

A LAWYER'S GUIDE TO POWERFUL PLEADINGS

Statements of Defence: Writing Clearly and Effectively

Graham Smith
January 16, 2018

Writing Clearly and Effectively – Statements of Defence

Does the quality of writing really matter as long as the *Rules* are met?

Most tips for effective writing of defences may seem obvious or common sense, but it is not at all uncommon that drafters of pleadings – including experienced counsel – are beholden to one model they have observed from a mentor or a precedent, and thus to the writing habits and style of that one model. Often, that model uses phrases and styles that are archaic, unnecessary and distracting, diminishing the effectiveness of the pleading. This brief paper offers tips for effective, clear writing of statements of defence. It does not focus on the legal requirements for statements of defence such as the rules for pleading in the *Rules of Civil Procedure*,¹ nor does it focus on the substantive law as to what defences must be pleaded in order to be relied on (e.g., limitation periods). Rather, it attempts to offer suggestions on *how to express* the defence of your case in your statement of defence, and how to choose from the available modes of expression.

Why does the quality of writing really matter in a statement of defence? The statement of defence is the seminal document in the defence of the case, and it plays a significant part in setting the tone for the defence of the case throughout – including the first impression of the credibility and plausibility of the defence case. It is accordingly a key *strategic document* and not simply a formality. As defence counsel we should consider every element of the statement of defence in the context of its ultimate potential uses and its audience, with emphasis on the ultimate potential audience: the judge trying the case at trial or deciding a hearing at a pre-trial

¹ It is important, however, to appreciate that poor writing can “bleed over” into non-compliance with the pleading requirements of the *Rules*. Illustrations of this can be seen in the case excerpts in the accompanying PowerPoint.

stage. It behooves us, once we have satisfied ourselves that the minimum legal requirements for the pleading have been met, to create from our pleadings the best first impression of our case that we can, and to maximize any strategic advantage that may arise from effective pleadings in all stages of the case.

So what is conducive, and what isn't, to clear, effective writing of a statement of defence?

Guiding Principle

In many ways, of course, clear and effective writing for a statement of defence turns on the same principles for clear and effective writing more generally. These include the well-known 'rules' of point-first writing, conciseness, use of action words instead of passive and avoidance of verbiage. It is presumptuous for anyone to proffer that his or her approach is '*the*' style and mode of writing that you should adopt in all your statements of defence. For one thing, presumably most counsel would not have been able to become lawyers without having a decent proficiency in writing. For another, even the best writer of pleadings will adopt different styles depending on his or her ultimate strategy in the particular case. Further, every idea can be expressed in a multitude of ways: this is the very nature, beauty and short-coming of language.

So, in my view there are few universal absolutes in terms of writing an effective statement of defence. Nonetheless, I strongly believe that the single most important message is to keep in mind, for every sentence (indeed for every word) of your pleading, the ultimate goals you want to achieve, and dispassionately ask yourself if your choice of language and style and tone has advanced those goals, be they to aggressively dispute the claim and call the plaintiff a liar, to show there are subtleties the plaintiff is conveniently omitting, to tilt the first impression of the

real sympathies in the case, or to take a high-road educative or corrective approach. Every sentence should be written, reviewed and edited in the context of the relevant audience and how the defence will be used in the case. Think ahead, and picture the various scenarios in which the statement of defence will or might play a role (e.g.: the judge's first introduction to the case, discovery, motions, trial). Like all steps you take in a case, the guiding principle is to keep the ultimate, long view at the forefront and ensure everything you do is designed as best you can to advance your ultimate objective in the case.

Tilting (or at least levelling) the playing field

In a significant way, the plaintiff has a real 'starting advantage.' The plaintiff gets to write the first chapter and the title of the book. The statement of claim will usually allege all kinds of wrongdoing by the defendant, bad motivation or intention on the defendant's part, and unjust consequences to the plaintiff. There may be a natural inclination to infer the plaintiff wouldn't be claiming if there weren't at least some basis for the claim (some fire behind the smoke). The statement of defence is the defendant's first chance to re-tilt or level the playing field, to show who has the real 'ownership' of the case, to show in a credible way that the plaintiff has overreached or indeed concocted a case, and that it is the defendant that has the plausible story. Remember, the pleadings are generally the vehicle of first impression for the judge, and setting the right strategic, credible tone is important.

How do you re-tilt the field? The choices for the tone for the statement of defence include: aggressive and hostile counter-punching; bland and passive denial of the allegations and statement of the actual facts; firm but respectful disagreement with the characterization of events and/or legal consequences alleged by the plaintiff (politely 'educating' the Court that the plaintiff

has missed the point); or a mixture of these depending on which element of the statement of claim is being responded to.

Generally, in my view, little is accomplished by an aggressive and hostile tone, even though many defendant clients will want to see that. The hyperbolic tone may serve to unnecessarily aggravate the other side, and indeed convey to the Court a sense of exaggeration, irrationality or unreasonableness on the defendant's part (possibly feeding in to the plaintiff's strategy) and enhance the reader's first impression of the plausibility of the plaintiff's claim. As plaintiff counsel, I usually delight in that kind of defence, because it is much easier to attack a case made on an overstated, hyperbolic defence than a more educative one.

Above all, in my view, defence counsel should strive to convey a sense of 'ownership' of the case; that is, to convey a sense that the defendant is the side with the real grasp of the events and the applicable legal theory, and that the Court can rely on the defence to present the rational, more helpful case. The role a statement of defence plays in this objective will vary from case to case, as opposed to, say, the *always* crucial presentation of evidence and argument at a trial or other hearing, but keeping this 'ownership' objective in mind will help you choose your wording and the tone in your pleading. Generally, a confident, straightforward mode of writing, with the material facts clearly expressed, without hyperbole will help to achieve this.

Take the example that your client Jones Co. has been sued for the failure to deliver goods that have been paid for, and the dispute is over which party bore the risk of non-delivery, where the formal terms of sale did not allocate that risk. In defending Jones Co. from the assertion that it had assumed the risk of non-delivery of goods it was selling, one common mode of expressing the core of your case runs like this:

“The Defendant states, and the fact is, that it was an express or implied term of the contract between the parties that the goods would be at the risk of the Plaintiff once they left the Defendant’s premises.”

This is a passive and fairly legalistic mode of making the key point. It probably meets the minimum standards under the *Rules*, and a judge will keep an open mind that there may be evidence to lead to the conclusion pleaded, but the defendant has foregone the opportunity to ‘own’ this aspect of the case from the get-go. A more ‘field-levelling’ alternative might be:

“The Defendant does not bear the risk of non-delivery. The Plaintiff never sought any term putting the risk of non-delivery risk on the Defendant, and the contract of sale nowhere provides for the risk of non-delivery to be on the defendant. In fact, given the circumstances of the transaction described above, it was an implied term that the Plaintiff bore the risk of non-delivery.”

Active versus passive expression

Usually the fundamental rule of effective writing prevails in the pleading context: use the active voice (e.g.: “The Chair then vetoed the resolution without any basis.” *versus* “Without any basis, the resolution was then vetoed by the Chair.”) But this should still be a conscious choice by the writer: sometimes you may want the passive mode: e.g., to reframe the consequence of, or responsibility for, something (e.g.: “300 redundant positions were required to be eliminated.” *versus* “The defendant then eliminated 300 jobs.”)

Overstating

Some counsel will almost invariably use every opportunity in the statement of defence to attempt to impugn the integrity, honesty and motives of the plaintiff. I believe that at best this creates a first impression of ‘a pox on all your houses’. At worst, it suggests ‘thou doth protest too much’ and creates an unnecessarily high bar for the defendant. Indeed, the risk in using hyperbole, exaggeration and dramatic denials and accusations is real. This mode of expression can impair

the initial impression of the plausibility of your case, your client's reasonableness and the implausibility of the other side's case. It can also open up you and your client to a degree of embarrassment, and potentially impaired plausibility, in argument and/or cross-examination. This is potentially more of a danger in a jury trial, where a jury may be considerably less familiar with what a pleading is or the role of counsel in preparing a pleading and thus not appreciate the relatively little input of most clients into the drafting.

Using 'legalese' and formalistic language

Sometimes 'magic' words are necessary, or at least advisable, to ensure there is no ambiguity that a particular doctrine or defence is being asserted (e.g., expiry of a limitation period, *estoppel*, waiver, contributory negligence, *ex turpi causa*, *volenti non fit injuria*, etc.). When this is the case, and even more generally where you want to state the legal consequences of the facts, it makes for a more effective read to set out the facts that support such a legal principle (setting out the intuitive case for your position) and then say something like:

“Accordingly, the plaintiff is estopped from asserting its claim for X.”

or

“The Plaintiff is accordingly disentitled to any claim by virtue of the doctrine of *ex turpi causa*.”

Otherwise, however, using what passes for 'legalese' where plainer English would suffice, does not make for the most persuasive, plausible pleading. A good check is, if you wouldn't speak or write this way in real life, is it really helpful to write that way here? As a reader, what are you more likely to easily absorb?

For example:

“In order to” ⇒ Can you use “to”?

“Takes the position that” ⇒ Can you use “claims”?

“The aforesaid meeting” ⇒ Can you use the same or similar words used earlier (e.g., “the September 20 meeting”) or a defined term?

Likewise, in telling the story, it makes for a much more natural read to use real names instead of “Plaintiff”, “Defendant”, “Third Party”, “Co-Defendant”, “Defendant to the Third Party Claim”, etc. Once the party has been identified early on, and if need be defined as their actual name, you can simply use their actual name. (Consider though that sometimes you may *want* to depersonalize the subject and refer to “the Plaintiff”, etc.).

Template verbiage

. There is no magic in most ‘template’ verbiage. I believe template verbiage is usually employed out of habit, ignorance, fear of writing plainly, or robotic adherence to a template.² An example of classic template verbiage is:

“The Defendant pleads that Smith was not qualified to perform the services provided.”

“The Defendant states that Smith was not qualified to perform the services provided.”

Or, my favourite:

“The Defendant pleads, and the fact is, that Smith was not qualified to perform the services provided.

Firstly, the judge *knows* the defendant is pleading the point. That’s what a statement of defence is. Why say that? Secondly, this formatting takes away from the more effective, more powerful power statement, such as:

² Using template language unnecessarily may even be dangerous. Although not a pleadings example, I once received an affidavit from the opposing counsel which included the template verbiage “I swear this Affidavit in support of a motion for summary judgment and for no improper purpose.” Except that it actually said “and for an improper purpose”. The statement is not even necessary in the first place.

“Smith, however, was not qualified to perform the services he promised to provide.”

Worse, the commonly repeated use of introductory template phrases at the beginning of each paragraph or even each sentence (such as “The Defendant pleads that...”) is distracting, causes glazing over and shows less ‘ownership’ of the case than the plain statement.

Redundant words are usually not helpful: e.g.: “binding contract”, “mandatory requirement”, “suddenly without warning”, “later in time”, “at this point in time”. Consider if it is more powerful, and still makes the point, to simply say “contract,” “requirement,” “suddenly,” “later,” “at the time.”

Defined terms

The ever-expanding use of definitions by solicitors in transaction documents has crept into litigation documents. This is especially true in the Commercial List. More than a few definitions, however, make for a very awkward and unnatural read, requiring extra thought and work. So, ask yourself if a defined term is necessary and helpful. Just as importantly, make every defined term intuitive: the use of multiple acronyms makes for a difficult read, especially if they are similar. For example:

“Jones Co. (Canada) Rotor Manufacturing Inc. (“**JCRMI**”)” ⇒ Consider using:
“**Jonesco Canada**”

Once you’ve defined a term, be careful to consistently use that definition. Often the subject is in fact referenced later in a pleading but the defined term is not used: this creates ambiguity and lack of clarity.

If the statement of claim has used definitions, which it likely has, be careful in simply adopting those *holus bolus*. Are they intuitive and helpful in telling your story? Has the plaintiff snuck in

a qualitative aspect to a definition that is not a fair characterization (e.g., “the Late-delivered Goods”)? Has the plaintiff been accurate or sloppy in using defined terms for a group of companies, or a “business,” that is not *per se* a relevant legal entity? Was that on purpose to attempt to avoid legal entity distinctions? You may not want to buy into the definition so that plaintiff has used. If they are fair definitions, though, and if using the plaintiff’s definitions would help the judge grasp your case, you should use them.

Precision

I do not see the point in fudging dates unless you have to because you don’t have the precise dates yet or it is a deliberate decision that makes for a more natural, easier read. Why start with the ambiguous lead-in when you don’t need to? For example, what we often see is:

“On or about August 30, 2015, the parties met and discussed the services to be performed.”

Or, even worse:

“The Defendant states that and the fact is that on or about August 30, 2015, the parties met and discussed the services to be performed.”

Do you know the date? If so, say it (“On August 30, 2015...”) and own the case. Don’t be insecure. If it isn’t known with precision, try:

“About August 30, 2015,” or “Towards the end of August 2015” or even “Following the first meeting, the parties again met to discuss the services to be performed.”

Alternative Defences

Judges are well versed in the legal concept that a defendant may legitimately assert alternative – even inconsistent – defences. It is nothing to be embarrassed about in your pleading if that is

helpful to your client's case. However, be strategic in pleading these. Often, alternative defences are mashed together and convey a sense of "throw it against the wall and see what sticks." For example:

"The defendant did not enter into a contract with the plaintiff, and in the alternative, if the defendant did enter into a contract with the plaintiff, there was no consideration, and in the further alternative it is unenforceable for duress and/or is unconscionable."

The alternatives may well have potential substance, and you may want to cover the bases by pleading all these things, but it is important to present them so that they seem in first instance plausible and not unthinking boilerplate. How about, after presenting the compelling factual story:

"Accordingly, the Plaintiff and Defendant never agreed on terms and no contract was formed.

In any event, if in law the parties are found to have agreed on terms that would otherwise constitute a contract in law, there was no consideration flowing to the Defendant and therefore no enforceable contract.

Further, even if there was an otherwise enforceable contract between the parties, the terms were unconscionable and the purported contract is not enforceable against the Defendant."

Do headings help?

Consider if using headings helps the judge to understand your story, tilts the table in your favour, or shows ownership of the case. Do not feel compelled to use the plaintiff's headings or organization, especially if you have a more helpful organization. Using headings can help show your ownership of the case. They can highlight the important elements of the theme.

Check for error and review as an objective audience

This sounds basic, and probably is: review your pleading carefully, preferably after having put it aside for a day or so. Avoid all typos, missing “nots”, unintended double negatives³ and the incredibly oft-seen mix-up of “plaintiff” and “defendant.” Have you overstated anything? Have you proofread every word? Are your quotes from documents exactly correct? Avoid the embarrassment of your client (and you) being faced with mistakes or overstatements.

Above all, try to sit back and review your statement of defence with a judge’s eye. Assume that, at least prior to a trial or hearing, it will be read fairly quickly and only once: is there anything that diverts from a plain and clear read?

³ Even intended double negatives do not make for an effortless read.