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Pleading Negligence

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NOTES

PLEADING NEGLIGENCE

In negligence actions the complaint must set forth facts showing the defendant's duty to the plaintiff, his acts constituting the breach thereof, the resulting injury to the plaintiff, and the latter's damage.¹ In stating the ordinary negligence action, the problem is to determine how specifically the occurrence in question should be set forth in the complaint.

Pleading has undergone three metamorphic stages which may be characterized as issue pleading at common law, fact pleading under the codes, and finally, under the new rules, a mere statement of a claim entitling the plaintiff to relief. The least successful of these has been the code system.² The codes almost universally require that the pleader must state merely dry, naked, actual facts³ relating the sequence of events which constitute the cause of action, in ordinary and concise language. Thus the pleader must plead only ultimate facts, excluding on one hand evidential facts and on the other legal conclusions. If the pleader succeeds

1. Clak, *Code Pleading*, 297 (2d ed. 1947).

2. *Id.* at 56.

3. Pomeroy, *Code Remedies*, 640 (5th ed. 1929).

in stating only ultimate facts, his complaint meets another obstacle. It must state a "cause of action," a term which remains judicially undefined.⁴ The statement of a claim for relief at common law was surprisingly more simple and more successful.⁵ Logically, pleading reforms have been directed toward the common law form of pleading negligence, but of course, stripping it of its verbiage and reiteration. To illustrate this trend a comparison can be made of Form 9⁶ and a typical allegation of negligence at common law.⁷ They are strikingly similar.

Brevity and simplicity is one of the principal objectives of the rules.⁸ The complaint shall contain "a short and plain statement of the claim showing that the pleader is entitled to relief."⁹ It is obvious that the rules do not require that the pleader state only "ultimate facts" which constitute a "cause of action."

To illustrate the simplicity it seems apt to consider the manner in which the claim based upon a defendant's negligence should be stated. First it is necessary to set forth with reasonable clarity and definiteness the sequence of events which is relied upon as showing the defendant's duty to the plaintiff. The pleader should not narrate with particularity every detail of the occurrence which led to the injury. It is sufficient to state facts from which the court can easily see a duty owing from the defendant to the plaintiff.¹⁰ A good illustrative example is Form 9 in the appendix of forms. These forms are sufficient to withstand attack under the rules, and the practitioner may rely on them to that extent.¹¹ The complaint set forth by Form 9 merely states that on a certain date the defendant was driving a motor vehicle on a public highway and that the plaintiff was then crossing said highway. From this short statement the court can easily see the duty relationship between the parties. That is, the defendant must drive with reasonable care so as not to strike the plaintiff.

In some circumstances it may be necessary to be more specific if a duty is not clearly owing to the plaintiff. For instance, if the plaintiff were injured while on the defendant's property, the complaint should show how he was lawfully there. The court could then infer that the duty owing

4. *Id.* at 628; 1 Barron and Holtzoff, *Federal Practice and Procedure* § 255 (Rules ed. 1950).

5. Holtzoff, *Twelve Months Under the New Rules of Civil Procedure*, 26 A.B.A.J. 45 (1940).

6. Wyo. Rules of Civil Procedure, Form 9: "Defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway. As a result plaintiff . . . was injured."

7. *Williams v. Holland*, 10 Bing. 112 (C. P. 1833): "Defendant so carelessly drove his horse that through his carelessness his horse struck the plaintiff's horse and cart, injuring the plaintiff."

8. *Supra* note 5.

9. Wyo. Rules of Civil Procedure, Rule 8(a)(2).

10. Clark, *Code Pleading*, 298 (2d ed. 1947).

11. Wyo. Rules of Civil Procedure, Rule 84; *Sierocinski v. E. I. DuPont De Nemours & Co.*, 103 F.2d 843 (3d Cir. 1939); *Hardin v. Interstate Motor Freight System*, 26 F.Supp. 97 (S.D.Dhio 1939); See also, Notes of the Advisory Committee on the Federal Rules, 28 U.S.C.A. (1946 Supp.) following § 723c.

the plaintiff was ordinary and reasonable care.¹² Likewise, in a negligence action brought under the Federal Employer's Liability Act the allegations of duty must be more specific. Form 14 sets forth the facts sufficient to show the duty relationship as contemplated by the act. The complaint must show that the defendant was a railroad company engaged in interstate commerce, that the plaintiff was employed by the defendant in such commerce, and that while so employed the plaintiff was injured as a result of the defendant's negligence.¹³

It is also sufficient to allege generally the defendant's breach of duty or negligent act which produced the plaintiff's injury.¹⁴ In an action for damages based upon the breaking of the flywheel of a truck manufactured by the defendant, the complaint was held sufficient even though it did not state specifically the manner in which the flywheel was defectively manufactured.¹⁵ In *Sierocinski v. E. I. Du Pont De Nemours & Co.*¹⁶ the court upheld a general allegation that the defendant negligently manufactured a dynamite cap in such a manner that it was unable to withstand the crimping to which the defendant knew it would be subjected. This simplicity is well illustrated by Form 9. The breach is set forth by merely stating that the "defendant negligently drove a motor vehicle against the plaintiff who was then crossing the said highway."

To exemplify, a comparison may be made of these general allegations and a typical allegation recently made in a negligence action under the Wyoming Code.¹⁷ In that case the defendant was charged with negligence in the operation of its truck whereby the plaintiff was struck and injured while on the sidewalk. The complaint charged the defendant with several specific acts or omissions as follows:

- (1) failing to keep the truck under control; (2) operating the truck when its brakes were not in good working order; (3) failing to keep a proper lookout; (4) driving the truck into the pedestrian sidewalk and colliding with plaintiff; (5) failing to give warning that truck was out of control; (6) failing to turn truck to right or left so as to avoid colliding with plaintiff; (7) failing to inspect truck and determine if brakes were in good working condition; (8) failing to maintain and keep the truck's brakes in proper mechanical condition.¹⁸

It is not clear from the court's opinion whether the plaintiff had originally pleaded all of these specific acts, or whether they were made upon a motion for a more definite statement. Even the latter seems of doubtful value or utility.¹⁹ The person charged with negligence may ordinarily be

12. *Supra* note 10; 45 C.J., Negligence § 643 (1928).

13. 45 U.S.C.A. § 51 (1954 ed.); *Lewis v. Denver & R.G.R.R.*, 131 Minn. 122, 154 N.W. 945 (1945).

14. *Sierocinski v. E. I. Du Pont De Nemours & Co.*, 103 F.2d 843 (3d Cir. 1939).

15. *Hartleib v. General Motors Corp.*, 10 F.R.D. 380 (S.D.Ohio 1950).

16. 103 F.2d 843 (3d Cir. 1939).

17. *McClanahan v. Woodward Construction Co.*, Wyo., 316 P.2d 337 (1957).

18. *Id.* at 339.

19. *Clark*, Code Pleading, 301 (2d ed. 1947).

assumed to possess at least equal, if not superior knowledge of the affair to that possessed by the injured party.²⁰ In most cases "the piling up of extensive details in formal allegations is at best delaying and merely confusing, at worst unfair and inequitable to the litigants."²¹

In *Vignovich v. Great Lakes S. S. Co.*²² a paragraph of the complaint contained numerous allegations of negligence similar to those set out above. The court held that the pleading violated the federal rule requiring each averment to be simple, concise and direct. The action was dismissed, and the plaintiff was allowed twenty days to amend the complaint to a short and plain statement of the claim showing that he was entitled to relief.

The complaint must also show a cause and result relation between the negligent act and the damages sustained by the plaintiff.²³ This may be shown, however, by merely reciting "by reason of" or "as a result of" the defendant's act the plaintiff was injured.²⁴ Note that paragraph two of Form 9 sets forth the casual relation by simply stating that "as a result plaintiff was thrown down and had his leg broken and was otherwise injured."

The exact nature of the injury need not be set forth in the complaint.²⁵ A mere statement that the "plaintiff had his leg broken and was otherwise injured" is sufficient.²⁶ Where an injury is thus shown the law will presume general damages to follow.²⁷ General damages are those which are the natural and necessary result of the wrongful act.²⁸ For example, pain and suffering are the natural and necessary consequences of a broken leg.

However, where items of special damage are claimed, Rule 9 (g) requires that they be specifically stated. Special damages are those which are the natural but not the necessary result of the wrongful act.²⁹ These damages arise due to the special circumstances of each case. They must be specifically pleaded so that the defendant may be informed of the nature of the claim against him and not taken by surprise.³⁰ Thus in Form 9 it is specifically stated that the plaintiff "incurred expenses for medical attention and hospitalization in the sum of one thousand dollars." This is a sufficient statement of special damages, made in compliance with Rule 9 (g).³¹ Medical and hospital expenses are naturally expected

20. *Rannard v. Lockheed Aircraft Co.*, 157 P.2d 1 (Cal. 1945).

21. Clark, Code Pleading, 302 (2d ed. 1947).

22. 3 F.R.D. 69 (W.D.N.Y. 1942).

23. *Mitchell v. White Consolidated*, 177 F.2d 500 (7th Cir. 1949).

24. *Michels v. Boruta*, 122 S.W.2d 216 (Tex. 1938); see also Clark, Code Pleading 300, 301 (2d ed. 1947).

25. *Trotta v. Cleveland City Transit System*, 9 F.R.D. 315 (E.D. Ohio 1949).

26. *Green v. McGaughey*, 1 F.R.D. 604 (E.D. Tenn. 1940); Wyo. Rules of Civil Procedure, Form 9.

27. Clark, Code Pleading, 329 (2d ed. 1947).

28. *Elgin v. United States*, 89 F.Supp. 195 (W.D. Mo. 1950).

29. *Ibid.*

30. 1 Barron and Holtzoff, Federal Practice and Procedure § 308 (Rules ed. 1950).

31. 2 Moore, Federal Practice, 1924 (2d ed. 1957).

to flow from such injury but not necessarily in all cases. As a further example, if a condition or disease which follows an injury is not a necessary result of that injury the damages growing out of such disease or condition are special. So where the plaintiff received injuries due to the defendant's negligent operation of an elevator and a cancerous growth resulted from such injury, the damages are special and must be pleaded specifically.³²

One last point in pleading negligence under the rules in Wyoming deserves consideration. It is a majority rule that a violation of a municipal ordinance relied upon as evidence of negligence is not required to be pleaded where the cause of action is common law negligence, rather than the violation of the ordinance.³³ So under an allegation in the complaint that a train was being run wantonly and recklessly at a high rate of speed, a municipal ordinance regulating the speed of trains was admissible though not pleaded.³⁴ Some of the Wyoming trial courts have taken the opposite view and, for instance, will not admit in evidence an ordinance to prove the speed limit unless the ordinance has been pleaded. The majority rule is preferable, especially under the new rules, as the following rationale will show.

It is true that if the law is local or foreign the judge is not expected to know it and should not take judicial notice of it. If the plaintiff is relying on an ordinance which creates a penalty in his favor as the foundation of his cause of action, the ordinance should be pleaded.³⁵ This will give the judge and the defendant notice of the complete claim.

But the plaintiff's action may be based on the common law rule that negligence is the failure to act as a reasonably prudent man. In such a case if the defendant has violated an ordinance he has not acted with this required prudence. Since the action is based upon the common law and not on the ordinance, the violation of the ordinance is an evidentiary fact and may be proved without being pleaded like any other fact tending to show negligence.³⁶ This is not an exception to the rule that the court does not take judicial notice of local or foreign law, but rather, since the judge does not judicially know the ordinance, it is introduced into evidence like any other fact tending to prove negligence on the defendant's part. This line of reasoning is in harmony with the theory of the new rules. In the *Sierocinski* case³⁷ the court said, "the plaintiff need not plead evidence. He sets forth a claim when he makes a short and plain statement of the claim showing that the pleader is entitled to relief."

32. *Supra* note 28.

33. *Gross v. Pacific Motor Co.*, 85 Cal.App. 455, 259 Pac. 355 (1927); *Gragg v. Los Angeles Trust Co.*, 154 Cal. 663, 98 Pac. 1063, 16 Ann.Cas. 1061 (1908); *Christensen v. Hennepin Transportation Co.*, 215 Minn. 394, 10 N.W.2d 406, 147 A.L.R. 945 (1927); 1 *Bancroft, Code Pleading, Practice & Remedies* § 69 (1937); 38 *Am.Jur. Negligence* § 330, no. 10 (1941); *contra*, *Blanchard v. Lake Shore & M.S.Ry.*, 126 Ill. 416, 18 N.E. 799, 16 Ann.Cas. 1064 (1888); 38 *Am.Jur., Negligence* § 330 n. 9 (1941).

34. *Louisville & N.R.R. v. Irwin*, 209 Fed. 614 (5th Cir. 1913).

35. 1 *Bancroft, Code Pleading* § 69 (1926).

36. *Larson v. Lowder*, 240 Minn. 80, 282 N.W. 669 (1938).

37. 103 F.2d (3d Cir. 1939).

"Simplified pleading is basic to any program of civil procedural reform. With it the modern remedies of discovery, pre-trial, and summary judgment acquire increased significance and effectiveness."³⁸ This approach is exemplified by the new rules and the appendix of forms. In pleading negligence it should be remembered that general allegations are sufficient in most cases. If the court can reasonably infer that the defendant owed a duty to the plaintiff and that this duty was violated, the allegation is sufficient. A short statement to the effect that as a result of such negligence the plaintiff was injured is also sufficient. Of course if the plaintiff is seeking special damages these should be specifically stated in the demand for relief. With these simple, direct requirements the pleader is no longer required to squander time and effort perfecting long and formal pleadings. Through discovery procedure, a mutual knowledge of the true issues is gained by the parties, the possibility of surprise is reduced, and the door to the pre-trial conference is opened where the issues may be further narrowed. The litigants will be assured of a greater opportunity for a just, speedy and inexpensive determination of their rights.

BOB R. BULLOCK

PROCEDURE IN LIEU OF SPECIAL APPEARANCES

Under the former practice in Wyoming if the defendant had objections based on the defenses of improper venue, lack of jurisdiction over the person, insufficiency of process or insufficiency of service of process, he had to come into court under a special appearance in order to avoid submitting himself to the jurisdiction of the court. Under this practice the defendant was in court only for the purpose of objecting to the jurisdiction. If any action was taken which would recognize the jurisdiction of the court over the merits of the case, the objections based on jurisdiction were deemed waived and the defendant was held to have made a general appearance.¹ The problems encountered in this situation are illustrated by the case of *Honeycutt v. Nyquist*² in which the defendant appeared specially on a motion to quash service. Later, in the court room, he agreed to a continuance of a hearing on a motion made by the plaintiff. The court ruled that any action which recognized the case as in court constituted a general appearance, and that by agreeing to the continuance the defendant had made a general appearance. A more recent Wyoming case decided before the adoption of the rules defined a correct special appearance by saying that it is made properly when the appearance is for the sole purpose of objecting to the jurisdiction.³ It is obvious that under

38. Clark, *Simplified Pleading*, 2 F.R.D. 456 (1943).

1. 6 C.J.S., *Appearances* § 9 (1937).

2. 12 Wyo. 183, 74 Pac. 90 (1903).

3. *Vanover v. Vanover*, Wyo., 307 P.2d 117 (1957).