. Nordenberg, *The Supreme Court and Discovery Reform: The Continuing Need for an Umpire* (1980), 31 Syracuse Law Rev. 543, at p. 548: "So common has discovery become that one federal court was recently compelled to decide that a litigant is under no obligation to use discovery to prepare its case. . . ."

⁵³ Cf., Miller, *loc. cit.*, footnote 20, at p. 16; Brazil, *Chicago Study, loc. cit.*, footnote 32. This problem has been observed by numerous other writers.

⁵⁴ Cf., the famous dictum of *Hickman v. Taylor*, 329 U.S. 495, at p. 507 (1946): "Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation." Early volumes of the Federal Rules Decisions are littered with professional articles which accuse dissenters from this view of being antediluvian adherents of the "sporting theory of justice". (The influence of Pound, *loc. cit.*, footnote 1, was profound). Cf., *Brennan v. J. Posluns & Co. Ltd.*, *supra*, footnote 16.

⁵⁵ Provision for discovering witnesses in Canada is more restricted than it is in the United States but the main point remains.

⁵⁶ These are the supposed benefits of having "the cards on the table". See, however, the discussion in Part V, *infra*.

rather striking in the impressions of some English lawyers, that civil trials in North America seem almost carefully rehearsed, if not nearly redundant.⁵⁷ Indeed, there is something so striking that we might ourselves ponder the proper function and relationship of discovery and trial. What should be remarked here is that litigating with, by our standards, only rudimentary provision for pretrial discovery must be a rather different experience, calling perhaps for significantly different professional skills—and this ought to warn, at least, against too readily concluding that we could easily do with less discovery.⁵⁸

It was suggested earlier that attempting to impose narrow and precise boundaries on the examination for discovery tends to encourage procedural disputes. This was advanced partly on the theory that strict enforcement of a rule may exaggerate its importance. It was also suggested that there is not much to be hoped in this (nor, for that matter, in any other) respect from appeals to members of the profession to behave themselves. It may now be suggested that this is perhaps due in part to the absence, in the large fused professions of Canada and the United States, of a genuine professional community, upon which the success of such appeals may be supposed to depend. Indeed, it may be that such success as the English have had in diminishing the importance of procedure generally,⁵⁹ while at the same time maintaining a comparatively precise procedural regimen, is owed in good measure to the structure of their profession, within which there are strong professional and social pressures to discourage some of the excesses more prevalent in North America.⁶⁰

It is not the intention here to venture into the complex issues affecting the structure of the profession, or the number, or the competence of its members. It has to be observed, however, that these may have a great deal to do with controlling discovery abuses. So too does the role of the court in the administration of civil proceedings.

⁵⁷ J.A. Jolowicz, *Some Twentieth Century Developments in Anglo-American Civil Procedure*, in *Studi in Onore di Enrico Tullio Liebman* (1979), 217, 255, reprinted (1979), 7 *Anglo-American Law Rev.* 163; A. Zukerman, *Can an Enlarged Law of Discovery Make Civil Trials Redundant?* (1984), 4 *Oxford J. of Legal Studies* 250.

⁵⁸ The Americans contemplated imposing arbitrary limits to the amount of discovery which could be had without court approval, as one way of tackling the problem of overuse, but these proposals were rejected as unworkable: Rosenberg and King, *loc. cit.*, footnote 23.

⁵⁹ *Cf.*, B. Kaplan, *An American Lawyer in the Queen's Courts: Impressions of English Civil Procedure* (1971), 69 *Mich. Law Rev.* 821, at p. 828.

⁶⁰ Jolowicz, *op. cit.*, *supra*, footnote 57, p. 240. (Of course, the English do not have the examination for discovery but, were they to, it would almost certainly be conducted by a barrister. And it may be suggested that the fact that a barrister is retained by a solicitor would also have a restraining influence on some North American abusive practices).

Discovery abuse may well be—like those age-old sources of dissatisfaction with civil proceedings, cost and delay—a “pathology inherent in. . . rigid insistence” that the prosecution of civil proceedings is entirely the affair of the litigants, or rather, their lawyers.⁶¹ Giving the court a much greater managerial role, the solution now being pursued with characteristic fervour in the United States Federal Courts,⁶² has a beguiling obviousness. Closer supervision of the discovery process could, of course, take many forms,⁶³ but effective management probably depends for success upon the court having significant responsibility in the *formulation*, as well as the prosecution, of civil disputes.⁶⁴ That should only follow a wholesale consideration of the role of the parties and the court in civil litigation. While it is certain that some of its proponents maintain unjustified conviction of the adversary system’s superior guarantee of “natural justice” there are very real risks in the court assuming such a function.⁶⁵

A managerial role for the court obviously requires a larger court staff, unless the case-load is significantly decreased, and that is a problem in itself. It could be suggested that, as certain kinds of cases produce more problems than others—that it is possible, for example, to see trouble coming in *Allarco* and *Cominco* from a mile off—so the judges’ energies could more particularly be devoted to these. This also is not free of difficulty.⁶⁶ Management functions could be assigned to “lesser” court officials than the judges themselves, but not without affecting the court’s authority, and hence ability, to participate in the formulation of the cases before it. And there are serious limits to the number of judges

⁶¹ M.E. Frankel, *The Search for Truth: An Umpireal View* (1974-75), 123 U. Pa. Law Rev. 1031, at p. 1054.

⁶² Fed. R. Civ. P. Rule 26(f), and see R.F. Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition* (1981), 69 Calif. Law Rev. 770; M. Pollack, *Cutting the Fat from Petrial Proceedings*, 97 F.R.D. 319 (1983). It is a solution that McEachern C.J.S.C., for one, has rejected outright: *The Pre-Trial Conference* (1980), 38 *The Advocate* 299.

⁶³ Including the simple, but from our point of view unsatisfactory, English system of requiring leave to deliver interrogatories.

⁶⁴ *Cf.*, the attempts to resurrect the otherwise disappointing “pre-trial” in the U.S. Federal Courts: Pollack, *loc. cit.*, footnote 62.

⁶⁵ *Cf.*, J. Resnick, *Managerial Judges* (1982), 96 Harv. Law Rev. 374. The court has its own “institutional” interests in any proceedings—not all sinister, I hasten to say—which may occasionally conflict with the *several* other interests involved. This, unfortunately, may be easily seen where the court chooses to take an active role in “simplifying” the issues in a dispute or in encouraging the parties to settle altogether: *Cf.*, *Rimmer v. Rimmer* (1980), 19 C.P.C. 197 (Alta Q.B.); Symposium, *A Model Institute on Judicial Administration, Consisting of Demonstrations of the Pre-Trial Conference*, 11 F.R.D. 2 (1952). See especially the demonstration of Judge Holtzoff at pp. 15-28.

⁶⁶ This is pretty much the solution contemplated by Fed. R. Civ. P. Rule 26(f) discussed post, footnotes 120 *et seq.* and accompanying text.

that can be tossed into the judging pool. Apart from objections of cost, there is need to be concerned about the quality of candidates who would accept appointments to an expanded bench.⁶⁷ A paradox should particularly be observed: the office of the "passive" judge of the common law's adversary system carries enormous prestige that is, arguably, the *sine qua non* of the position of the judiciary in our constitutional framework. That prestige depends heavily upon the very small number of judges who are appointed.

Early involvement of the courts in the management of civil disputes would add significantly to what may fairly be regarded as already elaborate pretrial proceedings. Apart, again, from objections of added cost⁶⁸ there is a certain inescapable irony to it all. Discovery is, after all, necessary largely *because* of our insistence that it is for the parties both to formulate the terms of their dispute and to submit it for decision by a judge who, in theory at least, will be ignorant of all but the parties' instructions during trial.⁶⁹ If the court is to become more immediately and closely involved, we are left not only to reconsider the role of the parties and the judge in "private" lawsuits, but also to wonder what justification would remain for maintaining the common law's sharp distinction between "interlocutory" proceedings and the single session trial.

V. *The Role of Discovery in Civil Litigation*

No one doubts that discovery cannot be conducted either efficiently or fairly unless the permissible enquiry is in some way limited by reference to the dispute between the litigants; in precisely what way can be, as we have seen, a question involving problems of considerable managerial complexity. Development of the procedure has been most profoundly influenced by a belief that pretrial disclosure of facts enhances the quality of resolution of disputes. This belief, in turn, has been the product partly of experience, and partly of faith in what "mutual knowledge of the facts" may achieve. It may now be legitimately doubted whether faith has been vindicated, and whether discovery is worth the candle. The belief, however, is also ideological and it would be regrettable if the

⁶⁷ Cf., Miller, *loc. cit.*, footnote 20. The U.S. Federal Bench, it may be noted, is sizeable, and its quality has been the subject of considerable criticism. Cf., Attorney General Bell, The Pound Conference Follow-Up: A Response from the United States Department of Justice, 76 F.R.D. 320 (1978).

⁶⁸ This is, in fact, a double objection. First, that it would add significantly to the overall costs of litigation, and second, that it involves a significant "front-loading" of resources—both litigants' and the court's resources—to litigation of a great many disputes which simply are not going to proceed to trial. Cf., McEachern, *loc. cit.*, footnote 62.

⁶⁹ Cf., F.A. Mann, *Fusion of the Legal Professions?* (1977), 93 Law Q. Rev. 367. This theory is somewhat exaggerated from actual practice but serves well to capture an essential characteristic of adversary proceedings.

issue were not viewed as one, fundamentally, of what we envisage civil litigation should achieve.

The examination for discovery originated in the equitable practice which served to secure the "negation of the party's privilege at common law trials not to testify against his own cause".⁷⁰ Discovery's function as a means of obtaining an opponent's evidence in support of one's own case was greatly diminished after the parties became compellable witnesses in civil trials.⁷¹ The "primitive" notion of justice, or "fair play", underlying the common law privilege —*nemo tenetur armare adversarium suum contra se*⁷²—left somewhat more durable traces.⁷³ The searching cross-examination possible in an oral examination is supposed, however, to be a particularly powerful instrument for obtaining admissions and is, therefore, thought to be a means of simplifying proof at trial.⁷⁴ The available empirical evidence suggests that discovery does not shorten trials—in fact, it seems the reverse is true.⁷⁵ Although it may be argued that the data is impoverished, such as it is, it leaves one to wonder how often, in the ordinary run of cases, the examination for discovery⁷⁶ yields up useful

⁷⁰ J.H. Wigmore, *Evidence* (3rd ed., 1940), vol. 6, s. 1846.

⁷¹ A development which, in some sense, remarkably *preceded* the introduction of the oral examination.

⁷² Co. Litt. 36(a) (1628), cited by Wigmore, *op. cit.*, footnote 70, s. 1845.

⁷³ It clearly underlies the *Hickman v. Taylor*, *supra*, footnote 54, "work product" doctrine, and no doubt something of it is to be found in the Canadian privilege extended to materials prepared in anticipation of litigation (including expert's reports); *cf.*, *Steeves v. Rapanos* (1982), 39 B.C.L.R. 60 (B.C.S.C.), *aff'd* (on different grounds) 41 B.C.L.R. 312 (B.C.C.A.); *Yemen Salt Mining Corp. v. Rhodes-Vaughan Steel Ltd. and Stanton Pipes Ltd.* (1977), 5 B.C.L.R. 248 (B.C.S.C.).

⁷⁴ We have seen that this function could be hamstrung by insisting too closely upon questions being manifestly relevant to the pleaded issues.

⁷⁵ Glaser, *op. cit.*, footnote 38; Columbia University School of Law Project for Effective Justice, *Field Survey of Federal Pretrial Discovery* (1965) (hereafter cited as *Columbia Project Field Survey*). Both reports were based on the same empirical study. The results are briefly summarized by Rosenberg, *loc. cit.*, footnote 25. This datum may be both reliable and not surprising. It may, however, be attributable to a fundamental confounding in the study. It was not a controlled experiment, and it is probable that actions in which discovery took place were simply more complicated than those in which there was no discovery. Moreover, the sample may have been skewed—it seems that two-thirds of the cases surveyed were personal injury actions: *cf.*, Brazil, *Vanderbilt Study*, *loc. cit.*, footnote 32.

⁷⁶ I hasten to note, for fear of being otherwise misunderstood, that discovery of documents, as a means of obtaining documentary proof, is unquestionably useful for this purpose. Indeed, it should be remarked, in England discovery procedures are essentially limited to discovery of documents and written interrogatories, which may only be served with leave of the court. While discovery of documents is regarded as an important procedure (not the least because it is an embracing means of revealing the facts surrounding a dispute) the lame interrogatory is little used, and regarded as limited in usefulness "to precise points in which information or admission is sought". *Cf.*, Jacob's *Supreme Court Practice* (1979 ed.), p. 448.

evidence from an opponent otherwise unwilling to make admissions.⁷⁷ While discovery unquestionably altered an ancient tradition and now requires a litigant to assist his opponent to reveal the truth, there are other conflicting traditions in the adversary system which must inevitably, to some degree, infect that process. "While a critical objective of the adversary system is the ascertainment of truth, that is not its sole purpose; if it were, the system would be a tragic illustration of [human] irrationality."⁷⁸ There are other sound reasons for the tradition, for example, that each party bears the onus of proving its claims before a "trier of facts";⁷⁹ and very few would assert, as entirely free of difficulty, that it should be the duty of litigants to volunteer every scrap of information known to them which might assist their opponent.⁸⁰ Expectations that an examination can pry much of it loose may be wishful thinking.

Otherwise, discovery's function as a means of obtaining evidence in support of a case is substantially more controversial. Strict insistence that discovery must "relate to a matter in question" presupposes, of course, pleadings of "material facts" which are in issue and which disclose a "claim" or "cause of action".⁸¹ The rule "against fishing" may be stated in varying degrees of preclusion⁸² but, if asserted dogmatically only as a means of keeping examinations for discovery short, it must be indefensible.

My anonymous reviewer (*supra*, footnote 44) commented: "I wonder about. . . the low value he assigns to obtaining admissions. When I prepare for a discovery *after full document discovery* my whole approach, always, is to obtain admissions on all essential points. At trial, if settlement has not been achieved, admissions obtained on discovery play a central role." (Emphasis added). I may be guilty of underestimating the value of the oral examination as a means of obtaining admissions, but my point, to be absolutely clear, is to question whether the full panoply of the oral examination really yields up more in the way of valuable admissions than can be gained by much reduced procedures. The English practice may suggest that it does not.

⁷⁷ It may be noted that there is theoretically some obligation to admit allegations in pleadings of defence and reply, and this is singularly ineffectual. The curious life in both the United States and England of interrogatories and the "notice to admit facts" may hold some clues. It seems that some difficulty in obtaining admissions lies in the need to know, in the first place, fairly precisely the facts one wants admitted; and another difficulty may be that the tradition of allowing parties to put the other to their proof is too strong. *Cf.*, Shapiro, *loc. cit.*, footnote 31; J.A. Jolowicz, *The Active Role of the Court in Civil Litigation* in M. Cappelletti and J.A. Jolowicz, *Public Interest Parties and The Active Role of the Judge in Civil Litigation* (1975), p. 186; T. Finman, *The Request for Admissions in Federal Civil Procedure* (1961-62), 71 *Yale Law J.* 371.

⁷⁸ Shapiro, *ibid.*, at p. 1088 (references omitted).

⁷⁹ *Ibid.* (and other works cited there).

⁸⁰ *Cf.*, *Hickman v. Taylor*, *supra*, footnote 54. See also A. Homburger, *Functions of Orality in Austrian and American Civil Procedure* (1970-71), 20 *Buff. Law Rev.* 9, at p. 17 *et seq.*

⁸¹ *Cf.*, British Columbia Supreme Court Rules, Rule 19(1)(24).

⁸² *Cf.*, *Playfair v. Cormack and Steele* (1913), 9 D.L.R. 455, at p. 455 (Ont.

To some extent serious issues are buried in the rhetoric which tends to characterize the debate. It is here that differing ideologies concerning the social function of civil litigation become most evident and divide most sharply. Compare the following two statements:

When a plaintiff undertakes to sue in a court of law . . . the most fundamental and elementary principles of justice and fair-play demand that he should formulate his charge with clearness and certainty. . . . Discovery is in aid of the case as pleaded, and an examining party has no right to ask questions for the purpose of finding out something of which he knows nothing now. . . .⁸³

From a theoretical point of view, the current practice of allowing general pleadings and extensive discovery cannot seriously be challenged. There seems to be little reason why litigants should be prevented from establishing legitimate claims in actions in which the admissible facts are to be found only in the minds. . . . of opposing parties.⁸⁴

The first claim denies outright that there is any injustice in refusing redress simply because a plaintiff may be unable to say in precisely what way his or her rights have been infringed. The second seems to dismiss out-of-hand the fact that plaintiffs (fictionally, in the name of the Queen) invoke enormous power against defendants, and the latter may legitimately assert some right to be protected from unwarranted invasions of their privacy.⁸⁵

The right to discovery obviously does and should depend variously upon the "injury", the relief claimed and other, perhaps competing interests involved.⁸⁶ Debate concerning what refinements may be desirable

S.C.): "It is a cardinal rule that discovery is limited by the pleadings. . . . The party examining has no right to go beyond the case as pleaded and to interrogate for the purpose 'of finding out something of which he knows nothing now and which might enable him to make a case of which he has no knowledge at present'. . . ." (per Middleton J., reference omitted); *Cominco Ltd. v. Westinghouse Canada Ltd. et al.*, *supra*, footnote 10, at p. 149: "Counsel said that one cannot embark on a fishing expedition. I find little help in that statement. I take it that a fishing expedition describes an examination for discovery that has gone beyond reasonable limits into areas that are not and cannot be relevant. That one fishes is not decisive, it is where the fishing takes place that matters." (per Seaton J.A.); A. Holtzoff, A Judge Looks at the Rules After Fifteen Years of Use, 15 F.R.D. 155, at p. 163 (1954): "Fishing excursions are allowed if there is a reasonable prospect of any fish being caught." Skues, no doubt, would have remarked that the Americans appreciate nothing of the etiquette of the chalk stream. The metaphor is rather tired.

⁸³ *Somers v. Kingsbury* (1923), 54 O.L.R. 166, at p. 170 (Ont. App. Div.), per Middleton J., dissenting.

⁸⁴ J.H. Friedenthal, A Divided Supreme Court Adopts Discovery Amendments to the Federal Rules of Civil Procedure (1981), 69 Calif. Law Rev. 806, at pp. 816-817.

⁸⁵ The same issue is, of course, present in greatly magnified form where a litigant seeks discovery of a "mere witness".

⁸⁶ For examples of extremes, one might cite *Norwich Pharmacal Co. v. Customs and Excise Commissioners*, [1974] A.C. 133, [1973] 2 All E.R. 943 (H.L.) and *Anton Piller, K.G. v. Manufacturing Processes Ltd.*, [1976] Ch. 55 [1976] 1 All E.R. 779 (C.A.). In the United States, there is a notable willingness to accommodate antitrust

must necessarily be affected by "substantive" as well as "procedural" considerations. It is self-evident, however, that no possible reform, even of the "tinkering" kind, and whether we care to call it procedural or substantive, will do other than pervade the legal process in ways which will be neither "purely procedural" or "purely substantive". Here we enter areas about which we are rather ignorant. It may be presumed that the terms of availability of discovery could substantially affect the incidence of litigation in certain areas (indeed, this point lies at the centre of much of the raging controversy over the scope of discovery in the United States).⁸⁷ The fashioning of rules of liability, in turn, may substantially affect the incidence of litigation and the use of discovery.⁸⁸ Presumably, the fashioning of some rules takes some account of the fact that proof of liability may or, indeed may only, be available from discovery.⁸⁹ And on some occasions, the fashioning of some rules of liability may be preceded by discovery of evidence of facts upon which liability ultimately is made to rest.⁹⁰

Pre-trial disclosure, for its own sake, of facts relevant (more or less broadly) to disputes is generally regarded as a significant "discovery" function.⁹¹ Its virtues are supposed to be that it clarifies the issues, elim-

actions, presumably because of the significant public interest involved: *Hospital Building Co. v. Rex Hospital Trustees*, 425 U.S. 738, at p. 746 (1975): "We have held that 'a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' . . . And in antitrust cases, where 'the proof is largely in the hands of the alleged conspirators,' . . . dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly."

⁸⁷ See Friedenthal, *loc. cit.*, footnote 84.

⁸⁸ Cf., M. Rosenberg, *Devising Procedures that are Civil to Promote Justice that is Civilised* (1971), 69 Mich. Law Rev. 797; Soafer, *loc. cit.*, footnote 45. Both authors (as have others) make the only apparently extreme suggestion that problems of administration of justice call for re-thinking substantive rights as well as procedural laws.

⁸⁹ Cf., F. James, Jr. and G. Hazard, *Civil Procedure* (2nd ed, 1977), p. 177; Friedenthal, *loc. cit.*, footnote 84, at p. 818. The American antitrust, employment discrimination, and some products liability actions are given as examples.

⁹⁰ This may occur only infrequently but the phenomenon, however rare, is surely never inconsequential. The development of punitive damage awards, and liability for conscious design choices (based on a duty to warn of known risks) in the field of products liability may be examples. Cf., *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 757 (1978); D.G. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products* (1982), 49 U. Chic. Law Rev. 1. (Compare that as a general rule courts are reluctant to dismiss claims as "bad in law" without fully hearing the evidence upon which the claim is based).

⁹¹ Discovery of "mere" witnesses is, of course, entirely justified on this ground (the provisions for discovery of witnesses is narrower in Canada than in the United States). There is still lingering controversy in Canada over "the party's own evidence" rule. It ought to be regarded as anomalous, in that it is justified in the country of its birth on the belief that, to some extent, "surprise" at a trial is desirable—not a belief, one

inates "fictitious" issues and surprise, and therefore improves the quality of trials, and to boot, encourages fairer settlements. This may be sound intuition—how could it be anything other than to the good that litigants know a great deal about their disputes? The empirical evidence, again such as it is, suggests in fact that discovery leads to a multiplication of issues, and hence possibly greater surprise, at trials, and to fewer, if any, rather than more settlements.⁹² These are not points to belabour.⁹³ There are, however, a few significant theoretical issues which emerge.

It will, perhaps, be best to begin with the role of discovery in promoting settlements. It bears reiterating that discovery procedures may be supposed to affect the settlement of disputes in ways which may not be intentional and yet may be systematic. We may imagine that its effects, as to some extent we have already observed, are not "substantively neutral" and, moreover, the various "institutional" interests involved in litigation will differ as to those effects. Its costs undoubtedly discourage some lawsuits and some classes of litigants, while not others. It probably encourages some kinds of litigation, more than others. Its use may favour plaintiffs more than defendants; its abuse—defendants more than plaintiffs. Those cases to which it is more "vital"—in which, hence, it is more "troublesome"—may take up a "disproportionate" amount of the courts' time, to the exclusion of "equally deserving" disputes. Or, perhaps, "some other" cases are distracting too much of the courts' time from where it is "needed".⁹⁴

would have thought, that there is any other evidence to suggest Canadians inherited with the rule. See generally N.J. Williams, *Discovery of Civil Litigation Trial Preparation in Canada* (1980), 58 Can. Bar Rev. 1.

⁹² Glaser, *op. cit.*, footnote 38; Columbia Project, *op. cit.*, footnote 75.

⁹³ Problems with the data are discussed *supra*, footnote 75. A common reaction to the suggestion that discovery does not lead to more settlements is total disbelief: see, for example, Daskow, *loc. cit.*, footnote 21. Of course, the contribution of discovery to the quality of trials and settlements is largely immeasurable (see, however, footnote 94 and accompanying text, *infra*). And it is impossible to know quite what to make of the possible effects of discovery abuses in the process (but see again footnote 94, and accompanying text, *infra*).

⁹⁴ The excessive demands now being placed on judicial resources is undoubtedly the justification for the modern trend of involving judges directly in the settlement process (and the justification as well for the parallel trend of encouraging resort to "alternative dispute resolving mechanisms"). My impression is that this results in the selection of cases for adjudication on no basis other than that the parties still persist in disputing, and the court has not been able to persuade them otherwise. A potential problem associated with this trend is observed in footnote 65, *supra*. But the real problem, it may be suggested, is more general. Settlement does not involve "applying the law to the facts"—it is not, in other words, adjudication in anything like the traditional sense. For that reason alone, there are dangers in engaging judges in the task. And there are, perhaps, some disputes which, ideally, courts should adjudicate? Cf., O.M. Fiss, *Against Settlement* (1983-84), 93 Yale Law J. 1073.

Otherwise, although the subject of settlements in civil proceedings is rather teasing,⁹⁵ it must be accepted that not every dispute could, even if it were theoretically desirable, be resolved by a court; and it is in the public interest both that litigants are in some degree encouraged to settle their own disputes, and that the means be available to ensure that settlements are "fair". In theory the contribution of discovery seems sound: if each party may be equally and well informed, then each is equally well placed to make predictions about the outcome of their dispute, were it to proceed to trial, and on that basis arrive at a fair settlement. If it is really the case that discovery does not lead to more settlements, this is disturbing because it suggests that litigants do not behave as if discovery makes the outcome of their litigation any more certain. If we are disposed to dismiss the empirical evidence as simply incredible,⁹⁶ it may be more to the point to admit that we do not know very much about why litigants settle their disputes. In order to avoid overworking speculation on this issue, only two points of possibly theoretical importance will be suggested. The first—it is a rather obvious suggestion—is that uncertainty may be as or more significant an inducement to settle, as certainty. Second, Brazil's study of Chicago litigation provided several pieces of evidence indicating that cases may actually settle during the discovery stage of proceedings because important information is *not* disclosed.⁹⁷ The paradoxical conclusion, that discovery encourages settlements because it does not work, at least in the manner the theory suggests, is rather distressing.

It has been objected that establishing the "issues" in a dispute by "fact" pleading may result only in precision that is by and large artificial and that, rather than the issues controlling the scope of discovery, the reverse should be the rule.⁹⁸ This view was in fact adopted by the

⁹⁵ I will add only a little more to what I have said in the preceding footnote. The thing which teases is the extent to which it is legitimate for a system for the administration of justice to pursue actively settlement as a goal for the system. That issue arises, probably, because the common law is lacking a systematic appreciation of the nature of "private rights" and its relationship to the "right" not to litigate. In short, the extent to which we regard it as a function of litigation to achieve the "realisation of law", as distinct from the resolution of disputes, is uncertain. For discussions of civilian approaches to these questions see R.W. Millar, *The Formative Principles of Civil Procedure* (Parts I, II and III) (1923-24), 18 *Ill. Law Rev.*, at pp. 1-36, 94-117, 150-168 (reprinted A. Engleman *et al.*, *A History of Continental Civil Procedure* (1928), pp. 3-81; Jolowicz, *op. cit.*, footnote 77.

⁹⁶ And it seems all the more incredible given that settlement is one of the alleged ends of discovery abuses.

⁹⁷ *Loc. cit.*, footnote 32, at pp. 810-824. Lawyers interviewed stated that in a significant number of cases they had succeeded in settling cases before having to disclose important evidence, and that, in other cases, opposing lawyers had initiated settlements without having discovered vital evidence.

⁹⁸ James and Hazard, *op. cit.*, footnote 89.

drafters of the pleading and discovery provisions of the American Federal Rules⁹⁹ and to a lesser extent it is manifested in Canada by a "forgiving" attitude towards the standard of pleading¹⁰⁰ and a wariness of applications for "particulars" before discovering.¹⁰¹ Pleading, of course, requires commitment to a particular version of the parties' dispute at a stage of the litigation when fact-finding is relatively nascent. There is then always a risk that certain facts will not be pleaded because they are not then known, and that for this reason litigants may be deprived of their substantive rights. (This is, of course, only a variant of the more controversial objection to "fact" pleadings considered above.) On the other hand, it may be objected that much of their *raison d'être* is lost if amendments to pleadings are readily permitted.¹⁰²

It was, in fact, suggested that discovery was leading to a multiplication of the issues presented, and hence to greater rather than less surprise at trial because it was enabling litigants to advance several legal theories of their claims.¹⁰³ This, arguably, is not a bad thing at all. There is here another, perhaps less obvious, sense in which "fact" pleadings may be regarded as an artificially precise version of the litigants' dispute. It may be supposed that the transition, completed by the Judicature Acts, from the old "forms of action" to "fact" pleading was intended to confer upon the "court. . . the means of administering complete justice",¹⁰⁴ and to secure "the separation of substantive law from procedure [making] possible the proposition which we now take for granted, that it is the task of the court to decide what are and were the rights and obligations of the parties to litigation by the application of 'the law' to 'the facts'".¹⁰⁵

⁹⁹ Cf., Fed. R. Civ. P. Rule 8, 26. They were undoubtedly also motivated by miserable experience with "fact" pleading under the codes. Cf., C.B. Whittier, Notice Pleading (1917-18), 31 Harv. Law Rev. 501; R.W. Millar, Civil Procedure of the Trial Court in Historical Perspective (1952), pp. 174-175.

¹⁰⁰ G.D. Watson and N.J. Williams, Canadian Civil Procedure -Cases and Materials (2nd. ed, 1977), pp. 6-49.

¹⁰¹ Cf., *Cominco v. Westinghouse Canada Ltd. et al.* (1978), 6 B.C.L.R. 25 (B.C.S.C.); *Somers v. Kingsbury supra*, footnote 83; *Fairbairn v. Sage* (1925), 56 O.L.R. 462 (Ont. App. Div.).

¹⁰² F. James, Jr., The Revival of Bills of Particulars Under the Federal Rules (1957-58), 71 Harv. Law Rev. 1473, at pp. 1481-1483. The Americans, it may be said, are particularly hung-up by this objection because their experience under the codes was that applications for amendments to the pleadings, because of "variance" at a trial, were almost invariably found to involve prejudice to the other party requiring a re-trial: cf., Whittier, *loc. cit.*, footnote 99; Pound, *loc. cit.*, footnote 1. This problem is perhaps only occasional, and they have solved it only with the expense of vastly more elaborate proceedings. The English, in contrast, generally regarded costs as a satisfactory panacea: cf., *Cropper v. Smith* (1884), 26 Ch. D. 700 (C.A.).

¹⁰³ Glaser, *op. cit.*, footnote 38.

¹⁰⁴ 2nd Report of the Common Law Commissioners, Parliamentary Papers 1852-53, xl, pp. 34 ff., cited in Jolowicz, *loc. cit.*, footnote 1, at p. 297.

¹⁰⁵ Jolowicz, *ibid.*, at pp. 300-301.

"Fact" pleading nevertheless requires a statement of "material facts" showing a "cause of action". It requires, in other words, that facts be selected and pleaded according to a theory of their legal consequence.¹⁰⁶ The parties' pleading can, and occasionally will, deprive the court of the opportunity "of administering complete justice" because a party may misconstrue the legal significance of facts surrounding the dispute.¹⁰⁷ There is, however, a more general issue involved: to what extent is it properly the function of the parties to determine the basis upon which civil disputes are to be resolved, and to what extent should the court be bound either to lend its assistance or, indeed, to determine that basis for itself? Theory aside, it is evident that our response to these questions is largely determined by our method of proceeding. It was undoubtedly thought, when the American Federal Rules were first introduced, that among their greatest advantages was the significant opportunity the court has to participate in defining "the issues" and the applicable legal theories of the parties' dispute, at a stage when the facts "relevant to the subject matter" may be largely known.¹⁰⁸ It is an opportunity to a great extent absent where the issues are defined by pleadings, and discovery is confined by pleaded issues.

The American experiment has not been an unqualified success. When they were first introduced, the Federal Rules did make provision for "particulars" of the parties' claims, to be given in order to enable them "to prepare for trial".¹⁰⁹ This was a grudging "concession to the special pleaders in a system that on the whole rejected their views" and in 1946 the provision was eliminated.¹¹⁰ The theory underlying Kaplan's dictum—"When strong discovery comes in, bills of particulars naturally go out. . ."¹¹¹—was that particulars of a party's contentions should be unnecessary: full disclosure of the facts "puts both parties (or their lawyers) in the same position to see what contentions are warranted by the facts".¹¹² After 1946, however, the practice developed of permitting interrogatories which in effect sought a party's contentions of fact, selected and stated in terms of their legal consequence:—"Of just such stuff are bills of particulars made."¹¹³ The practice was ultimately legitimated by the 1970 amendments to the rules, but these managed largely to preserve the original philosophy by providing that answers to these inter-

¹⁰⁶ James, *loc. cit.*, footnote 102.

¹⁰⁷ *Cf.*, *Golko v. Clarke Simpkins Limited* (1957), 23 W.W.R. 88 (B.C.C.A.).

¹⁰⁸ *Cf.*, Fed. R. Civ. P. Rule 16; James and Hazard, *op. cit.*, footnote 89, pp. 92-93.

¹⁰⁹ James and Hazard, *ibid.*, p. 204.

¹¹⁰ *Ibid.* "Special Pleader" is not a term of endearment.

¹¹¹ *Loc. cit.*, footnote 59, at p. 823.

¹¹² James, *loc. cit.*, footnote 102, at p. 1484. (Emphasis added).

¹¹³ *Ibid.*, at p. 1474.

rogatories may be delayed until other discovery is completed.¹¹⁴ Paradoxically (at least, so it could easily appear to one accustomed only to "fact" pleading) it was also the intention that a party's proof at trial should not be limited by the contentions stated in interrogatories, and it seems that a party will only most exceptionally be prevented subsequently from "amending" an answer.¹¹⁵

The 1970 amendments adopted the few recommendations for improvements flowing from an otherwise generally favourable study of the workings of the discovery provisions.¹¹⁶ One might be forgiven for remarking in retrospect that it would have been most unfashionable of that study to have reported that discovery was not, by and large, accomplishing its functions. By 1976, however, reports of dissatisfaction with discovery were widespread, and following the "Pound Conference"¹¹⁷ of that year a "blue ribbon" committee of judges and trial lawyers was invited to make recommendations on ways of improving the procedure. There is little point now in discussing, in any detail, the recommendations which followed, beyond observing that the Special Committee floated a proposal that Rule 26 should be amended to confine discovery questions to the "issues raised by the claims" rather than the "subject matter of the dispute", and noted that a message had to be sent to the judges to uphold firmly the requirement of relevancy, rather than to continue the practice "of erring on the side of expansiveness".¹¹⁸ Predictably this proposal was met vigorously with the objections that, among other things, it would fail to solve the problems of "duplicative, redundant, or simply disproportionately costly" discovery, it would set off a new

¹¹⁴ Fed. R. Civ. P. Rule 33(b), providing that an interrogatory "is not. . . objectionable merely because [it] involves an opinion or contention that relates to fact or the application of law to fact". Apparently the amendments were promulgated partly in an effort to clear Federal Court motions calendars of discovery disputes—disputes seemingly reminiscent of the squabbles under the New York provisions (Sunderland, *loc. cit.*, footnote 26). Other amendments concerned the gargantuan "work product doctrine" spawned by *Hickman v. Taylor*, *supra*, footnote 54. See Note, Federal Discovery Rules: Effects of the 1970 Amendments (1971-72), 8 Colum. J. of Law & Social Problems 623.

¹¹⁵ Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery, 48 F.R.D. 487, at p. 524 (1970) (Advisory Committee's Note on Rule 33). See generally K.P. Taube, Limiting the Scope of Litigation: Bills of Particulars, Interrogatories, and Requests for Admission in Illinois and Federal Courts, [1979] Law Forum 211. It is a rule which unquestionably emphasizes the inevitable tensions of attempting to secure "the just, speedy, and inexpensive determination of every proceeding on its merits".

¹¹⁶ Glaser, *op. cit.*, footnote 38; and the Columbia Project, Field Survey, *loc. cit.*, footnote 75.

¹¹⁷ The occasion was to commemorate the 70th anniversary of Pound's famous address, *supra*, footnote 1. The proceedings of the Pound Conference are reported in 70 F.R.D. 79 (1976).

¹¹⁸ Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, 77 F.R.D. 613, at pp. 627-628 (1978).

round of litigation over the application of the rule and, of course, it would "wipe out notice pleading".¹¹⁹ What was ultimately adopted by the Supreme Court¹²⁰ was a provision enabling the court to convene the attorneys for the parties for "a conference on the subject of discovery".¹²¹ Following a "Discovery Conference" the court must enter an order "tentatively identifying the issues for discovery purposes, establishing a plan and schedule for discovery, setting limitations on discovery, if any; and determining such other matters. . . as are necessary for the proper management of discovery in the action. An order may be altered or amended whenever justice so requires." The effort made to avoid the impression of "reintroducing special pleading in another guise" is striking. It would not be appropriate to speculate here on how successful this reform has been, and may be expected to be in the future.¹²² It would, however, perhaps be forgivable to observe that the "Discovery Conference" is not, surely, expected in most cases where it will be used to work otherwise than by having "issues", identified by the parties at an early stage of the proceedings, control the scope of discovery.¹²³

The developments, culminating in the 1970 and 1980 amendments to the Federal Rules, all rather tellingly suggest that, as one observer put it, "where the issues are not sufficiently defined by the pleadings, in one way or another a degree of precision must still be given to the *allegations* of the parties—the much maligned lawyers' statements—if a truly adversary system is to be operated successfully".¹²⁴ This precision

¹¹⁹ Cf., Rosenberg and King, *loc. cit.*, footnote 23; M.M. Schroeder and J.P. Frank, *The Proposed Changes in the Discovery Rules*, [1978] *Ariz. St. Law J.* 475; H.H. Stern Cutner, *Discovery - Civil Litigation's Fading Light: A Lawyer Looks at the Federal Discovery Rules After Forty Years of Use* (1979), 52 *Temple Law Quart.* 933.

¹²⁰ Amendments to the Federal Rules of Civil Procedure, 85 F.R.D. 521 (1980). There was a vigorous dissent, which claimed that "these tinkering changes will delay for years the adoption of genuinely effective reforms". (per Powell J., Stewart and Rehnquist JJ. joining, at p. 523).

¹²¹ Fed. R. Civ. P. Rule 26(f). The court may do so on its own motion, and is obliged to do so on the motion of one of the parties.

¹²² There were further amendments made to Fed. R. Civ. P. Rules 16, 26(a) and 26(g) in 1983. These were also part of the war against abuses, intended to encourage the court to limit the use of discovery and to impose sanctions for discovery abuse: cf., Pollack, *loc. cit.*, footnote 62. The discovery conference may or may not be much used, depending upon the will of litigants and the court to use it, and it can be imagined that it will not work, where it is used, without robust participation on the part of the judiciary. (Compare the disappointing experience with the pretrial—see Pollack, *ibid.*).

¹²³ Although it has been asserted: "Since the Advisory Committee specifically rejected proposals to limit the scope of discovery to claims or defenses as opposed to the subject matter involved in the action, the discovery conference provisions should not be read as authorizing the court to narrow the general scope of discovery."; E.F. Sherman and S.O. Kinnard, *Federal Court Discovery in the 80's—Making the Rules Work*, 95 F.R.D. 245, at p. 272 (1983).

¹²⁴ Jolowicz, *op. cit.*, footnote 57, pp. 245-246.

is now achieved under the Federal Rules only by means which, arguably, must often be unnecessarily elaborate, and, at the same time, the impassioned insistence that the precision achieved can never be more than "tentative" may substantially deprive it of its value. There remains the obvious fact that the parties do, and as a matter of principle probably should, bear the lion's share of the costs of bringing civil proceedings. There is a point beyond which insistence that they fund pursuit of "complete justice" in their dispute becomes entirely self-defeating.

It would be difficult for any reader of the American debate on the proper function of pleadings and discovery to avoid the impression that much of it has concerned sympathies with the substantive issues involved in the comparatively new forms of litigation which now dominate Federal Court resources.¹²⁵ These are the "multiparty" and class suits involving, for example, large products liability claims, environmental disputes, anti-trust and discrimination allegations. All are forms of "private" litigation, which because of the diversity of parties and issues at stake, involve significant and often controversial "public" interests.¹²⁶ They are also cases in which the realisation of substantive rights may depend substantially on discovery. Our imagined reader might be tempted to suggest that these cases have had a disproportionate influence in shaping American civil procedure and that it has been tailored to suit "disputes" for which, it may be ultimately necessary to conclude, civil proceedings are unsuited.¹²⁷ The central, perhaps obvious point, however, is this: whatever the scope of discovery, it will most surely to some degree reflect and determine the social function of civil lawsuits.

VI. Conclusion

We are returned to the question first posed in the course of this somewhat expatiatory look at a microcosm of procedural reform: what is it that we want to survive in the trial process?

Enough has been said about the role of discovery in civil litigation to conclude that even the minor adjustments in practice may pervade the process, in ways calling for careful thinking about the way procedure functions in fact, and careful rethinking about the way it ought to function. The otherwise noble day-to-day efforts to improve procedure do no

¹²⁵ Director of the Administrative Office of the United States Courts, Annual Report (1976), p. 125, reported that "complex" litigation was proportionally increasing in the Federal Courts' case loads and complex antitrust suits were "the single most time consuming category of cases handled by the U.S. district courts"; cited Note, Discovery Sanctions, *loc. cit.*, footnote 45.

¹²⁶ Cf., A. Chayes, The Role of the Judge in Public Law Litigation (1975-76), 89 Harv. Law Rev. 1281.

¹²⁷ Cf., L. Fuller, The Forms and Limits of Adjudication (1978-79), 92 Harv. Law Rev. 353.

more than barely engage in this process. There are, it may be suggested, at least two respects in which they are deficient. The first is that the adjustments in practice are usually made with scant empirical information concerning either need or effect. As Professor Rosenberg once observed, in a piece characterized by both insight and wit:¹²⁸

The three commandments of legal reform are

- (1) Identify the "evil to be remedied."
- (2) Pass a law to remedy it.
- (3) Go on to the next evil.

Law reform has had a strong addiction to the motto of Satchel Paige, the baseball pitcher and sage extraordinaire, who used to advise: "Never look back. They might be gaining on you." That is fine advice for aging ballplayers, but poor practice for lawmakers.

The second defect is that the "patchings and tinkerings" are marked by a keen appreciation of today's problems—the brush fires—and little evidence of any systematic appreciation of our aspirations, save that we would like procedure to be more efficient. More efficient at doing what? Underlying much of what has been said here are questions concerning the nature and function of civil litigation itself.¹²⁹ Yet, in procedural reform, the great sun around which everything tends to revolve is our method of proceeding. Here, perhaps, lies the reason, when after much earnest turning of screws and tightening of nuts, the machine is found to creak much the same and the sense of crisis remains.

This epoch in the crisis of confidence in the administration of civil justice may differ from any other which has preceded it. It is now frequently being said that the adversary system is increasingly unsuited to its task;¹³⁰ and so too, the new salvation is being sought (evidently without any sense of irony) in the form of "alternatives" to adjudication.¹³¹ We should begin to wonder if the task is no longer, if it ever was, adequately enough defined.

I suspect that, if asked what the purpose of civil litigation was, many practising lawyers would unhesitatingly say "to resolve disputes". Even so "simple" and "minor" an issue like the scope of permissible discovery is sufficient to demonstrate how heavily laden with ambiguity that answer is. It may be asserted, however, that the form of our procedure has tended to determine its meaning, rather more than the other way around. There is nowhere to be found in the inheritance of our

¹²⁸ Rosenberg, *loc. cit.*, footnote 88, at p. 801.

¹²⁹ Cf., Jolowicz, *op. cit.*, footnote 77, p. 275.

¹³⁰ Cf., Miller, *loc. cit.*, footnote 20.

¹³¹ Both in the form of judicial participation in settlements discussions, and in the form of conciliation, mediation and arbitration as adjuncts to litigation. Cf., McEachern, *loc. cit.*, footnote 62; W. Burger, *Isn't There a Better Way?* (1982), 68 A.B.A. J. 274. See also *supra*, footnotes 94 and 95.

method of proceeding some "first principle" of what law, hence adjudication, is intended to achieve, and from which the structure of civil litigation follows.¹³² If it really is true, that we feel increasingly that our system for administering justice is unsuited to its task (and that, for many disputes there are "better ways" to resolving them), then it seems, as likely as not, that the task is changing. Changing, moreover, in ways we have yet fully to appreciate. The last major, structural reforms of civil procedure took place with the introduction of the 19th Century Judicature Acts, and it now seems impossible that the paradigmatic "private dispute" of 19th Century civil litigation is still a satisfactory model for devising civil procedure. What may be a more appropriate model, and what it demands of the structure of the civil process, needs to be explored. Otherwise, we cannot do more than turn screws and tighten nuts. The problems will get better, or they will get worse, or nothing will happen at all. Some will go away, some others will appear, yet some others will reappear. "Dissatisfaction with the administration of justice is as old as law."¹³³

¹³² Indeed, such an idea is completely "foreign"; cf., Millar, *loc. cit.*, footnote 95.

¹³³ Pound, *loc. cit.*, footnote 1, at p. 729.