Pleading Causation

The Hon. Justice John K Bond

Introduction

[1] Pleadings are a sequence of formal documents, prepared in compliance with certain procedural rules, by which parties to civil litigation explain to each other and to the court what the dispute between them is about.

[2] If they are prepared properly, they will promote the possibility that the resolution of the dispute by the court will occur in a manner which is both –

(a) efficient (because the parties will know what the matters in issue are and will be able to focus their efforts accordingly); and

(b) fair (because the parties will know what is coming at trial and should not be surprised by what happens there).

[3] And although it is but an elaboration on the twin themes of efficiency and fairness, it is by reference to the pleadings that a court determines:

(a) what documents need to be discovered by compulsory process before trial;

(b) what evidence is admissible at trial;

(c) what issues can be argued at the conclusion of the trial;

(d) what matters can be raised on appeal; and

(e) the extent to which the judgment of the court binds the parties, so as to prevent them from relitigating matters in future.

[4] Not all pleadings are created equally. Some are so obscure that a judge will read to the end but still not really know what the party's case is about. Some are so long and convoluted that a judge will not want to attempt to read to the end. As Martin J observed about an unsatisfactory pleading in *Pinehurst Nominees Pty Ltd v Coeur De Lion Investments Pty Ltd* [2012] QSC 314 at [29]:

> "… Neither the opposing party nor the court should have to wade through a series of unconnected assertions searching for the issues. To paraphrase an illuminating statement made elsewhere judges are not like pigs, hunting for truffles in pleadings."

[5] And some pleadings are so deficient that a case which could have been prosecuted (or defended) expeditiously to success dies the death of a thousand cuts in interlocutory application hell.

[6] One particularly troublesome area is the manner by which litigants plead something which asserts a causation hypothesis. The purpose of this paper is to develop some thoughts as to the principles which should inform the proper pleading of a causation hypothesis, with a view to assisting pleaders to avoid some common problems.

The golden rules of pleading

[7] The twin golden rules of pleading are:

(a) Your pleading must evidence clarity of legal analysis and

(b) Your pleading must evidence clarity of presentation.

[8] The former occurs when the pleader has a clear understanding of the elements of the cause(s) of action or of the base(s) of defence that are to be expressed in the pleading. The criticality of the performance of the appropriate legal analysis which leads to that understanding cannot be overstated.

[9] The latter occurs when the pleader has taken the time to ensure that, having done the requisite legal analysis, the elements of the cause(s) of action or of the base(s) of defence have been articulated in writing in a way which is both –

(a) lawful (in the sense that the presentation has obeyed the applicable mandatory procedural rules); and

(b) persuasive (in the sense that that the presentation is organised, efficient and comprehensible to the reader).

[10] Let me explain how and why that is so.

Clarity of legal analysis and causation

[11] It is a trite proposition that pleaders must know and understand the substantive law which is applicable to the proper analysis of their client's rights. Without doing so they cannot hope to be able to plead the material facts which will establish their client's rights.

[12] Of particular relevance to the subject matter of this paper is the fact that all of the most common causes of action by which a claimant can assert an entitlement to the recovery of a pecuniary remedy involve the assertion of a causation hypothesis. And implicit in the pecuniary remedy which many plaintiffs wish to assert is the establishment of some form of counterfactual.[1] The present point is that the substantive law is not necessarily the same either in relation to the nature of what is necessary to establish the requisite causation, or in what type of counterfactual might be relevant or appropriate to a pleading.

[13] It is not the function of this paper to examine the substantive law on these issues in any detail. It will suffice merely to describe the considerations which should be examined by the pleader in each case.

[14] We all know that the law of contract confers an entitlement to recover damages for breach of contract on a contracting party who has been injured by the other contracting party's breach of contract. The law of contract also tells us that where a party sustains a loss by reason of a breach of contract, that party is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.[2] The causation hypothesis is that the breach of contract caused the claimed loss. The measure of damages depends upon establishing the counterfactual that the plaintiff would have been in a better position had the contract been performed according to its terms, and then measuring the extent of the difference between that position and the position in which the plaintiff found itself because of the breach.[3]

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1 The Macquarie Dictionary defines the noun "counterfactual" as "a conditional statement, the first clause of which expresses something contrary to fact, as: *if I had known*."

2 *Robsinson v Harman* (1848) 1 Exch 850 at 855, approved in *Commonwealth of Australia v Amann Aviation Pty Ltd* (1991) 174 CLR 64 per Mason CJ and Dawson J at 80, Brennan J at 99, Deane J at 117, Toohey J at 134, Gaudron J at 148-9 and McHugh J at 161.

3 *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272 at 286; *Clark v Macourt* (2013) 253 CLR 1 per Hayne J at 6 and 8, Crennan and Bell JJ at 11-12, Gageler J at 19 and Keane J at 30-32.

[15] Some complexity might be introduced where the difference between the two positions is that in the former position, the plaintiff would have had a valuable commercial opportunity and in the latter position the plaintiff does not. Then the measure would be the value of the lost opportunity. Where what has been lost is a commercial opportunity of some value (not being a negligible value), the value of that lost opportunity is to be ascertained by reference to hypotheses and possibilities which, though they were speculative and therefore not capable of proof on the balance of probabilities, could be evaluated as a matter of informed estimation.[4]

[16] In order to be able to plead a case which claims damages for breach of contract, one would have to understand at least those propositions.

[17] But one would also have to identify and consider the applicability to the circumstances under consideration of those aspects of the substantive law which inform the determination of causation and measure of damages in contract, including foreseeability and remoteness.

[18] Sometimes statute law will be relevant to a contract case. Take the case of breach of a contract which imposed a duty on party "A" to exercise reasonable care in the respect of the protection of party "B" from harm. In such a case it would be necessary to consider the impact of the *Civil Liability Act 2003* (Qld) on the cause of action, that statute containing important provisions concerning causation, foreseeability, and onus of proof.[5]

[19] Similarly, the law of tort confers an entitlement to recover damages on a person harmed by another person's tort. The law of tort tells us that the injured party is entitled to be compensated by an award against the tortfeasor in a sum which, so far as money can do so, will put that party in the same position as he or she would have been in if the tort had not been committed.[6] The causation hypothesis is that the tortfeasor's conduct caused the loss. The measure of damages depends on identifying the extent to which the plaintiff is worse off by reason of the tort, which turns at least as a matter of logic on a comparison between a counterfactual (namely the position in which the plaintiff would have been had the tort not occurred) and the factual (the position in which the plaintiff found itself because of the tort).[7] Notably, the *Civil Liability Act 2003* (Qld) often applies in relation to tort claims.

[20] One of the most common causes of action in modern commercial litigation is the cause of action under s 236 of the *Australian Consumer Law* to recover loss or damage suffered because of another person's misleading and deceptive conduct in contravention of s 18 of the *Australian Consumer Law*. The causation hypothesis is that the claimant suffered loss or damage "because of" the wrongdoer's contravening conduct. The measure of damages depends on identifying the extent to which the consumer is worse off because of the contravening conduct, which turns, at least as a matter of logic, on a comparison between a counterfactual (namely the position in which the consumer would have been had the

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4 *Berry v CCL Secure Pty Ltd* (2020) 94 ALJR 715 at [32] per Bell, Keane and Nettle JJ, citing relevant passages from *Malec v JC Hutton Pty Ltd* (1990) 169 CLR 638; *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 and *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332.

5 ss 9, 10, 11 and 12.

6 *Haines v Bendall* (1991) 172 CLR 60 at 63 per Mason CJ, Dawson, Toohey and Gaudron JJ and *Amaca Pty Ltd v Latz* (2018) 264 CLR 505 per Kiefel CJ and Keane J at [41] and Bell, Gageler, Nettle, Gordon and Edelman JJ at [87].

7 *Malec v JC Hutton Pty Ltd* (1990) 169 CLR 638 at 639.

contravening conduct not occurred) and the factual (the position in which the consumer found itself because of the contravening conduct).[8]

[21] Of course, the considerations which I have just mentioned are as significant for a defendant as they are for a plaintiff. In the first place is that so because the defendant will put itself in the position of being able to analyse the plaintiff's case properly and so to determine where weaknesses may be found. But, importantly, it may be that the defendant itself must assert a causation hypothesis, and it might be a causation hypothesis which asserts a particular counterfactual.

[22] For an important example of such a case, regard should be had to the High Court decision of *Berry v CCL Secure Pty Ltd* (2020) 94 ALJR 715.

(a) That case concerned an agency agreement under which either party could terminate by giving 30 days' written notice on or after the "expiry date", expressed in terms that "the agreement remains valid until 30th June, 2008 and will be automatically renewed for further terms every two years unless terminated as per the Termination clauses."

(b) The respondent misled the appellant into signing a letter of termination, the appellant's expectation being that the termination was just an administrative act and that the agency arrangement would nevertheless continue.

(c) The appellant sued for damages under s 82 of the *Trade Practices Act*, each party proceeding on the basis that, if the respondent were found to have engaged in misleading or deceptive conduct contrary to s 52, the amount recoverable depended on the commissions that would have been payable had the termination letter not been signed in reliance on the respondent's wrongful conduct.

(d) The appellant contended that, but for being tricked into signing the termination letter, the agency agreement would have continued indefinitely or at least until June 2010 when the respondent terminated all of its other agency agreements after public disclosure of bribery allegations. The respondent countered that it would have terminated the agency agreement lawfully by giving notice expiring on 30 June 2008.

(e) Both sides, in other words, were advancing competing counterfactual propositions.

(f) The two judgments in the case (on the one hand that of Bell, Keane and Nettle JJ, and on the other, that of Gageler and Edelman JJ) bear careful examination. They contain interesting examinations of the legal onus of proving damage and of how an evidential onus can shift onto someone not bearing the legal onus in particular circumstances.

(g) There had been a suggestion at first instance that to allow the respondent to rely on such a hypothetical counterfactual was precluded as a matter of law, because to allow it to be advanced would be to allow the respondent to take advantage of its fraud. Bell, Keane and Nettle JJ opined (at [27]):

> "Permitting a fraudster to plead and prove a lawful counterfactual which, but for its fraud, the fraudster would have pursued, is not in any sense to permit the

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[8] *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 322 per Mason CJ and Dawson, Toohey and Gaudron JJ at 355 and Brennan J at 368; *Gates v City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1 per Gibbs CJ at 6-7 and Mason, Wilson and Dawson JJ at 12.

> fraudster to take advantage of its fraud. … it is to do no more than to limit the amount recoverable by the victim to the amount of loss or damage which the victim is shown to have suffered "by" the contravening conduct within the meaning of s 82 of the TPA. That accords with the general principle at common law that a wrongdoer is not required to compensate a victim for loss which the wrongdoer does not cause, even where the cause of action is the tort of deceit."

(h) Notably, their Honours immediately followed that observation with the observation that that possibility might be more theoretical than real, when they stated that established principle and authority supported the view:

> "… in circumstances where a party has resorted to fraud to achieve an objective which it was open to achieve by lawful means, it becomes more difficult, if not impossible, to draw an inference that, but for the fraud, that party would have chosen to proceed by lawful means …".

(i) The case was resolved by Bell, Keane and Nettle JJ on the basis that the respondent had not established that there was a real (not negligible) possibility that the respondent would have terminated the agency agreement by lawful means at any time before June 2010 and by Gageler and Edelman JJ on the basis that the respondent failed at trial to discharge the evidentiary onus imposed upon it by the way it had joined issue with the appellant on the pleadings, on the question of causation of the loss they claimed to have suffered.

[23] I will come back to the signifance of this case under the consideration to which I now turn, namely the relationship between the second of the twin golden rules of pleading to the question of pleading causation.

Clarity of presentation and causation

[24] I have earlier identified that my conception of a pleading which meets these requirements is a pleading which is both –

(a) lawful (in the sense that the presentation has obeyed the applicable mandatory procedural rules); and

(b) persuasive (in the sense that that the presentation is organized, efficient and comprehensible to the reader).

Obeying the applicable mandatory procedural rules

[25] Let us first consider the implications of the first aspect, namely obedience to the applicable mandatory procedural rules.

[26] Rule 149 of the *Uniform Civil Procedure Rules* requires plaintiffs to set out a statement of all the material facts on which they rely, including by stating specifically any matter that if not stated specifically might take another party by surprise. Rules 150 and 155 identify matters which must be specifically pleaded, including concerning damages. Rule 157 requires the inclusion of particulars necessary to define the issues for, and prevent surprise at, the trial; and enable the opposite party to plead; and support a matter specifically pleaded under rule 150.

[27] My decision in *Sanrus Pty Ltd v Monto Coal 2 Pty Ltd (No 7)* [2019] QSC 241 draws into one place a number of the leading authorities concerning the implications of such rules on pleading causation. The critical proposition was advanced in these terms (at [21]):

"The result is that where a party's causation hypothesis depends on establishing a particular counterfactual scenario to establish the alleged causal link between breaches of contract and the loss which it is said would have eventuated if the conduct which the party impugns had not occurred, that counterfactual scenario must be pleaded and particularised in accordance with the rules of pleading. This should be done with the degree of clarity referred to in *Oztech Pty Ltd v Public Trustee of Queensland*. The pleading so framed must at least arguably establish a reasonable inference that the impugned conduct and the claimed loss stand to each other in the relation of cause and effect."

[28] In the subsequent High Court decision of *Berry v CCL Secure Pty Ltd,* Gageler and Edelman JJ (at [72]) made similar observations in the following passage:

"The function of pleadings is to state with sufficient clarity the case that must be met" and thereby to "ensure the basic requirement of procedural fairness that a party should have the opportunity of meeting the case against him or her and … to define the issues for decision". A plaintiff should be expected to plead all material facts on which the plaintiff relies to constitute the statutory cause of action, including any counterfactual on which that plaintiff relies to establish the requisite causal link between identified loss or damage and identified misleading or deceptive conduct. In the same way, a defendant resisting the statutory action should be expected to plead any different counterfactual on which that party might rely to deny the causal link. Unless and to the extent that the parties choose to depart from the pleadings in the way they go on to conduct the trial, choice between the competing pleaded counterfactuals on the balance of probabilities should then exhaust the fact-finding that is required to be undertaken by the court on the issue of causation."

[29] One should not get too carried away by the presently fashionable use of the terminology of "counterfactual". I say presently fashionable because an *Austlii* search reveals the earliest use of the term in Australian case law as occurring in 1999. An ICLR search in British case law suggests the earliest use of the term as occurring in 2002. The truth is that not every pleading of a causation hypothesis requires a pleader to rely on the explicit articulation of a counterfactual. For example:

(a) If the defendant is alleged to have hit the plaintiff with a car, breaking the plaintiff's leg, and the plaintiff's case was limited to claiming medical expenses and loss of amenities, one would not expect to see any pleading of a counterfactual. Probably a short assertion of "By reason of the defendant's negligence the plaintiff has suffered loss and damage in that xxx and yyy" would do. Of course, there are other provisions governing how personal injuries cases must be pleaded: see for example r 547 articulating the requirements for the statement of loss and damage.

(b) On the other hand, if in the same circumstances, the plaintiff's case was that the plaintiff was a rising movie star who at the time of the accident walking towards an audition for the role of the star of the latest blockbuster, and the plaintiff's advanced a case for recovery of damages measured by reference to the amount which would have been earned if the plaintiff had won the role, one would expect to see a particular and carefully pleaded counterfactual. Probably the pleading would assert that the injury caused them to lose the valuable opportunity of starring in the particular role and seek to have the opportunity valued in accordance with the possibilities and probabilities of the opportunity occurring.

(c) Similarly, if the plaintiff alleged it was misled into investing $1 million into the defendant's fraudulent pyramid scheme, and claimed damages measured by the lost million together with statutory interest, one would not expect to see any pleading of a counterfactual.

(d) On the other hand, if in the same circumstances, the plaintiff said that, had it not been tricked into the pyramid scheme, it would have invested the money into the development of what has turned out to be an immensely profitable diamond mine, and claims damages measured by reference to that outcome, one one would expect to see a particular and carefully pleaded counterfactual.

[30] In misleading and deceptive conduct cases it is common to distinguish between "no transaction" cases and "altered transaction" cases. In the former case, the counterfactual is "but for the contravening conduct the plaintiff would not have entered into the transaction". That counterfactual is simple to plead. The measure of loss is also usually simple and is quite often a variation on a "worse off because spent money and lost it" theme. In the latter case, the counterfactual is "but for the contravening conduct the plaintiff would have entered into a different transaction" whether the same transaction with changes, or a different transaction entirely. In that case the counterfactual requires greater attention.

[31] What is necessary in all cases, however, is that, having done the requisite analysis and identified the pecuniary recovery which is sought to be made, the pleader articulates a causation hypothesis pleading the material facts which establish the causal link between the impugned conduct and the loss in such a way as will match the type of case the pleader is seeking to advance.

<u>What are some common issues?</u>

[32] Pleaders who have not done the requisite analysis or who have not read or understood any of the rules of pleading, tend to make the same types of mistakes.

[33] **First**, a pleading which asserts something like this

> "In consequence of [the impugned conduct], the plaintiff has suffered loss in the sum of $xxx,"

where the amount claimed has hidden within in it some form of complex counterfactual and detailed consideration which the pleader hasn't bothered either to think about or articulate.

[34] Such a pleading is defective because it pleads a rolled up conclusion that conduct caused loss, without pleading the material facts which establish the link between the conduct and loss. Such a pleading may also be defective for failure to comply with the provisions of the UCPR concerning specific pleading of damages.

[35] **Second**, a disorganised pleading which narrates a story in a prolix way and the ends with something like "in the premises, the plaintiff has suffered loss". Usually such a pleading has the additional flaw that the prolix narrative is merely a recitation of evidence rather than an attempt at pleading material facts which establish the elements of the cause of action concerned. Such a pleading confronted Jackson J in *Mio Art Pty Ltd v Macequest Pty Ltd & Ors* [2013] QSC 211. The plaintiff's case was that it had suffered loss arising from breach of various contractual, statutory and fiduciary duties which arose in a complicated property development transaction. The pleading alleged in narrative style factual matters

in chronological order and that paragraph [261] was in this form "By reason of the matters pleaded in paragraphs [1] to [260] KHD has suffered loss and damage". Unsurprisingly his Honour found that to be unsatisfactory.

[36] **Third**, the pleader that seeks to avoid having to confront the difficult task of meeting the requirements of orthodoxy by suggesting that it becomes unnecessary in modern case-managed litigation where parties will by direction be required to deliver their lay and expert evidence in staged manner before trial, usually in such a way that the Court will not permit further evidence without leave. I addressed some of the implications of the modern case managed litigation in *Sanrus Pty Ltd v Monto Coal 2 Pty Ltd (No 4)* [2019] QSC 199. In that case, I observed (at [15]):

> "It is axiomatic that if case management orders have required the parties to disclose to their opponents the way they intend to prove their respective pleaded cases, that course was required because the Court determined that it would serve to facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum of expense. But recitation of that sort of motherhood statement is not a sufficient articulation of the purpose of requiring such a course. The underlying purpose is to avoid surprise to the other party and to allow the issues to be narrowed, albeit at a more granular level than is achieved by the delivery of pleadings. It is to allow any eventual trial to proceed in a more efficient manner than it might otherwise have proceeded. In order to fulfil that purpose, it must follow that there is some degree to which the parties are confined to the manner of proving their case which they have flagged by the material which they have delivered in compliance with such case management orders. That is why such orders conventionally also specify that the parties may not deliver evidence outside the constraints of the orders concerned, except with leave of the Court. The extent of confinement which must be regarded as having been achieved by such orders and the attitude which must be taken to applications for leave will be very much a question of fact and degree, and will vary from case to case. The considerations which would be relevant to the exercise of a discretion to permit evidence to be adduced outside the constraints imposed by the case management orders of the type under discussion are similar to those applicable to pleading amendment: see *Sanrus No. 2* at [12] to [15]."

[37] Whilst it must be acknowledged that any deficiency in pleading causation in an orthodox manner may be ameliorated to some extent by the fact that the pleading was delivered in the context of a proceeding which is case managed in that way, I pointed out in *Sanrus No 7* (at [32] to [34]) that the extent of that amelioration is not complete for at least these three reasons:

> "First, the evidential material which each side provides to their opponent consequent upon such directions is proposed evidence. It is not a pleading. It does not actually bind the party providing it in the same way as does a pleading. If a pleaded allegation is admitted on the pleadings, no evidence is required on the admitted fact and the admission may not be withdrawn without leave. On the other hand, a plaintiff's witness summary (or expert report) and a defendant's witness summary (or expert report) delivered before trial might well suggest that the witnesses agree on a fact or on an opinion, but that does not bind either party in the same way as a pleaded admission. Even if the proposed evidence is admitted into evidence at the trial, either party can still ask the trier of fact not to accept one aspect of the evidence it adduces at trial, or ask the trier of fact to prefer one aspect of the evidence it adduces at trial over another.

> A second and related point is that, for one reason or another, the proposed evidence may not actually find its way into evidence at the trial. A party may choose not to call the witness or to tender the expert report. Or, the proposed evidence might be held out because of successful objections as to its admissibility.
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> Third, in any event the extent of the clarity which a party obtains concerning the fact and nature of any unpleaded counterfactual propositions in an opposing party's pleading would necessarily derive from their own analyses of the opposing party's evidence rather than from the opposing party having committed to a statement in their pleading which defined and confined their case. Pleadings are required so that a party does not have to work out itself what is the opposing party's case. As the Full Court of the Federal Court said in *Oztech Pty Ltd v Public Trustee of Queensland* …, the pleading party should ensure that "there be no need for the opposite party to closely scrutinise the pleading in a process of textual construction to determine whether a particular fact is relied upon, or the purpose for which it is alleged". *A fortiori*, when a party has left the definition of its case to be divined from its evidence, delivered in a case which has been managed in the way I have described."

[38] **Fourth**, it is not uncommon to find a lazy pleader who seeks to meet the requirements of a proper pleading of causation by pleading cross-reference to an expert report. This may seem to be an efficient and convenient way of addressing causation and often such a pleading will escape any complaint either from the opponent or from the Court. But it is technically deficient because it is a plea of evidence rather than material fact. And the pleader must be aware that by taking such a course, any change in the expert opinion will amount to a departure from the pleading. In almost all cases it would be better for a competent pleader to understand the case actually being presented in the expert report, and then to articulate a plea of material facts which makes such a case.

<u>Pleading persuasively (in the sense that the presentation is organised, efficient and comprehensible to the reader)</u>

[39] A pleading is the pleader's first chance to demonstrate to the opponent and to the judge that the pleader's case has merit. Care should be taken to adopt techniques suited to that goal.

[40] **First**, pleaders should try to organise the pleading logically and chronologically. Hopefully they will have done the analytical exercise of identifying the cause or causes of action and the elements thereof, so they should adopt a structure consistent with that analysis including by the liberal use of headings which differentiate between the causes of action which they assert and within each cause of action which identify the relevant elements in some way.

[41] **Second**, pleaders should use but not overuse defined terms. In this regard:

(a) They should try to choose obvious and neutral definitions so that both parties can adopt them. Defining the defendant as "the wrongdoer" is unlikely to be a helpful choice.

(b) Pleaders should avoid multiple use of acronyms because that is often very confusing for a judge.

(c) If particular contractual instruments are relevant to the case, pleaders should consider using some or all of the defined terms in the contractual instruments so as to promote consistency.

(d) There isn't any point in defining a term which is only used once or twice in the pleading.

[42] **Third**, where a case involves a multiplicity of allegations of the same type or which fall into groups, give careful attention to the best way to present detail in a way which is intelligible and useful. In particular, pleaders should give consideration to the use of techniques which permit distracting detail to be removed from the body of the pleading and to be put in a schedule or schedules. The technique adopted in building and construction cases of using a Scott Schedule is very useful in such cases and is capable of being modified and used in other cases.

[43] **Fourth**, pleaders should be conscious of the fact that the pleading is the foundation for the development of the case as a whole and their case in particular. If, for example, a pleader is for the defendant and the plaintiff's pleading is a shambles, the pleader may want to give consideration to starting the defence not simply by responding paragraph by paragraph to the shambles, but rather pleading an organised collection of material facts first. Then when the pleader gets to the responsive part of the pleading he or she can plead by cross-reference back to something which makes sense.

[44] **Fifth**, pleaders should plead tactically. Thus:

(a) Pleaders should be conscious of the fact that they want to formulate propositions which are capable of being admitted and which must be responded to in a proper way. Huge convoluted paragraphs with many subparagraphs and sub subparagraphs will not achieve that goal.

(b) Pleaders should be conscious that they may have to amend as things develop. That is a good reason not to plead by cross-reference to an early version of an expert report. Far better to "translate" the report into a proper pleading of material facts set out at a sufficiently high level of generality as will admit some variation to the expert opinion.

(c) But a related point is that if pleaders plead at too high a level of generality they will advance an embarrassing pleading as their opponents will legitimately complain that they cannot sufficiently understand the case they have to meet, and they are unfairly being asked to respond to what can properly be described as a movable feast. On the other hand, pleading with too high a level of specificity will likely descend into pleading evidence not material facts, and will have the potential downside of greatly confining the case to a particular mode of proving the material facts.

[45] **Finally**, pleaders should be conscious of the fact that the document is a literary work which a judge will read. As with many things, style counts. They should have a consistent paragraph numbering and headings scheme. They should employ consistent use of font and indentations. They should try to use proper grammar and spelling.