

Civil Procedure
Winter Term 2024

LECTURE NOTES NO. 8

VI. PLEADINGS

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 / Associate Judge	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.

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.

Evidence has a broad meaning. Basically, it refers to a sworn statement or document or thing that is used to prove a proposition of fact.

A **material** fact is one necessary to make out the claim or defence.

Relevant or probative evidence is evidence that makes a purported fact more or less likely to be true.

Thus, evidence is **admissible** provided it is both relevant and material. By the same token, irrelevant evidence is not admissible.

Please note that these definitions are somewhat elastic. Thus, relevant evidence is admissible to prove a material fact but also may be admissible to support or undermine credibility of a witness or the trustworthiness of other evidence.

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

material facts?

The defendant's car was an old Chevy worth no more than \$1000. Despite its age, it was travelling 100 km/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.

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.

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.

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 a/c in Allan's car.

Allan refused to pay for the repair.

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.]

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 (S.C.C.)***

This appeal deals principally with the law respecting punitive damages. An action 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 Plead?

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...

What can we learn from Copland and Whiten?

- A deficiency in the pleadings may lead to having the offending paragraphs struck out.
- Where the pleadings are insufficient, a party may ask for further particulars of the allegations and/or discover them during the discovery process.
- Failure to act in time may be fatal to any later objection. If unsure, demand particulars.
- A conclusion of law may be pleaded if there are sufficient material facts pleaded.
- A lawyer who plays tactical games in the litigation exposes his or her client to sanction – costs or even jury-awarded punitive damages.