Civil Procedure
Winter Term 2024

LECTURE NOTES NO. 9

VI. PLEADINGS (cont'd)

Recall **sub-rule 1.04(1)**:

> 1.04 (1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

Some relevant factors dealing with pleadings:

- "just": preserving the right of the parties to have the litigation determined on the merits while at the same time not prejudicing any party due to defective pleadings against that party.

- "most expeditious": whether arguments over pleadings advance the litigation. For example, narrowing the issues so that the parties can properly present a case on the evidence.

- "least expensive": whether arguments over pleadings are merely a tactical use of the Rules to delay or complicate the litigation unduly.

Inadequate Pleadings and Pleadings which Disclose No Claim or Defence

The pleadings must allege 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.

Note the distinctions between Rule 20, Rule 21, and sub-rule 25.11.

> **Rule 20**
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> 20.04
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> (2) **The court shall grant summary judgment if,**
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> (a) **the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence**; or

(b) the parties agree to have all or part of the claim determined by a summary judgment and the court is satisfied that it is appropriate to grant summary judgment.

(2.1) In determining under clause (2) (a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:

1. Weighing the evidence.

2. Evaluating the credibility of a deponent.

3. Drawing any reasonable inference from the evidence.

Conceptually, this rule deals with an early determination of litigation on the merits where “there is no genuine issue requiring a trial with respect to a claim or defence.” The rule is applied through a motion on evidence. This is directed to the sufficiency of evidence.

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).**

Conceptually this rule allows for an early determination of the litigation on the merits as pleaded; that is, the claim or defence as pleaded is defective as a question of law without reference to evidence.

> **Rule 25.11**
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> 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,
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> **(a) may prejudice or delay the fair trial of the action;**
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> **(b) is scandalous, frivolous or vexatious; or**
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> **(c) is an abuse of the process of the court.**

Here the nature of the allegations pleaded might in theory support a claim or defence, but the manner in which these facts are pleaded is defective. Here the Court will consider whether to strike the pleadings, or, more usually, order that the pleadings be amended consistent with **Rule 26**, below.

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

This is the leading case on striking pleadings under Rule 21. 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]
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> …

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.
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> …

[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 (S.C.C.)

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.
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> 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.

Amending Pleadings

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.**

The plaintiff 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.**
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> [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 (Ont. S.C.J.)

- **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...