

CHAPTER 7

Pleadings

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§ 700 Introduction

After evaluating the case and conducting the preliminary investigation, the next step is to initiate the formal litigation process. Filing a complaint symbolizes the commitment of the attorney and client to pursue the claim to its necessary conclusion. The complaint will join the parties in a common interest and will demand the response of others for several years. The evaluation process in Chapter 1 is designed to weed out cases of dubious merit prior to filing the complaint.

Once the decision is made to proceed with the litigation, the initial pleadings will typically involve the following:

- Complaint
- Answer
- Demurrer, Motion to Strike, or other preliminary motions
- Cross-Complaint
- Complaint-in-Intervention
- Default Judgment

In the sections that follow, these pleadings will be explored and explained in more detail. A sample complaint and answer are included at the end of the chapter. For more forms and information on slip and fall pleadings, see Chapter 7, TARANTINO & OLIVEIRA, PERSONAL INJURY FORMS (1992 James Publishing).

§ 710 Complaint

In modern practice, complaints and other pleadings may be presented in a wide variety of formats, ranging from the traditional and stylized fact pleading to modern form pleadings. Most of the elements of the complaint are the same. Both the traditional and the modern simplified complaints can be difficult to understand and may even be susceptible to demur or motion to strike if drafted poorly. A better understanding of the purpose of the complaint and the required elements will help to avoid these problems.

§711 Scope and Purpose

No matter which style of pleading is used, the basic purpose of the complaint is to notify the defendant of the lawsuit, the incident out of which the action arises, and the plaintiff's allegations of

negligence or other wrongdoing. Careful analysis of the allegations and the parties helps the defense attorney identify potential cross-defendants. The use of fictitious "Doe" defendants is an effective way of proceeding with the basic suit while relying on the discovery proceedings to identify the unknown parties.

In nearly all states, the prayer for damages is expressed only in general terms in the complaint. In order for courts of general jurisdiction to assume jurisdiction in the matter, an allegation regarding the minimum jurisdictional amount of damages is necessary. In many states, the statement of damages is filed as a separate form with the court.

§712 Necessary Elements

§712.1 Parties

The complaint must identify all known parties, including the complete and proper name of the plaintiff. The plaintiff's residency must be added when necessary for jurisdiction. If there is more than one plaintiff, such as the husband in a loss of consortium action, each must be identified along with the proper relationship.

The defendant is usually more difficult to identify. In most cases it is necessary to separately allege the identity of the defendant and the defendant's status, whether a real person or a corporation. Residency should also be included, along with the defendant's relation to the premises. Typically the defendant's relationship is that of owner, lessor, lessee, builder, designer, maintenance contractor and so on. Proper identification will assist the court in determining the relationship between the parties in multidefendant cases.

Because the plaintiff may not know all parties at the time of filing, it is sometimes necessary to include "Doe" defendants, which are general allegations to cover all possible parties involved in the ownership, building or maintenance of the premises. After determining the parties' identities, amend the complaint with the new information and serve the additional defendants.

The attorney must walk a very narrow line in naming defendants. Empty chairs at trial often indicate that some of the proper parties were not included. On the other hand, naming a defen-

dant without a factual basis for doing so exposes the attorney and client to a possible lawsuit for malicious prosecution. In some states, like California, the jury is instructed to apportion damages among all individuals who may have substantially contributed to the plaintiff's injuries. This includes all named and unnamed parties in the suit. Thus, the plaintiff may be denied a complete recovery if all proper defendants are not named.

§712.2 Accident

Avoid extensive fact pleading about the accident. General statements describing how and why the plaintiff was on the premises and the existence of a specific hazard should be sufficient to place the defendant on legally sufficient notice of the site, date, time and general conditions of the occurrence. If the area was slippery, rough, uneven, poorly illuminated or badly maintained, simply allege that these conditions created "a dangerous and hazardous condition" and that the plaintiff fell victim to the hazards.

Specific details of how the accident happened or the exact mechanics of the fall will properly become known through the discovery process based on the physical evidence and oral testimony. The use of the checklist in §160 will keep the allegations simple and clear.

§712.3 Defendant's Duty

To avoid conclusory allegations, the defendant's duty must be alleged in the complaint. The duty allegation is typically a statement that the defendant failed to use ordinary care in maintaining the premises so as to prevent an unreasonable risk of harm. The sample complaint in §741 illustrates the appropriate language used in various sections of the country.

§712.4 Defendant's Negligence

The defendant's liability may arise from either a negligent act or strict liability. Negligence is alleged by stating that the defendant failed to do something to keep the premises safe or carelessly created a hazardous condition to which the plaintiff fell victim. Where applicable, include an allegation that the defendant's action was a violation of a building or safety code and the resulting condition was a substantial contributing factor to the plaintiff's fall. This allegation will be helpful in requesting a negligence per se jury instruction at the time of trial.

Sometimes the hazardous condition may give rise to a claim for strict liability in tort. Where strict liability is recognized, the sample in §741 should help in drafting the complaint. For a general discussion of strict liability, see §240.

Some defendants may also be liable on a theory of products liability when the plaintiff's shoes were unusually slippery or broke just prior to the fall. See the sample complaint in §741 for an allegation that the defendant sold or manufactured defective shoes.

§712.5 Injury

In many states, a general statement that the plaintiff was injured is all that is required in the complaint. Where there are hard injuries such as a broken leg or hip, simply state them. If there are residual problems or complications with the injury, say so. Do not include graphic or anatomical details of the injury. Cases are rarely won by colorful and dramatic language in the pleadings. Save these creative descriptions for the arbitration or trial summations.

§712.6 Damages

Damage allegations should be simple and to the point. State that the plaintiff suffered physical injuries and medical, legal, maintenance and care expenses. Do not include monetary figures unless required by state law. An indication that the plaintiff lost income, general allegations of pain and suffering, and detrimental changes in lifestyle or quality of life will be sufficient. Because financial damages are likely to increase during the litigation, general allegations are recommended.

§713 Adequacy of Allegations

The modern trend is to use simple declarative sentences in complaints and other pleadings. Wordiness leads to ambiguity, which leads to costly and time-consuming demurrers.

All required elements should be adequately included in the complaint. Check state codes or local court rules for necessary allegations. Local jury instructions are an excellent source of information since they clearly set the duty of the parties and the criteria for breach. It is unlikely that a demurrer will be sustained if the plaintiff alleges the elements for liability as defined in the jury instructions.

§ 720 Answer

The answer should contain denials or affirmative defenses to the major allegations contained in the complaint. A cross-complaint is necessary to claim affirmative relief against existing or new parties.

§ 721 Scope and Purpose

The answer places all of the allegations contained in the complaint “at issue” and provides an opportunity for the defendant to deny the allegations. A denial may be general or specific. Where all of the allegations in the complaint are objectionable or subject to procedural or jurisdictional defects, the answer may contain general language such as, “Defendant denies each and every allegation of the complaint because the court does not have subject matter or personal jurisdiction over the defendant.” Ideally, the defendant should identify and deny each cause of action in the complaint.

§ 722 Necessary Elements

The complaint should be read carefully to identify all material allegations. Each of the allegations must be either admitted or denied.

§ 722.1 Effective Denials

Allegations that are not denied are deemed admitted. The plaintiff’s allegations must be material to the action. A material allegation is one that is a necessary element of the prima facie case. For example, notice is an essential element in a negligence action. Without it, the case would fail as a matter of law. Any allegation of notice must be effectively denied in the answer. The same is true for each of the essential material elements listed above.

In answering a complaint, each allegation should be denied by paragraphs. For example, “defendant denies each and every allegation contained in Paragraph 5 of the complaint” is sufficient to controvert every material allegation in that paragraph without exposing the defendant to the risk of “negative pregnant” in the answer.

§ 722.2 Affirmative Defenses

Affirmative defenses are part of the defendant’s burden and must be plead as new matter in the answer. A denial alone may not be effective in

establishing the affirmative defense. In negligence actions, affirmative defenses typically consist of comparative fault, statute of limitations, and assumption of the risk. Care must be taken in drafting the affirmative defenses. If they are not properly plead, they will be waived by the defendant.

Code sections cited in the answer must be checked for accuracy. An incorrect code section may negate the entire defense. If the allegations are “fact plead” in the complaint, the affirmative defenses should be fact specific.

For sample affirmative defenses, see § 742.

§ 723 Answering Other Pleadings

Many personal injury suits really consist of two or more actions in one. While the plaintiff may sue on a theory of negligence, the plaintiff’s employer may bring a complaint-in-intervention to recover the benefits paid on a workers’ compensation claim, or a named defendant may bring a cross-complaint against new parties for indemnification to recover for damages paid by the defendant. Each form of the complaint must be answered asserting the necessary affirmative defenses. See the sample answer in § 742 for commonly used affirmative defenses.

§ 730 Additional Pleadings

§ 731 Cross-Complaint

When affirmative relief is sought by the defendant, a cross-complaint should be filed against the plaintiff or another appropriate party. Often a denial of the plaintiff’s request for relief is not a sufficient basis for granting the claim.

The cross-complaint is not dependent on the plaintiff’s original complaint. Even if the plaintiff’s complaint is dismissed, the defendant maintains the right to proceed to trial on the cross-complaint.

The cross-complaint may be compulsory if the subject matter is related to the issues raised in the complaint. In such cases, if a cross-complaint for affirmative relief is not filed, it may not be raised or asserted later during the trial of the original complaint.