The National Legal Eagle

Volume 16
Issue 2 *Spring 2010*

Article 5

2010

Pleadings: How a Case Gets to Trial

Victoria Baumfield
Bond University, vbaumfie@bond.edu.au

Pleadings: How a Case Gets to Trial

Senior Teaching Fellow Victoria Baumfield Faculty of Law Bond University

We all know that litigations that do not settle eventually wind up in court, but how do cases get there? On TV, it often seems that one minute a client has walked into a lawyer's office to discuss a new potential case, and then seemingly the next day the case has gone to trial. What these shows often leave out is the long process that takes place between that first meeting in the lawyer's office and the eventual plaintiff's day in court. (Those shows also usually leave out the fact that most cases settle during this long pre-trial process and never result in a trial at all!) This article will discuss some of the procedural aspects that sometimes do not get talked about on TV: the steps that lawyers must take to either commence a lawsuit and advance it towards an eventual trial date (if they are working for the plaintiff) or defend it and attempt to get it dismissed before trial (if they are working for the defendant).

Coming up with the theory of the case

Long before a case goes to trial, the lawyers will have been working hard conducting legal research, engaging in factual investigations (including examining documents[1] and interviewing witnesses), and putting those two together to come up with what they hope will be a winning theory of the case.

The lawyers for the plaintiff (that is, the party that is bringing the claim) will have to come up with one or more arguments[2] as to why the conduct that is the subject of the plaintiff's lawsuit should result in legal liability for the defendant. Usually, this will entail arguing that the defendant breached some legal obligation that the defendant owed to the plaintiff. For example, a plaintiff might argue that a defendant deceived or misled the plaintiff into entering into a contract when the defendant had an obligation to disclose all of the material facts of the contract to the plaintiff before they entered into the contract.

The lawyers for the defendant will then scrutinise those documents in order to come up with one or more theories as to why the plaintiff's claim should fail. The defendant might argue, for example, that it did not owe any such obligation to the plaintiff in the first place; that it complied with its obligations and accordingly did nothing wrong; or that some other defence applies. In the example set forth above, therefore, the defence lawyers might argue that:

a. the defendant in fact had no obligation to disclose all material facts to the plaintiff;
b. the plaintiff did disclose all material facts (ie, the information that the plaintiff claims was not disclosed was not material); or
c. the plaintiff's own bad conduct prevents the plaintiff from being able to bring such a claim even if the defendant has otherwise breached its duty (this is known as an 'unclean hands' defence).

Whichever side they are on, the lawyers will have to set forth their arguments in a series of documents that are served on the other side and filed with the court. These documents are called the *pleadings*.

Documents used to set forth one's claims in federal litigation

The plaintiff asserts the basis of her cause of action (ie, her legal argument as to why she is entitled to relief) in a *Statement of Claim*. It is simply a statement of the facts alleged that justify a right to sue to obtain money (damages and compensation), the return of property, or the enforcement of a right. The Statement also asserts the rights in law the plaintiff is relying upon – eg, breach of s 180(1) of the *Corporations Act 2001* and of the directors' common law and equitable duty of care. The document looks rather official, of course, but the term Statement of Claim or its equivalent in other jurisdictions (for example, in America it is called a 'Complaint'; Canada uses Statement of Claim) is used to describe any document that asserts a legal claim by a plaintiff.

The Statement of Claim is usually drafted in numbered paragraphs. Allegations in the Statement of Claim may be supported by what we call *particulars*, which set out the basis for the allegation. Each paragraph is a separate allegation, and the Statement of Defence (discussed below) usually responds to each allegation.[3]

At the trial, the plaintiff will be required to prove the facts set forth in the Statement of Claim that are necessary to satisfy the elements of his or her claim(s). If during *discovery* (the pre-trial process where each party asks for relevant information and documents from the other in an attempt to 'discover' pertinent facts) the plaintiff learns new facts that require her to modify her claims, she will have to file an *Amended Statement of Claim*. In response to this, the Defendant(s) may need to file an *Amended Statement of Defence* – this will be discussed below.

It is a straight forward process to file a Statement of Claim, but if it is not drafted properly, it can be rejected on technical grounds. Accordingly, a Statement of Claim should be expressed clearly and competently.

The formal answer to a Statement of Claim by the defendant is called the *Statement of Defence* (in the US, it is called an 'Answer'). It is usually a short document but it is important for the defendant (assuming she wishes to defend the claim) to draft this carefully, as the case hinges on these two documents being substantiated and played out in court. You usually have a short time to file your Defence - generally 28 days.

The Statement of Defence is a response to the allegations in the Statement of Claim. The defendant must go through each paragraph of the Statement of Claim and either admit or deny the allegations, or state that he or she does not have enough information to answer. The defendant might also admit the allegation but provide additional information that casts that fact in a new light. For example, the defendant might say, 'We admit the allegation that we evicted the tenant from the apartment before his lease expired, but we were entitled to do so because he had not paid his rent for the previous four months, he had refused to respond to any of

our requests to speak with him about it, and ignored our final demand for payment.'

Ways that the Defence can seek to get a case thrown out before trial

As a matter of strategy, before filing a Statement of Defence, defendants may ask the court to *strike out* the plaintiff's claims as legally insufficient. Here, the defendants are arguing that even if every fact alleged in the Statement of Claim were true, those facts would not amount to a breach of any legal obligation or otherwise state a cause of action. The benefit of striking out claims early is that the defendant will be able to end or at least limit the scope of the litigation before it has had to spend significant amounts of time and money on discovery. That is obviously a better result than only winning after a long, drawn out lawsuit that might have proved distracting and upsetting (as well as expensive) for the people involved. For this reason, in complex commercial (ie, business) litigations, defendants often seek to strike out the plaintiff's claims at the very beginning of the case.

After discovery but before trial, the defendants have another chance to seek the dismissal of the lawsuit. At this stage they can file a motion arguing, not that the allegations in the Statement of Claim are insufficient to support a claim but, that the facts that came out in discovery do not support the allegations in the Statement of Claim. In other words, the defendants can argue that they should win because the plaintiff will not be able to prove what he has alleged. For example, if the plaintiff has argued that the defendant breached a contract with the plaintiff, the plaintiff's claim might fail if the facts that came out in discovery show that the contract was in fact with somebody else – not the defendant. This sort of motion is called a *summary judgment motion*.

Note that either a defendant or a plaintiff can file a summary judgment motion.[4] The test that the court will apply in determining such a motion is that the opposing party has 'no reasonable prospect of defending the proceeding or that part of the proceeding.'[5] Therefore, the defendant can bring a summary judgment motion to seek to throw out either all or part of the lawsuit.

As you can imagine, this sort of argument will only work to the extent that the existence of a certain fact is necessary for one of the plaintiff's claims to be successful. The plaintiff's inability to prove a fact that is irrelevant to his or her claims will not be a reason for the court to dismiss the lawsuit. For example, unless the identity of who did something is in issue, it might not be legally relevant that the plaintiff got someone's hair colour wrong in the Statement of Claim (in this example, we can however wonder why the person's hair colour was mentioned at all if it was not relevant to the plaintiff's claim).

The plaintiff or defendant may have filed an *affidavit* in support of its Statement of Claim or Statement of Defence or some other document filed with the court. An affidavit is simply the factual testimony offered by a witness or other person with relevant knowledge in written form (as opposed to on the witness stand in the courtroom). Depending on the document being filed, the civil procedure rules may require the document to be accompanied by a supporting affidavit.

To ensure the affidavits are serious documents, they are 'sworn' (or affirmed) before a person authorised to witness affidavits. This may be a solicitor, a Justice of the Peace (JP) (sometimes called an Honorary Justice), or someone belonging to one of the noble occupations, such as a lawyer, a teacher or even post office managers, listed in the relevant *Evidence Act*.

If the case is not thrown out

If the above manoeuvres do not work to get a case disposed of in either the defence or plaintiff's favour, then the case will be set for trial. The process from the commencement of an action through to trial may, in the case of a complicated matter, take several years, although in recent years the courts have been making increasing efforts to prevent litigants from causing unnecessary delays in the prosecution of a matter. For example, one case that the author worked on started in 1998, and still had not been anywhere near trial by the time the case settled in 2001.

Any case that makes it this far without being disposed of in one party's favour is a case that would seem to have enough in dispute that either side could potentially win. This means that the case is risky for both sides, especially since in Australia the loser usually will have to pay the winner's costs (including their legal fees). For this reason, most litigants will choose to settle the matter before trial. From the defendant's perspective, settlement caps its potential loss at an amount the defendant can live with rather than risking being on the losing end of a potentially catastrophically large judgment. From the plaintiff's perspective, the view is often that even a partial recovery is better than the total loss that could face them at trial.

This truth may not make for good television, but working on a case for months or even years then seeing it settle on the eve of trial is an inevitable part of life for any litigator.

References

1 Note that in a complex litigation, such as when two companies end up in litigation over a failed business deal, there can be hundreds of thousands or even millions of documents!

2 The reason why the lawyers may be attempting to come up with more than one reason or argument why they should win is because lawyers are allowed to plead in the alternative. This means that they can make multiple different arguments – even arguments that contradict each other – without any of those arguments being taken as an admission that the other argument is without merit. For example, a prosecutor might argue, first, that a person is guilty of murder because he intentionally killed the victim and, in the alternative, that the person is guilty of manslaughter because he recklessly (instead of intentionally) engaged in the act that led to the victim's death.

3 As discussed below, the defendant must respond to each paragraph. Eg, 'Regarding paragraph 1, the defendant admits the allegations'; or 'Regarding paragraph 6, the defendant denies the allegations.' Sometimes a defendant will respond that it does not have enough facts to admit or deny the allegation.

4 A plaintiff might seek summary judgment if the facts on a certain point are so clear-cut and uncontroverted that there is no part of the claim left to be proved at trial.

5 *Federal Court of Australia Act 1976* (Cth) s 31A.

The litigation process

Have a go at drawing a diagram of the process that is involved in civil litigation – from the Statement of Claim through to the Trial. Note on your diagram the different times that a matter may be finalised.