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The Specificity of Pleading in Modern Civil Practice: Addressing Common Misconceptions

Ian James Wilson
University of Richmond

William Louis Payne
University of Richmond

NOTES

THE SPECIFICITY OF PLEADING IN MODERN CIVIL PRACTICE: ADDRESSING COMMON MISCONCEPTIONS*

> The substantial rules of pleading are founded in strong sense, and in the soundest and closest logic, and so appear, when well understood and explained, though, by being misunderstood, and misapplied, they are often made use of as instruments of chicane.[1]
>
> —Lord Mansfield

I. INTRODUCTION

The pleading procedure serves as the foundation for the entire legal process. Pleadings focus the issues, narrow the evidence admissible at trial, apprise the adverse party and the court of the matter in dispute, and provide the extent of the res judicata effect of the judgment.[2] To secure the foundation and to effectuate the purposes of the pleading procedure, it is imperative that the pleading set forth sufficient allegations. The standard for determining the sufficiency of the allegations is referred to as the specificity requirement and serves as the focus of this Note.

A common misconception in modern Virginia practice is that Virginia is a "notice" pleading state.[3] The Virginia pleading standard, however, is

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1. B. SHIPMAN, COMMON LAW PLEADING 5 n.9 (1923) (quoting Robinson v. Raley, 1 Burr. 316).

2. *See* Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 949 (1987). "[T]here is a great deal more in pleading than mere form. It stands . . . as the bulwark of protection between the bench and the litigant; it fixes inviolate limitation within which the judge may rule . . . [and] it confines the testimony which may be introduced." *Id.* at 909 (quoting Shelton, *Simplification of Legal Procedure: Expediency Must Not Sacrifice Principle*, 71 CENT. L.J. 330, 333, 337 (1910)); *see also* Blume, *Theory of Pleading: A Survey Including the Federal Rules*, 47 MICH. L. REV. 297, 297-318 (1949).

3. *Compare* VA. CT. R. 1:4(d) ("Every pleading shall state the facts on which the party relies . . . and it shall be sufficient if it clearly informs the opposite party of the true nature of the claim. . . .") *with* FED. R. CIV. P. 8(a)(2) ("A pleading which sets forth a claim for relief, . . . shall contain . . . a short and plain statement of the claim showing that the

clearly distinguishable from the "notice" standard of the Federal Rules of Civil Procedure when viewed in light of its historical development and judicial interpretation.[4] A Virginia state court pleading is governed by both the Rules of the Supreme Court of Virginia[5] and the Virginia Demurrer Statute.[6] What do the rules and demurrer statute require? The answer to this question is more elusive than expected at first blush. The requirement is not easily discernable from the modern cases.[7] Moreover, reference to older precedent can be misleading because the standard enunciated in the older cases is a product of the specificity requirement in force during the period in which the particular case was decided.[8] Therefore, in order to understand the subtle guidance contained in the modern cases, and to determine the proper impact of older cases, it is essential to possess a thorough understanding of the evolution of the specificity requirement in Virginia.[9]

To this end, an analytical framework consisting of two branches will be utilized. The first branch concerns the need for allegations to establish a right to remedial relief; this will be referred to as the cognizable substantive branch. The second branch concerns the degree of factual precision required in the allegations describing the actual dispute; this will be referred to as the factual precision branch.

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pleader is entitled to relief. . . .").

The wording of the rules is similar and has led to the misconception that they are the same. *See* Greer, *Virginia and the Federal Rules*, 47 VA. L. REV. 907, 909 (1961) ("[N]otice pleading is part and parcel of the Virginia rules. . . . There could be no better description of notice pleading [than Rule 1:4(d), formerly Rule 3:18(d)].").

4. *See infra* notes 187-228 and accompanying text.

5. VA. CT. R. 1:4(d); *id.* 1:4(j). Virginia Court Rule 1:4(d) provides: "Every pleading shall state the facts on which the party relies in numbered paragraphs, and it shall be sufficient if it clearly informs the opposite party of the true nature of the claim or defense." Virginia Court Rule 1:4(j) as drafted by Judge Brockenbrough Lamb provides: "Brevity is enjoined as the outstanding characteristic of good pleading. In any pleading a simple statement, in numbered paragraphs, of the essential facts is sufficient."

6. VA. CODE ANN. § 8.01-273(A) (Repl. Vol. 1984). The section provides: "In any suit in equity or action at law, the contention that a pleading does not state a cause of action or that such pleading fails to state facts upon which the relief demanded can be granted may be made by demurrer."

7. Unlike the older cases which explicitly address the specificity requirements, the modern cases couch their analysis of the specificity requirement in terms of the substantive law. As a consequence, modern lawyers and judges have the arduous task of disentangling the specificity requirements implied in the courts' decisions. *Compare* Eaton v. Moore, 111 Va. 400, 69 S.E. 326 (1910) (quoting and analyzing the allegations contained in the pleading, and stating the rationale for the determination of the sufficiency of the allegations) *with* Duggin v. Adams, 234 Va. 221, 360 S.E.2d 832 (1987) (court analyzing the substantive elements of the cause of action and concluding that the pleading is sufficient, without setting forth the rationale for the determination of the sufficiency).

8. *See infra* notes 62-177 and accompanying text.

9. "In order to understand the progress of the law the well educated lawyer must live through its evolution." B. SHIPMAN, *supra* note 1, at 4 n.7.

This Note is comprised of four sections. The first section presents a description of the four general pleading theories.[10] The four general theories will be evaluated using the analytical framework. The conclusions of this evaluation provide points of reference for determining the pleading theory peculiar to Virginia practice. The second section presents the historical development of the pleading rules in Virginia, evaluating their evolution through the use of the analytical framework.[11] The conclusions of this analysis will be compared with the points of reference gained from the general theories. Thus, the evolution of the Virginia pleading rules will be traced and the changing pleading theories identified. The third section analyzes the modern pleading rules in light of the basis created by the historical development. Through this analysis, the specificity requirement currently in force in Virginia will be derived.[12] The final section provides guidelines for complying with Virginia's specificity requirement.[13]

II. General Theories of Pleading: Points of Reference

There are four general theories of pleading; common law, equity, code and notice.[14] Although the pleading theory in force in Virginia does not fall clearly within any one of these general theories,[15] aspects of the general theories form the foundation of the Virginia pleading theory.[16]

A. *Common Law Pleading*

The touchstones of common law procedure were the rigid writ system[17]

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10. *See infra* notes 14-61 and accompanying text.

11. *See infra* notes 62-177 and accompanying text.

12. *See infra* notes 178-226 and accompanying text.

13. *See infra* notes 227-28 and accompanying text.

14. *See* Oakley & Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 Wash. L. Rev. 1367 (1986) (providing a test to distinguish between the different theories and to classify the systems of the 50 states under the different theories). *See generally* J. Friedenthal, M. Kane & A. Miller, Civil Procedure 237-39 (1985).

15. *See* W. Bryson, Handbook on Virginia Civil Procedure 187 (2d ed. 1989). "The Virginia method of reform in the area of common law pleading was to keep the basic system while removing a few totally archaic parts and improving on others." *Id.*; *see also infra* notes 110-77 and accompanying text.

16. *See* W. Bryson, *supra* note 15, at 187-88.

17. J. Baker, An Introduction to English Legal History 52 (2d ed. 1979). The common law pleading began with the original writ which stated the nature of the claim, in common form, since the writs were drafted by the chancery, not the plaintiff's lawyer. Because the writ was "ready-made", it shed little light on the true nature of the claim. As the writ system evolved, the legal profession influenced changes in the language of the writ. However, the court would scrutinize such writs and dismiss a writ if its contents "erred too much on the side of originality." T. Plucknett, A Concise History of the Common Law 408-09 (5th ed. 1956).

and the forms of action.[18] In order to obtain judicial relief, a party was forced to select a single writ and meet the requirements of the form of action contained in that writ.[19] All circumstances and human events, however, did not fit neatly into the prescribed forms of action. This dilemma shaped the common law specificity rules.[20]

At common law a party was required to allege facts in the declaration which established all of the elements of the particular form of action in

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The following is an example of the form of an Original Writ in Debt:

> George the Third, etc., to the Sheriff of _____, Greeting: Command C.D., late of _____, that justly and without delay he render to A.B. the sum of £ _____, of good and lawful money of Great Britain, which he owes to and unjustly detains from him, as it is said; and unless he shall do so, and if the said A.B. shall make you secure of prosecuting his claim, then summon, by good summoners, the said C.D. that he be before us, on _____ wheresoever we shall be in England (or, in C.P. before our Justices at Westminster, on _____), to shew wherefore he hath not done it, and have there the names of the summoners, and this writ. Witness ourself, etc. L.S.

B. SHIPMAN, *supra* note 1, at 18.

18. *See* Subrin, *supra* note 2, at 917 ("Lawyers had to analogize to the known writs and use "fictions" because of the rigid forms of action."); *see also* Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 437 (1986).

19. *See* W. BRYSON, *supra* note 15, at 190. The various forms of action included the following:

> The *contract* actions were: (1) *debt* which was used by the plaintiff to recover a sum certain, (2) *covenant*, which was used to recover damages cause by a breach of a sealed agreement, (3) *assumpsit*, which was used to recover damages from a breached contract not under seal, and the recovery of money due the plaintiff and (4) *account*, which was used to ascertain and recover an amount due to a bailiff or receiver of goods or money.
>
> The *tort* actions were: (1) *trespass*, which was used for the recovery of damages for an injury committed by force, (2) *trespass on the case*, which lay for non-violent or consequential injuries or an "incorporeal" right, (3) *trover*, which was used to recover damages for the conversion of specific personal property, (4) *detinue*, which was used for the recovery of a specific chattel wrongfully detained, (5) *replevin*, which was used to recover specific personalty wrongfully taken together with damages for the detention and (6) *ejectment*, which was used to recover property held adversely.

C. CLARK, HANDBOOK ON THE LAW OF CODE PLEADING 45 (1928).

20. A plaintiff commenced a common law action by purchasing an original writ from the chancery, the crown's secretariat. The original writ indirectly bestowed jurisdiction on the Royal Court to hear the dispute. J. BAKER, supra note 17, at 49-50. In ancient practice, the chancery clerk drafted a writ based upon the plaintiff's representation of the dispute. Once judgment was given upon an action, the writ became precedent for like disputes. *Id.* at 51. Thus, the writ contained a formula for judicial relief. *Id.* The formula was a set of elements which were required to be proved in order to show a right to relief.

In ancient practice, it was believed that there were as many formulae as there were actions. *Id.* However, as the number of writs with precedential value increased, the invention of new writs, with new formulae for relief, was viewed as changing the law. As a result, in the Provisions of Oxford in 1258, the power of the chancery clerks to invent new writs was revoked. This legislative action was an improper task for a bureaucrat. W. BRYSON, *supra* note 15, at 190. Since 1258, plaintiffs have been required to fit their disputes into one of the existing prescribed writs and establish by proof the elements contained in its formula. J. BAKER, *supra* note 17, at 51.

order to satisfy the cognizable substantive branch.[21] For example, in order to show a right to remedial relief in an action for assumpsit, a party had to allege facts establishing promise, consideration, breach and damage.[22]

A party satisfied the requirements of the factual precision branch by pleading general allegations in the declaration without specifying the underlying circumstances which gave rise to the dispute.[23] This provided the party with the necessary flexibility to fit his claim within a rigid form of action. Consequently, as common law pleading practice developed, the general allegations in the declaration became nothing more than formulated terms of art set out to meet the requirements of a particular form of action. For example, the plaintiff would allege that the defendant injured him or his property with "swords, bows, and arrows" to establish the element of "force and arms" in actions of trespass.[24] Although these expressions had little to do with the underlying circumstances of the case, pleading these terms of art became the standard practice to invoke the judicial process.[25] Terms of art are indicative of the factual precision branch of common law pleading.

The primary purpose of the common law pleading was to focus the issues.[26] The common law definition of the specificity requirement reflects the court's emphasis on the statement of elements and its disinterest in the particular allegations of the underlying circumstances of the dispute. By requiring a statement of the elements, the court was able to identify the issues involved with each element.

The common law procedure was greatly criticized because of its rigidity. In addition, the general allegations which developed eventually undermined the ability of the pleading to focus the issues because the pleading became little more than a formality.[27]

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21. *See generally* B. SHIPMAN, *supra* note 1, at 219.

22. *See* Winston's Ex'r v. Francisco, 2 Va. (2 Wash.) 703, 703-04 (1796).

23. *See* Wolfson, *Addressing the Adversarial Dilemma of Civil Discovery*, 36 CLEV. ST. L. REV. 17, 21-22 (1988).

24. *See* E. JONES, MANUAL OF EQUITY PLEADING AND PRACTICE 15 (1916) (Other examples of the terms of art include: "*owes to and unjustly detains*" signifying an action in debt, "*converted to the defendant's use*" signifying an action in trover.); Sutherland, *Legal Reasoning in the Fourteenth Century: The Invention of "Color" in Pleading*, ON THE LAWS AND CUSTOMS OF ENGLAND, ESSAYS IN HONOR OF SAMUEL THORNE 190 (1981).

25. *See* Wolfson, *supra* note 23, at 22. "As the common law developed, the pleading became more formalized and clear statements of fact gave way to vague and often fictitious allegations couched in a sort of antiquated terminology." *Id.* at 22; *see also* J. FREIDENTHAL, *supra* note 14, at 248.

26. *See* Subrin, *supra* note 2, at 916-17. This focus was necessary because of the common law's use of the jury for most forms of action. *See also* W. BRYSON, *supra* note 15, at 186 (simplifying the issues was considered better suited for decision making by the uneducated layman in the jury); C. CLARK, *supra* note 19, at 10-12.

27. The procedures of the common law, however, varied with the form of action. The trespass on the case action had greater flexibility. Although the procedures of the common

B. *Equity Pleading*

In the fifteenth century, the Court of Chancery emerged to combat the failures of the rigid common law system.[28] The equity courts filled the gaps created by common law practice in order to provide a just result.[29] This was reflected in the scope of the jurisdiction of the equity court.[30]

Filing a bill of complaint commenced a suit in equity. Unlike common law, the party in equity was not required to comply with the rigid requirements of a writ. Rather, the bill of complaint contained a factual narrative and a request for relief.[31]

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law have been criticized, the Supreme Court of Virginia has recognized the need to maintain the substantive aspects of the common law. *See, e.g.*, Carter v. Hinkle, 189 Va. 1, 7, 52 S.E.2d 135, 138 (1949).

28. *See* J. HOLCOMBE, BARTON'S HISTORY OF A SUIT IN EQUITY 25-38 (1847).

29. B. SHIPMAN, *supra* note 1, at 61. For example, "where substantial justice requires that a contract be strictly and *specifically* performed, a court of equity has authority to compel such performance, because a pecuniary recompense, which is all that a court at law can give, would be an incomplete satisfaction." J. HOLCOMBE, *supra* note 28, at 35.

30. The scope of equity jurisdiction is based on the following criteria:

> 1. Where the principles of law by which the ordinary courts are guided give a right, but the powers of those courts are not sufficient to afford a complete remedy, or their modes of proceedings are inadequate to the purpose.
> 2. Where the courts of ordinary jurisdiction are made the instruments of injustice.
> 3. Where the principles of law, by which the ordinary courts are guided, give no right, but upon the principles of universal justice the interference of the judicial power is necessary to prevent a wrong, and the positive law is silent.
>
> It may also be collected that courts of equity, without deciding upon the rights of parties, administer to the ends of justice by assuming a jurisdiction.
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> 4. To remove impediments to the fair decision of a question in other courts.
> 5. To provide for the safety of property in dispute pending a litigation, and to preserve property in damager of being dissipated or destroyed by those to whose care it is by law entrusted, or by person having immediate but partial interests.
> 6. To restrain the assertion of doubtful rights in a manner productive of irreparable damage.
> 7. To prevent injury to a third person by the doubtful title of others.
> 8. To put a bound to vexatious and oppressive litigation, and to prevent the multiplicity of suits.
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> Further, courts of equity, without pronouncing any judgment which may affect the rights of parties, extend their jurisdiction:
>
> 9. To compel a discovery or obtain evidence which may assist the decision of other courts.
> 10. To preserve testimony when in danger of being lost before the matter to which it relates can be the subject of judicial investigation.

J. HOLCOMBE, *supra* note 28, at 34 n.1 (quoting Lord Redesdale in his treatise on pleading).

31. *See* Subrin, *supra* note 2, at 918. Instead of focusing on a single issue, the bill in equity was an attempt to persuade the chancellor by telling the story behind the dispute. *Id.*; *see also* E. JONES, *supra* note 24, at 15 (In contrast to common law pleading, "[t]he employment of particular words, or fixed forms of expression was never a requisite of good pleading in equity, and an adherence to the formal precedents, though often wise, is not essential.").

In equity, the cognizable substantive branch required a statement of the "essential facts" to establish a right to remedial relief.[32] Originally, the essential facts were required only to show a wrong, thereby establishing a right to relief. However, as the substantive equity doctrines evolved, equity became bound by precedent. Allegations of the "elements" contained in prior precedent were required to be pleaded to show a right to the particular remedy.[33] Thus, similar to common law, a party was required to allege facts establishing the elements of the equitable remedy to show a right to remedial relief.

The factual precision branch required a statement of the specific underlying facts of the dispute, rather than the fixed forms of expression required at common law.[34] The plaintiff had two incentives for stating specific facts. First, properly setting forth facts broadened the plaintiff's chances for obtaining the relief sought because the chancellor shaped the remedy according to the allegations in the bill. Second, the plaintiff was entitled to the "right of discovery."[35] The "right of discovery" compelled the defendant to answer under oath all of the material allegations propounded in the plaintiff's bill. The defendant was not only required to admit or deny the allegations, but also was compelled to disclose all facts deemed relevant to the suit.[36]

The primary purpose of equity pleading emphasized setting forth the particular facts depicting the circumstances of the case. Therefore, a body of rules requiring the parties to state the facts with particularity developed.[37] By requiring such a statement of specific facts, the specificity rules of equity accomplished the purposes of the pleading process.

C. *Code Pleading*

Dissatisfaction with the common law system set the stage for law reform in the early nineteenth century. To this end, David Dudley Field, in 1848, propounded a code of practice for New York. The "Field Code" merged the common law and equity courts into one system and abolished the technical common law writ system. An action was initiated by filing a

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32. For cases interpreting the "essential facts" requirement, see *infra* notes 103-09 and accompanying text.

33. *See* W. FLETCHER, EQUITY PLEADING AND PRACTICE 104 (1902).

34. *See* E. JONES, *supra* note 24, at 15; Subrin, *supra* note 2, at 920 ("[E]quity was more flexible, discretionary, and individualized.").

35. *See* E. JONES, *supra* note 24, at 17-18. For a discussion of the discovery processes under common law and equity, see Wolfson, *supra* note 23, at 21-25.

36. E. JONES, *supra* note 24, at 18-19. The defendant "must answer each and every allegation of the bill, and give all the discovery called for by the bill." *Id.* at 18 (emphasis omitted). The disclosure of facts included the production of deeds, writings, or any other information which tended to prove the plaintiff's case. *Id.* at 19.

37. W. FLETCHER, *supra* note 33, at 103-05.

complaint, which had the same requirements for every substantive form of action.[38]

The requirement of "a plain and concise statement of the facts constituting a cause of action without replication" codified the specificity requirement.[39] Contained in this language are the two branches of the analytical framework. The requirement of stating a cause of action encompasses the cognizable substantive branch, and the requirement of stating the facts which formed the basis of the action encompasses the factual precision branch.

As the concepts of the "Field Code" spread to other jurisdictions, the exact determination of what constituted a "cause of action" and what constituted a "fact" differed from jurisdiction to jurisdiction.[40] The debate over the proper definition of a cause of action narrowed to two primary views.[41] The first view, advocated by Professor McCaskill[42] stated that the cause of action refers to a group of facts that establish the party's entitlement to specific relief.[43] The well established and logical distinctions of the substantive common law remained the determining factor for whether the facts established a right to relief. Under this view, a party was required to plead the facts that established the substantive elements of the cause of action.[44]

Professor Clark, the driving force behind the federal pleading rules, advocated the second view. Clark asserted that a cause of action was merely a group a facts which would entitle the party to relief in the eyes of a layman, without reference to the substantive requirements of the common law.[45] Clark's view was based on his belief that the primary purpose of the pleading was to provide notice of the claim to the opposite party. Clark maintained that the requirement of setting forth the elements in the pleading unwisely focused the judge's attention on procedures, rather than on substantive matters.[46]

Jurisdictions adopted the cause of action view that manifested their concept of the primary purpose of the pleading. Some jurisdictions moved along the continuum toward a notice standard. Others held steadfast to a

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38. *See* C. CLARK, *supra* note 19, at 17-19.

39. 1851 N.Y. LAWS, c. 479, § 1.

40. *See generally* Cook, *Statements of Fact in Pleading Under the Codes*, 21 COLUM. L. REV. 416 (1921); Gavit, *Legal Conclusions*, 16 MINN. L. REV. 378 (1932); Morris, *Law and Fact*, 55 HARV. L. REV. 1303 (1942); Wheaton, *The Code "Cause of Action:" Its Definition*, 22 CORNELL L.Q. 1 (1936).

41. *See* C. CLARK, *supra* note 19, at 77-87.

42. McCaskill, *Actions and Causes of Action*, 34 YALE L.J. 614 (1925).

43. *Id.*

44. *See* Subrin, *supra* note 2, at 995. "The idea of a cause of action helps lawyers and judges to decide what is relevant." Form is needed to shape the substance. *Id.*

45. C. CLARK, *supra* note 19, at 83-87.

46. *See* Subrin, *supra* note 2, at 963.

statement of facts standard, with the tried and true common law substantive concepts providing the necessary structure to focus the issues.[47]

The degree of factual precision was taken from equity practice.[48] The underlying facts and circumstances were required to be pleaded, thus, rectifying pleading problems wrought by the general allegations of common law practice. However, the factual precision branch of code pleading required the plaintiff to plead ultimate facts rather than evidentiary facts or conclusions of law; the difference between these concepts is a matter of degree.[49]

The primary purpose of code pleading was to obtain a statement of the underlying facts in order to provide structure for the expandable single form of action. The Field Code was criticized because of the differing interpretations of its pleading requirements.[50]

D. *Federal Rules of Civil Procedure*

The growing criticism with the problems inherent in code pleading resulted in a major change in pleading theory; the Federal Rules of Civil Procedure embodied this change. Federal Rule 8(a)(2) requires a party to set forth "a short and plain statement of the claim showing that the pleader is entitled to relief."[51]

The federal rules adopted Clark's concept of a cause of action.[52] Therefore, under the cognizable substantive branch, in federal practice a party is required merely to apprise the opposing party of the general nature of the claim, without regard to the substantive elements of the particular cause of action.[53]

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47. For a discussion of the concept of a cause of action in Virginia, see *infra* notes 187-210 and accompanying text.

48. *See* Subrin, *supra* note 2, at 933-34.

49. *See id.* at 966. "Clark was impressed with the observation that one could not define what was a fact, evidence, or ultimate fact in a scientific way, and that such terms were best seen as a continuum, without logical cut-off points." *Id.* For a discussion of these concepts, see *infra* notes 125-43 and accompanying text.

50. *See* J. FRIEDENTHAL, *supra* note 14, at 248-51.

51. FED. R. CIV. P. 8(a)(2).

52. *See supra* notes 45-46 and accompanying text.

53. J. FREIDENTHAL, *supra* note 14, at 254 (citing Hospital Bldg. Co. v. Trustees of Rex Hosp., 425 U.S. 738 (1976)). Some commentators prefer to characterize the federal rules as "modern pleading" rather than "notice pleading." Clark, *Pleading Under the Federal Rules*, 12 WYO. L.J. 177, 181 (1958).

> The fear is that "notice" will be taken to mean that no more is required than a mere statement that a suit has been filed and damages are desired; whereas, in fact, the pleader must refer to the circumstances and events upon which the claim or defense is based. What the pleader need not do is worry about the particular form of the statement or that it fails to allege a specific fact to cover every element of the substantive law involved.

The factual precision branch requirements under the federal rules are equally liberal. The federal rules abandoned the distinction between ultimate facts, evidentiary facts, and conclusions of law.[54] A pleading under the federal rules is merely a method of initiating a proceeding and provides little practical importance in focusing the issues or apprising a party of a specific claim.[55]

The advent of notice pleading was hailed as a major improvement over the code system.[56] In recent years, however, notice pleading has shown signs of tarnish on the shield set up by its advocates. Federal courts are requiring greater specificity.[57] Federal Rule 11 now requires the pleading to be "well grounded in fact" and "warranted by existing law. . . ."[58] Rule 11 and the trend toward requiring more specificity show a movement back to McCaskill's concept of a cause of action[59] and its underlying emphasis on the statement of fact.[60] This movement is a result of the inadequacy of notice pleading to accomplish the purposes of pleading.[61]

J. FRIEDENTHAL, *supra* note 14, at 253-54 (1985).

54. 2A MOORE'S FEDERAL PRACTICE ¶ 8.13, at 8-60 (1990).

55. *Id.* at ¶ 8.02, at 8-9.

56. "First, the rule eliminates the seemly endless controversies concerning what constitutes a 'cause of action' and what is a 'fact' as opposed to mere evidence or a conclusion of law." J. FRIEDENTHAL, *supra* note 17, at 253. "The issue becomes whether the opposing party has been sufficiently notified concerning the claim (or defense) so as to be able to prepare to meet it." *Id.* (citing Conley v. Gibson, 355 U.S. 41 (1957); Dioguardi v. Durning, 139 F.2d 774 (2d Cir. 1944)).

> Second, the rule avoids the traumatic problems of the theory of the pleadings doctrine. The doctrine clearly has no place in the federal scheme, which abolishes the requirement that a "cause of action" be stated. As the federal cases consistently hold, a party is permitted to recover whenever she has a valid claim, even though her attorney fails to perceive the proper basis of the claim at the pleading stage.

J. FRIEDENTHAL, *supra* note 14, at 253.

57. Marcus, *supra* note 18, at 444-51.

58. FED. R. CIV. P. 11.

59. *See supra* notes 42-44 and accompanying text.

60. *See* Weltner, *On With the Old!*, 24 GA. ST. BAR 13 (1987). Justice Charles Longstreet Weltner of the Supreme Court of Georgia discusses the inadequacy of the federal rules notice pleading and the "discovery abuse" that has emerged in recent years. Justice Weltner describes the effects of notice pleading as follows:

> Anxiously [the defendant] scans the complaint. ("What have I done—what did I do—to so injure and damage another?") The answer: conclusions, hyperbole, asseveration, contention —words signifying nothing! ("But what did I do!"—he asks.)
>
> No answer.
>
> A plaintiff may demand a million dollars with no *hint* of the basis for that demand.
>
> That is untidy and unseemly—that a defendant must spend *his* time and money prying from the plaintiff the factual elements of the claim against him! That is just the opposite from the proper order of things. No one should be permitted to invoke the costly (to the public and opposite party alike) machinery of the law without having to *say what happened.* Otherwise, the taxpayers are subsidizing an instrument for oppression, where any spite-filled person may select a victim who, under pain of default, must find out where he is supposed to have erred, while the claimant may cloak his ultimate factual designs in vague charges and conclusions. Such a perversity hardly merits the name of Justice.

Id. at 20.

61. When notice pleading dumps into the lap of a court an erroneous controversy without the slightest guide to what the court is asked to decide; when discovery—totally un-

III. Evolution of Pleading in Virginia

Having gained an understanding of the general pleading theories, we now turn to the unique development of the specificity requirement in Virginia. The following historical perspective serves two purposes. First, it provides an understanding of the intended specificity standard contained in the Virginia rules and demurrer statute. Second, it demonstrates the impact of the older precedent on the modern standard.

In 1607 the settlers of Virginia brought with them the legal system which was in force in England—the system of common law and equity.[62] The common law and equity jurisdictions have been administered in a fused court system since the colonial period.[63] When Virginia adopted the English system, it also inherited the pleading system that was in force, including the revisions set in place by English statutes.[64] At the time of

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> limited because no issue is framed—mulls over millions of papers, translates them to microfilm and feeds them into computers to find out if they can be shuffled into any relevance . . . we should, I think, consider whether noble experiments have gone awry.

Subrin, *supra* note 2, at 912 n.15 (quoting Kirkham, *Complex Civil Litigation—Have Good Intentions Gone Awry?*, in The Pound Conference: Perspectives on Justice in the Future (A. Levin & R. Wheeler Eds. 1979)).

Given the ease of pleading, the aggressive and creative lawyers being paid by the hour will utilize the rules as an "unbounded procedural playground." *Id.* at 980. The federal procedure "no longer provides the definition, confinement, and focus that aid in law application and rights vindication." *Id.* at 988. Settlements are based on anticipated trial results and therefore the pleading must confine the focus in order to make a prediction on the result. As there is no focus, the pleading does not aid in settlement. *Id.* at 989. "It seems clear that the pleading rules themselves without the aid of supplementary procedures, do not attain the objectives of clearing the ground and defining the issues." Fee, *The Lost Horizon in Pleading Under the Federal Rules of Civil Procedure*, 48 Colum. L. Rev. 492 (1948).

62. W. Bryson, *supra* note 15, at 33-34, 62-63. The common law filled the gap in the colonies because there was no pre-existing system of law. In the charter given to the Jamestown Colony there was a requirement that disputes be settled in accordance with common law and equity. *Id.* at 34-35.

63. *Id.* at 67.

64. The sixteenth century statute of Jeofails was among the English statutes adopted by Virginia. Va. Code. Ann. ch. 28 (1789). The statute of Jeofails provided that defects of form would not be grounds for dismissal unless specifically alleged in the demurrer. The statute of Jeofails adopted by Virginia was based upon the version of the statute of Jeofails contained in the Statute of Anne. Cathrae v. Clarke, 32 Va. (5 Leigh) 107, 110 (1834). The language of the statute of Jeofails was altered when it was adopted by the Virginia legislature. *Compare* 27 Eliz. ch. 5 *with* Va. Code. Ann. ch. 76, § 27 (1792). The Virginia version of the statute differs in two respects. *Cathrae*, 32 Va. (5 Leigh) at 110-11. First, the Virginia statute applies to defects of both form and substance whereas the English version only ap-

independence, statutes reaffirmed the use of the system of common law and equity.[65] The common law and equity system, although modified in some respects, continues in force today.[66]

A. *Pleading Theory in Early Virginia Common Law Practice*

1. Forms of Actions as a Basis of Pleading Theory

Although the Original Writ was not required,[67] the forms of action remained the driving force behind early Virginia practice.[68] The procedures in prosecuting the actions and the respective pleading rules differed between the forms of action.[69] Therefore, in order to properly analyze the early Virginia pleading rules, an understanding of the different forms of action is required.[70]

There were two categories of actions at common law. First, there were praecipe actions which vindicated rights of the plaintiff.[71] The praecipe writ commanded the defendant to either do right or come before the court and explain why he had not acted.[72] The praecipe actions focused on restoration of the right rather than compensation for the misconduct.[73] A number of species of praecipe writs emerged in the register of writs, including the writ of right to lands, the writ of debt, the writ of detinue, and the writ of covenant.[74] As the praecipe writs were the oldest actions,

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plied to defects of form. *Id.* at 111. The purpose of covering defects of substance as well as form was to combat the practice of English judges who interpreted defects of substance in order to bypass the statute. Second, the Virginia statute provided that if the declaration omitted "something so essential to the action . . . as that judgment according to the law . . . cannot be given" the court may regard such a defect even though it is not specifically set forth in the demurrer. *Id.* This language was a manifestation of the legislature's intent to define the required substance of the declaration as allegations which are essential to the right of recovery. *See* Dickinson's Adm'r v. M'Craw, 25 Va. (4 Rand.) 76, 77 (1826).

65. *Id.* at 33 (citing VA. CODE ANN. § 1-10; 1 P.A. BRUCE, INSTITUTIONAL HISTORY OF VIRGINIA 463-77 (1910)).

66. VA. CODE ANN. § 1-10 (Repl. Vol. 1987).

67. The jurisdictions of the courts in Virginia are prescribed by statute. Thus, in early Virginia practice an Original Writ was not required. *See* M. BURKS, PLEADING AND PRACTICE § 138 (4th ed. 1952). A common law action was commenced by filing a memorandum with the clerk of the court. 2 HENING'S STATUTES, 71, Act 32. The memorandum informed the clerk as to the form of action requested. *See* M. BURKS, *supra*, at § 139. The clerk would then issue a summons and the plaintiff would file a declaration. *See id.* at § 138.

68. *See generally* W. BRYSON, *supra* note 15, at 185-89.

69. The various forms represented individual theories of liability, procedure, and specificity requirements. *See generally* M. BURKS, *supra* note 67.

70. Earlier, this Note discussed the forms of action in general terms for the purpose of providing a general background. *See supra* notes 17-22 and accompanying text.

71. J. BAKER, *supra* note 17, at 55.

72. *Id.* at 54.

73. *Id.* at 55.

74. *Id.*

the procedures that accompanied them were archaic.[75] The complexity of these procedures led to decreased use of the praecipe writs.

The second category was trespass actions which vindicated wrongs suffered by the plaintiff. The trespass writ did not offer the option of doing right, but instead summoned the defendant to show why he had done the alleged wrong.[76] The royal court initially limited the scope of trespass actions to trespass involving a breach of the peace, known as *trespass vi et armis*.[77] Species of *trespass vi et armis* included trespass to land by breaking a close, taking and carrying away goods, and assault and battery.

The limited scope of the *trespass vi et armis* left many wrongs without judicial remedy. The writ of trespass on the case filled the gap.[78] Trespass on the case applied to all non-forcible wrongs. The scope of trespass on the case was expandable to accommodate society's changing needs. The subspecies of trespass on the case included assumpsit, trover, and ejectment. Subsequently, trespass on the case became the primary action because of its flexibility and the problems of procedure and proof associated with the rigid praecipe actions.[79]

The pleading rules under the praecipe writs and the *trespass vi et armis* writs exemplified the traditional common law pleading rules.[80] A

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75. The writ of right was originally tried by battle. A writ in debt and a writ of covenant were tried by wager of law. *Id.* at 56.

76. *Id.*

77. The limitation of the *trespass vi et armis* was primarily a jurisdictional matter. The clerks issued the writs for trespasses which breached the king's peace, for wrongs done in opposition to royal franchise, or for deceits of the king's court. Other wrongs were considered general, not suitable for royal justice, and were restricted to the county courts. The wrongs in the county courts were further restricted to matters over 40 shillings or to matters in which the claim was true, as in a case of assault and battery. Other limitations existed which increased the desire for additional avenues of remedy. Consequently new writs began to be issued which required the plaintiff to plead his cause of action with more particularity. These writs were called writs of trespass for "special case." These writs grew into a wider family of writs more commonly know as trespass on the case. *Id.* at 57.

78. *See id.* at 58; *see also* PROSSER & KEETON, THE LAW OF TORTS § 6, at 29 (1984).

> Trespass was the remedy for all forcible, direct and immediate injuries, whether to person or to property—or in other words, for the kind of conduct likely to lead to a breach of the peace by provoking immediate retaliation. Trespass on the case . . . developed . . . to afford a remedy for obviously wrongful conduct resulting in injuries which were not forcible or not direct. . . . The classic illustration of the difference between trespass and case is that of a log thrown into the highway. A person struck by the log as it fell could maintain a trespass against the thrower, since the injury was direct; but one who was hurt by stumbling over it as it lay in the road could maintain, not trespass, but an action on the case.

Id.

79. The forms of action survived so long because the changing needs of society were supplied by the action of trespass on the case which was an expandable general form of action. W. BRYSON, *supra* note 15, at 190-91.

80. *See supra* notes 17-27 and accompanying text.

party was required to state the elements in general terms of art to meet the requirements of the restrictive forms. In contrast, trespass on the case actions required the plaintiff to set forth the specifics of the underlying factual dispute. The specific facts were required because of the expandable nature of the action.

2. Cognizable Substantive Branch in Early Virginia Pleading

Early Virginia pleading exemplified the traditional common law concept of the cognizable substantive branch. The courts required the pleading to aver all of the substantive elements of the particular cause of action.[81] In *Laughlin v. Flood*,[82] the court held that the declaration in an action of covenant was defective.[83] To establish a cause of action of covenant a plaintiff must plead three elements: 1) the existence of a covenant; 2) breach; and 3) damage.[84] In *Laughlin*, the plaintiff entered into a covenant which provided that, in exchange for services rendered, the defendant promised to pay one-twelfth of the grain grown on his plantation at the close of the year.[85] Although the plaintiff averred in the declaration that the defendant did not pay him one-twelfth of the grain, the plaintiff failed to allege that any grain was grown during that year.[86] Accordingly, the declaration was held defective for failing to establish the element of breach.[87]

Judge Spencer Roane discussed the definition of the term "cause of action."[88] Judge Roane reasoned that the covenant merely laid the foundation for a cause of action and that a cause of action existed only upon establishing a breach with resulting damage.[89] Thus, the cause of action is defined as a set of facts which establish the right to recovery under the substantive law. This concept that the substantive law provides the basic skeleton for shaping the pleading is the crux of traditional common law pleading.[90]

Averments establishing each element of a cause of action was required under all forms of action. This requirement not only existed under the praecipe writ as illustrated by *Laughlin*, but it also existed under trespass

81. *See* Laughlin v. Flood, 17 Va. (3 Munf.) 255 (1811); Winston's Ex'r v. Francisco, 2 Va. (2 Wash.) 703 (1796).
82. *Laughlin*, 17 Va. (3 Munf.) at 255.
83. *Id.* at 274.
84. M. BURKS, *supra* note 67, § 80, at 167-68.
85. *Laughlin*, 17 Va. (3 Munf.) at 260.
86. *Id.* at 261-62.
87. *Id.* at 274.
88. *Id.* at 261-62.
89. *Id.*
90. *See supra* notes 17-27 and accompanying text.

on the case actions.[91] In *Winston's Executor v. Francisco*,[92] the plaintiff brought an action for trespass on the case in assumpsit.[93] The court held that the declaration was defective because the plaintiff failed to aver promise, which is an element of assumpsit.[94] In early Virginia practice, therefore, the cognizable substantive branch was exemplified by the traditional common law requirement of alleging a cause of action by stating the elements of the substantive law which establishes the parties' right to judicial relief.

3. Factual Precision Branch in Early Virginia Pleading

The court addressed the factual precision branch in *Turberville v. Long*.[95] In *Turberville*, the plaintiff brought an action under a praecipe writ of *quod reddat* to recover his real property.[96] The allegations concerning the boundaries of the land were in dispute. The plaintiff, in describing the boundaries, alleged that they were lines established by a survey. The court stated that the plaintiff need only state the terms of art for boundaries in this action; the description given as "the lands of A. B. C. and D. or by such a river, or such a creek, or water-course, and the lands of A. B. C." was held to be sufficient.[97] In praecipe actions, the general terms of art of traditional common law pleading typified the required factual precision.[98]

The requirements of the factual precision branch in trespass on the case, however, differed from that of the praecipe writs. In *Jones v. Old Dominion Cotton Mills*,[99] the court outlined the factual precision requirements of an allegation in a trespass on the case action. The court held that the declaration in this negligence case was sufficient because it stated with detail the injury, improper conduct, and the care and maintenance of the machinery.[100] Therefore, the factual precision branch in trespass on the case required a detailed statement of the underlying facts which gave

91. *See* Winston's Ex'r v. Francisco, 2 Va. (2 Wash. 187) 703 (1796).

92. *Id.* at 703.

93. For assumpsit, which was directed at recovery of damages for breach of contract, the essential elements were promise, consideration, breach, and damage. *See* M. BURKS, *supra* note 67, § 94, at 196.

94. *Winston's Ex'r*, 2 Va. (2 Wash. 188) at 704.

95. 13 Va. (3 Hen. & M.) 674 (1809) (writ of right to recover lands).

96. *Id.*

97. *Id.* at 674. Although the court allowed the use of general terms of art, that did not rigidly require a specific set of general terms of art, as did the early common law courts in England. Rather, they allowed other general terms of art which had the same import. *See* Mairs v. Galluhue, 50 Va. (9 Gratt.) 94 (1852). The court stated that the general term "owned the banks" had the same import as "had the fee simple property in the land on both sides of the stream." *Id.* at 96-97.

98. *See supra* notes 17-27 and accompanying text.

99. 82 Va. 140 (1886).

100. *Id.* at 148.

rise to the dispute, unlike the general averments under the praecipe writs.[101] This rule demonstrates the factual precision branch concept enunciated under the code pleading theory. The similarity to the code pleading theory is a result of the expandable scope of the trespass on the case action.[102]

B. *Pleading Theory in Early Virginia Equity Pleading*

The general substantive and procedural principles that had evolved in England were adopted in colonial Virginia.[103] Virginia adopted the primary rule of equity pleading requiring the complainant to state in the bill of complaint the essential facts which would entitle him to the relief sought.[104]

The requirement of a statement of essential facts satisfies both the cognizable substantive branch and the factual precision branch. The requirements of the cognizable substantive branch are illustrated in *Saunders v. Baltimore Building & Loan Association.*[105] In *Saunders*, the complainant sought to enjoin the defendant from selling the complainant's real estate, which secured a debt owed to the defendant.[106] For an injunction, a party must show that damage is imminent.[107] The complainant failed to aver damage in the bill.[108] Therefore, the complaint was defective because it failed to state the essential facts showing a substantive right to the relief sought.

Like common law, the substantive principles of equity provide the basic skeleton for shaping the pleading. The requirements of the factual precision branch were the traditional requirements of equity practice. The underlying circumstances of the dispute were required to be pleaded. Statements of fact rather than conclusions of law or evidence were necessary.[109]

C. *Reform of Virginia Common Law Pleading 1849-1949*

During the end of the nineteenth century and the early part of the twentieth century, there was a growing dissatisfaction with the common

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101. *See supra* notes 95-98 and accompanying text.

102. The code theory had but one form of action, and thus, the specific factual circumstances were required to be pleaded. *See supra* notes 38-50 and accompanying text.

103. *See* W. BRYSON, *supra* note 15, at 62-63.

104. Saunders v. Baltimore Bldg. & Loan Ass'n, 99 Va. 140, 145, 37 S.E. 775, 777 (1901).

105. *Id.* at 140, 37 S.E. at 775.

106. *Id.* at 141-42, 37 S.E. at 776.

107. *Id.* at 144, 37 S.E. at 777.

108. *Id.*

109. *See infra* notes 129-37 and accompanying text.

law system in Virginia, which was perceived to be archaic.[110] The fever of law reform flourished at this time as jurisdictions across the country wrestled with the decision of whether to follow the Field Code[111] and later the Federal Rules of Civil Procedure.[112] Although the adoption of a new system of procedure was a topic of great debate,[113] Virginia avoided a precipitous rejection of past procedures. Instead, Virginia, mindful of the tested procedures of the past, modified the existing system to adapt it to the needs of the time. This adaptation was performed by legislative action, expanded use of trespass on the case, and increased availability of the motion for judgment.

1. Statutory Reforms

The traditional common law system, including its pleading rules, was modified by the legislature in three ways. First, the legislature changed a number of the rigid common law pleading rules which were "traps for the unwary."[114] The legislature abolished several formal rules requiring the allegation of technical details such as averring jurisdiction,[115] pleading the place of the contract,[116] and alleging the place of a tortious act.[117] In addition, the legislature provided for amendments to the pleadings, which would be granted in furtherance of justice.[118]

Second, the legislature tempered the problems of the general allegations of common law pleading by requiring specific allegations in a number of actions. For example, in a declaration for ejectment, the premises

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110. *See* Allen, *Some Defects in Virginia Practice and Procedure*, 32 VA. L. REV. 429 (1946); Patteson, *Law Reform—A Rejoinder*, 14 VA. L.J. 65 (1890); Patteson, *Law Reform*, 13 VA. L.J. 677, 679 (1889); W.B., *Suggested Changes In Civil Procedure in Virginia*, 11 VA. L.J. 69 (1887). *Cf.* Shelton, *The Reform of Judicial Procedure; Necessity for an Equable Division of Power Between the Legislature and Judicial Departments*, 1 VA. L. REV. 89 (1913) (stressing the need for Virginia courts to undergo reform).

111. For a discussion of the Field Code, see *supra* notes 38-50 and accompanying text. *See also* Note, *In the Hope of a New Birth of the One Form of Action*, 13 VA. L. REV. 69 (1926) (making a plea for Virginia to abandon the forms of action in pleadings).

112. For a discussion of the Federal Rules of Civil Procedure, see *supra* notes 51-61 and accompanying text. *See also* Clark, *Two Decades of the Federal Civil Rules*, 58 COLUM. L. REV. 435 (1958) (surveying the first twenty years of the Federal Rules of Civil Procedure).

113. *See* W. BRYSON, *supra* note 15, at 198; *see also* Phelps, *The Notice of Motion and Modern Procedural Reform*, 35 VA. L. REV. 380, 391 (1949) (stating that "a great deal of discussion [is] going on in Virginia as to the advisability of adopting the federal rules of procedure as the rules of procedure for the state courts.").

114. W. BRYSON, *supra* note 15, at 199.

115. VA. CODE ANN. § 3244 (1887). This statute changed Thornton v. Smith, 1 Va. (1 Wash.) 420 (1792) which held that a declaration was insufficient because it failed to state the terms "within the jurisdiction of the court." *Id.* at 421.

116. VA. CODE ANN. § 3243 (1887).

117. *Id.* at § 3247.

118. 1914 VA. ACTS ch. 331.

were required to be described with certainty.[119] Also, the legislature created a provision for the bill of particulars.[120] The bill of particulars was created to give notice of the nature of the claims, and therefore, tempered the general allegations permitted under early common law pleading.[121]

Third, the legislature rectified many problems of the rigid common law forms of action. Most importantly, it made trespass on the case available for any action which sounded in trespass.[122] Also, whenever an action of covenant would lie, the plaintiff could sue in assumpsit.[123] These statutes had a profound effect on the specificity required in Virginia because they precipitated the increased use of the trespass on the case action.

2. The Rise of Trespass on the Case

As trespass on the case became the primary form of action in the late nineteenth century, the greater degree of specificity required under trespass on the case affected Virginia practice. Because the specific underlying facts of the dispute were required to be pleaded in trespass on the case actions, the court had to provide guidance for the necessary degree of precision in the statement of the underlying facts.

Two competing interests were involved in determining the necessary degree of precision. First, there was a need to ensure that a statement of sufficient underlying facts provided structure to the expandable scope of the trespass on the case action. Second, there was a need to limit the underlying facts in order to prevent the pleading from becoming convoluted and thereby confusing the true issues. Therefore, the Virginia Supreme Court created a body of rules, similar to those that had evolved in equity.[124] These rules provided guidance for the required precision, and in so doing, balanced the competing pleading needs.

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119. VA. CODE ANN. § 5458 (1919).

120. *Id.* § 3249 (1887).

121. W. BRYSON, *supra* note 15, at 211. The purpose of the bill was to reduce surprise at the trial by providing additional information which apprised the opposite party of the true nature of the claim. The bill further presented the issues and limited the evidence admissable at trial. *Id.* at 211-12; *see also* Phelps, *The Bill of Particulars in Virginia*, 39 VA. L. REV. 989 (1953).

122. VA. CODE ANN., ch. 148, § 7 (1849); *see also* Stonegap Colliery Co. v. Hamilton, 119 Va. 271, 279, 89 S.E. 305, 307 (1916) (stating that the declaration did not have to state the plea in trespass or trespass on the case because it was sufficient to allow the court to proceed on the merits).

123. VA. CODE ANN. § 6088 (1919).

124. For a discussion of the equity rules, see *supra* notes 103-09 and accompanying text.

a. Statement of Facts Rather Than Conclusions of Law and Statement of Ultimate Facts Rather Than Evidentiary Facts: Parameters for Determining Required Factual Precision

The court defined the factual precision branch in trespass on the case actions by using two rules which created parameters for the allegations. The first parameter was that the allegations must be statements of fact rather than conclusions of law.[125] This rule ensured that the allegations provided the necessary structure for defining the issues under the expandable trespass on the case action. The second parameter was that the allegation must be a statement of ultimate fact rather than evidentiary fact.[126] This rule ensured clarity by limiting the amount of detail which would otherwise confuse the substantive issues. The factual allegations met the required factual precision if they fell within the parameters of these rules.[127]

The first parameter, a statement of fact rather than a conclusion of law, was addressed by Judge Burks in *E.I. Du Pont De NeMours & Co. v. Snead's Administrator*.[128] Judge Burks gave the following example:

> [T]he substantive law says if *A* assaults *B*, he shall respond in damages to *B*, and *B* comes in and by his declaration says *A* assaulted me. The necessary conclusion from these premises, if not controverted, is a judgement [sic] in favor of *B* against *A* for damages. It is wholly unnecessary for *B* to say anything about the law of the case, or what were the respective rights and duties of the parties in the premises. This is a matter of law of which the court takes judicial notice. . . . What must be stated is the *facts* out of which the legal duty arises.[129]

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125. *See, e.g.*, E.I. Du Pont De Nemours & Co. v. Snead's Adm'r, 124 Va. 177, 184, 97 S.E. 812, 813 (1919).

126. *See, e.g.*, Norfolk & Portsmouth Beltline R.R. v. Sturgis, 117 Va. 532, 85 S.E. 572 (1915).

127. The ultimate or operative facts are those facts which will allow the plaintiff to win his case. B. SHIPMAN, *supra* note 1, at 493. The failure of ultimate facts destroys the legal result intended by the plaintiff. *Id.* at 492. The ultimate facts must be "facts, definite and concrete enough to direct attention to the basis and ground of his legal contentions. But at the same time they must reduce the case to its essentials." *Id.* at 493. For example, if the plaintiff wants to show that he is the owner of land, he should not set forth the links in his chain of title, as this would be evidentiary. However, stating that the defendant signed and delivered a contract in writing is a statement of operative facts in executing the contract. *Id.* The ultimate facts do not include the details and particulars of evidence on which the ultimate facts are to be established. *Id.* at 492. The evidentiary facts are subordinate to the ultimate facts and may be brought forward for the first time at trial. *Id.* at 493. Denial of evidentiary facts on the record is usually an immaterial issue, not decisive of the question in dispute. *Id.* at 494. An assertion which merely states legal conclusions is insufficient. *Id.* Statements describing conduct as negligent or wrongful or statements describing the existence of a legal duty are mere conclusions. *Id.* at 495.

128. *Du Pont*, 124 Va. 177, 97 S.E. 812.

129. *Id.* at 183-84, 97 S.E. at 813.

As Judge Burks indicated, the distinction between a conclusion of law and statement of fact can best be illustrated by considering the proper function of the pleading and the court. The function of the court is to take notice of the law, and the function of the pleading is to state facts.[130] The court must determine whether the facts, if proved, would establish a right to relief under the substantive law. The pleading gives the court the necessary tool to make this decision. If the pleading alleges conclusions of law rather than statements of fact, the pleading usurps the role of the court, as the court has no basis for determining if the substantive elements exist to be proved at trial.[131]

For example, in *Wright v. Atlantic Coast Line Railroad*,[132] the declaration was held to be insufficient. The plaintiff alleged that "the negligence of the defendant was willful and wanton." The plaintiff failed to allege facts which would establish willful and wanton conduct.[133] The role of the court was to decide whether the plaintiff established a right to relief under the substantive law—whether the defendant's conduct was willful and wanton. The pleadings only alleged the substantive element, willful and wanton conduct, rather than alleging the facts of the underlying dispute. The role of the court in deciding whether the substantive elements were established was usurped by the pleading because the court was given no facts on which it could base its decision. Therefore, the court held that the declaration was insufficient because the allegation was a conclusion of law.[134]

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130. *Id.*

131. *See* Shumaker's Adm'x v. Atlantic Coast Line R.R. Co., 125 Va. 393, 396-97, 99 S.E. 739, 739-40 (1919). In *Shumaker* the court stated that it is not necessary to mention in the declaration the statute under which the plaintiff is suing, but rather the facts which support the cause of action arising under the statute. *Id.* at 397, 99 S.E. at 740; *see also* Southern Ry. Co. v. Simmons, 105 Va. 651, 654, 55 S.E. 459, 460 (1906) (stating the pleading was sufficient if it suggested the legal effects of a statute).

In Chesapeake & O. Ry. Co. v. Hunter, 109 Va. 341, 64 S.E. 44 (1909), the declaration stated that the defendant had a "duty . . . to exercise ordinary care . . . and that he failed to exercise such care." *Id.* at 342, 64 S.E. at 45. The court held that the declarations merely stated conclusions of law and not the underlying facts which created the duty. *Id.* at 343, 64 S.E. at 45.

In City of Richmond v. McCormack, 120 Va. 552, 555, 91 S.E. 767, 768-69 (1917), the declaration contained facts which established the duty and also the meaning of the term "duty." The court held that the pleading was sufficient and treated the term duty as mere surplusage, a defect in form cured by the statute of Jeofails. *Id.* at 556, 91 S.E. 768-69.

In Lane Bros. Co. v. Seakford, 106 Va. 93, 55 S.E. 556 (1906), the court held the declaration sufficient because it not only stated the bare elements, but it also set out the facts with sufficient detail so that the court could find the plaintiff entitled to recovery if the facts were proved. *Id.* at 95-96, 55 S.E. at 556-57.

132. 110 Va. 670, 66 S.E. 848 (1910).

133. *Id.* at 676, 66 S.E. at 850.

134. *Id.* at 677, 66 S.E. at 850. The declaration in a malicious prosecution action was held to be defective in Craft v. Moloney Belting Co., 117 Va. 480, 85 S.E. 486 (1915). The plaintiff alleged that the defendants, by means of evidence they knew was false, caused the plain-

In contrast, in *E.I. Du Pont*[135] the plaintiff alleged that the intestate was invited on the defendant's premises and that the defendant's servant wrongfully killed the intestate. However, the plaintiff did not use the word "duty."[136] The role of the court was to determine if the pleadings established the element of duty. The allegation that the intestate was invited on defendant's premises gave the court a basis for determining whether the substantive element, duty, was established; the declaration was sufficient.[137]

The court discussed the second parameter—ultimate facts rather than evidentiary facts—in *Norfolk & Portsmouth Beltline Railroad v. Sturgis*.[138] The court reasoned that the allegations were sufficient if they apprised the trial court and the opposing party of the nature of the claim.[139] Facts which directly establish the substantive elements of the action apprise the court and the opposing party of the claim. These are ultimate facts.[140] Facts which go beyond this are evidentiary facts and need not be pleaded.

An ultimate fact is a fact in issue and an evidentiary fact is a fact which proves the existence of ultimate facts.[141] This distinction is best illustrated by considering the function of the factfinder and the function of the pleading. It is the function of the pleading to state facts which show a right to judicial remedy. It is the function of the factfinder to decide whether the facts alleged in the pleading are established by the evidence. Therefore, only those facts that directly establish the substantive requirements—ultimate facts—must be pleaded. The facts which allow the factfinder to determine if the ultimate facts are established—evidentiary facts—need not be pleaded.

In *Hunter v. Burroughs*,[142] the declaration alleged that the defendant was unskillful and "negligent" as he "*did prescribe . . . wholly improper, inappropriate*, and *hurtful* medicines and so-called remedies, *being two*

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tiff to be convicted. The plaintiff did not allege how the defendants knew the evidence was false. *Id.* at 482-83, 85 S.E. at 487. The role of the court was to decide whether the substantive element, knowledge of falsity, was established. Because the allegations did not contain underlying facts, the court had no basis for determining whether the substantive elements were established. Therefore, the declaration was defective because it was a mere conclusion of law. *Id.*

135. 124 Va. 177, 97 S.E. 812 (1919).

136. *Id.* at 184-185, 97 S.E. at 814.

137. *Id.* at 185, 97 S.E. at 814.

138. 117 Va. 532, 85 S.E. 572 (1915).

139. *Id.* at 539, 85 S.E. at 574-75.

140. *See* American Hide & Leather Co. v. Chalkley & Co., 101 Va. 458, 44 S.E. 705 (1903) (the declaration stated facts which established the elements of assumpsit; more than that is not required because they would be evidentiary facts).

141. Klaff v. Virginia Ry. & Power Co., 120 Va. 347, 349, 91 S.E. 173, 173 (1917), *rev'd on other grounds*, 123 Va. 260, 96 S.E. 244 (1918).

142. 123 Va. 113, 96 S.E. 360 (1918).

certain salves, which were prescribed by and [were] known to [the defendant] . . . each of which were wholly unsuited to the condition of the plaintiff's said legs and ankles [and produced] further injuries. . . ."[143]

The legal issue in *Hunter* was whether the defendant breached his duty of care. The fact that the defendant prescribed improper medicine, unsuited for the treatment of the plaintiff's legs and ankles, established the substantive element of breach; it was an ultimate fact. The role of the factfinder was to determine whether the evidence showed that the medication was improper and was provided by the defendant. Therefore, the allegation that the medicine "being two certain salves, which were prescribed by and known to the defendant" was an evidentiary fact.

Hunter is a good example of the factual precision parameters. The allegation that the defendant was negligent is a conclusion of law. The fact that the defendant prescribed improper medicine unsuited for the treatment of the plaintiff is an ultimate fact, and the only fact that need be pleaded.

b. Analysis of the Trespass on the Case Pleading Rules

An analysis of the pleading rules for trespass on the case actions illustrates the changing emphasis of the Supreme Court of Virginia. The cognizable substantive branch was marked by the traditional common law requirement of alleging a cause of action by stating the elements of the substantive law.[144] The unwavering requirement of a statement of elements demonstrates the court's insistence that the pleading focus the issues.

The factual precision branch for trespass on the case actions centered around attaining a statement of facts. The distinctions between conclusions of law, ultimate facts, and evidentiary facts were intended to require an adequate statement of underlying facts. In addition, the court required that the ultimate facts be alleged with certainty.[145] Further, the requirements of the factual precision branch enticed pleaders to err on the side of alleging too many facts. Although the court did not commend

143. *Id.* at 120-21, 96 S.E. at 362 (emphasis in original).

144. *See supra* notes 20-37 and accompanying text.

145. *See* Eaton v. Moore, 111 Va. 400, 69 S.E. 326 (1910). In *Eaton* the declaration stated that "plaintiff who was then an infant of the age of three years . . . got possession of the [dynamite caps], and in some way, while in possession, and without any fault on the part of the plaintiff, the said caps were exploded, which [blinded the child]." *Id.* at 401, 69 S.E. at 326. The court stated that the rules of pleading require that the plaintiff set out the material facts of the case to show a complete right of action. The court then held the pleading insufficient because the "declaration [does] not aver that the plaintiff exploded the caps, nor [does] it show that they were exploded by an agency from which the defendants were responsible. In other words, every averment of the declaration may be true, and yet there may be no liability whatsoever resting on the defendants." *Id.* at 403, 69 S.E. at 327.

allegations of evidentiary facts because they confused the issues, their use in the pleading was not fatal because they were treated as mere surplusage.[146]

The pleading theory of trespass on the case is similar to the equity pleading theory. The expandable scope of the trespass on the case action is similar to the single type of equity proceeding. The success of the equity pleading rules influenced common law pleading during this period. In addition, the pleading theory of trespass on the case was similar to the pleading theory of code jurisdictions, which retained the traditional notion of a cause of action.[147] These similarities demonstrate the reform of the period and the debate in the Virginia bar over the adoption of a system similar to the Field Code.[148]

3. The Rise of the Motion for Judgment

The major method of law reform in Virginia in the late nineteenth and early twentieth centuries was to increase the availability of the motion for judgment proceeding.[149] The motion for judgment was an informal proceeding at first, with no right to a jury.[150] The motion for judgment took the place of the common law writ and declaration.[151] The motion for

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146. *See, e.g.*, City of Richmond v. McCormack, 120 Va. 552, 91 S.E. 767 (1917). In *McCormack*, the declaration contained facts of the circumstances which were sufficient to establish the element of duty. The declaration also contained the term "duty." The court held that the pleading was sufficient and treated the term duty as mere surplusage, a defect in form cured by the statute of Jeofails. *Id.*; *see also* Washington-Virginia Ry. v. Bouknight, 113 Va. 696, 75 S.E. 1032 (1912). In *Bouknight* the declaration alleged that the plaintiff who was a passenger in the defendants' care was injured when the defendants' car derailed. In addition, the declaration stated "the said car [was] derailed by reason of the carelessness and negligence of the said defendant." *Id.* at 699, 75 S.E. at 1033-34. The court stated that a presumption of negligence is made in passenger injuries, and thus, the declaration was sufficient and the addition of the averment of carelessness and negligence was mere surplusage. *Id.* at 699, 75 S.E. at 1034.

147. *See supra* notes 40-47 and accompanying text.

148. *See supra* notes 110-13 and accompanying text.

149. For a thorough discussion of the history of the motion for judgment proceeding in Virginia, see W. BRYSON, *supra* note 15, at 192-202.

150. *Id.* at 194.

151. Virginia Hot Springs Co. v. Schreck, 131 Va. 581, 109 S.E. 595 (1921) (Burks, J.). "The notice, however, so far as it serves as a substitute for the declaration, must state in substance a good cause of action, else it will be bad on demurrer, and so far as it serves as a writ it must fix a time and place for the defendant to make defense. . . ." *Id.* at 584-85, 109 S.E. at 596; *see also* Tench v. Gregg, 102 Va. 215, 46 S.E. 287 (1904); Grubbs v. National Life Maturity Ins. Co., 94 Va. 589, 27 S.E. 464, 466 (1897).

The following is an example of a motion for judgment:

> To Mr. J. R. Pirkey:
>
> You will please take notice that * * * I will move the circuit court * * * for judgment against you for the sum of twenty-seven hundred dollars ($2,700.00), with legal interest thereon from September 14, 1917, until paid, the same being due me from you by virtue of the following account, which said account is sworn to and filed as

judgment instructed the defendant to appear, and it presented the allegations depicting the dispute.

The motion for judgment was created in 1705 to allow public officials to recover fees collected by sheriffs.[152] In 1748, the motion for judgment became available to private parties for suits on forthcoming bonds.[153] The availability continued to expand to a variety of specific actions.[154]

The legislature slowly sanctioned the use of the motion for judgment as an alternative to the general common law actions. In 1849, all actions for money judgments on contracts could be prosecuted by motion for judgment.[155] In 1912, any action sounding in tort could be prosecuted by motion for judgment.[156] The motion for judgment became an alternative to all common law actions in 1919,[157] and quickly supplanted the traditional common law procedures because of its simplicity.[158]

a. Cognizable Substantive Branch Under the Motion for Judgment

Although the motion for judgment was analogous to the complaint under the Field Code, because all substantive actions were prosecuted under the same procedures, Virginia did not abandon the substantive underpinnings of the common law. The complaint under the Field Code took the place of the common law declaration, as did the motion for judgment. Under both the Field Code and the motion for judgment, the allegations had to establish a "cause of action."[159]

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part of this notice:

J.R. Pirkey in Account with W.A. Rinehart.

September 14, 1917. To amount advanced to the Covington Savings Bank, Incorporated, for your benefit to repair and replenish your forty (40) shares of stock on the Covington Savings Bank, Inc., on which you have drawn dividends on two occasions since your said stock being so repaired and replenished, and which said sum of $2,700 so advanced by me to repair you said stock you have impliedly promised to pay me and which said advancement of $2,700 on my part to repair you said stock was subsequently ratified by you, thus making you liable to me for $2,700 with legal interest thereon from September 14th, 1917, till paid."

[Signed] W. A. Rinehart, by Counsel.

Schreck, 131 Va. at 581, 109 S.E. at 595.

152. *See* W. BRYSON *supra* note 15, at 192-93.

153. *Id.* at 194.

154. *Id.* at 195-96.

155. *Id.* at 196.

156. *Id.* at 198.

157. *Id.* at 199.

158. *Id.* at 200-01. *See* Arnold, Simonton & Havighurst, *Report to the Committee on Judicial Administration and Legal Reform of the West Virginia Bar Association Concerning Suggestions Pleading and Practice in West Virginia*, 36 W. VA. L. Q. 1, 67-68 (1929) (stating that the simplicity of the motion resulted in its use in 90% of cases where it could be employed).

159. *Compare* 1851 N.Y. LAWS, ch. 479, § 1 *with* Mathews v. LaPrade, 130 Va. 408, 107

Many code jurisdictions, and the federal rules, adopted the view that the requirements for establishing a cause of action are the same for all actions regardless of the substantive right or requested remedy. For example, in *Brewer v. Temple*,[160] a New York court held that a complaint setting forth the history of one occurrence was a single cause of action even though the plaintiff sought redress for both an assault and slander. In this case the cognizable substantive branch required a statement of a set of facts, an occurrence, which showed the plaintiff had been wronged.

Virginia rejected this view and retained the traditional concept of the substantive elements of a particular form of action establishing a cause of action. In *Bowles v. May*,[161] the court held that the motion for judgment was defective because it contained elements of assault and slander combined in a single recital of events. The court said that assault and slander were two separate causes of action and must be alleged with certainty so that the defendant could ascertain the true basis of the plaintiff's claims.[162] Under the Virginia view, therefore, allegations must establish the substantive elements of each particular form of action.[163]

The Virginia Supreme Court has been unwavering in its rejection of the view enunciated in *Brewer*.[164] The court addressed the need to retain the substantive common law principles in *Carter v. Hinkle*,[165] stating:

> Shortcuts and improvisations may be appealing, but if certainty and predictability, qualities so necessary in the law, are to be maintained, the logical and symmetrical distinction of the common law carefully developed through the necessities of experience, should be preserved and not destroyed. . . . [R]ights are too important and liability too oppressive to be determined and administered in wholesale fashion.[166]

Moreover, Virginia's view results from the fact that the motion for judgment procedures were an alternative to the common law system. The

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S.E. 795 (1921).

160. 15 How. Pr. 286 (1857).

161. 159 Va. 419, 166 S.E. 550 (1932).

162. *Id.* at 422-23, 166 S.E. at 551.

163. The requirement that an allegation establish the substantive common law elements is illustrated in Mathews, 130 Va. at 408, 107 S.E. at 795. In *Mathews*, the plaintiff sought damages for breach of an option contract. The court held that a substantive element of the action was the exercise of the option. *Id.* at 413, 107 S.E. at 796-97. As the plaintiff did not allege in the motion that the option was exercised, the motion failed to state a cause of action; the demurrer was properly sustained. *Id.*

164. Foltz v. Conrad Realty Co., 131 Va. 496, 501, 109 S.E. 463, 465 (1921); Virginia Hot Springs Co. v. Schreck, 131 Va. 581, 584-85, 109 S.E. 595, 596 (1921); Mathews v. LaPrade, 130 Va. 408, 107 S.E. 795 (1921); Mankin v. Aldridge, 127 Va. 761, 105 S.E. 459 (1920); Security Loan & Trust Co. v. Fields, 110 Va. 827, 830, 67 S.E. 342, 343 (1910).

165. 189 Va. 1, 52 S.E.2d 135 (1949).

166. *Id.* at 7-8, 52 S.E.2d at 138 (quoting Vasu v. Kohlers, Inc., 145 Ohio St. 321, 61 N.E.2d 707, 718 (1945)).

legislature intended the scope of the motion for judgment procedures to cover remedies which were available through the common law actions.[167] The motion for judgment derived its structure from the substantive elements required to be established in order to show a right to judicial relief.

b. Factual Precision Branch Under the Motion for Judgment

The purpose of the motion for judgment was to provide a simpler and less expensive procedure than the common law process.[168] Thus, the court viewed a pleading's factual precision with leniency and was careful not to destroy the effectiveness of the motion for judgment by imposing needless restrictions.[169] In early motion for judgment cases, the court created a legal fiction that the parties, rather than a person versed in the law, had drafted the motion.[170] However, the fiction failed to establish a standard which could be used as guidance, and the court later rejected it.[171]

Judge Burks, clarifying the standard for a motion for judgment, enunciated the necessary factual precision for the motion by stating:

> [P]rocedure by motion is looked upon with great indulgence, and notices are upheld as sufficient, however informal, where they contain sufficient substance to fairly apprise the defendant of the nature of the demand . . . and states sufficient *facts* to enable the court to say that if the *facts* stated are proved, the plaintiff is entitled to recover.[172]

Therefore, to have the required factual precision, a motion for judgment had to state facts that fairly apprised the opposing party of the true nature of the claim by stating a cause of action.[173]

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167. *See* M. BURKS, *supra* note 67, § 180, at 290.

168. Witley v. Brooker Brick Co., 113 Va. 434, 436, 74 S.E. 160, 161 (1912).

169. *Id.* (citations omitted).

170. Board of Supervisors v. Dunn, 68 Va. (27 Gratt.) 608, 612 (1876).

171. Judge Burks rejected this legal fiction in Mankin v. Aldridge, 127 Va. 761, 767, 105 S.E. 459, 461 (1920). In *Mankin*, Judge Burks stated:

> The procedure by notice . . . is looked upon with great indulgence, not because the notice is supposed to be the act of a layman ignorant of forms of procedure, for that would be contrary to almost universal experience, but because the courts are loath to sacrifice substance to form, and desire, so far as possible to avoid that result. The adoption of this method of procedure however, cannot dispense with the allegation of the substance of a good ground of action or defense. Anything less than this would endanger the substantial rights of litigants.

Id. at 767, 105 S.E. at 461.

172. *Id.* at 765, 105 S.E. at 460 (emphasis added).

173. *See id.*; *see also* Curtis v. Peebles, 161 Va. 780, 783-84, 172 S.E. 257, 258 (1934); Foltz v. Conrad Realty Co., 131 Va. 496, 501, 109 S.E. 463, 465 (1921); Virginia Hot Springs Co. v. Schreck, 131 Va. 581, 584-85, 109 S.E. 595, 596 (1921); Colley v. Summers Parrot Hardware Co., 119 Va. 439, 89 S.E. 906 (1916). In Colley, the defendants demurred because the motion merely stated that the paper sued on was a promissory note but did not allege it to be negotiable. The court held that incompleteness of the allegation was not enough to sustain the demurrer because it "in no way affected the defendant to his prejudice." *Id.*

Under the factual precision branch, it is difficult to distinguish the test for a trespass on the case from the test for a motion for judgment. Both tests require the pleading to allege a statement of facts, but the distinguishing characteristic is the elasticity of the definition of a sufficient statement of facts.

As shown, the trespass on the case test applied mechanical rules to determine whether the allegation was an ultimate fact, and therefore, a sufficient statement of fact.[174] In contrast, the motion for judgment test gave the court greater discretion in determining whether an allegation was a sufficient statement of fact. As long as the motion for judgment informed the opposing party of the claim's underlying factual basis, the allegation was sufficient, even though it may have violated the mechanical definition of an ultimate fact.

By creating a case specific test, rather than a universal application of mechanical rules, the court balanced the need to elevate substance over form with the need of the parties to have notice of the specific facts which gave rise to the cause of action. Once again, Virginia engrafted a well-reasoned modification of existing pleading rules, rather than a wholesale abandonment of valuable past experience.

c. Analysis of Pleading Rules of the Motion for Judgment

The pleading theory which evolved in Virginia under the motion for judgment was unique. The cognizable substantive branch required a statement of elements establishing a cause of action. The unwavering insistence on the statement of substantive elements was a result of the view that the pleading must focus the issues.[175] Therefore, the cognizable substantive branch is similar to the traditional common law pleading theory.

The factual precision branch of the motion for judgment illustrates a subtle change from the trespass on the case pleading theory. The court shifted its emphasis from the mechanical pleading rules of trespass on the case and focused upon the opposing party's knowledge of the cause of action. In so doing, the court moved closer along the continuum toward the notice pleading theory of the federal rules.

Nevertheless, the factual precision branch of the motion for judgment remained distinguishable from the federal notice pleading theory in two respects. First, a motion for judgment, unlike a federal complaint, must allege facts that establish all the elements of a cause of action.[176] Therefore, the motion for judgment necessarily requires more facts to be al-

174. *See supra* notes 125-43 and accompanying text.

175. *See id.*

176. *Compare supra* notes 159-67 and accompanying text *with supra* notes 52-53 and accompanying text.

leged. Second, the motion for judgment, unlike the federal complaint, must allege the underlying facts rather than bare conclusions.[177] Thus, the factual precision standard of the motion for judgment is more particular than the liberal standard of the federal rules.

IV. Specificity in Modern Virginia Practice

A. *A Historical Perspective*

Unlike the early Virginia pleading rules, which were created by case law, the standards regulating modern pleading are codified. The older case precedent, however, is the basis for the Virginia rules of court and the demurrer statute. This section will present a historical perspective of the pleading standards, analyze the court's use of the standards, and provide the modern specificity requirement.

1. The Rules of the Supreme Court of Virginia

Law reform in the early twentieth century culminated in the adoption of procedural rules by the Virginia Supreme Court.[178] The rules retain the distinction between common law and equity, and prescribe different procedures for each. The only marked change in the pleading practice of actions at law was the abolition of the common law procedural writs and the declaration system of the forms of action. Rule 3:1 provided that the rules applied to all actions at law.[179] Rule 3:3 provided that the filing of a motion for

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177. In a federal complaint in Samsing v. S. & P. Co., 325 F.2d 718, 718 (9th Cir. 1963), the plaintiff alleged that he had exhausted his administrative remedies. The court held that the plaintiff need not set out the facts which were the basis of the claim, and the conclusion of the plaintiff provided sufficient notice. *Id.* For cases where the Supreme Court of Virginia found pleadings based on conclusions of law, see *supra* notes 128-37 and accompanying text.

178. *See Report of Committee to Study the Necessity for Revision of Procedure in Virginia* (June 15, 1940) (briefly outlining, *inter alia*, the status of Virginia law, the attitudes of the bar toward a revision of Virginia law, and the recommendations for vesting the rulemaking power in the Supreme Court of Virginia) (this source can be obtained at the Virginia State Library); Boyd, *Virginia Procedural Legislation of 1954*, 40 VA. L. REV. 1097, 1097-98 (1954) (stating that a significant change in Virginia's procedural system was accomplished when the supreme court adopted the Rules of Court effective February 1, 1950).

The supreme court was first given the power to prescribe rules of procedure in 1849. *See* Bowles, *The Course of Law Reform in Virginia*, 38 VA. L. REV. 689, 690 (1952). The power was not exercised until the Judicial Council headed by Chief Justice Hudgins adopted a system of procedure on February 1, 1950. The new system adapted many of the existing procedures for modern practice and added new procedures as required. The traditional method of law reform in Virginia is a slow and careful process. This style of law reform dates back to the works of Thomas Jefferson, Edmund Pendleton, George Wythe, Thomas Ludwell Lee and George Mason. *Id.*

179. See M. BURKS, *supra* note 67, § 180, at 290.

judgment commenced an action, thereby foreclosing the option of bringing an action under the common law writ system. Therefore, a single procedural form of action exists in Virginia.

In 1950, the specificity required in a motion for judgment was contained in Rule 3:18(d) which provided that "[e]very pleading shall state the facts on which the party relies . . . and it shall be sufficient if it clearly informs the opposite party of the true nature of the claim or defense."[180] In addition, Rule 2:20 contained the specificity required for a bill of complaint in equity; it stated that "[i]n any pleading a simple statement, in numbered paragraphs, of the essential facts is sufficient."[181]

In 1972, the Rules were amended to their present state. The standard for actions at law, formerly Rule 3:18(d), was moved to Rule 1:4(d). The standard for equity actions, formerly Rule 2:20, was moved to Rule 1:4(j). Both standards, therefore, now apply to law and equity actions. According to the language of the Rules, the pleadings are sufficient in both common law and equity actions, if they state "the essential facts" that "clearly inform[] the opposite party of the true nature of the claim or defense."[182] It should be noted that in determining the specificity standard, the Rules of Court must be read in connection with the demurrer statute.

In addition, the rules contain guidance for particular actions. Rule 3:16(b) allows general allegations in negligence and contributory negligence cases, and Rule 3:16(e) permits general allegations of the statute of limitation defense.

2. The Demurrer Statute

In Virginia, the sufficiency of a pleading is tested by demurrer.[183] A demurrer admits the truth of all facts which are well pleaded and facts which may be reasonably inferred from the facts alleged.[184] If the facts admitted establish a cause of action, the pleading is sufficient.[185]

In 1977, the General Assembly revised title eight of the Code of Virginia. The demurrer statute was amended to provide: "In any suit in equity or action at law, the contention that a pleading does not state a cause

180. VA. CT. R. 3:18(d) (amended 1:4(d)).
181. *Id.* at 2:20 (amended 1:4(j)).
182. *Id.* at 1:4(d).
183. *See* W. BRYSON, *supra* note 15, at 226-27.
184. Ames v. American Nat'l Bank, 163 Va. 1, 37, 176 S.E. 204, 215 (1934). Well pleaded facts are ultimate facts.
185. *Id.*

of action or that such pleading fails to state facts upon which the relief demanded can be granted may be made by demurrer."[186] The modern demurrer is the mechanism for determining whether the pleading meets the required standard.

B. *Analysis of Modern Pleading Practice*

1. Cognizable Substantive Branch of Modern Practice

The requirements of the cognizable substantive branch in modern Virginia practice are similar in both equity and common law actions. Virginia firmly retains the requirement that the substantive elements of the actions be established by the allegations. Although the forms of action were "buried" by Virginia in the 1950 Rules, "they still rule us from their graves."[187]

Unfortunately, the language of the 1950 Rule 3:18(d),[188] now 1:4(d), was similar to the standard in the Federal Rules of Civil Procedure.[189] The federal practice test is whether the opposing party can obtain an understanding of the claim,[190] whereas a Virginia pleading is tested by whether the stated facts inform the opposite party of the nature of the claim. The similarity in the language of the rules produced a misconception that Virginia is a "notice" pleading jurisdiction.[191]

This misconception arose from a failure to properly comprehend the historical development of pleading practice in Virginia. Although the language of Rule 3:18(d) did not explicitly require a statement of a "cause of action" it evolved from case precedent addressing motion for judgment proceedings.[192] Since the rule is a codification of the specificity rules under the prior motion for judgment, the requirement that the elements of the substantive action be pleaded remains the standard under the cognizable substantive branch of the rule.[193] It is submitted that the term "cause of action" was left out of the rule to avoid the problems that other jurisdictions had with the term.[194]

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186. VA. CODE ANN. § 8.01-273 (Repl. Vol. 1984).

187. *See* W. BRYSON, *supra* note 15, at 204 (quoting F. MAITLAND, THE FORMS OF ACTION AT COMMON LAW 2 (1965)); *see also* Wilson, *Writs v. Rights: An Unended Contest*, 18 MICH. L. REV. 255 (1920).

188. VA. CT. R. 3:18(d) (amended 1:4(d)).

189. *Compare* VA. CT. R. 3:18(d) *with* FED. R. CIV. P. 8(a)(2).

190. *See supra* notes 51-61 and accompanying text.

191. *See* Greer, *Virginia and the Federal Rules*, 47 VA. L. REV. 906 (1961). Greer states that the "notice pleading is part and parcel of the Virginia rules. . . . There could be no better description [than rule 3:18(d), now 1:4(d)] of notice pleading." *Id.* at 909.

192. *See* M. BURKS, *supra* note 67, § 182, at 295.

193. *Id.*

194. For a discussion of the problem in determining a cause of action, see *supra* notes 39-47 and accompanying text.

The Virginia Supreme Court, in interpreting Rule 3:18, stated that "[i]t is not even debatable that under . . . Rule 3:18 . . . material facts constituting a *cause of action* shall be stated."[195] Further, the Virginia Supreme Court's 1987 decision in *Fox v. Deese*,[196] illustrates the court's continued insistence that the allegations establish the elements of the substantive form of action. In *Fox*, the plaintiff sought damages for tortious interference with a contract.[197] In testing the sufficiency of the plaintiff's allegations, the court stated that one element of the action was that the interference induced or caused the breach of the contract.[198] The plaintiff failed to plead facts which would establish that the interference caused the breach. Therefore, the court held that the pleading was defective.[199]

In contrast, the cognizable substantive branch in federal practice is demonstrated in *Dioguardi v. Durning*.[200] In *Dioguardi*, Judge Clark held that a "home drawn" complaint was sufficient. The plaintiff alleged that his goods were auctioned by the defendant, but that some of the goods disappeared three weeks before the auction.[201] Judge Clark held that the federal rules did not require the allegations of fact to establish each element of the cause of action. Because the allegations informed the defendant that the plaintiff was claiming his goods were converted, the pleading was sufficient. *Dioguardi* shows that the cognizable substantive branch of the federal rules requires only that the allegations establish that the plaintiff has suffered an actionable wrong, without regard to the substantive elements of the claim.[202]

The 1972 amendments to the Virginia rules demonstrate a continued commitment to the requirement that pleadings establish the elements of a particular claim. The equity requirement of stating "essential facts" was made applicable to actions at law.[203] The essential facts are the allegations which show the party is entitled to relief under the substantive law.[204] For example, in *Pair v. Rook*,[205] the complainant sought specific performance of a contract. Entitlement to specific performance requires that the terms of the contract be certain and definite.[206] The court held that because the complaint did not allege definite terms of the contract,

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195. Manassas Park Dev. Co. v. Offutt, 203 Va. 382, 384, 124 S.E.2d 29, 30 (1962) (emphasis added).
196. 234 Va. 412, 362 S.E.2d 699 (1987).
197. *Id.* at 420, 362 S.E.2d at 703.
198. *Id.* at 429, 362 S.E. at 709.
199. *Id.*
200. 139 F.2d 774 (2d Cir. 1944).
201. *Id.*
202. *See supra* notes 51-61 and accompanying text.
203. VA. CT. R. 1:4(j).
204. *See supra* notes 32-37 and accompanying text.
205. 195 Va. 196, 77 S.E.2d 395 (1953).
206. *Id.* at 204, 77 S.E.2d at 400.

the pleading was defective.[207]

Finally, any doubt concerning the application of the cognizable substantive branch in Virginia was put to rest by the amendment of the demurrer statute in 1977.[208] The statute provides that failing to state a *cause of action* and failing to state facts upon which relief can be granted are grounds for demurrer.[209] The demurrer statute was a codification of existing practice.[210] Thus, it is clear that the allegations must establish elements of the substantive cause of action.

The cognizable substantive branch in Virginia practice originates from the traditional common law pleading requirements. Virginia has retained the proven common law substantive classifications as the structure for the pleading. Accordingly, the role of the pleading—focusing the issues—has been preserved.

2. Factual Precision Branch of Modern Virginia Practice: A Product of Reasoned Evolution

The required factual precision in modern Virginia practice is determined by two parameters. The first parameter is the requirement that the allegations be statements of fact, rather than conclusions of law.[211] This requirement is derived from the demurrer statute, Rule 1:4(d), and Rule 1:4(j), each of which requires a statement of fact. This principle was explained in *Phipps v. Sutherland*,[212] where the court stated:

> [I]t is improper to allege *legal conclusions* instead of *facts* from which such conclusions are drawn. For example, if defendant is sought to be charged as trustee for the plaintiff, the circumstances giving rise to the trust must be alleged; so, if the purpose of the bill is to have a deed set aside for fraud of

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207. *Id.* at 209, 77 S.E.2d 402.

208. VA. CODE ANN. § 8.01-273 (Repl. Vol. 1984).

209. *Id.*

210. *See* VIRGINIA CODE COMMISSION, REVISION OF TITLE 8 OF THE CODE OF VIRGINIA, HOUSE DOC. NO. 14 at 186 (1977).

211. *See* Koch v. Seventh Street Realty Corp., 205 Va. 65, 135 S.E.2d 131 (1964). In *Koch* the allegations in the plaintiff's bill stated that "by fraud, deceit and other devices" the defendants concealed from the stockholders "their real function, contrary to the interest of said corporation." *Id.* at 71, 135 S.E.2d at 135. The court held that the statements were conclusions of law, and thus, the plaintiff failed to state a cause of action. *Id.*; *see also, e.g.*, Abbott v. Board of Supervisors, 200 Va. 820, 108 S.E.2d 243 (1959).

In Arlington Yellow Cab Co. v. Transportation Inc., 207 Va. 313, 149 S.E.2d 877 (1966), the plaintiff's declaration stated that a taxi certification was illegally issued. The plaintiff alleged that the county manager "was arbitrary, capricious and unreasonable in that there was insufficient evidence" to support the county managers finding that the taxi service was needed. *Id.* at 318, 149 S.E.2d at 881. The court held that these allegations were conclusions of law because they failed to state facts indicating the specific information that was before the county manager when he make his decision. *Id.*

212. 201 Va. 448, 111 S.E.2d 422 (1959).

> the defendant, or because the contract was tainted with usury or illegality, a mere allegation that the transaction was fraudulent, or usurious, or illegal, without the facts constituting the fraud, or usury, or illegality, would be insufficient.[213]

The second parameter is more difficult to ascertain because it is not expressly addressed in the modern cases. The second parameter is discerned from analyzing the historical development of the pleading rules in Virginia in light of the demurrer.

In both common law and equity actions, the demurrer admits the facts which are well pleaded.[214] Under the demurrer test, "reasonable inferences of fact which a trier of fact may fairly and justly draw from the facts alleged" are also admitted.[215]

Rule 1:4(d) and the demurrer test can be read consistently, and through such an interpretation, the second parameter is discerned. The rule requires that the facts inform the opposite party.[216] If the fact directly establishes the element, it is a fact well pleaded, or in historical vernacular an ultimate fact, and thereby, the party is informed.[217] Alternatively, if the factfinder, as a matter of law, can reasonably infer the element, then the opposite party is informed. An examination of the court's decisions reveals that the degree of inference is narrow. The narrow degree of inference is a product of the court's strict treatment of modern pleadings, as demonstrated in *Harrell v. Woodson*,[218] where the

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213. *Id.* at 456-66, 111 S.E.2d at 428 (quoting W. LILE & E. MEADE, EQUITY PLEADING AND PRACTICE 75 (3d ed. 1952)).

214. *See, e.g.*, Grossmann v. Saunders, 237 Va. 113, 119, 376 S.E.2d 66, 69 (1989) (law case); Chippenham Manor, Inc. v. Dervishian, 214 Va. 448, 450, 201 S.E.2d 794, 796 (1974) (equity case).

215. Ames v. American Nat'l Bank, 163 Va. 1, 176 S.E. 204 (1934). *Ames* is a landmark demurrer case. The court draws an important distinction between the inferences which may be considered in a ruling on a demurrer. *Id.* at 37-38, 176 S.E. at 215-16. The court stated that "all reasonable inferences . . . which a trier of fact may fairly and justly draw from the facts alleged must be considered by the court in aid of the pleading." *Id.* at 37-38, 176 S.E. at 216. However, the demurrer does not permit inferences of fact drawn by the pleader from the facts alleged. *Id.* at 37, 176 S.E.2d at 216. In *Ames*, the court construed a contract which was incorporated in the pleading. The court determined that it was improper to use inferences of fact drawn by the pleader in deciding the sufficiency of a contract because this would "put a construction on the words the parties have used which they *do not properly bear*." *Id.* (emphasis in original). Thus, only the reasonable inferences of the trier of fact, not a party-pleader, could be used in determining the sufficiency of the pleading. *See also e.g.*, Hoffman v. First Nat'l Bank, 205 Va. 232, 135 S.E.2d 818 (1964); Kellam v. School Board, 202 Va. 252, 117 S.E.2d 96 (1960); Fleenor v. Dorton, 187 Va. 659, 47 S.E.2d 329 (1948). It should be noted that the rule in *Ames* applies in both equity and law cases and that the rule applies when the court is passing on validity of an amended pleading. *See* Ryland Group, Inc. v. Wills, 229 Va. 459, 461, 331 S.E.2d 399, 401 (1985).

216. VA. CT. R. 1:4(d).

217. For a discussion of ultimate facts, see *supra* notes 140-45 and accompanying text.

218. 233 Va. 117, 353 S.E.2d 770 (1987).

court stated:

> The less formal system established by the present rules offers greatly enhanced opportunities for the discovery of an opponent's evidence, but much less opportunity to pin down the legal theories underlying his claim. It is therefore even more important under the present system to insure that each party be fairly informed of the true nature of the claim or defense.[219]

Three modern cases demonstrate the narrow degree of inference permitted by the court. First, in *Ely v. Whitlock*,[220] in an attempt to establish that the defendant acted with specific intent to cause the plaintiff severe emotional injury, the plaintiff alleged that the defendant acted "with intent to injure plaintiff's health."[221] The court held that the allegation was not sufficient because the trier of fact could not reasonably infer the element from the allegation.[222]

Second, in *Rosillo v. Winters*,[223] an action for dissolution of a partnership, the plaintiff attempted to establish the element that "the 'business of the partnership can only be carried on at a loss.' "[224] To this end, the plaintiff alleged that the partnership had sustained substantial losses for several years and that "the partnership was in immediate danger of losing its assets."[225] The court held that the allegations were "barely" sufficient to establish the element.[226]

Third, in *Burns v. Board of Supervisors*,[227] an eminent domain action, the allegations stated that private property had been dedicated to the Board of Supervisors. The court determined that since the Board of Supervisors was a public body, it was a reasonable inference that the property was to be used for a public purpose.[228]

The court does not inquire about whether the party is on notice. Rather, the court selects allegations, without respect to their meaning within the context of the entire pleading, and determines if they establish the element. This method is similar to the method that was used in code pleading jurisdictions. This distinguishes the federal "notice" standard from the standard of specificity required in Virginia.

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219. *Id.* at 121, 353 S.E.2d at 773.
220. 238 Va. 670, 385 S.E.2d 893 (1989).
221. *Id.* at 677, 385 S.E.2d at 898.
222. *See id.*
223. 235 Va. 268, 367 S.E.2d 717 (1988).
224. *Id.* at 270, 367 S.E.2d at 718 (quoting VA. CODE ANN. § 50-32(1)(e) (Repl. Vol. 1989)).
225. *Id.*
226. *Id.*
227. 218 Va. 625, 238 S.E.2d 823 (1977).
228. *Id.* at 628, 238 S.E.2d at 825.

V. Guidance for Modern Practice

The proper framework for determining the sufficiency of the allegations in modern Virginia practice requires two primary steps. First, the allegations must comply with the modern cognizable substantive branch; the allegations must establish the substantive elements of the particular theory of liability.[229] All Virginia case authority is instructive because of Virginia's unwavering insistence on the establishment of a cause of action.

The second step in determining the sufficiency of the pleading is to ensure that the allegations comply with the factual precision branch. As shown, the allegations must fall within two parameters. First, the allegations must be statements of fact, rather than conclusions of law. Precedent from trespass on the case actions, pre-1950 motion for judgment cases, and the modern cases are instructive because they all require a statement of fact.

Second, the allegation must be either an ultimate fact, which is a fact well pleaded under the court's demurrer test, or a fact which may be reasonably inferred from the allegation. Trespass on the case and equity precedent offer the clearest guidance for determining what constitutes an ultimate fact.[230] A pleader should strive to state ultimate facts, otherwise, he must rely on the narrow degree of inference which the court finds permissible. If the pleader is unable to determine whether the allegation is an ultimate fact, he must be cautious to limit the number of links in the chain of inference.

VI. Conclusion

The modern system of pleading in Virginia has evolved through a process of well-reasoned refinements. The current system, properly used and enforced, focuses the issues, narrows the evidence admissible at trial, apprises the adverse party and the court of the matter in dispute, and provides the extent of the *res judicata* effect of the judgment. However, in order for the pleading system to be effective it must be clearly understood and enforced through demurrers and amendments. The Virginia pleading rules are "founded in strong sense, and in the soundest and closest logic" however through "being misunderstood, and misapplied, they are often made use of as instruments of chicane."[231]

Ian James Wilson
William Louis Payne

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229. *See supra* notes 189-212 and accompanying text.
230. *See supra* notes 140-65 and accompanying text.
231. *See* B. Shipman, *supra* note 1 (quoting Lord Mansfield).