

TOPIC TWO DRAFTING

Always consider the constituent elements required in any piece of legal prose

A. Letters of demand

A party to prospective litigation should consider serving a letter of demand.

A letter of demand provides informal notice of the claim and often includes an amount sought by the plaintiff. If the redress sought is non-monetary (return of property, performance of a contractual obligation), the object sought will not be money.

If the recipient does as demanded, the letter is useful to bring a speedy resolution to the matter. Demand may be rejected by a return letter – pointing out the deficiencies of the cases or the lack of insurer to cover the costs.

Cost penalties may be pursued against the party if the proceeding has been issued before an informal letter of demand has been issued.

Not all litigation waits for a letter of demand – see the injunction sphere, destruction of evidence or by tactical means

Prospective defendants will also have a tactical decision to make as to whether to respond to the letter of demand.

The demand must be ethical – unethical to threaten criminal proceedings, to demand a debt from someone with no legal liability to pay, claim unreasonable or excessive costs

B. Pleadings

Documents exchanged between parties in litigation setting out the material facts upon which they rely.

i. Purpose of Pleadings

They inform the court of matters on which the decision is sort, defines the issues, limits the ambit of discovery and evidence prepared for trial, informs the other side of the way in which the claim is defended, provides record of the matters raised to prevent further litigation on the same point between the same parties.

ii. Content of Pleadings

Statement of Claim and any Counterclaim must plead any material necessary to contain the allegations pleaded. Admission of any part will entitle the plaintiff to the relief sought.

Plead initial information – who the parties are, what is the matter between them.

- plaintiff is capable of suing; defendant is capable of being sued

Only facts are pleaded, not evidence.

- In a motor vehicle accident that is the result of high speed, the material fact is negligent driving. The evidence may be the observation of a passenger of a speedometer, CCTV camera footage and forensic evidence of a skid mark.
- **Material facts are set out in the pleadings**
- **Pleadings also contained what you claim in relief – damages, interest, costs, such further or other relief as the Court deems fit**

- Evidence is set out in the particulars; if not provided, a request for particulars can be issued

If the plaintiff is pleading an agreement, the details of whether oral or written will be included in the particulars. A copy may be inspected during normal business hours or advise that the document is not available – what has become of it etc.

If the plaintiff is pleading an oral agreement, particulars may include which parties had that conversation, implied terms, breach.

iii. Formal requirements

Contained in R 14 and R 27.

Effectively, the tram tracks and header

Supreme Court of Victoria Practice Note #4.

Paragraphs are numbered, one paragraph per concept, vertical lists are accepted.

iv. Statement of Claim

Plead each element of the cause of action you are attempting to claim.

Contain relevant factual matters only, irrelevant matters are liable to be struck out

Conclusory pleadings are available where properly established facts giving rise have been

Pleadings are material facts only – not evidence

- **Pleadings are generally required in actions (matters commenced either by writ and statement of claim)**
 - Pleadings are important to the doctrine of res judicata, as **they act as a precise record of the issues raised (questions for decision), so that a party may plead res judicata if another party attempts to re-litigate the dispute between the parties**
 - If relying on statutory cause of action, **the specific legislation and relevant provision(s) need to be pleaded**
 - damages requested should also be pleaded under the section
 - interest plead should also be pursuant to s 58 SCA
- Statement of claim does not anticipate any defense

eg. for a breach of contract (failure to repay a loan)

- plead the agreement
- the essential terms
- money was lent (drawdown)
 - o in performance of obligations under agreement, the plaintiff made X available
 - o Particulars – bank transfer no XX
- money not repaid (non-repayment)
- as a result, X is now owed
 - o particulars – how that was calculated

v. Defence and set off

R 13.7(1) – Defendant must plead in the facts all grounds of Defence and reasons why the plaintiff's claim cannot stand, otherwise raise matters of fact not arising out of the statement of claim

Eg claim – A was negligent in smashing into A's car, B's defence was that he was not the driver. This needs to be specifically pleaded before trial.

Defendant should:

- admit non-contested facts;
 - o reasons for doing this - court, at all times, has the power and discretion to award costs [costs penalty imposed on party denying an allegation without proper basis
- deny facts which it positively disputes; or
- not admit the fact when the allegation is outside the knowledge of the defendant

In the trial, there is little difference between denial and non-admission in that the prosecution must need to prove all these facts.

R 13.12(3) requires the defendant, if providing facts different to the plaintiff, to plead those facts

Procedural consequence – except with leave of the court, there will be a general prohibition of introducing facts that should have been, but were not, pleaded.

If a defendant has an affirmative defense to run, it must specifically plead those defenses.

Confession and avoidance plea – admit what is put in the claim but further say that the claim is not maintainable.

eg. the def admits entry into the contract but maintains that the contract is void for illegality

- the new fact is for the defendant to prove

vi. Counterclaim

R 13.15 specifically permits the defendant to bring a counterclaim against the plaintiff, but need not be connected with the claim made by the plaintiff

These claims can be run concurrently in one trial.

In pleading a counter-claim, defendant follows the same pleading requirements as in a statement of claim. Counter-claim must plead facts sufficient to establish a cause of action.