

Civil Procedure
Law 225

Fall 2017

Lecture Notes No. 3

LIMITATIONS

Limitations terminate the potential liability of a defendant, and the beginning of the time when one “should be secure in his reasonable expectation that he will not be held to account for ancient obligations;” *M.(K.) v. M.(H.)*, [1992] 3 S.C.R. 6 at para. 22. The prospect of a time bar to commence proceedings also acts to encourage litigants to move with reasonable dispatch in bringing their claims; this in turn allows for the collection and preservation of evidence as it is relatively fresh for the eventual trial. The principles rationalizing the limitations rules are thus easy to understand and to state, but difficult to apply due to those balancing mechanisms that may be present in a given context - such as ‘discoverability’ or context-specific complications (like disability) - that ensure that a party is not unfairly and unjustly deprived of his or her right to seek redress before the courts.

Limitations are now largely statutory law. Originally this was governed by an equitable doctrine, The equitable maxim *vigilantibus et non dormientibus jura subveniunt* (the laws aid those who are vigilant, not those who sleep) and gave rise to the doctrine of *laches*. The doctrine is not a defence and does not rely on merely the passage of time, but rather looks to acquiesce on the part of the claimant and detrimental reliance on the part of the defendant so as to recognize what is in essence a waiver or set up an estoppel.

Some friendly advice:

After a first client meeting on a litigation file, take careful note of when the cause of action arose and immediately diarize the termination of the limitation period. Failure to do so may result in omitting to bring proceedings in time, the client’s action becoming statute-barred, and you being held liable in negligence. Indeed, if you are consulted by a potential client and not retained, you should write the potential client to advise them that you met, that you aren’t retained, and that they ought to retain a lawyer or act to preserve their rights before the termination of the limitation period.

Please also note that some types of claims have strict **notice periods** – if the defendant is not notified within the time period the claim is barred. Your car was damaged travelling over the Causeway because the bridge hadn’t been de-iced properly? You have 10 days to notify the city of your claim; see *Municipal Act, 2001*, S.O. 2001, c. 25, s.44(10). As with the expiry of limitation period, be sure to warn potential clients who consult you of the notice period whether you are retained to act for the potential client or not.

(a) *Limitations Act 2002, S.O. 2002, c.24*

Limitations statutes are not predicated on fault encourage timely resolution of claims on an evidential record that is not inherently unfair to the defendant. We manage the applicable time period, depending on the statute, based on discoverability and postponement principles in addition to fraudulent concealment. The *Limitations Act 2002* is the default limitations statute and applies a 2-year limitation period with a 15-year maximum subject to certain statutory provisions that provide for atypical treatment. The limitations statute does not apply to statutes explicitly excluded or excepted from its operation, but does encompass all other claims be they in law and equity.

Thus, the basic provisions provides:

Basic limitation period

4. Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered.

Discovery

5. (1) A claim is discovered on the earlier of,

(a) the day on which the person with the claim first knew,

- (i) that the injury, loss or damage had occurred,
- (ii) that the injury, loss or damage was caused by or contributed to by an act or omission,
- (iii) that the act or omission was that of the person against whom the claim is made, and
- (iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and

(b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).

Presumption

(2) A person with a claim shall be presumed to have known of the matters referred to in clause (1) (a) on the day the act or omission on which the claim is based took place, unless the contrary is proved.

...

Ultimate Limitation Periods

15. (1) Even if the limitation period established by any other section of this Act in respect of a claim has not expired, no proceeding shall be commenced

in respect of the claim after the expiry of a limitation period established by this section.

General

(2) No proceeding shall be commenced in respect of any claim after the 15th anniversary of the day on which the act or omission on which the claim is based took place.

Period not to run

(4) The limitation period established by subsection (2) does not run during any time in which,

- (a) the person with the claim,
 - (i) is incapable of commencing a proceeding in respect of the claim because of his or her physical, mental or psychological condition, and
 - (ii) is not represented by a litigation guardian in relation to the claim;
- (b) the person with the claim is a minor and is not represented by a litigation guardian in relation to the claim; or
- (c) the person against whom the claim is made,
 - (i) wilfully conceals from the person with the claim the fact that injury, loss or damage has occurred, that it was caused by or contributed to by an act or omission or that the act or omission was that of the person against whom the claim is made, or
 - (ii) wilfully misleads the person with the claim as to the appropriateness of a proceeding as a means of remedying the injury, loss or damage.

Burden

(5) Subject to section 10, the burden of proving that subsection (4) applies is on the person with the claim.

(b) Does the Limitations Act 2002 Apply?

[See the Schedule to section 19 of the *Limitations Act 2002* for a list of statutes not effected by the statute.]

***McConnell v. Huxtable*
2014 ONCA 86**

In this case the question posed was which statute governs a claim for a constructive trust over real property on grounds of unjust enrichment – the 10-year period set out in the *Real Property Limitations Act* or the 2-year period set out in the *Limitations Act 2002*? The former. Read the case to understand that the choice becomes formally an interpretive question, but is really one bound up with public policy. That is, how the law wishes to institutionalize liability in certain types of actions. The rationale for the distinction in this case is that the law deals atypically with land as it is a unique asset and that monetary compensation may not be an adequate remedy for a successful claim.

Rosenberg J.A.:

21 This brings us to the central question at issue in this appeal: whether the respondent's claim for a constructive trust based on unjust enrichment is an action for recovery of land. The appellant's broad submission is that, as developed in Canada, a constructive trust is "merely" a remedy, not an independent claim. Therefore, the claim in this case is for unjust enrichment and not an action for recovery of land.

...

23 The motion judge held that the plain meaning of recover any land includes seeking an equitable interest in land through imposition of a constructive trust. As he said at para. 59, "a case in which someone asks the court to award them ownership of part or all of a piece of land held by somebody else is an action to recover land." The motion judge then considered the entire context of s. 4 of the Real Property Limitations Act, the scheme and object of the Act and the intention of the Legislature. This context included the Limitations Act, 2002, and the historical context of limitations law in the province. The motion judge reviewed at some length the historical context beginning with a 1969 Report on Limitation of Actions by the Ontario Law Reform Commission through various reports and iterations of proposed Bills that resulted in the 2002 legislation that came into force in 2004. The conclusion of his analysis is found in paras. 74-80. For present purposes it is sufficient to set out para. 77:

A party seeking an ownership interest by way of constructive trust must plead and then prove facts establishing entitlement to it. The fact that a claimant must prove enrichment of the other party and a corresponding deprivation of the claimant, with no juristic reason for the enrichment in order to establish a constructive trust, and must also show that damages alone are insufficient and only a proprietary remedy is

adequate, does not alter the fact that the claimant has asked the court from the beginning to award an interest in land. To me, all this means is that the claimant has to plead and prove those key elements, usually called "material facts" in litigation, to justify the order sought. It should not matter how many material facts there are or whether the entitlement to land requires a two step analysis, so long as the application makes a claim of entitlement to ownership of land.

...

38 With that background I return to the interpretive issue and specifically to the question of whether an application for the equitable remedy of a constructive trust in real property is an application for recovery of any land. In my view, the respondent is making a claim for recovery of land in the sense that she seeks to obtain land by judgment of the Court. That the court might provide her with the alternative remedy of a monetary award does not take away from the fact that her claim is for a share of the property. The repeated references to constructive trust as a remedy for unjust enrichment in Kerr demonstrate that a proprietary remedy is a viable remedy for unjust enrichment where there is a link or causal connection between her contributions and the acquisition, preservation, maintenance or improvement of the property.

39 In sum, I agree with the motion judge's conclusion at para. 80 of his reasons:

From the plain meaning of the words "action to recover any land" in section 4 of the Real Property Limitations Act, in their "entire context" as described above, I find that the applicant's claim in this case for an ownership interest in the house in question is an "action to recover any land" within the meaning of section 4 of the Real Property Limitations Act. It is subject to a ten year limitation period. Based on the record before me, it is not possible for me to conclude that the applicant's claim in this case is barred by the ten year limitation. Accordingly, this part of her claim is entitled to proceed.

(c) "Discoverability"

Of prime importance to the question of limitations is when the facts upon which the claim is based were discoverable by the plaintiff. In normal circumstances, we presume the claim was discoverable on the day that the facts supporting it came into being but there are exceptions. Please note: not all statutes that prescribe limitations periods admit of a postponement based on discoverability; i.e. the limitation in question may be strict.

***M.(K.) v. M.(H.)* [1992] 3 S.C.R. 6**

The plaintiff was sexually assaulted from the age of 10 by her father. She brought a claim for assault and breach of fiduciary duty at age 28, after she entered psychological counseling and therapy. The therapists gave evidence that she could not deal rationally

with the fact of the incest until she entered therapy. The issue was whether the claim was statute barred. The plaintiff lost at trial and appeal on the point but won in the Supreme Court of Canada. The modified rule is now codified as s.10 of the Limitation Act – '[t]he limitation period established by section 4 does not run in respect of a claim based on assault or sexual assault during any time in which the person with the claim is incapable of commencing the proceeding because of his or her physical, mental or psychological condition.' Moreover, we presume incapacity until the date the proceeding was commenced; s.10(2).

Per LaForest J.:

The Limitations Act and Reasonable Discoverability

21 ... **During the hearing, counsel for the respondent conceded that the doctrine of reasonable discoverability had application to an action grounded in assault and battery for incest. He submitted, however, that the appellant was aware of her cause of action no later than when she reached the age of majority.** In order to determine the time of accrual of the cause of action in a manner consistent with the purposes of the Limitations Act , I believe it is helpful to first examine its underlying rationales. There are three, and they may be described as the certainty, evidentiary, and diligence rationales; see Rosenfeld, "The Statute of Limitations Barrier in Childhood Sexual Abuse Cases: The Equitable Estoppel Remedy" (1989), 12 Harv. Women's L.J. 206, at p. 211.

22 Statutes of limitations have long been said to be statutes of repose; see *Doe d. Duroure v. Jones* (1791), 4 Term Rep. 300, 100 E.R. 1031 , and *A'Court v. Cross* (1825), 3 Bing. 329, 130 E.R. 540 . The reasoning is straightforward enough. **There comes a time, it is said, when a potential defendant should be secure in his reasonable expectation that he will not be held to account for ancient obligations. In my view this is a singularly unpersuasive ground for a strict application of the statute of limitations in this context.** While there are instances where the public interest is served by granting repose to certain classes of defendants, for example the cost of professional services if practitioners are exposed to unlimited liability, there is absolutely no corresponding public benefit in protecting individuals who perpetrate incest from the consequences of their wrongful actions. The patent inequity of allowing these individuals to go on with their life without liability, while the victim continues to suffer the consequences, clearly militates against any guarantee of repose.

23 **The second rationale is evidentiary and concerns the desire to foreclose claims based on stale evidence. Once the limitation period has lapsed, the potential defendant should no longer be concerned about the preservation of evidence relevant to the claim...** However, it should be borne in mind that in childhood incest cases the relevant evidence will often be "stale" under the most expedient trial process. It may be ten or more years before the plaintiff is no longer under a legal disability by virtue of age, and is thus entitled to sue in her own name... In any event, I am not convinced that in this type of case evidence is automatically made stale

merely by the passage of time. Moreover, the loss of corroborative evidence over time will not normally be a concern in incest cases, since the typical case will involve direct evidence solely from the parties themselves.

24 **Finally, plaintiffs are expected to act diligently and not "sleep on their rights"; statutes of limitation are an incentive for plaintiffs to bring suit in a timely fashion...** in *Cholmondeley (Marquis) v. Clinton* (Lord) (1820), 2 Jac. & W. 1, 37 E.R. 527 (Ch.) , the Master of the Rolls had this to say in connection with limitation periods for real property actions, at p. 140 and p. 577, respectively:

The statute is founded upon the wisest policy, and is consonant to the municipal law of every country. It stands upon the general principle of public utility. Interest reipublicae ut sit finis litium , is a favorite and universal maxim. The public have a great interest, in having a known limit fixed by law to litigation, for the quiet of the community, and that there may be a certain fixed period, after which the possessor may know that his title and right cannot be called in question. It is better that the negligent owner, who has omitted to assert his right within the prescribed period, should lose his right, than that an opening should be given to interminable litigation, exposing parties to be harassed by stale demands, after the witnesses of the facts are dead, and the evidence of the title lost. *The individual hardship will, upon the whole, be less, by withholding from one who has slept upon his right ...* [Emphasis added.]

There are, however, several reasons why this rationale for a rigorous application of the statute of limitations is particularly inapposite for incest actions.

...

Application of the Discoverability Rule to Incest

30 **In my view the only sensible application of the discoverability rule in a case such as this is one that establishes a prerequisite that the plaintiff have a substantial awareness of the harm and its likely cause before the limitations period begins to toll. It is at the moment when the incest victim discovers the connection between the harm she has suffered and her childhood history that her cause of action crystallizes...**

These passages show that the Court may interpret the statute and the discoverability principle in light of its foundational principles – in this case, first principles supporting the position that the limitations period ought not to have ‘tolled’ based merely on the plaintiff’s age.

A claim may also not be discoverable based on the defendant’s fraud or deception of the plaintiff. This is the **doctrine of fraudulent concealment** which was explained by LaForest J.:

63 The leading modern authority on the meaning of fraudulent concealment is *Kitchen v. Royal Air Forces Assn.*, [1958] 2 All E.R. 241 (C.A.), where Lord Evershed, M.R., stated, at p. 249:

It is now clear ... that the word "fraud" in s. 26(b) of the Limitation Act, 1939, is by no means limited to common law fraud or deceit. Equally, it is clear, having regard to the decision in *Beaman v. A.R.T.S., Ltd.*, [1949] 1 All E.R. 465, that **no degree of moral turpitude is necessary to establish fraud within the section. What is covered by equitable fraud is a matter which Lord Hardwicke did not attempt to define two hundred years ago, and I certainly shall not attempt to do so now, but it is, I think, clear that *the phrase covers conduct which, having regard to some special relationship between the two parties concerned, is an unconscionable thing for the one to do towards the other.*** [Emphasis added.]

While stated in the context of statutory "fraud", I have no doubt that this formulation is drawn from the ancient equitable doctrine and is applicable to today's common law concept of fraudulent concealment. I note also that Lord Evershed's formulation has been adopted by this court; see *Guerin v. R.*, [1984] 2 S.C.R. 335. **What is clear from *Kitchen* and *Guerin* is that "fraud" in this context is to be given a broad meaning, and is not confined to the traditional parameters of the common law action.**

64 The factual basis for fraudulent concealment is described in *Halsbury's*, 4th ed., vol. 28, para. 919, at p. 413, in this way:

It is not necessary, in order to constitute fraudulent concealment of a right of action, that there should be active concealment of the right of action after it has arisen; the *fraudulent concealment may arise from the manner in which the act which gives rise to the right of action is performed.* [Emphasis added.]

In my view incest falls within the second category outlined in this passage, i.e., concealment arising at the time the right of action arises. As I have stated, it is the very nature of an incestuous assault that tends to conceal its wrongfulness from the victim.

65 **There is an important restriction to the scope of fraudulent concealment**, which *Halsbury's*, 4th ed., vol. 28, para. 919, at p. 413, describes as follows:

In order to constitute such a fraudulent concealment as would, in equity, take a case out of the effect of the statute of limitation, it was not enough that there should be merely a tortious act unknown to the injured party, or enjoyment of property without title, while the rightful owner was ignorant of his right; **there had to be some abuse of a confidential position, some intentional imposition, or some deliberate concealment of facts.**

Kowal v. Shyiak
2012 ONCA 512

In this case the Court of Appeal changed the conventional approach to the application of the limitations rules to multiple defendants. A homeowner suffered water damage in a new home. After attempting to resolve the matter with the builder, an action was commenced against the builder. An expert report identified stucco installation as the problem. The Court of Appeal held that the action was out of time against both defendants; the clear implication was that the practice of waiting upon expert reports to add other parties as defendants should cease.

Pepall J.A.:

[18] Certainty of a defendant's responsibility for the act or omission that caused or contributed to the loss is not a requirement. **It is enough to have *prima facie* grounds to infer that the acts or omissions were caused by the party or parties identified:** *Gaudet et al. v. Levy et al.* (1984), 47 O.R. (2d) 577 (H.C.). **Expert opinions are not required in all cases:** *McSween v. Louis* (2000), 187 D.L.R. (4th) 446 (Ont. C.A.); and *Lawless v. Anderson*, 2011 ONCA 102, at para. 28.

[19] By August 31, 2007, and certainly by November 1, 2007, the respondents were familiar with all the material facts. They knew that they had contracted with both Giant Builders and Overall Plastering. **They were aware who had done the work on their home. They knew they had suffered a loss and that the acts or omissions were caused by either the appellants, or the third parties, or both. This was confirmed by the motions judge. There was ample evidence on which to base a claim against the appellants without the necessity of obtaining any expert opinions. In our view, the motions judge erred in concluding that the respondents needed to obtain expert opinions before determining that they had a cause of action against the appellants.** Indeed, cumulatively, the three reports were inconclusive. In any event, an element of the claim is that, as a general contractor, Giant Builders had a duty to oversee the third party's work and Giant Builders is alleged to have breached that duty. No expert report was required in order to advance this claim.

Brown v. Baum
2016 ONCA 325

A surgeon operated to deal with problems experienced in an early surgery that he performed. From when does the limitation period run? The Court of Appeal accepted that section 5(a)(iv) of the statute ["that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it"] supported the view that the cause of action was not discoverable until it was known that the second surgery was unsuccessful in curing the problem.

Feldman J.A.:

[15] On this appeal, the appellant challenges the finding by the motion judge that although by July 2009 Ms. Brown knew that an injury, loss or damage had occurred (undergoing breast reduction surgery without having been informed of the risks) and that the injury, loss or damage had been caused or contributed to by an act of Dr. Baum (his failure to inform her), she did not know that bringing a legal action would be an appropriate remedy. The appellant points to the fact that Ms. Brown was taking photographs of her breasts for months following the initial surgery “just in case [she] ended up in a lawsuit like this one.”

[16] The appellant cites two errors it alleges Justice Mew made in his analysis. First, the appellant says that the motion judge erred in his interpretation of s. 5(1)(a)(iv) in stating, at para 50 of his reasons, that the point of the subsection “is to delay the commencement of the limitation period until such time as initiating a proceeding is an appropriate remedy.” The appellant argues that the motion judge erred by conflating a claim to a legal right with taking legal proceedings to pursue that right.

[17] I do not agree that the motion judge erred in his interpretation of the section. I agree with the motion judge that the fourth condition of discoverability under the Act is met at the point when the claimant not only knows the factual circumstances of the loss she has suffered, but also knows that “having regard to the nature of the injury, loss or damage”, an action is an appropriate remedy. Once she knows that, she has two years to initiate that action.

[18] The motion judge’s application of the subsection to the facts on this record was particularly apt: he concluded that because the doctor was continuing to treat his patient to try to fix the problems that arose from the initial surgery, that is, to eliminate her damage, it would not have been appropriate for the patient to sue the doctor then, because he might well have been successful in correcting the complications and improving the outcome of the original surgery. On the evidence of Dr. Brown, the specialist who provided Ms. Brown with a second opinion, by September 2010, Dr. Baum in fact was successful in ameliorating Ms. Brown’s damage.

[19] Second, the appellant submits that the motion judge gave the term “appropriate” an “evaluative gloss” rather than applying the meaning of “legally appropriate”, contrary to this court’s decision in Markel. Again I do not agree. The motion judge was entitled to conclude on the facts of the case that Ms. Brown did not know that bringing an action against her doctor would be an appropriate means to remedy the injuries and damage she sustained following her breast reduction surgery until June 16 2010, after Dr. Baum performed the last surgery.

[20] Further, I am satisfied that the test in s. 5(1)(b) is met. A reasonable person in Ms. Brown’s circumstances would not consider it legally appropriate to sue her doctor while he was in the process of correcting his

error and hopefully correcting or at least reducing her damage. Where the damages are minimized, the need for an action may be obviated.

...

[24] In my view, the motion judge made no error in his approach to this issue. He considered all of the relevant case law, and applied it to the facts. He was entitled to find that Ms. Brown did not know that it was appropriate to sue Dr. Baum until after the last surgery he performed to try to correct the complications and improve the outcome of the original surgery. As the motion judge observed, it is not simply an ongoing treatment relationship that will prevent the discovery of the claim under s. 5. In this case, it was the fact that the doctor was engaging in good faith efforts to remediate the damage and improve the outcome of the initial surgery. This could have avoided the need to sue.

Lauesen v. Silverman
2016 ONCA 327

This case is a nice illustration of a contextual analysis of discoverability. “The appellant did not know she should sue her former lawyer for making an improvident settlement of a car accident action until she went to another lawyer who advised her to do so, after he obtained an expert opinion about the extent of her injuries. The issue in this case is discoverability for limitation purposes: when is it reasonable for a lay person to know that she should sue her former lawyer?” The answer that was accepted was when she was advised that she could sue by another lawyer.

(d) *Ultimate Limitation Periods*

15. (1) Even if the limitation period established by any other section of this Act in respect of a claim has not expired, no proceeding shall be commenced in respect of the claim after the expiry of a limitation period established by this section.

(2) No proceeding shall be commenced in respect of any claim after the 15th anniversary of the day on which the act or omission on which the claim is based took place.

General

...

Period not to run

(4) The limitation period established by subsection (2) does not run during any time in which,

(a) the person with the claim,

- (i) is incapable of commencing a proceeding in respect of the claim because of his or her physical, mental or psychological condition, and
- (ii) is not represented by a litigation guardian in relation to the claim;

(b) the person with the claim is a minor and is not represented by a litigation guardian in relation to the claim; or

- (c) the person against whom the claim is made,
- (i) wilfully conceals from the person with the claim the fact that injury, loss or damage has occurred, that it was caused by or contributed to by an act or omission or that the act or omission was that of the person against whom the claim is made, or
 - (ii) wilfully misleads the person with the claim as to the appropriateness of a proceeding as a means of remedying the injury, loss or damage.

Burden

(5) Subject to section 10, the burden of proving that subsection (4) applies is on the person with the claim.

(e) Pleading Limitation is a Defence

Collins v. Cortez 2014 ONCA 685 (Ont. C.A.)

This case dealt with the application of the *Limitations Act 2002* within the context of the new summary judgment motion regime under the 2010 amendments to the *Rules of Civil Procedure*. Here the plaintiff discovered serious injuries that would allow her to sue for damages outside the statutory benefits regime two weeks after the original injury was sustained. The action itself was brought two years and two days after the accident and dismissed based on limitations on a summary judgment motion. In allowing the appeal, van Rensburg J.A. held for the Court of Appeal:

[9] This motion was for summary judgment dismissing a claim against an existing defendant, and not a motion to amend a claim after the expiry of a limitation period. It was a motion for judgment, not a pleadings motion.

[10] In the normal course, if a limitations defence is raised, as here, in a statement of defence, and the plaintiff relies on the discoverability principle, the material facts relevant to discoverability should be pleaded in reply. I disagree with the conclusion of the motion judge that the appellant was required to plead the facts relevant to discoverability in her statement of claim. The expiry of a limitation period is a defence to an action that must be pleaded in a statement of defence... As such, discoverability, which is relevant to the limitations defence, need not be anticipated by a plaintiff and addressed in her statement of claim...

PLEADINGS

(a) Terms

Originating process	(a) a statement of claim, (b) a notice of action, (c) a notice of application, (d) an application for a certificate of appointment of an estate trustee, (e) a counterclaim against a person who is not already a party to the main action, and (f) a third or subsequent party claim, but does not include a counterclaim that is only against persons who are parties to the main action, a crossclaim or a notice of motion; r.1.03.
Claim	Assertion of a right to a remedy together with a version of the material facts to be proved in support of that assertion. Parties: plaintiff v defendant in an action. Request for an Order (application) together with a statement under oath of the undisputed and relevant material facts. Parties: applicant v respondent (if any) in an application.
Counterclaim	A claim by a defendant against the plaintiff.
Crossclaim	A claim by a defendant against another defendant.
Third Party Claim	A claim by a defendant against a third party who is not a party to the 'main proceeding';
Defence	A statement defending against a claim and presenting an alternative version of the material facts to be proved.
Reply	A statement replying to a statement of defence and which can be combined with a defence to a counter-claim. It is an optional step in the pleadings.
Issued	A court official accepts a form of process from a party and assigns it a court file number. The document, now issued, may then be served. There is usually a fee.
Served	Providing a person interested in or a party to the proceeding with a document in compliance with the Rules.
Filed	Providing the Court with a document, usually after it has been served.
Deliver	Serving and filing with proof of service.
Leave of the Court	Permission.

Evidence	A statement, document or thing that is offered to prove a proposition. Evidence is relevant if it makes the proposition more or less likely.
Material Facts	A fact is something that has actually occurred or that actually exists. A 'material' fact as used in the Rules is one that is necessary in relation to the claim or defence. Material facts must be proved by evidence or be admitted by the other party.
Discovery	The inspection of documents or real evidence or the questioning of witnesses that may be adduced by one party by the adverse party pursuant to the Rules.
Judge	A justice of the S.C.J. or the Ont. Court.
Deputy Judge	A per-diem judge of the Small Claims Court (usually a practising senior lawyer).
Master	A judicial officer with a jurisdiction to hear procedural motions and applications or assessment hearings in relation to costs or lawyers' accounts. A Master is not a judge (some types of relief can only be ordered by a judge).

(b) Why are 'pleadings' important?

- ***As a document of record***, it is available and may be referenced on pre-trial motions and proceedings (especially case management and settlement conferences). It provides the most basic and necessary information: (i) the parties to the litigation; (ii) the issues or questions of fact and law which are in dispute (and thus allows for the determination as to whether a reasonable cause of action or defence in issue); (iii) determines who has the burden of proof; (iv) determines the relevancy of evidence at trial; (v) sets out the relief sought.
- ***As a persuasive document***, it presents the Court with a comprehensive theory of the case from one party's perspective. Pleadings are important so it is necessary to spend sufficient time investigating and analyzing a client's position before drafting the pleadings.
- ***As a strategic document***, it shapes the scope of oral discovery and production of documents. In general, litigation begins with pleadings that set the outside boundaries of the disputes which are then narrowed on an ongoing basis through discovery, admissions, agreements, and interlocutory orders. From a broad series of allegations and counter-allegations, we aim to try the matter on as few issues as possible.

(b) Material Facts And Particulars

25.06 (1) Every pleading shall contain a **concise statement of the material facts** on which the party relies for the claim or defence, **but not the evidence** by which those facts are to be proved.

...

25.10 Where a party demands particulars of an allegation in the pleading of an opposite party, and the opposite party fails to supply them within seven days, the court may order particulars to be delivered within a specified time.

A **material** fact is one necessary to make out the claim; **evidence** is additional facts to prove the material fact.

Consider a case where the plaintiff sues the defendant for negligence:

(i) material facts?

The defendant's car was an old Chevy worth no more than \$1000. Despite its age, it was travelling 100 mk/h or more in a 60 km/h zone.

The defendant's car was an old Chevy worth no more than \$1000 is immaterial; it's speed was material.

(ii) a concise statement:

The plaintiff was struck when he was about one-third of the way across the roadway, just short of the mid-way point and a little bit closer to the other side.

v.

The plaintiff was hit by the car while he was crossing the street.

(iii) material facts v evidence

The defendant's car was travelling 100 km/h in a 60 km/h zone.

v.

Bob saw the defendant's car beside his car. Bob was travelling 90 km/h. The defendant's car was travelling much faster, at least 100 km/h. This was all in a 60 km/h zone.

(iv) pleading conclusions of law from material facts

25.06(2)

A party may raise any point of law in a pleading, but conclusions of law may be pleaded only if the material facts supporting them are pleaded.

Consider a claim for breach of contract and failure to specify the content of an agreement:

Allan and Boris had a contract.

Boris did work on Allan's car.

Allan owes Boris money for breach of contract.

v.

Allan and Boris had a contract.

The contract was for Boris to fix the a/c in Allan's car.

Boris fixed the car.

Allan refused to pay for the repairs.

Allan owes Boris money for breach of contract.

Copland v. Commodore Business Machines Ltd.

1985 CanLII 2190 (Ont. S.C.J.)

- **Pleadings → Particulars → Evidence**
- **Sufficient information in pleadings to defend.**
- **Conclusions of wrongful conduct struck out as didn't contain specific acts in a wrongful dismissal defence; leave to amend granted.**

An employee sued his employer for wrongful dismissal; the employer defended on the basis that the employee was dismissed for 'just cause' (i.e. the employer had the right to fire the employee). The Statement of Defence provided in para. 9:

(a) The plaintiff attempted to mislead representatives of the defendant as to the amount of his salary and as to his obligation to repay advances provided to him by the defendant;

(b) The plaintiff knowingly or incompetently permitted excessive costs of sales;

(c) The plaintiff entered into imprudent personal transactions which brought his personal interests into conflict with his duties to the defendant;

...

(e) The plaintiff abused limousine and entertainment privileges provided to him at the defendant's expense;

(f) The plaintiff was insubordinate at and systematically attempted to undermine the position and authority of the defendant's president by misrepresentations made with respect to the latter's conduct and abilities;

(g) On the final day of his employment the plaintiff openly confronted the defendant's president in the presence of another employee, in a manner which was abusive, improper, and incompatible with the continuance of the plaintiff's employment relationship with the defendant.

The plaintiff employee sought particulars of these allegations arguing that each was material to his action.

Per Master Sandler:

11 Under r. 25.06(1), "Every pleading shall contain a concise statement of the material facts on which the party relies ..., but not the evidence by which those facts are to be proved." This rule is almost identical to former R. 143. **Material facts must be pleaded; evidence must not be pleaded. In between the concept of "material facts" and the concept of "evidence", is the concept of "particulars". These are additional bits of information, or data, or detail, that flush out the "material facts", but they are not so detailed as to amount to "evidence". These additional bits of information, known as "particulars", can be obtained by a party under new r. 25.10, if the party swears an affidavit showing that the particulars are necessary to enable him to plead to the attacked pleading, and that the "particulars" are not within the knowledge of the party asking for them. An affidavit is not necessary only where the pleading is so bald that the need for particulars is patently obvious from the pleading itself.** New r. 25.10 is substantially the same as former R. 140, and in my view, the law on this subject has not changed by reason of the change from the Rules of Practice to the Rules of Civil Procedure.

...

15 **Rule 25.06(1) mandates a minimum level of material fact disclosure and if this level is not reached, the remedy is not a motion for "particulars", but rather, a motion to strike out the pleading as irregular. It is only where the minimum level of material fact disclosure has been reached, that the pleading becomes regular.** Thereafter, the discretionary remedy of "particulars" under r. 25.10 becomes available, if the party seeking particulars can qualify for the relief under the provisions of that rule.

16 Thus it becomes necessary, in any specific type of action, to determine the minimum level of material fact disclosure required for any particular pleading, in order to determine if the pleading is or is not regular. This is not an easy task by any means, and much common sense must be brought to bear in this endeavour. As well, the purpose and function of pleadings in modern litigation must be kept constantly in mind. It is often difficult to differentiate between, and articulate the difference between material facts, particulars, and evidence.

...

21 In my view, **the minimum level of material fact disclosure for a statement of defence in a wrongful dismissal action, where the defendant employer relies on cause for the dismissal, is very high, and the pleading must contain sufficient detail so that the employee and the Court can ascertain the exact nature of the questions to be tried, and so that the employee can meet the charge and respond in his reply accordingly.**

22 As one studies the allegations in paras. 9(a) through 9(g) of this statement of defence, it becomes apparent that material facts relating to each of these allegations is missing and have not been pleaded. For example, the material facts of the "imprudent personal transactions" referred in 9(c) are missing. The material facts concerning which employees were abusively and improperly treated and of what the plaintiff's conduct consisted, are missing from 9(d). The material facts concerning how the plaintiff abused his limousine and entertainment privileges, as pleaded in para. 9(e), are missing.

23 I am satisfied that each of paras. 9(a) through 9(g) fails to meet the minimum level of material fact disclosure required by rule 25.06(1) in the particular context of this particular action, and **I thus strike out para. 9 in its entirety, with leave to the defendant to amend as it may be advised.** (I suggest that the amended para. 9 be divided into additional paras. 9A, 9B, etc. containing all the necessary material facts, so that the numbering of the remaining paras. 10-18 of the statement of defence is not changed, which will make any subsequent review of the amended pleading much easier.)

[Please note that civil proceedings are not like criminal proceedings; where an information or indictment might be quashed in similar circumstances, the court here struck out the offending paragraphs and granted leave to amend.]

For a nice illustrative discussion of the structure and content of pleadings, please read ***Mudrick v. Mississauga Oakville Veterinary Emergency Professional Corp., 2008 CanLII 58422 (Ont. S.C.J., Master)*** where the plaintiff went so far as to include exhibits in his statement of claim.]

(v) Pleadings, Specificity and Damages:

25.06(9) Where a pleading contains a claim for relief, the nature of the relief claimed **shall** be specified and, where damages are claimed,

(a) the amount claimed for each claimant in respect of each claim shall be stated; and

(b) the amounts and particulars of special damages need only be pleaded to the extent that they are known at the date of the pleading, but notice of any

further amounts and particulars shall be delivered forthwith after they become known and, in any event, not less than ten days before trial.

For example,

Not:

The plaintiff claims damages for \$200,000.

Rather:

The plaintiff claims damages for breach of contract in the amount of \$50,000.

The plaintiff claims damages for negligence in the amount of \$150,000.

Better:

The defendant failed to supply the necessary parts. The plaintiff had to buy them from someone else for \$50,000. This is the amount of damages the plaintiff seeks for breach of contract.

The defendant installed the parts that the plaintiff obtained improperly which caused the milling machine to break and be inoperable for 30 days. The plaintiff seeks \$150,000 for the repairs that failed to be done in accordance with recognized standards of reasonable repair.

What about pleading punitive damages – how specific need punitive damages it be?

Whiten v. Pilot Insurance Co.

2002 SCC 18

This appeal deals principally with the law respecting punitive damages. An action was taken by an insured party against her insurer in relation to a fire insurance policy. The insurer denied the claim on the basis of arson and engaged in sharp litigation tactics designed to force the plaintiff to settle the claim on unreasonable terms. The jury found for the plaintiff and awarded \$1 million in punitive damages. One issue in the appeal was whether the claim for punitive damages was properly pleaded.

Per Binnie J:

(2) Was the Claim for Punitive Damages Properly Pleaded?

84 The respondent says that even if a separate claim arising under the insurance contract could provide the basis for punitive damages, none was pleaded in this case.

85 In other words, while "punitive and exemplary damages" are explicitly requested in para. 13 of the Statement of Claim, the material facts

necessary for the grant of such an award are not spelled out in the body of the pleading...

86 There is some case law that says a claim for punitive damages need not be specifically pleaded as it is included conceptually in a claim for general damages... In my view, the suggestion that no pleading is necessary overlooks the basic proposition in our justice system that before someone is punished they ought to have advance notice of the charge sufficient to allow them to consider the scope of their jeopardy as well as the opportunity to respond to it. This can only be assured if the claim for punitive damages, as opposed to compensatory damages, is not buried in a general reference to general damages. This principle, which is really no more than a rule of fairness, is made explicit in the civil rules of some of our trial courts... Ontario's Rule 25.06 (9) also has the effect of requiring that punitive damages claims be expressly pleaded. It is quite usual, of course, for the complexion of a case to evolve over time, but a pleading can always be amended on terms during the proceedings, depending on the existence and extent of prejudice not compensable in costs, and the justice of the case.

87 **One of the purposes of a statement of claim is to alert the defendant to the case it has to meet, and if at the end of the day the defendant is surprised by an award against it that is a multiple of what it thought was the amount in issue, there is an obvious unfairness. Moreover, the facts said to justify punitive damages should be pleaded with some particularity. The time-honoured adjectives describing conduct as "harsh, vindictive, reprehensible and malicious"... or their pejorative equivalent, however apt to capture the essence of the remedy, are conclusory rather than explanatory.**

88 Whether or not a defendant has in fact been taken by surprise by a weak or defective pleading will have to be decided in the circumstances of a particular case.

89 **In this case, the plaintiff specifically asked for punitive damages in her statement of claim and if the respondent was in any doubt about the facts giving rise to the claim, it ought to have applied for particulars and, in my opinion, it would have been entitled to them.**

90 **However, the respondent did not apply for particulars, and I think there is sufficient detail in the statement of claim to show that its failure to do so was not a self-inflicted injustice. There was no surprise except perhaps as to the quantum, which resulted in an amendment of the statement of claim at trial.** Quite apart from the advance notice that she was seeking punitive damages (para. 1(e)), the appellant specifically pleaded the basis for the independent "actionable wrong" in para. 10:

10. The Plaintiff pleads an implied term of the insurance contract was a covenant of good faith and fair dealings which required the Defendant, Pilot Insurance Company to deal fairly and in good faith in handling the claim of the Plaintiff.

91 The appellant also pleaded that Pilot's manner of dealing with her claim had created "hardship" of which "the Defendants, through their agents and employees always had direct and ongoing knowledge" (para. 8). In para. 14 she pleaded that "as a result of the actions of the Defendants, the Plaintiff has suffered and continues to suffer great emotional stress" (although there was no claim for aggravated damages). The respondent specifically denied acting in bad faith (Statement of Defence and Counterclaim of the Defendant, at para. 6). **The statement of claim was somewhat deficient in failing to relate the plea for punitive damages to the precise facts said to give rise to the outrage, but Pilot was content to go to trial on this pleading and I do not think it should be heard to complain about it at this late date.**

92 As to the respondent's objection that the pleading does not allege separate and distinct damages flowing from the independent actionable wrong, the respondent's argument overlooks the fact that punitive damages are directed to the quality of the defendant's conduct, not the quantity (if any) of the plaintiff's loss...

(c) Inadequate Pleadings

The pleadings must alleged a claim or defence known to law and sufficient material facts to make out that claim or defence in the litigation; if the pleadings fail to do so, they are *substantively inadequate* and are liable to struck out.

Rule 21**21.01 (1) A party may move before a judge,**

(a) for the determination, before trial, of a question of law raised by a pleading in an action where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs; or

(b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence,

and the judge may make an order or grant judgment accordingly.

(2) No evidence is admissible on a motion,

(a) under clause (1) (a), except with leave of a judge or on consent of the parties;

(b) under clause (1) (b).

One can allows move to strike pleadings under **Rule 25.11** on another basis altogether:

25.11 The court may strike out or expunge all or part of a pleading or other document, with or without leave to amend, on the ground that the pleading or other document,

(a) may prejudice or delay the fair trial of the action;

(b) is scandalous, frivolous or vexatious; or

(c) is an abuse of the process of the court.

(i) Not Pleading Sufficient Facts to Make Out a Claim

21.01 (1) A party may move before a judge,

(b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence

***Hunt v. Carey Canada Inc.*
[1990] 2 S.C.R. 959**

This is the leading case on striking pleadings. The action itself was in negligence and conspiracy and dealt with harms to workers through exposure to asbestos. On defendant brought a motion to strike the claim in conspiracy. Wilson J. reviewed the development of the law, and held in respect of the key phrase (“reasonable cause of action”) and the striking of a claim:

21 The requirement that it be “plain and obvious” that some or all of the statement of claim discloses no reasonable cause of action before it can be struck out, as well as the proposition that it is singularly inappropriate to use the rule’s summary procedure to prevent a party from proceeding to trial on the grounds that the action raises difficult questions, has been affirmed repeatedly in the last century: see *Dyson v. A.G.*, [1911] 1 K.B. 410 (C.A.); *Evans v. Barclays Bank & Galloway*, [1924] W.N. 97 (C.A.); *Kemsley v. Foot*, [1951] 2 K.B. 34, [1951] 1 T.L.R. 197, [1951] 1 All E.R. 331 (C.A.); and *Nagle v. Feilden*, [1966] 2 Q.B. 633, [1966] 2 W.L.R. 1027, [1966] 1 All E.R. 689 (C.A.). Lord Justice Fletcher Moulton’s observations in *Dyson*, at pp. 418-19, are particularly instructive:

Now it is unquestionable that, both under the inherent power of the Court and also under a specific rule to that effect made under the Judicature Act, the Court has a right to stop an action at this stage if it is wantonly brought without the shadow of an excuse, so that to permit the action to go through its ordinary stages up to trial would be to allow the defendant to be vexed under the form of legal process when there could not at any stage be any doubt that the action was baseless. *But from this to the summary dismissal of actions because the judge in chambers does not think they will be successful in the end lies a wide region, and the Courts have properly considered that this power of arresting an action and deciding it without trial is one to be very sparingly used, and rarely, if ever, excepting in cases where the action is an abuse of legal procedure.* They have laid down again and again that this process is not intended to take the place of the old demurrer by which the defendant challenged the validity of the plaintiff’s claim as a matter of law. Differences of law, just as differences of fact, are normally to be decided by trial after hearing in Court, and not to be refused a hearing in Court by an order of the judge in chambers. Nothing more clearly indicates this to be the intention of the rule than the fact that the plaintiff has no appeal as of right from the decision of

the judge at chambers in the case of such an order as this. So far as the rules are concerned an action may be stopped by this procedure without the question of its justifiability ever being brought before a Court. *To my mind it is evident that our judicial system would never permit a plaintiff to be "driven from the judgment seat" in this way without any Court having considered his right to be heard, excepting in cases where the cause of action was obviously and almost incontestably bad.* [emphasis added]

...

26 In Ontario, for example, the Court of Appeal dealt with R. 124 (the predecessor to R. 21.01) in *Ross v. Scottish Union and National Ins. Co.* (1920), 47 O.L.R. 308, 53 D.L.R. 415 (C.A.). The rule followed closely the wording of England's R.S.C. 1883, O. 25, r. 4, and read as follows:

124. A judge may order any pleading to be struck out on the ground that it discloses no reasonable cause of action or answer, and in any such case, or in case of the action or defence being shown to be frivolous or vexatious, may order the action to be stayed or dismissed, or judgment to be entered accordingly.

27 In *Ross*, Magee J.A. embraced the "plain and obvious" test developed in England, stating at p. 316:

That inherent jurisdiction is partly embodied in our Rule 124, which allows pleadings to be struck out as disclosing no reasonable cause of action or defence, and thereby, in such case, or if the action or defence is shewn to be vexatious or frivolous, the action may be stayed or dismissed or judgment be entered accordingly. *The Rule has only been acted upon in plain and obvious cases, and it should only be so when the Court is satisfied that the case is one beyond doubt, and that there is no reasonable cause of action or defence.* [emphasis added]

Magee J.A. went on to note at p. 317:

To justify the use of Rule 124, a statement of claim should not be merely demurrable, but it should be manifest that it is something worse, so that it will not be curable by amendment: *Dadswell v. Jacobs* (1887), 34 Ch. D. 278, 281; *Republic of Peru v. Peruvian Guano Co.* (1887), 36 Ch. D. 489; and it is not sufficient that the plaintiff is not likely to succeed at the trial: *Boaler v. Holder* (1886), 54 T.L.R. 298.

28 At an early date, then, the Ontario Court of Appeal had modelled its approach to R. 124 on the approach that had been consistently favoured in England. And over time the Ontario Court of Appeal has gone on to show the same concern that statements of claim not be struck out in anything other than the clearest of cases. As Laidlaw J.A. put it in *R. v. Clark*, [1943] O.R. 501 at 515, [1943] 3 D.L.R. 684 (C.A.):

The power to strike out proceedings should be exercised with great care and reluctance. Proceedings should not be arrested and a claim

for relief determined without trial, except in cases where the Court is well satisfied that a continuation of them would be an abuse of procedure: *Evans v. Barclay's Bank et al.*, [1924] W.N. 97. But if it be made clear to the Court that an action is frivolous or vexatious, or that no reasonable cause of action is disclosed, it would be improper to permit the proceedings to be maintained.

29 More recently, in *Gilbert Surgical Supply Co. v. F.W. Horner Ltd.*, [1960] O.W.N. 289 at 289-90, 34 C.P.R. 17 (C.A.), Aylesworth J.A. observed that the fact that an action might be novel was no justification for striking out a statement of claim. The court would still have to conclude that "the plaintiff's action could not possibly succeed or that clearly and beyond all doubt, no reasonable cause of action had been shown".

30 Thus, the Ontario Court of Appeal has firmly embraced the "plain and obvious" test and has made clear that it too is of the view that the test is rooted in the need for courts to ensure that their process is not abused. The fact that the case the plaintiff wishes to present may involve complex issues of fact and law or may raise a novel legal proposition should not prevent a plaintiff from proceeding with his action.

...

[Justice Wilson went on to approve the Ontario law as correct. The test, then, is whether the claim is not reasonable in the sense that it is "plain and obvious" that it cannot succeed. However, "power to strike out proceedings should be exercised with great care and reluctance" so as to not deny the plaintiff his or her day in Court. Ultimately, fairness to the defendant and preventing the abuse of the court's process are the dominant factors to be considered in respect of granting leave to amend the pleadings.]

***Holland v. Saskatchewan (Minister of Agriculture, Food & Rural Revitalization)*
2008 SCC 42**

This is the leading case in dealing with the question of striking novel claims.

Here, a group of elk farmers lost a government-sponsored herd certification for their game after they objected to terms in the government agreement. They took the provincial minister to judicial review and won; despite not bring an appeal to the decision, the government still refused to certify their game under the relevant program. The farmers then sued for, *inter alia*, various forms of negligence. The pleadings were struck as disclosing no reasonable cause of action on appeal. The farmers appealed and won in respect to one claim, 'negligent failure to implement an adjudicative decree' (which did not receive analysis as such in the Court of Appeal).

Per McLachlin CJC:

6 ... The Court of Appeal of Saskatchewan allowed the government's appeal from the ruling on negligence, holding that no action lies against public authorities for negligently acting outside their lawful mandates... The

question before this Court is whether the Court of Appeal erred in striking out the appellant's negligence claim in its entirety.

...

12 One allegation of negligence, however, appears to fall into a different category. Clause 61.1(f) of the appellant's statement of claim alleges that the Minister was negligent because "[n]otwithstanding the declarations of Mr. Justice Gerein that the indemnification and release clauses were invalid and [of] no effect, and that the herd status of 'surveillance' was wrongfully assigned, [he] refused to restore the CWD herd status [...] to the level [...] enjoyed before or to pay compensation [...] for [...] loss". The claim is essentially one of negligent failure to implement an adjudicative decree.

13 The Court of Appeal treated this claim as separate and different from the claim for breach of statutory duty, dealing with it under the heading "The Other Alleged Duties of Care". However, it did not address the central assertion in this claim that the Minister was under a duty to implement the judicial decree of Gerein C.J.Q.B. Gerein C.J.Q.B.'s order arguably placed the Minister under a duty to remedy the wrongful reduction of the applicants' herd status. The Court of Appeal never discussed this question. Instead, it held that the pleadings' reference to restoration of herd status must be struck, not because it disclosed no cause of action, but because the appellant "has not pleaded any facts to the effect his herd or any other farmer's herd had been maintained so as to warrant any particular CWD status, including the status it enjoyed before being reduced to 'surveillance'" (para. 49). "[T]he failure to plead such facts in the statement of claim," it concluded, "means this aspect of the negligence action must fail."

14 With respect, it is not clear to me that the reasons given by the Court of Appeal provide a sound basis for striking para. 61.1(f) at the outset of the proceedings. The real issue, not addressed by the Court of Appeal, is whether a claim for negligent failure to implement a judicial decree clearly cannot succeed in law and hence must be struck at the outset. Such a claim is not a claim for negligent breach of statute. It stands on a different footing...

15 **The remaining question is whether para. 61.1(f) must be struck because it fails to plead sufficient facts. In my view, it should not. The government's refusal "to restore CWD herd status" is pleaded as a fact. It is also pleaded, elsewhere, that loss of herd status led to losses to the members of the Class. These facts, in my view, were sufficient to support the claim for negligent failure to implement a judicial decree. It might be argued that facts relating to the conditions for restoration should have been pleaded. However, I am satisfied that the pleading was sufficient to put the government on the notice of the essence of the appellant's claim. Taking a generous view, it should not have been struck.**

16 I do not comment on whether the evidence and the applicable law will in fact establish a claim for negligence on this head at the time of trial. However, applying the rule that, on an application to strike,

pleadings must be read broadly and that it must be clear that the claim cannot succeed if it goes to trial, I am of the view that para. 61.1(f) should not be struck.

Paton Estate v. Ontario Lottery and Gaming Corporation (Fallsview Casino Resort and OLG Casino Brantford)
2016 ONCA 458

This is a technical case but with a dissent that makes a good point; the facts must be capable of founding a cause of action in a real sense. Here the claims were for an extension of existing doctrine rather than a new cause. I've asked you to read it as the dissent urges caution, which is an important consideration in cases of this sort.

As an aside... evidence on a motion to strike under r. 25.11...

One further point is of interest – on a Motion to Strike under Rule 25.11, the respondent is entitled to examine the moving party under oath to obtain relevant evidence under Rule 39.03. In a recent case, it was held that the responding party could call the moving party to determine whether he did not understand the claim as pleaded; see **Khan v. Lee, 2012 ONSC 4363**. In that case, Stevenson J. held:

[25] Dr. Lee alleges that Master Haberman erred in holding that it was incumbent on him to assert under oath that he lacks sufficient knowledge of the allegations against him in order to plead. Dr. Lee submits that this is a purely legal issue and that Master Haberman erred in law by finding that evidence may be relevant on this motion.

[26] The plaintiffs wish to examine Dr. Lee on his stated inability to respond to the allegations made in the statement of claim. **The test for a Rule 39.03 examination requires that the plaintiffs demonstrate that the examination they seek will be relevant to the upcoming Rule 25.11 motion to strike. Master Haberman finds, at paragraph 36 of her reasons, that Dr. Lee made his inability to respond to the allegations relevant by raising the issue in the factum he filed on that motion. She points out that Dr. Lee clearly found that issue relevant to his Rule 25.11 motion because he raised it in his factum.**

[27] As the case law set out above demonstrates, once it is shown that the proposed examination will be on an issue relevant to the pending motion, the party seeking to examine has a prima facie right to conduct that examination. **Master Haberman is correct that the onus on a party seeking to rely on Rule 39.03 is not a high one. I see no error in Master Haberman's finding that Dr. Lee's statement about his inability to respond to the allegations in the statement of claim is relevant to his motion to strike. Clearly, part of his argument will be that the statement of claim is so lacking in material facts that he cannot determine to what he must respond. As Master Haberman indicated at paragraph 34, the Rule 39.03 examination will be limited in scope to questions specifically**

relating to that issue. Dr. Lee is in a position to give evidence regarding his own ability to respond to the allegations.]

C. AMENDING PLEADINGS

Rule 25

25.11 The court may strike out or expunge all or part of a pleading or other document, with or without leave to amend, on the ground that the pleading or other document,

- (a) may prejudice or delay the fair trial of the action;
- (b) is scandalous, frivolous or vexatious; or
- (c) is an abuse of the process of the court.

Rule 26

26.01 On motion **at any stage of an action** the court shall grant leave to amend a pleading on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.

26.02 A party may amend the party's pleading,

(a) without leave, before the close of pleadings, if the amendment does not include or necessitate the addition, deletion or substitution of a party to the action;

(b) on filing the consent of all parties and, where a person is to be added or substituted as a party, the person's consent; or

(c) with leave of the court.

Miguna v. Ontario (Attorney General) 2005 CanLII 46385 (Ont. C.A.)

- **Here the pleadings were scandalous and an abuse (grave unspecific allegations) and leave to amend was refused; leave allowed on appeal – fairness favours amendment if no prejudice.**

Miguna Miguna is a Kenyan immigrant to Canada. He returned to Kenya, was active on politics, and has since returned to Ontario; see *Miguna v Walmart Canada*, 2015 ONSC 5744 (Ont. S.C.J.). He was arrested for sexual assault and acquitted. He then sued the Crown alleging many improper acts in the police investigation and Crown prosecution of his criminal charges, including racial profiling. His pleadings were struck with leave to amend refused. He then appealed to the Court of Appeal which allowed his appeal in part.

Per Blair J.A.

[14] By any standards, Mr Miguna's statement of claim is not well pleaded. He is claiming \$17.5 million in damages and alleging the gravest of

allegations against the Crown Attorney and Police defendants. Yet, instead of focusing his claim and the factual assertions supporting it on the few bases that may be open to him, he has taken the scattergun approach and raises – according to the respondents’ count – somewhere between sixteen and twenty-five causes of action...

[15] In addition, Mr. Miguna’s statement of claim confuses the need to plead the material facts relied upon – and in the case of malicious prosecution, the need to do so with full particularity – with the view that superimposing pejorative adverbs or adjectives one upon the other is a suitable substitute for pleading facts. For example, each of the Crown Attorney defendants is repeatedly alleged to have “negligently, incompetently, unethically, recklessly, and unprofessionally” (and, occasionally, “arrogantly”) engaged in various types of impugned activities. But the pleading is very sparse when it comes to setting out material facts in support of the sweeping allegations made.

[16] Having said that, however, the statement of claim does contain some basis for alleging the core causes of action that are asserted, and in my view, Mr. Miguna should be given an opportunity to amend to make out his case properly on a pleading basis...

...

[19] The motion judge accepted the respondents’ arguments that the statement of claim in its entirety was deficient... He concluded, however, that he should exercise his discretion not to grant leave to amend. His exercise of discretion was based upon the following considerations:

- a) the appellant had been made aware of the deficiencies in the pleading and had had ample opportunity to amend, but had not done so (and the proposed amended statement of claim presented at the hearing was deemed to be similarly deficient);
- b) the appellant had committed a grievous error in misrepresenting the reasons of the trial judge at the criminal trial on the charges of sexual assault; and,
- c) the appellant had made bald allegations of racial profiling, which amounted to a serious abuse.

[20] **Respectfully, the motion judge erred in principle in refusing to grant Mr. Miguna leave to amend his statement of claim for the foregoing reasons, in the circumstances of this case. He placed too much emphasis on what he perceived as the appellant’s failure to move quickly to deliver a proper amended statement of claim, in the face of the respondents’ criticisms of his pleading, and he appears to have reacted so as to punish Mr. Miguna for his erroneous characterization of the reasons of the trial judge at his criminal trial and for his allegations of racial profiling. These are factors that might well attract cost consequences as a sanction, but they do not justify a refusal to grant leave to amend in the circumstances.**

...

[24] ... **the test for granting leave to amend a pleading is not whether the pleader should be punished for previous misstatements or for making serious but bald allegations; rather, the test is whether the amendment can properly be made without prejudice to the other side.** Here, there is no prejudice to the respondents in permitting Mr. Miguna an opportunity to rescue his statement of claim by properly pleading the facts within his knowledge relevant to the causes of action available to him that do exist in law.

The amended claim was also the subject of litigation; see **Miguna v. Toronto Police Services Board, 2008 ONCA 799**.

**Stekel v. Toyota Canada Inc.
2011 ONSC 6507**

- **Here the pleadings named a subsidiary and not the parent corporation. There was actual knowledge that damages were being sought from the parent; no prejudice to the defendant and thus plaintiff should be allowed to amend.**

The plaintiff brought an action against the Canadian subsidiary of Toyota rather than the parent company and sought to amend the Statement of Claim to amend the pleadings and add the parent company. The claim against the parent company was beyond the basic limitations period. The doctrine of misnomer allows a correction to a mistaken identification of a party under s.21(2) of the Limitations Act and the plaintiff's position was that it ought to be allowed to amend its claim. The appeal by the plaintiff was dismissed as it was held that the claim was intended to include the parent company and the defendant knew as much. Should the Court refuse the amendment based on prejudice to the defendant?

Per Campbell J.:

[14] The Rules of Civil Procedure cannot properly be applied so as to effectively expand the ability of plaintiffs, through court order, to add party defendants to claims after the expiration of limitation periods.

[15] Rule 5.04 (2) provides that, at any stage of a proceeding, the court may "add, delete or substitute a party" or "correct the name of a party incorrectly named," on such terms as are just, "unless prejudice would result that could not be compensated for by costs or an adjournment." Rule 26.01 provides that, at any stage of an action, the court "shall grant leave to amend a pleading" on such terms as are just, "unless prejudice would result that could not be compensated for by costs or an adjournment."

[19] While rule 5.04(2) of the Rules of Civil Procedure formulates the general procedural rule for the addition, deletion, or substitution of other parties somewhat differently, this general rule cannot properly be applied so as to effectively change the interpretation of s. 21 of the Limitation Act, 2002. In short, in circumstances where a limitation period has expired, rule 5.04(2)

cannot be employed by the court to add a party to an ongoing proceeding unless it is only to “correct the name of a party incorrectly named” within the meaning of s. 21(2) of the Limitations Act, 2002.

...

[24] **The Court of Appeal for Ontario has made it clear that a plaintiff’s pleading will be viewed as reflecting a correctible “misnomer” in respect of a defendant where it is apparent: (1) that the plaintiff intended to name the defendant; and (2) that the intended defendant knew it was the intended defendant in relation to the plaintiffs claim. Moreover, such a misnomer can be corrected notwithstanding that it requires that the defendant be added to the litigation after the expiry of the limitation period...**

...

[33] As the master observed, in all of the circumstances of this case, it is more credible than not (and more likely than not), that TMC knew all about the plaintiffs’ claims....

[36] To the extent that the issue of potential prejudice to TMC must be considered in determining whether or not the proposed amendment can appropriately be made under s. 21(2) of the Limitations Act, 2002 and/or under rule 5.04(2) of the Rules of Civil Procedure, the evidence fails to establish any such prejudice... [this is] precisely the type of “prejudice” contemplated by s. 21(2) of the Limitations Act, 2002, it can not properly be relied upon to defeat a proposed amendment that is otherwise in accordance with the provision...