

Civil Litigation Fundamentals Sunrise Series

# Pleadings Are Like a Marriage, Factums Are Like a Divorce

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## Pleadings Are Like a Marriage

Like a marriage, pleadings:

- provide a lasting foundation for your case.
- should follow the Rules but cannot be too rigid.
- require room to grow and change.
- should be built on honesty.
- require you to recognize and choose the best option(s).
- must accommodate alternative approaches.
- will be tried and tested, stressed, may cause one or both parties much frustration.
- must be tended to periodically after the honeymoon period.



**What are pleadings?** Court documents used to state a party's position in a court action or application.

### **Types of pleadings**

- Statement of Claim
- Statement of Defence
- Reply
- Counterclaim
- Crossclaim
- Third Party Claim



### **Why are pleadings important?**

- Pleadings define with clarity and precision the question in controversy between the litigants;
- Pleadings give fair notice of the precise case which is required to be met and the precise remedies sought; and
- Pleadings assist the court in determining the issues in the case.



Pleadings are governed by Rule 25 of the *Rules of Civil Procedure*.

**FORM OF PLEADINGS**

**25.02** Pleadings shall be divided into paragraphs numbered consecutively, and each allegation shall, so far as is practical, be contained in a separate paragraph.

**Material Facts**

**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 the evidence by which those facts are to be proved.

**BAD**

In the past, all of the plaintiff's neighbours had expressed a fondness for the rose bush. They said that his rose bush was the most beautiful and well-tended rose bush they had ever seen. After the rose bush was uprooted, the plaintiff was devastated by the loss. The neighbours sent condolence cards to the plaintiff expressing their grief.



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**Material Facts But Not Evidence Examples****GOOD**

The plaintiff and the defendants are neighbours.

On October 17, 2012, the defendant uprooted the plaintiff's award winning rose bush and thereby caused damage to the plaintiff's property.



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**Material Facts But Not Evidence Examples****BAD**

Further or in the alternative, the Amsons and Polomskis and Clarke each state that Yorkton's counterclaims arise from a series of transactions which involved breaches of the *Ontario Securities Act* and regulations, as set out in a consent agreement between the Ontario Securities Commission and the defendants which followed an investigation by the Ontario Securities Commission into the activities of the defendants. The Amsons and Polomskis and Clarke each state that this investigation led to an administrative proceeding which was settled on consent by Yorkton and Paterson, pursuant to which the defendants admitted that they had created a culture of non-compliance and had not acted in the public interest with respect to the Book4Golf matter, and that Paterson had been selling Book4Golf shares on his personal account commencing on January 26, 2000 (that is, the same date that he interfered with the plaintiffs' sell orders for the same securities). The Amsons and Polomskis and Clarke crave leave to introduce a copy of the settlement at any trial of this action, and further plead that the defendants are estopped from challenging the factual basis of the complaint that resulted in the settlement. The Amsons and Polomskis and Clarke plead further or in the alternative that Yorkton cannot benefit by its involvement in this transaction, and they plead and rely upon the maxim of *ex turpi causa non oritur actio*.



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**Be Clear and Concise**

Material facts must be clear and concise – avoid using ambiguous expressions, colloquialisms or hyperbole.

Use plain but formal language that can be understood by a jury or a reporter.



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**Be Clear and Concise - Examples**

**BAD**

The defendant dentist was negligent. The root canal he performed on the plaintiff was a total trainwreck.



**GOOD**

The root canal completed by the defendant dentist fell below the standard of care in the following ways:

- The defendant applied freezing to the wrong side of the plaintiff's mouth.
- The defendant used a bic pen to remove the plaintiff's eroded filling.
- The defendant used a marshmallow to stop the plaintiff's bleeding.



Get the facts right! Pleadings can be amended, but it is difficult to withdraw admissions. A party requesting leave to withdraw an admission must show that:

- a) The proposed amendment raises a triable issue;
- b) The admission was inadvertent or resulted from wrong instructions; and
- c) That the withdrawal will not result in any prejudice that cannot be compensated for in costs



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**Admissions Are Hard To Get Out Of*****Claim for Relief***

**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.**



This is binding! Even admissions in correspondence are binding. A party can be held to a “With Prejudice” letter setting out their valuation of their own case.

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**Getting The Facts Right**

It is sometimes difficult to predict which facts will be important at the outset of a case. Strategically, it is often better to plead relatively few facts at the outset of the case.



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**Recognize and choose the “one” or the best option(s)**

- Take your time to spot the issues
  - Create an outline to identify each cause of action that your client is asserting or responding to
  - List the elements of each cause of action
  - Plead material facts to prove or disprove each element
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- Example: Breach of Contract

- (i) **Existence of Contract (offer, acceptance, consideration);**
- (ii) **Breach of Contract;**
- (iii) **Resulting Damage.**

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**Recognize and choose the “one” or the best option(s)**

- Example: Negligence

- **92.** ... each of the Defendants ... ought to have known that the Income Fund's Class Period prospectuses were materially misleading as detailed above. Accordingly, the Defendants have violated their duties to the Class Members.
- **93.** The reasonable standard of care expected in the circumstances required the Defendants ... to act fairly, reasonably, honestly, candidly and with due care in the course of compiling and disseminating the Income Fund's prospectuses.
- **94.** The Defendants ... failed to meet the standard of care required by issuing prospectuses during the Class Period that were materially false and/or misleading as described above.
- **96.** The negligence of the Defendants ... resulted in the damage to Class Members who purchased under a prospectus. Had the Defendants ... complied with their duty of care ... then the Units offered by such prospectuses either would not have been offered to and purchased by the Class Members or, alternatively, such Units would have been offered at prices that corresponded to their true value ...
- **97.** As a result, those Class Members who purchased Units under a prospectus bought their Units at inflated prices, and suffered a corresponding loss ...

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The Rules allow for inconsistent pleadings in the alternative.

***Inconsistent Pleading***

**(4) A party may make inconsistent allegations in a pleading where the pleading makes it clear that they are being pleaded in the alternative.**

Just because you can plead in the alternative doesn't mean you should. Consider whether you intend to advance alternative positions before trial starts.



Insulate your pleading against motions to strike – have you pleaded sufficient material facts to support your client's claim/defence?

Pleadings will define the scope of discoveries. Did your client REALLY suffer psychological harm and mental anguish resulting from the breach of a commercial contract?

Avoid unnecessary refusals motions.



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**Pleadings must be cared for and tended to periodically.**

Pleadings can be amended – you should revisit your pleadings (and your opponent's) regularly. Be sure to read them before trial.

- Does your pleading tell the story you want to tell?
- Are there facts in your pleading which are unnecessary or untrue? Are there facts in your pleading which are inconsistent with your current theory of the case?
- Are there facts in your opponent's pleading which help your case?



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**If Pleadings Are Like a Marriage, Factums Are Like A Divorce**

Like a divorce, the best factums are short and to the point. The most important section is the overview.

A factum has two functions: to tell the Court what result you want, and to set out how to get there.

Create an outline – if your factum does not have direction and clear objectives, things can get messy.

Like a divorce, try to claim the moral high ground.



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Thank  
You.

