THE CONDUCT OF LITIGATION
A SYMPOSIUM[1]

THE PANEL:
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THE STATEMENT OF CLAIM

Neil D. Maclean and C. W. Clement

When a client comes into your office and wishes to commence a lawsuit, I might suggest that the first thing you consider is whether there is any statute of limitations that forces you to quick and immediate action.

There are limitations, of course, in the Vehicles and Highway Traffic Act; in actions against a municipality. and actions against a railway. If you do not have to rush the preparation of the Statement of Claim then I might suggest that you get your client's story and cross-examine him on it. Most people favour their own case. Warn your client that suppression of evidence from his own solicitor is apt to prove costly. It is then necessary to get the story of the witnesses. Get them into your office, if possible, and get their statements. I might suggest that you have both the client and witnesses initial their statements, I have never taken statutory declarations from the clients or their witnesses. If my client needs to be tied down to his statement, I do not want him for a client. Initialling is helpful. Most of us have gone through the experience of a client who has lost his case saying, "Oh, I told my lawyer this and that, and he didn't put it in evidence."

Before you commence drawing the statement, read up some law on it. If you do this before you start the Statement then you are apt to save embarrassing situations later when you have to apply for amendments and leave.

When you are fairly well satisfied that you have the story and know, so far as possible, what your client and his witnesses are going to say, then you can start to draft the Statement. I repeat, unless there is some special reason for rushing take time over it and review it two or three times before you finally issue it.

In the course of examining the law both for and against your client's case, you should have become familiar with what will constitute the material facts that you have to prove. Those are the facts which, at this stage, become the ones on which you concentrate your attention. It is the material facts that must be pled. You may plead more than material facts but if you plead less than material facts you are going to get into difficulty at some stage. When you

[1] A panel discussion held before the Law Society of Alberta, January, 1956. Published through the courtesy of the Law Society of Alberta and the Chairman of the panel, S. W. Field, Q.C.

have become well seized of the material facts, you have reached the first stage in drawing the Statement of Claim.

The next stage I would suggest is to re-read rules 149-150 which seem to escape the attention of some pleaders. The rules read:

> 149. All pleadings shall be as brief as the nature of the case will permit.
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> 150. Every pleading shall contain and contain only a plain and concise statement, in summary form and in ordinary language, of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved.

These two rules are the only precepts that are required, aside from hard work, to draw a good Statement of Claim. As an example I have before me the Statement on which the action was founded in *Read* v. *Lyons*,[2] a case ultimately decided by the House of Lords. In that case the plaintiff was a worker in a munitions factory and there was an explosion in the factory and the plaintiff was injured.

Counsel considered that the case came within *Rylands* v. *Fletcher* and pled accordingly. The pleading is a nice application of the two rules:

> (1) The defendants were at all material times the occupiers of certain premises known as the Elstow Ordinance Factory in Elstow, in the County of Bedford;
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> (2) At the said premises the defendants carried on the manufacture or high explosive shells. To the knowledge of the defendant, high explosive shells were dangerous things;
>
> (3) The plaintiff at all material times worked in the Armaments Inspection Department at the said premises, having been directed to do so by the Minister of Labour and National Service.

Thereby was raised the contention that the plaintiff was an invitee.

> (4) On or about the 31st of August, 1942, the plaintiff in the course of her employment as aforesaid, was lawfully in a shell filling shop at the said premises when a high explosive shell exploded, whereby the plaintiff suffered injuries, loss and damage.

Out of that simple Statement of Claim arose very important litigation and that Statement contained all that was required to determine major issues in law.

Now let me observe that there was no law pled in that Statement. The rules prohibit the pleading of law. Any text dealing with the subject, Odgers for example, states that it is unnecessary to plead principles of common law or to set forth the contents of public statutes. Nevertheless to-day we find almost every Statement of Claim contains a reference, in a general way, to sundry statutes that the pleader thinks might have some bearing on the matters in issue. That is bad pleading and should not be done.

There is another point in this Statement of Claim which deserves comment: there are no immaterial facts alleged. It shows that the pleader had a clear mind, he knew precisely what it was he was dealing with and how he proposed to reach the objective. The Statement provides a fine blueprint for the presentation of his case.

Pleading immaterial facts is not necessarily fatal; it is sometimes done through carelessness, sometimes through a failure to have a complete grasp of the action. Occasionally immaterial facts are alleged with a view to colouring the action or to introducing prejudice. When this happens the right to have the offending clauses stricken from the record should be exercised.

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[2] [1947] A.C. 156 (H.L.).

DEFENCE AND THIRD-PARTY PROCEDURE

RONALD MAITLAND

A good deal of what has been said with regard to the drafting of Statements of Claim applies to Statements of Defence. Rules 149 and 150 apply to the Statement of Defence just as much as they do to the Statement of Claim.

There are two aspects of a Statement of Defence. The first is relatively easy; it is the matter of denial of allegations made in the Statement of Claim. Under the old Rules it was necessary to deny each fact in the Statement of Claim which you wished to traverse and we had long Statements of Defence, denying paragraph by paragraph, everything that appeared in the Statement of Claim. Under Rule 161 it is provided that silence of a pleading is not to be construed as an admission. The practice now is to deny the allegations in the Statement of Claim or to specify the allegations denied in one sentence.

The harder part of the Statement of Defence is to decide what positive allegations are to be made by way of an answer to the Statement of Claim. A mere denial does not allow you to allege facts which have not been pleaded. It is vital to read the law and define the issues; you will then allege the facts which will warrant the position you take in law in answer to the Statement of Claim.

Certain matters have to be pleaded under the rules. Examples are matters showing a transaction to be void or voidable, a plea of the Statute of Limitations or the Statute of Frauds. Now, everyone pleads the Contributory Negligence, the Tortfeasor's Act and the Town and Village Act. We have almost reached the point where we might as well say, "I plead all the provisions of all the Revised Statutes of Alberta and Canada, as amended." Needless to say, that is unnecessary and bad pleading.

Everyone knows there is a provision made in the rules whereby a defendant can third party another person in order to raise matters which can conveniently be dealt with at the same time, or where contribution or indemnity is claimed.

The cases in which that has most frequently arisen are automobile cases where the practice has been for each defendant to third party every other defendant with the resulting mass of pleadings. There has been an attempt made to clarify the matter but the confusion still remains. *In Hillburn* v. *Lynn*, at least this much has been decided: where there are issues of fault under s. 3 of the Contributory Negligence Act, as between the Defendants, i.e. their own fault and not vicarious responsibility, third party procedure is not necessary and the court has jurisdiction to deal with the matter without the use of a third party procedure.

Apart from that, as a matter of precaution, the practice will probably remain that you third party everybody against whom you think you may have some right of indemnity.

? (1956), 17 W.W.R. (N.S.) 15.

AFFIDAVIT ON PRODUCTION

NEIL D. MACLEAN

In regards to this question of an affidavit on production, we used to have, in every action, an order for directions which provided what steps were to be taken and an affidavit on production was invariably demanded. There is now a tendency to neglect or forget the affidavit.

The Rules are important:

> 225 At any time after the close of pleadings any party to a cause or matter may, by notice in writing, require any other party to such cause or matter to discover by affidavit the documents which are or which have been in his possession or power relating to all matters or questions in the said cause or matter, and the party so required shall within ten days after receipt of such demand, discover by affidavit the said documents, and shall subsequently produce the said documents on the examinations for discovery and at the trial of the action, and such notice shall have the same effect as a notice to produce.

The importance of an affidavit on production cannot be over-estimated. We all know that causes of action sometimes are brought to court years after the cause arose. In such a case the statements in documents made at the time the matter arose are the most important evidence in the case because all judges know that memories are fallible. They also know that a party is apt to colour his own testimony. A document which sets out the facts is always most important evidence.

There is another matter; you have to have your opponent's documents before you can properly examine for discovery. My suggestion is that in every case where documents are involved the first step after the close of pleadings is to demand an affidavit.

The affidavit should set forth what documents the party has and does not object to produce and quite often, a second schedule in which he sets out the documents which he does object to produce. As a matter of mechanics when a claim of privilege is made the relevant documents should be clamped to-gether in a file and numbered; in the affidavit you would claim privilege for the bundle of documents as numbered and to be found in the specified file.

There are many cases in which privilege should be claimed: in cases where an insurance company is involved or cases in which a railway is involved. If the other party wishes to question the privilege claimed he can go to a judge and have the latter examine the documents.

What documents are to be produced? Every counsel is expected to be fair. I feel that we all exercise a judgment we should not exercise in excluding documents from the affidavit on the grounds of irrelevance. The Rules provide that the inclusion of a document in the affidavit is not an admission of relevance. The safest approach would be for counsel to mention in his affidavit any document which may possibly be relevant. It is the opinion of the Panel that letters written without prejudice are material and should be included in the affidavit although privilege should be claimed.

EXAMINATION FOR DISCOVERY

C. W. Clement and Ronald Martland

Examination for discovery is one of the most important phases in litigation and counsel should have a clear idea of the objects and scope of the examination. The objects are stated neatly in the case of *McLean* v.*C.P.R.*[4] by Mr. Justice Beck:

> The purpose of an examination for discovery [is] two-fold; first to obtain discovery or information as to the facts and second to obtain admissions which may be used in evidence against a party or whose officer is examined.

There are your primary objectives.

The scope of examination was touched upon by Mr. Justice Clinton Ford in *Ross Estate* v. *Scarlett*[5] where he held that examination for discovery is both in substance and in form in the nature of a cross-examination but limited to the issues raised in the pleadings. The object is to enable the litigating parties to ascertain if the plaintiff has a good cause of action or the defendant such a defence as would render further litigation unless. To effect this purpose the examination should, so far as the issues raised in the pleadings are concerned, be as searching and as thorough as the party's cross-examination of the witness at trial could be. There is no right to go into questions of character or credit unless such evidence is directly in issue.

Now, having that in mind, and remembering that a case can be won or lost by the conduct of the Examination it is my view that the preparation for discovery should be as thorough as it would be for the trial itself. You should become thoroughly seized with your case and that of your opponent. Have in mind the material facts so that you may, by a suitably worded question, obtain admissions which will ease your burden of proving the material facts at trial.

The other aspect of examination: finding out what the plaintiff's case is, is in the nature of a cross-examination as Mr. Justice Clinton Ford pointed out. Take full advantage of this aspect; try to have your opponent commit himself to his story, precisely, not in vague generalities. You should not leave him the opportunity for reconsidering what he has said. You should not give him the opportunity of shifting his ground at trial without being able to bring him right back to what was said at discovery.

As to objections: objections should not be taken unless there is sound ground for them. It should be clear that opposing counsel is exceeding his limits. You will not unnecessarily prejudice your client's case by failing to object.

As to re-examination: there may be some value at times. Your client may have given a short answer which in justice and truth ought to have had some qualification or explanation. If you leave it unqualified and attempt to have it explained at trial your client will be in difficulty for not having given the explanation in the first place. A situation of this type is a legitimate use of re-examination.

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[4] (1916), 10 W.W.R. 949.

[5] [1946] 3 W.W.R. 533.

Examination of the officer of a corporation requires special considerations. Don't select a man who knows nothing about the subject matter of the suit as there will be constant adjournments while he seeks the information. Select a man of senior status in the company; he should feel himself in a position to answer on behalf of the company. He should make it his duty to obtain all the information surrounding the circumstances from the employees who have knowledge arising out of their employment. The authorities say he has that duty. Formerly there was a practice of examining the officer of a corporation and asking him if he accepted, on behalf of the corporation, information which he had received. The Alberta courts have decided in *Yanik* v. *Conibear*[6] that the old form of question was improper. The officer is not obligated to commit himself to accepting or rejecting the information which he has received unless, of course, it is information which is properly corporate knowledge. His position otherwise is this; "I have obtained that information from the employee; this is the information I have." He cannot be obligated to go on from there.

JURY TRIALS

Neil D. Maclean

The Rules in regard to jury trial are 277 and 278;

277. In actions of slander, libel, false imprisonment, malicious prosecution, seduction or breach of promise of marriage, and in actions founded upon any other contract or tort in which the amount claimed exceeds $1,000, and in actions for the recovery of real property, if either party signify his desire that the action be tried with a jury the action shall, subject to the next following rule, on application to a judge be directed to be tried with a jury.

278. If on application it is made to appear that the trial of any action included in the next preceding rule may involve a prolonged examination of documents or accounts or a scientific or local investigation which, in the opinion of a judge, cannot conveniently be made by a jury, such action may be directed to be tried without a jury, whether it has been previously directed to be tried by a jury or not.

I can remember that forty years ago practically every damage action was tried with a jury. I don't know of any civil action that has been tried with a jury in the last three to five years, but the Rule remains.

May I cite the disadvantages: it's expensive, you must put up the fees and they usually run from $300 to $500. There has been no provision for civil jury cases in the assignment lists for, I would say, five years and an assignment would have to be made. Juries are uncertain and they usually give answers which can be construed in two or three different days. They sometimes refuse to answer at all. Often a verdict would go to appeal and then be sent back because the court of appeal could not discover the meaning of the verdict. A jury case is time consuming. These reasons and the uncertainty of a jury trial show why jury trials have fallen into disuse.

There are some advantages. It is generally recognized that a jury verdict is less likely to be upset on appeal than is the fact finding of a judge. In certain types of actions there is an advantage in jury trials. I might refer to actions against a railroad as an example. As a solicitor for a railway I have defended in a great many jury cases, and have won only one.

[6] [1944] 1 W.W.R. 548, aff'd [1944] 3 W.W.R. 395.

BRIEF FOR TRIAL

NEIL D. MACLEAN

A trial brief should allow you to have practically anything you may need close at hand. During the course of a trial you do not have time to locate documents and refresh your memory as to the statements made by witnesses. I have seen many trials in which confusion has been the result of a failure to keep all relevant material at hand.

The contents of the brief should comprise; all the pleadings, the examination for Discovery, all the applications including particulars, a brief on the law, the authorities and statutes. I also think it is advisable to have the statements of witnesses bound up in your brief. They may not say exactly what was said in their statements but you should have the essence of their statements in your hands and you can tax for witnesses whom you have briefed.

It is most important to have everything which you are to use at the trial. Board orders, copies of by-laws are examples. You do not have much time to think at trial, and there is a danger of missing something if you do not have all the material at hand.

AMENDMENTS

RONALD MAITLAND

Amendments are frequently necessary because you may ascertain additional facts after pleadings are closed or your researches may reveal additional points of law in relation to which you must establish a foundation in your pleadings. What I am about to say is a counsel of perfection, and I cannot claim to have followed it throughout. There is a distinct advantage to making amendments early. One is that there may be a danger of the Statute of Limitations running and barring your amendment. Prompt amendments of the pleadings means that the judge has a complete record before him at the opening of the trial. At least some judges read the records before they go onto the Bench. If you should require further Examination for Discovery a prompt amendment will put you into a position from which you can seek further examination. Your opponent cannot seek a postponement on the basis of surprise if you have made your amendment early.

USE OF EXAMINATION FOR DISCOVERY AT TRIAL

C. W. CLEMENT

I have already suggested the two objects of examination for Discovery, one— to secure admissions, the other— a cross-examination to determine what your opponent will say at trial. Examinations are used by you in proving your own case by reading in your opponent's admissions.

There is at times an excess of enthusiasm about reading in questions and answers. It is to be kept in mind that when you have read into record parts of the Examination you are bound by them. Chief Justice Harvey in *Hayhurst* v.

Innisfail[7] has made clear the principle with which we should all be familiar:

> Under the Rule a party need not put in more of the examination than he wishes and subject to the right of the judge to have read any part so connected with what is put in as being necessary to make its meaning clear he need not be affected by any part of the examination other than serves his purpose, but when he puts in evidence any portion of such examination it becomes evidence and requires no rule to make it tell against him if it has that effect. He must take the burden, if any there be, with the benefit he receives.

I would suggest that in reviewing your examination for discovery in preparation for trial you should weigh and consider each question and answer at least twice before deciding whether or not you will read it into the record.

On occasion counsel has entirely misconceived what a Discovery is and the purpose of it and has put in questions and answers which he felt were so ridiculous that they would show to the court that the other side could not be believed. In putting in such questions and answers counsel adopted them, he was bound by them as part of his case. The results were disastrous. Put in only useful admissions. And if a useful admission is also harmful prove the fact by oral testimony.

In connection with the use of the Examination for Discovery in cross-examination the most important feature is to know the Examination thoroughly so that you can, without delay, find the inconsistent question and answer. The force of cross-examination is dissipated if you have to thumb through fifteen or twenty pages before you find the material with which you wish to confront the witness. I find it useful to prepare an index of cross-examination, not only of the opponent's witness but also of my own.

The question has been raised as to the phrasing of a question so as to obtain an unequivocal answer. As an example of this situation we might refer to a question for which we want a "yes or no" answer. "Did you sign this document?" You want a simple answer and the witness will not give it. If you cannot get a straightforward, unqualified answer you arrive at a position which is unsettled in Alberta. You tender to the court the question and only that part of the answer which you wish to put in. Some judges say you are entitled to a simple answer to a simple question. Others follow Chief Justice Harvey's reasoning and say that you must take the good with the bad. The point is not settled although it should be.

PRESENTATION OF THE CASE

RONALD MARTLAND

You must have prepared your plan of attack beforehand as you want to put your material in the order which is best able to enable the judge to understand your case. There should be a logical plan. In many instances it will be chronological sequence, particularly if it is a case in which there are many documents involved. In regard to witnesses it has been suggested frequently, and it seems sound, that it is desirable to start and finish strong, leaving the doubtful, shaky, witnesses in the middle. You may also reveal some of the disadvantageous material yourself rather than leave it to your opponent, if you feel that a witness will be discredited by the revelation on cross-examination.

[7] [1935] 1 W.W.R. 385, at p. 389.

It is a great help to have all the documents you plan to tender kept separately for the purpose. Also remember to have copies of all documents put in as exhibits. I find it helpful to have a schedule prepared in advance in relation to exhibits. If there is a case in which there will be frequent reference to statute law it is helpful to have a copy of the relevant statute available to the judge. With regard to the submission of legal authorities it is, again, helpful to have a typewritten list available for the judge. There is much less opportunity for error when such a list is available. As to the Examination for Discovery there seems to be a practice of putting in the answers at the end of the presentation for the plaintiff or defendant. I think that in some cases it is a sound idea when you have good admissions which summarize your case to put them in first, and begin with them as your strong evidence.

CROSS-EXAMINATION

NEIL D. MACLEAN

Cross-examination can either be the most valuable aid to your case or it can be a disaster. You must realize that your opponent's witness will be biased against you. It is wrong to believe that every witness against you is a criminal who should be imprisoned. Some are decent people who may be unconsciously biased. One of the best ways to cross-examine is to confront the witness with an inconsistent statement given on previous occasion. Usually you can find such a statement. In automobile cases there is often a police court procedure which took place some time previously. If the witness has not been properly briefed he will probably have forgotten what he said on that occasion. Then there are inquests at which witnesses have given evidence and of course, the Examination for Discovery. It is a mistake to spring up and ask the witness if on such an occasion he had been asked this question and given these answers. He will usually find some reason for the variance in his answers. If you have inconsistent statements arrange your questions so that the witness cannot qualify or explain away the earlier statement.

Clarence Darrow, a defence lawyer for almost fifty years, said that he always tried to get a little bit of favourable evidence from every witness that came on the stand. It is only once or twice in a life-time that you can break a witness on cross-examination. It has happened but it is uncommon and the best you can hope to do is to try and get some answers that may help your case or hurt that of your opponent.

Nearly all the texts on cross-examination lay down as an imperative rule that you should not ask a question to which you do not know the answer if an adverse answer would hurt your case. Failure to observe that precept is the commonest fault of the cross-examiner.

RE-EXAMINATION AND REBUTTAL

C. W. CLEMENT

Re-examination is a limited field. It is and ought to be confined to the explanation of matters which have arisen on cross-examination. Re-examination is not the time to introduce fresh evidence, it is the time to qualify and explain

otherwise damaging statements made during cross-examination. Counsel should object to the introduction of new evidence on re-examination. The judge may allow the introduction but the objecting counsel will be given the opportunity to cross-examine on the new material.

Rebuttal is simply what the name implies, a rebuttal of the defendant's case. You can bring in evidence to meet anything said in the course of the defendant's case. It is not a place to bring in evidence in chief. Don't reserve a strong witness for rebuttal, he may not be allowed to testify. His evidence should have been given in chief not in rebuttal.

There is a decision in England which carries to a logical extreme the view that rebuttal evidence cannot bring forth fresh evidence. When there is a claim and counter-claim arising out of identical issues, e.g. the typical collision suit, it has been held that there cannot be any fresh evidence given in rebuttal, so there is no right of rebuttal.

In a case in which the plaintiff is relying on a statutory presumption, such as an action brought by a pedestrian other evidence of negligence is, in the opinion of the Panel, fresh evidence and should be introduced in chief and not in rebuttal.

OBJECTIONS AND NON-SUIT PROCEDURE

RONALD MARTLAND

It is the mark of a great counsel to know when to object. It is the skill to sort out what is important from what is unimportant. I am of the opinion that objections should be strictly limited to matters which are of importance to your case. Frequent objections are disconcerting and particularly if there is a jury there is an inference that you are afraid to have the question answered. Stick to the objection and obtain a ruling rather than permit the answer to be heard subject to the objection when, of course, the answer has been given.

Nonsuits are dangerous in this province when you consider the effect of the *Hayhurst* v. *Innisfail*[8] decision because if you obtain the nonsuit and there is an appeal the appeal court will consider the evidence given at the trial, that is, only the plaintiff's evidence as you did not lead any. Unless you are absolutely convinced that no case has been made out or you fear that your witnesses will assist the plaintiff's case you should not seek a non-suit. If it is forced upon you then it should be made clear on the record that you have not asked for the non-suit and it is not your decision. In such a case I do not think the *Hayhurst* case would prevent your obtaining a new trial. The practice as to counsel seeking a non-suit undertaking not to call evidence is not uniform. There is English authority requiring counsel to undertake not to produce evidence after the motion for a non-suit.

[8] *Ibid.*