

PLEADINGS IN THE NEW MILLENIUM: THE IMPORTANCE OF WORKING YOUR THEORY INTO THE PLEADINGS

A. INTRODUCTION

Since the amendments to the *Judicature Act*, approximately 125 years ago, when the rules and forms related to pleadings were overhauled, there has been very little written about pleadings¹. This may be because there is little to be said, or as is more likely, because practitioners see pleadings as cause of action specific, where form triumphs over substance. Once the elements of the cause of action are established and the general rules of pleading have been followed, most practitioners believe that the drafting is at an end. The goal of this paper is to demonstrate that there is much more to be said in a pleading. The pleading is one of the most important documents that you will prepare. It should be more than a bare recitation of the relief claimed and the material facts that ground the cause or causes of action. The pleading² should be viewed as a persuasive document that captures and projects the essence of the dispute.

For the pleading is the one document that is used at every stage of the action and which will repeatedly be referred to by the court. Initially, it defines the issues and establishes the factual and legal foundation for the action. The facts and issues as pleaded govern production and discovery. The pleading may be the only document available for interlocutory motions. For instance, on refusals motions, the pleadings will determine the relevance of questions and documents. Motions for summary judgment can succeed or fail based on the case as pleaded. If the action proceeds to trial, the first exposure the trial judge will have is the pleading.

¹ For selection of articles found, see bibliography.

² Although a notice of application and affidavit are not pleadings in the true definition, they are the first documents read by the court and also define the issues. Affidavits properly drawn should

Originally, pleadings were oral³. The parties would literally state their case and the judge would then delineate the issues to be determined. This procedure had its obvious drawbacks. In Gulliver's Travels, Jonathan Swift observed that one could not help but feel that the element of surprise was the essence of the whole litigation process. The goal was ambush⁴. The oral tradition has been replaced by a written one, which has evolved into today's paper heavy battles.

The importance of a pleading that clearly describes the theory of the case has never been more important than it is today. The focus of our system is judicial management and efficiency. Because of demands on the judiciary, the best way to ensure that the court understands and is sensitive to your case is to make your pleading clear and articulate, directed to a persuasive theory.

The pleading is a marketing tool. The target is the court. The goal is to sell your theory. The pleading must tell a simple and logical story, setting forth the theory that will persuade the court to help your client. You know that you have succeeded when the court adopts your theory and your language into its Reasons for Decision.

B. WHAT IS THE THEORY?

Mauet, in Fundamentals of Trial Techniques, defined the theory of the case as:

A theory of the case is simply your position and approach, to all the undisputed and disputed evidence, which will be presented at trial. You must integrate the undisputed facts with your version of the disputed facts to create a cohesive, logical position at trial.

avoid adjectives and over-statement. Affidavits can set out a logical story with persuasive thoughts and language, but the theory, in general, of the case cannot be put in the affidavit

³ See Bullen and Leake, *Precedents of Pleadings*, 12th ed. (London: Sweet and Maxwell, 1975) at 10. For the history of the development of the common law system of pleadings, see Holdsworth, *History of English law*, Vol. III, 5th edition, page 627 etc. ,Vol. IX, 3rd ed., at 336, and for the history of the development of the system of equity pleadings, see *ibid* Vol. XI, at 376. In about the beginning of the 16th century the system of oral pleading began to be superceded by a system of written pleadings which were entered on the record when they were completed. The *Judicature Acts* of 1873-1875 and the *Rules of Court* that were passed pursuant to those statutes. The old system of pleading was replaced by the modern system of pleading.

That position must remain consistent during each phase of the trial. At the conclusion of the trial your position must be the more plausible explanation of what really happened to the jury.⁵

Lubet, in Modern Trial Advocacy, stated:

"A theory of the case should be expressed in a single paragraph that combines an account of facts and the law in such a way as to lead to the conclusion that your client must win."⁶

However, developing your theory should not wait until trial. It must begin with the originating document – the pleading. Your theory underscores the entire case. It, therefore, must be developed at the beginning. In order to understand how to develop the theory into the pleading, it is first necessary to understand what is the purpose of pleadings.

C. THE PURPOSE OF PLEADINGS

The primary purposes of the pleading may be stated as follows:

- a. To define with clarity and precision the issues or questions of fact and law which are in dispute between the parties and that are to be decided by the court;
- b. To provide the opposite party fair and proper notice of the case that it has to meet;

⁴ For an example of how our system has moved from "surprise" to ensuring that our client's case is fully pleaded, see *Hydro-Electric Power Commission of Ontario v. City of St. Catherines et al.* [1971] 3 O.R. 674. See also *R. v. Stinchcombe* [1991] 3 S.C.R. 326.

⁵ T. Mauet et al., *Fundamentals of Trial Techniques* (Toronto: Little, Brown and Company (Canada) Ltd., 1995) at 349.

⁶ S.Lubet, *Modern Trial Advocacy*, Cdn. eds. S.Block and C.Tape (National Institute for Trial Advocacy Inc., 1985) at 8. Lubet goes on to say that the theory must be logical, speak to the legal elements of your case, be simple, using maximum use of the undisputed facts and be easy to believe.

- c. To provide a permanent record of the issues and questions raised and to be decided in the action so as to prevent future litigation upon issues already adjudicated upon between the parties or those persons privy to them;
- d. To limit the ambit and range of documentary discovery;
- e. To limit the ambit and range of oral examination for discovery;
- f. To allow for the determination as to whether a reasonable cause of action or defence is disclosed;
- g. To fix the burden of proof;
- h. To provide a measure for the court to compare the evidence adduced by a party with the case which has been pleaded;
- i. To determine the range of admissible evidence which the party is entitled to adduce at the trial; and,
- j. To advise of the relief being requested⁷.

Not only must your pleading do all that, but it also provides the opportunity to integrate your theory of the case. By setting out the facts and the legal basis for the relief claimed in a cohesive manner, you can market the "more plausible explanation of what really happened" to the court.

D. HOW TO DEVELOP THE THEORY INTO YOUR PLEADINGS

Chances are you know very little, if anything, about the facts in dispute when you are first retained. The temptation, for counsel and client, is to obtain the basic facts, draft a quick pleading and issue it. This approach is cost effective.

⁷ *Supra* note 3 at 17.

However, it is a sacrifice at the expense of a complete understanding of the case and, most importantly, the development of your theory.

But how do you develop and work your theory into the pleading?

Before you even begin to draft your pleading, you must gather as much information as possible from your client. In doing so, do not be afraid to cross-examine your own client. If there is an important fact, either helpful or unhelpful, you want to know about it before you commit to a theory in the pleading, rather than after. Once you have the information, take the time to interview witnesses. Obtain witness statements if possible. There is no such thing as too much information or too much confidence in the credibility of that information as the underlying foundation for your pleading. You must answer the following questions: What happened? Why did it happen? What approach explains your client's conduct? What approach explains the other party's conduct? Why does that suggest your client should win?

A factual chronology of all events and documents must be prepared. Only by walking through the facts, good and bad, in chronological order will you appreciate how the events transpired to bring the client to your office. The chronology not only assists in developing the theory, it will form the factual structure of the pleading.⁸

The next step is to analyze the facts and identify available causes of action. Do your legal research now. Do not issue a pleading without knowing the law. It is impossible to develop your theory if you do not know the applicable law.

When analyzing the facts separate the “undisputed good facts” from the “undisputed bad facts” and the “disputed good facts” from the “disputed bad

⁸ The preparation of a detailed chronology will never be a waste of time. It is a valuable tool for discovery and trial.

facts”. Remember that it is essential that the theory be consistent with all of the facts, good and bad. Acknowledging and working with the bad facts from the outset will ensure that your theory remains credible and persuasive, and explains or puts those bad facts into context.

Where there are numerous disputed facts and issues, it may be helpful to prepare a “Scott Schedule”.⁹ Such a chart sets out the items in dispute and each party’s position. This schedule can assist in analyzing each party’s position and may be useful at any attendance before the court.

As part of this process, you must always have in mind your client's objective, articulate her objective and canvass all possible available remedies or results.

In developing a theory, regard should be had to the following principles:

- **Comprehensive** - The theory must be comprehensive so that it addresses both the strengths and weaknesses, consistencies and inconsistencies as well as each fact, witness document, piece of physical evidence and principles of substantive procedural and evidentiary law of the case.¹⁰
- **Theme** - Lubet says:

"Just as your theory must appeal to logic, your theme must appeal to moral force. A logical theory tells the trier of fact the reason why your verdict must be entered. In other words, your theme - best presented in a single sentence - justifies the morality of your theory and appeals to the justice of the case"¹¹.

⁹ *Supra* note 3 at 19.

¹⁰ It is in this context that the good fact, the bad fact analysis directs the comprehensiveness of the theory.

¹¹ Lubet, *supra* at 8.

The theme captures the most persuasive arguments and may be expressed through statements, phrases or words that capture key images that may be strategically repeated during the course of the trial. The theme is the case's mantra.

- **Consistency** – Consistency requires that the party's theory be resilient enough to avoid the microscope through which the evidence will be viewed.
- **Plausibility** – The theory must pass the “straight face test”. It must remain plausible with the trier of fact's belief about how people act and how the world operates. It should address issues of credibility. It should respect the emotional nature of human decision making to include feelings, such as sympathy, rage and fear as well as a sense of fairness and justice. An implausible theory offers explanations that are illogical and improbable or simply silly.
- **Legal Structure** – It requires you to analyze and evaluate the legal authority and identify legal issues so that you may assess and justify the relative merits of alternative or competing legal positions.
- **Accountability** – The theory must confront its weaknesses and admit its deficiencies. A sound theory does not rest upon assertions not clearly provable nor contest those that are uncontestable. A reasonable theory admits its weaknesses and turns them into strengths. A successful theory accounts for all facts and explains them in an accurate and honest way.
- **Congeniality** – Congeniality suggests that you select the least disagreeable explanation available. For example, a defence theory that suggests that a mistake was made as opposed to someone acting negligently or foolishly would have a more sympathetic appeal.

- **Simplicity** – A simple theory is one that may be presented as succinctly and persuasively as possible, regardless of the volume or complexity of the evidence. Simplicity requires clarity in both presentation and in an explanation of the law. It requires the use of simple language and simple sentence structure. The case should be broken down into its basic elements so that any complexity can easily be explained by an understanding of each of its parts.
- **Community** – The social setting in which the case is to be tried must be respected. Moral values and public perceptions help shape a case for the fact finder and of course are even more important in jury trials.
- **Flexibility** – The theory usually results from painstaking attention to detail, meticulous preparation and a thorough understanding of the facts and the legal issues. But trial practice has taught that flexibility and adjustment are essential. A theory should be sufficiently adaptable to accommodate an unfavourable evidentiary decision that compromises at least a portion of the theory. A theory should not rely on misstatements, mischaracterizations, misrepresentations or misconduct.

After articulating your theory, a good next step is to prepare your closing argument for trial before you begin drafting your pleadings. This process allows you to “put together” all your analyses. You can choose the language to be used in the pleading that supports your theory.

Just before drafting the pleading, there is one last question you should ask: How much of your theory should you reveal in the pleading? There is no easy answer. It may be that your client does not have enough information at this time to formulate a coherent theory for the pleading. While you may have a general

idea of the nature of the claim, you cannot predict what documents, evidence or position the opposite party will take. The best course of action is to have a theory that is broad enough to encompass potential positions of the defendant. That requires a careful analysis of the various alternative possibilities. However, it is better to go through this while drafting the pleading before much time and energy have been expended on a theory that will never succeed.

E. DRAFTING THE PLEADING

Before writing anything, prepare an outline using the following headings:

- a. the relief claimed;
- b. the parties;
- c. the material facts;
- d. why your client is entitled to the relief claimed; and,
- e. remedies.

You can then develop your theory under each of these headings.

Example

We will use the following fact situation:

The plaintiff enters into a contract on August 1, 1999 with the defendant for the supply of 1000 widgets. The plaintiff manufactures computers. The defendant is the only supplier of widgets in Canada. The widgets are essential components of the computer. The defendant was to deliver the widgets by December 1, 1999. The defendant did not deliver the widgets by December 1, 1999, with the result that the plaintiff cannot deliver the new computers in time for January 1, 2000. The defendant knows that the

plaintiff needs the widgets by December 1, 1999 in order to manufacture new computers that are Y2K compliant. The defendants know that the plaintiff cannot obtain the widgets anywhere else. The plaintiff knows that the defendant may be merging with another company that manufactures the same computers as the plaintiff. The theory is that the defendant purposefully failed to deliver the widgets by December 1, 1999, knowing that the plaintiff could not deliver the computers by January 1, 2000 because it could not get the widgets anywhere else.

1. Relief Claimed

In the relief claimed you could simply state:

"The plaintiff claims:

- a. \$1,000,000.00 in damages"

While this says that your client wants \$1,000,000.00, it does not provide any other information.

More persuasive is this:

"The plaintiff claims:

- a. \$1,000,000.00 in damages as a result of the defendant's breach of an agreement dated August 1, 1999 to supply 1000 widgets to the plaintiff by December 1, 1999 (the "Agreement")¹²

Immediately the reader knows part of your theory; there has been a breach of an agreement by the defendant to supply widgets. From that point on, the reader will know that the case is about a breach of contract. The reader also knows that the date of December 1, 1999 is important.

¹² The use of defined terms will be discussed in more detail below.

2. Parties

An explanation describing the parties comes after the prayer for relief. No matter if there are two parties or twelve, you want to describe the parties in a way that advances the theory of the case.

Frequently, we take the easy way out and simply define the parties as follows:

- "1. The plaintiff is a corporation incorporated pursuant to the laws of Ontario with its head office in Toronto (the "Purchaser").
2. The defendant is a corporation incorporated pursuant to the laws of Ontario with its head office in Mississauga (the "Vendor")"

While this establishes who the parties are and that they are legal entities, it provides absolutely no real information and does nothing to advance your theory.

Instead, try this:

- "1. The plaintiff, a corporation incorporated pursuant to the laws of Ontario, manufactures computers from its plant in Toronto (the "Purchaser").
2. The defendant, a corporation incorporated pursuant to the laws of Ontario, is the only supplier of the widgets that are used in the plaintiff's computers in Canada (the "Vendor")."

In this version, not only have you provided more information to the reader, but you have also furthered your theory by establishing the connection between the plaintiff and the defendant, and the plaintiff's reliance on the defendant for widgets. A caveat: these two paragraphs offend the general rule of "one thought

per paragraph", however, it can be useful to develop the theory and is permissible where you know the facts to be undisputed.

While our example only involves two parties, often the situation is more complicated. Part of the development of your theory is an identification of who are necessary parties to the action. It is important that all necessary parties be added. For instance, where a 50% shareholder brings proceedings against his co-shareholder to wind up the corporation, both the co-shareholder and the corporation are necessary parties.

However, there is a condition. Adding a party simply for atmosphere or embarrassment will not be permitted.¹³ Likewise, making allegations in the pleading against a non-party will also be struck.¹⁴

3. Material Facts

It is here that you can do the most to advance your theory in the pleading. A pleading must inform as to the particular issues toward which proof must be directed. This requires that the material facts be provided persuasively. Failure to do so will lead to either a pleading being struck or particulars being ordered.¹⁵

On the other hand, on a strict reading of Rule 25.06(1) the pleading "shall contain a concise statement of material facts in which the party relies for the claim or defence, but not the **evidence** by which those facts are duly proved". The restriction on pleading evidence would appear to limit the ability to "market the theory".

However, this does not need to be the case. The first part of Rule 25.06(1) does refer to the minimum requirement of a pleading, that is, a concise statement of material facts, but it does not limit the ambit of "material facts". In fact, the only

¹³ *National Trust Company v. Furbacher* [1995] O.J. No. 3566.

¹⁴ *General Security Insurance Co. v. Vasilaros* (1984), 46 C.P.C. 247 (S.C.).

limiting factor is that “the evidence by which those facts are to be proved” is not to be pleaded.¹⁶

The temptation to plead evidence to provide a persuasive context or create atmosphere is strong.¹⁷ The difference between material facts and evidence is a paper unto itself. Master Sandler in *Copland v. Commodore Business Machines Limited*,¹⁸ an oft cited case, discusses the difficulty in distinguishing between material facts and evidence and soundly suggests that regard be had to texts such as Bullen & Leake and the rules of pleading in order to determine what elements must be pleaded for a specific cause of action.

The litmus test to determine between a material fact or evidence is “do I need this “fact” to support my cause of action either in terms of liability or damages?” Any fact which a party must prove at trial is relevant and therefore material, and ought to be pleaded even though it may relate only to the quantum of damages or the type of relief claimed.¹⁹ “Material” has been said to be a fact necessary for the purpose of formulating a complete cause of action or a full defence.^{20,21}

Notwithstanding these limitations, there are techniques that can be used to develop your theory without offending the Rules of Pleading set out in the *Rules of Civil Procedure*.

Organization

To ensure that the court quickly understands your theory, organize the material facts of the pleading in a logical and coherent way. Most stories, especially

¹⁵ *Steiner v. Lindzon* (1976) 14 O.R. (2d) 122 (H.C.J.).

¹⁶ Rule 25.06(1)

¹⁷ Facts that are pleaded simply for atmosphere will be struck. *Wilson v. Wilson* [1948] O.W.N. 326 (H.C.J.).

¹⁸ *Copland v. Commodore Business Machines Ltd.* (1985) 52 O.R.(2d) 586 (S.C.), affirmed on appeal, September 24, 1985 by the Honourable Mr. Justice Henry.

¹⁹ Bullen and Leake, *Supra* note 3 at 35.

²⁰ *Ibid.* at 35.

where the reader is reading it for the first time, are best told chronologically. A pleading that is disorganized and jumbled may still contain all the elements required for the pleading, but it will not be persuasive.

For instance, in our example, it would be confusing to begin the recitation of material facts with the fact that the defendant did not deliver the widgets and then jump to the fact that an agreement was made between the plaintiff and the defendant.

Instead, start with the first fact: that is, that the plaintiff and the defendant entered into an agreement on August 1, 1999.

Organization is key; the reader should not have to look for the theory. This is not a hide and seek exercise. Nor should it be a return to trial by ambush and surprise. Remember, if you attempt to make the theory so obscure or ambiguous so that your opponent will not "catch on", chances on the court will not "catch on" either.

Defined Terms

Defined terms are invaluable tools to market your theory. Defined terms avoid needless repetition and therefore make the pleading easier to read. The Honourable Madam Justice Lang recently commented on defined terms in *Toronto-Dominion Bank v. Leigh Instruments Ltd.*²² and again in *Sun Life Assurance Co. of Canada v. 401700 Ontario Ltd.*²³

²¹ While one should be cautious, in practice it is not often that a motion to strike "evidence" from a pleading is brought.

²² [1990] O.J. No.2490.

²³ *Sun Life Assurance Co. of Canada v. 401700 Ontario Ltd.* (1991) 3 O.R. (3d) 684.

In using defined terms it is important to be consistent; failure to do so will not only be confusing but can also be a defect that can invite a motion to strike and require amendment.²⁴

In our example, you would not repeat "the agreement entered into between the plaintiff and the defendant on August 1, 1999". Instead, this collection of words should be defined as the "Agreement".

There is a caveat to the use of defined terms. One must be careful not to be too descriptive. Inflammatory terms and language is liable to be struck thereby leaving holes in your pleading and making it more difficult to understand. As well, defined terms that draw the very conclusion that is domain of the trier of fact will be struck. For instance, "informed purchases"²⁵, "honest employees"²⁶ and "conspicuous"²⁷ have been struck.

Catch Phrases

Catch phrases can be descriptive and help advance your client's theory. For instance, if your client's facts suggest that there were several agreements, that taken together formed the basis for a distribution relationship between it and the defendant, then define those agreements and that relationship as the "Overall Agreement". This term may then be repeated throughout the pleading. When you use this term consistently, the trier of fact will hopefully identify with the term and adopt the underlying premise. The repeated use of the term reinforces your theory that the relationship is more than one single agreement and defines the nature of the relationship as one of distribution. Spend time creating and developing descriptive catch phrases and terms that are the foundation of your theory and that you will use throughout the litigation.

²⁴ *National Trust v. Furbacher*, *supra* note 9.

²⁵ *Sun Life*, *Supra*.

²⁶ *Ibid*.

²⁷ *Ibid*.

Headings

Headings are much more than simply an organizational tool. They are extremely useful in developing a theory, especially in pleadings where the parties are numerous and the issues and facts are complicated. Headings provide a road map for the reader. Headings are not formally part of the pleading i.e. they do not need to be admitted or denied. Look at them as a bridging or transitional question. Headings must guide the reader as to the purpose of the next section.

Headings should be descriptive and should highlight elements of the theory. A defined term, or catch phrase can be used. Well-organized headings are similar to an index to a book, which when read together give an outline of the claim. However, like defined terms or catch phrases, headings cannot be unnecessarily conclusive or inflammatory.²⁸

Language

Language should be disciplined and concise. It is best to stay away from inflammatory language. Be creative. Keep the language and sentence structure simple. There is nothing more frustrating than having to re-read a sentence to understand what it means. If the theory is presented in complicated language, it will be difficult to follow.

Avoid pronouns if it is not clear to whom you may be referring by such words as “he” or “she” or “it”. Always allude to the same thing or person by the same name. If you maintain the same phraseology throughout the pleading, then it will be easy to follow. Short blunt sentences drafted in the positive; stay away from negative statements and double negatives. One should avoid “ifs” and introductory phrases that take away from the material facts or limit them.

²⁸ *Ibid.*

An Overview

There is nothing in the rules that prevent an overview paragraph at the outset of the pleading. Providing the context in which the material facts can be better understood is arguably a material fact. The overview can be used much like the headings, to capture the theory and language of the dispute.

As set out a recent article by the Honourable Mr. Justice Laskin related to factums in the Court of Appeal,²⁹ the beginning of a pleading could summarize the theory in a paragraph to explain what the case is about and why your client should prevail. This can make it easier for the reader to understand what follows as the reader will now have the context in order to understand why and how the particular details in the pleading are important.

For instance, using our example, after the relief claimed and the description of the parties, you may want to plead as follows:

"4. The Vendor intentionally failed to deliver widgets to the Purchaser, knowing that the Purchaser would not be able to fulfill its obligation to deliver computers to its customers by January 1, 2000, and would suffer damages including loss of profit and goodwill."

OR

"4. The Vendor failed to deliver widgets to the Purchaser in breach of the Agreement. The Vendor knew that the widgets were essential to the Purchaser, in order for the Purchaser to fulfill its obligations to deliver computers to its dealers by January 1, 2000. The Vendor knew there were no other timely source of widgets available to the Purchaser. The Vendor knew that the Purchaser would not be able to fulfill its obligations to deliver computers by January 1, 2000.

²⁹ Advocates Quarterly, Vol. 3, 1999

The Purchaser was not able to deliver the computers by January 1, 2000. The Purchaser has lost profit and goodwill."

OR

- "4. In breach of the Agreement, the Vendor failed to deliver the widgets to the Purchaser. The Vendor knew that the Purchaser would suffer losses when the Purchaser was not able to deliver the computers by January 1, 2000."

Because these overviews are placed at the beginning of the pleading, the reader is not only immediately confronted with the theory, but is also provided with the context of the action. Especially in pleadings that are lengthy, an overview can make the theory more easily understood and therefore, more persuasive.

Incorporation of Documents

A document that is referred to in a pleading, even if only "in passing", will be deemed to be incorporated by reference as part of the pleading.³⁰ For instance, in our breach of contract example, the agreement between the plaintiff and defendant is part of the pleading subject to production. Make sure that you are prepared to produce any document referred to. This rule applies not only to agreements, but other items; for instance, "widgets", videotapes and computer disks.

Charts and Tables

Some types of cases lend themselves to being presented with charts or tables. They can be placed in the body of the pleading or in a schedule. For instance, where a minority shareholder is claiming oppression, a chart setting out the date and amounts of cheques that the majority has paid to itself is very persuasive.

³⁰ *Corfax Benefit Systems Ltd. v. Fiducie Desjardins Inc.* [1997] 37 O.R. (3d) 50; *Montreal Trust Co. of Canada v. Toronto-Dominion Bank* (1992) 40 C.P.C. (3d) 389.

The Use of Adjectives

The use of adjectives can be dangerous in a pleading. For example, in a wrongful dismissal action where the plaintiff referred to “numerous complaints”, the court required particulars of all of these “numerous complaints” so that the defendant can plead. It would have been safer for the plaintiff to have pleaded that there were complaints, all the particulars of which are known to the defendant, to avoid the requirement of particulars.³¹

Restrictions on what Constitutes a Material Fact when Pleading

a. The Pleading of a Criminal Conviction

A criminal conviction against one of the parties may be pleaded in certain limited circumstances. Even though it is considered an admission, and in general admissions are not to be pleaded, as they are evidence, the conviction can be pleaded as one of the surrounding circumstances, such as in determining an issue of negligence or nuisance.³²

b. Motive

A defendant is not permitted to plead a plaintiff's motive for bringing an action³³.

c. Settlement Discussions

Unless you are bringing an action to enforce a settlement, and the settlement discussions themselves are part of the claim, it is not proper to plead settlement discussions³⁴

³¹ *Adams-Smith v. Christian Horizons* (1997) 14 C.P.C (4th) 78 at 82.

³² See *Hutchinson v. York Sanitation Co. Ltd.* (1986) 56 O.R. (2d) 778 (S.C.C.) and cases referred to therein; *Everdale Place v. Rimmer* (1975) 8 O.R. 641 (H.C.J.); *Morgan v. Tumosa* [1963] 1 O.R. 550 (H.C.J.).

³³ *Welch Anderson & Co. v. Roberts* [1946] O.W.N. 5 (H.C.J.).

d. Reference to Insurance

Reference to the fact that a party may have insurance to cover any claim may be struck³⁵.

4. Why your Clients are Entitled to the Relief Claimed

After persuasively setting out the material facts related to a cause of action, the next task is to plead the cause of action itself, i.e., in our breach of contract example to establish that there has been a breach of contract entitling the plaintiff to damages.

In doing so, there is a prohibition on pleading law. However, references to statutes must be pleaded. It is important not to overlook the pleading of statutory provisions, for it may preclude you from advancing an argument at trial.

The theory of your case may be based on alternative possible factual outcomes. When alternative claims are alleged, the facts relating to each such claim should be stated separately to show which facts belong to which alternative head of relief claimed. For example, when pleading fraudulent misrepresentation or in the alternative negligent misrepresentation, the way you plead it may very well depend on the theory of case.

For example if the facts and the documents indicate that the defendant was reckless in making the misrepresentation not caring whether it was true or false or indicate that, at the very least, the defendant was negligent (although the defendant's conduct may not have reached the level of recklessness) then the theory of your case would be based on recklessness or in the alternative negligent misrepresentation.

³⁴ *Sun Life Trust Co. v. Dewshi* (1993) 17 C.P.C. (3d) 217. For pleading settlement discussions as part of the claim see *Mueller Canada Inc. v. State Contractors Inc.* (1989) 35 C.P.C. (2d) 175

These inconsistent pleas are easily dealt with by one theory of the case, the defendant was reckless, not caring whether the statements made were true or false or at the very least was not careful in the making of the representation (negligent).

However, if the theory of the fraud case is that it was an intentional misrepresentation, then that is clearly inconsistent with a negligent misrepresentation. Proving intent requires a sound factual base, based on some uncontroverted facts that reasonably suggest intentional misrepresentation. That theory will obviously be totally inconsistent with negligent misrepresentation. However, although these are two inconsistent theories, the rules of pleading allow you to plead inconsistent allegations as long as you make it clear that they are being pleaded in the alternative.³⁶ However the theory of your case within those circumstances is based on two separate distinct and inconsistent theories.

5. Remedy

The last part of your pleading will address remedy. The remedy requested should be supported by the material facts you have already pleaded, and be consistent with your theory.

For instance, in our example, it would not be consistent with our theory if at the end of the pleading we asked for delivery of the widgets.

If requesting punitive damages, you may consider what additional facts should be pleaded. This can provide substantial latitude in pleading.³⁷ For instance, a

affirmed (1989) 71 O.R. (2d) 397.

³⁵ *Elder v. Kingston (City)* [1953] O.W. N. 409 (S.C.).

³⁶ Rule 25.06

³⁷ *Whiten v. Pilot Insurance Co.* (1999) 42 O.R. (3d) 341 (O.C.A.)

party's financial means is generally not relevant. However, when punitive damages are claimed, it may be appropriate to plead means³⁸.

At the time of pleading you may not know all of the particulars of the damages suffered. It is for this reason that you will often see "all the particulars of which will be provided prior to trial" at the end of the pleading. While this is sufficient, if the action proceeds to trial, seriously consider amending your pleading to provide those particulars so that the trial judge knows exactly what your case is before the trial begins.

If this is a defence for our example, consider the last paragraph of the defence reading:

"The defendant requests that this action be dismissed with costs, as the defendant states that it honoured all of its obligations to the plaintiff, including under the Agreement."

F. AMENDING YOUR PLEADING

The theory must go through a continual re-testing or re-analysis. If a fact learned from a document or evidence at discovery does not fit with the theory as pleaded, analyze this new fact and consider amending your pleading. A good time to re-evaluate your pleading is after discovery, but before the pre-trial. By that time, all the facts should be known, and you can decide whether the theory as pleaded is still consistent. If not, amend your pleading.

You can also amend to take into account matters that arise after the commencement of the action. Rule 14.01(4) provides:

"A party may rely on a fact that occurs after the commencement of a proceeding, even though the fact gives rise to a new claim or defence and

³⁸ 735619 *Ontario Ltd. v. Stone et al.* (1989) 36 C.P.C. (2d) 313 (S.C.).

if necessary may move to amend the originating process or pleading to allege the facts”.

G. CONCLUSION

In the result, you should see the pleading as your first tool by which to market your theory. Take the time to do the pleading properly; choose language with care, make it flexible enough to withstand the inconsistencies in the facts that are sure to arise as the action progresses. Always keep your theory in focus, adapting, re-evaluating and rewording when necessary.