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CONTINUING PROFESSIONAL DEVELOPMENT SEMINAR
PLEADINGS FROM THE DEFENDANT'S PERSPECTIVE
29 MARCH 2021

This paper is an outline for a one-hour seminar which considers pleadings for the effective and ethical conduct of litigated civil claims by a lawyer for a defendant. The contents will be supplemented by discussion on the day.

Core Areas: Professional skills & Legal ethics and professional responsibility.

Lawyers will be mindful of the unique nature of every legal dispute due to the specific factual and legal issues which arise in a case. A prudent lawyer will rely on her or his own analysis of the facts and relevant law to advise a client as to the appropriate conduct of litigation in the instant case.

Table of Contents

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A. The context of pleadings in the resolution of disputes by courts

1. Civil courts in Australia exist to quell controversies or disputes between parties according to law[1], which usually are brought before courts by way of a formal process. The means by which a civil proceeding is commenced in a court in the Australian Capital Territory is prescribed by the provisions of the *Court Procedures Rules 2006* (ACT) (**CPR**), which also regulate the conduct of a proceeding.

2. All courts in Australia are subject to procedural rules such as the CPR, and also individual practice notes or directions. Notwithstanding procedural differences, the substantive effect of the procedural rules for courts is to provide structure and process for the parties to identify their case, for principles of procedural fairness to be observed, and for each party to identify a proposed outcome or relief for a claim. The Commonwealth and the States have different technical approaches to achieve that goal by their relevant rules.

3. One procedural process by which parties articulate their opposing cases for the determination by the court of their dispute in a civil claim is the system of pleadings. This has been a procedural practice in common law courts since the Judicature Acts introduced in United Kingdom in the 1870s.

4. The Preface to Odgers' *Principles Of Pleading And Practice In Civil Actions In The High Court Of Justice* which was written in 1891, could as easily have been penned in 2021:

> The system of pleading introduced by Judicature Acts is in theory the best and wisest, and indeed the only sensible, system of pleading in civil actions. Each party in turn is required to state the material facts on which he relies, he must also deal specifically with the facts alleged by his opponent, admitting or denying each of them in detail, and thus the matters really in dispute are speedily ascertained and defined. Some such preliminary process is essential before the trial. The solicitor cannot fully instruct counsel as to the facts without thoroughly getting up the case, and a taxing master always discourages his doing so at this stage.[2]
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> (underlining added)

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1 "*… it is not the case law which determines the result; it is a clear and definite solution, if one can be found, of the difficulty the case presents – a solution worked out in advance by an apparently sound reconciliation of fact and law*", Sir Owen Dixon *Jesting Pilate* (Law Book Co, Sydney, 1965) at page 250

2 Preface to *Principles of Pleading and Practice in Civil Actions in the High Court of Justice*, W Blake Odgers, First Edition, 1891

5. In the ACT the party claiming relief, the *plaintiff*, files in the court an originating process to start the proceeding. The named party against whom relief is sought is the *defendant*. See generally CPR Chapter 2 and specifically CPR Part 2.2 regarding an originating claim, for which a pleading is required. Extracts of provisions from the CPRs follow to illustrate purposive principles which find expression in similar form elsewhere in Australia.

6. The CPR **Dictionary** defines the word ***pleading*** to include:

   (a) a statement of claim (referred to in this paper as a "claim"*)*; and

   (b) a defence; and

   other court processes such as a reply, a counterclaim. The Dictionary also states that an originating claim is not a pleading.

7. Courts have often recognised that rules of practice are the servants and not the masters of justice. Whilst rules of practice prescribe and articulate a purposive concept for pleadings, they will not be prescriptive if in the circumstances the administration of justice requires the exercise of a court's discretion to dispense with the application of the rules to a particular proceeding, see CPR r6.

8. In addition to the technical rules of court, the process of pleadings engages the ethical obligations imposed upon lawyers and standards for proper professional conduct by which they are bound generally in practice as officers of the Court.

9. Such ethical obligations include those stated expressly in the conduct rules for solicitors and the rules for barristers. An example is that a lawyer who is acting for a party in a civil claim must not file pleadings in a claim for damages in the absence of reasonable grounds for believing, based on provable facts and a reasonably arguable view of the law, that the proceedings have reasonable prospects of success. Another is the requirement to have a proper basis to plead an allegation of fraud by the opposing party. Such ethical obligations are imposed upon lawyers for each of the plaintiff and the defendant.

10. Further considerations for a pleader in the 21st Century are case management principles, such as *Court Procedures Act 2004 (ACT)* s5A, see:

> **5A Main purpose of civil procedure provisions**
>
> (1) The main purpose of the civil procedure provisions is to facilitate the just resolution of disputes—
>
> (a) according to law; and
>
> (b) as quickly, inexpensively and efficiently as possible.

B. Nature and purpose of pleadings

11. A pleading is a written statement by a party to a proceeding which sets out in summary form the material facts on which that party relies for its claim or defence. The function and purpose of pleadings is to define the facts and matters in issue between the parties and thereby to inform the court of the scope and the nature of the dispute.

12. The pleadings define the issues in dispute and thus will determine the conduct of the trial and upon whom the legal onus and evidentiary onus lies at different stages during a trial to establish a party's case.

13. Procedural fairness compels each party to have proper notice of the case it will have to meet at trial. Thereby a party is limited by the content of its pleadings for the case which it may advance at trial[3].

14. The content of pleadings has an important role in the persuasion of both the Court, and the opponent, of the merits of the client's case. Pleadings are an ongoing basis by which a lawyer persuades the court of the merits a party's case. As the forensic documents which define the issues in dispute in a proceeding, they have the importance of primacy. The likelihood in a proceeding that the pleadings will be referred to by the judge at different stages until final orders are made, confers recency upon pleadings in the forensic process. They are relevant to doctrines such as *res judicata* after judgment.

15. It is not exaggeration to identify pleadings as perhaps the most important documents in a civil law proceeding. If so, there is much merit for the lawyer acting for a defendant to settle a defence to a claim with great care and reflection upon the real issues in dispute. The economy achieved using pro forma or precedent based defences can be expensive for a client in the long run.

16. The relief claimed is the most important part of the plaintiff's claim. The purpose of the content of the plaintiff's claim is to persuade a court to grant the relief claimed, by findings founded upon the evidence to sustain the matters pleaded in the claim.

17. The purpose of the defendant's defence is to persuade a court not to accept the plaintiff's claim for relief, based on the matters pleaded in the defence and

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[3] *Banque Commerciale SA En Liquidation v Akhil Holding Ltd* (1990) 169 CLR 279 at 286-287

the evidence, to find that the plaintiff has not established a proper basis at law for the relief claimed in whole, or alternatively in part.

C. Guidance on pleadings from the High Court of Australia

18. Thirty years after its delivery the decision of the High Court of Australia in *Banque Commerciale SA En Liquidation v Akhil Holdings Limited* (1990) 169 CLR 279 remains an important authority on pleadings. The judgment continues to provide guidance for the profession and to be applied by Superior Courts for issues arising in pleading disputes. See for example: *Leda Commercial Properties Pty Ltd v Brenda Hungerford Pty Ltd* (2018) 13 ACTLR 252; [2018] ACTCA 17 at [41].

19. Pleading principles explained by Mason CJ and Gaudron J in *Banque Commerciale* include:

    (a) The function of pleadings is to state with sufficient clarity the case that must be met …;

    (b) pleadings serve to ensure the basic requirement of procedural fairness that a party should have the opportunity of meeting the case against him or her and, incidentally, to define the issues for decision …;

    (c) The rule that, in general, relief is confined to that available on the pleadings secures a party's right to this basic requirement of procedural fairness …;

    (d) the circumstances in which a case may be decided on a basis different from that disclosed by the pleadings are limited to those in which the parties have deliberately chosen some different basis for the determination of their respective rights and liabilities[4].

D. Client expectations in litigation and pleadings

20. A client's expectation for the outcome of litigation will define their level of satisfaction with the performance of the lawyer acting in the proceeding when judgment for the proceeding is delivered. That expectation in part will arise from the lawyer's professional advice as to prospects of success.

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[4] *Banque Commerciale* at pp286.8 – 287.2

21. Thus, a desired outcome for a case where the real client is an insurer is achieved by advising the insurer's claims manager what realistically can be achieved, i.e. by defining what is a successful outcome well in advance of the determination of the proceeding. Such advice compels an early analysis of the likely legal outcome arising from the factual matrix underpinning the dispute, to understand what might be achievable for the insurer, and to provide an early analysis of prospects to the claims manager.

22. Conventional reporting requirements for a lawyer acting for an insured client and the need for the claims manager and the insurer to provide appropriate reserves for a case compel a lawyer promptly to alert the insurer to any change of circumstances affecting the insured's risk. Furthermore, when a lawyer is acting for an insured defendant, instructions for the conduct of the defendant's case are often received from a claims manager employed by, or acting for, the insured.

23. It is by a realistic and objective assessment of the possible outcomes for a client's case that a lawyer may give practical advice to a client as to the outcome. Early identification to a client, and any insurer, of challenges and of potential adverse outcomes allows an achievable goal to be established in the case, by which success may be measured.

24. It is unwise to allow a client, and an insurer's claims manager, to form an optimistic expectation of the outcome of litigation without a proper basis, which is then not met upon the determination of the dispute. Otherwise discord between the lawyer and the client, or the claims manager for the insurer, is likely to arise due to unmet expectations, both by the client and the claims manager, and those that she or he reports to within the insurer's organisation.

25. The definition of success in litigation for a client will be susceptible to change with new facts and information as the litigation progresses and new facts arise. Embracing change during litigation is essential, and therefore a lawyer will need to redefine success for the client.

26. This approach allows the lawyer promptly to explain such new information and its consequence to the client. The client is then able to make informed decisions taking into forensic developments, including as to the personal and commercial ramifications for the client arising from a change in prospects for success of its case during the conduct of the proceeding.

27. Summary: a structured approach to achieve an early understanding of the relevant facts and issues in a dispute is required to allow a lawyer acting for a defendant properly to advise the real client. In acting for a defendant this will necessarily be an evolving process as a defendant has less forensic opportunity to do so prior to the filing and service of the claim, by comparison to that enjoyed by a plaintiff. A plaintiff will always enjoy the advantage of time to frame the dispute pleaded in its claim, and to gather relevant evidence, by comparison to a defendant.

28. The lawyer's early assessment of the nature and prospects for the defendant's case also is integral to drafting the defence in answer to the plaintiff's claim.

29. The following processes enable a lawyer for a defendant properly to advise her or his client, and of equal importance to prepare a defence for the client, with an understanding of the idiosyncratic nature of the individual dispute.

D.1 Case analysis

30. A case analysis is performed by the lawyer with the carriage of the matter for the defendant adopting an objective or neutral approach to the factual and legal contentions made by the plaintiff, with the detached perspective of a judge.

31. During this process the lawyer will identify potential challenges to the defendant's case which may arise in court when the judge hears the case. The lawyer also will identify problems for the defendant's case which require solutions for the further effective conduct of the case.

32. Amongst other matters the lawyer for the defendant will consider in regard to the plaintiff's claim: whether any cause of action is shown against the defendant, whether any cause of action is frivolous or vexatious, whether any portion of the claim is embarrassing, whether the claim ought to be struck out entirely or in part, whether particulars are necessary, and whether the defendant ought move the court for summary dismissal of the claim.

33. Each of these matters may prevent the lawyer from settling a defence to the claim until the issue is resolved.

34. Summary: an effective case analysis identifies what the dispute is about, in the sense of a detailed knowledge of the factual matrix and the basis for the plaintiff's claims of facts and law. It is then useful for the lawyer to develop a case theory for the defendant.

D.2 Case theory: elements and methods

35. A defendant's case must be understood well before trial. Trial advocacy begins long before the parties take a hearing date. Rules of court inhibit the amendment of an existing case or the advancement of a new case at a later stage.

36. For both plaintiffs and defendants, a case which is presented to a court in a cohesive and consistent manner, which develops and reinforces a client's position from opening to closing submissions, is more likely to be understood both by the judge and the lawyer[5].

37. A theory of a case or a "*case theory*" is a lawyer's statement of the means to present the client's case. In essence it is the strategy which will guide the running of the client's case to the conclusion of the litigation.

38. The case theory is a statement of a lawyer's means by which a client will be entitled to the desired judgment from the court.

39. A case theory has two limbs:

    (a) the legal case: an articulation of the essential elements of law which found a client's case to be advanced by a lawyer in the litigation.

    (b) the factual theory: a recitation of the relevant matters of fact which are relied upon to advance the client's case. A contest as to differing factual scenarios is frequently the catalyst for, and the driver of, civil litigation.

40. It is a fact of litigation for a defendant's lawyer that there will be many *unknown knowns* which become *known knowns* during a proceeding. This requires a case theory to be organic and to evolve with changing circumstances. A case theory should never be a static document.

41. Summary: The ongoing development of an effective case theory for a defendant requires the lawyer: *first*, to perform a case analysis to understand the nature and detail of the facts and matters advanced in the claim; *second*, to identify the relevant legal and factual matters in dispute between the parties; *third*, to articulate a cogent statement of the law and factual findings and the consequent contended for by the lawyer for a defendant in answer to the plaintiff's claim; and *fourth*, to adapt the case theory to take into account new information arising during the progress of the litigation.

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[5] *If you don't know where you're going, you'll end up someplace else*: Yogi Bera

E. Prior preparation prevents poor pleading practice

42. In a proceeding the plaintiff claims an entitlement based on the facts that constitute the plaintiff's right to sue to enforce a remedy or relief by way of orders against a defendant pursuant to equitable principles, or arising at common law, or by rights pursuant to a statute (**a cause of action**).

43. Three essential legal concepts arise regarding a cause of action.

    (a) *First*, the legal elements of the cause of action asserted.

    (b) *Second*, the nature of the relief claimed, including whether the cause of action gives rise to such relief.

    (c) *Third*, the jurisdiction of a particular court to grant the relief claimed.

44. The operation of, and often the construction of, the provisions of legislation may be engaged by the facts of the case, such as the *Limitation Act 1985*, or proportionate liability legislation.

45. A lawyer must understand the overall factual matrix to identify the relevant facts that are in dispute to identify the real legal issues in dispute.

46. For example, if the dispute is founded upon the effect, and meaning, of contemporaneous documents, an early and considered analysis of the genesis, content and context of each document will be beneficial to the long-term conduct of the matter.

47. Creation of a document library at an early stage will assist to convert unknown facts into known facts. Expect the unexpected and be attentive to the detail disclosed by documents in all formats, including the meta data.

48. Actively reading any plaintiff's witness statements or affidavits with a sceptical and critical eye, and marking up facts which appear improbable, or matters which may be subject to cross-examination, further assists in the process of understanding the dispute.

49. The analysis of expert reports advanced by a plaintiff in support of the claim is best achieved by focusing on the qualification, the asserted expertise, the assumptions relied upon, the reasoning process set out by the expert and the content of her or his opinion, including whether it lies within the area of the expert's expertise[6].

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[6] See *Museth v Windsor Country Golf Club* [2016] NSWCA 327

50. From this process a lawyer for a defendant is likely to develop an understanding of who are the key persons, and likely witnesses for the case advanced by the plaintiff, and what significant factual findings which the plaintiff must achieve to satisfy its legal onus.

51. It is only after this careful analysis and investigation of the plaintiff's claim that a lawyer for a defendant is able effectively to draft a defence. At this stage it is instructive to consider the formal requirements of the CPRs.

52. Experience suggests that it is unhelpful to be creative as to form of a pleading rather than to follow the conventions prescribed by the rules. The likely familiarity of a judge with the requirements of the rules makes a conventional approach which complies with the rules will allow a judge to focus on the substance of the pleading, rather than to be distracted by its form.

53. Furthermore, issues of cognitive bias may arise, such as a judge who subconsciously forms the view that the lawyer who advances a novel form of pleading may not have an understanding not only of the proper form, but also of the substance of her or his client's case.

54. Do not let the medium degrade the message.

F. Benefits of a consistent theme for the defendant's case

55. A considered defence allows the lawyer to present the defendant's case to the judge in a cohesive and confident manner. This will include the creation of key themes and phrases which are looped from the pleadings, into the opening submissions, into the cross examination, and into the final addresses. This consistent approach strengthens a client's case in the mind of a judge. By comparison, if dissonance arises in the theme of the client's case during the trial, a judge may perceive the lawyer's case to be unsound.

56. In a trial there are at least seven major opportunities to advocate the defendant's case to the judge by its pleadings. *First*, by the judge reading defence in advance of the trial. *Second*, by the judge referring to the defence during the opening submissions. *Third*, by the judge referring to the defence during interlocutory applications. *Fourth*, in contests as to admissibility of evidence or amendment applications which will require the judge to read the defence as to issues of relevance. *Fifth*, to consider the content of the written outlines of closing submissions filed by the parties before final addresses. *Sixth*, by the judge referring to the defence during oral addresses at the

conclusion of the trial. *Seventh*, by the judge referring to the defence after the trial, whilst the court's decision is reserved.

57. A clear and concise defence will provide a unifying theme to oral and written submissions. More so if the defendant pleads alternative factual scenarios to that pleaded by the defendant which are corroborated by contemporaneous evidence.

G. Embracing change and amendment

58. Lighthouse moments in litigation.

59. The course of litigation requires a defendant to plead at an early stage an effective response to the plaintiff's statement of claim. This will include the articulation of facts as required by the rules. If it was ever possible, it is certainly now not possible to rely on general defence in the hope that something will turn up.

60. A defendant may be required to file a holding defence whilst matters are investigated, such as by obtaining expert reports to meet a plaintiff's claim in a professional negligence claim. A defendant may be compelled not to admit an allegation pleaded by the plaintiff, by reason of professional ethical obligations, whilst enquiries are made for evidence properly to form a basis to deny the allegations.

61. As the proceedings advance, the defence will need to be reconsidered from time to time. By the proper analysis of the forensic effect of new information or a new perspective about the proceedings the need to amend the defence may become apparent. By example, new facts might emerge following discovery.

62. Any need to amend a defence must be acted on by the lawyer immediately. Delay may be fatal to the exercise of the court's discretion to grant leave to amend a defence.

63. Additionally, if the need to amend arises through an oversight by a lawyer, such a matter ought to be candidly explained to the court. The court usually will allow a defendant to amend its defence to address new information, see CPR r104 *Ground of defence arising after defence filed etc*, or to address the prejudice arising due to an inadvertent oversight by a lawyer which causes detriment to the defendant's case.

64. Such an approach is also prudent given CPR r105 *Defence - reliance on defence not disclosed*, which expressly states that a defendant may rely at the hearing of the proceeding on a ground of defence not stated in the defence, only if the plaintiff agrees, or the court gives leave.

H. The defence

65. The formal requirements of a defence include the matters stated in CPR Part 2.6 **Pleadings**. The rules found in that part run between pages 94 and 125 of the CPRs. It is an adventurous exercise to approach the pleading of a defence without having a passable knowledge of the content of CPR Part 2.6.

66. Fundamentals for proper pleading practice for a defence found in the CPRs include the formal structure and substance for both the claim and a defence:

> **405 Pleadings—formal requirements**
>
> (1) Each pleading must be in writing.
>
> (2) If a pleading alleges or otherwise deals with several matters—
>
> (a) the pleading must be divided into paragraphs; and
>
> (b) each matter must, as far as convenient, be put in a separate paragraph; and
>
> (c) the paragraphs must be numbered consecutively.
>
> (3) …

67. CPR r440 makes provision for answering pleadings, such as a defence in answer to a claim:

> **440 Pleadings – answering**
>
> (1) In response to a pleading, a party may plead a denial, non-admission or admission.
>
> (2) A plea of non-admission operates as a denial.

68. The defence must plead to each allegation made in a plaintiff's statement of claim. The better approach is to plead to the relevant allegation i.e. *Deny the allegation in paragraph 2*…, rather than *Deny paragraph 2* …[7]

69. A defendant will either:

(a) admit an allegation made by the plaintiff;

(b) deny an allegation made the plaintiff;

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[7] See *Canberra Data Centres Pty Ltd v Vibe Constructions (ACT) Pty Ltd* [2010] ACTSC 20 at [9].

(c) plead in further answer facts relevant to the plaintiff's allegation;

(d) plead additional facts that constitute a defence to the plaintiff's claim;

(e) allege a set off or counterclaim.

70. In CPR r441 provision is made as to the content of denials and non-admissions by a defendant as follows:

> **441 Pleadings – denials and non-admissions**
>
> (1) It is not enough for a party to deny generally the grounds alleged in a pleading.
>
> (2) Instead, a party must deal specifically with each allegation of fact.
>
> (3) However, a pleading in response to a pleading that alleges damage or damages is taken not to admit the allegation unless it specifically admits the allegation.
>
> (4) A party in a pleading must not deny an allegation of fact in the previous pleading of an opposite party in an evasive way.
>
> (5) Instead, a party must answer the point of substance.
>
> **Example**
>
> A plaintiff alleges that a defendant received an amount of money. It is not enough for the defendant to deny that the defendant received that amount. Instead, the defendant must deny that the defendant received that amount or any part of it, or set out how much the defendant received.
>
> (6) If an allegation is made with various circumstances, it is not enough to deny it along with the circumstances.
>
> (underlining added)

71. CPR r443 applies to the defence to a pleading in a personal injury claim, being a claim for damages for personal injury, see e.g. CLW Act at [79] below, and requires a defendant to plead to any allegation made by way of particulars.

> **443 Pleadings – defence to personal injury claims**
>
> (1) This rule applies to a defence to an originating claim that includes a claim for damages for personal injury.
>
> (2) The defendant must, in the defence, specifically admit or deny every material allegation of fact in the originating claim and statement of claim, including any allegation by way of particulars.
>
> (3) The allegation is taken to be admitted if the defendant does not comply with subrule (2) in relation to it.
>
> (4) A statement in the defence that the defendant does not know and therefore cannot admit a fact alleged in the originating claim or statement is taken to be a denial.

(5) If the defendant wishes to prove a version of facts different from that alleged in the originating claim or statement of claim, the defendant must plead that version in the defence.

(6) The defendant must plead every ground of defence to be relied on, together with the facts necessary to establish each ground.

(underlining added)

72. As can be seen from the content of CPR r443(5) and (6) a defendant bears a positive obligation to plead in its defence any alternative version of facts relied upon to that alleged by the plaintiff in the claim.

73. In *Hall v Martin* [2020] ACTSC 233 at [6] Justice Mossop provided, with respect, helpful guidance as to the need to plead a defendant's case with care, if a defendant wishes to assert an alternative factual scenario to that pleaded in the claim:

> 6. That defence denied that the plaintiff had been employed by the first defendant. There were non-admissions in relation to the paragraphs in the statement of claim relating to the events said by the plaintiff to have given rise to his injuries, with the second defendant responding that it "does not know and cannot admit" the relevant paragraph. These non admissions operated as denials: *Court Procedures Rules 2006* (ACT) (CPR) r440(2), with the result that the plaintiff was put to proof. However, non-admissions do not permit a positive case to be advanced by the second defendant. No application was made to amend the defence. The confined nature of the defence had the effect that the second defendant was significantly constrained in the evidence that it could lead. (Underlining added)

74. A traverse of a plaintiff's allegations puts the plaintiff to proof, and does not assert a fact. A defendant cannot by pleading a denial adduce evidence at the trial, beyond merely contradicting the plaintiff's evidence.

75. Therefore, the defendant also must plead facts necessary to establish an alternative factual scenario or a ground of a positive defence, such as contributory negligence. This is founded upon the principle that the party which pleads a matter bears the onus to prove facts pleaded by admissible evidence to establish such relief. Such an approach also is consistent with the obligation upon a party to give notice to the opponent of the case which the opponent must meet at trial.

76. Conventionally in the final paragraph of any defence to a claim, for which liability remains in issue, the defendant will deny any entitlement in the plaintiff to the relief claimed, in whole or in part.

I. Material facts and particulars in pleadings

77. Material facts are those facts necessary to establish a cause of action recognised in law. A pleading should contain, and contain only, a summary of the material facts on which the party relies, stated as briefly as the nature of the case allows. It should not include the party's evidence to prove those facts.

78. In *Goldsmith v Sandilands* [2002] HCA 31 at [2] Gleeson CJ:

> 2. The facts in issue in a civil action case emerge from the pleadings, which, in turn, are framed in the light of the legal principles governing the case. Facts relevant to facts in issue emerge from the particulars and the evidence. The function of particulars is not to expand the issues defined by the pleadings, but "to fill in the picture of the plaintiff's cause of action with information sufficiently detailed to put the defendant on his guard as to the case he has to meet and to enable him to prepare for trial".

J. The *Civil Law (Wrongs) Act 2002*

79. Many civil claims in the Australian Capital Territory engage the provisions of the *Civil Law (Wrongs) Act 2002 (ACT)* (**CLW Act**). CPR Chapter 4 *Negligence* is engaged by any claim alleging *a failure to exercise reasonable care and skill* which causes *harm* which is defined to include personal injury, damage to property and economic loss, see CPR s40.

80. Furthermore, the provisions of Chapter 4 have broad reach for any cause of action founded upon a failure to exercise reasonable care and skill:

> **41 Application—ch 4**
>
> (1) This chapter applies to all claims for damages for harm resulting from negligence, whether the claim is brought in tort, in contract, under statute or otherwise.
>
> (2) However, this chapter does not apply to a claim under the Workers Compensation Act 1951.

81. The CPR contains provisions which require a defendant to plead positive facts in answer to the allegations in the plaintiff's claim, and provisions which are a positive defence to a claim. Two areas are considered: CLW Act Part 4.2 *Duty of care*, and Part 7.3 *Contributory negligence*.

J.1 Duty of care

82. In CLW Act, **Part 4.2 s43 Precautions against risk – general principles** provides for the modification of the common law in regard to determining breach of duty of care in a cause of action in negligence and states:

43 Precautions against risk – general principles

(1) A person is not negligent in failing to take precautions against a risk of harm unless –

(a) the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known); and

(b) the risk was not insignificant; and

(c) in the circumstances, a reasonable person in the person's position would have taken those precautions.

(2) In deciding whether a reasonable person would have taken precautions against a risk of harm, the court must consider the following (among other relevant things):

(a) the probability that the harm would happen if precautions were not taken;

(b) the likely seriousness of the harm;

(c) the burden of taking precautions to avoid the risk of harm;

(d) the social utility of the activity creating the risk of harm.

(underlining added)

83. The plaintiff must identify and plead the *risk of harm*, and the *precautions* to be taken against such a risk or risks properly to engage the provision. In the absence of doing so, the defendant likely is to be embarrassed and unable to respond to the claim. This is because an essential ingredient of the cause of action will be absent.

84. A consideration of the proper approach to identifying the *risk of harm* was provided by Stephen Campbell J in regard to the equivalent level of legislation in New South Wales in *Vincent v Woolworths Limited* [2015] NSWSC 435 at [27] & [28]:

27. … I am attempting to apply it in the ordinary, everyday business of the trial court. It seems to me, reading Gummow J's judgment in *Dederer*, especially from p 351 to 355, as a whole, the question of the proper identification of the risk is a precursor to the assessment of breach. …

28. … I identify the relevant risk of harm as the risk of merchandisers suffering personal injury by being struck by moving trolleys pushed by customers. Ms Vincent says that the relevant precaution which Woolworths failed to take is the provision of a plastic barricade of the type depicted in the photograph … or providing a helper to keep customers clear from the merchandiser while the merchandiser was absorbed in her or his duties.

85. Once the *risk of harm* and the *precautions* which the plaintiff alleges the defendant failed to take are identified, the defendant must plead facts and matters to be advanced in answer to the claim. As considered above, a bare

denial in a defence will limit the ability of the defendant to advance alternative factual scenarios to those pleaded by the plaintiff.

J.2 Contributory negligence

86. In CLW Act, **Part 7.3** provides a positive defence for a defendant which must be expressly pleaded, if it is to be relied upon in the defence:

> **102 Apportionment of liability – contributory negligence**
>
> (1) If a person (the ***claimant***) suffers damage partly because of the claimant's failure to take reasonable care (***contributory negligence***) and partly because of someone else's wrong –
>
> (a) a claim for the damage is not defeated because of the claimant's contributory negligence; and
>
> (b) the damages recoverable for the wrong are to be reduced to the extent the court deciding the claim considers just and equitable having regard to the claimant's share in the responsibility for the damage.
>
> (2) However, if the claimant suffered personal injury and the wrong was a breach of statutory duty, the damages recoverable by the claimant for the personal injury must not be reduced because of the claimant's contributory negligence.
>
> (3) If an Act or contract providing for the limitation of liability applies to the claim, the amount of damages awarded to the claimant because of subsection (1) must not exceed the maximum limit applying to the claim.
>
> (4) This section does not defeat any defence arising under a contract.
>
> (5) This section has effect subject to part 7.1 (Damages for personal injuries—exclusions and limitations).

87. CPR r432 identifies that a defendant must plead contributory negligence.

> **432 Pleadings —negligence and breach of statutory duty**
>
> (1) <u>If a party pleads negligence (whether contributory or otherwise) or breach of statutory duty, the particulars must state the facts and circumstances of the negligent act or omission or breach of statutory duty</u>.
>
> (2) Also, if the party alleges 2 or more negligent acts or omissions or breaches of statutory duty, the particulars must, as far as practicable, state separately the facts and circumstances of each negligent act or omission or breach of statutory duty.

88. To effectively plead a contributory negligence defence pursuant to the CLW Act the defendant must plead the facts relevant to the instant case, rather than a generic formulation by way of particulars, together with other provisions of that Act regarding negligence.

89. Thus, the defendant will plead the elements of the claimant's failure to take reasonable care by identifying the ***risk of harm*** in CLW Act s43 against which the claimant failed to take precautions and thereby was contributorily negligent. The defendant also will plead the factual elements to satisfy the issue of ***causation*** which will be determined by the application of CLW Act s45 to the findings of fact.

K. Conclusion

90. May I conclude by reiterating the ethical obligation upon a lawyer not to settle a defence which alleges fraud or serious misconduct, other than on proper instructions from the client to allege such a defence, and based on evidence to support such a pleading, which then must be pleaded as required by the CPRs.

91. The fundamental purpose of a statement of defence is to provide an answer to a judge's question to the lawyer for a defendant at any stage of the proceeding: "*Why should your client win?*" or "*Why should the other side's win be limited?*".

92. Framed in this manner, there is an obvious benefit arising from a focused approach on the form and substance of the defence to enable a judge to take from the defence a clear understanding of the material facts which engage the legal principle relied on by the defendant to resist the plaintiff's claim for relief.

93. The pleadings are probably the most important forensic documents in a proceeding commenced by an originating claim. A prudent lawyer for a defendant will recognise the imperative of a considered and cogent defence to put a defendant's case at its highest.

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