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Persuasive Pleadings Promote Satisfying Settlements Sooner

(or Drafting Pleadings with Mediation in Mind)

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"Good preparation opens the mind to possibilities — and possibilities are the lifeblood of mediation."[1]

Introduction

The theme of this paper — that pleadings should be drafted with mediation in mind — is contrary to most notions of pleading I have considered in 30 years of civil litigation practice. In virtually every statement of claim I have drafted until now, my objective has been to:

- address every reasonably conceivable remedy
- make every allegation which could bolster my client's case
- make every allegation which could make the defendants look bad
- claim damages for more than the plaintiff's best case
- plead facts narrowly without evidence if possible
- make the statement of claim as "skinny" as possible
- plead alternative causes of action even if unsure they will succeed
- plead as if the main audience were the trial judge

Inspired by Don Short's invitation today, I am now proposing a different approach to pleading and it has so many interesting possibilities that I intend to change my habits. You will have to assess whether this changes from what we have used to is radical, forward-looking or are we just giving new labels to what has been done for years.

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1 S. Mutch, "Preparing an effective mediation brief makes sense" *The Lawyers Weekly*, Vol. 22, No. 44, March 28, 2003, p.13

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Drafting pleadings with mediation in mind is an approach driven by the new realities of litigation. What does it really mean? Here is the my hypothesis:

- Fewer cases go to trial than ever before. In our ADR-driven world, no more 2 or 3% of cases reach trial.
- Nearly all cases go to mediation, whether mandatory or voluntary or both.
- Since a trial is not the most likely end of the lawsuit, counsel who drafts pleadings with only the trial or trial judge in mind misses many important opportunities to improve the outcome of the client's case and to do so earlier at less cost.

Multi-faceted purpose of pleading

Pleadings are not only the documentary mechanism by which the plaintiff signals the start of the legal battle. A statement of claim which does little more than say "Hello, Defendant, I've sued you" may speak more to the ineffectiveness of plaintiff's counsel than it does to the strength of the plaintiff's claim. The statement of defence drafted with stark boilerplate defences, as if copied from the last precedent with the names changed, loses the opportunity to make serious inroads into the theory of the plaintiff's case. A bald defence is often a defence that simply defers to discovery or later, important opportunities to settle or perhaps misses them completely.

The statement of claim is one of the best marketing tools in the lawyer's arsenal. By this I do not intend that the statement of claim should be a press release about the plaintiff's claim (although some counsel have seen fit to do this). Rather, I am suggesting that counsel prepare the statement of claim with a view to persuading each of the audiences likely to read it. Every reader persuaded that the claim has some merit could help advocate for a disposition favourable to plaintiff. The same holds true for the statement of defence. To understand where this leads, we have to identify the target audiences for the pleading.

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Target Audience

If one accepts the notion that a statement of claim is a marketing tool to persuade the reader that the plaintiff's claim is meritorious, marketing principles should be applied to determine how to make the claim effective.

Before starting to draft the statement of claim, ask yourself: Who is going to read this pleading? What must be done to make it most persuasive? I decided to go to a marketer for some advice on how to be persuasive. Here are questions an internet marketer suggests you should ask yourself to persuade your target audience more effectively:[2]

- Who are the people I am trying to target?
- What problems am I trying to solve for each of the target audiences on my target list?
- What action or actions do I want each of the target audiences to take?
- What sort of things do my target audiences demand?
- What sort of things do my target audiences fear?
- What are they anxious about?
- What can I offer them to alleviate those fears?
- What sort of benefits can I give them?

Although selling the merits of your client's case is not like marketing a product or an internet site, the persuasive aspects are similar. To persuade your target audience, you still have to identify what the target audience is looking for. So, who is the target audience for a statement of claim? Pleadings have a broader audience than we might immediately recognize. The statement of claim you are about to draft will be read by the following:

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[2] Marketing plan: target audience by James Atkinson found at www.ultimate-affiliate.com

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- Other lawyers in your firm
- Your client, i.e., the plaintiff or plaintiffs themselves
- Members of your client's family
- If the client is a corporation, members of the corporation's management
- The client's in-house counsel or corporate solicitor
- Your referring lawyer
- The filing clerk at the court registrar's office
- The process server you engage to serve the claim
- The defendant or defendants
- Members of the defendant's family
- The defendant's counsel and others in her/his firm
- The defendant's insurance adjuster and insurance claims manager
- The mandatory mediator at a pre-discovery mediation
- The case management Master at a motion or case conference
- The judge or master on pleading or particulars motions
- The judge or master on a motion for summary judgment
- The master on a post-discovery refusals motion
- The judge or master at the settlement conference or pre-trial conference
- The private mediator at a post-discovery mediation
- The trial judge
- The judge who conducts the in-trial settlement conference
- Members of the print and electronic media
- Any member of the public who searches the public file at the court office

Even if each of these categories represents only one person (which is very unlikely), at least 23 people will read your statement of claim over the course of a lawsuit. Of these, only the summary judgment motions judge and the trial judge are focussed on deciding the merits of the case. As we have already observed, the chance of reaching the trial judge is very small.

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Many of the other readers of your pleading will be key parts of the process of finding a voluntary, alternative resolution of the dispute by negotiation or mediation. In this list are some of the people you will have persuade about the value of your case.

The purpose of pleading

What must counsel do to make the statement of claim as effective as possible for the most important persons who will consider its contents? To answer this question, we must, first determine the purpose of the statement of claim.

I cannot improve on Paul Perell's excellent article[3] on "The Essentials of Pleading". Although the article was published eight years ago, it is still an excellent guide for what should be pleaded and what should not.[4] Using Paul Perell's guidance, pleading in the era of mediation may require a slight change in emphasis. Rule 25.06(1) of the Rules of Civil Procedure provides that "every pleading shall contain a concise statement of the material facts on which the party relies for claim or defence but not the evidence by which those facts are to be proved." The rule is broad enough to permit latitude in good drafting.

Many of us were taught that good pleadings should be "skinny" — they should provide only the basic facts with as few particulars as necessary to advance the claim. Historically, the function of pleading was to compel parties to a lawsuit to disclose facts they are relying on to sustain their case. Professor Gary Watson and Craig Perkins (now Mr. Justice Perkins) described the function of pleadings as "giving notice, issuing definition and [providing] mutual disclosure."[5] There is a large body of law on when particulars of allegations in

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[3] P.M. Perell, "The Essentials of Pleading" (1995) *17 Adv. Q*. 205.

[4] Paul Perell's article is annexed as an appendix. The author acknowledges Paul Perell's permission append the article and his assistance in the preparation of this paper.

[5] G.D. Watson and C. Perkins, *Holmsted and Watson - Ontario Civil Procedure*, para. 25-17, as quoted

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pleadings will be ordered under 25.10.[6] The purpose of particulars was succinctly described by Lerner J.[7] as follows:

> Particulars are ordered primarily to have a pleading made sufficiently clear to enable the applicant to frame his answer thereto properly; the secondary purpose is to prevent surprise at trial.

Instead of drafting skinny pleadings which limit the information provided, plaintiff's counsel should see the statement of claim as an opportunity to persuade the primary target audiences of the merits of the claim. Persuasion is in part a presentation art form. The following factors will adversely affect the persuasiveness of your statement of claim:

- The claim lacks eye appeal or is unreadable due to font size or other factors
- The claim is not well-worded or contains errors of spelling or grammar
- The claim is in the wrong form or does not comply with Rules
- The claim is vague, unparticularized and difficult to follow
- The claim is too wordy; the paragraphs are too long and difficult to follow
- The claim exaggerates or misstates important facts
- The claim fails to disclose a reasonable cause of action
- The claim contains allegations bound to anger the defendant
- The claim raises remedies without pleading the elements required to prove them
- The claim alleges fraudulent conduct without sufficient particulars
- The claim alleges fraudulent conduct which cannot be proved
- The claim alleges fraudulent conduct which makes insurance inapplicable
- The claim seeks damages for "pie in the sky", unrecoverable amounts
- The claim seeks punitive damages when they could never be recovered

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in P.M. Perell, "The Essentials of Pleading" (1995) *17 Adv. Q*. 205.

6 P.M. Perell, "The Essentials of Pleading" (1995) *17 Adv. Q*. 205 at p.207-209

7 *Steiner v. Lindzon*,(1976), 14 O.R. (2d) 122 (H.C.) at p. 128.

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- The claim seeks punitive damages for unrecoverable amounts

The statement of claim should establish a good climate for mediation. The case will mediated one or more times. Establishing a climate for mediation does not mean that your pleading should be weak or conciliatory. The pleading should not contain an offer to settle or compromise the plaintiff's claim. On the contrary, pleadings with mediation in mind should be as persuasive as possible about the strengths of the plaintiff's claim. But persuasive pleadings should also be civil, reasonable and measured. That is why pleadings which suffer from the defects indicated above are less likely to produce an early settlement.

Preparation and Investigation

The old practice of drafting skinny, unparticularized pleadings was driven by the reality that counsel prepares the statement of claim without the benefit of all of the evidence necessary to prove the claim at trial. Also, the less we had to tell the other side about the case, the more we could develop as the action progressed. Lawyers tend to rely on the documents and documents the client has provided. Some investigation may be undertaken but in-depth investigation, detailed analysis of productions, interview of potential witnesses usually occurs long after the claim has been issued.

Our Rules of Civil Procedure may encourage this process to some extent. As noted, pleadings require facts not evidence. Affidavits of documents are not required contemporaneously with the issue of the statement of claim, so many documents may not have been seen by counsel when claim is drafted. Expert reports, including damages assessments are not due until 90 days before the trial. As a result, counsel takes the available information and packages it as well as possible.

Further, counsel knows that Rule 26.01 provides that the court *shall* grant leave to amend of a pleading in all but the most extreme circumstances, and even then, unless prejudice to the

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defendant cannot be remedied by costs or an adjournment.

Pleading with mediation in mind requires more advance planning. Here are some steps counsel can take to prepare persuasive pleadings to increase prospects for mediation success:

As plaintiff's counsel

- Identify all of the defendants who might reasonably be liable
- Map out a theory how each defendant might be liable
- Clearly establish facts and legal basis for each claim
- Research the elements of each cause of action and plead facts to support them
- Anticipate the areas about which particulars might be sought and provide them
- Claim damages in an amount which reflects what plaintiff is likely to recover
- If claiming punitive damages, plead the basis clearly and claim reasonable quantum
- Draft so to avoid unnecessarily angering the defendant
- Be sure that allegations of fraudulent conduct are particularized and provable
- Obtain a copy of the defendant's insurance coverage: keep the claim within its scope
- Use the simplified procedure unless it cannot be avoided
- Divide claim separate elements of liability and damages
- Plead statutory provisions or principles of law clearly
- Consider attaching one or more schedules with the most important documents
- Help defendant understand the claim: draft in plain English not in legalese
- Make your pleading a mini mediation memorandum
- Role play: if you were defendant's counsel, how would you react to this claim?
- Role play: if you were the defendant, would you refuse to negotiate this claim?
- Role play: if you were the mediator how would you react to this claim?
- Role play: if you were the defendant's insurer, would you want to settle this claim?

As defendant*'s counsel*

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- Analyze each cause of action to determine if any constituent elements are missing
- Demand particulars of bald allegations
- Demand documents referred to in pleadings
- Identify facts which support dismissal or reduction of plaintiff's claim
- Consider a pre-defence teleconference with plaintiff's counsel before drafting:
    - to foster a friendly rapport
    - to develop a basis for negotiations
    - to obtain production of documents
    - to correct obvious errors in the claim
    - to request particulars
    - to identify or narrow issues or consider settlement
    - to persuade plaintiff's counsel to withdraw or narrow a hopeless claim
    - to persuade plaintiff's counsel to withdraw allegations of fraud
    - to persuade plaintiff's counsel to use the simplified procedure
    - to secure particulars and inspection of documents without formal demand
    - to secure consent for admissions for the purpose of mediation only
    - to limit the quantum damages to realistic amounts
    - to determine which claims plaintiff's counsel thinks are really meritorious
    - to determine whether there are any genuine issues for trial
    - to negotiate an admission of liability where appropriate
- Respond in detail to factual inaccuracies in the Statement of Claim
- Plead facts succinctly and attach most important documents as a schedule
- Plead statutes, limitation periods and principles of law clearly
- Plead in detail factual or legal deficiencies in any element of plaintiff's claim
- Plead in detail plaintiff's failure to mitigate
- Plead counterclaim as if it were a claim – see points above for plaintiff's counsel
- Serve an offer to settle contemporaneously with the defence where appropriate

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- Make your pleading a mini mediation memorandum
- Assess whether there is any possibility of future dealings between the parties

Pleadings and Interest-Based Mediation

In the mid-1990's, the American concept of "interest-based" mediation began to take hold with Ontario lawyers. Inspired by the work of Harvard Law School Professor Frank Sander and others[8], many Ontario litigation counsel participated in mediation workshops[9] to learn new skills and a new way of looking at dispute resolution. Interest based mediation offered many advantages in addition to the benefits of the more traditional rights-based mediation generally. Here are some of the interests mediation serves which ought to incline every litigant to favour taking mediation, particularly, interest-based mediation, very seriously:

- attempts to bring civility to dispute resolution
- attempts to reduce emotional level of the parties in litigation
- attempts to save the expense of further litigation
- attempts to avoid the trauma and an uncertainty of the trial
- attempts to minimize the aggravation and wasted time of litigation
- limits the destructiveness often produced by the adversarial nature of a trial
- limits the trauma of opponent's hurtful allegations of lying or fraud
- limits the embarrassment of having one's credibility impeached at trial
- limits the risk of financial ruin if the trial goes badly
- avoids the notoriety of a media report of an adverse judgment

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8 See S. B. Goldberg, F. E. A. Sanders, N.H. Rogers, *Dispute Resolution: Negotiation, Mediation and Other Processes*, Little, Brown & Co., Boston, 1992; and 1995 Supplement, Aspen Law & Business Publishers; L.R. Singer, *Settling Disputes: Conflict Resolution in Business Families & the Legal System*, Westview Press, Boulder, CO, 1994

9 One of the best of these was given by the Advocates Society, Toronto in conjunction with Harvard University Faculty of Law, taught by Professors Frank Sanders, Linda Singer and Michael Lewis

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- avoids the notoriety of reporting of an adverse judgment in law reports or QL
- raises the possibility the relationship between the parties can be repaired
- raises the possibility of a win-win settlement with advantages for all parties
- raises the possibility of better post-trial rapport in family proceedings

Keeping the emotional temperature low

The last three bullets above demonstrate the unique value of interest-based mediation. For instance, it follows that divorcing spouses can expect better post-divorce rapport if they can avoid "The War of the Roses"[10] and can settle the litigation during mediation. Settlement is more likely if counsel finds effective ways to advance the client's case reasonably but not vindictively. I believe that counsel's role as an advocate for a client in an emotionally-charged case includes the duty to educate the client that the objective of the litigation process is not to destroy the opposing party but to make the most favourable result within a range of reasonable possibilities.

In matrimonial litigation, where tensions of marriage breakdown are very high, the desire of one spouse to punish the other presents itself often. It may be a challenge for counsel to persuade the client to put aside the bitterness of undeniably bad behaviour by the opposing party in the interest of adopting a civil approach. In many cases, the opposing party, and sometimes, his/her counsel refuse to be civil or reasonable. Responses in kind are may be understandable. After all, and this may be a surprise to many of our clients: lawyers are human too! The suggestions put forward here will not work in every case. Truculent and vindictive behaviour by one party is not remedied by a response in kind by the other party.

The benefit of civility applies to litigation between business people as well. Good business is

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10 *The War of the Roses* refers to the 1989 film produced by 20th Century Fox, starring Michael Douglas, Kathleen Turner and Danny DeVito in which spouses going through a divorce each refuse to give an inch. They eventually destroy one another personally, physically and legally.

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about building and maintaining reputations and relationships. A businessman who believes that the opposing party has unfairly impugned his credibility or integrity may be unprepared to sit down to negotiate with his accusers. The bitterness and hurt feelings which flow from a trial in which a business person's credibility is impeached may never be remedied.

Pleading fraud and claiming punitive damages

In American litigation, nearly every defendant is alleged to have perpetrated a fraud and nearly every claim claims millions of dollars in punitive damages. American litigation was wild about punitive damages even before the famous case of *Pennzoil v. Texaco*,[11] where $3 billion in punitive and exemplary damages were awarded in a corporate dispute involving intentional interference with contractual relations of major oil companies. Of course, that was the high water mark for American punitive damages but Canadian courts have been far more restrictive in awarding punitive damages both as to scope and quantum.[12] In *Whiten et al. v. Pilot Insurance Co.*, Binnie J., writing for a majority of the Supreme Court of Canada said:[13]

> "(1) Punitive damages are very much the exception rather than the rule, (2) imposed only if there has been high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour. (3) Where they are awarded, punitive damages should be assessed in an amount reasonably proportionate to such factors as the harm caused, the degree of the misconduct, the relative vulnerability of the plaintiff and any advantage or profit gained by the defendant, (4) having regard to any other fines or penalties suffered by the defendant for the misconduct in question. (5) Punitive damages are generally given only where the misconduct would otherwise be unpunished or where other penalties are or are likely to be inadequate to achieve the objectives of retribution, deterrence and denunciation. (6) Their purpose is not to compensate the plaintiff, but (7) to give a defendant his or her just dessert (retribution), to deter the defendant and others from similar misconduct in the future (deterrence), and to mark the community's collective condemnation (denunciation) of what has happened. (8) Punitive damages are

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11 *Texaco, Inc. v. Pennzoil Co.* 729 S.W.2d 768, 1987 Tex. App.(1987) and see also 784 F.2d 1133, 1986 U.S. App. (1986), 481 U.S. 1,107 S. Ct. 1519 (1987) (US Sup Ct.)

12 *Whiten et al. v. Pilot Insurance Co.* [2002] S.C.J. No. 19

13 Ibid.

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> awarded only where compensatory damages, which to some extent are punitive, are insufficient to accomplish these objectives, and (9) they are given in an amount that is no greater than necessary to rationally accomplish their purpose. (10) While normally the state would be the recipient of any fine or penalty for misconduct, the plaintiff will keep punitive damages as a "windfall" in addition to compensatory damages. (11) Judges and juries in our system have usually found that moderate awards of punitive damages, which inevitably carry a stigma in the broader community, are generally sufficient."

While the extreme case may justify an award of punitive damages up to $1 million, most cases will not justify punitive damages at all. An Ontario court will simply not award punitive damages unless the test of "high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour" is clearly met.

Ask yourself whether the defendant's conduct has really be so egregious to warrant punitive, aggravated or exemplary damages. Do you really expect to go to trial to seek these additional damages? Here are some good reasons to consider to consider this:

- Punitive damages are never paid as part of a settlement
- Defendant's insurer may not negotiate when punitives are claimed
- Punitive damages are rarely taken seriously by the defendant
- Punitive damages beyond what is recoverable are scoffed at
- Is there authority for punitive damages on facts similar to your case?

Pleading fraudulent conduct or deceit

Allegations of fraud, deceit or fraudulent conduct including fraudulent misrepresentations must be particularly pleaded and strictly proved.[14] In *Bargman et al. v. Rooney et al.,*[15]

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[14] Ont. Rules of Civ. Pro. 25.06(8) provides: Where fraud, misrepresentation or breach of trust is alleged, the pleading shall contain full particulars, but malice, intent or knowledge may be alleged as a fact without pleading the circumstances from which it is to be inferred. See also, Paul Perell's article

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Blair J. (now Blair RSJ.) held that solicitor-client costs (now substantially indemnity costs), payable forthwith, should be awarded when unsubstantiated allegations of fraud are made and not proven, even on a motion. Blair J. went on to make these observations:[16]

> The power to award costs on a solicitor-and-client scale is within the discretion of the Court. It is a discretion to be exercised in special and rare cases. However, proceedings where allegations of fraud and dishonesty are made and not established are recognized as falling into that category of "special and rare cases". See, generally, Murano v. Bank of Montreal, supra, at para 82, and authorities cited in that paragraph.
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> . . .
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> ¶18 It matters not, in my view, at what stage in the proceedings the unproved allegations are levelled. Because of their extraordinarily serious nature - going, as they do, directly to the heart of a person's very integrity - allegations of fraud and dishonesty are simply not to be made unless there is every reasonable likelihood that they can be proved. The cost sanction exists in these circumstances to help ensure that such will be the case. As Winkler J. noted recently in *Toronto-Dominion Bank v. Leigh Instruments Limited* [1998] O.J. No. 4221 (at p.10),
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>> The court should not condone the recent trend in commercial cases of alleging fraud, seemingly without regard for the rule that fraud must be strictly pleaded and strictly proved.

It is absolutely clear that if the plaintiff makes allegations of fraud which cannot be proved, substantial indemnity costs will be awarded. Also, the defendant will be angry and less inclined to negotiate with the plaintiff. As plaintiff's counsel, you should take these principles seriously and explain them to your client.

In some cases, pleading fraud may be a serious impediment to settlement. Suppose you have a claim against a lawyer or realtor for negligence and your client suspects that the professional also committed a fraudulent act. Under the LAWPRO errors and omissions policy, a claim against a lawyer based on fraud is not covered. A similar provision exists in

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in the Appendix at p. 8

15 [1998] O.J. No. 5528

16 *Bargman et. v. Rooney et al. supra.*, [1998] O.J. No. 5528, para. 15, 18 and 19

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the insurance policy which covers real estate brokers. If you frame the claim on the basis of fraud, the insurer may take the position that there is no coverage. Your client's claim may sound great on paper but you will lose important opportunities to recover damages from the insurer. An insurer who is not defending will not participate in a mediation to settle the case.

The last thing you want is an uncollectible judgment. If the claim for fraud will make your claim more difficult to settle, you will have to consider advancing it in some other manner. Persuade your client to abandon the claim for fraud and limit the claim to provable allegations of negligence which fall within the scope of insurance coverage. Allegations of fraud could be left for a misconduct complaint to the defendant's professional regulator.

Mediation is bound to happen — get ready for it

In Ontario litigation today, mediation is everywhere. Rule 24.1 and Rule 77 of Ontario Rules of Civil Procedure require that early on, before discovery is completed, a mandatory mediation be held.[17] Non-mandatory mediations are also arranged in most cases. Even in commercial arbitrations, counsel often conduct a mediation before the hearing.

There are also other procedures in the court process which resemble mediation and are geared to assess risk and bring the case closer to resolution. In Toronto, every action is now case managed. The Toronto case management system requires case conferences and settlement conferences. These conferences require counsel to meet or teleconference with the assigned case management master to address issues on a regular basis. Although case conferences are often adversarial and may result in an order or the imposition of a schedule, all meetings with the Master offer opportunities to narrow issues in the case. The settlement conference is a

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17 Ont. Rr. Civ. Pro. See also *Kneider v. Benson, Percival, Brown* [2000] OJ No. 1088 (Master Polika)

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risk analysis session. Although, the Master may not to engage in "shuttle diplomacy" like a mediator, attempts to narrow the issues and reach a settlement are similar.

Dependence on Documentary and Oral Discovery

Many counsel treat mandatory mediations less seriously because they occur before there has been significant documentary discovery and before any oral discovery. The view seems to be that not enough is known about the other side's case to make a reasonable analysis of the strengths and weaknesses of the case. Many counsel believe that early, pre-discovery mediation is premature and unlikely to accomplish much.. This notion may have merit in some complex, document-intensive cases and in personal injury cases involving serious, unresolved injuries. However, early mediation has great value even if the case does not settle. Counsel can increase the value of early mediation by drafting excellent pleadings.

Many counsel (and I am sure I am not exception) permit themselves to practice "deferral" litigation. We tend to put off to a later time any aspect of the case which does not have to be dealt with immediately. For a defendant, this may be understandable. When pre-judgment interests rates are low, there may be an advantage to deferring having to deal with settling the plaintiff's claim. We then become bogged down in time-consuming, endless discovery, undertakings, more discovery, refusals motions and more discovery. Before you know it, a few years have passed. Each side has spent thousands more on the process than ever anticipated and settlement becomes more complicated because the litigation cost, which grows exponentially, has to be factored in.

Intensive oral discovery is a North American malady. In the United States, the scope of oral discovery is even broader than in Canada. By contrast, in European litigation, pre-trial oral discovery is far more limited. In international commercial arbitration, which is the ADR

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process of choice for many European businesses, oral discovery is often avoided even in cases involving quantum in hundreds of millions of Euros, dollars or pounds sterling.

If Europeans can litigate and arbitrate major cases without exhaustive discovery, it suggests that Canadian and American counsel could., at a minimum, conduct an effective mediation before expansive oral discovery. The case for serious mediation *before* discovery is strong. Consider these points:

- Discovery is time-consuming and expensive
- Scheduling issues stretch out the litigation process by months or years
- Discovery increases the cost of litigation exponentially
- As the legal costs of all parties increase, settlement becomes more difficult
- Answering undertakings takes a lot of time for client and counsel
- Refusals motions are tedious, painful and expensive for all parties
- Re-attendance after undertakings and refusals takes more time
- The scope of documentary discovery is becoming even broader

Our computer and internet-focussed electronic world has expanded documentary discovery in every lawsuit. In an interesting article published in The Lawyers Weekly, Louis Frapporti identifies nearly 40 areas of inquiry[18] to locate documents stored on a computer system which may be relevant to the case. Frapporti points out that commercial endeavours today of every size and kind are dependent on upon electronic information stored in electronic form, which can be easily manipulated. Not all of these records are printed and litigants are frequently not

[18] L.A. Frapporti, "Effective electronic discovery is crucial for commercial litigator", *The Lawyers Weekly*, Vol. 22, No. 45, Butterworths Canada, April 4, 2003, p.22

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apprised of their obligation to search for electronically stored information. Frapporti further suggests that counsel sometimes lacks the technical sophistication to ask their clients or the opposing party the right questions to identify all relevant documents.

Once counsel have identified the new sources of documents, the size of litigation files will increase. As a result, oral discovery is likely to become even longer, more time-consuming and more expensive. While we are bogged down with the "joys" of discovery and the minute search for the "smoking gun" which will turn the case in our client's favour, preparation for mediation or serious settlement discussion is hardly on our "radar screens". These are good reasons to do better documentary discovery before drafting pleadings.

I propose that drafting pleadings with mediation in mind means that the statement of claim should be "a more thorough statement of the plaintiff's claim" than it has been in the past. To the extent that the Rules of Civil Procedure allow,[19] the statement of claim should prepare counsel for the mandatory mediation which will soon take place.

An effective mediation brief

Under Ontario's mandatory mediation process, the parties are required to submit a Statement of Issues.[20] In a recent article, Stuart Mutch reports that some lawyers find that form is not useful and could be dispensed with.[21] Some mediators report that it is not used at all. Mutch proposes that a creative brief may be a tool of persuasion and he continues with this

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19 Paul Perell's article, supra., f.n. 3, annexed as a schedule is a very useful guide.

20 Ontario Rules of Civil Procedure, Form 24.1C

21 S. Mutch, "Preparing an effective mediation brief makes sense" *The Lawyers Weekly*, Vol. 22, No. 44, March 28, 2003, p.13, commenting on an ADR breakfast in which mediators and practitioners discussed the use of the form.

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observation about the pleadings:[22]

> "Some mediators found provisions of the pleadings to be critical to their understanding of the case. In my view, the pleadings are like the set in a play, they contain and enhance the space where the action unfolds. They are generally drafted in the broadest possible terms and some of the facts and most of the interests will not be revealed until the action begins. The [mediation] brief should therefore "flesh out" the issues that are actually preventing the parties from moving forward. The brief should provide what Hollywood calls "the back story"— the facts you need to know in order to understand what the heck is unfolding on the screen in front of you."

The question for us to consider is: where do pleading end and where does the mediation brief begin?. Should pleadings be expanded so that they are like a mediation brief with appendices and important documents attached? Or should counsel prepare a Statement Issues and a mediation brief before preparing the statement of claim and statement of defence? I don't pretend to have the answers to these questions. I do recognize that the statement of claim and other pleadings will not contain matters which compromise the claim. The pleadings are not without prejudice whereas the mediation brief is.

As part of our continuing effort to improve the quality of our advocacy and to achieve more satisfying settlements earlier in the litigation, counsel must find more effective and persuasive ways to tell the story of the client's case. I favour the concept of an expanded statement of claim but the format must be adjusted to ensure that it is readable. As we become even more comfortable with the use of technology, I envisage that plaintiff's counsel will serve a hard copy of the statement of claim with appendices containing some important documents. Along with the hard copy will be a read-only CD-ROM containing a PDF (Adobe) formatted version of the statement of claim with hyperlinks to the appendices in all right places. This will enable the reader to click to the appropriate document which substantiates the plaintiff's claim.. This is not *"Star Trek"*. The software to do this is probably already on your computer.

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22 Ibid.

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Conclusion

A better mediation increases the likelihood of settlement. It begins with the pleadings. Pleadings which make a strong but reasonable case to your primary target audiences — the defendant, his/her counsel and the mediator ---- are more likely to be persuasive and to be taken seriously at the mediation. Pleadings which are "civil" and do not contain unnecessary, unprovable allegations are more likely to create a better atmosphere for settlement negotiations. Persuasive pleadings promote satisfying settlements sooner.

Appendix

The published version of this article annexed P.M. Perell's "The Essentials of Pleading" (1995) *17 Adv. Q*. 205.

Toronto, April 14, 2003.

This article was published for presentation at a *continuing legal education seminar for lawyers in 2003*. It is NOT intended as legal advice. It has been placed on our website to inform readers in a general way of the authors' view of the law at the time of its presentation. No reliance may be placed on its contents. Some principles of law or procedure may have changed or may no longer be applicable since its publication. The authors and Ellyn-Barristers disclaim any liability arising from reliance on any aspect of this article.