PLEADINGS

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I. INTRODUCTION

This chapter covers the following Rules of Court:

1. Parties to an action (Rules 34 to 74);
2. Specific rules on pleadings (Rules 138 to 163);
3. Attacks on pleadings (Rules 173 and 174) and amendment (Rules 165 to 172);
4. Pleadings in Simplified Procedure (Rules 477 to 489); and
5. Pleadings considerations under Originating Notices and Judicial Review (Rules 451 to 459 and Rules 664 to 676).

A. DEFINITION

The *Queen's Bench Act, 1998*, section 2, defines pleading to include a petition, a summons and the statement in writing of:

1. the claim or demand of:
   (a) a plaintiff against a defendant;
   (b) a defendant against a third party;
   (c) a third party against a subsequent party; or
   (d) a subsequent party against any other subsequent party.
2. a defence or counterclaim of a defendant, third party or subsequent party to a claim or demand mentioned in clause 1;
3. a reply to defence or counterclaim mentioned in clause 2; and
4. a rejoinder to a reply mentioned in clause 3.

The helpfully vague "include" catches cross-claims, defences to cross-claims, and other documents normally thought to be "pleadings".[1]

[1] *Saskatchewan Crop Insurance Corp*. v. *Greba* (1997), 154 Sask. R. 120 says the following should be included in contents of the certified copy of the pleadings: statement of claim; demand for particulars, reply to demand; statement of defence; statement of defence and counterclaim; defence to counterclaim; cross-claim; defence to cross-claim; third party claim; defence to third party claim; notice to admit facts; admission of facts.

Who is a third party? The *Queen's Bench Act, 1998* defines third party as a person served with notice of a defendant's claim, *whether a party to the action or not*. This would make a defendant against whom a cross-claim has been made a "third party", even though this is not the usual terminology. However, the definition is for the purpose of section 32 only[2]; there is no definition in the Rules.[3]

B. FUNCTION

The function of pleadings is:

1. to clearly and precisely define the question in controversy;
2. to give notice of the case which the opposing party has to meet;
3. to aid the court in its investigation of the truth of the allegations; and
4. to form a record of the issues involved in the action.

C. PURPOSE

The purpose of pleadings, as well as defining the real issues dividing the parties, includes fair warning to the other side of what is going to be claimed. This in turn serves to delimit the scope of discovery, to prevent surprise, to avoid adjournments and to reduce cost by facilitating the orderly and disciplined preparation of evidence for trial.[4]

D. IMPORTANCE

Pleadings define the questions in controversy and outline the scope and range of:

1. the discovery of documents;
2. questions that may be asked at examinations for discovery; and
3. questions that may be asked at trial.

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2 Section 32(1) of the *Queen's Bench Act, 1998*.

3 It is likely of little practical importance, but do remember that definitions ARE important.

4 *Rieger* v. *Burgess* (1988), 4 W.W.R. 577, 66 Sask. R. 1 (C.A.).

This means that it is your pleading and your opponent's that a chambers judge will examine when you seek production of documents that will be helpful to your case. It is to the pleadings that a chambers judge will turn when your opponent seeks answers to questions your client has refused to answer on discovery. It is to the pleadings that the trial judge will refer when you seek to introduce evidence in a particular area and your opponent objects on the grounds of relevance. So, when you draft a pleading, think ahead. If there is some juicy evidence you look forward to introducing at trial, it *must* be relevant to your cause of action, and you must plead a fact relevant to your cause of action that will permit you to introduce the evidence. If it is not relevant to your cause of action, you (alas) cannot plead it. If you do, your alert opponent can move to strike it out, and will later object when you try to introduce that evidence.

Pleadings will help you crystallize the work you have done in analyzing the facts and law relevant to your client's case. You can (and should) use pleadings as a framework for:

1. organizing the evidence;
2. preparing for discovery;
3. preparing for trial; and
4. presenting your view to the pre-trial judge and to the trial judge.

II. CONTENTS OF PLEADINGS

A. WHAT MUST PLEADINGS CONTAIN?

Pleadings must contain:

1. everything you need to prove in order to win everything your client is entitled to;
2. everything you need to force production of the other party's documents;
3. everything you need to examine the other party on points you need to have admissions on;
4. enough detail to prevent applications by the other party, such as:
   (a) a motion to strike under Rule 173;
   (b) a demand and motion for particulars under Rules 164(1) and (4)[5]; and

[5] Also consider Rule 213 that requires immediate production of a document referred to in your pleadings.

5. those things the Rules say they must contain, such as:
   (a) statutes and regulations: Rule 142; and
   (b) particulars of "bad" deeds, but not "bad" thoughts: Rules 148 and 149.[6]

B. THE PARTIES

Rules 34 to 74 deal with parties to an action. You would commonly consult them for procedural details on:

1. how to sue or defend on behalf of a person or group other than the standard adult or corporation;
2. what to do if your client or your opponent's client dies, goes bankrupt, amalgamates, or assigns the claim;
3. who may or must be included in the action; and
4. adding someone, or getting your client added.

Substantive law governs who has to be a party. For example, all persons who are joint debtors must be sued, but you can pick and choose debtors who are joint and several. Persons to whom an obligation is owed jointly must sue jointly: those who do not agree to sue can (must) be joined as defendants.[7]

Are you in a real hurry? Don't know the defendant's name (or correct name)? Limitation period expiring or an interlocutory injunction required? John Doe or Jane Doe is acceptable.[8] You can add or substitute parties, even after a limitation period[9] See also "Amendment to Pleadings" later in this paper.

Think ahead to enforcing your judgment. You may wish to search the Land Registry to ensure that a defendant is named according to the property registered in his, her or its name. If this name does not exactly correspond to the information you have (John Quentin Doe or John Doe rather than Jack Q. Doe), you may wish to name the defendant under one or more aliases.[10]

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6 "Bad deeds": misrepresentation, fraud, breach of trust, wilful default or undue influence. "Bad thoughts": malice, fraudulent intention, knowledge or other condition of the mind. See pages 11 to 13 of this paper.

7 Rule 36(3) generally; Rule 51(d) for partnerships; Rule 60 for executors and administrators.

8 *Saskatchewan Power Corporation* v. *John Doe*, [1988] 6 W.W.R. 27 (Sask. Q.B.); [1988] 6 W.W.R. 634 (Sask. C.A.).

9 Section 30, the *Queen's Bench Act, 1998.*

10 Randall M. Sandbeck, "Post Conversion: Selected Topics in relation to the Saskatchewan Land Registry and the Saskatchewan Writ Registry", CBA Mid-winter Meeting 2002, page 5.

C. PARTICULAR KINDS OF PARTIES

In limited circumstances a minor may sue, continue or defend as if of full age.[11] In all other cases, though not in Small Claims Court,[12] the minor must have a litigation guardian.[13] If you act for a minor plaintiff, it is common to appoint a parent as litigation guardian, as long as there is no adverse interest between them.[14]

The style of cause is:

> Huey Duck, Louie Duck and Dewey Duck, by their litigation guardian Donald Duck
> Plaintiffs

You will need to submit the details of any settlement of a minor's claim (including your account) to the Public Trustee's office and to the Court. The Public Trustee need not consent, but must comment. The litigation guardian must consent.[15] If you expect to have the money paid to the litigation guardian, provide expressly for that, as otherwise it will go to the Public Trustee to be held for the minor.[16]

If you sue a minor, as plaintiff's counsel you do not have to have a litigation guardian appointed: that is the defence's responsibility. However, you cannot note a minor for default of defence, except with leave of the court.[17]

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11 Rule 42(1) and (2).

12 *MacDougall* v. *Uhl*, 2003 SKQB 137.

13 Rule 42(3). At common law, an infant has the capacity to sue and to defend himself: *Stachuk* v. *Nielsen* (1958), 26 W.W.R. 567 at 568. According to Stevenson and Coté, *Civil Procedure Guide 1996 (Alberta)*, the purpose of the rule was to protect a defendant for costs in an action by an infant plaintiff. However, Rule 50 now exonerates a litigation guardian personally from costs (unless otherwise ordered). The wording of Rule 42(3) says a minor "may", not "must" sue by litigation guardian. However, if a minor does not have a litigation guardian, it is at least an irregularity, although not fatal: see McKeague and Voroney, Rule 42.

14 Rule 43(2) and Form 5.

15 Rule 45(1).

16 Rule 45(2).

17 Rule 113.

D. ADULTS WITH IMPAIRED CAPACITY

Acting on behalf of an adult whose capacity for decision-making is impaired poses numerous problems, whether the person is suing or being sued. A careful reading of the new *Adult Guardianship and Co-Decision-making Act*,[18] the applicable Rules of Court[19] and *The Public Guardian and Trustee Act* is essential. Under the new *Act*, a co-decision-maker or guardian may be appointed by the court for either property[20] or non-property[21] litigation matters.[22]

If there is nobody with the appropriate authority and a person with a cause of action whose decision-making is impaired, there are various possibilities to consider:

1. appoint a personal or property co-decision-maker with appropriate authority under the new *Act*;
2. appoint a personal or property guardian;[23]
3. apply directly to the court under existing Rule 46(2)(f); or
4. appoint a temporary property guardian under section 44(1)(b).[24]

There are potential limitation period implications because of the detailed requirements of the *Act.*

If the proposed defendant is incapable, be aware of the 30 days' written notice of intention to sue which must be given to the property co-decision-maker or property guardian under section 63 of the new *Act.* If there is no property guardian, an application may be made to serve the Public Trustee.[25]

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18 Chapter A-5.3, proclaimed in force July 15, 2001. Regulations and forms also in force at July 15, 2001.

19 There have not been any changes to the Rules as a result of the new *Act.*

20 Section 43.

21 Section 15(g).

22 Under this section, decisions are subject to the powers of any litigation guardian, presumably one who has already been appointed under existing – or old – Rule 46(1).

23 Rights of action are choses in action, which are property, and so may be considered to come under the authority of the property guardian, who is responsible for the "estate". Personal guardians might be responsible (for example) for divorce and custody applications.

24 A temporary personal guardianship is not available, as it is only given where it is necessary to protect the adult from serious physical or mental harm.

25 Section 32 of the *Public Guardian and Trustee Act*.

E. PARTNERSHIPS AND SOLE PROPRIETORSHIPS (RULES 51 TO 57)

Actions by and against partnerships can always be brought in the firm name (unless plaintiff partners do not consent).

Example:

McDougall Gauley

Plaintiffs
(Defendants by Counterclaim)

v.

MacPherson Leslie & Tyerman

Defendants
(Plaintiffs by Counterclaim)

Rule 52 lets you sue the partnership alone and get judgment against unnamed individual partners by serving a Notice of Alleged Partner.[26] Rule 54 lets you find out who the partners are on eight days' notice,[27] and permits you to get judgment against each of them. Rule 55 lets you add unnamed partners after you get judgment against the partnership or some of the partners.

The Rules also provide for:

1. a firm suing as all the individual partners;[28]
2. those partners who agree suing in their individual names, joining those who disagree as defendants;[29] and
3. suing the partnership *and/or* all or some of the individual partners.[30]

Examples of the foregoing:

1. Huey Duck, Louie Duck and Dewey Duck, carrying on business as "Duck Brothers";
2. Huey Duck and Louie Duck, carrying on business with Dewey Duck as "Duck Brothers" (Plaintiffs) v. Walt Disney and Dewey Duck (Defendants);
3. Minnie Mouse (Plaintiff) v. Duck Brothers and Huey Duck (Defendants).

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[26] Rule 52(2) and Form 5B.

[27] Rule 54 and Form 5C.

[28] Rule 51(c).

[29] Rule 51(d).

[30] Rules 51 and 52.

A partnership must defend in the firm name, but dissident partners may also file separate defences.[31]

Sole proprietorships are generally subject to the same rules. A sole proprietor may sue or be sued as:

1. John Acme;
2. Acme Widgets; or
3. John Acme, carrying on business as Acme Widgets.[32]

F. DECEASED PERSONS, ESTATES AND TRUSTS – RULES 58 TO 69 AND 73 AND 74

Normally, it is the executor or administrator of the estate of a person who has died who brings or defends an action. Estates without executors or administrators may have an administrator *ad litem* appointed,[33] who is subject to additional restrictions on authority to settle or discontinue, and on distribution of proceeds.[34] Rule 67 is of great assistance if a person had died before the action (whether known or unknown to you) or if there is uncertainty who the personal representative might be.[35] The Rules also provide for joining other persons, such as beneficiaries, next of kin, creditors or others,[36] if the facts or the substantive law make this necessary or desirable.

Sample style of cause:

James Trusty, Theodora True and First Canadian Trust Company,
Executors of the Estate of Thelma True

Plaintiffs

v.

John Doe, Administrator *ad litem* of the Estate of Theresa True

Defendant

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31 Rule 53.

32 Rule 57(1).

33 Action *by* the estate: Rule 62; action *against* the estate: Rule 61. See also the *Survival of Actions Act.*

34 Rule 65.

35 If you sue "The estate of A.B. deceased" or "the personal representative of A.B. decreased", for example, it is NOT a nullity: Rule 67(1)(d). You can then apply to fix it up: Rule 67 (2)(a).

36 Rules 58(2) and 59.

If a party to the action dies, goes bankrupt, assigns its interest in the proceedings, etc., there must be an order reflecting the change in circumstance.[37]

G. THE CAUSE OF ACTION - LIABILITY

Preparation of your case for trial is an ongoing process. At the pleadings stage, you will have the facts your client provides to you, supplemented by as many additional sources as possible (documents, witnesses, experts' views). Acting for the plaintiff, you must then relate these facts to a cause of action: contract, tort, possession of land. This will govern the remedies that are available to you. If you are preparing a statement of defence, you will need to know what factual and legal defences are available to your client, and whether there is someone else who should share the responsibility with your client.

H. DAMAGES AND OTHER RELIEF

The cause of action will determine what relief you may claim. If you are a plaintiff, the remedies available begin with damages and the several flavours of damages available:

1. non-pecuniary damages;
2. special damages;[38]
3. punitive or exemplary damages; and
4. aggravated damages.[39]

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[37] Rule 73. To proceed in a bankruptcy requires the trustee's consent.

[38] While practice has been *not* to particularize special damages, this may be changing. Particulars were ordered in *Driscol* v. *McBain et al*, 2002 SKQB 244 (Klebuc, J.). There are two types of special damage, which in many cases will not overlap. The first is: "Special damages in the sense of a monetary loss which the plaintiff has sustained up to the date of trial". Clearly, those occurring *after* the claim issues cannot be pleaded in the claim itself. However, monetary losses before the claim should be pleaded. The second type of special damages depends on a distinction drawn between general and special damage: "General damage is such as the law will presume to be the natural or probable consequence of the defendant's act. It arises by interference of law, and need not, therefore, be proved by evidence and may be averred generally. Special damage, on the other hand, is such a loss as the law will not presume to be the consequence of the defendant's act, but such as depends in part, at least, on the special circumstances of the particular case. It must therefore be always explicitly claimed on the pleading, as otherwise the defendant would have no notice that such items of damage would be claimed from him at the trial."

[39] Aggravated and punitive damages must be expressly pleaded: *Lauscher* v. *Berryere* (1999), 177 Sask. R. 219 [1999] 8 W.W.R. 476 (C.A.), C.A. 99-022, paragraph 13.

Additional remedies include:

1. equitable relief, including injunctions (interim, interlocutory, final), specific performance, constructive trust;
2. contractual remedies, including rescission, rectification;
3. judicial review, including *certiorari, mandamus*, prohibition;[40]
4. declaratory relief; and
5. property remedies: foreclosure, sale, possession, replevin (recovery) of chattels.[41]

I. SPECIFIC RULE REQUIREMENTS – PART X, RULES 138 TO 163

1. Rule 139

Plead material facts, not the evidence by which the facts are to be proved. One way to test this is to ask: Would I still have a cause of action (or a defence) if I removed this "fact"? If so, it is likely only a "subordinate fact" or evidence. If you are in genuine doubt, leave it in.[42]

2. Rule 140

In many situations, the law affords several remedies: some are cumulative; others are alternative. Similarly, a defendant also may have a variety of grounds, both factual and legal, upon which the plaintiff's claim can be defeated. As a result, it is perfectly proper and desirable to plead in the alternative. What you may not do is to make allegations of fact that are inconsistent with each other.[43]

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[40] See Judicial Review later in this paper.

[41] For foreclosure, see Rules 433 to 440; for sale, see Rules 428 to 432; for possession – see Rule 433 and special statutes: the *Land Contracts (Actions) Act;* the *Landlord and Tenant Act;* the *Residential Tenancies Act;* the *Recovery of Possession of Land Act*; for replevin, see Rules 406 to 410.

[42] Subordinate facts which may be (strictly speaking) unnecessary will not be struck where the effect is to give notice of the issues to be argued and where they do not themselves prejudice a party or embarrass or delay the trial. Where inclusion of details amounts to evidence (rather than fact) but does not embarrass or prejudice the other party costs *may* be awarded: *Bush et al* v. *Wiens (Minister of Environment and Resource Management) et al*, Q.B. 96-095.

[43] You may suck or blow. You may not suck and blow. *Moody* v. *Ashton*, Q.B. 98-0102 is a good example of the former. The plaintiffs sued to set aside a transfer of assets as fraudulent. They claimed under the sections on fraudulent conveyance (gift) and the sections on fraudulent preference (transfer for value) of the *Fraudulent Preferences Act*. Since it is unlikely that a plaintiff knows in advance whether a transferee is a *bona fide* creditor of the defendant, this is appropriate.

Examples:

(Acceptable)

The defendant was negligent in:
(a) failing to apply his brakes;
(b) failing to keep a proper or any lookout;
(c) driving too fast for road conditions; or
(d) failing to control his vehicle.

(Problematic)

The defendant was negligent in:
(a) keeping the stairs of its store in a poor state of repair; or
(b) waxing and polishing the stairs of its store excessively.

[Not necessarily inconsistent, given the right facts.]

(Not acceptable)

The defendants admit that the plaintiff was not dismissed for cause, but say that by reason of his conduct and attitude they had lost confidence in his ability to satisfactorily discharge his duties.[44]

3. Rule 141

Don't plead conclusions of law unless you set up a factual basis ("material facts" again).[45]

4. Rule 142

Statutes and regulations should be referred to.[46] A claim for pre-judgment interest (under the *Pre-Judgment Interest Act*) must be pleaded but may be included in the prayer for relief only.[47]

Example:

The alleged agreement for sale of land was not in writing. The Defendant relies on the *Statute of Frauds*, (1677) 29 Charles II, c. 3, section 3.[48]

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[44] *Romancic* v. *Hartman* (1986), 51 Sask. R. 169 (Q.B.) Held: inconsistent, and not a valid defence and struck.

[45] *Ceapro Inc.* v. *Saskatchewan,* 2003 SKQB 221.

[46] *Garrett* v. *Cameco Corp.*, 1999 SKQB 106, [1999] TWL QB99513.

[47] *Krueger* v. *Krueger* (1997), 157 Sask. R. 297.

[48] For regular Saskatchewan statutes, it is unnecessary to give the full details conventionally provided, e.g., the *Contributory Negligence Act*, R.S.S. 1978, c. C-31. The first section of current Saskatchewan statues invariably states, e.g., "This *Act* may be cited as the *Contributory Negligence Act*". I have been assured by a Justice drafter that use of this provision is desirable. *Do*, however, include section and paragraph references, especially when the statute is long, or more than one provision could apply.

5. Rule 148

States of mind (malice, knowledge) can be pleaded as fact. Evidence (circumstances) from which the state of mind may be inferred need not be pleaded.

Example:

> At all material times, the Defendant *knew* the Plaintiff was relying on it to deliver the goods by October 27, 2000.

6. Rule 149

Full particulars are required of:

(a) misrepresentation,[49]
(b) fraud,
(c) breach of trust,
(d) willful default , or
(e) undue influence[50].

For misrepresentation, you should provide the circumstances (time and place?) when the misrepresentation was made, to and by whom, what was said (or omitted), and why it was incorrect. You will have to think whether it should be characterized as innocent, negligent, or fraudulent, (and whether these should be pleaded as alternatives, bearing in mind that innocent and fraudulent misrepresentation are somewhat inconsistent with each other), whether the misrepresentation induced a contract, and what remedies flow from each type of misrepresentation.

To plead fraud, or wilful default, with the consequences in costs (to your client, and perhaps to you) if you completely fail to prove your case, you must be very specific. Merely sticking "fraudulently" or "wilfully" in front of a verb will not suffice. Alleging that the fraud is within the defendant's knowledge is not appropriate.[51]

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[49] *Driscol* v. *McBain et al*, 2002 SKQB 244 (Klebuc, J.); *Mills* v. *Gibbs*, 2003 SKQB 245.

[50] *Balog* v. *Lapointe*, 87 Sask. R. 235.

[51] *Schoenfeld* v. *Rhythmic Gymnastics Club of Prince Albert* [1995], TWL QB95632.

Undue influence does not require particulars to the same extent as allegations of fraud: it is sufficient to allege the conduct said to be undue influence and the gifts or transactions which are to be set aside because of the undue influence.[52]

7. Rules 152 and 156

You are required to admit those allegations you know to be true. Failure to do so may result in solicitor-client costs against you.[53]

On the other hand, if in your defence you fail to deny an allegation in the statement of claim, you are deemed to admit it.[54] There are several ways of avoiding problems under this Rule (156). The most common is a general denial in the first paragraph of the defence:

> "1. Except as specifically admitted, the defendant denies each allegation in the statement of claim."

This is a somewhat negative beginning. If you can *remember* to always put it in at the end, its location there is more appealing to the reader. Sometimes the denial can be combined with an admission of uncontroverted facts:

> "1. The defendant admits paragraphs 1 to 4 inclusive of the statement of claim. The defendant denies all other allegations in the statement of claim not specifically admitted in this statement of defence."

To make sure that every paragraph of the statement of claim has been addressed, it may be desirable (though boring) to begin each paragraph of the defence as follows:

> "1. With respect to paragraph 2 of the statement of claim, the defendant is a Canada corporation, not a Saskatchewan corporation. The balance of paragraph 2 is admitted.
> 2. With respect to paragraph 3 of the statement of claim, ...
> 3. With respect to paragraph 4 of the statement of claim, ..."

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52 *Balog* v. *Lapointe, supra*.

53 Rule 152 and *Leitchman Custom Homes Ltd.* v. *Werhun* (1997), 165 Sask. R. 293.

54 In *Mus* v. *Matlashewski* [1944], 3 W.W.R. 358, defendant pleaded: "The defendant has no personal knowledge of the allegations contained in paragraph 5 and is therefore unable to plead to same." The Manitoba Court of Appeal characterized this as a "failure to deny" that amounted to an admission. (!) Maybe the initial general denial would save this. If this practice is confined to pleadings about defendants you do not represent, there should be no adverse consequences. If there is a default in defence, is this a total admission? Maybe not – Rule 122 gives the judge a discretion: *Richter* v. *Capri Holdings Ltd.*, 2001 SKBQ 520, [2001] TWL QB01542.

Sometimes the statement of claim is drafted so badly (i.e., in such logical or chronological disarray), that responding to it logically or sequentially is impossible. In this case, it may well be preferable to begin with the general denial, and then plead your own version of the facts in a logical and chronological way.[55]

8. Rule 154

Don't deny evasively. If you act for a hospital and see that for some reason the plaintiff has claimed against the wrong doctor, both of whom the hospital employs, don't phrase your defence to conceal that the wrong person has been sued (hoping that the limitation period will expire in the meantime).[56]

9. Rule 159

Actions on bills of exchange, debts or liquidated demands are hard to defend against unless there are particular facts exonerating the defendant. If your client didn't sign the cheque, deny it. If your client does not think the debt is yet due or owing, deny that. A general denial will not work here.[57]

J. MULTIPLE PROCEEDINGS

1. Counterclaim

Sometimes the best defence is a good offence. If the defendant has any right or claim against the plaintiff, it may counterclaim. Under some circumstances, the counterclaim may be *set off* against the plaintiff's claim, by way of defence:

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55 See Rules 155 and 157.

56 *Johnston* v. *Regina General Hospital Bd.* (1981), 129 D.L.R. (3d) 499, [1982] 1 W.W.R. 15, 15 Sask. R. 271, 24 C.P.C. 155 (Q.B.).

57 *Bank of Nova Scotia* v. *Pidperyhora*, [1988] TWL QB880237; *Porcupine Credit Union Ltd.* v. *Szydlowski*, [1992] TWL QB92280.

(a) where there are mutual debts; or

(b) where the claim arises out of the same dealings, transactions or occurrence giving rise to the plaintiff's claim.[58]

Since there are many claims other than these, the counterclaim – a more flexible remedy than set-off – is used more frequently. Even set-offs which are strictly defences may be counterclaimed.[59]

For example, in a counterclaim, a defendant may include other parties than the plaintiff as defendants by counterclaim, if these are necessary or proper parties.[60]

Unfortunately (if you act for a plaintiff), a counterclaim is frequently used to stall or delay a legitimate initial claim. For example, a defendant who has simply failed to pay on time for goods he has received may counterclaim alleging that the goods were defective. The plaintiff's remedy is to:

(a) request a separate trial of the counterclaim;[61]

(b) apply to strike out the counterclaim (allowing the defendant to assert it in a separate action);[62] or

(c) apply for a stay of the counterclaim.[63]

The chance of success on these applications is directly related to the apparent frivolity of the counterclaim (as perceived by the court, not your client).

A plaintiff should not forget to defend against a counterclaim, or it may be noted for default. A counterclaim is treated just as if it were a statement of claim, except that it is contained in the statement of defence under the heading "Counterclaim".

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58 Rule 104A(1)(a) and (c).

59 Rule 104A(3).

60 Rule 105(2).

61 Rule 105E(2).

62 Rule 105E(2).

63 Rule 105F(2).

Example:

1. The defendant admits paragraphs 1 and 2 of the statement of claim. Except as specifically admitted, the defendant denies the remaining allegations in the statement of claim.
2. The defendant did not start the fight as alleged, or at all.
3. If there was damage to the plaintiff's hand, which is not admitted but specifically denied, then the damage occurred when the plaintiff's hand contacted and broke the defendant's jaw.
4. The plaintiff's injuries, if any, were solely the fault of the plaintiff.
5. The defendant requests the plaintiff's claim be dismissed with costs.

Counterclaim

6. The defendant (plaintiff by counterclaim), repeats the facts in paragraphs 1 to 5 of the statement of defence.
7. As a result of the plaintiff's unprovoked attack on the defendant, the defendant's jaw was broken.
8. The defendant (plaintiff by counterclaim) therefore claims:
   (a) non-pecuniary damages;
   (b) special damages;
   (c) payment for the cost of health services defined in section 19 of *The Department of Health Act;*
   (d) pre-judgment interest under section 6(1) of the *Pre-judgment Interest Act;* and
   (e) costs of this counterclaim.

2. Cross-Claim

A cross-claim is used when a defendant thinks the co-defendant is wholly or partly responsible. It can include a claim for contribution or indemnity.[64] The timing for service of a cross-claim is more relaxed. It may be served before a joint request to assign a pre-trial conference date.[65] After that time, leave of the court is required.[66]

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[64] Rule 106(1)(a).

[65] Where no joint request is filed, within 10 days after service of the notice of motion for an order for pre-trial conference.

[66] Rule 106(2)(c).

3. Third Party Claims

A third party claim may be made by a defendant against someone not already a party to the action, under these circumstances:

(a) The third party is liable to the defendant for some or all of the plaintiff's claim.

Examples:

(i) Third party and defendant co-signed a promissory note to the plaintiff – the defendant's claim is for *contribution.*

(ii) Third party manufacturer sold defendant retailer the goods the plaintiff says are defective – the defendant's claim is for *indemnity* under an implied warranty of fitness.

(iii) Defendant organizer of athletic activities claims against a third party owner of athletic facilities for contribution under the *Contributory Negligence Act* to the damages of the plaintiff injured during the activity at the facility. Defendant alleges faulty maintenance of the facility that caused or contributed to the plaintiff's injury.

(b) The third party could be liable to the defendant for other relief connected to the subject matter of the main action, not necessarily the plaintiff's claim;[67] or

(c) The third party should be bound by the determination of an issue between the plaintiff and the defendant.[68]

There are situations where, even if these rules apply, they can be overridden on terms under Rule 107 I, where the plaintiff's claim would be prejudiced or unnecessarily delayed. For example, a subcontractor sued the general contractor for payment of about $24,000 incurred in

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[67] Rule 107(b). For example, until this Rule was added in 1981, third party procedure was not permitted in the following case. Plaintiff sold a used tractor to defendant, and took promissory notes from the defendant to carry out repairs to the tractor. The tractor was already subject to a chattel mortgage (unknown to the defendant, who said plaintiff was supposed to give clear title) and was seized by the chattel mortgagee. Then plaintiff sued defendant on the promissory notes and for the value of the repairs. Defendant wanted to join the chattel mortgagee as a third party, but was not successful. (The chattel mortgagee was not liable to defendant in any way, and the seizure had nothing to do with the promissory notes or the repairs. The lower court said the *tractor* was common subject matter, but the higher court disagreed.) Defendant's counterclaim against plaintiff for the price of the tractor could include the chattel mortgagee as a co-defendant to counterclaim: *Construction Equipment Co.* v. *Acorn Construction Ltd*. (1969), 9 D.L.R. (3d) 529 (Sask. C.A.).

[68] Rule 107(c). Example: A company claimed under a fire insurance policy. The insurer joined the majority shareholder of the company as a third party, alleging conspiracy to defraud. *Higgins Co*. v. *SGIO*, [1976] 6 W.W.R. 288.

a major construction project. The general contractor and the owner were locked in a multimillion dollar battle over the main contract. The defendant general contractor wanted to add the owner as a third party to this action, and approximately 100 other subcontractors' claims.[69]

The timing of making the third party claim is the same as for a cross-claim.[70]

One perennially vexing question is whether or not a defendant must apply for leave to commence a third party claim where it is for contribution under the *Contributory Negligence Act*, section 7 of which refers to adding a third party to the action "upon such terms as are deemed just".[71] The Court of Appeal has recently held, twice, that leave is required.[72]

The new difficulty is to determine the basis upon which leave will be granted or refused. If the requirements of Rule 107(a) or (b) are met, and the defendant has an independent claim then prior leave should not be required.[73] Even on an independent claim, the plaintiff can apply under Rule 107 I(3) to obtain terms to protect from the ensuing delay or prejudice.[74]

A third party defence may simply dispute the third party's liability to the defendant, or it may dispute the defendant's liability to the plaintiff, or both. Examples (where the defendant is a retailer and the third party is a manufacturer):

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69 *B.A.C.M. Ltd.* v. *Foundation Co. of Can*. (1971), 22 D.L.R. (3d) 358, [1972] 1 W.W.R. 280 (Sask. C.A.). In that case, the claim was actually disallowed. However, *Morrow* v. *City of Regina* (1990), 79 Sask. R. 98 now says that under Rule 107I(3), delay or prejudice to the plaintiff will result in terms to protect the plaintiff, but not dismissal of the third party claim.

70 Rule 107(a).

71 The *Act*, passed long before the Rules purporting to do away with the requirement of leave, was not changed when the Rules were.

72 *Noren* v. *R.M. of Huron No. 223*, C.A. 99060, (1999) 177 Sask. R. 258 and *Bouchard* v. *Carruthers and Board of Education*, 2001 SKCA 9.

73 Or at least, the third party would be best advised not to attack it. Note that you do not need leave to begin an ordinary action against a defendant. A third party can make an affirmative attack, e.g., under Rule 173: *S. (G.)* v. *Canada (Attorney General)*, 2001 SKQB 427, [2001] TWL QB01413.

74 *C. (Y.)* v. *Canada (Attorney General)*, 2001 SKQB 217, [2001] TWL QB01204.

1. "The lawn mower I sold you was not defective when you received it from my factory. You put it together wrong and that caused the plaintiff's injury."[75]
2. "The lawn mower I sold you was not defective. It was used improperly by the plaintiff."[76]
3. "The lawn mower I sold you was not defective when you got it. You put it together wrong and the plaintiff misused it. If he was injured, it was partly his own fault."[77]

III. ATTACKS ON PLEADINGS

A. MOTIONS TO STRIKE – RULE 173

Frequently, a motion to strike a statement of claim will be brought even when the claim is carefully drafted by a competent solicitor. It may seem odd that such an attack is more likely to be successful than one brought against a badly drafted statement of claim.[78]

The reason for this is that Rule 173(a) is frequently used to challenge novel propositions of law. For example, if a plaintiff's lawyer alleges a duty of care in new and unusual circumstances, a defendant will frequently oppose the claim on the grounds that it fails to disclose a reasonable cause of action or defence.[79]

On such an application, it is assumed that all the facts in the pleading are true but that they simply fail to add up to a legal claim or defence.

Such an application can also be used for a defective pleading that has failed to include a major element of the cause of action (e.g., the plaintiff failed to adequately allege the breach of contract complained of).[80]

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[75] The third party is entitled to discovery from the defendant, but not the plaintiff.

[76] The third party is entitled to discovery from the plaintiff, but not the defendant.

[77] In these circumstances, the third party is entitled to discovery from both the plaintiff and the defendant.

[78] Self-represented litigants ARE subject to Rule 173(a)*: M.L.R. and P.K. Sr.* v. *Dueck et al*, 2002 SKQB 113.

[79] Rule 173(a).

[80] *Crawford Commercial & Industrial Transport et al* v. *Lombard Canada Insurance Company et al*, 2002 SKQB 165: no allegations that any act of two of the defendants was a breach of duty or resulted in any damages.

The other permitted attacks on pleadings have a fine 18th century sound to them – you can claim your opponent's pleading is:

1. "immaterial, redundant or unnecessarily prolix";[81]
2. "scandalous, frivolous or vexatious";[82]
3. "may prejudice, embarrass or delay the fair trial of the action";[83] or
4. "otherwise an abuse of the process of the court."[84]

Generally, as long as the fact pleaded is *relevant* to an accepted cause of action or ground for defence, it will survive any of these attacks. "Scandalous" means "irrelevant" in this context,[85] and "embarrassing" means "really irrelevant".[86] "Vexatious" means lacking in legal justification, whether for ulterior motives or to re-litigate, for example.[87] "Abuse of process" covers a variety of procedural sins, arising originally from the court's inherent jurisdiction to protect itself from baseless, manifestly unsound actions.[88]

On applications to strike under Rule 173(a), the court will look only at the pleadings themselves (including particulars, and also including any document referred to in the pleadings).[89] Evidence

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81 Rule 173(b).

82 Rule 173(c).

83 Rule 173(d).

84 Rule 173(e).

85 *White Fox Alfalfa Seed Growers Co-op. Marketing Ass'n Ltd*. v. *A.E. McKenzie Co.Ltd*., [1940] 3 W.W.R. 433 at 442 (Sask. K.B.).

86 *White Fox, supra*, and *Meyers* v. *Freeholders Oil Co. Ltd.* (1956), 19 W.W.R. (N.S.) 546 at 549 (Sask. C.A.): "...nothing is scandalous which is relevant ... allegations are embarrassing when they are so irrelevant that to allow them to stand would involve useless expense and would prejudice the trial by involving the parties in a dispute that is wholly apart from the issues". (Bryant, L.M. in *White Fox*) Confusingly, "embarrassing" has also been held to mean "ambiguous" in the sense leaving the opposite party in doubt as to what was intended: *Davis* v. *Patrick* (1893), 2 Terr. L.R. 9 (C.A.).

87 "... instituted for an ulterior motive other than to enforce a true legal claim, or maliciously without probable cause": *Kichula* v. *Farm Credit Corp*. (1991), 95 Sask. R. 245 at 249 (Q.B.).

88 *George* v. *Araya* (1995), 129 Sask. R. 72. A multiplicity of actions for the same relief frequently gives rise to applications to strike for abuse of process.

89 *Provincial Court Judges Association (Sask.)* v. *Sask. (Min. of Justice)* 137 Sask. R. 204 at 205, paragraph 2 (C.A.), and see Rule 213 regarding production of a document described in the pleadings.

is probably unnecessary where the pleading is alleged to be "redundant or prolix". Evidence by affidavit is admissible on applications to strike for other reasons.[90]

To be successful under Rule 173(a), you must meet a stringent test: "... a court should, of course, dismiss the action or strike out any claim made by the plaintiff only in plain and obvious cases where the court is satisfied that 'the case is beyond doubt'".[91] Or, "... assuming that the facts as stated in the statement of claim can be proved, is it 'plain and obvious' that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be 'driven from the judgment seat'. Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail..."[92]

The test under Rule 173(c) or (e) may be less so: "Striking out an entire claim on the ground that it is frivolous, vexatious or an abuse of process of the court is based on an entirely different footing. Instead of considering merely the adequacy of the pleadings to support a reasonable cause of action, it may involve an assessment of the merits of the claim, and the motives of the plaintiff in bringing it. Evidence other than the pleadings is admissible. Success on such an application will normally result in dismissal of the action, with the result that the rule of *res judicata* will likely apply to any subsequent efforts to bring new actions based on the same facts."[93]

An abuse of process inquiry is essentially factual, so that a defendant may be in a better position to raise the issue after discoveries.[94]

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90 *Kaplan* v. *Congregation Agudas Israel*, 2001 SKQB 3, [2001] TWL QB0100.

91 *A.G. Canada* v. *Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735, at 740.

92 In *Milgaard* v. *Kujawa et al* (1994), 123 Sask. R. 164 at 171 (C.A.), Sherstobitoff J.A. adopted the language of Madam Justice Wilson in *Hunt v. Carey*, [1990] 2 S.C.R. 959 at 981.

93 *Sagon* v. *Royal Bank of Canada et al* (1992), 105 Sask. R. 133 (C.A.).

94 *Fischer* v. *Halyk*, 2003 SKCA 71, para. 46.

B. PARTICULARS - RULE 164

If you receive a pleading that is ambiguous, or leaves you *and* your client uncertain as to the case you have to meet, you *may* be in a position to require further "particulars" from your opponent.

Common examples where you might feel you need particulars include:

1. When and to whom did the defendant slander the plaintiff?
2. Is the "agreement" referred to oral or in writing (or both)?
3. Which work (on the multimillion dollar construction project) was improperly performed?

A demand for particulars will extend your time for pleading until you have received a response. Your opponent has eight days to respond.[95] However, your time for responding to the particulars you have received shrinks. If you have 20 days to defend, and you don't demand particulars until day 15, you have only five more days to defend to the particularized claim.[96] If you do not receive a response in eight days, and you are in a hurry, or if you are not satisfied with the response, you can bring a motion for particulars.

There are two kinds of motions for particulars: for particulars required to plead, and for particulars required for trial. There are many borderline situations where you *could* plead to an uninformative statement of claim (even if only by a denial of the offending paragraph), and obtain details on discovery. In such a case, the court often takes the robust view that you should just get on with it. Since statements of defence rarely *require* a reply, applications for particulars of a defence are few, and usually unsuccessful.

[95] Rule 164(2).

[96] Rule 164(3).

IV. AMENDMENT TO PLEADINGS

You can amend your pleadings[97] once, prior to the close of pleadings; with your opponent's consent, at any time; or with leave of the court, at any time. The amendment must arise out of the same transaction or occurrence, and must not cause actual prejudice to a party, in the sense of denying that party an opportunity to meet the allegations.[98]

The tests for allowing an amendment are:

1. Is it necessary to determine the issues in dispute?
2. Can it be done without injustice to the other side?
3. Could the amendment be struck out under Rule 173?[99]

The court may impose terms, such as time limits, costs, permission to your opponent to amend. (You are often given leave to amend your pleadings if the court strikes them under Rule 173.) You bear the costs of the amendment in any event of the cause.[100]

If your opponent does not consent, an alternative to applying to the court for leave is discontinuing your action and starting another one. Since your opponent may tax costs on a discontinuance of the action (Rule 198), discontinuance may not be cost effective, and of course is fatal if a limitation period has intervened.

An amended pleading shows the amendments by underlining or striking, e.g.,

> On ~~or before March 31, 1999~~ March 12, 1999, the defendant slandered the plaintiff ~~to various people~~ by telling the members of the Board of Directors of Acme Widgets Inc. that the plaintiff was dangerously incompetent, morally defective and unfit to continue as President.

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97 The *Queen's Bench Act, 1998*, section 30 and Rules 165 to 172.

98 *Potash Corp. of Saskatchewan Inc.* v. *Crown Investment Corp. of Saskatchewan*, 2001 SKQB 418, [2001] TWL QB01407.

99 *Judith River Farm and Water Ltd.* v. *Saskatchewan*, 2003 SKQB 443, paras. 10-12.

100 New Rule 172, in force July 1, 2003: the court's discretion to relieve from costs has been removed.

V. SIMPLIFIED PROCEDURE

The Simplified Procedure Rules of Part Forty (Rules 477 to 489), which apply when there is $50,000 or less at stake, require the claim to include the statement:

> "This action is being brought under Part Forty of the Queen's Bench Rules."[101]

If your claim is over $50,000, you may still use the Simplified Procedure, but only if the defendant does not object. If the defendant does object, you can still use the Simplified Procedure if you abandon that part of your claim over $50,000.[102] There are detailed rules for amending into and out of the Simplified Procedure.[103]

VI. CLASS ACTIONS

The Class Actions Act came into force January 1, 2002, and Rules came into force January 18, 2002.[104] A discussion is beyond the scope of this paper.[105]

VII. OTHER FORMS OF PROCEEDINGS

A. ORIGINATING NOTICES

Some proceedings begin, not with a Statement of Claim, but by Notice of Motion, specifically, by Originating Notice (of motion). Generally, Originating Notices are used for estate matters (interpretation of a will, appointment of a new trustee, etc.), or for applications to the court under a statute. (For example: an application by a municipality to determine the appropriate compensation for property expropriated.)[106]

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101 Rule 478(3).

102 Rule 479(2) and (3).

103 Rules 481 and 482. You need leave to amend after the close of pleadings: *Agricore Cooperative Ltd*. v. *3L Cattle Co.*, 2002 SKQB 370 (Gerein, C.J. Q.B.).

104 New Rules 76 to 86, and amendment to Rule 477.

105 As the jurisprudence develops in this new area, it may become appropriate to include a discussion.

106 The *Municipal Expropriation Act*, S.S. c. M-27, s. 7.

Although Rule 455 says that the rules applicable to proceedings begun by Statement of Claim apply to proceedings begun by Originating Notice,[107] from the pleadings perspective, there is not much similarity. It is really more like an ordinary notice of motion, with supporting affidavit material, except that the material is filed first and then served (Rule 453), and you need 11 days after all parties have been served before the motion is returnable to chambers. Even then, the hearing is often adjourned (e.g., if some counsel for beneficiaries under a will claim to need more time to prepare argument). It can be a somewhat leisurely process.

B. JUDICIAL REVIEW

Applications for *mandamus*, prohibition, *certiorari*, and *quo warranto* are often time sensitive, and are begun by notice of motion (not Originating Notice) under Part Fifty-Two (Rules 664 to 676). As with Originating Notices, the rules governing pleadings are not usually appropriate.

VIII. TIMING

When your client drifts into the office languidly waving a statement of claim and asking "What should I do about this?", one of the first questions you should ask is "*When* did you get this?". The answer is important because it determines the date the defence is due[108] or the date by which you must have demanded particulars,[109] or objected to jurisdiction, improper service, etc.[110]

The Rules give you 20 days.[111] It is common practice in this province, notwithstanding the 20 day rule, to immediately contact the plaintiff's lawyer, advise you are representing the defendant,

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[107] Rule 455.

[108] Rule 100.

[109] Rule 164.

[110] Rule 99.

[111] Longer if the defendant is served outside of Saskatchewan [Rules 100(1)(b) and (c)]. As little as eight days, for an amended pleading: Rule 169(1).

and request that your client not be noted for default of defence[112] without reasonable notice, effectively extending the 20 days for an indefinite but reasonable period. What is reasonable depends: Is the action complex? If acting on an insurance claim, does coverage need to be investigated before a defence can be provided? Are you going on holidays?[113]

It is almost as common practice for the plaintiff's lawyer to agree, although if the plaintiff is extremely anxious to get things moving, the plaintiff's lawyer may discuss a fixed date acceptable to both of you. Of course, the plaintiff has every right to insist on performance within the 20 days, to which the defendant's remedies include:

1. serving and filing a notice of intent to defend, which gives an additional 10 days;[114]
2. demanding particulars and moving to require them;
3. moving to strike portions of the statement of claim;
4. complying in time and later amending the defence;
5. applying to the court after default has been noted[115] (with a costs penalty); and
6. recalling that there are other Rules that have time limitations for which the plaintiff may later seek an indulgence.[116]

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[112] Rule 114.

[113] *Principles of Civility for Advocates* includes the following:

> "13. Counsel should agree to reasonable requests for scheduling changes, such as extensions of time, provided the client's legitimate interests will not be materially and adversely affected.
>
> 14. Counsel should not attach unfair or extraneous conditions to extensions of time. However, Counsel is entitled to impose conditions appropriate to preserve rights that an extension might otherwise jeopardize. Counsel may also request reciprocal scheduling concessions but should not unreasonably insist on them.
>
> 19. Subject to the Rules of Practice, Counsel should not cause any default or dismissal to be entered without first notifying opposing Counsel, assuming the identity of opposing Counsel is known.
>
> 30. Counsel, and not the client, has the sole discretion to determine the accommodations to be granted to opposing Counsel in all matters not directly affecting the merits of the cause or prejudicing the client's rights. This includes, but is not limited to, reasonable requests for extensions of time, adjournments, and admissions of facts. Counsel should not accede to the client's demands that he or she act in a discourteous or uncooperative manner toward opposing Counsel."

[114] Rule 100(2) and Form 6.

[115] Rule 114(3).

[116] For example, the plaintiff is required to deliver a statement as to documents within 10 days after the statement of defence has been filed, as is the defendant: Rule 212, another Rule more honoured in the breach than in the observance. Again, consider the principles of civility when plaintiff requests an extension of time.

IX. REFERENCES

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