Drafting Persuasive Pleadings with Mediation and the New Rules in Mind:
Litigating in the Enlightened Age of Mediation

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"Mediation is a cornerstone of the justice system in this province."
Ontario Chief Justice Warren Winkler, April 21, 2008[1]

This paper was inspired by an April 2003 presentation by Igor Ellyn at an OBA CLE mediation seminar. The paper entitled "Persuasive Pleadings Promote Settlements Sooner" is still relevant. See the Appendix to this paper.

The view counsel takes of mediation will drive your approach to the case from the first meeting with your client until the dispute is resolved.

Less than a generation ago, litigation lawyers gave advice on based only on how the trial judge or the judge and jury were likely to view the facts and the law of the case. In retrospect, this was rather surprising because even in the last decades of the previous millennium, when the trend to mediated settlements was in its infancy, more than 90% of cases settled before trial.

Back then, however, lawyers approached pleadings with a minimalist philosophy. Good young counsel were taught by their senior principals in the fine art of "skinny pleadings." The objective was to give away as little of the case as possible and get to trial as quickly as possible. Senior counsel spoke of "knocking off a Statement of Claim in five minutes" and using as much "boilerplate" language as possible. A pleading, replete with evidence and full of "he said", "she said", was typically the mark of a lawyer who did not practice much litigation or of counsel who was too busy to properly mentor his freshly-minted junior.

Upon further reflection, the old approach was understandable. Before the advent of mediation as an ubiquitous and highly effective dispute resolution mechanism, settlements were

[1] H. Burnett, "Pilot project meets many of its goals", Law Times (April 21 2008).

all too frequently driven by a call from the Trial Office that the case would be called for trial "next week" and the Trial Scheduling Judge was not tolerating requests for adjournments lightly. Amid cries of "Yikes!!", and "Where's the file!!!", a small voice whispered, "How about calling the other side to negotiate a settlement?" What a brilliant idea! Many cases settled as much to avoid having to prepare for trial than on the basis of the merits of the case. Some cynics may argue not much has changed. Some traditionalists will claim we are being too cynical.

At the end of 2009, we have entered the "Enlightened Age of Mediation." As Ontario Chief Justice Winkler said 18 months ago, "Mediation is the cornerstone of the justice system in this province." Mediated settlements, not trials and appeals, not even summary judgment motions, have become the most likely way to resolve a dispute.

Aha, you say: "So, how much can get for my dusty court robes?" and "Thank goodness, we won't have to spend any more money on those expensive CLE programs on written and oral advocacy." Not so fast, Mickey. In the "Enlightened Age of Mediation, written and oral advocacy skills are more important than ever.

Good advocacy begins with excellent and persuasive pleadings. Excellent and persuasive pleadings require an insightful appreciation of the litigation process in the context of the new Rules of Civil Procedure which come in to effect on January 1, 2010. Persuasive pleadings must, more than ever, be drafted with mediation in mind.

Some things have not changed. Wordy, unpersuasive pleadings are still the mark of counsel who has failed to appreciate the importance that a good first impression of your client's case makes. Unpersuasive pleadings are also the mark of the litigator who has not identified the target audiences of his/her client's case and may be missing out on important opportunities to achieve a successful and possibly, early resolution of the dispute.

The theme of Igor Ellyn's 2003 paper[2] was that since the prospect of reaching trial was less than 5%, pleadings should be drafted with target audiences who are most likely to be persuaded by your client's case in mind. The target audiences of the statement of claim or statement of defence and counterclaim you draft in the privacy of your office will be read by a surprisingly large number of people, including:

- Other lawyers, law clerks and students in your firm
- Your client
- 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 opposing party or parties
- Members of the opposing party's family
- If the defendant is a corporation, members of the corporation's management
- Opposing party'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 judge who conducts the in-trial settlement conference
- The trial judge
- The judges of the Court of Appeal

[2] See the Appendix for the April 2003 paper: "Persuasive Pleadings Promote Satisfying Settlements Sooner" – also posted at http://www.ellynlaw.com/info_centre.htm.

Many of the above readers, other than the summary judgment, the trial judge and the judges of the Court of Appeal, will be key parts of the process of finding a voluntary, alternative resolution of the dispute by negotiation or mediation. Even if each category of reader represents only a single person (which is unlikely), there are more than 22 potential readers of your first public presentation of your client's position in the action: the Statement of Claim or the Statement of Defence and Counterclaim.

Attitudes to Mediation and Settlement

While we are not sure which is the "chicken" and which is the "egg", the enlightenment of mediation is either the result or the cause of a new approach to advocacy. Gone are the days when the advocate's role was solely to careen toward trial like an out of control train. Clients may still be looking for the toughest lawyer and the lawyer who will not compromise under any circumstances but we now know that this is not what produces the results our clients are looking for.

In fact, a study published in the *Journal of Empirical Legal Studies* in September 2008,[3] quantitatively evaluated the incidence and magnitude of errors made by lawyers and clients in unsuccessful settlement negotiations. The study analyzed more than 2000 cases in which settlement negotiations broke because the plaintiffs refused to accept the defendants' last offer and proceeded to trial. The study found that in more than 60% of the cases, the plaintiffs recovered less at trial than the settlement offer. The study concluded that overall, clients are happier when the case settles because of the avoidance of risk and closure the settlement produces.

In an anecdotal 2001 study by Windsor law Professor Julie Macfarlane, forty commercial lawyers in Toronto and Ottawa were interviewed to determine their attitudes to mediation. Professor Macfarlane summarized lawyers' attitudes towards mediation into five categories:[4]

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[3] R. L. Kiser, M.A. Asher, B. B. McShane, *Let's Not Make a Deal: An Empirical Study of Decision Making in Unsuccessful Settlement Negotiations 5 Journal of Empirical Legal Studies (Sept. 2008) 551-591* , found online at www3.interscience.wiley.com/cgi-bin/fulltext/121400491/PDFSTART
Randall L. Kiser, Martin A. Asher, and Blakeley B. McShane

[4] M. Fitz-James, "Measuring Mediation" Canadian Lawyer, vol. 25, no. 5 (May 2001), at 37-40.

True Believer	finds that mediation has significantly affected his/her practice; sees conflict between the adversarial litigation role and that of peace facilitator in mediation.
Pragmatist	finds mediation attractive due to time and cost efficiencies; generally sees no conflict between the mediation and litigation roles.
Instrumentalist	views mediation as a strategic tool to promote adversarial interests and goals.
Dismisser	sees mediation as equivalent to traditional negotiation; considers mandatory mediation an intrusion by the court.
Denier	sees mediation as a threat to the integrity of the role of the lawyer; strongly opposes mediation.

While it is too much to expect all litigators will become True Mediation Believers and Mediation Pragmatists, the Dismissers and Deniers have to accept that the "Mediation Train" has left the station and enlightened litigators simply have to be on it to succeed. In the Enlightened Age of Mediation, the question is not "Will there be a mediation?" but rather, "how can the mediation be made more effective to increase the prospects for settlement of the dispute?" We submit that the successful mediated settlement track begins with persuasive pleadings.

Our point that persuasive pleadings are your first opportunity to communicate the righteousness of your client's case to the opposing party while underscoring the weaknesses of the defendants' position and their exposure to adverse consequences was also recently made in a well-written paper recently submitted to an OBA CLE seminar by Renato Gasparotto and Michael Polvere.[5] The authors emphasize that at the heart of good advocacy is the effective of use of language and a realistic understanding and assessment of the supporting facts, well-organized and clearly expressed. To this we add, that there has to be a mindset, a format and an understanding of the law.

[5] OBA Current Issues in Civil Litigation: Keys to Victory: Feb. 4, 2008: R. Gasparotto and M. Polvere, "Pleadings: Framing your case and whittling theirs". www.siskinds.com/pdfs/Keys%20To%20Victory%20In%20Litigation.pdf.

The New Rules of Civil Procedure

The new Rules of Civil Procedure are intended to make the civil justice system more accessible and affordable for Ontarians. There has been a shocking increase in the number of unrepresented litigants. The November 2007 Civil Justice Reform Project under the able chairmanship of former Ontario Associate Chief Justice Coulter A. Osborne, QC recommended better and less expensive access to the Courts with more mechanisms to promote early settlement.[6]

Most of the amendments make it easier to take a case off the "litigation track" and put it on the "mediation track". Of course, this does not mean litigants lose their opportunity to have their day in Court if settlement is impossible. However, the new system recognizes that most cases will settle by mediation or by counsel applying mediation principles and negotiating settlement themselves.

Under the new *Rules of Civil Procedure*, more cases will settle before trial, because:

- more cases will be subject to mandatory mediation. All cases in Toronto, Ottawa and Windsor[7] which do not fall within the specific exceptions in new Rule 24.1.04(2) are subject to mandatory mediation.[8]

- All simplified rules cases in Toronto, Ottawa and Windsor are subject to mandatory mediation.

- The cap or ceiling for simplified rule cases increases to $100,000.00.[9]

- There is more flexibility as to the timing of a mandatory mediation. Rule 24.1.09(1) permits the mediation to take place within 120 days after the first defence was filed.[10] Also, the parties may consent to postpone the mediation to a later date.[11] This flexibility enables counsel to delay the mediation until enough documentary and oral discovery has taken place to enable parties to better understand each other's positions and what evidence will be adduced at trial.

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[6] The Report and recommendations are at: www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/
[7] The new Rules actually refer to all of Essex County not just the City of Windsor.
[8] Rule 24.1 – Mandatory Mediation and Rule 24.1.04(1).
[9] December 31, 2004 Practice Direction - Toronto Region "Backlog Reduction / Best Practices Initiative" by the Winkler RSJ. (as he then was) and Smith CJ, which was extended to December 31, 2010 on December 1, 2007 by the. Smith CJ. and Then RS.J. It can be found at http://www.ontariocourts.on.ca/scj/en/notices/#reg; December 31, 2001 Practice Direction for Ottawa-Carlton by the Hon. Dunningham S.J.; March 10, 2004 Practice Direction for Count of Essex by Leitch RSJ.
[10] Rule 24.1.09(1)
[11] Rule 24.1.09(3) "Despite subrule (1), the mediation session may be postponed to a later date if, the parties consent to the date in writing; and the consent is filed with the mediation co-ordinator."

Matters to consider before you draft your pleading

It is not enough to draft the bare minimum when it comes to pleadings. A good lawyer will use every tool s/he has to advocate on behalf of a client, and a strong pleading is the first step.

Preparation and Investigation

Pleadings should not be "skinny". They should be used by counsel to present the best face of their client's case with the information available to them at that time. Much can be done to prepare persuasive pleadings even before discovery.[12] Before you begin to draft your pleading, make sure that you have done the following:

- Speak to your client(s) at length and get their full story in detail
- Speak to potential trial witnesses
- Hire a private investigator
- Ask your client for a chronology of key events in the case
- Review the chronology in detail and identify what documents are likely to exist
- Press your client to provide all documents related to the case in any way
- Don't forget documents in electronic format; get all of the emails
- Organize and read the documents your client sends
- Prepare your own chronology of the events from an advocacy perspective
- Identify the factual and legal issues in dispute[13]
- Identify the remedies your client hopes for
- Now is the time to research all of the applicable issues of law
- Balance your client's hopes with an analysis of what is achievable
- Identify all your causes of action and ensure you have the proper "test"
- Identify all applicable statutes, rules, regulations and maxims
- Identify all defences, including limitation periods, which are now very short
- Assess whether to Crossclaim, Counterclaim or Third Party
- Critically review precedent pleadings in your office or on databases

[12] See Igor Ellyn's April 2003 Paper at pages 8-10 for steps counsel can take to prepare persuasive pleadings to increase prospects for mediation success.
[13] Rule 24.1.10(2): the same facts and issues in dispute you have to identify for the mediation Statement of Issues

Oral and Documental Discovery

Under the new Rule 29.1 counsel are required to agree to, and to update, a written discovery plan. In their discovery plan counsel will jointly decide when the Affidavit of Documents will be exchanged.[14] Where the parties have failed to agree to or update a discovery plan in accordance with Rule 29.1, and where a party has brought a motion under Rules 30-35 (the discovery rules) the court may refuse to grant any relief or to award any costs.

As for examinations for discovery, gone are the days of endless hours and days of examinations. Under Rule 31.05.1(1) there is now a 7 hour time limit on the length of examinations for discovery per party.[15]

To encourage counsel to discuss settlement earlier in the action, parties in Rule 76 Simplified Rules cases will have the opportunity to examine an opposing party for discovery but it shall not "exceed a total of two hours of examination, regardless of the number of parties or other persons to be examined."[16] As there are no transition rules, claims between $50,000.00 (the old simplified rules cap) and $100,000.00 (the new simplified rules cap) will also only be allowed two hours of examinations for discovery; whereas before they were allowed unlimited days for examination for discovery.

Drafting effective pleadings

Instead of drafting skinny pleadings, which limit the information provided, counsel should see pleadings as an opportunity to persuade the primary target audiences of its merits. Persuasion is in part a presentation art form. As set out in Igor Ellyn's April 2003 paper, a good pleading should *no*t:

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[14] Rule 29.1.03(3)(b) "The discovery plan shall be in writing, and shall include, dates for service of each party's affidavit of documents (Form 30A or 30B) under rule 30.03."

[15] Rule 31.05.1(1) "No party shall, in conducting oral examinations for discovery, exceed a total of seven hours of examination, regardless of the number of parties or other persons to be examined, except with the consent of the parties or with leave of the court." Rule 31.05.1(2) sets out the criteria a court must consider before making an order extending the time for discoveries.

[16] R. Todd, "New civil rules unveiled", LawTimes (December 15, 2008); Rule 76.04(2) " Despite rule 31.05.1 (time limit on discovery), no party shall, in conducting oral examinations for discovery in relation to an action proceeding under this Rule, exceed a total of two hours of examination, regardless of the number of parties or other persons to be examined."

- lack eye appeal or is unreadable due to font size or other factors
- be too wordy or contain spelling or grammar errors
- be vague, unparticularized and difficult to follow
- contain more than one major thought per paragraph
- exaggerate or misstate important facts
- fail to disclose a reasonable cause of action
- raise remedies without pleading the elements required to prove them
- contain allegations bound to anger the other party
- allege fraudulent conduct without sufficient particulars or that cannot be proved
- allege fraudulent conduct which makes insurance inapplicable
- seek damages for "pie in the sky" unrecoverable amounts
- seek punitive damages when they could never be recovered
- seek punitive damages for unreasonable amounts

In 1996, Justice Paul Perell, whose expertise about pleadings was well-recognized before he was appointed to the Superior Court of Justice in 2005, published an excellent article entitled "*The Essentials of Pleading*"[17]. Although the article was published 13 years ago, it is still a useful guide for what should and should not be pleaded. Persuasive pleadings should be civil, reasonable and measured. Good pleadings are a powerful advocacy tool to present the strengths of your client's case while exposing the weakness of the opposing party's position.

You know there will be a mediation

Almost as sure as the sun will rise tomorrow, there will be a mediation in your case; unless your client gives up or the defendant goes bankrupt early in the case. We recognize that there some obstinate litigants who refuse to participate in a mediation and some who want their day in court "no matter what". In our experience, even most of these will eventually find their way to mediation, which may settle the whole case. Rule 24.1 requires that early on, before discovery is completed, a mandatory mediation be

[17] P.M. Perell,"The Essentials of Pleading" (1995)17 Adv. Q. 205, which is annexed as an appendix to the 2003 article.

held.[18] Non-mandatory mediations are also arranged in most cases.

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 allow,[19] the statement of claim should prepare counsel for the mandatory mediation which will soon take place. Under Ontario's mandatory mediation process, the parties are required to submit a Statement of Issues.[20] A well drafted pleading assists counsel in drafting their statement of issues or mediation brief.

Well-drafted pleadings will assist counsel in settling the case. An effective pleading assists in the preparation of the Statement of Issues or Mediation Brief. A lot of the work required for the mediation has already been completed:

- the facts of the case are already set out in an easy to follow chronology
- it may be easier to forge an agreed statement of facts[21]
- turned their mind to the issues in dispute in the action[22]
- researched the case law
- identified and referred to the applicable statutes, rules and maxims

The only difference between the pleadings and the Statement of Issues and Mediation Brief is that the pleadings will not contain matters which compromise the claim. The pleadings are not without prejudice whereas the mediation brief is.

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[18] Rule 24.1.
[19] Paul Perell's article, supra., f.n. 3, annexed as a schedule is a very useful guide.
[20] Rules Form 24.1C
[21] Rule 24.1.10 (2) "The statement shall identify the factual and legal issues in dispute and briefly set out the position and interests of the party making the statement."
[22] *Ibid*.

Pre-Trial Conferences

All parties of cases that fall under the new Rule 76 Simplified Rules[23] are required to attend a pre-trial conference in front of a Master or Judge;[24] arranged by the registrar within 90 days after the action is set down for trial[25].

Rule 50, which deals with pre-trial conferences, has been completed revamped. When the Rule amendments were introduced, the Attorney General noted that the government "hopes to encourage settlement and the narrowing of trial issues by mandating pretrial conferences."[26] The purpose of Rule 50 is "to provide an opportunity for any or all of the issues in a proceeding to be settled without a hearing."[27] The new rules also will require parties to file a detailed conference briefs. Parties and counsel must appear at pre-trial conferences, and courts will be empowered to order a timetable for moving forward when matters are not settled at the conference, said the ministry. [28]

Judges are more knowledgeable about mediation than they were a decade ago. Indeed many judges are very skilled mediators. The pre-trial conference is a mediation opportunity. Counsel knows that the pre-trial judge will read the pleadings. Well-drafted pleadings, which tell a clear, concise, persuasive story in short sentences and short paragraphs will assist the pre-trial judge in understanding your case.

A few words of wisdom from the pre-trial judge can have a major impact on the direction of the case. A party quickly begins to talk settlement when the pre-trial judge says "Look, we assess risk here every day. You don't have to settle but if I were the trial judge, you'd have a still uphill climb to persuade me of your position. Another judge might see it differently but …" If the defendant is represented by counsel for an insurance company, the lawyer will have report to his client. An acceptable settlement offer may soon follow.

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[23] Rule 76.
[24] Rule 76.10 (2).
[25] Rule 50.02.
[26] R. Todd, "New civil rules unveiled", *supra* at note 16.
[27] Rule 50.01
[28] *Ibid*.

In such situations, the likelihood of reaching a settlement depends on good advocacy and effective negotiations. Good advocacy begins with good pleadings, which put your client's best foot forward and persuade the opposing party that you are competent counsel who will effectively advance the strengths of your client's case and expose the weaknesses of the defendant's case at trial if there is no settlement.

Case and Settlement Conferences

Old Rules 77 (Civil Case Management) and 78 (Toronto Civil Case Management) are revoked as of January 1, 2010. In its place, the new Rule 77, which applies to proceedings in Ottawa, Toronto and Windsor,[29] incorporates the old Rules and adds some new elements. The new rule mandates case conferences and settlement conferences throughout the action. Each of these events represents an opportunity to obtain the assistance of the Court in narrowing the issues and possibly, settling the action. Good pleadings may assist in achieving these objectives.

Conclusion

In the Enlightened Age of Mediation, the trial is no longer the end game of the litigation process. With the ever increasing cost of litigation, the most likely resolution will be a mediated settlement. It is likely to save money and achieve a better result than the risk of a trial and an appeal. Coincidentally, this is what your clients are hoping for.

Pleadings which make a strong but reasonable case to your target audiences are more likely to be persuasive and will assist you in negotiating a better settlement for your client at mediation or sooner.

Toronto, November 2009.

[29] Rule 77.02.

Appendix

1. Igor Ellyn, QC, April 2003, Persuasive Pleadings Promote Satisfying Settlements Sooner (or Drafting Pleadings with Mediation in Mind).

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

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

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.

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

- 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.

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

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.

- 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

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*

- 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

- 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

- 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.

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.

> 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

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.
>
> . . .
>
> ¶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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15 [1998] O.J. No. 5528 in the Appendix at p. 8

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

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)

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

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

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

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.

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.

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.

THE ESSENTIALS OF PLEADING

*Paul M. Perell**

1. Introduction

The purpose of this article is to describe in a practical way the essentials of pleading. Since a practical pleader will wish to ensure that his pleadings are functionally adequate, the article begins by identifying the functions of pleadings. Since a pleader will wish to ensure that his pleading complies with any technical requirements imposed by the Rules of Civil Procedure, R.R.O. 1990, Reg. 194, the article also will review the rules that govern how a party must and may plead.

2. The Functions of Pleadings

The primary function of a system of fact pleading is to compel the parties to disclose the essential facts that they are relying on to sustain their claim or defence. Disclosure functions to facilitate due process and a fair hearing because the parties are given notice of the case that they confront and because the parties and the court are able to identify the matters that are uncontested and the issues that must be resolved by trial.[1] Professor Garry Watson has succinctly described the function of pleadings as notice giving, issue definition and mutual disclosure.[2]

The primary function of disclosure is implemented both actively and passively. The implementation is active in the sense that a party is compelled by the rules and the case-law to disclose the facts it is relying on and to respond to the opponent's pleading with

* Of Weir & Foulds, Toronto. This article is based on a lecture delivered at a seminar sponsored by the Law Society of Upper Canada.

[1] About pleadings generally see: W.B. Williston, Q.C. and R.J. Rolls, *The Law of Civil Procedure* (Toronto: Butterworths, 1970); Professor G.D. Watson and C. Perkins, *Holmsted and Watson — Ontario Civil Procedure* (Toronto: Carswell, 1990); D.B. Casson, *Odgers on High Court Pleadings and Practice*, 23rd ed. (London: Sweet & Maxwell/Stevens, 1991); I.H. Jacob, *Bullen & Leake and Jacob's Precedents of Pleadings*, 12th ed. (London: Sweet & Maxwell, 1975); J. Jacob and I.S. Goldrein, *Pleadings: Principles and Practice* (London: Sweet & Maxwell, 1990); J.O. Hare and R.N. Hill, *Civil Litigation*, 6th ed. (London: Longman, 1993).

[2] *Holmsted and Watson — Ontario Civil Procedure, ibid.*, 25§17.

admissions, denials and its own version of the facts; it is implemented passively in the sense that parties are confined to the cases that they plead and they may be deemed by silence to make admissions about the opponent's allegations of fact.[3]

More precisely, the function of compelling disclosure is a product of several aspects of the design of the *Rules of Civil Procedure*. First, beginning with cl. 21.01(1)(*b*), this rule provides that a pleading may be struck out and judgment granted on the ground that it discloses no reasonable cause of action or defence. Thus, obviously, a party is compelled, at a minimum, to set out in his pleadings the facts necessary to constitute a claim or a defence recognized by law. Second, case-law establishes that a party is tied to his pleadings and precluded from leading evidence at trial that is inconsistent or irrelevant to the pleadings and, subject to the court's power to grant amendments, a party cannot rely on a claim or defence not pleaded.[4] This means, for example, that if a plaintiff proved only a claim not pleaded, his action would be dismissed unless the court allowed the statement of claim to be amended. Or, it may mean that a new trial may be ordered where the judgment is based on a claim or a defence not pleaded.[5] Thus, a party is compelled to plead sufficient facts to establish all of his claims or defences. Complementing this law about the effect given pleadings at trial, the pleadings, by defining the matters in issue, also determine the scope of documentary discovery and the scope of questioning permitted on examinations for discovery.[6] Third, rule 25.06(1), which is the most

[3] See rules 25.07, 25.08, and 25.09, all discussed below.

[4] *Hughes v. J.H. Watkins & Co.*, [1927] 3 D.L.R. 302, 60 O.L.R. 448, 32 O.W.N. 173 (S.C.), affd [1928] 2 D.L.R. 176, 61 O.L.R. 587, 33 O.W.N. 289 (S.C., App. Div.); *Severin v. Vroom* (1977), 76 D.L.R. (3d) 427, 15 O.R. (2d) 636, 3 C.P.C. 183 (C.A.); *Allan v. New Mount Sinai Hospital* (1981), 125 D.L.R. (3d) 276*n*, 33 O.R. (2d) 603*n*, 19 C.C.L.T. 76 (C.A.); *Sutton, Mitchell & Simpson Ltd. v. Kelore Mines Ltd.*, [1956] O.W.N. 648 (C.A.); *Bedford Construction Co. v. Gilbert*, [1956] O.W.N. 293 (C.A.); *Ramoska-Kaluza v. Ellis*, [1955] O.W.N. 969 (C.A.); *Hydro-Electric Power Commission of Ontario v. St. Catharines (City)* (1971), 21 D.L.R. (3d) 410, [1971] 3 O.R. 674 (H.C.J.), affd 24 D.L.R. (3d) 278, [1972] 1 O.R. 806 (C.A.), affd 36 D.L.R. (3d) 160*n*, [1973] S.C.R. vi.

[5] *Allan v. New Mount Sinai Hospital, ibid.*, revg 109 D.L.R. (3d) 634, 28 O.R. (2d) 356, 11 C.C.L.T. 299 (H.C.J.); *Mercer v. Gray*, [1941] 3 D.L.R. 564, [1941] O.R. 127, [1941] O.W.N. 202 (C.A.).

[6] *Kay v. Posluns* (1989), 71 O.R. (2d) 238 (H.C.J.); *Soulos v. Korkontzilas* (1990), 74 O.R. (2d) 766, 45 C.P.C. (2d) 59 (H.C.J.); *Siverhill Realty Holdings Ltd. v. Ontario (Minister of Highways)*, [1968] 1 O.R. 357 (C.A.); *Playfair v. Cormack* (1913), 9 D.L.R. 455, 4 O.W.N. 817, 24 O.W.R. 56 (S.C.); *Kalp v. Orfus Construction Ltd.* (1978), 9 C.P.C. 37 (Ont. H.C.J.); *Ontario Bean Producers' Marketing Board v. W.G. Thompson & Sons* (1981), 120 D.L.R. (3d) 531, 32 O.R. (2d) 69, 19 C.P.C. 221 (H.C.J.), affd 134 D.L.R. (3d) 108, 35 O.R. (2d) 711, 27 C.P.C. 1 (Div. Ct.).

important general rule applicable to all pleadings, compels a statement of the material facts supporting the claim or defence. The rule states:

> 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 his or her evidence by which those facts are to be proved.

This rule goes beyond the minimum of pleading the facts necessary to constitute a claim or defence and, subject to the constraint that evidence is not to be pleaded, directs the pleading of the material facts relied on to prove the claim or defence. (The distinction between material facts and evidence is sometimes a fine one, of which more will be said below.) Thus, a party should plead and disclose not only the facts constituting the claim or defence but also the material facts relied on to prove that claim or defence. For defences, rule 25.06 is reinforced by rule 25.07, discussed below, which, among other things, directs a defendant to plead his version of the facts. Fourth, as the discussion below will detail, through the device of providing "particulars", a party may be compelled to disclose more facts about his claim or defence. Fifth, as will also be detailed in the discussion below, disclosure is compelled by the rules and case-law about admissions, denials, contradictions and silence, *i.e.*, disclosure is compelled by the law about what is a properly responsive pleading. All these circumstances show that the pleader's first task and a pleading's prime function are to disclose the material facts to sustain a claim or defence.

Using the idea of rhetoric in its neutral or non-pejorative sense of being the study of the means of persuasion, pleadings also have a rhetorical function.[7] From the interlocutory stages and throughout the trial, the pleadings shape the dispute and articulate each party's position. The pleadings send a message not only to give notice of the claim or defence but also to persuade the other side, and particularly the court, about the merits and justice of the claim or defence. Compelled to make disclosure in any event, a party will wish to use the pleadings to advance his chances of success. So a party may wish to state facts that may go beyond being constituent elements or matters of proof for his claim or defence[8] and a party

[7] Pleadings also serve the function of creating a record for the proceedings. Thus they underpin the doctrine of *res judicata*, which precludes relitigation of matters that were decided by the judgment in the action.

[8] There is, of course, also a tactical element to pleading. For example, a party might include allegations designed to expand the scope of the examinations for discovery.

will want to employ a style and language designed to persuade.[9] (A little more about rhetoric will be said at the end of this article.)

Some of the rules about pleading may be seen as safeguards to prevent a party from going too far either in disclosing facts or in rhetorically presenting his case. Thus, for example, as already noted above, rule 25.06(1) directs that evidence not be pleaded. And rule 25.11, discussed below, empowers the court to strike out a pleading that may prejudice or delay the trial or that is scandalous, frivolous, vexatious or an abuse of process. Part of the general design of the rules about pleadings is to strike a balance between insufficient and excessive or intemperate disclosure.

This last observation brings the discussion about the function of pleadings to the role of particulars. Particulars may be ordered under rule 25.10, which states:

> 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.

Master Sandler described the role of particulars in *Copland v. Commodore Business Machines Ltd.*[10] He stated:

> 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.[11]

In *Mexican Northern Power Co. v. Pearson*,[12] Master Holmsted adopted the observation from *Halsbury* that particulars have the effect of providing details that narrow the generality of pleadings. He quoted:

> "The function of particulars is to limit the generality of pleadings and thus to define the issues which have to be tried and as to which discovery must be given. Each party is entitled to know the case to be made against him at the trial and to have such particulars of his opponent's case as will prevent him from being taken by surprise."

[9] For more about the rhetorical aspects of legal writing, see P.M. Perell, "Written Advocacy" (1993), 27 L.S.U.C. Gazette 5.

[10] (1985), 52 O.R. (2d) 586, 3 C.P.C. (2d) 77 at p. 80 (S.C.), affd *loc. cit.*, O.R., C.P.C.

[11] Cases supporting Master Sandler's articulation of the court's jurisdiction to order particulars are: *Fairbairn v. Sage*, [1925] 2 D.L.R. 536, 56 O.L.R. 462, 27 O.W.N. 401 (S.C., App. Div.); *Physicians' Services Inc. v. Cass*, [1971] 2 O.R. 626 (C.A.); *Steiner v. Lindzon* (1976), 14 O.R. (2d) 122 (H.C.J.).

[12] (1913), 25 O.W.R. 422 (Master) at p. 425.

In *Steiner v. Lindzon*,[13] Lerner J. described the purpose of particulars 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 . . .

Thus, particulars are adjectival and they may be restrictive or non-restrictive. They are restrictive when they narrow the claim or defence; they are non-restrictive when they provide additional information about the claim or defence. In either case, they are designed to provide disclosure, to prevent surprise and to facilitate responsive pleading.

Before particulars are ordered, the pleadings themselves should satisfy the requirements of the rules. This was a point noted by Master Sandler in the *Copland v. Commodore* case, where he stated:[14]

> 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.

Master Sandler also noted that it is often difficult to differentiate between material facts, particulars and evidence and that they were relative concepts, *i.e.*, what is the minimum level of fact disclosure and what are particulars or evidence depends upon the nature of the individual case. These points will be expanded upon as the discussion moves to an examination of the rules that implement the function of pleadings.

3. The Rules of Pleading — Applicable to All Pleadings

(1) Introduction

The case-law establishes several general principles that are applicable to all types of pleadings and certain of the *Rules of Civil*

[13] *Supra*, footnote 11, at p. 128 O.R.

[14] *Supra*, footnote 10, at pp. 80-1 C.P.C.

Procedure are made applicable to all types of pleadings. This section discusses the generally applicable rules and principles. There are also rules enacted specifically for statements of defence and replies and these are discussed later.

(2) Substantive Adequacy

The discussion above reveals that, practically speaking, the task of the pleader is to steer a course between the shores of insufficient and excessive pleading. To avoid going aground on the rocks of insufficiency under rule 21.01(1)(*b*), a statement of claim must disclose a reasonable cause of action and a statement of defence must disclose a reasonable defence. By rule 25.06(1), a party is directed to make this disclosure by pleading facts. It is not necessary for a pleader to put a legal name to the claim or defence or to plead a formula of legal elements,[15] but it is necessary for a pleader to set out comprehensively the material facts that establish the constituent elements of a claim or defence.

Each cause of action will have its own constituent elements and it is well beyond the scope of this article to describe what counts for substantive adequacy for any particular cause of action. Practical pleaders, if they have any doubt about the constituents, will use several well-known precedent texts that provide the skeleton or framework for most claims and defences.[16]

Canadian courts are lenient in their scrutiny of whether a pleading discloses a reasonable claim or defence. The principles for a motion to strike a pleading for failure to disclose a claim or defence are:[17] (1) the allegations of fact unless patently ridiculous or incapable of proof are accepted as proven; (2) the party moving to strike must show that it is plain, obvious and beyond doubt that the plaintiff could not succeed; (3) the novelty of the cause of action will not militate against the plaintiff; (4) the pleading must be read generously with allowance for inadequacies due to drafting deficiencies.

In addition to pleading a reasonable cause of action or defence, rule 25.06(1) compels a minimum level of disclosure of the material facts. As already noted above, when a pleading fails to meet the minimum level of disclosure, the appropriate remedy is not particulars but the striking out of the pleading usually with leave to amend.[18] Thus, the case-law about disclosure shows that there is both a qualitative and a quantitative aspect to a pleading that is substantively adequate. As to quality, a party must plead a reasonable claim or defence; as to quantity, a party must plead sufficient facts to alert the other side of the case it must meet.[19] In *Region Plaza Ltd. v. Hamilton-Wentworth (Regional Municipality)*,[20] where certain defendants successfully moved to strike out the allegations against them in a statement of claim, Rosenberg J. tested the quantitative adequacy of the pleading by asking the following question: "Are the facts given sufficient to allow the defendant to plead to the statement of claim knowing what allegations are against them?"

The quantitative and the qualitative measure of a pleading are both relevant when a pleading is so incoherent, ambiguous or vague that the opponent is incapable of meaningfully responding. In such cases, the court may strike out the pleading usually with leave to amend.[21]

The standard of disclosure may be higher or lower for certain types of claim or defence. Rule 25.06(8) states:

> 25.06(8) 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.

The first half of this rule imposes a higher degree of disclosure

[5] *Almas v. Spenceley* (1972), 25 D.L.R. (3d) 653, [1972] 2 O.R. 429 (C.A.).

[6] Bullen & Leake and Jacob, *Precedents of Pleadings*, 13th ed. (1990); *Atkin's Court Forms*, 2nd ed. (1992); D.B. Casson, *Odgers on High Court Pleadings and Practice*, 23rd ed.

[7] *Hunt v. Carey Canada Ltd.* (1990), 74 D.L.R. (4th) 321, [1990] 2 S.C.R. 959, [1990] 6 W.W.R. 385; *R.D. Belanger & Associates Ltd. v. Stadium Corp. of Ontario Ltd.* (1991), 5 O.R. (3d) 778, 57 O.A.C. 81 (C.A.); *Jane Doe v. Metropolitan Toronto (Municipality)* (1990), 72 D.L.R. (4th) 580, 74 O.R. (2d) 225, 40 O.A.C. 161 (Div. Ct.), leave to appeal to Ont. C.A. refused 1 O.R. (3d) 416*n*; *Chatelaine Homes Ltd. v. Miller* (1982), 140 D.L.R. (3d) 319, 39 O.R. (2d) 611, 26 R.P.R. 68 (C.A.); *Tsiopoulos v. Commercial Union Assurance Co.* (1986), 32 D.L.R. (4th) 614, 57 O.R. (2d) 117, 21 C.C.L.I. 212 (H.C.J.); *Colonia Life Holdings Ltd. v. Fargreen Enterprises Ltd.* (1990), 1 O.R. (3d) 703 (Gen. Div.); *Toronto-Dominion Bank v. Deloitte Haskins & Sells* (1991), 5 O.R. (3d) 417, 8 C.C.L.T. (2d) 322 (Gen. Div.); *MacDonald v. Ontario Hydro* (1994), 19 O.R. (3d) 529 (Gen. Div.).

[18] *Copland v. Commodore*, *supra*, footnote 10; *Sun Life Assurance Co. of Canada v. 401700 Ontario Ltd.* (1991), 3 O.R. (3d) 684 (Gen. Div.); *Region Plaza Inc. v. Hamilton-Wentworth (Regional Municipality)* (1990), 12 O.R. (3d) 750 (H.C.J.); *Peaker v. Canada Post Corp.* (1989), 68 O.R. (2d) 8 (H.C.J.), affd 24 A.C.W.S. (3d) 183 (C.A.); *Henrickson v. Henrickson*, [1962] O.W.N. 75 (Master).

[19] *Amdahl Canada Ltd. v. Circle Computer Services Inc.* (1993), 50 C.P.R. (3d) 386 (Ont. Ct. (Gen. Div.)); *Aboutown Transportation Ltd. v. London Free Press Printing Co.* (1993), 14 O.R. (3d) 19 (Gen. Div.).

[20] *Supra*, footnote 18, at p. 756 [see italicized heading].

[21] *Cashin v. Craddock* (1876), 3 Ch. D. 376 (C.A.); *Morin v. Prince Edward Island* (1989), 78 Nfld. & P.E.I.R. 88, 39 C.P.C. (2d) 14 (P.E.I.S.C.); *AMCA International Ltd. v. Ellis-Don Ltd.* (1990), 42 C.L.R. 225 (Ont. Ct. (Gen. Div.)).

for allegations of fraud, misrepresentation or breach of trust.[22] This approach is consistent with the case-law that historically has held that these matters must be specifically pleaded.[23] The second half of this rule allows a lower degree of disclosure for allegations of malice, intent or knowledge. For these allegations, a bald assertion is adequate pleading.[24]

(3) Material Facts and Not Evidence

Unlike the procedure that governed before the reforms introduced by the old Judicature Acts, where a party would plead legal conclusions without the supporting facts ("issue pleading"), since the reforms and now under rule 25.06(1) a party must plead a concise statement of the material facts relied on to prove the claim or defence but not the evidence by which those facts are to be provided ("fact pleading"[25]).

To understand the requirements of rule 25.06(1), set out above, it helps to break it down into its constituents. The rule requires a statement of material facts. Material facts include facts that establish the constituent elements of the claim or defence.[26] Material facts also include any facts that the party pleading is entitled to prove at trial and at trial anything that effects the determination of the party's rights can be proved. Accordingly, a material fact is a fact that can have an effect on the determination of a party's rights.[27] Conversely, a fact that is not provable at the trial or is incapable of effecting the outcome is immaterial and ought not to be pleaded. As described by Riddell J. in *Duryea v. Kaufman*,[28] such a plea is said to be "embarrassing". He said:

> No pleading can be said to be embarrassing if it allege[s] only facts which may be proved — the opposite party may be perplexed, astonished, startled, confused, troubled, annoyed, taken aback, and worried by such a pleading — but in a legal sense he cannot be "embarrassed." But no pleading should set out a fact which would not be allowed to be proved — that is embarrassing . . .

A pleading that is embarrassing may be struck out.[29] Unless material in some other way, a fact that simply anticipates a position of the opponent, which may never be advanced, is not material and may be struck out.[30] Pleadings that go solely towards the issue of costs are improper and may be struck.[31]

Rule 25.06(1) requires that evidence not be pleaded. The difference between pleading material facts and pleading evidence is a difference in degree and not of kind. This follows because a pleading of evidence is a pleading of facts; what the prohibition against pleading evidence is designed to do is to restrain the pleading of facts that merely tend to prove the truth of the substantial facts in issue.[32] And, as noted above, the classification of a fact as a material fact, as a particular or as evidence will depend upon the circumstances of the case.

Pleadings of evidence may be struck out.[33] Admissions by an opponent are a matter of evidence that ought not to be pleaded, so they may be struck.[34] A pleading of evidence of similar facts may or may not be proper depending on the nature of the particular case.[35]

(4) Pleading Law

Rule 25.06(2), which is a partial codification of *Famous Players Canadian Corp. v. J.J. Turner and Sons Ltd.*,[36] permits the pleading of conclusions of law and states:

[22] *Sun Life Assurance Co. of Canada v. 401700 Ontario Ltd.*, *supra*, footnote 18.
[23] *Blay v. Pollard*, [1930] 1 K.B. 628 (C.A.); *L'Estrange v. F. Graucob, Ltd.*, [1934] 2 K.B. 394; *Medcalf v. Oshawa Lands and Investments Ltd.* (1914), 15 D.L.R. 745, 5 O.W.N. 797, 25 O.W.R. 702 (S.C., App. Div.).
[24] *Prete v. Ontario (Attorney General)* (1993), 110 D.L.R. (4th) 94, 16 O.R. (3d) 161 at p. 170, 86 C.C.C. (3d) 442 (C.A.); but see *Region Plaza Inc. v. Hamilton-Wentworth (Regional Municipality)*, *supra*, footnote 18, at p. 756.
[25] Professor G.D. Watson and C. Perkins, *Holmsted and Watson — Ontario Civil Procedure* (Toronto: Carswell, 1990), 25§11.
[26] *Philco Products, Ltd. v. Thermionics, Ltd.*, [1940] 4 D.L.R. 1, [1940] S.C.R. 501 at p. 505.
[27] *Hammell v. British American Oil Co.*, [1945] O.W.N. 742 (Master); *Duryea v. Kaufman* (1910), 21 O.L.R. 161 (Master); *Flexlume Sign Co. v. Hough* (1923), 53 O.L.R. 611, 24 O.W.N. 208 and 254 (H.C.J.); *Millington v. Loring* (1880), 6 Q.B.D. 190 (C.A.) at p. 194; *Brydon v. Brydon*, [1951] O.W.N. 369 (C.A.).
[28] *Ibid.*, at p. 168.
[29] *Famous Players Canadian Corp. v. J.J. Turner and Sons Ltd.*, [1948] O.W.N. 221 (H.C.J.) at p. 221; *Peaker v. Canada Post Corp.*, *supra*, footnote 18 at pp. 29-31; *Everdale Place v. Rimmer* (1975), 8 O.R. (2d) 641 (H.C.J.) at p. 643; *Davy v. Garrett* (1878), 7 Ch. D. 473 (C.A.); *Dalex Co. v. Schwartz Levitsky Feldman* (1994), 19 O.R. (3d) 463, 23 C.C.L.I. (2d) 294 (Gen. Div.).
[30] *Barclay v. Taylor*, [1946] O.W.N. 787 (Master).
[31] *A.I. Macfarlane & Associates Ltd. v. Delong* (1986), 55 O.R. (2d) 89, 10 C.P.C. (2d) 25 (H.C.J.); *AMCA International Ltd. v. Ellis-Don Ltd.*, *supra*, footnote 21.
[32] *Grace v. Usalkas*, [1959] O.W.N. 237 (Master).
[33] *Sun Life Assurance Co. of Canada v. 401700 Ontario Ltd.*, *supra*, footnote 18.
[34] *Davy v. Garrett*, *supra*, footnote 29; *Sun Life Assurance Co. of Canada v. 401700 Ontario Ltd.*, *supra*, footnote 18.
[35] *Mackenzie v. Wood Gundy Inc.* (1989), 35 C.P.C. (2d) 272 (Ont. H.C.J.); *Union Gas Ltd. v. Steel Co. of Canada Ltd.* (1976), 1 C.P.C. 325 (Ont. H.C.J.); *Stauffer v. Sampson*, [1962] O.W.N. 115 (H.C.J.).
[36] *Supra*, footnote 29.

> 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.

So, if conclusions of law are pleaded they must be accompanied by material facts supporting the legal conclusion. Conclusions of law should be pleaded if they would take a party by surprise. What is objectionable is to plead a legal proposition without supporting facts or to plead facts for a legal proposition that are not obvious from the pleading and that might take a party by surprise.

If a statute is pleaded, the particular sections relied on should be identified.[37] Statutory provisions should be pleaded if they would take a party by surprise.[38] If a foreign statute is pleaded, the particular sections relied on should be identified and the nature of the contravention described.[39] *Res judicata* must be specifically pleaded.[40] Estoppel must be pleaded.[41]

(5) Inconsistent Pleadings

In disclosing his case, it is not improper for a party to provide more than one version of the material facts even if the versions are contradictory or inconsistent.[42] Rules 25.06(4) and (5) govern inconsistent pleadings. These rules state:

> 25.06 (4) A party may make inconsistent allegations in a pleading where the pleading makes it clear that they are being pleaded in the alternative.
>
> (5) An allegation that is inconsistent with an allegation made in a party's previous pleading or that raises a new ground of claim shall not be made in a subsequent pleading but by way of amendment to the previous pleading.

Rule 25.06(5) is designed to prevent what is known as a "departure", which occurs when a party's subsequent pleading is inconsistent with an earlier pleading. The idea here is that while a party may plead inconsistent claims or defences, the inconsistent pleading must occur in the same document. So a plaintiff, rather that taking an inconsistent position in a reply, must amend his statement of claim to plead the inconsistent position in the alternative.[43]

[37] *Brazier v. Toronto Transportation Commission*, [1946] O.W.N. 890 (Master); *McAlpine v. Bell Telephone Co. of Canada*, [1943] O.W.N. 592 (Master).

[38] *Hydro-Electric Power Commission of Ontario v. St. Catharines (City)* (1971), 21 D.L.R. (3d) 410, [1971] 3 O.R. 674 (H.C.J.), affd 24 D.L.R. (3d) 278, [1972] 1 O.R. 806 (C.A.), affd 36 D.L.R. (3d) 160*n*, [1973] S.C.R. vi; *Perlmutter v. Jeffery* (1979), 23 O.R. (2d) 428 (S.C.).

[39] *Hands v. Stampede International Resources Ltd.*, [1971] 3 O.R. 44 (H.C.J.); *Bryant Press Ltd. v. Acme Fast Freight Inc.*, [1951] O.W.N. 665 (H.C.J.).

[40] *Mann v. Mann* (1973), 40 D.L.R. (3d) 504, 1 O.R. (2d) 416, 11 R.F.L. 392 (H.C.J.); *Cooper v. Molson's Bank* (1896), 26 S.C.R. 611 at p. 620.

[41] *Famous Players Canadian Corp. v. J.J. Turner and Sons Ltd., supra*, footnote 29, at p. 224; *Hughes v. J.H. Watkins & Co.*, [1927] 3 D.L.R. 302, 60 O.L.R. 448 at p. 450, 32 O.W.N. 173 (S.C.), affd [1928] 2 D.L.R. 176, 61 O.L.R. 587, 33 O.W.N. 289 (S.C., App. Div.).

[42] *Colonia Life Holdings Ltd. v. Fargreen Enterprises Ltd.* (1990), 1 O.R. (3d) 703 (Gen. Div.) at p. 707; *Re Morgan; Owen v. Morgan* (1887), 35 Ch. D. 492 (C.A.) at p. 499.

(6) Claim for Relief

The forms that are mandated for the statement of claim, for counterclaims, cross-claims and for third party claims require that the allegations of material fact be preceded by a statement of the precise relief sought by the party pleading.[44] Rule 25.06(9) provides direction about the pleading of the claim for relief. It states:

> 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.

Under this rule, the amount claimed for each claimant in respect of each claim should be stated.[45]

To understand the operation of this rule, the difference between general and special damages must be noted since the pleading of the specifics of special damages may be postponed. Special damages are damages that are capable of exact calculation while general damages arise as a matter of law and are not capable of precise calculation. *Bullen & Leake and Jacob's Precedents of Pleadings*, provides a useful description of the difference:[46]

> The distinction between general and special damages is this. General damage is such as the law will presume to be the natural or probable consequence of the defendant's act. It arises by inference of law, and need not, therefore, be proved by evidence and may be averred generally. Special damage, on the other hand, is such a loss as the law will not presume to be the consequence of the defendant's act, but such as depends in part, at least, on the special circumstances of the particular case. It must therefore be always explicitly claimed on the

[43] *McComb v. American Can Canada Inc.* (1986), 15 C.P.C. (2d) 242 (Ont. H.C.J.); *Levinson v. Levinson*, [1943] O.W.N. 177 (Master); *Burford v. Cosa Corp. of Canada Ltd.*, [1955] O.W.N. 8 (Master).

[44] Rule 25.01.

[45] *Ontario Store Fixtures Inc. v. Mmmuffins Inc.* (1989), 70 O.R. (2d) 42 (H.C.J.), supplementary reasons *loc. cit.*, at p. 47.

[46] *Bullen & Leake and Jacob's Precedents of Pleadings*, 12th ed. (London: Sweet & Maxwell, 1975), at p. 60; see, too, *Standard Trust Co. v. Barbeau* (1980), 21 C.P.C. 141 (Ont. Master).

pleading, as otherwise the defendant would have no notice that such items of damage would be claimed from him at the trial.

Special or general damages may include prospective damages, *i.e.*, an award of money to compensate for a loss that will arise in the future after the trial.[47]

(7) Scandalous Pleadings

Rule 25.11 empowers the court to strike out a pleading that may prejudice or delay the trial or that is scandalous, frivolous, vexatious or an abuse of process.[48] The rule states:

> 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.[49]

Before discussing the topic of this section, scandalous pleadings, t is necessary to recall the purpose of this article, which is to discuss he essentials of pleadings. The article is not about circumstances ehind the pleadings that may discredit the pleader: neither is it bout a pleading that is vexatious or an abuse of process because he pleader is using the court process for improper purposes. Such leadings can be attacked and the court may be assisted by affidavit vidence about circumstances outside the pleading.[50] So, keeping he scope of the article in mind, this section considers pleadings hat are intrinsically bad; that is, pleadings that serve little purpose ther than to disconcert or humiliate the opponent; such pleadings

Walker v. CTV Television Network Ltd. (1992), 7 O.R. (3d) 704 (Gen. Div.).
Foy v. Foy (1978), 88 D.L.R. (3d) 761, 20 O.R. (2d) 747, 9 C.P.C. 141 (C.A.); *Demeter v. British Pacific Life Insurance Co.* (1983), 150 D.L.R. (3d) 249, 43 O.R. (2d) 33, 2 C.C.L.I. 246 (H.C.), affd 13 D.L.R. (4th) 318, 48 O.R. (2d) 266, 8 C.C.L.I. 286 (C.A.); *R. Cholkan & Co.* v. *Brinker* (1990), 71 O.R. (2d) 381 (H.C.J.).
Related to rule 25.11 is rule 21.01(3), which states, among other things that:

> 21.01 (3) A defendant may move before a judge to have an action stayed or dismissed on the ground that,
> . . . . .
> (*d*) the action is frivolous or vexatious or is otherwise an abuse of the process of the court,
> and the judge may make an order or grant judgment accordingly.

Foy v. Foy, supra, footnote 48; *Cameron Packaging Ltd. v. Ruddy; Ruddy v. Cameron Packaging Ltd.* (1983), 41 C.P.C. 154 (Ont. S.C.), affd *loc. cit.*, at p. 154*n* (C.A.).

are scandalous. If a pleading, however, is of a material fact it cannot be scandalous.[51]

An example of a scandalous pleading is an allegation that the opponent was convicted of a criminal offence when the commission of a crime is irrelevant to the proof of the pleader's claim or defence.[52] Such a pleading may be struck out. For example, in *Wilson v. Lind*,[53] the plaintiffs sued for damages arising from a motor vehicle accident and alleged in their statement of claim that the defendant habitually drove while impaired, had been previously convicted of impaired driving, was a menace to highway users and had both before and after the accident with the plaintiffs driven while impaired. These pleadings were struck out as prejudicial and scandalous.

Generally speaking, the style of the pleading is left to the discretion of the pleader and descriptive language, epithets and definitions may be used. However, if the language is inflammatory or prejudicial, it may be struck out.[54]

(8) Rules to Simplify Pleading

Several rules are designed to simplify the task of pleading. These rules include 25.06(3) (Condition Precedent); 25.06(6) (Notice), and 25.06(7) (Documents or Conversations).

Beginning with rule 25.06(3), which concerns "conditions precedent to the assertion of a claim or defence",[55] these are formalities that are imposed by law and should be satisfied before a party may assert a claim or defence. Conditions precedent are not constituent elements of the claim or defence. An example of a condition precedent is the provision in the *Libel and Slander Act*[56] that a plaintiff in an action for libel in a newspaper or in a broadcast must give the defendant notice before commencing the action for

[51] *Erinco Homes Ltd. (Re)* (1977), 3 C.P.C. 227 (Master); *Ontario (Attorney General) v. Dieleman* (1993), 14 O.R. (3d) 697 (Gen. Div.).
[52] *Robinson v. Robinson*, [1942] O.W.N. 410 (H.C.J.).
[53] (1985), 35 C.C.L.T. 95, 3 C.P.C. (2d) 113 (Ont. H.C.J.).
[54] *Sun Life Assurance Co. of Canada v. 401700 Ontario Ltd.* (1991), 3 O.R. (3d) 684 (Gen. Div.).
[55] See *Johns-Manville Canada Inc. v. John Carlo Ltd.* (1980), 113 D.L.R. (3d) 686, 29 O.R. (2d) 592 (H.C.J.), affd 123 D.L.R. (3d) 763*n*, 32 O.R. (2d) 697*n* (C.A.), afffd 147 D.L.R. (3d) 593, [1983] 1 S.C.R. 513, 1 C.C.L.I. 55, *sub nom. Citadel General Assurance Co. v. Johns-Manville Canada Inc.*; without addressing the matter of conditions precedent; *Sentinel-Review Co. v. Robinson*, [1928] 3 D.L.R. 97, [1928] S.C.R. 258; *Canadian Plasmapheresis Centres Ltd. v. Canadian Broadcasting Corp.* (1975), 8 O.R. (2d) 55 (H.C.J.).
[56] R.S.O. 1990, c. L.12, s. 5.

defamation. Here, notice under the Act is not a constituent element of a claim for defamation but is a superimposed requirement that a plaintiff should satisfy before suing. Rule 25.06(3) deems conditions precedent to have been satisfied unless the opposite party pleads and contests the satisfaction of the condition precedent. The rule states:

> 25.06(3) Allegations of the performance or occurrence of all conditions precedent to the assertion of a claim or defence of a party are implied in the party's pleading and need not be set out, and an opposite party who intends to contest the performance or occurrence of a condition precedent shall specify in the opposite party's pleading the condition and its non-performance or non-occurrence.

In addition to pointing out that it will not always be easy to distinguish between a condition precedent and a constituent element, several points should be noted about rule 25.06(3). First, its major effect is that the defence of failure to satisfy a condition precedent is precluded unless pleaded. Second, if the satisfaction of a condition precedent is made an issue, then the onus of proving due performance falls on the party that is subject to the condition precedent.

Similar in operation is rule 25.06(6), which simplifies the pleading of an allegation that a party was given notice of an event or circumstance. The rule states:

> 25.06(6) Where notice to a person is alleged, it is sufficient to allege notice as a fact unless the form or a precise term of the notice is material.

Rule 25.06(7) simplifies the pleading of the contents of documents. Pursuant to this rule, it is permissible to paraphrase the effect of a document or the purport of a conversation unless the precise words are material. The rule states:

> 25.06(7) The effect of a document or the purport of a conversation, if material, shall be pleaded as briefly as possible, but the precise words of the document or conversation need not be pleaded unless those words are themselves material.

4. Rules of Pleading Applicable to Defences

Statements of defence, including statements of defence to a counterclaim, and replies receive specific attention in the case-law and under the *Rules of Civil Procedure*.[57] Rule 25.07, which has six

[7] Under the modern regime of fact pleading, which requires a party to disclose its case, the historical nomenclature for the main types of defences is not particularly significant. The main defences are: (1) plea in abatement, where the defendant raises the issue of capacity to sue, the adequacy of the joinder of parties or the existence of another pending action; (2) objection in point of law, where the defendant raises a legal challenge to the plaintiff's alleged cause of action; (3) a traverse, where the defendant contradicts the plaintiff; and (4) confession and avoidance, where the defendant admits the plaintiff's facts but pleads additional facts to avoid liability.

subrules, is the specific rule applicable to statements of defence. To appreciate this rule, it is perhaps best to analyze it in its totality. Rule 25.07 states:

> *Admissions*
>
> 25.07 (1) In a defence, a party shall admit every allegation of fact in the opposite party's pleading that the party does not dispute.
>
> *Denials*
>
> (2) Subject to subrule (6), all allegations of fact that are not denied in a party's defence shall be deemed to be admitted unless the party pleads having no knowledge in respect of the fact.
>
> *Different Version of Facts*
>
> (3) Where a party intends to prove a version of the facts different from that pleaded by the opposite party, a denial of the version so pleaded is not sufficient, but the party shall plead the party's own version of the facts in the defence.
>
> *Affirmative Defences*
>
> (4) In a defence, a party shall plead any matter on which the party intends to rely to defeat the claim of the opposite party and which, if not specifically pleaded, might take the opposite party by surprise or raise an issue that has not been raised in the opposite party's pleading.
>
> *Effect of Denial of Agreement*
>
> (5) Where an agreement is alleged in a pleading, a denial of the agreement by the opposite party shall be construed only as a denial of the making of the agreement or of the facts from which the agreement may be implied by law, and not as a denial of the legality or sufficiency in law of the agreement.
>
> *Damages*
>
> (6) In an action for damages, the amount of damages shall be deemed to be in issue unless specifically admitted.

Taken together, the subrules of rule 25.07 direct a defendant to admit what he does not dispute and to plead affirmatively any defences. Rule 25.07 reinforces or reiterates the command of rule 25.06(1), which requires every pleading to contain a precise

statement of the facts relied upon. For statements of defence, with an exception for damages which are deemed to be in issue unless specifically admitted, rule 25.07 and the case-law discourage general denials and silence; the defendant should plead his version of the facts. Undenied allegations from the statement of claim are deemed to be admitted unless the defendant pleads that he has no knowledge about the allegation. Under rule 25.06(4), a defendant must disclose any defence that would take the plaintiff by surprise. Of this subrule, Professor Garry Watson has written:[58]

> This rule is to the same effect as former Rule 145. Indeed it even uses more or less the identical language, although the former rule closed with examples which might take the opposite party by surprise or raise new issues viz. "for instance, fraud, The Limitations Act, release, payment, performance, facts showing illegality either by statute or common law, of The Statute of Frauds". These examples are still clearly covered by the new rule — as indeed are many other defences, e.g., statutes that limit liability, contributory negligence, assumption of risk, waiver, estoppel, non est factum, equitable defences.

The case-law recognizes that a statement of defence should be responsive to the statement of claim. This means that the adequacy of a statement of defence must be judged, in part, by reference to the action's statement of claim. In *Cherry v. Petch*,[59] a plaintiff successfully moved to have a statement of defence struck out for failure to be responsive to the statement of claim. The master concluded that given the nature of the plaintiff's allegations and given the rule that a defendant must not take the plaintiff by surprise, an answer was called for and the defendant could not rely on a general denial.[60]

A defendant's denial of a contract is given specific treatment by rule 25.07(5). The prime effects of this rule are that it compels a defendant to specifically plead, if so advised, that the contract relied upon by the plaintiff is illegal or that the acts or documents alleged to be a contract are inadequate to constitute a contract. In other words, if the defendant simply denies the contract but at trial the plaintiff proves the contract, then the defendant cannot challenge

[58] Watson and C. Perkins, *Holmsted and Watson — Ontario Civil Procedure* (Scarborough: Carswell, 1984), 25§24.

[59] [1946] O.W.N. 383 (Master). See also *Sharpe v. Reingold*, [1945] O.W.N. 730 (Master), where the adequacy of the statement of defence was determined by reference to how the plaintiff had pleaded.

[60] A non-responsive pleading can provide grounds for an order that particulars be provided: *Steiner v. Lindzon* (1976), 14 O.R. (2d) 122 (H.C.J.).

the legality of the contract without having specifically pleaded this challenge.

5. Rules of Pleading Applicable to Replies

The reply is the pleading that responds to the statement of defence and, with a few exceptions, the design and underlying policy for replies as a responsive pleading are similar to the design for the statement of defence. Once again, it is helpful to consider the rules about replies in their totality. This time two rules, rules 25.08 and 25.09, must be considered. They state:

> WHERE A REPLY IS NECESSARY
>
> *Different Version of Facts*
>
> 25.08(1) A party who intends to prove a version of the facts different from that pleaded in the opposite party's defence shall deliver a reply setting out the different version, unless it has already been pleaded in the claim.
>
> *Affirmative Reply*
>
> (2) A party who intends to reply in response to a defence on any matter that might, if not specifically pleaded, take the opposite party by surprise or raise an issue that has not been raised by a previous pleading shall deliver a reply setting out that matter, subject to subrule 25.06(5) (inconsistent claims or new claims).
>
> *Reply Only Where Required*
>
> (3) A party shall not deliver a reply except where required to do so by subrule (1) or (2).
>
> *Deemed Denial of Allegations Where No Reply*
>
> (4) A party who does not deliver a reply within the prescribed time shall be deemed to deny the allegations of fact made in the defence of the opposite party.
>
> RULES OF PLEADING — APPLICABLE TO REPLIES
>
> *Admissions*
>
> 25.09(1) A party who delivers a reply shall admit every allegation of fact in the opposite party's defence that the party does not dispute.
>
> *Effect of Denial of Agreement*
>
> (2) Where an agreement is alleged in a defence, a denial of the agreement in the opposite party's reply, or a deemed denial under subrule 25.08(4), shall be construed only as a denial of the making of the agreement or of the facts

from which the agreement may be implied by law, and not as a denial of the legality or sufficiency in law of the agreement.

For replies, as was the case for the statement of defence, disclosure and an affirmative response are called for by the rules. However, the rules recognize that the plaintiff may have already articulated his response in the statement of claim, thus making a reply redundant. If no reply is called for, then the plaintiff is not injured by his silence to the statement of defence; rule 25.08(4) deems the plaintiff's silence a denial and not an admission. Where a response is called for, however, a plaintiff must avoid contravening rule 25.06(5), the rule about departures, which was discussed above. Therefore, if a reply would be inconsistent with the statement of claim, the plaintiff must amend his statement of claim and there plead in the alternative as permitted by rule 25.06(4).

For replies, the treatment under rule 25.09(2) of a denial of an agreement is identical to the treatment under rule 25.07(5), discussed above.

6. The Rhetoric of Pleadings

As already noted above, pleadings have a rhetorical purpose. They have a role to play in advocacy but it is well beyond the scope of this practical article to explore the many details of effective written advocacy. Instead, focusing on the essentials of pleading, four major interrelated points may quickly be made.

The first point is that the rhetorical, persuasive or adversarial aspects of pleadings should be recognized and used. This point seems obvious but many pleadings are written as if their sole purpose was to avoid an interlocutory motion leading to a summary judgment. A good pleading requires something more than substantive and technical competence. The practical pleader recognizes that delivering a pleading is an opportunity to communicate a message about the merits and justice of the client's case and about the lack of merit and injustice of the other side. It is an axiom of advocacy that the justice of a case is found in the facts. It follows that a pleading, which is designed to be a statement of facts, should present a consciously selected and skilfully recited set of facts.

This first point is meant to motivate. No pleading will win a prize for writing and few pleadings will provide an opportunity for other than professional or technical writing. But pleadings have an audience. If the practical pleader simply remembers that his pleading will have a psychological effect, be it positive or negative, on the

audience, then common sense will take over and many of the basic principles of rhetorical or persuasive writing will follow automatically.

The second point also is obvious; to be persuasive, a pleading should be clear. A pleading that is unclear will not be understood and cannot succeed in advancing the party's claim or defence. Although this point is obvious, it is missed by many pleaders who use ambiguous and wordy prose that obscures meaning. Effective pleadings require a simple and direct style. In practical terms, this means a pleader should not slavishly follow the precedent books. The practical pleader, rather, should reflect about what he wants to say about the particular claim or defence to be pleaded. From the clarity of thought will come the clarity of writing.

The third point is that a pleading should be concise. While conciseness is, in any event, mandated by rule 25.06(1), it is rhetorically a good idea to state a point concisely because through conciseness, clarity and understanding are advanced, and a concise pleading responds to the needs of the judge, who will want to quickly know the competing positions.

The fourth and last point is that the importance of individual word choices cannot be overstated. Unlike blocks of words and standard phrases, a carefully selected word makes a pleading clearer and more precise, concise and readable. And individual words may have emotive or psychological effects. In other words, a carefully selected word is not only an aspect of the technical skills needed for good persuasive writing but is also itself an element of persuasion.