Civil Procedure
Law 225

Fall 2018

Lecture Notes No. 3

VI. PLEADINGS

(a) Terminology

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).

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) Rule 25 Concepts: 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) throught 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 the 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.

Brozmanova v. Tarshis
2018 ONCA 523

This was a motion to strike under r.21.01(b). The theory of the moving party was that the claim was statute barred for limitations, which was successful. The dicta of Brown J.A. is useful.

Brown J.A.:

II. THE PROCESS ADOPTED BY THE RESPONDENTS

[9] Before dealing with the merits of the appeal, some comments are in order about the procedure adopted by the respondents to strike out Ms. Brozmanova's claim under rules 21.01(1)(a) and (b).

[10] The Rules of Civil Procedure make available two sets of procedural devices by which a party can seek to dispose finally of a proceeding on a contested basis.

[11] One set is evidence-based, under which the parties adduce evidence by various means, on the basis of which the court decides whether to grant or dismiss a proceeding. The Rules permit or offer several standard evidence-based procedural devices by which to obtain such a final adjudication on the merits: (i) the conventional trial; (ii) the hybrid trial; (iii) two forms of summary judgment – rules 20.04(2)(a) and 20.04(2)(b); and (iv) a rule 38 application.

[12] The second set of procedural devices enables a party to ask the court to determine a question of law that may dispose of all or part of a proceeding. These law-based devices include: (i) a rule 22 special case; (ii) rule 21.01(1)(a), where a question of law is raised by a pleading; and (iii) rule 21.01(1)(b), where a pleading discloses "no reasonable cause of action or defence".

[13] The law-based character of the devices available under rules 21.01(1)(a) and (b) is reinforced by the limits placed on the use of evidence on motions brought under those rules. No evidence is admissible on a "no reasonable cause of action" motion; nor is evidence admissible on a "question of law" motion, except with leave of the judge or on consent of the parties: rule 21.01(2).

[14] The rationale for these prescriptions is a simple one: the allegations asserted in the pleading, which the court must accept as provable at trial, are sufficient to determine the question of law or whether the pleading discloses a cause of action or defence recognized by law: see *Hunt v. Carey Canada Inc.*, 1990 CanLII 90 (SCC), [1990] 2 S.C.R. 959, at pp. 980, 988 and 990-

991. No further facts are required to determine the legal sufficiency of the claim.

[15] In the present case, Dr. Tarshis was sued for conduct as a medical practitioner. He and Ms. Brown are represented by a law firm with long experience in representing medical practitioners. They sought to dismiss Ms. Brozmanova's action relying on two law-based rules: 21.01(1)(a) and (b).

The "question of law" under rule 21.01(1)(a)

[16] The "question of law" the respondents raise under rule 21.01(1)(a) is that Ms. Brozmanova commenced her action outside of the two-year limitation period.

[17] Relying on rule 21.01(1)(a) to advance a limitation period defence is a problematic use of the rule. Some decisions of this court characterize the issue of whether a plaintiff has commenced a proceeding within the limitation period as one involving a question of fact… Others describe it as involving a question of mixed fact and law… Regardless, it does not involve a question of law.

[18] In the basic case, the court must ascertain "the day on which the claim was discovered": Limitations Act, 2002, S.O. 2002, c. 24, Sched. B, s. 4 (the "Limitations Act"). This, in turn, requires making two findings of fact: (i) the day on which the person first knew of the four elements identified by s. 5(1)(a)(i)-(iv) of the Limitations Act;[1] and (ii) under s. 5(1)(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" s. 5(1)(a). The earliest of the two dates is the date on which the claim is discovered: s. 5(1).

[19] The analysis required under s. 5(1) of the Limitations Act generally requires evidence and findings of fact to determine. It does not involve a "question of law" within the meaning of rule 21.01(1)(a).

[20] Yet, here the respondents invoked a law-based rule to establish a largely fact-based defence. I recognize, as respondents' counsel submits, that some jurisprudence exists that has allowed a defendant to resort to rule 21.01(1)(a) to determine its limitations defence "where it is plain and obvious from a review of a statement of claim that no additional facts could be asserted that would alter the conclusion that a limitation period had expired"...

[21] However, courts must always remember that permitting a defendant to move under 21.01(1)(a) to establish a limitations defence could prove unfair to a plaintiff, especially a self-represented one. By selecting rule 21.01(1)(a) as the procedural means to adjudicate its fact-based limitations defence, a defendant puts a plaintiff in the position where she cannot, as of right, file evidence to explain when she discovered her claim. Instead, she must seek leave of the court.

[22] A plaintiff who risks the dismissal of her action on the basis of a limitations defence should not have to ask a court for permission to file evidence on the issue of when she discovered her claim. She should be entitled to do so as of right. It is unfair for a defendant to attempt, tactically, to deprive her of that right and put her to the unnecessary expense (and risk) of asking permission to do so.

[23] Notwithstanding the jurisprudence that opens the rule 21.01(1)(a) door to some efforts to prove a limitations defence, in my respectful view such an approach risks working an unfairness to a responding plaintiff. Requiring a defendant to move under an evidence-based rule – either rule 20 (summary judgment) or rule 51.06(2) (concerning admissions of the truth of facts in a pleading) – avoids such potential unfairness and is to be preferred.

"No reasonable cause of action" under rule 21.01(1)(b)

[24] The respondents also invoked rule 21.01(1)(b) to dismiss Ms. Brozmanova's claim. As noted, the motion judge accepted their submission that Ms. Brozmanova had failed to plead a constituent element of the tort of civil fraud – i.e., that she had acted or failed to act on the basis of representations by Dr. Tarshis.

[25] Rule 21.01(1)(b) focuses on the legal sufficiency of a plaintiff's pleading. As described by *Perell & Morden*, at p. 614:

> The focus of the motion is the substantive legal adequacy of the claim or defence. The essence of the motion is that the defendant's wrongdoing as described in the statement of claim is not a violation of the plaintiff's legal rights, with the result that the plaintiff is not entitled to a remedy even if he or she were able to prove all the material facts set out in the statement of claim. [Footnotes omitted.]

[26] Put another way, rule 21.01(1)(b) enables a defendant, before pleading over, to move to strike out a claim on the basis that it is plain and obvious that the plaintiff is not advancing a legally sufficient claim, even if all the facts she pleads can be proved at trial. As a result, the appropriate time for a defendant to move under the rule usually is before filing its statement of defence. That is because by filing a statement of defence, a defendant usually signals that the plaintiff has advanced a legally sufficient claim which the defendant intends to resist on the grounds set out in the statement of defence.

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.**]

(d) 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...

(e) Service

See Rules 16-18.