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## CONTENTS

### Articles

- Reforming Federal Personal Injury Litigation by Incorporation of  
the Procedural Innovations of Scotland and Ireland: An  
Analysis and Proposal  
*Daniel H. Erskine* 1
- Tearing Down the Great Wall: The New Generation Investment  
Treaties of the People's Republic of China  
*Stephan W. Schill* 73

### Essay

- The Case for a Flat-Earth Law School  
*Erik M. Jensen* 119

### Notes

- Selective Prosecution in Russia – Myth or Reality?  
*Yelina Kvurt* 127
- Disappearing Safeguards: FISA Nonresident Alien “Loophole” is  
Unconstitutional  
*Brenton Hund* 169
- Price Discrimination in the Textbook Market: An Analysis of the  
Post-*Quality King* Proposals to Prevent and Disincentivize  
Reimportation and Arbitrage  
*Christine Ongchin* 223

### Current Event

- Winning the Battle, but Perhaps Losing the War: Endorsing  
Deregulation of Emergency Contraception at the Expense of  
Derogating Abortion  
*Melissa Bond* 259

## ARTICLES

# REFORMING FEDERAL PERSONAL INJURY LITIGATION BY INCORPORATION OF THE PROCEDURAL INNOVATIONS OF SCOTLAND AND IRELAND: AN ANALYSIS AND PROPOSAL

*Daniel H. Erskine\**

### ABSTRACT

Federal procedure has embraced the referral of civil cases outside the court system to alternative dispute resolution. This article argues that by utilizing courts to settle cases through civil procedure, courts realize their central role in ensuring the quality of settlements produced through the judicial administration of justice. The purpose of this article is to provide litigants with an optional procedure to expeditiously resolve federal personal injury cases. The system proposed in this article incorporates Scottish and Irish civil procedural reforms into a coherent method for judicial officers to declare the settlement value of a personal injury action without referring the case to alternative dispute resolution.

Federal procedure has embraced the referral of civil cases outside the court system to alternative dispute resolution (ADR).<sup>1</sup> Referral from court procedure to ADR mechanisms results in a greater frequency of out of court settlements.<sup>2</sup> The reason civil cases settle out of court is because of “a desire to avoid the expense and delay associated with taking the case to trial, or to avoid the risk of a trial outcome significantly more adverse than the outcome

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<sup>1</sup> Judith Resnik, *Mediating Preferences: Litigant Preferences for Process and Judicial Preferences for Settlement*, J. DISP. RESOL. 155, 156–60 (2002) (noting judicial preference for settlement).

<sup>2</sup> *Id.*

achievable through settlement.”<sup>3</sup> Although most applaud the rise in settlements achieved through ADR, at least one author criticizes these settlements because “when the parties settle . . . it is not justice itself.”<sup>4</sup> This critique led others to argue that courts must not view settlements “as a stray byproduct of the judicial process, but as part of the . . . central task of the administration of justice.”<sup>5</sup> Judicial willingness to permit ADR neutrals to adjudicate civil actions illustrates the lack of recognition that court procedure should ensure “the quality of these processes and the settlements they produce.”<sup>6</sup> This article argues that by utilizing courts to settle cases through civil procedure, courts realize their central role in ensuring the quality of settlements produced through the judicial administration of justice.<sup>7</sup>

The purpose of this article is to provide litigants with an optional procedure to expeditiously resolve federal personal injury cases.<sup>8</sup> Personal injury actions represent the single greatest amount of cases filed in the U.S. federal courts.<sup>9</sup> In 2004 alone, 57,357 new personal injury cases were filed.<sup>10</sup> As many as 35,336 personal injury cases were pending three or more years in federal courts without resolution at the end of September 2005.<sup>11</sup>

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<sup>3</sup> JOHN E. SHAPARD, *LIKELY CONSEQUENCES OF AMENDMENTS TO RULE 68, FEDERAL RULES OF CIVIL PROCEDURE* 11 (1995).

<sup>4</sup> Owen M. Fiss, *Against Settlement*, 93 *YALE L.J.* 1073, 1085–86 (1984).

<sup>5</sup> Marc Galanter & Mia Cahill, “*Most Cases Settle*”: *Judicial Promotion and Regulation of Settlements*, 46 *STAN. L. REV.* 1339, 1390–91 (1994).

<sup>6</sup> *Id.*

<sup>7</sup> This proposal tangentially combats the problem of forum-shopping in personal injury cases alluded to in a recent bill passed by the U.S. House of Representatives. Law Abuse Reduction Act of 2005, H.R. 420, 109th Cong. § 4 (2005).

<sup>8</sup> Special procedures are not unknown to federal procedure. See *FED. R. CIV. P.* 71(a).

<sup>9</sup> ADMIN. OFFICE OF THE U.S. COURTS, *FED. JUD. CASE LOAD STATISTICS* 11 (2005), available at <http://www.uscourts.gov/caseload2005/front/mar05JudBus.pdf> (noting that over the five year period from 2001 to 2005 new filings of personal injury cases caused a 10 percent overall rise in federal civil case filings and asserting federal civil filings rose only 3 percent excluding personal injury actions).

<sup>10</sup> *Id.* at 42-44 app. tbl. C-2, available at <http://www.uscourts.gov/caseload2005/tables/C02mar05.pdf> (demonstrating that adding table’s nature of suit categories of total personal injury actions filed with total other personal injury actions filed results in 57,357 personal injury actions initiated in 2004).

<sup>11</sup> ADMIN. OFFICE OF THE U.S. COURTS, *2005 ANNUAL REPORT OF THE DIRECTOR ON THE JUDICIAL BUS. OF THE COURTS* 56-58 supp. tbl. S-11 (2005), available at <http://www.uscourts.gov/judbus2005/tables/s11.pdf> (adding table’s nature of suit categories of total personal injury actions with total other personal injury actions). Other American jurisdictions have undertaken efforts to alleviate case congestion and make courts more efficient. See *N.Y. JUDICIAL INST., COMPREHENSIVE CIVIL JUSTICE PROGRAM 2005*:

The system proposed in this article incorporates Scottish civil procedural reforms. These reforms address the way a case progresses from filing to resolution.<sup>12</sup> This article sets forth a method, drawing on the radical substantive changes authored in Ireland, for judicial officers to declare the settlement value of a personal injury action without referring the case to ADR.<sup>13</sup> The proposed procedural reform is optional. Litigants elect a judicial process to efficiently resolve their personal injury cases.<sup>14</sup> Parties are free to utilize the traditional method of case resolution through ADR and cumbersome civil procedural devices.

The proposal of the new procedure occurs in two parts. The first part discusses recently enacted procedures in Scotland and Ireland to expeditiously resolve personal injury cases.<sup>15</sup> The second part illustrates how an optional procedure for personal injury actions may be introduced to the U.S. federal system despite potential legal impediments.

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STUDY AND RECOMMENDATIONS 1–6 (2006), available at [http://www.nycourts.gov/reports/Civil\\_Justice\\_Program\\_2005.pdf](http://www.nycourts.gov/reports/Civil_Justice_Program_2005.pdf).

<sup>12</sup> See generally PETER BARRIE, *PERSONAL INJURY LAW: LIABILITY, COMPENSATION, AND PROCEDURE* (2d ed. 2005) (describing English legal and procedural developments); Marco Bona & Philip Mead, *European Personal Injury Damages: An Overview of Recent Developments*, 10 J. PERS. INJ. L. 272, 272–80 (2003).

<sup>13</sup> On the utility of comparative law analysis see generally John Wolff, *Non-Competing Goods in Trademark Law*, 37 COLUM. L. REV. 582 (1937) (discussing utility of knowledge of foreign law by American attorneys in addressing domestic legal problems); John Wolff, *The Utility of Foreign Law to the Practicing Lawyer*, 27 A.B.A. J. 253 (1941) (arguing that discussion of foreign legal principles by American attorneys can expand U.S. constitutional jurisprudence); John Wolff, *Unfair Competition by Truthful Disparagement*, 47 YALE L.J. 1304 (1938) (noting foreign law could provide interpretive guidance to American judges in deciding cases or in defining particular phrases).

<sup>14</sup> The theories behind the procedural reforms occurring in Scotland and Ireland do find support in previous American attempts to reform the federal system. See AMERICAN BAR ASSOCIATION, *THE IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE* 59–67 (4th ed. 1961) (contemplating increased usage of pretrial conferences as mechanism for case resolution, need for impartial expert medical evidence, and restoration of common law authority of the judge to govern trial proceedings); AMERICAN BAR ASSOCIATION, *DEFEATING DELAY: DEVELOPING AND IMPLEMENTING A COURT DELAY REDUCTION PROGRAM* (1986) (arguing for mediation involving reference of case to three-attorney panel for valuation of claim, pretrial settlement and issue conferences, and court-annexed arbitration); STUART M. GERSON, ET AL., *A PLAN TO IMPROVE AMERICA'S SYSTEM OF CIVIL JUSTICE FROM THE PRESIDENT'S COUNCIL ON COMPETITIVENESS* (1992) (arguing for introduction of voluntary ADR, more controlled discovery, and loser pay theory for discovery motions).

<sup>15</sup> For a brief comparison of the Scottish and English personal injury systems see generally William J. Stewart, *Comparative Personal Injury Litigation: Roads, Organs, Terms and Procedure in the UK*, 12 J. PERS. INJ. L. 138–46 (2005).

## I. SCOTTISH AND IRISH PROCEDURAL INNOVATIONS

A. *Scottish Procedure*

A proposal of a new efficient federal procedure begins with a description of the latest reforms adopted in Scotland. The Scottish procedural improvements preserve trial by jury as an option for case resolution in personal injury actions. The reforms simplify the mechanics of litigation in order to expedite case resolution and decrease the administrative costs associated with adjudicating personal injury cases. Because Scotland retains civil juries, the reforms enacted are ripe for integration into American civil procedure.

1. *The Court of Session: Locale for Civil Litigation*

A discussion of Scottish procedure requires a brief description of the court system utilized in litigating a personal injury case. The Court of Session, permanently resident in Edinburgh, is the highest civil court in Scotland.<sup>16</sup> The Court is composed of an Inner and Outer House.<sup>17</sup> The Inner House functions as an appellate court, while the Outer House, seized with jurisdiction over all civil actions, handles trial matters.<sup>18</sup> The Outer House of the Court of Session is composed of Lord Ordinaries who preside over jury trials or decide cases sitting without a jury.<sup>19</sup> The Inner House is divided into a First Division presided over by the Lord President and a Second Division presided over by the Lord Justice Clerk.<sup>20</sup> The Lord President may compose an Extra Division of the Inner House

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<sup>16</sup> Civil Jurisdiction and Judgments Act, 1982, c. 27. See JOHN ERSKINE, *PRINCIPLES OF THE LAW OF SCOTLAND, IN THE ORDER OF SIR GEORGE MACKENZIE'S INSTITUTIONS OF THAT LAW* 26–30 (10th ed. 1816) (concise history of the Court of Session); JAMES GLASSFORD, *REMARKS ON THE CONSTITUTION AND PROCEDURE OF THE SCOTTISH COURTS OF LAW* 130–67 (1812) (tracing Court of Session's evolution); A.R.G. M'MILLAN, *THE EVOLUTION OF THE SCOTTISH JUDICIARY* 28–80 (1941); NICHOLAS PHILLIPSON, *THE SCOTTISH WHIGS AND THE REFORM OF THE COURT OF SESSION 1785–1830* (1990) (describing key legal events transforming the Court of Session and its jurisdiction); ROBIN M. WHITE & IAN D. WILLOCK, *THE SCOTTISH LEGAL SYSTEM* 89–95 (3d ed. 2003).

<sup>17</sup> Court of Session Act, 1988, c. 36, § 2 (Scot.). See DAVID M. WALKER, *THE SCOTTISH LEGAL SYSTEM: AN INTRODUCTION TO THE STUDY OF SCOTS LAW* 291–97 (8th ed. 2001) (describing current jurisdiction and composition of court).

<sup>18</sup> Court of Session Act, 1988, c. 36, §§ 9–18, 28–39 (Scot.). Appeal from an Inner House judgment lies in the House of Lords in the Westminster Parliament. § 40.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

should the caseload of the court require an additional appellate forum.<sup>21</sup>

a. The Court of Session's "Ordinary" Procedure  
for All Civil Actions

The Scottish procedural innovations are best illustrated by a comparison between the "ordinary," or regular procedure, and the new optional method of litigating personal injury cases. The ordinary procedure exists as the traditional method for litigating all civil actions in the Outer House of the Court of Session. A description of the ordinary procedure provides the rationale for the optional procedure.

i. Initiating an Ordinary Action

An individual "who takes steps to raise, begin or bring a civil action" in the Outer House is called a pursuer.<sup>22</sup> The defender is the individual against whom the pursuer brings a civil action.<sup>23</sup> Ordinary actions begin with a pursuer's service of a summons upon a defender.<sup>24</sup> Twenty-one days after service of the summons on the defender, the pursuer calls the summons in court.<sup>25</sup> Calling is the publication of a summons "by posting, in a list on the walls of the court and in the printed rolls of the court, the names of the parties and of the pursuer's legal representative."<sup>26</sup> The Court of Session possesses many rolls, which contain lists of cases set down for hearing before the court.<sup>27</sup> After the summons is called, the defender

<sup>21</sup> *Id.*

<sup>22</sup> J.A. BEATON, SCOTS LAW TERMS AND EXPRESSIONS 83 (1982).

<sup>23</sup> THE LAW SOCIETY OF SCOTLAND, GLOSSARY: SCOTTISH AND EUROPEAN UNION LEGAL TERMS AND LATIN PHRASES 30 (2003).

<sup>24</sup> Rules of the Court of Session, 2004, S.C.R. 13.1 (Scot.); Act of Sederunt, 1994, S.I. 1994/1443 (Scot.), available at <http://www.scotcourts.gov.uk/session/rules/index.asp>, amended by Act of Sederunt (Rules of the Court of Session Amendment No. 2) (Personal Injuries Actions), 2002, S.I. 2002/570 (Scot.) (effective Apr. 1, 2004), available at <http://www.opsi.gov.uk/legislation/scotland/ssi2002/20020570.htm>; Act of Sederunt (Rules of the Court of Session Amendment No. 4) (Personal Injuries Actions), 2004, S.I. 2004/291 (Scot.), available at <http://www.opsi.gov.uk/legislation/scotland/ssi2004/20040291.htm>. The pursuer presents the summons to the clerk of the Court of Session for signeting, a process whereby the clerk permits the issuance of the action and registration. S.C.R. 13.5 (Scot.). The signet itself is the imprint of the monarch's seal upon the summons conferring upon the summons the legal status to initiate a civil action. See THE LAW SOCIETY OF SCOTLAND, *supra* note 23, at 156.

<sup>25</sup> S.C.R. 13.13 (Scot.).

<sup>26</sup> THE LAW SOCIETY OF SCOTLAND, *supra* note 23, at 24

<sup>27</sup> *Id.* at 146-47 (thirteen total rolls).

has seven days to lodge defenses with the court.<sup>28</sup> These defenses respond to the summons and raise “pleas-at-law” applicable to the issues raised in the summons.<sup>29</sup>

Within fourteen days after the expiration of the period for lodging defenses, the pursuer creates an open record consisting of “the pleadings of the parties and the interlocutors pronounced in the action or cause.”<sup>30</sup> An interlocutor is the “official document embodying an order or judgment pronounced by the court in a civil action.”<sup>31</sup> All the documents making up the record are lodged or deposited by the parties with the clerk of the court.<sup>32</sup>

## ii. The Problem of Adjustment & Pleadings

For a minimum of nineteen weeks the pleadings are adjusted, meaning each party may alter its previously submitted written pleading to reflect new information discovered or correct erroneous assertions.<sup>33</sup> During the period of adjustment, the record remains open as parties endeavor to flesh out the particular factual and legal details of their positions.<sup>34</sup> Scottish pleading requires the parties to answer one another’s claims through the written articulation of the record as it proceeds through the period of adjustment.<sup>35</sup> The end product is the closed record, which will circumscribe the evidence allowed and the argument heard at trial.<sup>36</sup> Because Scottish litigation focuses on the written pleadings to establish the legal and evidentiary grounds for each party’s position, Scottish procedure permits advocates considerable time in writing and rewriting these pleadings.<sup>37</sup> As a result, the period of adjustment is frequently extended by the Lord Ordinary causing considerable delay in the progress of the case.<sup>38</sup>

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<sup>28</sup> S.C.R. 18.1 (Scot).

<sup>29</sup> *Id.*

<sup>30</sup> S.C.R. 22.1 (Scot).

<sup>31</sup> THE LAW SOCIETY OF SCOTLAND, *supra* note 23, at 83.

<sup>32</sup> *Id.* at 98. The corpus of all documents filed on behalf of each party to a civil action is called the process. *Id.* at 130. A particular portion of the process is the record, which consists of all written pleadings filed by the parties. *Id.* at 139.

<sup>33</sup> *Id.* at 11.

<sup>34</sup> S.C.R. 22.2 (Scot).

<sup>35</sup> See Stephen Woolman, *Pleadings, in SCOTS LAW INTO THE 21ST CENTURY, ESSAYS IN HONOR OF W.A. WILSON*, 277, 277–83 (Hector L. Macqueen ed., 1996).

<sup>36</sup> *Id.* at 278.

<sup>37</sup> LORD CULLEN, REVIEW OF BUSINESS OF THE OUTER HOUSE OF THE COURT OF SESSION 11 (1995).

<sup>38</sup> *Id.*

Traditional pleadings in Scotland are a unique species. Scottish lawyers utilize highly detailed fact pleadings to focus precisely on the disputed issues of a case.<sup>39</sup> The purpose of the high level of detail is to give notice of the basis of the claim or defense.<sup>40</sup> Scottish pleadings typically extend over many pages to address one particular issue raised and contain frequent use of Latin phrases contained within eighteenth century idioms describing key points in controversy.<sup>41</sup> The following provides an example of a Scottish pleading from a closed record articulating one aspect of the pursuer's claim:

Further, and in any event, when the defender bought the said painting as condescended on, he acted in breach of a duty owed to *inter alios*, the pursuer, in not having known or discovered the true value or the said painting when his representative examined it or not having discovered its true value before offering to buy it from the pursuer. In this duty he failed and by his offer he impliedly represented through his said employee that the sum offered was the true value of the said painting. This failure in duty caused the pursuer, who acted throughout in reliance on the defender's skill, experience and knowledge, to act under essential error and induced him to sell the said painting for a grossly inadequate sum. By his said misrepresentation the defender caused the pursuer a loss of £144,000, which is the sum sued for. With reference to defender's averments in answer the defender was in breach of duty in allowing the said Mr. Bloggs to negotiate for him and contract on his behalf if he was inadequately experienced in nineteenth-century painting.<sup>42</sup>

The defender answered this particular claim of the pursuer as follows:

Denied that defender owed to the pursuer any such duty of care as is averred. Denied that he was in breach of any duty of care to the pursuer. *Quoad ultra* denied. *Esto*, which is denied, the defender owed to the pursuer any such duty as is averred his said representative, in making the contract with the pursuer, acted in good faith but was inexperienced and, if he misrepresented the true value of the said painting, did so innocently.<sup>43</sup>

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<sup>39</sup> See Elizabeth G. Thornburg, *Detailed Fact Pleading: The Lessons of Scottish Civil Procedure*, 36 INT'L LAW 1185 (2002).

<sup>40</sup> CULLEN, *supra* note 37, at 16.

<sup>41</sup> *Id.* at 279–80.

<sup>42</sup> WALKER, *supra* note 17, at 597.

<sup>43</sup> *Id.*

Because highly detailed fact pleading caused considerable delay in the adjudication of personal injury cases, the Lord President of the Court of Session formed a committee in 1979 to address the continued use of these pleadings in personal injury actions.<sup>44</sup> The committee convened because, after the parties spent considerable time laboriously adjusting their pleadings, almost all personal injury cases settled immediately after the expiration of the period for adjustment.<sup>45</sup> Hence, the committee issued a report, which resulted in the passage of new court rules abolishing the use of highly detailed pleadings in personal injury cases.<sup>46</sup> The committee also recommended that personal injury actions operate on an expedited timetable to eliminate delay in resolution of these cases.<sup>47</sup> These recommendations were enacted in the 1985 Court of Session Rules as an optional procedure.<sup>48</sup> Litigants had the option of proceeding under the new simplified procedure or the old detailed fact pleading scheme. The 1985 optional procedure was not successful, thereby causing establishment of a more radical optional procedure in 1994.<sup>49</sup>

The 1994 procedure, despite its radical reforms in pleadings, never garnered any real enthusiasm for its use by a large number of attorneys.<sup>50</sup> The 1994 optional procedure did not achieve the desired result of streamlining and quickening the adjudication of personal injury actions.<sup>51</sup> In 2001, personal injury actions continued as the greatest source for jury trials in Scotland, accounting for 71 percent of all cases filed in the Outer House of the Court of Session.<sup>52</sup> As a result of the 1994 procedure's failure and the continued backlog of personal injury cases, the Lord President of the

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<sup>44</sup> CHARLES HENNESSY, *CIVIL PROCEDURE AND PRACTICE* 90 (2000).

<sup>45</sup> *Id.* at 89.

<sup>46</sup> *Id.* at 90; Andrew Murray, *Fair Notice-The Role of Written Pleadings in the Civil Justice System*, in *THE REFORM OF CIVIL JUSTICE* 49, 49-67 (Hume Papers on Public Policy, vol. 5 no. 4 1997) (describing and evaluating written pleadings in light of criticisms); Woolman, *supra* note 35, at 277-83 (discussing role of pleadings and form that abbreviated pleadings should take, as well as addressing criticisms of Scottish pleadings system); see Act of Sederunt (Rules of Court Amendment Number 1) (Optional Procedure in Certain Actions in Reparation), 1985, S.I. 1985/227 (Scot.).

<sup>47</sup> HENNESSY, *supra* note 44, at 90-1.

<sup>48</sup> *Id.* at 90.

<sup>49</sup> *Id.* at 90-1. The 1994 optional procedure, unlike its predecessor, required the pursuer to waive his right to jury trial in order to utilize the optional procedure. *Id.* at 94.

<sup>50</sup> *Id.* at 99-100 (articulating numerous reasons for the 1994 procedure's failure).

<sup>51</sup> See *Alexander v. Metbro Ltd.* [2004] ScotCS CSOH 207, available at <http://www.scotcourts.gov.uk/opinions/pd52104.html>.

<sup>52</sup> THE SCOTTISH EXECUTIVE, *CIVIL JURY STATISTICS SCOTLAND 2001*, at 8 (2002),

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Court of Session convened a Working Group in 2003 to produce a new, more efficient optional procedure.<sup>53</sup> The result of the 2003 Working Group was a new optional procedure for personal injury actions, which was adopted by the Court of Session.<sup>54</sup>

The new optional procedure accepted that most personal injury cases were settled on the first day of trial before an opening statement was heard by the jury.<sup>55</sup> In these cases, jurors were empanelled at a considerable cost to the Court of Session only to be dismissed when they arrived on their first day.<sup>56</sup> Furthermore, most trials never permitted the jury to issue a verdict because “an inevitable and largely unavoidable feature of civil litigation in Scotland” was the high rate of settlement during trial.<sup>57</sup> Recognizing that cases were settled before and during trial, the new optional procedure espoused a procedural method designed to expeditiously bring the parties to settlement.<sup>58</sup> Litigants deliberately elect the new optional procedure to avail themselves of its benefits by deliberate choice.<sup>59</sup> Should parties choose the optional procedure, their cases proceed with abbreviated pleadings on an expedited timeframe.<sup>60</sup>

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<http://www.scotland.gov.uk/library5/justice/cjst.pdf> (2,969 cases were filed with 1,691 resolved by final judgment); see also SAMANTHA COOPE & SUE MORRIS, LEGAL STUDIES RESEARCH BRANCH SCOTTISH EXECUTIVE, PERSONAL INJURY LITIGATION, NEGOTIATION AND SETTLEMENT (2002), available at <http://www.scotland.gov.uk/library5/justice/pil.pdf> (extensive statistic study of cases filed in Court of Session and Sheriff’s Court).

<sup>53</sup> See *Alexander*, [2004] ScotCS CSOH at 207.

<sup>54</sup> See generally Communication from Lord President’s Office, New Procedures for Personal Injury Actions in the Court of Session, reprinted in 32 S.L.T. 267, 267–68 (2002) (Scot.); Andrew J. Bowen, *The Civil Procedure Rules 1998: The Overriding Objective*, 13 S.L.T. 97, 97–100 (1999) (Scot.); Nigel M.P. Morrison, *Reform of Civil Procedure*, 18 S.L.T. 137, 137–44 (1998) (Scot.); Rachel Wadia, *Judicial Case Management in Scotland: Indecision and Indigestion*, 31 S.L.T. 255, 255–59 (1997) (Scot.).

<sup>55</sup> The 2003 Working Party “believed that the great majority of those involved in litigation would like to see a system which encouraged early settlement of the cases which should settle and would be willing to work positively within a system which facilitated that end.” Rep. of the Working Group (2003), [http://www.scotcourts.gov.uk/session/injuries/docs/new\\_personal\\_injury\\_procs.pdf](http://www.scotcourts.gov.uk/session/injuries/docs/new_personal_injury_procs.pdf).

<sup>56</sup> *Id.*

<sup>57</sup> ANDREW M. HAJDUCKI, CIVIL JURY TRIALS 113 (1998).

<sup>58</sup> See PRACTICE NOTE NO. 2 of 2003 (2003), available at [http://www.scotcourts.gov.uk/session/practiceNotes/pn02\\_2003.pdf](http://www.scotcourts.gov.uk/session/practiceNotes/pn02_2003.pdf).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

b. The Court of Session's New Optional Procedure for  
Personal Injuries Actions

Underlying the new optional procedure is the belief that settlements produced through court procedure provide enhanced benefits to both sides of the litigation.<sup>61</sup> One of the benefits afforded by the optional procedure is the use of pleadings that permit attorneys to focus the dispute on factual issues rather than legal liability, which allows for more efficient resolution of the case. The Scots permit litigants to revoke their decisions to proceed under the optional procedure, but the Lord Ordinary decides whether to transform the case into a traditional ordinary action.<sup>62</sup>

i. Abbreviated Pleadings & Expedited Timetable

The new optional procedure “to encourage speedy and economic resolution” of a personal injury action abolished the use of detailed fact pleading.<sup>63</sup> The pursuer proceeds with an abbreviated mandatory summons that contains no pleas-in-law.<sup>64</sup> The conciseness of the abbreviated pleading reflects greater preparation of the case by Scottish attorneys before filing an action.<sup>65</sup> The summons gives a brief factual outline of the claim and includes a statement indicating whether the action is based upon common law or breach of statutory duty.<sup>66</sup> If the action arises from a breach of statutory duty, the pursuer must indicate the precise statute violated.<sup>67</sup> The

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<sup>61</sup> See generally CULLEN, *supra* note 37.

<sup>62</sup> S.C.R. 43.5(1), 43.5(3)(a)–(c) (Scot.) (either party must move to revoke application of the new optional procedure and transform the matter into an ordinary action within twenty-eight days of lodging defenses); *Broadfoot & Anor v. Forth Valley Acute Hosps.* [2003] ScotCS CSOH 184, available at [http://www.scotcourts.gov.uk/opinions/a1281\\_02.html](http://www.scotcourts.gov.uk/opinions/a1281_02.html) (permitting transformation of optional procedure case into an ordinary action).

<sup>63</sup> *Benson v. City of Edinburgh Dist. Council* [2004] ScotCS CSOH 215, 2005 S.C. 24, available at [http://www.scotcourts.gov.uk/opinions/PD108\\_04.html](http://www.scotcourts.gov.uk/opinions/PD108_04.html).

<sup>64</sup> See S.C.R. 43.2; S.C.R. FORM 43.2-A (2004) (Scot.), available at [http://www.scotcourts.gov.uk/session/rules/forms/form43\\_2\\_a.rtf](http://www.scotcourts.gov.uk/session/rules/forms/form43_2_a.rtf); PRACTICE NOTE NO. 3 of 2004 (2004), [http://www.scotcourts.gov.uk/session/practiceNotes/pn03\\_2004.pdf](http://www.scotcourts.gov.uk/session/practiceNotes/pn03_2004.pdf).

<sup>65</sup> Court of Session, *Changes in Practitioners' Work-Methods*, PERS. INJURIES: NEW R. NEWSL., Feb. 2004, at 1, [http://www.scotcourts.gov.uk/session/newsletters/newsletter\\_01\\_feb\\_04.pdf](http://www.scotcourts.gov.uk/session/newsletters/newsletter_01_feb_04.pdf) (asserting that preparation before filing summons may require several months).

<sup>66</sup> S.C.R. FORM 43.2-A, *supra* note 64. Use of abbreviated pleadings attempts to resolve the perceived problem that ordinary pleadings “become elaborate, encumbered with unnecessary detail (often and erroneously of evidence) and, in the case of defences, lack candour.” Nigel Morrison, Q.C., *The Cullen Report*, 1996 S.T.L.A. 93, 94 (Scot.).

<sup>67</sup> See *Wallace v. Keltbray Plant Ltd. & Anor* [2006] ScotCS CSOH 21, available at <http://www.scotcourts.gov.uk/opinions/2006csoh21.html> (indicating precision in allegation of statutory breach helpful and possibly required by rules).

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defender's lodged defenses do not contain pleas-in-law or legal assertions.<sup>68</sup> An example of the summons used by the optional procedure litigants appears below.<sup>69</sup>

#### CONCLUSIONS

1. For payment by the Defender to the Pursuer of TWO MILLION POUNDS (£2,000,000) STERLING.
2. For the expenses of the action.

#### STATEMENT OF CLAIM

1. The Pursuer is James A who resides at 12 Whitburn, West Lothian. He is a joiner and was born on 2 April 1970.
2. The First Defender is Derek B who resides at Whitburn, West Lothian, is unemployed and was born on 5 January 1978. The Second Defender is Paul C residing at Hartlepool, is an insurance salesman and was born on 5 November 1960.
3. The Court has jurisdiction to hear this claim against the Defenders because the accident in which the Pursuer was injured occurred in Scotland.
4. (a) On 15 June 1996 at 10.30am the Pursuer was a front seat passenger in a Ford Escort motor car, registration number 12233 which was being driven by the First Defender; (b) The said vehicle was stopped in a lay-by in East Mains Street, Whitburn; (c) The First Defender drove the vehicle out of the lay-by and proceeded to execute a U turn into the path of a Ford Sierra motor car, registration number which was being driven by the Second Defender; (d) The First and Second Defenders were both driving at excessive speed; (e) The Second Defender drove his car into collision with the First Defender's vehicle as a result of which the Pursuer sustained serious injury.
5. The Pursuer suffered severe head injuries in said accident and has received treatment therefore at Edinburgh Royal Infirmary, Astley Ainslie Hospital Edinburgh, St. John's Hospital Livingston, Western General Hospital Edinburgh and from his GP Dr. A. Health Centre, Whitburn, West Lothian. He seeks damages for: (a) solatium; (b) wage loss to date of decree; (c) future wage loss; (d) Services (Section 8) to date; (e) future services (Section 8); (f) future care costs; (g) increased costs of

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<sup>68</sup> See PRACTICE NOTE No. 3 of 2004, *supra* note 64; Court of Session, *Form of Defences*, PERS. INJURIES: NEW R. NEWSL., May 2004, at 1, 2-3, [http://www.scotcourts.gov.uk/session/newsletters/newsletter\\_02\\_may04.pdf](http://www.scotcourts.gov.uk/session/newsletters/newsletter_02_may04.pdf).

<sup>69</sup> For another example see *Higgins v. DHL Int'l (UK) Ltd.* [2003] ScotCS CSOH 272, available at <http://www.scotcourts.gov.uk/opinions/pd36.html>.

electricity and transport to date of decree; (h) future increased costs of electricity etc.; (i) increased costs of transport to date of decree; (j) future increased costs of transport; (k) increased costs of holidays; (l) costs of employing tradesmen; (m) costs of extra equipment; (n) costs of alteration to accommodation.

6. The action was caused by the fault and negligence of both Defenders in particular by reason of their failure to pay due care and attention to other road users.<sup>70</sup>

The contrast between the new optional procedure's summons and the traditional Scottish pleading is stark. The ordinary procedure's pleadings extend over multiple pages, whereas the new optional procedure pleading outlined above fits on a mere page.<sup>71</sup>

Once defenses are lodged, a timetable is ordered by the Court for, among other things, production of document requests, adjustment of pleadings, pursuer's lodging of the record, and witness lists.<sup>72</sup> The Lord Ordinary's ordered timetable may be adjusted upon motion of any party, but such motion may only be granted upon a showing of substantial justification for modification based upon the particular facts and circumstances of the case.<sup>73</sup> Adherence to the timetable results in settlement of the case within fourteen weeks after the case's initiation and trial of the action twelve months after the filing of the action.<sup>74</sup> The introduction of the timetable is essential to the speedy resolution of the action because the Lord Ordinary must ensure the action is resolved within a specified timeframe.<sup>75</sup>

## ii. The Valuation Statement

An additional feature of the optional procedure is the requirement that parties exchange a valuation statement.<sup>76</sup> The valuation statement itself is a court form, which is accompanied by docu-

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<sup>70</sup> General Department of the Court of Session, Example File Style 1 (2006), [http://www.scotcourts.gov.uk/docs/offices/Style01\\_James\\_A.rtf](http://www.scotcourts.gov.uk/docs/offices/Style01_James_A.rtf).

<sup>71</sup> *Cf.* Jones v. Leslie [2004] ScotCS CSOH 115, *available at* <http://www.scotcourts.gov.uk/opinions/pd1155.html> (Lord Ordinary found pursuer's pleading too brief so as to deny trial by jury because of brevity of pleadings).

<sup>72</sup> S.C.R. 43.6(1)(a)–(b) (Scot.).

<sup>73</sup> S.C.R. 43.8(1), (2)(a)–(b) (Scot.).

<sup>74</sup> PRACTICE NOTE NO. 2 of 2003, *supra* note 58, at Appendix. Once the pursuer lodges the record, he lodges a motion imploring the Court to permit preliminary proof on certain delineated matters, allow proof, consent to issues for jury trial, or provide another special order. S.C.R. 43.6(5) (Scot.).

<sup>75</sup> PRACTICE NOTE NO. 2 of 2003, *supra* note 58, at app.

<sup>76</sup> S.C.R. 43.9(1) (Scot.).

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ments supporting the cash values for damages stated in the form.<sup>77</sup> The non-binding valuation statement must reflect a party's realistic value of the claim.<sup>78</sup> The statement and the supporting documents are filed with the court.<sup>79</sup> The pursuer first lodges his valuation statement eight weeks after the defender lodges his defenses,<sup>80</sup> while the defender lodges his valuation statement eight weeks after he receives the pursuer's statement.<sup>81</sup>

The valuation statement is a simple sheet laying out the method a party used to calculate the party's perceived monetary value of the case.<sup>82</sup> Valuation statements are submitted before the pretrial meeting is conducted.<sup>83</sup> The valuation procedure "is a significant provision which experience has shown has encouraged the early settlement of claims~~False~~"<sup>84</sup> Valuation statements, "no doubt primarily intended to aid settlement," surely facilitate resolution of personal injury actions because the mandatory statements reveal to the parties the exact amount a party is willing to accept to resolve the case.<sup>85</sup> For example, in an action where the pursuer valued her claim at £5,200<sup>86</sup> and the defender valued the pursuer's claim at £3,400,<sup>87</sup> the case settled for £3,400 immediately after the defender lodged his statement.<sup>88</sup>

The pretrial meeting occurs between the parties for the express purpose of trying to settle the claim.<sup>89</sup> At a minimum, the pretrial meeting should secure an agreement between the parties

<sup>77</sup> S.C.R. 43.9(3) (Scot.).

<sup>78</sup> PRACTICE NOTE No. 2 of 2003, *supra* note 58, at R. 43.9.

<sup>79</sup> S.C.R. 43.9(2) (Scot.).

<sup>80</sup> PRACTICE NOTE No. 2 of 2003, *supra* note 58, at app.

<sup>81</sup> *Id.*

<sup>82</sup> S.C.R. FORM 43.9 (2004) (Scot.), [http://www.scotcourts.gov.uk/session/rules/forms/form43\\_9.rtf](http://www.scotcourts.gov.uk/session/rules/forms/form43_9.rtf).

<sup>83</sup> PRACTICE NOTE No. 2 of 2003, *supra* note 58, at app.

<sup>84</sup> *Benson v. City of Edinburgh Dist. Council* [2004] ScotCS 215, *available at* [http://www.scotcourts.gov.uk/opinions/PD108\\_04.html](http://www.scotcourts.gov.uk/opinions/PD108_04.html); *See Easdon v. A Clarke Co. (Smithwick) Ltd.* [2006] ScotCS CSOH 12 (suggesting valuation statement intended to aid in case settlement, *available at* <http://www.scotcourts.gov.uk/opinions/2006csoh12.html>).

<sup>85</sup> *Id.*

<sup>86</sup> *Benson v. City of Edinburgh District Council* [2004] ScotCS CSOH 215, [2005] 2005 S.C. 24, *available at* [http://www.scotcourts.gov.uk/opinions/PD108\\_04.html](http://www.scotcourts.gov.uk/opinions/PD108_04.html).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> S.C.R. 43.10 (1) (Scot.) (meeting to occur four to five weeks before proof or trial); *cf. Zimmerman v. Armstrong* [2004] ScotCS CSOH 148, *available at* <http://www.scotcourts.gov.uk/opinions/pd21.html> (arguing meeting should occur immediately after defender lodges statement of valuation).

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on as many issues as possible to remove them from dispute.<sup>90</sup> Specifically, the rules demand that lawyers have access to the party (or a party's duly authorized agent) for the duration of the pretrial meeting for the purpose of consenting to and executing a settlement.<sup>91</sup>

iii. Comparisons & Contrasts: U.S. & Scottish Procedure  
     a. *Pleadings*

American civil actions uniformly proceed under the Federal Rules of Civil Procedure, which are similar to the Scottish Court of Session Rules.<sup>92</sup> American pleadings resemble Scottish optional pleadings because they are restricted to short and plainly stated assertions of the grounds for the court's jurisdiction, the claim for relief, the type of relief sought, and the factual basis of the claim.<sup>93</sup> Yet, Scottish optional pleadings contain greater factual articulation

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<sup>90</sup> S.C.R. 43.10(1) (Scot.).

<sup>91</sup> S.C.R. 43.10(4) (Scot.). A joint pretrial statement is submitted three weeks before the date of proof or trial. S.C.R. 43.10(2) (Scot.).

<sup>92</sup> The Federal Rules of Civil Procedure, supplemented by specific statutory enactments, provide the method for litigating all civil actions, but each district court may enact its own local rules that are not inconsistent with federal rules and law. U.S. CONST. art. III §§ 1, 2; 28 U.S.C. § 2071(b); FED. R. CIV. P. 83(a); see ROBERT A. CARP, ET. AL., *JUDICIAL PROCESS IN AMERICA* 23–56 (6th ed. 2004) (discussing history and origin of federal courts); GEORGE W. FIELD, *A TREATISE ON THE CONSTITUTION AND JURISDICTION OF THE COURTS OF THE UNITED STATES, ON PLEADING, PRACTICE AND PROCEDURE THEREIN, AND ON THE POWERS AND DUTIES OF COMMISSIONERS OF THE CIRCUIT COURTS, WITH FORMS FOR SAID COURTS AND COMMISSIONERS* (1883); *ORIGINS OF THE FEDERAL JUDICIARY* ESSAYS ON THE JUDICIARY ACT OF 1789 (Maeva Marcus ed., 1992); ERWIN C. SURRENCY, *HISTORY OF THE FEDERAL COURTS* (2d ed. 2002); Charles E. Clark & James William Moore, *A New Federal Civil Procedure*, 44 *YALE L.J.* 392, 392 (1935); John P. Frank, *Historical Bases of the Federal Judicial System*, 23 *IND. L.J.* 236, 236–70 (1948); Erwin C. Surrency, *A History of Federal Courts*, 28 *MO. L. REV.* 214, 214–44 (1963). The present federal judicial structure descends from a number of statutes enacted between 1887 and 1925. LARRY W. YACKLE, *FEDERAL COURTS* 42–3 (2d ed. 2003). The unification of practice before the federal courts occurred with the assistance of the congressionally-created Judicial Conference of the United States in 1922, the Administrative Office of United States Courts in 1939, and the Federal Judicial Center in 1967. See *id.* at 43; 28 U.S.C. §§ 331–333, 601, 620 (judicial conference, additional judicial council and conference of the federal circuits, and establishment of Administrative Office of the U.S. Courts); see also *FEDERAL JUDICIAL CENTER, DESKBOOK FOR CHIEF JUDGES OF U.S. DISTRICT COURTS* 25–38 (3d ed. 2003) (succinct description of material bodies involved in federal judicial administration).

<sup>93</sup> FED. R. CIV. P. 8(a); see FED. R. CIV. P. 8(b) (providing that defenses to claims be in the form of admissions or denials either generally or specifically to each claim asserted or indicate insufficient knowledge to admit or deny the assertion). Pleadings must be “simple, concise, and direct,” and no forms are prescribed for use by litigants in a civil action. FED. R. CIV. P. 8(e)(1). See *Conley v. Gibson*, 355 U.S. 41, 48 (1957) (describing content

of the basis for a claim than is required under American federal procedure.<sup>94</sup> The Scottish optional pleadings contain a succinct narration of the salient events giving rise to the litigation.<sup>95</sup> Scottish pleadings provide greater factual detail, which allows for superior disclosure of the basis of the dispute to the trial judge.<sup>96</sup> Disclosure to the trial judge of information sufficient to understand the basis of the dispute allows the judge to play a more active role in resolving the dispute between the parties.<sup>97</sup>

#### b. *Pretrial Conference*

This active judicial role is a further benefit of the Scottish optional procedure as evidenced by the use of the pretrial meeting as a settlement conference. American pretrial conferences convene primarily to address procedural issues.<sup>98</sup> Federal procedure does

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of pleadings under federal rules as notice pleading); CHARLES ALAN WRIGHT, *LAW OF FEDERAL COURTS* 467–77 (5th ed. 1994) (describing modern theory of pleading).

<sup>94</sup> Unlike the new optional procedural pleadings, an American litigant may make alternative legal claims for relief concerning the same claims, as well as assert as many claims as possible under law or equity regardless of their consistency with one another. FED. R. CIV. P. 8(e)(2). Every claim or defense must appear in a proscribed format including a caption indicating the name of the parties, name of the court, case number, and an appropriate title of the pleading with the contents of the pleading proceeding in numbered paragraphs. FED. R. CIV. P. 10(a)–(b). Additionally, unlike Scottish pleadings, defenses to a complaint may be raised by way of motion. FED. R. CIV. P. 12(b), (g).

<sup>95</sup> American actions, like their Scottish counterparts, begin with the filing and service of a complaint, accompanied by a summons, upon a defendant. FED. R. CIV. P. 3, 4 (filing of complaint commences civil action and summons must be presented to Clerk for signature). The issuance and service of a summons and complaint is followed by an answer by the defendant accompanied by any counterclaims with the plaintiff providing a reply to any of the defendant's counterclaims. FED. R. CIV. P. 7 (third-party and cross-claims complaints coupled with replies to these documents circumscribe all permissible pleadings in a federal action). See FED. R. CIV. P. 13 (discussing contents of counterclaims and cross-claims). Cf. FED. R. CIV. P. 15 (describing amendment of pleadings and permitting supplemental pleading upon litigant's motion coupled with occurrence underlying amendment which happened after prior filing pleading). Cf. FED. R. CIV. P. 5(e) (filing with court defined). See 28 U.S.C. §§ 81–144, 1330–1369 (2000) (composition and jurisdiction of federal district courts).

<sup>96</sup> See FED. R. CIV. P. 12(e) (indicating that litigants may request opposing party to clarify statements in writing if original pleading is vague or ambiguous).

<sup>97</sup> The factual assertions presented in the pleadings must be supported by medical evidence. *Clifton v. Hays PLC*, [2004] G.W.D. 2–23, available at <http://www.scotcourts.gov.uk/opinions/PD485.html>.

<sup>98</sup> FED. R. CIV. P. 16(a)(1)–(5), (c) (calling conferences for purposes of expediting the disposition of the case, controlling the procedural management of the case, discouraging protracted wasteful pretrial tactics, improving conduct of the trial by making parties prepare more thoroughly, and facilitating settlement of the action); see also D. MARIE PROVINE, *FEDERAL JUDICIAL CENTER REPORT: SETTLEMENT STRATEGIES FOR FEDERAL*

permit the discussion of settlement during the pretrial conference, but the sole purpose of the conference is not the settlement of the case.<sup>99</sup> American procedure lacks the efficiency of the Scottish procedure because federal judges initiate multiple pretrial conferences during the discovery process.<sup>100</sup> A final pretrial conference occurs shortly before trial and results in parties formulating a plan for trial, which addresses the introduction of evidence at trial.<sup>101</sup> Only after multiple pretrial hearings, the completion of a time-consuming discovery process, and resolution of dispositive motions, is the case ready for trial.<sup>102</sup>

### c. *Scheduling Orders*

The timetable ordered by the Lord Ordinary in Scottish optional procedure ensures expeditious resolution of the case. American federal judges are also authorized to enter scheduling orders establishing due dates for the filing of motions, amendment of pleadings, and deadlines for completion of discovery.<sup>103</sup> Entry of an initial scheduling order is mandatory and occurs after the parties have completed a discovery conference outside the presence of the judge.<sup>104</sup> The scheduling orders, coupled with pretrial orders, provide American litigants with timeframes for completing discovery actions and disposition of pending motions, and prescribe cer-

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DISTRICT JUDGES (Federal Judicial Center 1986) (discussing different strategies and dilemmas faced by trial judge in actively promoting settlement of case pursuant to Rule 16).

<sup>99</sup> See FED. R. CIV. P. 16 advisory committee's note (1983); 97 F.R.D. 165, 168–71 (1983), *reprinted in* FED. R. CIV. P. as amended in 1983 (West 2004) (indicating success of Rule in facilitating settlement but failure in provision of case management leading to extensive revision of Rule to provide effective case management); Advisory Committee's Note on the 1993 Amendment to Rule 16, 146 F.R.D. 401, 427–31 (1993), *reprinted in* WEST, FEDERAL RULES OF CIVIL PROCEDURE 113–14 (2004) (declaring addition of paragraph 6 in section c of rule to emphasize major importance of judge controlling discovery process); David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice Of Rulemaking*, 137 U. PA. L. REV. 1969, 1981, 1986–87 (1989) (demonstrating that original 1938 Rule specifically omitted settlement and controversy over inclusion of settlement in 1983 Amendment); *see also* 6A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1522 (2d ed. 1990) (describing controversy about role of judge in facilitating judgment and provision's inclusion into Rule through 1983 Amendment).

<sup>100</sup> FED. R. CIV. P. 26–37. *See generally* JAY E. GRENIG & JEFFREY S. KINSLER, *Handbook Of Federal Civil Discovery And Disclosure* (2d ed. 2002) (detailing discovery process and rules governing discovery in federal courts).

<sup>101</sup> FED. R. CIV. P. 16(d).

<sup>102</sup> FED. R. CIV. P. 40.

<sup>103</sup> FED. R. CIV. P. 16(b).

<sup>104</sup> *Id.* FED. R. CIV. P. 26(f).

tain procedural elements of the conduct of the trial.<sup>105</sup> Yet, these scheduling orders do not resolve the case through settlement fourteen weeks after the case is filed nor result in trial of the action twelve months after initiating the action, as under the Scottish optional procedure.

#### d. *Valuation Statements*

A feature unfamiliar to American procedure is the requirement to exchange valuation statements. This requirement compels each side to place cash values on the injuries sustained by the pursuer. In effect, the valuation statement is the first offer by each side to settle the case. Scottish procedure compels litigants to place their initial offers on the table for open consideration. This open disclosure permits the Lord Ordinary to play an active role in facilitating settlement of the case at the pretrial meeting. American federal judges on the other hand are unable to make a forthright attempt to fairly settle the case on the basis of significant disclosure of the circumstances under which the injuries occurred and the monetary compensation expected by the injured party. Thus, American procedure denies federal judges the tools to effectively engage parties in settlement discussions at the pretrial stage of litigation.<sup>106</sup>

The new optional procedure decreases the costs incurred by litigants on both sides of the case. The reduction in cost to litigants also permits conservation of court time for cases incapable of amicable resolution. Thus, the citizenry at large receives the advantage of lower costs to operate the court system because costly events, like empanelling a jury, are reserved to those cases already known to require such expenses.

#### iv. The Modern Civil Jury in the Court of Session

Both American and Scottish law preserve trial by jury in civil cases. Yet, the Scottish optional procedure may be a further step

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<sup>105</sup> FED. R. CIV. P. 16(c).

<sup>106</sup> One federal judge, speaking of judicial involvement in the pretrial process, asserted that “[a]ctive judicial management has been attacked by commentators who fear it will undermine the adjudicatory process. But the critics of so-called managerial judges do not appear to have considered the benefits of management in improving the quality of adjudication, and in particular the quality of jury trials.” William W. Schwarzer, *Reforming Jury Trials*, 132 F.R.D. 575, 577 (1991).

toward entirely abolishing the civil jury in Scotland.<sup>107</sup> By accelerating the time to adjudicate the action and mandating settlement discussions, the new optional procedure advocates resolution of claims outside the ambit of a jury trial. The procedure's allowance of trial by jury, rather than mandating the pursuer waive this right, appears to reflect the perception of the jury as a tool in securing faster settlement.<sup>108</sup> A brief description of the civil jury in Scottish procedure illustrates why Scottish lawyers perceive the jury as a secondary method for resolution of disputes.

a. *Statutory Enactments Limiting Availability of Trial By Jury*

Trial by jury is not a native Scottish institution; as Lord Abernethy asserted, “[j]ury trials in civil actions were imported into our law from England by the Jury Trials (Scotland) Act 1815 and have remained part of our law ever since.”<sup>109</sup> Before 1815, the last time a civil jury heard a Scottish case was in the early 1600s.<sup>110</sup> Trial by jury in civil cases was reintroduced to Scottish litigants for a seven year period through the Jury Court.<sup>111</sup> Despite the jury's absence for 200 years, the Jury Court proved popular and caused the Westminster Parliament to enact the Jury Trials (Scotland) Act 1819.<sup>112</sup> Although the 1819 Act permanently established the Jury Court, it was abolished in 1830 by transference of its jurisdiction to the Court of Session.<sup>113</sup> Five years before the abolition of the Jury Court, an Act of Sederunt (rules promulgated under the Court of

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<sup>107</sup> On the greater role of the Lord Ordinary in dispensing with cases, compare Jeroen M.J. Chorus, *The Judge's Role in the Conduct of Civil Proceedings: Some Continental and Scottish Ideas from Before 1800*, in *COMPARATIVE AND HISTORICAL ESSAYS IN SCOTS LAW: A TRIBUTE TO PROFESSOR SIR THOMAS SMITH*, Q.C. 43–46 (D.L. Carey Miller & D.W. Meyers eds., 1992) with Rachel Wadia, *Judicial Case Management: The Quiet but Significant Revolution*, in 5.4 HUME PAPERS ON PUBLIC POLICY: THE REFORM OF CIVIL JUSTICE 66, 66–79 (1997) (asserting theory proved by Scots system that judicial intervention propels cases toward settlement).

<sup>108</sup> See HAJDUCKI, *supra* note 57, at 58 (noting mere threat of trial by jury may induce a defendant into settlement). R

<sup>109</sup> *Girvan v. Inverness Farmers Dairy (No 2)* [1996] S.C. 134 (Inner House Ex. Div.) *aff'd*, 1998 S.C. 1 (H.L.).

<sup>110</sup> See generally IAN DOUGLAS WILLOCK, *THE ORIGINS AND DEVELOPMENT OF THE JURY IN SCOTLAND* (The Stair Society 1996).

<sup>111</sup> HAJDUCKI, *supra* note 57, at 6. R

<sup>112</sup> The Jury Trials (Scotland) Act, 1819, 59 Geo. 3. c. 35; WILLOCK, *supra* note 110, at 259. R

<sup>113</sup> WILLOCK, *supra* note 110, at 262; Court of Session Act, 1830, 11 Geo. 4 & 1 Will. 4 c. 69, § 2. R

Session's own rulemaking authority)<sup>114</sup> limited the availability of trial by jury in civil actions to a handful of enumerated causes.<sup>115</sup>

In 1988, the enumerated causes or types of actions where trial by jury was available were further limited.<sup>116</sup> The enumerated causes upon which a party may seek a jury trial are an action for damages for personal injuries; an action for libel or defamation; an action founded on delinquency or quasi-delinquency, where the conclusion is for damages only and expenses; an action for reduction on the ground of incapacity, essential error, or force and fear; and such an action which has been ordered by the Lord Ordinary to be tried by jury.<sup>117</sup>

In addition to statutory restriction of the availability of trial by jury, litigants themselves may prohibit a jury trial.<sup>118</sup> The pursuer retains the right to trial by jury unless the defender proves that "special cause" exists to deny the pursuer a trial by jury.<sup>119</sup> "What constitutes special cause will vary with the facts and circumstances of each case."<sup>120</sup> The Lord Ordinary possesses great discretion in finding special cause to deny the pursuer a jury trial.<sup>121</sup> Yet, this discretion is not unfettered as the Inner House of the Court of Session recently articulated:

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<sup>114</sup> Court of Session Act, 1988, c. 36, § 5.

<sup>115</sup> Court of Session Act, 1825, 6 Geo. 4, c.120. Popular enthusiasm for the mode of trial by jury caused the enactment of the 1907 Sheriff Courts (Scotland) Act, which extended trial by jury to the inferior Sheriff Courts. Sheriff Courts (Scotland) Act, 1907, c. 51. Yet, this waive of enthusiasm for trial by jury would subside by the 1980's when the Scots abolished trial by jury in the lower Sheriff Courts. Law Reform (Miscellaneous Provisions) (Scotland) Act, 1980, c. 55, §11. The abolishment of trial by jury in the lower courts was quickly followed by relegation of jury trials solely to the Outer House of the Court of Session in Edinburgh. Court of Session Act, 1988, c. 36, §§ 9(b), 11. See G. CAMERON & R. JOHNSTON, *PERSONAL INJURY LITIGATION IN THE SCOTTISH COURTS: A DESCRIPTIVE ANALYSIS*, The Scottish Office Central Research Unit 10 (1995). In 1939, trial by jury in all civil matters was suspended pending the resolution of the Second World War. Administration of Justice (Emergency Provision) (Scotland) Act, 1939, 2 & 3 Geo. 6, c. 79, § 4. In the 1950s, trial by jury in civil actions was reinstated. HAJDUCKI, *supra* note 57, at 10.

<sup>116</sup> Court of Session Act, 1988, c. 36, § 11.

<sup>117</sup> *Id.*

<sup>118</sup> S.C.R. 22.3(5)(a)(v).

<sup>119</sup> *Annandale v. Santa Fe Int'l Serv. Inc.* [2006] ScotCS CSOH 52, available at <http://www.scotcourts.gov.uk/opinions/2006csoh52.html>. A pursuer seizes his statutory right to trial by jury by filing a motion craving the court to allow issues for jury trial. S.C.R. 22.3(5)(a)(v). Parties may consent to trial by jury (if the summons raises one of the "enumerated causes") at the close of the record, or if the parties disagree on trial by jury, then a motion is made to place the matter on the "By Order (Adjustment) Roll." S.C.R. 22.3(5)(b).

<sup>120</sup> *Annandale*, [2006] ScotCS CSOH 52.

<sup>121</sup> Court of Session Act, 1988, c. 36, § 9(b).

The Lord Ordinary must, however, correctly identify the special cause and, in particular, he must find it established by reference to the circumstances of the case he is considering and not to some consideration of a general character. There must be facts in the case that can reasonably bring it into the region of special cause. There must, in other words, also be material before the Lord Ordinary to justify his determination that special cause has been established.<sup>122</sup>

Two examples from recent cases illustrate what constitutes special cause.<sup>123</sup> Recently, a Lord Ordinary found special cause to deny a trial by jury in a personal injury action where an administrative agency was a party to the case, making it “impossible to avoid bringing up the question of insurance in the jury’s presence.”<sup>124</sup> Additionally, the action was unsuitable for jury trial because proper application of a statutory exception to liability caused “a possible source of confusion for the jury, . . . as a difficult question of mixed fact and law.”<sup>125</sup> As a result, the Lord Ordinary found the case as a whole too complex for a jury to deliberate and resolve.<sup>126</sup>

In a second case, a Lord Ordinary permitted a trial by jury where the pursuer suffered numerous injuries requiring expert medical testimony.<sup>127</sup> In addition to digesting the medical evidence, the jury would determine future lost earning capacity and a pension claim.<sup>128</sup> The Lord Ordinary ruled that all of these considerations necessitating juror comprehension to resolve the case were not so complex as to preclude a jury from resolving such claims.<sup>129</sup>

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<sup>122</sup> *Morris v. Fife Council* [2004] ScotCS A688/02 (Inner House, Ex. Div.), available at <http://www.scotcourts.gov.uk/opinions/A688.html>.

<sup>123</sup> See also *Cheesman v. Int'l Travel Serv. Ltd.* [2005] ScotCS CSOH 164 (Outer House), available at <http://www.scotcourts.gov.uk/opinions/csoh164.html>; *Scott v. Vieregge* [2005] ScotCS CSOH 42, available at <http://www.scotcourts.gov.uk/opinions/2005csoh42.html>.

<sup>124</sup> *McFarlane v. Thain* [2005] ScotCS CSOH 22, available at <http://www.scotcourts.gov.uk/opinions/CSOH22.html>, *aff'd* [2006] ScotCS CSIH 3 (Inner House), available at <http://www.scotcourts.gov.uk/opinions/2006CSIH3.html>.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* See also Andrew M. Hajducki, *Insurers, Indemnifiers and the Jury*, 8 S.L.T. 49, 49–52 (2005) (discussing and critiquing the decision).

<sup>127</sup> *Stewart v. Nicoll*, 2003 S.L.T. 843, 845 (Outer House), available at [http://www.scotcourts.gov.uk/opinions/A333\\_00.html](http://www.scotcourts.gov.uk/opinions/A333_00.html).

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

b. *Case Law Attacking the Civil Jury in Scotland*

As illustrated by the preceding discussion, the availability of trial by jury is restricted by statute and by judicial authority. These restrictions did not lead to the abolishment of the civil jury, but civil juries faced another attack on their existence because of the allegation that Scotland's modern civil jury system deprives a litigant of his right to fair process under Article 6(1) of the European Union's Convention on Human Rights.<sup>130</sup> A recent case, decided in the Extra Division of the Inner House, arose out of an action for damages for personal injuries sustained from a motorcycle accident.<sup>131</sup>

The defender argued that use of the jury violated Article 6(1) of the Human Rights Convention on six separate grounds.<sup>132</sup> The first ground for objection rested on the procedural inability to lay before the jury, as one could before a judge sitting without a jury, comparable cases and amounts of awards in damages.<sup>133</sup> Second, the jury was unskilled, insensitive, and not properly instructed in assessing damages.<sup>134</sup> Third, an award of damages by a jury itself is unfair because there is no likelihood that an appeal of the jury decision will be successful.<sup>135</sup> Fourth, the unfairness of trial by jury could not be remedied through the appellate process.<sup>136</sup> Fifth,

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<sup>130</sup> Article 6(1) of the European Convention on Human Rights provides:

Article 6 – Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law

Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11, *available at* <http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm>.

<sup>131</sup> *Heasman v. J M Taylor & Partners*, [2002] ScotCS CSIH 63, 2002 S.C. 326 (Inner House Ex. Div.), *available at* [http://www.scotcourts.gov.uk/opinions/A2703\\_00.html](http://www.scotcourts.gov.uk/opinions/A2703_00.html) (liability was admitted and defenders objected before jury trial commenced).

<sup>132</sup> *Id.* at 2002 S.C. 328–29.

<sup>133</sup> *Heasman*, 2002 S.C. at 328–29.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

proof before a judge, rather than a jury, permitted a “legitimate expectation that an award would fall within the well understood parameters for awards in similar cases, so that it was open to the defenders to protect their position by making a tender.”<sup>137</sup> This legitimate expectation is part of the inherent fairness of the judicial process. Sixth, juries do not give reasons for their decisions and only articulate awards with no explanation.<sup>138</sup>

Lord Coulsfield delivered the opinion for the court.<sup>139</sup> His Lordship surveyed the European Court of Human Rights’ jurisprudence regarding trial by jury in criminal and civil contexts to address the defender’s objections. Specifically, his Lordship found only the objection regarding a jury’s failure to give reasons for its award as possibly sufficient to raise a claim under Article 6 of the Convention. Ultimately, Lord Coulsfield concluded that the Convention’s jurisprudence possessed no requirement for a reasoned written decision in every legal case.<sup>140</sup>

Particularly, his Lordship focused on *Tolstoy v. United Kingdom*,<sup>141</sup> a civil case decided by the European Court of Human Rights involving libel and the assessment of a large amount of damages. The case concerned the circulation of a pamphlet written by a historian to members of Parliament and the House of Lords, asserting that the Warden of Winchester College, Lord Aldington, committed atrocious, unpunished war crimes.<sup>142</sup> The case went to trial before a jury of twelve who ruled for Lord Aldington, finding the charge of libel substantiated, and awarded damages three times higher than any such award in English legal history.<sup>143</sup> The European Court of Human Rights dismissed a contention of the defendant that the jury trial process was unfair under Article 6.<sup>144</sup>

Lord Coulsfield asserted that the *Tolstoy* decision was not directly applicable, but illustrated that the European Court dismissed a defendant’s claim that trial by jury was a procedural device that deprived an individual of his Article 6 Convention right to fair pro-

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<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> Three opinions were delivered by the three-judge panel hearing the case. Lord Coulsfield’s opinion was agreed to by the other two Lords, Hamilton and Johnston, who heard the appeal. *Id.* at 347, 350–51.

<sup>140</sup> *Id.*

<sup>141</sup> 20 Eur. Ct. H.R. 442 (1995).

<sup>142</sup> *Id.* at 447–48.

<sup>143</sup> *Id.* at 449–51.

<sup>144</sup> *Id.* at 459–60 (Court found no violation of Article 6.).

cess.<sup>145</sup> After detailing the procedures utilized in Scotland for jury trial and appeal, his Lordship concluded that trial by jury was not inherently unfair and noted that change in the law concerning jury trial is a matter of public policy to be determined by the legislature.<sup>146</sup> The Court remanded the case to the Lord Ordinary to allow trial by jury.<sup>147</sup>

The Scottish civil jury survived another assault. The refusal of Lord Coulsfield to judicially abolish or further restrict the availability of trial by jury illustrates the Scots' belief that trial by jury is an effective means to resolve disputes. This belief is further evidenced by the fact that the new optional procedure, enacted after Lord Coulsfield's decision, permits the pursuer to elect the simplified procedure without waiving his right to trial by jury. Had the new optional procedure followed the prior precedent of the 1994 optional procedure, a pursuer would lose the right of trial by jury by electing the simplified procedure.<sup>148</sup>

### c. *Procedure to Secure a Jury Trial*

If a party who pleads an enumerated cause survives an inquiry into whether special cause exists and does not run afoul of any European Convention rights, then the Lord Ordinary will order issues and counter-issues to be drawn up.<sup>149</sup> Issues are formal questions to be placed before the jury for resolution.<sup>150</sup> The Lord Ordinary continues to play an active role in approving the questions a jury will be responsible for resolving. Within fourteen days after the Lord Ordinary grants an interlocutor allowing issues for trial by jury, the pursuer lodges his proposed issues with the court.<sup>151</sup> The defender may lodge proposed counter-issues seven days after the pursuer lodges his proposed issues.<sup>152</sup> After the expiration of the seven-day period for lodging a proposed counter-issue, the pursuer

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<sup>145</sup> *Heasman v. J M Taylor & Partners* [2002] ScotCS CSIH 63, 2002 S.C. 326, 338–39 (Inner House Ex. Div.), available at [http://www.scotcourts.gov.uk/opinions/A2703\\_00.html](http://www.scotcourts.gov.uk/opinions/A2703_00.html).

<sup>146</sup> *Id.* at S.C. 339–40.

<sup>147</sup> *Id.*

<sup>148</sup> *Hajducki*, *supra* note 57, at 30 (noting that pursuer waived right to jury trial, but defender retained ability to request or also waive trial by jury). R

<sup>149</sup> Court of Session Act, 1988, c. 36, §§ 9(b), 11.

<sup>150</sup> See THE LAW SOCIETY OF SCOTLAND, *supra* note 23, at 84. R

<sup>151</sup> S.C.R. 37.1(1).

<sup>152</sup> S.C.R. 37.1(4).

must file a motion to approve the proposed issue.<sup>153</sup> Within seven days of the pursuer's motion, a motion to approve the proposed counter-issue must be lodged.<sup>154</sup> The Lord Ordinary then must approve both motions in order for the cause to proceed to the jury trial diet and issuance of a jury precept.<sup>155</sup> The jury trial diet is the date set by the court for the jury trial to begin.<sup>156</sup> A jury precept is the order by the court for the case to proceed to trial by jury.<sup>157</sup>

d. *Comparisons & Contrasts Between U.S. & Scottish Procedure*

The Scottish view of trial by jury differs greatly from the American perception.<sup>158</sup> Americans favorably view the civil jury as an effective arbiter of disputes.<sup>159</sup> The Federal Rules of Civil Procedure reiterate the Seventh Amendment's preservation of trial by jury in civil cases.<sup>160</sup> Yet, the right of trial by jury is not absolute because a party must demand in his pleadings that a jury resolve all issues in a case or limit the jury's deliberations to particular issues asserted in the pleadings.<sup>161</sup> The litigants possess the ability to limit the questions resolved by the jury, rather than solely by the judge, as in the Scottish system. Further, the right to a jury trial may be waived and lost if not properly procedurally demanded.<sup>162</sup> Also, the litigants may consent to trial of a civil suit by a judge alone even if a demand for a jury trial is properly filed.<sup>163</sup> These minor procedural devices bear little similarity to the impediments placed upon Scottish litigants to secure a trial by jury.

The Scottish notion of special cause is not entirely unfamiliar to American federal judges. Under the Seventh Amendment, a ju-

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<sup>153</sup> S.C.R. 37.1(6).

<sup>154</sup> S.C.R. 37.1(7).

<sup>155</sup> S.C.R. 37.2, 37.1(9)–(10).

<sup>156</sup> See THE LAW SOCIETY OF SCOTLAND, *supra* note 23, at 49.

<sup>157</sup> See *id.* at 126.

<sup>158</sup> Valerie P. Hans, *Attitudes Toward the Civil Jury: A Crisis of Confidence?*, in VERDICT: ASSESSING THE CIVIL JURY SYSTEM 248–81 (Robert E. Litan ed., 1993) (noting various studies and polls indicate Americans' strong support of the civil jury).

<sup>159</sup> *Id.*

<sup>160</sup> FED. R. CIV. P. 38(a) (ensuring inviolability of right of jury trial). See 28 U.S.C. §§ 1330–1369 (2000) (detailing the jurisdiction of federal courts); AM. LAW INST., FEDERAL JUDICIAL CODE REVISION PROJECT 603–612 (2004) (describing three tier jurisdiction of the federal courts as established by the constitution, federal statute, and judicial decisions); JAMES P. GEORGE, THE FEDERAL COURTHOUSE DOOR: A FEDERAL JURISDICTION GUIDE (2002).

<sup>161</sup> FED. R. CIV. P. 38(b).

<sup>162</sup> *Duignan v. United States*, 274 U.S. 195, 199 (1927); FED. R. CIV. P. 38(d).

<sup>163</sup> FED. R. CIV. P. 39(a).

risprudence centered upon the “Ross test” decides the availability of trial by jury to resolve certain types of civil actions.<sup>164</sup> Indeed, the question of whether civil actions are too complex for jury resolution has arisen in America, but federal judges have always favored resolution of the case by the jury rather than by the court.<sup>165</sup>

The American civil jury, like its Scottish counterpart, has been criticized.<sup>166</sup> Proposals for reform of the jury system and comparative studies by Americans abound.<sup>167</sup> One federal judge wrote to his colleagues asserting, “[t]he American jury system is dying—more rapidly on the civil than on the criminal side of the courts and more rapidly in the federal than in the state courts—but dying nonetheless.”<sup>168</sup> Others claim that ADR mechanisms have contributed to the erosion of trial by jury in civil cases.<sup>169</sup> Despite these criticisms, calls for reform, and suggestions that trial by jury is in

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<sup>164</sup> *Ross v. Bernhard*, 396 U.S. 531 (1970); Rachael E. Schwartz, “*Everything Depends on How You Draw The Lines*”; *An Alternative Interpretation of the Seventh Amendment*, 6 SETON HALL CONST. L.J. 599 (1996).

<sup>165</sup> See generally ELLEN E. SWARD, *THE DECLINE OF THE CIVIL JURY* 157-208 (2001) (describing American jurisprudence affecting Seventh Amendment right to trial by jury); George K. Chamberlin, Annotation, *Complexity of Civil Action as Affecting Seventh Amendment Right to Trial by Jury*, 54 A.L.R. 733 (2005).

<sup>166</sup> Valerie P. Hans & Andrea J. Appel, *The Jury On Trial*, in A HANDBOOK ON JURY RESEARCH § 3.01, §§ 3.01-05 (Walter F. Abbott & John Batt eds., 1999) (illustrating reforms enacted by various states to improve civil jury and arguing civil jury at a crisis).

<sup>167</sup> See, e.g., THE BROOKINGS INST., *CHARTING A FUTURE FOR THE CIVIL JURY SYSTEM* 13-32 (1992) (proposing numerous procedural reforms for civil juries); Justice Scott Brister, *The Decline in Jury Trials: What Would Wal-Mart Do?*, 47 S. TEX. L. REV. 191 (2005) (noting abolishment of civil jury trial abroad and unpredictability of American civil jury decisions as reason for trial by jury’s decline in America); Graham C. Lilly, *The Decline of the American Jury*, 72 U. COLO. L. REV. 53 (2001) (discussing costs associated with trial by jury, possible diminishing public opinion of jury as effective decision-maker, and reviewing various reform measures); Douglas G. Smith, *Structural and Functional Aspects of the Jury: Comparative Analysis and Proposals for Reform*, 48 ALA. L. REV. 441 (1997) (setting out numerous suggested reforms).

<sup>168</sup> William G. Young, *An Open Letter to U.S. District Judges*, 50 FED. LAW. 30, 31 (2003).

<sup>169</sup> Frederic N. Smalkin & Frederic N.C. Smalkin, *The Market for Justice, the “Litigation Explosion,” and the “Verdict Bubble:” A Closer Look at Vanishing Trials*, 2005 FED. CTS. L. REV. 8, available at <http://www.fclr.org/2005fedctslrev8.htm> (asserting alternatives to trial main cause for jury decline); Kent D. Syverud, *ADR and the Decline of the American Civil Jury*, 44 UCLA L. REV. 1935 (1997) (illustrating ADR one cause for decline of civil jury); The Ad Hoc Committee on the Future of the Civil Trial of the American College of Trial Lawyers, “*The Vanishing Trial: The College, the Profession, the Civil Justice System*,” 226 F.R.D. 414 (2005) (presenting statistical data on diminishing use of trial by jury in civil cases and noting ADR a cause for decline in jury as well as fear of jury verdict).

decline, the American civil jury remains a firmly embedded part of American litigation.<sup>170</sup>

c. Beneficial Scottish Reforms Federal Procedure  
Should Incorporate

The beneficial features of the Scottish optional procedure outlined above are the submission by parties of valuation statements, the pretrial meeting, and the timetable producing case resolution by settlement in fourteen weeks. Alteration of the contents of American pleadings to conform to the narrative factual style of the Scottish optional procedure proves too cumbersome. Although the Scottish pleading scheme succinctly discloses litigants' accounts of the occurrences giving rise to the litigation, American federal pleadings already possess brevity and conciseness. Therefore, incorporation of the Scots' optional form of pleading is not recommended.

A discussion of the technical aspects of how valuation statements, the pretrial meeting solely focused on settlement, and the expedited fourteen week timetable are translated into American federal procedure takes place in Part II of this article. Deferring the discussion of the integration of these Scottish reforms into American legal procedure permits an analysis of the Irish procedural innovations. From these innovations additional beneficial reforms are discovered whose assimilation into American federal procedure will require further discussion. Therefore, Part II of this article will present a single coherent optional procedure for federal personal injury cases.

B. *Irish Procedure*

The discussion now turns to the radical reforms recently accomplished in Ireland. The Irish incorporation of an extrajudicial board to provide litigants with suggested cash values for personal injury claims is reminiscent of the workers' compensation scheme presently in force in many American states.<sup>171</sup> The Irish method produces an independent assessment of damages according to a

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<sup>170</sup> Paul D. Carrington, *The Civil Jury and American Democracy*, 13 *DUKE J. COMP. & INT'L L.* 79, 87-94 (2003) (responding to various criticisms and showing why trial by jury remains central to American concept of adjudication).

<sup>171</sup> See, e.g., N.Y. *WORKERS' COMP. LAW* §§ 1-355 (McKinney 2004); *CONN. GEN. STAT.* §§ 31-275 to -355b (2003 & Supp. 2006).

methodology and compensation guidelines.<sup>172</sup> The assessment fosters amicable settlement of personal injury actions within an expedited timeframe.<sup>173</sup> The extrajudicial assessment of damages is coupled with a new method for litigating personal injury cases, reminiscent of Scottish reforms.<sup>174</sup> The extrajudicial assessment process and the new court procedure produce a single coherent system to resolve personal injury actions.

The Irish reforms discussed below represent a logical progression from the procedural reforms enacted in Scotland. However, while Scottish reformers restricted themselves to traditional civil procedural mechanisms, Irish innovators aimed to reduce the number of claims litigated in the courts by encouraging early settlement of a majority of cases, thereby efficiently disposing of those actions that failed to settle in the court system.<sup>175</sup> The goal of both systems is the reduction of litigations costs.<sup>176</sup>

### 1. *Personal Injuries Assessment Board Act of 2003*

Radical reform of the Irish system for adjudicating personal injury actions occurred in 2003 with the introduction of a Personal Injuries Assessment Board (the Board).<sup>177</sup> Introduction of the Board procedure occurred as a result of politics rather than law reform activities.<sup>178</sup> As a result, the chairman of the Bar Council, the head representative of all practicing barristers in Ireland, strongly criticized the Board procedure.<sup>179</sup> Political pressure built in Ireland because of the “cripplingly high rising insurance costs of recent years and . . . the very significant weight of litigation

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<sup>172</sup> See generally RAYMOND BYRNE & WILLIAM BINCHY, ANNUAL REVIEW OF IRISH LAW 2003 608–31 (2004).

<sup>173</sup> *Id.*

<sup>174</sup> See generally RAYMOND BYRNE & WILLIAM BINCHY, ANNUAL REVIEW OF IRISH LAW 2004 409–13 (2005).

<sup>175</sup> HILARY DELANY & DECLAN MCGRATH, CIVIL PROCEDURE IN THE SUPERIOR COURTS 627 (2d ed. 2005).

<sup>176</sup> *Id.*

<sup>177</sup> Personal Injuries Assessment Board Act, 2003 (Act No. 46/2003) (Ir.). For criticism of the Board as a fair and economic method for resolving personal injury claims, see Ward McEllin, *View Point*, 98 L. SOC'Y GAZETTE 8–9 (June 2004).

<sup>178</sup> Conor Maguire, *Proposed Changes to The Handling of Personal Injuries Claims*, 7 B. REV. 331 (2003).

<sup>179</sup> *Id.* at 331–32 (arguing that procedure would increase insurance costs and provide inadequate compensation).

costs.”<sup>180</sup> The establishment of the Personal Injuries Assessment Board sought to combat the high costs of insurance and litigation by providing an alternative method to expeditiously resolve claims through a predictable system.<sup>181</sup> Despite barristers’ concerns about the Board, early cases resolved through the Board’s process confirmed the efficiency of the system and its significantly reduced litigation costs.<sup>182</sup> An example of the success of the Board is a recent claim involving a retired man who tripped and fell in a public place breaking his hip and shoulder, which the Board procedure resolved in thirty-two weeks, costing litigants €1,936. Resolution of the same case in court would have taken three years and cost litigants €61,502.46.<sup>183</sup>

The Board’s membership reflects its political origins because both governmental and non-governmental individuals, competent in matters under the jurisdiction of the Board, populate the eleven-member body.<sup>184</sup> These eleven members are appointed to five-year terms by the Irish government’s Minister for Enterprise, Trade, and Employment.<sup>185</sup> In addition to the governmental actors on the Board, the Irish Congress of Trade Unions nominates two individuals for appointment to the Board by the Minister.<sup>186</sup> The Irish Business and Employers Confederation nominates one individual for appointment to the Board, while the Irish Insurance Federation, another non-governmental actor, nominates an additional

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<sup>180</sup> RAYMOND BYRNE & WILLIAM BINCHY, *supra* note 172, at 608; Bar Council, *Personal Injury Claims Bar Council Proposals for Court Reform*, 8 B. REV. 107, 107–08 (2003) (suggested reforms were ultimately adopted as new court procedures).

<sup>181</sup> See PERSONAL INJURIES ASSESSMENT BOARD, 2004 ANNUAL REPORT 7 (2005), <http://www.piab.ie/pdf/AnnualReportEnglish.pdf> [hereinafter PIAB 2004 ANNUAL REPORT]. The overall purposes of the Board are to resolve personal injury claims by assessment of such claims; produce and publish a “Book of Quantum,” which contains “general guidelines as to the amounts that may be awarded or assessed in respect of specified types of injury;” to undertake a “cost-benefit analysis” of the existing procedures for assessing compensation for personal injury claims; to collect and distribute data on personal injury claims; and to perform such other functions as are assigned to the Board. Personal Injuries Assessment Board Act, §54.

<sup>182</sup> See PERSONAL INJURIES ASSESSMENT BOARD, SAMPLE CASES, <http://www.piab.ie/samplecases.html> (last visited February 26, 2007).

<sup>183</sup> *Id.*

<sup>184</sup> Personal Injuries Assessment Board Act, § 56(1)–(2).

<sup>185</sup> *Id.* § 56(3), (6), (8). Governmental posts with membership on the Board are the Chief Executive of the Personal Injuries Assessment Board, the Director of Consumer Affairs, and the Consumer Director of the Irish Financial Services Regulatory Authority. *Id.*

<sup>186</sup> *Id.* § 56(5).

individual for appointment to the Board by the Minister.<sup>187</sup> Of the eleven seats on the Board, four are non-governmental individuals and seven are government post holders.<sup>188</sup> This distribution of seats between governmental and non-governmental actors is to ensure representation “of the interests of employees, employers, consumers and insurers, as well as” the government itself.<sup>189</sup>

a. How a Litigant Engages the Personal Injuries Assessment Board

The Board process applies to all “relevant actions,” or all civil actions involving claims for damages as a result of personal injury, which do not arise out of medical negligence.<sup>190</sup> Once an individual makes an application to the Board he is known as the claimant, while the defendant is called the respondent.<sup>191</sup> A claimant undertaking a relevant action may not initiate a civil case in court for personal injuries without first making an application to the Board.<sup>192</sup> An application to the Board must proceed in strict adherence to the Board’s procedures in order to request an assessment of the amount of damages a claimant should receive

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<sup>187</sup> *Id.*

<sup>188</sup> *Id.* § 56(5)–(6).

<sup>189</sup> 174 SEANAD DEB. col. 1209 (Nov. 20, 2003) at <http://historical-debates.oireachtas.ie/S/0174/S.0174.200311200005.html> (Minister for Enterprise, Trade, and Employment explaining proposed Act section by section). Purposefully excluded is a representative of the legal profession. *See* 174 SEANAD DEB. col. 1321–23 (Nov. 24, 2003) (discussing and rejecting amendment to Act providing for of legal profession’s representative membership on the Board).

<sup>190</sup> Personal Injuries Assessment Board Act, 2003 (Act No. 46/2003) (Ir.) §§ 2–4, 9, 11; DELANY & MCGRATH, *supra* note 175, at 630. Property damages are also within the Board’s jurisdiction if the damage resulted from the same act causing personal injury. Personal Injuries Assessment Board Act, § 4(1)(b). Excluded from the Personal Injuries Assessment Board’s jurisdiction are all claims involving “bona fide” actions based upon other theories seeking damages or alternate recovery based upon non-personal injury claims, applications for compensation for personal injuries incurred by a member of the Irish National Police, any action alleging breach of the Constitution of Ireland, and claims for breach of the European Convention on Human Rights pursuant to section 3 of the European Convention on Human Rights Act, No. 20, 2003. *Id.* § 4(1)(b)(i)–(iv).

<sup>191</sup> Personal Injuries Assessment Board Act § 4.

<sup>192</sup> Personal Injuries Assessment Board Act, § 9–10, 12; DELANY & MCGRATH, *supra* note 175, at 629. *Cf.* Campbell v. O’Donnell, [2005] I.E.H.C. 266 (H. Ct.) (Ir.), available at <http://www.bailii.org/ie/cases/IEHC/2005/266.html> (last visited Feb. 16, 2006) (ruling action against Motor Insurers Bureau of Ireland must be pursued through Personal Injuries Assessment Board).

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according to the specific guidelines and schedules established by the Board.<sup>193</sup>

A claimant is obligated by law to initially file a relevant action with the Board.<sup>194</sup> In order to secure a Board assessment of damages a claimant must file a statement of claim, which includes:

- 1) a letter delivered by the “claimant, to the person or persons whom he or she believes to be liable to pay compensation to him or her in respect of the claim, notifying the person or persons of his or her relevant claim and seeking the payment of compensation;”
- 2) copies of all other communications between the claimant and the respondent concerning the claim;
- 3) a report by a treating “medical practitioner” concerning the injuries suffered by the claimant; and
- 4) documents proving loss or damage relating to special damages claims.<sup>195</sup>

The claimant may also submit any other relevant documents relating to the claim, and must produce additional documents upon the written request of the Board or any of its staff.<sup>196</sup>

Once a claimant makes an appropriate submission, the Board issues a notice to the respondent querying whether the respondent consents to the assessment of damages in the action by the Board.<sup>197</sup> If the respondent does not consent to an assessment of the amount of damages by the Board, then the Board issues an authorization to the claimant to initiate a personal injury action in court.<sup>198</sup> A civil action initiated in this manner is governed by the new court procedures described in the next section of this article.

Should the respondent consent to an assessment or fail to reply to the Board’s query within the time prescribed in the Board’s

<sup>193</sup> Personal Injuries Assessment Board Act, §§ 10(b), 11, 20(1).

<sup>194</sup> *Id.* §§ 9–11.

<sup>195</sup> Personal Injuries Assessment Board Act, § 11(3)(a)–(c). On the role of and right to legal representation during the Board’s assessment, see *O’Brien v. Pers. Injuries Assessment B.* [2005] I.E.H.C. 100 (H. Ct.) (Ir.), available at <http://www.bailii.org/ie/cases/IEHC/2005/100.html> (last visited Feb. 16, 2006).

<sup>196</sup> Personal Injuries Assessment Board Rules, 2004. Rule 3(1)(c)(v)–(vi) (2004), available at <http://www.piab.ie/rules.html>.

<sup>197</sup> Personal Injuries Assessment Board Act, § 13 (respondent must consent to Board in writing).

<sup>198</sup> *Id.* § 14(1)(2)–(4). *Cf. id.* § 15 (describing similar procedure for multiple respondents).

original notice, the Board then makes an assessment of damages.<sup>199</sup> In either case, the Board retains discretionary authority to refuse to provide or discontinue an assessment of damages based on specific statutory reasons.<sup>200</sup> The Board makes an assessment of damages when none of the statutory impediments are present.<sup>201</sup>

b. Procedure for Making An Assessment of Damages

For the purpose of making the assessment the respondent is presumed “fully liable to the claimant.”<sup>202</sup> The standard for the assessment of damages must be in accord with guidelines set down by the *Book of Quantum* with “reference to the same principles governing the measure of damages in the law of tort and the same enactments as would be applicable in an assessment of damages were proceedings to be brought in relation to the relevant claim concerned.”<sup>203</sup> The *Book of Quantum* is promulgated by the Board and sets out the method by which an assessment of damages is conducted.<sup>204</sup>

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<sup>199</sup> *Id.* § 14(1). The respondent’s consent to a Board assessment of damages does not imply an admission of liability and may not be introduced against the respondent in further proceedings as evidence of culpability. *Id.* § 16.

<sup>200</sup> *Id.* § 17. These reasons are nonexistence of significant case law or settlements concerning the particular personal injuries suffered by the claimant; the complexity of the claimant’s personal injuries, including determination of the effect of preexisting physical conditions or multiplicity of injuries previously suffered by the claimant; the difficulty in determining damages for physiological injury; if the “aggravated or exemplary damages are bona fide. . . . sought to be recovered in the relevant claim;” if trespass to the person is the sole basis of the relevant claim; the severity of the claimant’s injuries are such that an early trial would be ordered because of the imminence of the claimant’s death; extension of the time for completing an assessment to account for long term effect of injuries; conflict of interest of the guardian of the claimant or respondent necessitating replacement unlikely achievable in a reasonable time; or the claim stated is of a sort that the Board, with the consent of the Minister for Enterprise, Trade and Employment and the Minister for Justice, Equality and Law Reform, deems “there to be other good and substantial reasons for its not arranging the making of such an assessment.” *Id.* § 17(1)(b)(i)–(v) (Board must provide its opinion of the existence of any of these statutory conditions in writing to parties).

<sup>201</sup> An additional statutory ground for denying claimant an assessment is failure of the claimant or respondent to pay required charges (“fees”). *Id.* §§ 17(3), 22(2), (5).

<sup>202</sup> Personal Injuries Assessment Board Act, § 20(1).

<sup>203</sup> *Id.* § 20(4). For criticism of this standard as not providing for just compensation, see Robert Pierse, *Guessing Damages in Personal Injury Cases—A Practitioner’s View*, 23 IR. L. TIMES 43, 43–5 (2005). On the law of torts generally, see PHILIP BURKE & VAL CORBETT, *ESSENTIAL LAW TEXTS THE LAW OF TORTS* (2003); BRYAN M.E. MCMAHON & WILLIAM BINCHY, *LAW OF TORTS* (3d ed. 2000).

<sup>204</sup> BOOK OF QUANTUM 3 (2004), <http://www.piab.ie/pdf/BookofQuantum.pdf>.

The Board delegates the actual assessment to one or more assessors who are employees of the Board who may utilize “retained experts” in rendering an assessment.<sup>205</sup> The assessor renders an assessment based solely upon the documents submitted by the claimant, as well as any additional documents requested by the assessor from the claimant, respondent, any state agency, or any other third party.<sup>206</sup> Furthermore, the assessor may access governmental data on the claimant’s amount of income for the limited purpose of determining financial loss.<sup>207</sup> Should any party refuse to provide information requested by the assessor, the assessor may apply for a court order to force production of the requested information.<sup>208</sup>

#### i. Mechanics of the Assessment

An assessment of damages includes a sum to compensate for pain and suffering (general damages) as well as a sum (special damages) for “loss of enjoyment of life, specific losses such as past loss of earnings and medical bills, future cost of medical care and loss of earnings into the future caused by the injury.”<sup>209</sup> The appropriate range of damages is established by identifying the category of the injury and the severity of the injury as evidenced by medical reports.<sup>210</sup> Next, an assessor ascertains, with due regard for the effect of multiple injuries, the range of damages indicated in the *Book of Quantum*.<sup>211</sup>

There are four main categories of injuries in the *Book of Quantum* that represent regions of the human body.<sup>212</sup> An assessor identifies the main body region of the injury in the *Book of*

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<sup>205</sup> Personal Injuries Assessment Board Act, § 20(2), (3). *Cf. id.* § 80 (describing who may be retained as experts). The final assessment of damages issued to the parties by the assessor may not be paid in installments. *Id.* § 21(4).

<sup>206</sup> *Id.* §§ 21, 23, 26. If the respondent questions the medical statement submitted by claimant, the assessor may require claimant to submit to an additional medical examination by an independent medical expert. *Id.* § 24.

<sup>207</sup> *Id.* § 28.

<sup>208</sup> *Id.* § 26 (also criminalizing failure to comply). *See* *Mulkern v. Flesk* [2005] I.E.H.C. 48 (H. Ct.) (Ir.), available at <http://www.bailii.org/ie/cases/IEHC/2005/48.html> (last visited Feb. 16, 2006) (addressing section 26 and not finding a violation of section 26); Patrick Groarke, *The Truth, The Whole Truth*, 99 L. SOC’Y GAZETTE 18–23 (Aug. 2005) (discussing a similar Supreme Court case).

<sup>209</sup> Groarke, *supra* note 208; PIAB 2004 ANNUAL REPORT, *supra* note 181, at 17.

<sup>210</sup> BOOK OF QUANTUM, *supra* note 204, at 3.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.* (regions are Head, Neck, Back and Trunk, Arms, and Legs).

*Quantum*, which refers him to more specific types of injuries to the particular portion of the body identified.<sup>213</sup> Within the specific injury types are ranges of monetary damages an assessor may award based on the severity of the injury.<sup>214</sup> A page from the *Book of Quantum* illustrates what an assessor views after determining the main category and specific type of the injury:

*Shoulder / Upper Arm (humerus and scapula bones)*

*Soft Tissue*

The level and duration of treatment as well as any complications and permanent ongoing disability will dictate the level of compensation.

This category includes all sprains to the upper arm and shoulder region including partial and complete tears of the tendons forming the joint capsule (the rotator cuff), which may result in substantial reduced capacity.

*Substantially recovered up to €22,600*

*Significant ongoing €14,800 to €51,500*

*Serious and permanent conditions €41,000 to €71,600*<sup>215</sup>

The assessor then determines the level of severity of the injury.<sup>216</sup> There are three levels of severity set out in the *Book of Quantum*.<sup>217</sup> The first level of severity is “Substantially Recovered,” which “covers injuries from which a claimant has substantially recovered but there are ongoing symptoms that interfere with carrying out full day to day activities.”<sup>218</sup> The second level is “Significant Ongoing,” which “includes the above and in addition the injury has resulted in some permanent incapacity or limitation that significantly restricts or alters lifestyle.”<sup>219</sup> The third level is “Serious and Permanent Conditions,” which “will apply if the injury is very severe and has caused major disruption to a claimants [sic] life in a number of areas or results in serious continuing pain and/or requires permanent medical attention.”<sup>220</sup>

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<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* at 8.

<sup>216</sup> *Id.* at 3.

<sup>217</sup> *Id.* at 4.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

Once the assessor determines the level of severity, he looks to the range of compensation indicated. The compensation range results from a compilation of the awards for damages by the courts in personal injury actions, settlements agreed to by the insurance industry, and settlements entered into by the State Claims Agency in the year 2003.<sup>221</sup> The assessor may then render an assessment of damages with reference to the range of compensation indicated in the *Book of Quantum*.<sup>222</sup> An illustration of how an assessment looks appears below:

Claimant sustained soft tissue injuries and the award was assessed on the following basis:

<u>General Damages for pain and suffering</u>	<u>€7,200</u>
Special Damages	
Net loss of earnings	€400
Physiotherapy	€200
Doctors fees	€150
<u>Total settlement</u>	<u>€8,076<sup>223</sup></u>

The overarching principles of the *Book of Quantum* are consideration of the individual facts of the case and assessment of damages in line with the range of values assigned “to obtain an indication as to the likely range of compensation for a particular injury . . . .”<sup>224</sup> Therefore, to avoid rigid damages assessments, the ranges indicated in the *Book of Quantum* are neither maximums nor minimums of permissible compensation.<sup>225</sup> The entire publication provides an assessor with a method to calculate damages and a guideline for the amount of damages a claimant is realistically likely to receive.<sup>226</sup>

Utilizing the *Book of Quantum*'s method, the assessor provides the claimant and respondent with a written assessment, which each party must accept or reject.<sup>227</sup> The written assessment bears a notice indicating a certain time for the respondent, no less than

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<sup>221</sup> PIAB 2004 ANNUAL REPORT, *supra* note 181, at 5, 17 (data submitted by the Irish Court Service, the State Claims Agency, and the Irish Insurance Federation).

<sup>222</sup> *Id.*

<sup>223</sup> *Id.* at 4.

<sup>224</sup> *Id.* at 1.

<sup>225</sup> *Id.* at 2–3.

<sup>226</sup> *Id.*

<sup>227</sup> Personal Injuries Assessment Board Act, 2003 (Act No. 46/2003) (Ir.), § 30(1). An assessment should be expeditiously made within nine months or at the most fifteen months from date of the claimant's submission. *Id.* § 49.

twenty-one days from service, and the claimant, no less than twenty-eight days from service, to accept the assessment.<sup>228</sup> Should the respondent fail to reply to the notice, he is deemed to have accepted the assessment in the amount of damages indicated.<sup>229</sup> Alternatively, should the claimant fail to reply to the assessor's notice, the claimant is deemed to have rejected the assessment.<sup>230</sup>

If either party rejects or is deemed to have rejected the assessment, then the claimant is issued an authorization to litigate the case in court.<sup>231</sup> Should both parties accept the assessment, it is binding, but may require further judicial approval under certain circumstances.<sup>232</sup> Barring the need for court approval, one month after the acceptance of the assessment, the Board issues to the respondent an order to pay reflecting the amount indicated in the assessment of damages.<sup>233</sup> The order to pay functions as a judgment and is conclusive as to the liability of the respondent.<sup>234</sup>

### c. Benefits of the Irish Personal Injuries Assessment Board

The Personal Injuries Assessment Board provides litigants with an opportunity to receive a neutral assessment of the amount of damages a plaintiff could recover. Since the assessor is bound by the *Book of Quantum*'s requirements, predictable baselines are established that the assessor relies upon in providing an assessment of damages. This neutral assessment serves to induce speedy settlement of the action.

An additional benefit of the Board is the absence of oral hearings and legal arguments on whether the respondent is liable for the claimant's injuries. Decisions based on written submissions permits the assessor to focus on the classification of the injuries sustained. Without the concern for establishing legal liability for

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<sup>228</sup> *Id.* § 30(2)(a), (b).

<sup>229</sup> *Id.* § 31.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.* § 32. The court, in awarding damages in the subsequent suit, must refer to the Personal Injuries Assessment Board's *Book of Quantum*. *Id.* § 22. Yet, the court may consider factors other than those listed in the *Book of Quantum* in awarding damages in the subsequent suit. *Id.*

<sup>232</sup> Personal Injuries Assessment Board Act, §§ 33, 35. Judicial approval required if mandated by court rule, it is an action for wrongful or negligent death, or the claimant is a minor or incompetent. *Id.* § 35(1)–(2).

<sup>233</sup> *Id.* § 38 (indicating joint and several liability for multiple respondents).

<sup>234</sup> *Id.* § 41 (stating full payment is a complete satisfaction and less than full payment is equivalent to a partial satisfaction). *See id.* § 44 (respondent additionally responsible for payment of respondent's costs).

the injuries sustained by the claimant, the parties benefit from receiving a neutral statement of what the case should settle for, which will likely cost the respondent less than litigating the case.

The composition of the Board and the provision for input from extrajudicial entities in formulating the *Book of Quantum* ensures that the cash values assigned to the injuries listed in the Book will comport with real world compensatory schemes used in similar non-judicial assessments. The non-binding nature of the assessment mitigates toward its adoption into American procedure. Because the assessment is non-binding, the parties may continue the action to trial by jury in conformance with American constitutional precepts.

Yet, the Board procedure results in an out of court settlement. Out of court settlement by an ADR mechanism is precisely what this article seeks to avoid. The process of assessment of damages may be transmitted into American procedure by eliminating the extrajudicial board. Thus, American procedure could benefit from the methodology of the *Book of Quantum*, while keeping the case within the court system. In order to assign the assessor's role to a federal judicial officer, similar American evaluation methods currently utilized by federal courts must be considered.

i. American Procedures Bearing Similarities  
to the Irish Procedure

Independent evaluation of a civil case by a neutral assessor is not entirely foreign to American federal procedure. The two methods described below, utilized in Michigan and New York, apply to any civil action and are not specific to personal injury actions. Notably, the New York and Michigan methods place assessment of damages with an attorney lacking any guidance as to appropriate cash valuation of personal injuries in contrast to the Irish assessor who refers to the *Book of Quantum*. The Michigan and New York procedures discussed below are ADR mechanisms available to litigants for settlement outside of court procedure. Each illustrates that evaluations of likely damages in personal injury actions presently occur outside of judicial oversight and without the benefit of guidelines or a methodology to place a monetary value on the case. Nonetheless, acceptance of these methods within the federal system provides precedent for an Irish-style case assessment of damages in the American federal system.

a. *Case Evaluation—Michigan Federal District Courts' Mediation Method*

The district courts of Michigan adopted a method of ADR called case evaluation, which had been utilized in the Michigan state courts.<sup>235</sup> A description of this method illustrates the extent to which American jurisprudence has sanctioned alternative methods for resolving civil disputes in the federal courts.<sup>236</sup> The Michigan method also provides precedent in support of a greatly enlarged resolution system incorporating elements of the Irish procedures into American federal procedure.

The Western District of Michigan's local court rules provide a meticulous explanation of the case evaluation method.<sup>237</sup> Under Local Rule 16.5, two methods of case evaluation are available to litigants.<sup>238</sup> These methods are "standard track" and "Blue Ribbon" case evaluation.<sup>239</sup> Each method presupposes the use of a three-attorney panel to establish the "settlement value" of any civil case ordered by a court to undergo case evaluation.<sup>240</sup> As the two methods of case evaluation are substantially similar, only the "standard track" case evaluation, which follows Michigan state civil procedural rule 2.043 with a few noted exceptions, will be discussed.<sup>241</sup>

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<sup>235</sup> W.D. MICH. LOC. CIV. R. 16.5; E.D. MICH. LOC. CIV. R. 16.3. Cf. MICH. COMP. LAWS §§ 600.4951-.4969 (2000); MICH. CT. R. 2.403, 2.404.

<sup>236</sup> For a description of various ADR methods utilized and accepted in the United States, see generally Cheryl L. Baber, *Alternative Dispute Resolution in the United States District Court for the Northern District of Oklahoma*, 36 TULSA L.J. 819 (2001) (discussing local and national ADR phenomenon); *Developments in the Law—The Paths of Civil Litigation VI: ADR, the Judiciary and Justice: Coming to Terms with the Alternatives*, 113 HARV. L. REV. 1752, 1851–75 (2000); Lucy V. Katz, *Compulsory Alternative Dispute Resolution and Voluntarism: Two-Headed Monster or Two Sides of the Same Coin?*, 1993 J. DISP. RESOL. 1 (1993).

<sup>237</sup> The local rule was recently amended on June 21, 2005. See Reconstitution of the Case Evaluator Panel, Admin. Order No. 05-052, W.D. MICH. LOC. CIV. R. 16.5 (2005), available at [http://www.miwd.uscourts.gov/PUBLIC\\_NOTICES/AO05-052.pdf](http://www.miwd.uscourts.gov/PUBLIC_NOTICES/AO05-052.pdf).

<sup>238</sup> Cf. W.D. MICH. LOC. CIV. R. 16.2(a)–(b) (describing favoritism of ADR procedures in resolving actions and court administration of ADR programs).

<sup>239</sup> See W.D. MICH. LOC. CIV. R. 16.5(b)–(c).

<sup>240</sup> W.D. MICH. LOC. CIV. R. 16.5(a) (some tort cases that Michigan state law governs must be submitted for case evaluation unless all parties agree to refer the matter to Voluntary Facilitation Mediation).

<sup>241</sup> W.D. MICH. LOC. CIV. R. 16.5(b)(i). Standard track panel members are compensated by payment of each plaintiff and defendant in the amount of \$100 for a total of \$300 per side of the litigation for each of the three-attorney panel members, or \$200 total for each individual panel member for an overall cost of \$600 for one panel. UNITED STATES DISTRICT COURT WESTERN DISTRICT OF MICHIGAN CASE EVALUATION PROGRAM DESCRIPTION 2 (2005), available at [http://www.miwd.uscourts.gov/ADR/ce\\_program\\_](http://www.miwd.uscourts.gov/ADR/ce_program_)

Members of the case evaluation panel are chosen by the ADR Administrator, a member of the court's personnel, who also certifies panel members for service on panels.<sup>242</sup> Additionally, the ADR Administrator appoints the chairman of the panel who both presides over the evaluation session to ensure "fair and orderly presentation" and files the evaluation award with the ADR Administrator.<sup>243</sup>

The court fixes the timeframe for the case evaluation hearing, while the plaintiff's counsel coordinates the time, neutral place, and date of the evaluation hearing.<sup>244</sup> At least fourteen days before the date of the evaluation hearing, each litigant must submit an evaluation statement not exceeding twenty pages in length concisely articulating the legal and factual positions of the party concerning each issue raised in the action.<sup>245</sup>

According to the Michigan state rules, ninety-one days after the filing of the answer to the complaint, a judge may set the case for evaluation on written stipulation of the parties, motion by a party, or on the judicial officer's own initiative.<sup>246</sup> Should any of these events occur, the case remains on the trial docket as any other case following the progression toward trial.<sup>247</sup> A party may file an objection to remove the action from case evaluation by way of written motion served on all the parties, as well as the ADR

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desc.html (Proof of payment must be filed by each party with the ADR Administrator and failure to pay results in a fifty dollar fine added to the original unpaid fee.). Panel members may waive the fee for their service, which results in the payment of the required fee to the court itself. *See id.*

<sup>242</sup> W.D. MICH. LOC. CIV. R. 16.5(b)(i)(A); CASE EVALUATION PROGRAM DESCRIPTION, *supra* note 241, at 1. The ADR Administrator certifies attorneys for service as case evaluators by approving applications filed by the attorneys. W.D. MICH. LOC. CIV. R. 16.2(f). Panel members are subject to the statutory judicial disqualification requirements of 28 U.S.C. § 455 (2000). *See id.* In the Michigan State civil procedure rules, a judge may be selected as a part of the panel, but both rules prohibit panel members as witnesses in the subsequent trial of the action. MICH. CT. R. 2.403(D)(3)-(4); W.D. MICH. LOC. CIV. R. 16.2(f).

<sup>243</sup> The chairman also serves upon the parties the evaluation award. CASE EVALUATION PROGRAM DESCRIPTION, *supra* note 241, at 2-3.

<sup>244</sup> *Id.* at 3 (Adjournments or other postponements of the hearing are only permissible by unanimous stipulation.). Plaintiff's counsel also provides the ADR Administrator with certification of service of such matters upon opposing counsel. *Id.*

<sup>245</sup> W.D. MICH. LOC. CIV. R. 16.5(b)(i)(C); MICH. CT. R. 2.403(I)(1). Failure to file the evaluation statement subjects the attorney or party to a \$150 fine, which may not be passed by the attorney to his client for payment. W.D. MICH. LOC. CIV. R. 16.5(b)(i)(C); MICH. CT. R. 2.403(I)(2).

<sup>246</sup> MICH. CT. R. 2.403(B)(1).

<sup>247</sup> MICH. CT. R. 2.403(B)(2); W.D. MICH. LOC. CIV. R. 16.2(e).

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Administrator, within fourteen days of receipt of the order assigning the action for case evaluation.<sup>248</sup> A hearing on the motion must occur before the case is submitted for case evaluation.<sup>249</sup>

Assuming that the case proceeds to the evaluation hearing, a party has a right to attend the hearing, but is not required to attend.<sup>250</sup> No testimony is taken of either party at the hearing, but attorneys may present fifteen minute oral statements to the panel and documentary evidence bearing on liability or damages.<sup>251</sup> The rules of evidence do not apply to the hearing; the panel may request information on insurance policy limits and obtain the details of any settlement negotiations.<sup>252</sup>

Thus far the Michigan procedure possesses a passing similarity to the Irish case assessment system. Both systems require an element of consent by all parties to partake in the evaluation. The Michigan method, in contrast to the Irish process, permits oral presentations by the parties in addition to document submissions. The three-attorney panel does not have to follow a prescribed methodology to arrive at an appropriate valuation of the case. No guidelines for the amount of damages are mandated by the process. Where the two systems bear great similarity is in the issuance of the valuation statement to the parties for their acceptance or rejection.

The three-attorney panel renders a written decision at the close of the evaluation hearing, which determines the case's settlement value.<sup>253</sup> Within twenty-eight days of the panel's decision

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<sup>248</sup> MICH. CT. R. 2.403(C)(1).

<sup>249</sup> MICH. CT. R. 2.403(C)(1)–(2) (hearing to occur within fourteen days of filing motion).

<sup>250</sup> MICH. CT. R. 2.403(J)(1) (not a requirement to attend hearing even if physical disfigurement is an alleged injury).

<sup>251</sup> W.D. MICH. LOC. CIV. R. 16.5(b)(i)(D); MICH. CT. R. 2.403(J)(1)–(3).

<sup>252</sup> MICH. CT. R. 2.403(J)(3).

<sup>253</sup> W.D. MICH. LOC. CIV. R. 16.5(b)(i)(E). This provision of the federal rule differs from the state rule requiring a decision in writing within fourteen days after the evaluation hearing. MICH. CT. R. 2.403(K). The settlement value decision must indicate if an award is not unanimous, and “must include a separate award as to the plaintiff’s claim against each defendant and as to each cross-claim, counterclaim, or third-party claim that has been filed in the action.” MICH. CT. R. 2.403(K)(2). No award for equitable relief may be made by the panel. MICH. CT. R. 2.403(K)(3). Additionally, the state rule permits the panel to find a party’s action or answer frivolous if by unanimous decision the panel finds all of a plaintiff’s claims or all of a defendant’s defenses to liability, to meet at least one of the following conditions:

(a) The party’s primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the opposing party.

each party must file a written acceptance or rejection of the panel decision with the ADR Administrator.<sup>254</sup> At the conclusion of the twenty-eight day period, the ADR Administrator sends notice to each party of the other party's acceptance or rejection of the panel decision.<sup>255</sup> Failure to file either an acceptance or rejection constitutes a rejection of the panel decision.<sup>256</sup>

Should the parties accept the decision of the panel, then twenty-eight days after the notification of acceptances, judgment shall be entered in accordance with the panel's decision.<sup>257</sup> Rejection of the panel decision results in the action proceeding to trial in the normal procedural course.<sup>258</sup> A party rejecting the panel decision must pay the prevailing party's actual costs "unless the verdict is more favorable to the rejecting party than the case evalua-

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(b) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.

(c) The party's legal position was devoid of arguable legal merit.

MICH. CT. R. 2.403(K)(4). Should the action proceed to trial, then the party receiving a unanimous panel decision of frivolousness shall post a bond of \$5,000 to the court, which shall be utilized to pay reasonable cost should that party receive an adverse decision at trial of the action. MICH. COMP. L. §§ 600.4915(2), 600.4963(2) (2000).

<sup>254</sup> MICH. CT. R. 2.403(L)(1). In an action involving multiple parties, a litigant has the option of "accepting all of the awards covering the claims by or against that party or of accepting some and rejecting others," but the litigant must "as to any particular opposing party, . . . either accept or reject the evaluation in its entirety." MICH. CT. R. 2.403(L)(3)(a). If a party accepts all awards within the panel decision involving multiple parties, then that party may indicate whether such acceptance is conditioned upon acceptance of all opposing parties of the panel decision or acceptance of opposing parties of the panel decision relating to particular co-parties. MICH. CT. R. 2.403(L)(3)(b) (termed limited acceptance). Failure to include the limitation results in deemed acceptance of the panel decision as to the deemed accepting party and any other accepting party with the action proceeding between the deemed accepting party and any rejecting party. *See id.*

<sup>255</sup> MICH. CT. R. 2.403(L)(2). Acceptances and rejections are placed in a sealed envelope filed by the ADR Administrator with the Clerk of Court, and disclosure of the contents of the sealed envelope is not permitted in any subsequent trial not involving a jury. MICH. CT. R. 2.403(N)(4).

<sup>256</sup> MICH. CT. R. 2.403(L)(1).

<sup>257</sup> MICH. CT. R. 2.403(M)(1) (unless within that period of time the amount of the panel decision award is paid, in which case the action is dismissed). In a multiple party action, judgment or dismissal is entered against all parties accepting the panel decision. MICH. CT. R. 2.403(M)(2).

<sup>258</sup> MICH. CT. R. 2.403(N)(1). Should any party's claim or defense be found frivolous, then that party may, within fourteen days of notice of rejection of the panel decision, file a written motion with the court requesting review of the panel decision. MICH. CT. R. 2.403(N)(2)(a) (Oral argument is permitted by the representing attorneys, but review of decision rests upon decision itself and all documentary evidence considered by the panel.).

tion.”<sup>259</sup> Yet, if the prevailing party also rejected the panel decision, then “a party is entitled to costs only if the verdict is more favorable to that party than the case evaluation.”<sup>260</sup> Either way, if the panel decision lacks unanimity, then costs are not awarded.<sup>261</sup>

Having described the Michigan case evaluation method, the differences between it and the Irish Personal Injuries Assessment Board procedure are amplified. The Irish procedure possesses the advantage of utilizing a neutral standard, the *Book of Quantum*, which sets values upon types of injuries. The *Book of Quantum* draws from both legal and extralegal inputs to derive its constitution. Additionally, the Irish procedural framework permits neutral review of an action based solely upon documentary submissions, dispensing with the need for oral argument and attorney presentations. These advantages of the Irish system mitigate toward adoption of a procedure within the entire federal system more closely resembling the Irish structure than the Michigan case evaluation method.

b. *Northern District of New York’s Early Neutral Evaluation*

The Northern District of New York method of early neutral evaluation (ENE) closely approximates the Irish Personal Injuries Board Assessment method. A brief discussion suffices to exemplify the ENE process as similar to that of the Irish procedure, which uses individualized assessment. Generally, ENE is a process whereby a single attorney with acceptable expertise in the general subject matter of the dispute undertakes “to improve case planning and settlement prospects by providing litigants with an early advi-

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<sup>259</sup> MICH. CT. R. 2.403(O)(1). Verdict is defined as “a jury verdict, . . . a judgment by the court after a nonjury trial, . . . [or] a judgment entered as a result of a ruling on a motion after rejection of the case evaluation.” MICH. CT. R. 2.403(O)(2)(a)–(c). Costs may be denied if the verdict results from a motion after rejection of the case evaluation. MICH. CT. R. 2.403(O)(11).

<sup>260</sup> MICH. CT. R. 2.403(O)(1); cf. MICH. CT. R. 2.403(O)(4)–(5) (describing rules for multiple party action and if verdict includes equitable relief).

<sup>261</sup> MICH. CT. R. 2.403(O)(7). Request for costs must be made by motion filed within twenty-eight days after entry of judgment. MICH. CT. R. 2.403(O)(8). Actual costs are defined as:

- (a) those costs taxable in any civil action; and
- (b) a reasonable attorney fee based on a reasonable hourly or daily rate as determined by the trial judge for services necessitated by the rejection of the case evaluation.

MICH. CT. R. 2.403(O)(6).

sory evaluation of the likely court outcome.”<sup>262</sup> The evaluator conducts a confidential session with the parties to “clarify arguments and evidence, identif[y] strengths and weaknesses of the parties’ positions, and give the parties a nonbinding assessment of the merits of the case.”<sup>263</sup> The evaluator may also mediate a settlement between the parties.<sup>264</sup> Many federal courts offer ENE, but the Northern District of New York utilizes a distinct form of this process.<sup>265</sup>

In the Northern District of New York, the evaluator possesses the qualifications and engages in the processes generally applicable to all ENE programs nationwide.<sup>266</sup> Yet, “[i]f settlement does not occur, the [New York] evaluator then offers his or her opinion as to the settlement value of the case, including the likelihood of liability and the likely range of damages.”<sup>267</sup> This opinion is not binding on the parties.<sup>268</sup>

Furthermore, attendance of an insurance company representative with settlement authority is required “[i]n cases involving insurance carriers.”<sup>269</sup> The evaluator possesses broad discretion to conduct the ENE hearing, but may not engage in formal examination of witnesses.<sup>270</sup> At the end of the evaluation process, the evaluator submits a report to the court indicating whether the parties have reached settlement as to all or part of the issues in dis-

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<sup>262</sup> FED. JUDICIAL CTR., CIVIL LITIGATION MANAGEMENT MANUAL V.B.3(c) (2001).

<sup>263</sup> *Id.*

<sup>264</sup> See W.D. MICH. LOC. CIV. R. 16.4.

<sup>265</sup> See BETTE J. ROTH, ET AL., *Alternative Dispute Resolution Practice Guide* § 1:12 (West 2005).

<sup>266</sup> N.D.N.Y. L.R. 83.12-2, -4, -7 (2006). The evaluation process begins between 150 and 200 days after plaintiff’s filing of a complaint upon order of the court, by a motion of any party, or by consent of all parties. N.D.N.Y. L.R. 83.12-3(1)(a)–(c), 83.13-4(a). The entire process is confidential. *Id.* at 83.12-8.

<sup>267</sup> *Id.* at 83.12-1. Ten days before commencement of the ENE process, each party submits a ten page, exclusive of attachments, evaluation statement detailing legal or factual issues whose resolution would facilitate settlement negotiations or reduce the scope of the litigation. *Id.* at 83.12-5(A)(2). Important documents must accompany the evaluation statements, and parties must identify individuals whose presence in addition to the parties would “significantly improve the productivity of the session.” *Id.* at 83.12-5(B), (C). Important documents include medical reports and contracts. See *id.*

<sup>268</sup> *Id.* at 83.12-1.

<sup>269</sup> *Id.* at 83.12-6(C).

<sup>270</sup> *Id.* at 83.12-7(A).

pute.<sup>271</sup> Should the ENE process not reach settlement, then the case proceeds to trial in the normal course.<sup>272</sup>

The deficiency in the New York ENE is that production of a settlement value for the parties consideration is a secondary concern. The ENE neutral also does not possess a methodological guide, like the *Book of Quantum*, to direct the neutral in making an evaluation of the case. The primary purpose of ENE is to assess the merits of the case, rather than permit the parties to view a cash valuation of the action. Unlike the Irish Board's sole reliance on documents, the New York process permits both oral and written presentation of the case. Nonetheless, the New York ENE permits the neutral to make an assessment of the likely range of damages. This authorization to engage in, essentially, the same conduct as the Irish Board's assessor provides substantial precedent for enacting a federal procedure similar to the Personal Injuries Assessment Board. Also, parties are free to reject the evaluator's assessment and proceed to trial.

### c. *The Civil Justice Reform Act of 1990*

Although most of the 1990 Act's provisions have expired, this brief discussion of the Act demonstrates the great need seen by the U.S. Congress to enact reforms to assist judges in expediting resolution of civil actions.<sup>273</sup> Both the Michigan and New York ADR systems are responses to U.S. congressional findings that the significant cost and delays occurring in district court actions necessitated introduction of an "effective litigation management and cost and delay reduction program."<sup>274</sup> The Congress mandated the develop-

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<sup>271</sup> *Id.* at 83.12-10(1).

<sup>272</sup> *Id.* at 83.12-10(4).

<sup>273</sup> Civil Justice Reform Act of 1990, Pub. L. No. 101-650, § 102, 104 Stat. 5089 (1990), amended by Arbitration in United States District Courts—Appropriations Act, Pub. L. No. 105-53, § 2, 111 Stat. 1173 (1997) (further amended by Federal Courts Improvement Act, Pub. L. No. 106-518, § 206, 114 Stat. 2410 (2000)) (statute as amended maintains Judicial Conference's responsibility to promulgate manual). See Bernadette Bollas Genetin, *Expressly Repudiating Implied Repeals Analysis: A New Framework for Resolving Conflicts Between Congressional Statutes and Federal Rules*, 51 EMORY L. J. 677, 699-700 n.119 (2002); Carl Tobias, *The Expiration of the Civil Justice Reform Act of 1990*, 59 WASH. & LEE L. REV. 541 (2002).

<sup>274</sup> Civil Justice Reform Act of 1990 § 102. The Judicial Conference of the United States includes the Chief Justice of the United States Supreme Court, the chief judge of each judicial circuit, the chief judge of the Court of International Trade, and a district judge from each judicial circuit. 28 U.S.C. § 331 (2000). Cf. 20 CHARLES ALAN WRIGHT & MARY KAY KANE, FEDERAL PRACTICE & PROCEDURE: DESKBOOK § 67 (2002) (discussing criticism of Act as overstepping Congressional authority); Carl Tobias, *Local Federal Civil*

ment and implementation of expense and delay reduction plans “to facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy, and inexpensive resolutions of civil disputes” by each federal district court or by the Judicial Conference of the United States.<sup>275</sup>

Two provisions of the Act are still currently in force. First, the Act charged the Judicial Conference to continually study “ways to improve litigation management and dispute resolution services in the district courts” and to communicate its findings periodically to the district courts.<sup>276</sup> Second, the Act further instructed the Judicial Conference to promulgate a manual containing “a description and analysis of the litigation management, cost and delay reduction principles and techniques, and alternative dispute resolution programs considered most effective . . . .”<sup>277</sup>

The Judicial Conference produced its first such manual in 1992 and an amended version in 2001.<sup>278</sup> The contents of the manual are not binding on district court judges, but serve as guidelines to achieve the Act’s goals. The manual covers judicial involvement from the inception of a case to trial with special emphasis on Rule 16 pretrial conferences, discovery management, and appropriate utilization of ADR processes.<sup>279</sup>

Legislative direction to the Judicial Conference to produce the manual described above provides a basis for Congress to charge the Conference with promulgation of a personal injuries valuation manual that mimicks the Irish *Book of Quantum*. The American version of the *Book of Quantum* would provide ranges of compensation with reference to particular injuries sustained by the plaintiff. The manual would be utilized by federal judges to value a personal injury case in the event parties elected to proceed through a special procedure. This special procedure would incorporate

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*Procedure For The Twenty-First Century*, 77 NOTRE DAME L. REV. 533, 535-57 (2002) (discussing history and propriety of federal district court local rules); Tobias, *supra* note 273.

<sup>275</sup> 28 U.S.C. § 471 (2000).

<sup>276</sup> 28 U.S.C. § 479(b)(1)-(2) (2000).

<sup>277</sup> 28 U.S.C. §§ 476, 479(c)(3) (2000). The Act also required automation of case information for each individual district court case so parties could electronically access this information. 28 U.S.C. § 481 (2000).

<sup>278</sup> MANUAL FOR LITIGATION MANAGEMENT AND COST AND DELAY REDUCTION (1992); THE JUDICIAL CONFERENCE OF THE U.S., COMM. ON CT. ADMIN. & CASE MGMT., CIVIL LITIGATION MANAGEMENT MANUAL (2001).

<sup>279</sup> CIVIL LITIGATION MANAGEMENT MANUAL, *supra* note 278, at 11-41, 57-77.

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Scottish-style valuation statements, pretrial hearings, and expedited resolution timetables. Additionally, this American special procedure would incorporate Irish case valuation by reference to independent guidelines providing the judge with a method for determining a settlement value for the case based upon the particular injuries sustained by an individual.

d. Irish Procedure for Litigating a Personal Injury Action

The Irish recognized the benefit of coupling the Personal Injuries Assessment Board, an extrajudicial entity, with a streamlined court procedure for personal injury litigants. Both American ADR systems described above permitted litigants to resume the ordinary progress of their case to trial after failing to settle. The Irish recognized the benefit of allowing cases that progressed through the Personal Injuries Assessment Board to access a streamlined court procedure.<sup>280</sup> The procedure is also available to individuals whose actions are excluded from the Board's process.<sup>281</sup>

The impetus for the reform of the way personal injury cases were litigated in the courts began with the 2002 Motor Insurance Advisory Board's report that recommended introduction of new court procedures governing personal injury actions.<sup>282</sup> The Committee on Court Practice and Procedure acted on the Motor Insurance Advisory Board's report by identifying sixteen specific deficiencies in the traditional method of litigating personal injury cases.<sup>283</sup> Among the sixteen deficiencies were the excessive cost of litigating personal injury claims, the length of time taken to resolve an action, the lack of urgency in the pretrial phases of the litigation,

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<sup>280</sup> See generally DELANY & McGRATH, *supra* note 175, at 632.

<sup>281</sup> *Id.*

<sup>282</sup> BYRNE & BINCHY, *supra* note 174, at 409–10; see also GOVERNMENT OF IRELAND, DEPARTMENT OF ENTERPRISE, TRADE & EMPLOYMENT, FINAL REPORT OF THE MOTOR INSURANCE ADVISORY BOARD (2002), available at <http://www.entemp.ie/publications/commerce/2002/miab/miab.pdf>.

<sup>283</sup> GOVERNMENT OF IRELAND, THE COMMITTEE ON COURT PRACTICE AND PROCEDURE, 29TH REPORT, INQUIRY TO EXAMINE ALL ASPECTS OF PRACTICE AND PROCEDURE RELATING TO PERSONAL INJURIES LITIGATION 6–8, 24–27, 56–78 (2004) [hereinafter COURT PRACTICE AND PROCEDURE 29TH REPORT]; see generally Colm O'Dwyer, *New Procedures for Personal Injuries Claims*, 9 B. REV. 199 (2004) (providing practical description of new procedure). On previous suggestions for reform of the personal injuries procedures, see GOVERNMENT OF IRELAND, LAW REFORM COMMITTEE, REPORT ON PERSONAL INJURIES: PERIODIC PAYMENTS AND STRUCTURED SETTLEMENTS 4–21, 34–39, 121–144 (1996).

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and the failure of cases to expeditiously settle.<sup>284</sup> Because of these deficiencies, the Committee recommended adoption of new rules to streamline the litigation process by introduction of simplified pleadings, accelerated timeframes for completing various portions of litigation, and procedural mechanisms to induce settlement of cases.<sup>285</sup> The result of the Commission's work was the Civil Liability and Courts Act of 2004.<sup>286</sup>

Like the procedural reforms in Scotland, the new Irish court procedure "encourages the parties to make all possible efforts to settle proceedings."<sup>287</sup> The general principle governing the 2004 procedural reforms is that the courts, in awarding damages, must refer to the Personal Injuries Assessment Board's *Book of Quantum*.<sup>288</sup> Both processes focus on an expeditious settlement, albeit through differing mechanisms. The new court procedure applies to a plaintiff who initiates a civil action excluded from the Board procedure, as well as to those who refuse a Board assessment or reject an assessor's statement of damages.<sup>289</sup>

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<sup>284</sup> COURT PRACTICE AND PROCEDURE 29TH REPORT, *supra* note 282, at 26. *Cf.* Butler v. Regan, [2004] I.E.H.C. 326 (1st July, 2004) (H. Ct.) (Ir.), available at <http://www.bailii.org/ie/cases/IEHC/2004/326.html> (last visited Feb. 16, 2006) (describing a trial of a personal injuries action taking thirteen years to be placed on lists for trial). R

<sup>285</sup> COURT PRACTICE AND PROCEDURE 29TH REPORT, *supra* note 283, at 56–74. R

<sup>286</sup> Civil Liability and Courts Act, 2004 (Act No. 31/2004) (Ir.); Statute of Limitations (Amendment) Act, 1991 (Act No. 18/1991) (Ir.), amended by Civil Liability and Courts Act, 2004 (Act No. 31/2004) (Ir.), § 7 (statute of limitations is three years); Civil Liability and Courts Act 2004 (Commencement Order), 2004, S.I. No. 544 of 2004) (Ir.) (authorizing provision for Act to enter into force on May 31, 2005). *See* Michael Boylan, *Time Waits for No Man*, 99 L. SOC'Y GAZETTE 8, 8–11 (Oct. 2005) (discussing possible effects of new limitation period on medical negligence cases).

<sup>287</sup> BYRNE & BINCHY, *supra* note 174, at 410. R

<sup>288</sup> Civil Liability and Courts Act § 22. The court may consider factors other than the *Book of Quantum* in awarding damages. *Id.* § 22(2). The court must also consider any actuarial tables published by the government in any award of damages. *Id.* § 23. For examples of how courts utilize the Book of Quantum, see Meagher v. Shamrock Public Houses Ltd. Trading as The Ambassador Hotel, [2005] I.E.H.C. 35 (H. Ct.) (Ir.) available at <http://www.bailii.org/ie/cases/IEHC/2005/H35.html> (last visited February 16, 2006) (following *Book Quantum's* provisions); Power v. Governor of Cork Prison & Ors, [2005] I.E.H.C. 253 (20th July, 2005) (H. Ct.) (Ir.), available at <http://www.bailii.org/ie/cases/IEHC/2005/H253.html> (last visited Feb. 16, 2006) (declining to follow the *Book of Quantum* because injury type not specified by Book). *Cf.* Nolan v. Murphy, [2005] I.E.S.C. 17 (18th Mar 2005) (S.C.) (Ir.), available at <http://www.bailii.org/ie/cases/IESC/2005/17.html> (last visited Feb. 16, 2006) (a novel appeal deciding appropriate award of civil damages in a sexual assault case and referring to the *Book of Quantum*).

<sup>289</sup> DELANY & MCGRATH, *supra* note 175, at 632. For a concise description of the previous procedure governing personal injury actions see COURT PRACTICE AND PROCEDURE 29TH REPORT, *supra* note 283, at 9–22; KIERON WOOD, THE HIGH COURT: A USER'S GUIDE (2d ed. 2002). R

The reforms enacted by the 2004 Civil Liability and Courts Act function in all three of Ireland's courts.<sup>290</sup> Because severe criticism of excessively high jury awards prior to 1988 resulted in the abolition of trial by jury, personal injury litigants in each of these courts lack the option to resolve their case by jury trial.<sup>291</sup> For civil claims likely to exceed €38,092 in damages, a litigant files his action with the High Court.<sup>292</sup> The Circuit Courts have jurisdiction over claims for civil damages up to €38,092.<sup>293</sup> Should a litigant seek civil damages not exceeding €6,350, he files in one of the Dis-

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<sup>290</sup> Specifically, Article 34 of the Constitution provides for the establishment of a Supreme Court as a final court of appeal, a High Court as a court of first instance, and local courts of inferior jurisdiction. IR. CONST., 1937, arts. 34–37. The Oireachtas or Irish Parliament created the Circuit Courts and District Courts as local inferior courts of limited civil jurisdiction in 1961. See JAMES CASEY, CONSTITUTIONAL LAW IN IRELAND 279 (3d ed. 2000); McMAHON & BINCHY, *supra* note 203, at 94 (quoting The Courts (Establishment and Constitution Act), 1961 (Act No. 39/1961) (Ir.) and indicating these courts existed since 1924 under the previous 1922 Constitution).

<sup>291</sup> Civil juries in personal injuries actions were abolished in the High Court in 1988 by Courts Act, 1988 (Act No. 14/1988) (Ir.), §1–2, and in the Circuit Court in 1971 by the Courts Act, 1971 (Act No. 36/1971) (Ir.), § 6. See RAYMOND BYRNE & J. PAUL McCUTCHEON, THE IRISH LEGAL SYSTEM (2d ed 1989), at 102; *cf.* The Courts of Justice Act, 1924 (Act No. 10/1924) (Ir.), §94 (former Act guaranteeing right to civil jury trial). Jury trial in the District Court never existed. See Courts of Justice Act, 1924 (Act No. 10/1924) (Ir.), §§ 77, 94 (omitting jury trial as an option in District Court proceedings in civil cases).

<sup>292</sup> The High Court sits in Dublin, but also hears personal injury and fatal injury actions in a number of locations throughout Ireland. BYRNE & McCUTCHEON, *supra* note 291, at 168; Courts (Supplemental Provisions) Act, 1961 (Act No. 29/1961) (Ir.), §§ 8, 13. The number of personal injuries actions filed in the High Court in 2004 was 15,293, the court issued awards of damages in 492 cases with €4.55 million as the highest award of damages by the court. GOVERNMENT OF IRELAND, COURT SERVICE, 2004 ANNUAL REPORT 102, 108 (2004).

<sup>293</sup> BYRNE & McCUTCHEON, *supra* note 291, at 163; Courts Act, 1991 (Act No. 20/1991) (Ir.), § 2. *Cf.* Courts (Supplemental Provisions) Act, 1961 (Act No. 39/1961) (Ir.), §22, 3rd Schedule. Yet, all parties may consent to the court hearing a claim involving any amount of damages. BYRNE & McCUTCHEON, *supra* note 291, at 163 n. 83 (citing Courts (Supplemental Provisions) Act, 1961 (Act No. 29/1961) (Ir.), § 22(1)(b)). Circuit Courts exist within the eight circuits that divide Ireland geographically. *Id.* at 103–104. The Circuit Courts made 1,182 awards of damages in personal injuries actions in 2004 with €130,000.00 as the highest award of damages. COURT SERVICE, 2004 ANNUAL REPORT, *supra* note 292, at 116–17.

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trict Courts.<sup>294</sup> Personal injury cases proceed in exactly the same manner in all of these courts.<sup>295</sup>

i. Letter of Claim, Summons, and Defenses

The 2004 reforms go further than the Scottish procedural changes previously discussed because the Irish procedure begins its drive to settlement before a plaintiff files a formal action. A prospective plaintiff must, within two months of the date plaintiff was injured, send a “letter of claim” to “the wrongdoer or alleged wrongdoer stating the nature of the wrong alleged to have been committed by him or her.”<sup>296</sup> The purpose of the letter is to give notice of prospective legal proceedings and provide the prospective defendant “sufficient details of the particular incident at issue so that the alleged wrongdoer could investigate the merits of the claim.”<sup>297</sup> Like the Scottish optional procedure, the Irish court rules emphasize preparation and investigation prior to filing a civil action. After service of the letter of claim, a plaintiff may then commence a judicial action through the filing of a “personal injuries summons.”<sup>298</sup>

The summons contains the occupation of the plaintiff and defendant, as well as description of the injuries suffered by the plaintiff, details about the circumstances and events giving rise to the injuries, an articulation of any claims by the plaintiff for special damages, and an account of the negligent acts of the defendant.<sup>299</sup> Failure to utilize the format of the personal injury summons results in dismissal of the action or an order for the plaintiff to comply or amend his summons.<sup>300</sup> The failure may also be considered by the judge in determining the appropriate award of costs or if costs shall

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<sup>294</sup> BYRNE & McCUTCHEON, *supra* note 291, at 156 (citing Courts Act, §2). The District Courts sit in twenty-four districts throughout Ireland. *Id.* at 105 (citing Courts (Supplemental Provisions) Act, §32(1)). As with the Circuit Court, parties may consent to the District Court hearing a claim for damages in excess of the court’s jurisdictional limitations. *Id.* at 160 (citing Courts Act, § 4(c) and noting this right is by Act and not codified into a District Court Rule).

<sup>295</sup> See Rules of the Superior Courts (Personal Injuries) 2005 (S.I. No. 248 of 2005) (Ir.); Circuit Court Rules (Personal Injuries) 2005 (S.I. No. 526 of 2005) (Ir.); District Court (Personal Injuries) 2005 (S.I. No. 257 of 2005) (Ir.).

<sup>296</sup> Civil Liability and Courts Act, 2004 (Act No. 31/2004) (Ir.), § 8 (including in cause of action definition when knowledge of injury by wrongdoer acquired).

<sup>297</sup> DELANY & McGRATH, *supra* note 175, at 629.

<sup>298</sup> Civil Liability and Courts Act, § 10.

<sup>299</sup> *Id.* § 10(2).

<sup>300</sup> *Id.* § 10(3).

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be awarded to the plaintiff if he prevails in the claim.<sup>301</sup> The summons reflects the Scottish preference for factual narrative because the Irish rules require that the summons “contain full and detailed particulars of the claim of which the action consists and of each allegation, assertion or plea comprising that claim.”<sup>302</sup>

The plaintiff must also serve on the defendant a “verifying affidavit,” which accompanies any pleadings where the plaintiff makes allegations or assertions.<sup>303</sup> The affidavit itself must be filed with the court, and subjects the filing party to dismissal of the action and criminal penalties should the affidavit be proved false or misleading.<sup>304</sup> The purpose of the affidavit is to protect against false and exaggerated claims.<sup>305</sup> The verifying affidavit protects against the three types of exaggeration:

- (i) where the whole claim is concocted, (ii) where there is a genuine claim but the effect of the injuries is exaggerated by the claimant because of a subjective belief that the injuries have had a worse effect [then] they have . . . [, and] (iii) . . . where there is a genuine case of negligence established but the plaintiff deliberately exaggerates the injuries, knowing that he or she is exaggerating the injuries and their effects.<sup>306</sup>

Once the summons is filed and served upon the defendant, the defendant may request limited additional factual information from the plaintiff concerning the claim asserted.<sup>307</sup> Additionally, the de-

<sup>301</sup> *Id.* § 10(4).

<sup>302</sup> DELANY & McGRATH, *supra* note 175, at 633.

<sup>303</sup> Civil Liability and Courts Act, § 14(1). A verifying affidavit must also accompany defendant’s pleading. *Id.* § 14(2).

<sup>304</sup> *Id.* §§ 26(2), 29(1). The criminal penalty is “a fine not exceeding €100,000, or imprisonment for a term not exceeding 10 years, or to both.” *Id.* § 29(1).

<sup>305</sup> DELANY & McGRATH, *supra* note 175, at 627 (citing *O’Connor v. Bus Atha Cliath/ Dublin Bus* [2003] I.E.S.C. 66, [2003] 4 I.R. 459 (S.C.) (Ir.), available at <http://www.bailii.org/ie/cases/IESC/2003/66.html> (last visited Feb. 16, 2006)).

<sup>306</sup> *Id.*

<sup>307</sup> Civil Liability and Courts Act, § 11. The information capable of production at the defendant’s request includes:

- (a) particulars of any personal injuries action brought by the plaintiff in which a court made an award of damages,
- (b) particulars of any personal injury action brought by the plaintiff which was withdrawn or settled,
- (c) particulars of any injury sustained or treatment administered to the plaintiff that would have a bearing on the personal injury to which the personal injuries action relates, and
- (d) the name of any persons from whom the plaintiff received such medical treatment.

*Id.* § 11(1) (referred in Act as further information).

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defendant may obtain information about the plaintiff's income or other sources of earnings before filing his defenses.<sup>308</sup> Eight weeks after receiving the summons, the defendant files his defenses, which like plaintiff's summons, contains detailed factual assertions denying or admitting each of the plaintiff's allegations.<sup>309</sup> Any counterclaims of the defendant must be submitted with the defenses.<sup>310</sup> Should the defendant fail to file these pleadings as required, he is subject to an order for compliance, judgment entered against him, and consideration of failure or refusal to comply in the amount of the order for payment of costs.<sup>311</sup> The plaintiff may file a reply within six weeks of receipt of the defense.<sup>312</sup> Additionally, the plaintiff may file a defense to the counterclaim within eight weeks of the receipt of the counterclaim.<sup>313</sup>

The above discussion of the initial stages of Irish procedure for litigating personal injury actions reveals a process similar to the Scottish optional procedure. Both value detailed factual pleadings to give notice to both parties of the basis and nature of their claims. Both also operate on an expedited timeframe for filing pleadings.

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<sup>308</sup> *Id.* § 11(2) (information limited to that permitted by appropriate governmental ministries' regulation). Failure to comply with defendant's requests results in the same remedies articulated above, i.e. order to comply, dismissal, and consideration in amount of costs award to victorious plaintiff. *Id.* § 11(3).

<sup>309</sup> DELANY & McGRATH, *supra* note 175, at 634-35. The defense must contain:

- (a) the allegations specified, or matters pleaded, in the personal injury summons of which the defendant does not require proof,
- (b) the allegations specified, or matters pleaded in the personal injuries summons of which he or she requires proof,
- (c) the grounds upon which the defendant claims that he or she is not liable for any injuries suffered by the plaintiff, and
- (d) where the defendant alleges that some or all of the personal injuries suffered by the plaintiff were occasioned in whole or in part by the plaintiff's own acts, the grounds upon which he or she so alleges.

Civil Liability and Courts Act, § 12(1).

<sup>310</sup> The mandatory information to be included with defendant's counterclaims is as follows:

- (b) the injuries to the defendant alleged to have been occasioned by the wrong of the plaintiff,
- (c) full particulars of all items of special damage in respect of which the defendant is making a claim,
- (d) full particulars of the acts of the plaintiff constituting the said wrong and the circumstances relating to the commission of the said wrong,
- (e) full particulars of each instance of negligence by the plaintiff.

*Id.* § 12(2).

<sup>311</sup> *Id.* § 12(3).

<sup>312</sup> DELANY & McGRATH, *supra* note 175, at 635.

<sup>313</sup> *Id.*

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The Irish system employs the letter of claim and the defendant's right to request additional information before filing a defense to provide the defendant with abundant information about the action before formally entering into the litigation. These two devices allow the defendant to make a meaningful appraisal of the plaintiff's case and permit the defendant to offer settlement outside the court structure should the plaintiff's case prove strong. The verifying affidavit provides a level of assurance that the plaintiff's claim is truthful and reliable. Additionally, the penalties associated with filing a false claim serve to deter fraudulent litigants from entering the system.

## ii. Pretrial Hearings

In contrast to the Scottish procedure's single pretrial hearing focused strictly on settlement of the case, the Irish rules empower the courts to convene multiple pretrial hearings to assist the parties in fleshing out the issues in dispute.<sup>314</sup> During pretrial hearings and trial of the action, the court may order the presentation of evidence by affidavit to expedite the resolution of the case.<sup>315</sup> The court may also appoint any expert "it considers appropriate to carry out investigations into, and give expert evidence in relation to, such matters as the court directs."<sup>316</sup> The cost of employing such an expert shall be paid as ordered by the court.<sup>317</sup> Similar to American procedure, these powers are conferred upon the courts to shorten the length of the trial.<sup>318</sup>

## iii. The Mediation Conference

In addition to judicial ability to hold pretrial meetings, any party to the personal injury action may request the court to order a

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<sup>314</sup> Civil Liability and Courts Act, § 18(1).

<sup>315</sup> *Id.* § 19 (giving due regard to the right of cross examination).

<sup>316</sup> *Id.* § 20(1). Should the court appoint an expert, the parties must cooperate with the individual by producing

- (a) (i) any report or other document prepared by the party, or
- (ii) any report or other document prepared on behalf of the party concerned, for the purposes of or in contemplation of the personal injuries action, and
- (b) any document or information used or referred to for the purpose of preparing the report.

*Id.* § 20(2).

<sup>317</sup> *Id.* § 20(3). Parties retain the right to cross-examine the expert. *Id.* § 20(4).

<sup>318</sup> BYRNE & BINCHY, *supra* note 174, at 411.

mediation conference before the trial of the claim.<sup>319</sup> The court may order such a conference if the court believes the conference would likely result in settlement of the claim.<sup>320</sup> Should the court find the mediation conference appropriate, the parties agree on a time and place to hold the conference.<sup>321</sup>

A chairperson, agreed to by all parties, presides over the mediation conference.<sup>322</sup> The court appoints a chairperson if the parties fail to agree.<sup>323</sup> The chairperson delivers to the court and the parties a report of the mediation conference indicating whether a settlement occurred along with the terms of the settlement signed by the parties if a settlement resulted.<sup>324</sup> The chairperson's notes, evidence presented, records, and all communications occurring during the mediation conference are confidential and inadmissible in any civil or criminal proceedings.<sup>325</sup> Costs of the mediation conference are borne as ordered by the court.<sup>326</sup>

The possibility of referral to mediation outside the gambit of judicial procedure is an inefficient reform. To direct parties to resolve their dispute outside the court system reflects a failure of the judiciary and procedure to effectively assist the parties in resolution of the dispute. The purpose in reforming the pleading structure and reducing the time taken in court to conclude the controversy is to guarantee that litigants employ judicial procedure rather than avoid it.

Both the mediation conference and pretrial hearings reflect a greater judicial role in resolution of a personal injury case. It is the judge who possesses the authority to decide whether a conference

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<sup>319</sup> Civil Liability and Courts Act, § 15.

<sup>320</sup> *Id.* § 15(1)(b) (court orders time and place should parties disagree).

<sup>321</sup> *Id.* § 15(3).

<sup>322</sup> *Id.* § 15(4)(a).

<sup>323</sup> *Id.* § 15(4)(b). The chairperson appointed by the Court must possess the following mandatory qualifications: "(I) be a practising barrister or practising solicitor of not less than [five] years standing, or (II) a person nominated by a body prescribed, for the purpose of this section, by order of the Minister." *Id.*

The Minister prescribed Mediators Institute Ireland, The Chartered Institute of Arbitrators (Irish Branch), Mediation Forum-Ireland, Friarylaw, The Bar Council, The Law Society of Ireland, and the International Centre for Dispute Resolution as bodies competent to nominate chairpersons. Civil Liability and Courts Act (Bodies Prescribed Under Section 15) Order 2005 (S.I. No. 168/2005) (Ir.); Civil Liability and Courts Act (Bodies Prescribed Under Section 15) (No. 2) Order 2005 (S.I. No. 336/2005) (Ir.).

<sup>324</sup> Civil Liability and Courts Act, §16(1)(b). The Chairperson submits a report to the court stating the reasons the mediation conference did not occur. *Id.* § 16(1)(a).

<sup>325</sup> *Id.* § 15(5).

<sup>326</sup> *Id.* § 15(6).

between the parties will lead to settlement as well as how best to frame the issues in dispute between the parties. Greater judicial involvement to resolve the case is laudable because the judge already occupies the role of neutral arbiter.

#### iv. Formal Written Offers of Settlement Before Trial

The plaintiff, before trial of the claim, must serve upon the defendant a formal written offer that includes terms of settlement to settle the case.<sup>327</sup> The defendant must formally respond to the plaintiff's offer by either presenting a counter settlement offer or a declaration that the defendant is not prepared to settle the case for any sum of money.<sup>328</sup> The formal offers are filed with the court, but the trial judge is not made aware of the terms of the formal offer until judgment upon the claim is entered.<sup>329</sup> After judgment is entered, the trial judge reviews the terms of the formal offer and the reasonableness of the conduct of the parties in proposing the formal offer and considers both in ordering the payment of costs in an action.<sup>330</sup>

The requirement for service of formal offers of settlement by each party is an efficient procedural mechanism. Where the Scots required submission of detailed valuation statements, the Irish employ formal settlement offers to explicitly cause settlement of the matter. Another benefit of the Irish scheme is the requirement that the defendant file a complete denial to settle the matter. This device permits the case to proceed directly to trial and dispense with referral of the case to ADR. The Irish permit settlement offers at any time before trial of the action, but a more efficient rule would be for parties to make formal offers of settlement before a Scottish-type pretrial meeting to allow greater disclosure of each party's position.

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<sup>327</sup> *Id.* § 17(1). The defendant shall also serve upon the plaintiff a formal written offer with terms of settlement or a statement indicating the defendant refuses to pay plaintiff any monetary sum to settle the case. *Id.* § 17(2).

<sup>328</sup> *Id.* § 17(2).

<sup>329</sup> *Id.* § 17(4). The formal offer is filed with the court after the prescribed date, which (a) in the case of the High Court and Circuit Court, commence on the prescribed date and end on the expiration of fourteen days after the service of the notice of trial in those proceedings; and (b) in the case of the District Court, commence on the prescribed date and end on the expiration of four days after the delivery of a defense in those proceedings. Civil Liability and Courts Act 2004 (Section 17) Order 2005 (S.I. No. 169/2005) (Ir.).

<sup>330</sup> Civil Liability and Courts Act, 2004 (Act No. 31/2004) (Ir.), §17(5).

## v. Similar American Procedural Devices

The Irish procedural reforms are not entirely foreign to current federal procedure. The offers of settlement and mediation conference bear similarity to Rule 68 of the Federal Rules of Civil Procedure and federal statutes requiring litigants to consider ADR programs. Rule 68 grants the defendant the ability to serve upon the plaintiff an offer of judgment ten days before the date scheduled for trial.<sup>331</sup> If the offer is accepted by written notice to the offering party, then either party may file the offer and acceptance with the Clerk of the District Court who shall enter judgment according to the terms of the offer.<sup>332</sup> If the offer is not accepted, it is deemed withdrawn and is inadmissible except for a determination of costs.<sup>333</sup> Additionally, should the non-offering party receive judgment in its favor for an amount less than the offer, then such party must pay the other party's costs incurred after service of the offer.<sup>334</sup>

The provisions of this rule were introduced to "encourage settlements and avoid protracted litigation."<sup>335</sup> The Rules Advisory Committee and the federal judiciary acknowledge the rule's sparse use, but both agree on the rule's tremendous potential impact upon litigation.<sup>336</sup> A 1994 Federal Judicial Center Study revealed a large majority of attorneys favored amendment of Rule 68 to permit any party to initiate an offer of judgment, rather than solely the defendant as authorized under the current rule.<sup>337</sup> The same study also indicated that attorneys perceived a drastic reduction in litigation costs resulting from settlement.<sup>338</sup>

The offer process is similar to the Irish procedure, but does not require the plaintiff to serve a formal settlement offer upon the defendant. The American defendant is not required to respond to a mandatory settlement offer with either a counteroffer or statement refusing settlement. Further, American litigants engage Rule

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<sup>331</sup> FED. R. CIV. P. 68.

<sup>332</sup> *Id.*

<sup>333</sup> *Id.*

<sup>334</sup> *Id.* (rule permits multiple offers).

<sup>335</sup> FED. R. CIV. P. 68 advisory committee's note (1946).

<sup>336</sup> See 12 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 3001 (2d ed. 1994).

<sup>337</sup> JOHN E. SHAPARD, LIKELY CONSEQUENCES OF AMENDMENTS TO RULE 68, FEDERAL RULES OF CIVIL PROCEDURE 3 (Federal Judicial Center 1995).

<sup>338</sup> *Id.* at 7-8 (indicating attorneys' estimated 45 percent reduction in litigation costs through settlement).

68 only ten days before trial. Also, the rule does not operate in a procedure specially designed for efficiency and the production of a just settlement. If no other reform in this article is adopted, a revised Rule 68 adhering to the text of the Irish rule would likely realize the potential both attorneys and judges believe Rule 68 could have to impact litigation by reducing litigation costs.

The Irish court procedure's referral to a mediation conference is similar to federal statutes and local district court rules authorizing federal judges to use ADR procedures.<sup>339</sup> Provision of ADR to civil litigants within the federal system is mandatory, as all such litigants are required by statute to consider ADR.<sup>340</sup> This statutory scheme, enacted in 1998, embraces a congressional finding that ADR provides, among other things, "greater efficiency in achieving settlements."<sup>341</sup> The statute permits individual district courts to exclude or require certain actions as well as categories of actions to be referred to ADR.<sup>342</sup> Regulation of a panel of neutrals falls to each individual district court through establishment of local rules regarding qualifications and selection of neutrals from the panel to hear particular cases.<sup>343</sup>

Whereas Irish court procedure embraces mediation, American federal law specifically advocates arbitration.<sup>344</sup> The arbitration

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<sup>339</sup> 28 U.S.C. §§ 651–658 (2000). See Carl Tobias, *Local Federal Civil Procedure for the Twenty-First Century*, 77 NOTRE DAME L. REV. 533, 535–41, 542–57 (2002) (discussing history and propriety of federal district court local rules); Caroline Harris Crowne, Note, *The Alternative Dispute Resolution Act of 1998: Implementing a New Paradigm of Justice*, 76 N.Y.U. L. REV. 1768, 1771 (2001) (describing impact of statutory scheme).

<sup>340</sup> 28 U.S.C. § 652 (2000). The Federal Judicial Center and Administrative Office of the United States Courts are authorized to assist federal district courts in implementing ADR programs. *Id.* § 651(f).

<sup>341</sup> Alternative Dispute Resolution Act of 1998, Pub. L. No. 105-315, § 2, 112 Stat. 2993 (1998).

<sup>342</sup> 28 U.S.C. § 652(a)–(b). See ROBERT J. NIEMIC, ET AL., GUIDE TO JUDICIAL MANAGEMENT OF CASES IN ADR (Federal Judicial Center 2001) (outlining judicial strategies for use in management of ADR processes and describing use of ADR procedures throughout federal courts); ELIZABETH PLAPINGER & DONNA STIENSTRA, ADR AND SETTLEMENT IN THE FEDERAL DISTRICT COURTS: A SOURCEBOOK FOR JUDGES AND LAWYERS (Federal Judicial Center 1996) (describing procedures implemented in various federal courts on a case wide basis).

<sup>343</sup> 28 U.S.C. § 653 (2000).

<sup>344</sup> *Id.* § 654(a) (prohibiting individual district courts from referring cases to arbitration where money damages claimed exceed \$150,000 or the action involves alleged violation of constitutional or statutory civil rights). Qualifications of arbitrators are also determined through local rule by individual federal district courts. *Id.* § 655(b); see also BARBARA S. MEIERHOEFER, FEDERAL JUDICIAL CENTER REPORT: COURT-ANNEXED ARBITRATION IN

award functions as a civil judgment.<sup>345</sup> Where Irish procedure considers settlement through mediation the end of a case, American litigants may place their case back on the trial docket as if no referral to arbitration occurred by filing a demand for trial within thirty days of an arbitration award.<sup>346</sup> Because Americans preserve trial by jury, evidence of the arbitration award or the fact arbitration transpired is inadmissible in the subsequent trial.<sup>347</sup>

A final passing similarity between American federal procedure and the Irish court procedure is the requirement of a verifying affidavit. Generally, American federal practice does not require verified pleadings or affidavits supporting pleadings or motions.<sup>348</sup> Yet, specific federal statutes and rules may require verified pleadings.<sup>349</sup> The requirement for a verifying affidavit in federal practice might insulate attorneys from sanctions should a litigant's assertions prove untruthful.<sup>350</sup>

#### e. Beneficial Irish Procedures Federal Procedure Should Incorporate

The Irish concept of providing an extrajudicial mechanism to provide litigants a reasonable assessment of damages coupled with a streamlined court procedure should be emulated by American federal procedure. Rather than place the power of assessment with a Personal Injuries Assessment Board, American federal procedure should permit the trial judge to make an assessment of dam-

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TEN DISTRICT COURTS (1990) (describing local rules, impact of utilization of arbitration, and needs for statutory reform).

<sup>345</sup> 28 U.S.C. § 657(a), (c)(1)–(2) (2000). The trial judge may not receive the contents of the arbitration award until the final judgment on the case is rendered or the action is otherwise terminated. *Id.* § 657(b); *cf.* ROBERT TIMOTHY REAGAN, ET AL., FEDERAL JUDICIAL CENTER REPORT: SEALED SETTLEMENT AGREEMENTS IN FEDERAL DISTRICT COURT (2004) (providing statistical analysis and reproducing local rules on sealing settlement agreements as well as indicating personal injury cases resulted in the greatest percentage of sealed settlements).

<sup>346</sup> 28 U.S.C. § 657(c)(1)–(2).

<sup>347</sup> *Id.* § 657(c)(3) (unless such information is admissible under the Federal Rules of Evidence or the parties stipulate to the admissibility of such facts). The subsequent trial is the de novo trial previously requested by the party filing the demand for de novo trial.

<sup>348</sup> FED. R. CIV. P. 11(a). For state rules regarding verification, see generally 71 C.J.S. *Pleading* § 486 (2000).

<sup>349</sup> 42 U.S.C. § 247d-6d (2000).

<sup>350</sup> A recent bill proposes to increase attorney sanctions for presenting pleadings and the like that prove lacking in factual support. Lawsuit Abuse Reduction Act of 2005, H.R. 420, 109th Cong. § 2 (2005) (as passed by the House, Oct. 27, 2005 and reported to the Senate Committee on the Judiciary, Oct. 31, 2005).

ages for the parties' consideration. By reference to an American version of the Irish *Book of Quantum*, the trial judge would make an assessment of damages in all federal personal injury cases, including medical negligence actions.

The non-binding assessment of damages would follow Irish procedure in permitting litigants to accept or reject the assessment. Rejection of the assessment by any party would then permit the case to proceed upon an expedited track to trial by jury. In order to maximize judicial time in making the assessment of damages, formal offers of settlement would be exchanged by the parties and filed with the court prior to a Scottish-type pretrial meeting focused on settlement of the case. Should the pretrial meeting not result in settlement, then the trial judge would make an Irish-style assessment of damages. Additionally, federal procedure would require traditional American-style pleadings to be accompanied by a verifying affidavit to deter fraudulent claims.

Discussion of the means to incorporate these Irish reforms into federal procedure occurs in Part II of this article. Through an amalgamation of Scottish and Irish beneficial reforms, American procedure may develop an efficient system for litigating federal personal injury actions. Incorporation of these elements into American practice requires introduction of a new rule of civil procedure and a minor amendment to a federal statute. Thus, the new American procedure for litigating personal injuries actions will result from judicial rulemaking and congressional action.

## II. REFORMING THE U.S. FEDERAL SYSTEM FOR LITIGATING PERSONAL INJURY CASES

### A. *New Optional Procedure for Federal Personal Injury Cases Incorporating Foreign Procedural Devices*

The optional procedure for personal injury actions shall apply to all federal cases involving personal injury, whether founded on federal question or diversity of citizenship jurisdiction.<sup>351</sup> The plaintiff shall elect whether to proceed under the optional procedure or to commence an ordinary federal civil action. The defendant shall retain the right to object to the optional procedure. Objection to the optional procedure places the action on the ordinary track to resolution under the current Federal Rules of Civil

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<sup>351</sup> See U.S. CONST. art. III, § 2, amend. XI; 28 U.S.C. §§ 1331, 1332 (2000) (authorizing federal question and diversity of citizenship jurisdiction to federal district courts).

Procedure. Absent a defense objection at the initiation of the case, the personal injury action progresses under the scheme proposed below.

Although the benefits of Scottish and Irish narrative fact pleading have been noted, the optional procedure shall employ the traditional structure of American pleadings. The optional procedure alters the timeframe for the filing of traditional pleadings and requires the plaintiff's complaint and defendant's answer to be accompanied by a verifying affidavit. Additionally, the plaintiff must include with the complaint and verifying affidavit a report by a treating medical doctor concerning the injuries suffered by the plaintiff.

Within twenty-eight days of service of a summons, the defendant must file his answer and counterclaims. Thirty days after plaintiff files the summons and verifying affidavit, the plaintiff's valuation statement must be filed with the court and served upon the defendant. Within the same time period plaintiff may file a reply to any counterclaims. The defendant shall file a valuation statement within thirty days after receipt of the plaintiff's valuation statement.

A pretrial meeting held for the sole purpose of settling the case shall be ordered by the court after the complaint and answer are filed. The pretrial meeting shall occur twenty-eight days after the filing of the defendant's valuation statement. Five days prior to the pretrial meeting the parties shall file with the court and serve upon each other formal offers of settlement. Should the defendant not desire to settle the case, then he shall file a statement to that effect. In the event the defendant files such a statement, the pretrial meeting shall be for the purpose of narrowing the issues in dispute between the parties. If the parties settle the case at the pretrial meeting, then case resolution will occur within eighty-eight days or about twelve and a half weeks from the date of the case's initiation.

Should the case not settle at the pretrial meeting the trial judge shall make an assessment of damages according to the *Book of Compensation*, the American version of the *Book of Quantum*, produced by the U.S. Judicial Conference. Assignment of the production of the *Book of Compensation* to the Judicial Conference occurs by minor amendment to 28 U.S.C. § 331 by inserting an ad-

ditional paragraph into the statute.<sup>352</sup> The new paragraph would make the Conference responsible for the production and maintenance of a *Book of Compensation* for use by district court judges in providing to litigants an assessment of damages as provided for in the Federal Rules of Civil Procedure. The paragraph would define the *Book of Compensation* as a methodology for determining the appropriate level of damages in a personal injury case based upon a set range of cash values. According to the statute, the Judicial Conference would promulgate the *Book of Compensation* to each district court, and engage in a continuous review of the schedules of damages contained within the Book to ensure the reasonableness of the amounts indicated in the schedules.

The Conference should adopt a method for assessing damages similar to or exactly the same as the methodology for determining the appropriate amount of damages as the Irish *Book of Quantum*. The Irish technique for assessing damages required the assessor to first locate the type of injury under one of the four general regions of the body. Next, the assessor identified the entry within the general region applicable to the injury claimed by the plaintiff in the present case. The assessor then determined the severity of the injury. The seriousness of an injury was determined by reference to three severity levels. Each level of severity corresponded to a range of appropriate damages to compensate the injured plaintiff.

Rather than an assessor, the trial judge, a magistrate judge, or a senior judge shall issue a written assessment of damages to the parties within twenty days after the pretrial meeting.<sup>353</sup> Parties shall have twenty days to either accept or reject the assessment. Should parties accept the assessment, the judge shall enter an order of payment in the amount of damages assessed.<sup>354</sup> In the case of acceptance by all parties of the assessment, the case shall resolve in 128 days or about eighteen weeks from the case's initiation.

Should either party reject the assessment, the judge shall order a discovery conference to be held within twenty-eight days of the expiration of the twenty day period for acceptance of the assessment. At the conclusion of the discovery conference, the trial judge shall order the completion of discovery within 120 days of

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<sup>352</sup> See 28 U.S.C. § 331 (2006) (authorizing creation of the U.S. Judicial Conference).

<sup>353</sup> See *id.* §§ 294, 636.

<sup>354</sup> The orders for payment may be kept on a separate register by the clerk of the court for each district court so that these registers may be transmitted annually for statistical purposes to the Judicial Conference. FED. R. CIV P. 79(b).

the discovery conference. Each party shall have one motion to extend the discovery period for sixty days as of right. No other motions to extend the discovery phase past 240 days shall be accepted.

Trial of the action shall occur at the expiration of the discovery phrase. With no extensions in the discovery phase by either party, trial of the case will occur 148 days or twenty-one weeks after the assessment of damages. Should both parties exercise their motion to extend the discovery phase, the case would be tried 268 days or thirty-eight weeks after submission to the parties of the assessment. Trial of personal injury actions would occur approximately nine months after the filing of the complaint. Litigants progressing to trial of their personal injuries case shall retain the right of appeal.<sup>355</sup>

Consideration of the proposed new civil procedure rule aids in the presentation of the optional procedure. The proposed new rule appears below.

*Rule 71B. Optional Personal Injury Procedure*

(a) *Applicability of Other Rules.* The Rules of Civil Procedure for the United States District Courts govern the adjudication of a personal injury action, except as otherwise provided for in this rule.

(b) *Commencement of Action.* A personal injury action invoking the optional procedure is commenced by filing with the court and service upon the defendant of a complaint whose caption reads in bold font, "Optional Personal Injury Procedure," an affidavit verifying the factual allegations of the complaint executed by the plaintiff, and a report by a medical doctor detailing the injuries sustained by the plaintiff.

(1) *Defendant's Right to Object to Optional Procedure.* Defendant may object to commencement of the optional procedure by filing with the court and serving upon the plaintiff a statement indicating objection to plaintiff's election of the optional procedure. Such objection shall be filed and served no later than five days after receipt by the defendant of the plaintiff's complaint. Objection by the defendant removes the action from the optional procedure.

(c) *Abbreviated Timetable.* Absent defendant's objection, the defendant shall file and serve, within twenty-eight days of receipt of plaintiff's complaint, an answer to plaintiff's complaint accompanied with an affidavit verifying the factual allegations executed by

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<sup>355</sup> Cf. FED. R. CIV. P. 54(a) (defining judgment); FED. R. APP. P. 3-5 (rules governing appeals as of right and discretionary appeals).

the defendant. Defendant may file and serve a counterclaim, in the same manner prescribed for a plaintiff commencing an optional procedure action, at the same time as the answer.

(1) *Valuation Statements.* Plaintiff shall file and serve a valuation statement thirty days after receipt of defendant's answer. The valuation statement shall be on Form 1C accompanied by documents supporting the cash values for damages stated in the form. Defendant shall file and serve a valuation statement within thirty days of receipt of plaintiff's valuation statement in the same manner as prescribed for plaintiff.

(2) *Reply to Counterclaim.* Plaintiff may file and serve a reply to defendant's counterclaim(s) with plaintiff's valuation statement.

(3) *Order for Pretrial Meeting.* An order by the court setting a pretrial meeting shall issue immediately after the filing of defendant's answer with the court. The order shall require parties to attend a pretrial meeting with the court to discuss settlement of the action. Parties shall be required to attend the pretrial meeting with any representatives necessary to give consent to a settlement of the action. The court may require the attendance of any other necessary parties at the pretrial meeting should the court determine that the attendance of such parties would facilitate settlement of the action. The pretrial meeting shall occur within twenty-eight days after defendant files his valuation statement.

(4) *Formal Offers of Settlement.* Each party shall file with the court and serve upon the other, five days before the pretrial meeting, a formal settlement offer including terms of settlement. Defendant may elect to file and serve a declaration that the defendant is not prepared to settle the case for any sum of money at anytime before the pretrial meeting. Should defendant file such a declaration, the pretrial meeting shall focus on narrowing the issues in dispute between the parties.

(5) *Assessment of Damages.* Should the pretrial meeting fail to resolve the action in settlement the court shall make an assessment of damages in accord with the *Book of Compensation* promulgated by the Judicial Conference of the United States. The court shall produce a written assessment of damages to the parties twenty days after the pretrial meeting. Either party may accept or reject the assessment. Acceptance of the assessment by both parties shall result in an order of payment issued by the court. Rejection by one party causes the action to continue to trial of the action according to this rule. Parties shall have twenty days to accept or

reject the assessment of damages. The court, if a party rejects the assessment, shall convene a discovery conference within twenty-eight days after the expiration of the twenty day period to accept the assessment of damages.

(6) *Discovery Conference.* The court will convene a discovery conference with the parties to consider the nature and basis of their claims and defenses, the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused upon particular issues.<sup>356</sup> The court shall order the completion of discovery within 120 days of the discovery conference. The court shall grant as of right, one motion for a sixty day extension of discovery for each party. No other motions to extend the discovery past 240 days shall be entertained by the court.

(7) *Trial.* Trial of the action shall occur immediately after the close of discovery. The mode of trial shall be either trial by jury or by the court in accordance with Rules 38 and 39.

(8) *Appeal.* Either party may appeal from a judgment entered after trial of an action as provided for by rule or statute.

The proposed valuation statement Form 1C would resemble the form appearing below.<sup>357</sup>

*Form 1C. Valuation Statement*

*Damages*

1. Personal injury
  - a. (insert corresponding *Book of Compensation* description)
  - b. Describe applicable *Book of Compensation* quantification factors
  - c. Total: \$
2. Past wage loss
  - a. Date from which wage loss claimed:
  - b. Date to which wage loss claimed:
  - c. Rate of net wage loss (per week, per month or per annum):
  - d. Total: \$
3. Interest on past wage loss
  - a. Percentage applied to past wage loss (state percentage rate):

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<sup>356</sup> This language is borrowed from FED. R. CIV. P. 26(f).

<sup>357</sup> Form based on the Scottish FORM 43.9 (2004), available at [http://www.scotcourts.gov.uk/session/rules/forms/form43\\_9.rtf](http://www.scotcourts.gov.uk/session/rules/forms/form43_9.rtf).

- b. Total: \$
- 4. Future wage loss
  - a. Specify method of calculation:
  - b. Total: \$
- 5. Future loss of capacity to provide personal services
  - a. Specify method of calculation
  - b. Total: \$
- 6. Needs and other expenses
  - a. Specify method of calculation
  - b. Total: \$
- 7. Specify any other included items
  - a. Total: \$

The optional procedure proposed results in uniform federal practice. Through the *Book of Compensation*, a guidepost in assessing the cash value of a personal injury action, parties benefit from a judicial assessment of damages. The judge in the optional procedure actively facilitates settlement between the parties by rendering an assessment of damages and engages in a greater managerial role through participation in the discovery conference.

The expanded role of the judge in the optional procedure comports with existing law.<sup>358</sup> Judicial assessment of damages is similar to the authority granted to the trial judge in a summary judgment proceeding.<sup>359</sup> In a hearing on a motion for summary judgment where the motion does not dispense with the case, the judge examines the pleadings and evidence, and interrogates counsel to ascertain the disputed factual issues.<sup>360</sup> The judge then issues an order “specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just.”<sup>361</sup> The Code of Conduct for U.S. Judges permits judges, “with consent of the parties, [to] confer separately with the parties and their counsel in an effort to mediate or settle pending matters.”<sup>362</sup> It has been noted that ethical concerns *may* arise in “nonjury trials, when a judge may be involved in

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<sup>358</sup> FED. R. CIV. P. 16(b)–(c) (authorizing judge to enter scheduling order setting dates for completion of discovery, additional conferences, filing of motions, as well as to facilitate settlement).

<sup>359</sup> FED. R. CIV. P. 56(d).

<sup>360</sup> *Id.*

<sup>361</sup> *Id.*

<sup>362</sup> CODE OF CONDUCT FOR U.S. JUDGES, Canon 3(A)(4) (2000).

settlement discussions, probe the parties' assessments of the value of the case, review the parties' settlement offers (and perhaps suggest to them specific settlement amounts), and then, when settlement talks fail, try the case and award damages."<sup>363</sup> A judge should evaluate on a case by case basis the need for disqualification from trial in this situation.<sup>364</sup>

The optional procedure is superior to ADR because the settlement results from court procedure. Rather than parties referring an action to a neutral outside the court system, litigants benefit from the trial judge's knowledge of the law in rendering an assessment of damages. Further, the assessment of damages focuses at the heart of the personal injury dispute—a cash award for the maintenance or recompense of the injured party by the injurer.

B. *Potential Legal Impediments to Establishment of the New  
Optional Procedure for Federal Personal Injury Cases:  
the Rules Enabling Act, the Rules of Decision  
Act & the Concept of Federalism*

The proposal of a new uniform federal procedure for litigating personal injury actions, which incorporates elements of the Scottish and Irish procedures, must address the jurisprudential restrictions of the Rules Enabling Act (REA),<sup>365</sup> the Rules of Decision Act (RDA),<sup>366</sup> and the concept of federalism.<sup>367</sup> Each proscribes the spheres of authority between state and federal law to fashion new procedural mechanisms in various ways.<sup>368</sup> The REA permits the U.S. Supreme Court to promulgate procedural rules governing the

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<sup>363</sup> 2 COMM. ON CODES OF CONDUCT 95 (1999), available at <http://www.uscourts.gov/guide/vol2/95>, reprinted in JAY E. GREINIG, *ALTERNATIVE DISPUTE RESOLUTION* 75 (2005).

<sup>364</sup> *Id.*; 28 U.S.C. § 455 (2000).

<sup>365</sup> 28 U.S.C. §§ 2071–74 (2000).

<sup>366</sup> 28 U.S.C. § 1652 (2000).

<sup>367</sup> U.S. CONST. art. I, § 8, cl. 18; art. VI; amend. X, §2; THE FEDERALIST NOS. 10, 45, 46, 51 (James Madison), Nos. 15, 17 (Alexander Hamilton). See generally DONALD L. DOERNBERG, ET AL., *FEDERAL COURTS, FEDERALISM AND SEPARATION OF POWERS: CASES AND MATERIALS* (3d ed. 2004); DANIEL J. ELAZAR, *AMERICAN FEDERALISM: A VIEW FROM THE STATES* (3d ed. 1984); STANLEY ELKINS & ERIC MCKITRICK, *THE AGE OF FEDERALISM* (1993); DAVID L. SHAPIRO, *FEDERALISM: A DIALOGUE* (1996). See also Peter J. Smith, *The Marshal Court and The Originalist's Dilemma*, 90 MINN. L. REV. 612, 640–62 (2006).

<sup>368</sup> See SAMUEL ISSACHAROFF, *CIVIL PROCEDURE* 133–41 (2005) (discussing interrelation of statutes and federalism); LARRY L. TEPLY & RALPH U. WHITTEN, *CIVIL PROCEDURE* 486–92 (3d ed. 2004).

adjudication of actions within the federal courts.<sup>369</sup> The RDA requires federal courts “exercising diversity jurisdiction to obey the decisional law of the state in which they [sit].”<sup>370</sup> The concept of federalism delineates authority to establish and regulate procedure within the federal courts between the Congress and the Judicial Branch—but the “Supreme Court has never materially clarified those procedural matters that only Congress can regulate and those which Congress can delegate to the courts.”<sup>371</sup>

The RDA, REA, and federalism interact in a morass of judicially-created tests which cause much uncertainty as to the appropriate operation of each principle in a given case. The culmination of this ambiguity is the exercise of diversity of citizenship jurisdiction by the federal courts.<sup>372</sup> In 1824, Justice Story authored the Supreme Court’s initial pronouncement attempting to clarify the ambiguity of the interaction between the RDA, REA, and federalism. In *Swift v. Tyson*,<sup>373</sup> the Court dealt with the argument that the RDA required federal courts to adhere to the decisional law produced by state courts as determinative in federal diversity actions.<sup>374</sup> The Court reasoned that laws are not analogous to court decisions, and therefore state judicial decisional law need not be applied by federal courts under diversity of citizenship jurisdiction in disputes involving general matters of law.<sup>375</sup> The meaning of “laws” in the RDA “limited its application to state laws, strictly local, that is to say, to the positive statutes of the state, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intra-

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<sup>369</sup> 28 U.S.C. § 2072(a) (2000); *Sibbach v. Wilson & Co.*, 312 U.S. 1, 10 (1941); see *Henderson v. United States*, 517 U.S. 654, 656 (1996); *Willy v. Coastal Corp.*, 503 U.S. 131, 134 (1992); *Burlington N. R. Co. v. Woods*, 480 U.S. 1, 5 (1987).

<sup>370</sup> ISSACHAROFF, *supra* note 368, at 136. “Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state.” *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). R

<sup>371</sup> TEPLY & WHITTEN, *supra* note 368, at 487 (discussing *Wayman v. Southard*, 23 U.S. 1 (1825) decision and separation of power principles). R

<sup>372</sup> 28 U.S.C. § 1332 (2000).

<sup>373</sup> 41 U.S. 1 (1842).

<sup>374</sup> *Id.* at 18. The Act discussed by the Court is the first statutory expression of the RDA, which is for current purposes identical to the RDA. Compare Judiciary Act of 1789, ch. 20, § 20, 1 Stat. 73, 92, with 28 U.S.C. § 1652 (2000).

<sup>375</sup> *Swift v. Tyson*, 41 U.S. 1, 18 (1842). In the Court’s own words, state court decisions, “are, at most, only evidence of what the laws are, and are not, of themselves, laws.” *Id.*

territorial in their nature and character.”<sup>376</sup> Should such matters arise in a federal action founded upon diversity of citizenship jurisdiction, then federal courts would give deference to state court decisions. In all other cases, state court decisions on point would receive consideration, “but they cannot furnish positive rules, or conclusive authority” for federal courts adjudicating actions under diversity jurisdiction.<sup>377</sup>

Thus, federal common law developed under the *Swift* regime until 1938.<sup>378</sup> In that year, the Supreme Court declared that the ruling in *Swift* caused “grave discrimination” to citizens of the state where the litigation took place.<sup>379</sup> This discrimination contravened the constitutional genesis authorizing diversity of citizenship jurisdiction in the federal courts.<sup>380</sup> The Court noted new academic research that discovered the original intent of the RDA was to ensure that state judicial opinions be applied by federal courts sitting in diversity jurisdiction in all cases except those actions founded specifically on federal law.<sup>381</sup> The Court found that the discriminatory result of the *Swift* ruling violated the constitutional mandate of equal protection of the laws.<sup>382</sup> Hence, the Court concluded the substantive law applicable in all cases, save those arising under the Constitution or Acts of Congress, is the law of the state—and rejected the existence of general federal common law.<sup>383</sup>

In 1945, the Court pronounced that a suit filed in federal court under diversity jurisdiction should result in “substantially the same” outcome as if the same action was adjudicated in the courts of the state where the federal court sat.<sup>384</sup> In 1958, the Court further qualified the substantially similar standard by asserting “state statutes and constitutional provisions could not disrupt or alter the

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<sup>376</sup> *Swift*, 41 U.S. at 18.

<sup>377</sup> *Id.* at 19.

<sup>378</sup> See generally Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 899–902 (1986); Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 13–6 (2006).

<sup>379</sup> *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 74 (1938).

<sup>380</sup> *Id.*

<sup>381</sup> *Id.* at 73 (citing Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49 (1923)).

<sup>382</sup> *Id.* at 75. Cf. U.S. CONST. amend. XIV, § 1.

<sup>383</sup> *Erie*, 304 U.S. at 78. Additionally, the Court noted Justice Holmes’ opinion that the *Swift* doctrine violated constitutionally proscribed limitations on the authority of federal courts. *Id.* at 79.

<sup>384</sup> See *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945).

essential character or function of a federal court.”<sup>385</sup> The substantive law of the state reigned supreme in federal diversity jurisdictional actions, but the Court did not address whether federal civil procedural rules still governed all federal suits or if state procedural law circumvented its federal counterpart in certain instances.

In 1965, the Supreme Court took up this exact question in *Hanna v. Plumer*.<sup>386</sup> The Court ruled on the question because of “the threat to the goal of uniformity of federal procedure posed” by the lower court decision, which displaced a federal procedural rule with a conflicting state rule.<sup>387</sup> The Court first noted the federal procedural rule in question did not violate the REA or the Constitution, and therefore was a valid exercise of federal authority within the scheme of federalism.<sup>388</sup> The standard used to assess compliance with the REA and the Constitution came from *Sibbach v. Wilson & Co.*,<sup>389</sup> which announced,

The test must be whether a rule really regulates procedure,—the [*sic*] judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them.<sup>390</sup>

The Court declared *Sibbath* the only proper test for the applicability of federal procedural rules in conjunction with a finding that the federal rule complies with the REA and the Constitution.<sup>391</sup>

The Court addressed whether federal courts may apply federal procedural rules when exercising diversity of citizenship jurisdiction when such rules might substantively affect the outcome of the litigation.<sup>392</sup> The Supreme Court concluded that:

the constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in those courts, which in turn includes a power to regulate matters which, though falling within the uncertain area be-

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<sup>385</sup> *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525, 539 (1958) (holding federal trial by jury provisions govern despite contrary state rule).

<sup>386</sup> 380 U.S. 460 (1965).

<sup>387</sup> *Id.* at 463.

<sup>388</sup> *Id.* at 463–64.

<sup>389</sup> 312 U.S. 1 (1941).

<sup>390</sup> *Id.* at 14.

<sup>391</sup> *Hanna v. Plumer*, 380 U.S. 460, 465. (1965).

<sup>392</sup> *Id.* at 461–63, 466.

tween substance and procedure, are rationally capable of classification as either.<sup>393</sup>

Hence, the Court declined to hold that a federal rule, “whenever it alters the mode of enforcing state-created rights” ceases to operate, because such a holding would “disembowel either the Constitution’s grant of power over federal procedure or Congress’ attempt to exercise that power in the Enabling Act.”<sup>394</sup>

The Court found that federal procedural rules, even those in conflict with state law, must be applied in diversity cases because the RDA governed only applicability of state substantive law.<sup>395</sup> Therefore, federal procedural rules governed federal adjudications, which appeared settled law until 1996.

In 1996, the Supreme Court held in *Gasperini v. Center for Humanities, Inc.*<sup>396</sup> that a New York procedural rule must be applied by New York federal courts where failure to apply the New York rule “is *outcome affective*.”<sup>397</sup> The Court articulated in a footnote that federal rules govern absent unconstitutionality or violation of the REA.<sup>398</sup> The Court then asserted “[f]ederal courts have interpreted the Federal Rules, however, with sensitivity to important state interests and regulatory policies.”<sup>399</sup> Thus, the Court undertook an examination of whether the New York procedural rule “[w]ould . . . ‘have so important an effect upon the fortunes of one or both of the litigants that failure to [apply] it would [unfairly discriminate against citizens of the forum State, or] be likely to cause a plaintiff to choose the federal court.’”<sup>400</sup>

Notably, the quoted language in *Gasperini* generating a new “outcome affective” test is contained within a footnote in the Court’s prior *Hanna* opinion, which announced the supremacy of federal procedural rules in all situations.<sup>401</sup> Apparently the Court

<sup>393</sup> *Id.* at 472.

<sup>394</sup> *Id.* at 473–74.

<sup>395</sup> *Id.* at 473–74 (Court’s opinion overruling *Swift* did not apply to procedural matters).

<sup>396</sup> 518 U.S. 415 (1996).

<sup>397</sup> *Id.* at 428 (emphasis added). The Court dealt with a procedural rule that the Court believed operated like state substantive law. “*Gasperini* acknowledges that a statutory cap on damages would supply substantive law for *Erie* purposes. . . . Although CPLR § 5501(c) is less readily classified, it was designed to provide an analogous control.” *Id.* at 428–29.

<sup>398</sup> *Id.* at 428 n. 7.

<sup>399</sup> *Id.* (citing *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980)).

<sup>400</sup> *Id.* at 428 (citing *Hanna v. Plumer*, 380 U.S. 460, 468 n. 9 (1965)).

<sup>401</sup> The anomaly in diversity cases whereby federal procedural rules might not apply directly results from the Supreme Court’s overruling of prior precedent that federal courts could not promulgate uniquely federal common law in diversity actions when considering

intended to incorporate the entirety of the quoted language, so the “outcome affective” test occurs when application of the federal rule of procedure rather than the state rule would

make so important a difference to the character or result of the litigation that failure to enforce it would unfairly discriminate against citizens of the forum State, or whether application of the rule would have so important an effect upon the fortunes of one or both of the litigants that failure to enforce it would be likely to cause a plaintiff to choose the federal court.<sup>402</sup>

Yet, this “outcome affective” test deviates from *Hanna’s* holding that the considerations quoted by the *Gasperini* Court are inapplicable in determining whether a federal rule in conflict with a state procedural rule governs.<sup>403</sup> The *Hanna* Court expressly stated that incorporation of these types of considerations fell squarely in the realm of substantive law matters.<sup>404</sup>

The following formulation restates the current jurisprudence under the “outcome affective” test: a) federal rules of procedure govern in actions arising exclusively under Acts of Congress and the Constitution; b) federal procedural rules govern in diversity of citizenship actions where displacement of state procedural rules, in relation to citizens of the forum state, does not result in unfair discrimination or inducement to select a federal court rather than a state court.<sup>405</sup> Both rules contain the additional proviso that the federal rule must be in compliance with the Constitution and the REA in order to be presumptively valid. Recent lower federal appellate interpretations of the “outcome affective” test appear to support the preceding formulation.<sup>406</sup>

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matters of general jurisprudence. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 71, 77–8 (1938) (overruling *Swift v. Tyson*, 41 U.S. 1 (1842)).

<sup>402</sup> *Hanna*, 380 U.S. at 468 n. 9.

<sup>403</sup> *Id.* at 473–74.

<sup>404</sup> *Id.* Contextually, one may argue that the fact that the *Hanna* Court did not adopt the reasoning of its footnote in the main holding of the case resulted in its implicit rejection of the propriety of such a contradictory rule.

<sup>405</sup> *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 427 (1996).

<sup>406</sup> See *Correia v. Fitzgerald*, 354 F.3d 47, 54 n. 3 (1st Cir. 2003) (declaring special circumstances must exist to implicate outcome affective test); *Houben v. Telular Corp.*, 309 F.3d 1028, 1034–36, 1038 (7th Cir. 2002) (explaining outcome affective test as balancing and accommodation of federal and state interests); *Esfeld v. Costa Crociere, S.P.A.*, 289 F.3d 1300, 1307 (11th Cir. 2002) (announcing outcome determinative applies only if no federal rule or statute is on point); *Com/Tech Commc’n Tech., Inc. v. Wireless Data Sys., Inc.*, 163 F.3d 149, 150 (2d Cir. 1998) (stating test inapplicable if federal rule directly addresses situation).

The “outcome affective” test raises significant doubt as to whether this new test governs all federal procedural applications—thereby effectively overruling previous precedent—or merely reiterates a standard, already jurisprudentially present, coexisting with the fundamental rule that federal procedural rules govern in diversity actions unless such rules violate the Constitution or the REA.<sup>407</sup>

The ruling of the *Gasperini* Court in 1996 illustrates why diversity of citizenship cases pose the greatest threat to federal coherence of a new procedural mechanism to utilize in personal injury cases. Academic commentary disputes the reasoning of the “outcome affective” test.<sup>408</sup> Given the strength of prior precedent instructing that, even in diversity cases, federal procedural rules generally govern and the uncertain validity of the “outcome affective” test, the proposal described above creating a new rule of federal civil procedure, a new federal procedural form, and introducing a minor amendment to an existing federal statute is offered to provide a new procedural method for litigants to use in federal civil actions involving claims for personal injuries consistent with existing federal law.

### C. Conclusion

The proposed new American optional procedure described above complies with the American constitutional and statutory precept of preserving trial by jury in civil cases. Compliance with

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<sup>407</sup> Accord Robert J. Condlin, “A Formstone of Our Federalism”: *The Erie/Hanna Doctrine & Casebook Law Reform*, 59 U. MIAMI L. REV. 475, 518 (2005) (arguing Supreme Court reversed correct analytical framework in pronouncing the outcome affective test, but correctly decided case).

<sup>408</sup> C. Douglas Floyd, *Erie Awry: A Comment on Gasperini v. Center for Humanities, Inc.*, 1997 BYU L. REV. 267, 290–305 (1997) (noting lack of definition and Supreme Court’s misapplication of prior precedent in formulating outcome affective test); Richard D. Freer, *Some Thoughts on the State of Erie after Gasperini*, 76 TEX. L. REV. 1637, 1663 (1998) (carefully examining all prior precedents and concluding outcome affective test lacks clarity); J. Benjamin King, Note, *Clarification and Disruption: The Effect of Gasperini v. Center for Humanities, Inc. on the Erie Doctrine*, 83 CORNELL L. REV. 161, 183–92 (1997) (determining new test uncertain and undermines previous Supreme Court holdings that federal rule on point governs presumptively); Wendy Collins Perdue, *The Sources and Scope of Federal Procedural Common Law: Some Reflections on Erie and Gasperini*, 46 U. KAN. L. REV. 751 (1998) (suggesting rationalization of outcome affective test through alternate context); Robert P. Wasson, Jr., *Resolving Separation of Powers and Federalism Problems Raised by Erie, the Rule of Decision Act, and the Rules Enabling Act: A Proposed Solution*, 32 CAP. U. L. REV. 519, 660–668 (2004) (criticizing outcome affective test as encapsulating all previous mistaken doctrine).

these fundamental jurisprudential concepts occurs because the optional procedure places the ultimate decision to accept the assessment of damages with the parties. The parties retain the right to reject the assessment and proceed to trial by jury in the normal course.

Additionally, the optional procedure is valid under the separation of powers and REA rubric because the procedure allocates to Congress those areas historically dealt with by statutory enactment, while permitting the courts to exercise appropriate rulemaking powers within the generally accepted sphere of judicial authority.<sup>409</sup> Further, the proposed rule changes do not infringe upon the substantive rights of litigants because the rules are in line with already existing ADR procedures, like those of the district courts in Michigan and New York.

Moreover, the RDA and “outcome determinative” test are satisfied by the optional procedure. The “outcome determinative” test, present in diversity of citizenship cases, will permit uniform use of the optional procedure because the new federal rules do not unfairly discriminate against non-forum state citizens or induce selection of a federal court venue over that of a state tribunal because alternate ADR procedures currently exist in most states similar to the Michigan state rules and the New York ENE process described above.<sup>410</sup>

Since personal injury actions continue as the greatest number of cases filed in federal courts, the optional procedure should provide considerable assistance in ensuring these cases are efficiently and justly resolved by the courts. The procedure benefits the parties as an aid to settlement, the judiciary by effectuating their role to administer justice, and the public in assuring that juror voir dire panels are constituted after serious negotiation and thought by the parties about reaching a reasonable settlement of the action.

Furthermore, the proposed optional procedure allows attorneys to “advocate the interests of their clients and involve them in

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<sup>409</sup> *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941).

<sup>410</sup> See SARAH R. COLE ET AL., *MEDIATION: LAW, POLICY AND PRACTICE* app. C (2d ed. 2001) (listing mediation statutes in several states); BETTE J. ROTH ET AL., *Alternative Dispute Resolution Practice Guide* § 2:12, app. II-2 (West 2005) (describing and listing state arbitration statutes); Wayne D. Brazil, *Court ADR 25 Years After Pound: Have We Found a Better Way?*, 18 OHIO ST. J. ON DISP. RESOL. 93, 113 (2002) (noting extensive development of ADR in state courts); Louise Phipps Senft & Cynthia A. Savage, *ADR and the Courts: Progress, Problems, and Possibilities*, 108 PENN ST. L. REV. 327, 328–330 (2003) (noting growth of state court ADR programs).

the process of resolving their dispute.”<sup>411</sup> Individuals will continue to retain an attorney to impart tactical and strategic considerations to the client. The attorney plays a vital role in the optional procedure to ensure the process provides opportunities for participants to reach settlement. The optional procedure also ensures that litigants, represented by counsel, achieve settlements arrived at through the deliberate judicial administration of justice.

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<sup>411</sup> TED A. DONNER & BRIAN L. CROWE, *ATTORNEY'S PRACTICE GUIDE TO NEGOTIATIONS* 4-7 (2d ed. 2003).