SOME NOTES ON PLEADINGS[1]

By J. E. COTE*

This paper was prompted by the comments expressed at a recent litigation seminar by a number of lawyers on current Alberta habits of pleading.

PLEADINGS GENERALLY

Many pleadings in Alberta tend to be lengthy and loosely drawn, almost in narrative form in the manner of an old-fashioned Bill in Chancery. They are usually five or ten times as long as is common in the English practice: one can see this by an examination of *Bullen and Leake, Atkin's Court Forms,* or a similar English work. Eminent Alberta lawyers pointed out as long ago as 1956[2] that the Plaintiff's pleading in *Read* v. *Lyons* was only about nine *lines* in length!

It is true that few Alberta pleadings are so frivolous, vexatious, or scandalous as to do the opposite party serious enough harm that a Master or Judge is likely to strike them out, but lengthy or loosely-worded pleadings usually are an inconvenience (or worse) to the opposite party.

Moreover, such pleadings can be very harmful to the party who files them. In the first place, such a practice suggests that his solicitor is unsure of himself and has but a hazy idea of what is relevant, much in the manner of a "scattergun answer" to an examination. In the second place, such pleadings take a long time to prepare and type and proofread and vastly increase chances for error and the need to amend something later. A long pleading is difficult to check and to bear in mind during the law suit. Then again, a long pleading greatly expands the information available to the opposite party and the avenues he may and must explore on discovery, thereby lengthening the lawsuit and making it more expensive. A Plaintiff who is the author of such a thing is therefore ill advised. Finally, a long pleading must contain a large number of irrelevant details to which the party filing it commits himself. When some later prove to be incorrect his opponents may seek adjournments or argue as to whether the pleadings need be amended and the prolix party's solicitor may look careless. What is worse, he has tied himself to a detailed narrow case and it is highly unlikely that the evidence at trial, after memories have faded and the facts have been probed by both sides for a year or more, will come out in exactly the manner predicted at the outset. A long pleading will almost certainly admit things whose significance cannot be assessed at an early stage.[2a]

A party should plead only enough details to give himself the legal essentials which he needs, and to enable his opponent to identify the transaction or event in question and plead to it. If his opponent wants further particulars he can ask for them, and it will only take a few days to give them.

---

*B.A. (Hons.), LL.B., B.C.L. (Oxon.), of the Alberta Bar.

[1] Special thanks are due to J. P. Brumlik and W. A. Stevenson for their generosity in taking time to give advice and comments in the revision of this paper.

[2] *The Conduct of Litigation A Symposium* (1956) 1 Alta. L. Rev. 88.

[2a] Some authorities limit greatly the power to amend to withdraw an admission: e.g., *Broham* v. *Aroutsidis* [1969] 2 O.R. 790.

Therefore, observance of the general Alberta Rules on pleadings would help all parties. The main rules say:

> 104. Every pleading shall contain only a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which those facts are to be proved, and the statement shall be as brief as the nature of the case admits.
>
> 113. Whenever it is material to allege malice, fraudulent intention, knowledge or other condition of the mind of any person, it is sufficient to allege it as a fact without setting out the circumstances from which it is to be inferred.
>
> 114. Whenever it is material to allege notice to any person of any fact, matter or thing, it is sufficient to allege the notice as a fact, unless the form or the precise terms of the notice or the circumstances from which the notice is to be inferred are material.

Rule 104 has also been held to forbid the use in a pleading of exhibits or sketches or plans.[3] A document should not be quoted verbatim because of Rule 106, unless it is alleged to be defamatory.[4] Pleading evidence may deprive one of one's costs, even where the pleading is not bad enough to be struck out.[5]

Some lawyers object to brief pleadings and say that they like their pleadings to tell a story so as to acquaint the trial judge with their side of the case. That may or may not be proper, but even if it is, it is hard to see how five pages of irrelevance can do that effectively. Particulars of the other party's misconduct will be much more striking if not buried in the midst of a long recital. The shorter the pleading, the sooner the meat will come. If every paragraph makes a telling blow, the effect is much greater than if most only set the stage obscurely, or repeat the preceding allegations with slight variations.

Then again, an examination of English pleadings will show skilful conciseness of language, with several important averments in each sentence.[5a] Which of the following versions is more effective and less time wasting?

> "1. The Plaintiff carries on business in the City of Edmonton as a commercial dry cleaner.
>
> 2. On or about the 12th day of June A.D. 1974 the Defendant agreed to sell to the Plaintiff an electric pressing iron.
>
> 3. Such electric pressing iron was to be installed in the Plaintiff's dry cleaning business in Edmonton.
>
> 4. The Defendant knew that the Plaintiff carried on business as a dry cleaner and needed the said pressing iron in such business."

or

> "1. On or about the 12th day of June 1974 the Defendant agreed to sell to the Plaintiff an electric pressing iron well knowing the same to be needed and intended for the Plaintiff's business as a commercial dry cleaner."

Or consider another example, where a hunting accident is involved. What Plaintiff would wish to forego a paragraph like the following?

> "1. On or about the 12th day of October A.D. 1974 the Defendant shot the Plaintiff in the stomach with a shotgun."

This version even satisfies those who like to tell a story, for the last six

---

[3] *Cf. Taylor* v. *Krever* [1957] O.W.N. 549 (H.C.); (plan).

[4] *Gatley on Libel and Slander*, paras. 983, 985 (7th ed. 1974); *Churchill Forest Inds.* v. *Finkel* [1971] 1 W.W.R. 745 (Man. C.A.), *Berry* v. *Retail Merchants' Assn.* [1924] 1 W.W.R. 1279 (Sask. C.A.).

[5] *Pelechaty* v. *Humnicki* (1960) 31 W.W.R. 432 (Man.); *Meyers* v. *Freeholders' Oil Co.* (1956) 19 W.W.R. 546 (Sask. C.A.); *Milos* v. *Schmidt* [1923] 3 W.W.R. 1278 (Sask.); (voluminous denials).

[5a] One would, however, be well advised not to mingle in one paragraph allegations which one's opponents are and are not likely to admit.

words give impressive detail, yet take little space. Giving the weather, time of day, legal description of the farmer's field, and so forth would only obscure this.

It is probable that many loose or prolix pleadings stem from use of dictating machines, which both encourage one to talk too much and make it difficult to see what one has written. Repetition results. Many people find it far better and quicker to think about the matter, make an outline of what to cover, and then do a draft in pencil, which can be seen and corrected on the spot.

STATEMENTS OF CLAIM

In a District Court action it is desirable to show that the court has jurisdiction, either by reciting that the Defendant resides in the Judicial District where the action was begun, or that the cause of action arose there.[6] In a Supreme Court action, recital of the parties' residence is ordinarily a waste of time, especially as it has to be given in the endorsements anyway.

Apart from jurisdiction in District Court actions, there are only three things the body of Statement of Claim need contain:

(a) enough facts to disclose a cause of action
(b) any very unusual law or regulation or by-law[7] likely to take the other side by surprise
(c) place of trial proposed.

Nothing else should be given.[8] Least of all should one allege incorporation of a company, for Rule 122 presumes it unless it is denied, and recital of it may cause the Defendant inadvertently to deny it.[8a]

It is most unlikely anything in the Revised Statutes of Canada or of Alberta should take the other side by surprise. The only law which should be pleaded in the Statement of Claim would be regulations or by-laws, private Acts, Acts not repealed but not in the Revised Statutes, or old English Acts still in force, such as the Metropolitan Fires Prevention Act 1774.[9] To plead the Highway Traffic Act or Bills of Exchange Act is almost to insult the intelligence of the court and one's opponents, and might even raise a suspicion whether one does realize that these Acts are well known.

Conversely, where one intends to rely upon a statute one must allege sufficient facts. To say "The Plaintiff will rely upon s.132 of the Highway Traffic Act" is useless. It says too much and too little.[10] One should instead give as a particular of negligence:

> "(c) failing to stop in time, or at all, at an intersection marked by a red light alone shown by a traffic control signal facing the Defendant."

The final evil in pleading law is that it may allow the other side to examine upon the question.[11]

---

[6] District Court Act, R.S.A. 1970, c. 111, s. 30; but *cf.* s. 34.

[7] *Granholm* v. *Can. Greyhound Lines* (1952) 6 W.W.R. (NS) 562 (B.C.); *Wyman* v. *Vancouver Real Est. Board* (1956) 20 W.W.R. 652 (B.C.); *Stephen* v. *Stewart* (1943) 59 B.C.R. 410 at 420 (B.C. C.A.).

[8] *Int. Bro. of Teamsters etc.* v. *Therien* [1960] S.C.R. 265 at 282.

[8a] *Cf. Krug Furniture Co.* v. *Union of Woodworkers* (1903) 5 O.L.R. 463 at 468.

[9] *Sydney & Louisburg Coal & Ry. Co.* v. *Sword* (1892) 21 S.C.R. 152 (private Act); *Roche* v. *Marston* [1951] S.C.R. 494 at 502-03 (illegality by statute).

[10] *Wyman* v. *Vancouver Real Est. Board* (#2) (1957) 22 W.W.R. 133 (B.C. C.A.); *See also* n. 16, *Infra.*

[11] *Barclay Log Transport* v. *Anglo-Scottish Ins. Co.* (1963) 43 W.W.R. 190 (B.C. C.A.).

Therefore to draft a Statement of Claim one should take the following steps:

1. Interview the necessary people, read their documents, look up the law and list all the causes of action one wishes to rely upon. Thus a man who had part of the ceiling or a fixture in a hotel fall on him because of leaking water might well wish to rely upon negligence, nuisance, *Rylands* v. *Fletcher,* contract, occupier's liability to invitees, and possibly even some statute or regulation on buildings or hotels.
2. List the essential facts which must be proved to give each cause of action. Naturally a fact should go on the list only once and any repetitions should be deleted.
3. Note the precise wording of any relevant statutory provisions.
4. Recite the facts noted in one's list of facts. Add no more additional details than:

(a) time and place, and

(b) particulars of negligence,[11a] misrepresentation, fraud, breach of trust, wilful default, or undue influence, under Rule 115, and

(c) special damages to the extent these are known.[12]

One need not plead facts presumed by law or the onus of disproving which is on the other party: Rule 107. Nor need one plead performance of a condition precedent: Rule 108.[13]

Failing to follow this procedure may not only produce a long disjointed narrative full of irrelevant details, but will run a great risk of leaving out essential allegations. It would otherwise be natural to omit any mention (in the hotel example above) of the Defendant's bringing to the premises a large quantity of water for a non-natural purpose, or of the fact the hotel was a certain size or type (to which certain government or municipal regulations apply). It may seem strange to do such exhaustive research so early, but if no limitation periods threaten, there is no reason to omit such steps, and they will have to be taken sooner or later.

If the Plaintiff omits essential averments he may be non-suited. At best he will have to seek an amendment, and his opponent may seek an adjournment and possibly even further discoveries.

A Statement of Claim drafted in the manner above will not only show the Defendant's solicitor that the Plaintiff knows he has several possible causes of action, but may frighten the Defendant's solicitor when he realizes the Plaintiff's solicitor has already researched and considered areas of the law scarcely known to the Defendant.

STATEMENTS OF DEFENCE

The general remarks given above as to Statements of Claim and pleadings apply to Statements of Defence, especially with reference to the desirability of brevity, and the rule against pleading law. Alberta Rules 109 and 123 also call for express reference to release, illegality, performance or payment, matters likely to take the Plaintiff by surprise,

---

[11a] While particulars of negligence are usual, Rule 115 does not mention negligence, and it is by no means certain that particulars of negligence are necessary.

[12] *See* 30 *Halsbury's Laws* 12-13 (3d ed.).

[13] *Pyramid Construction* v. *Feil* (1957) 22 W.W.R. 497 (Alta.); *Sentinel-Review Co.* v. *Robinson* [1928] S.C.R. 258; *Int. Bro. of Teamsters etc.* v. *Therien, supra* n. 8. *But cf. Procinsky* v. *McDermott* (1955) 15 W.W.R. (NS) 495 (Alta. A.D.).

and the Statute of Frauds[14] and limitations statutes. Even in that context, however, there must be sufficient facts pleaded:[15] It is not enough to plead the Statute of Frauds if no one has pleaded facts to show its application. One must at least plead that "there is no sufficient memorandum in writing under the Statute of Frauds."[16] If this defence were based on the argument that the contract was not to be performed within a year, and that fact did not appear from anything contained elsewhere in the Statement of Claim or Statement of Defence, then it seems reasonable that it should be alleged in the Statement of Defence.

Just as the Statement of Claim must give all the facts necessary for a cause of action, a Statement of Defence must allege all facts necessary for a defence. What those are requires a little analysis, for there are three ways to defend a claim:

(a) One may deny the truth of some or all of the facts alleged by the Plaintiff. Before 1875 this was known as a traverse, though such terminology has no place in the wording of a pleading today.

(b) One may take the position that even if some or all the facts alleged by the Plaintiff are true, they do not give him a sufficient (or any) right in law to what he seeks. This used to be called a demurrer.

(c) One may plead that even if the facts alleged by the Plaintiff are true, there are other facts not mentioned by him which give one a defence of some kind. This used to be called a confession and avoidance.

Under modern pleading it is perfectly permissible to take one or more of these positions in a single Statement of Defence, whether cumulatively or in the alternative: Rule 111. While the old terminology is dead, the concepts still survive, and one cannot draw a proper Statement of Defence unless one mentally reviews all three possibilities and jots down points to be covered under each. It is only with such an outline or list that one can then draft the actual document.

The wording of a denial of facts should be much simpler and shorter than many Statements of Defence would lead to believe. Since 1914 Alberta's Rules have provided a presumption that any facts in the Statement of Claim not expressly admitted are denied by the Statement of Defence: Rule 119.[17] The only exceptions are suits on bills of exchange or for money demands (Rules 124, 125), and non-performance of conditions precedent.[18] Therefore a Statement of Defence should open or close much as follows:

"1. Paragraphs 1 and 2 and the first sentence of paragraph 3 of the Statement of Claim are admitted.
2. The other allegations in the Statement of Claim are denied."[19]

To take a paragraph of the Statement of Defence to deny each paragraph of the Statement of Claim raises a suspicion that one is paid by the word. To deny "each allegation as though set out separately and traversed seriatim" suggests that one is still copying precedents prepared before the First World War, if not before 1875. To "put the

---

[14] *Dominion Meat Co.* v. *Jamieson* [1917] 3 W.W.R. 929 (Alta. A.D.); *but cf. Kent* v. *Ellis* (1900) 31 S.C.R. 110 on collateral contracts; see 2 *Holmested and Gale's Ontario Judicature Act* 1175-83, 1195-96.

[15] *Hecht* v. *Grand Lodge etc.* (1956) 20 W.W.R. 181 (Man.).

[16] *See further James* v. *Smith* [1891] 1 Ch. 384 on pleading the section.

[17] *See further* 2 Holmested and Gale, *op.cit. supra* n. 14, at pp. 1184-86.

[18] *See* n. 13 *supra*.

[19] Indeed, strictly speaking, not even the general denial is necessary.

Plaintiff to the strict proof thereof" suggests one is so credulous and slipshod as to be willing to put something in a pleading of whose meaning he is totally ignorant.

The form of a demurrer is simple, and usually runs as follows: "The Statement of Claim discloses no cause of action against this Defendant." Or "The Statement of Claim discloses no right to the relief claimed."[19a]

A confession and avoidance poses no particular problems of wording, for it is expressed much in the manner of most of the allegations in a Statement of Claim. What is difficult is to know when one is required. In a negligence suit an allegation of contributory negligence on the part of the Plaintiff is often needed, and a plea of interruption in causation or failure to mitigate damages is often appropriate. Confession and avoidance is less common in other situations, where often the sole issue is whether the facts alleged in the Statement of Claim are true. One case where it is needed is where the Statement of Claim pleads little because the Plaintiff is able to rely upon presumptions in his favour, as where the Plaintiff is a pedestrian, or the payee of a bill of exchange.

Where one wishes to set up a different version of a transaction, by Rule 121 one must recite it and not merely deny the Plaintiff's version; but the scope of this rule is difficult to determine.

Some lawyers like to begin allegations in their Statement of Defence with: "The Defendant says . . ." which is unnecessary verbiage. Everything in the Statement of Defence is obviously what the Defendant says. Furthermore, the practice leads logically to the silly extreme "This Defendant says and the fact is . . ."[19b]

REPLY AND JOINDER

The Alberta Rules now call for an automatic denial of the allegations in the Statement of Defence by the Plaintiff unless a Reply is filed admitting some or all of them: Rule 102. Therefore, there is absolutely no point to preparing and filing a Reply which merely denies the allegations in the Statement of Defence.[20] Nor is it taxable even if the Plaintiff wins, for Schedule C item 9 allows costs only for a Reply which is necessary. A Reply may be justified where the Plaintiff wishes to demur to the sufficiency in law of the Statement of Defence, but one is not clearly needed unless the Plaintiff wishes to raise an equitable plea, or to confess and avoid with respect to the Statement of Defence. That may occur, but it is uncommon, for most often the Plaintiff will (by good luck or good management) already have pleaded the necessary facts in his Statement of Claim. It is certainly a waste of everyone's time to put in a Reply anything already found in the Statement of Defence.

The Plaintiff must be careful in his Reply not to disagree with his Statement of Claim or to raise a new cause of action not in his Statement of Claim: Rule 110(2).

COUNTERCLAIMS

A counterclaim should be conjoined with the Statement of Claim by Alberta Rule 93(4) unless the Defendant has no defence (Rule 98) though if this has not been done (e.g., because of a rush to defend before being

[19a] *But cf. Mire* v. *Northwestern Mutual Ins. Co.* (#2) [1972] 6 W.W.R. 614 (Alta. A.D.).

[19b] Yet without this, the reference to "the Defendant says" may be an improper pleading of belief: *McLean* v. *Johnston* [1923] 3 W.W.R. 913 at 916 (B.C. C.A.).

[20] *See further* (English) *Supreme Court Practice* 18/3/3; Bullen and Leake, *Precedents of Pleadings* 693-94 (11th ed. 1959).

noted in default) a Counterclaim may be filed later either with leave of the court, or (under Rule 135) with the written consent of the opposite parties.

It need hardly be said that a Counterclaim must show a proper cause of action as much as a Statement of Claim.[21] But there is no point to repeating wording which is already found in the Statement of Defence or even the Statement of Claim and it would be quite safe to incorporate parts of these by reference, e.g.,

> "1. Paragraphs 1 and 2 of the Statement of Claim and 1 to 7 inclusive of the Statement of Defence are repeated."

There is even some authority to suggest that anything in the Plaintiff by Counterclaim's own Statement of Defence need not be repeated in his Counterclaim, so that if there are five paragraphs in his Statement of Defence the first paragraph in his Counterclaim would be numbered 6.[22] That makes reference later much more convenient and prevents errors.

Endorsements to pleadings are usually no problem, for printed backs for Statements of Claim and Statements of Defence are available. But Counterclaims are tricky. Usually no endorsements are required (other than address for service), but a special form is prescribed by Rule 89 where any of the Defendants by Counterclaim are not already parties, and one must be very careful not to overlook it.

A Counterclaim must show only Defendants in the main suit as its Plaintiffs by Counterclaim,[23] and probably it must bear some relation to the main suit.[24] The authorities appear to conflict as to whether there may be a Counterclaim to a Counterclaim.[25] The wording of Rule 93(1) suggests that at least one of the Defendants by Counterclaim must already be a Plaintiff in the main claim.[26]

---

[21] *See further*, 2 Holmested and Gale, *op. cit. supra* n. 14 at R. 116 §7.

[22] *See further* 30 *Hals. Laws* 5 note (d), 13 (3d ed.) and 13 *Encyclopedia of Court Forms* 214.

[23] *Richards* v. *Wright* [1948] 1 W.W.R. 484 (Alta. D.C.); Holmested and Gale, *op. cit. supra* n. 14, at R. 114 §§ 15-18; *Makarchuk* v. *Pollard* (1957) 23 W.W.R. 617 (Alta. A.D.).

[24] *Mills* v. *Ins. Co. of N. America* [1937] O.W.N. 395; *cf. Andoniadis* v. *Bell* [1946] O.W.N. 949 (Ont. C.A.); Holmested and Gale *op. cit. supra* n. 14, at R. 114 § 9.

[25] *See Lewis Falk* v. *Jacobwitz* (1944) 197 L.T. Jo. 109; *Solway* v. *Potter* [1958] O.W.N. 125; *Five Wheels* v. *Wallace* (1963) 42 W.W.R. 47 (Alta.); *cf. The Normar* [1968] P. 32, (1908) 2 W.L.R. 704.

[26] *See further* Holmested and Gale, *op. cit. supra* n. 14, at R. 114 §§ 5-9, 15-18, and *cf. Buck* v. *Kinshella* (1958) 25 W.W.R. 593 (Alta. A.D.).