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Comments

PLEADING—ADVANTAGES OF GENERAL ALLEGATIONS OF NEGLIGENCE, WITH PARTICULAR REFERENCE TO THE HIGHWAY CASES

The modern pleader faces a dilemma as he prepares his petition in a negligence case. At the pleading stage he may not know what evidence he will be able to prove; hence if only one or two specifications of negligence are alleged, he may find that on trial he is unable to prove the precise allegations of the petition and so varies from the pleadings, although one good cause of action is

(512)

alleged and an equally good cause of action proved.¹ As a result of this danger he usually alleges all conceivable acts of negligence that might have caused the injury, trusting that one can be proved.² On the other hand, defendant, by his objections to plaintiff's pleadings, seeks to tie plaintiff down as much as possible, and at the same time to discover the grounds upon which plaintiff seeks to recover. If plaintiff alleges only a few specific acts of negligence, defendant can prepare himself to meet the issues at the trial and at the same time plaintiff has tied himself down. But neither of these advantages accrues to defendant when plaintiff alleges many acts of negligence, nor is there any way to tie plaintiff down to only a few of them.³ It is true that plaintiff is in much less danger of varying from such a petition in his proof, but that is the only benefit derived from such allegations and indeed the practice serves to complicate the pleadings.

It is submitted that both parties will profit from the use of the pleader's other alternative, a general allegation of negligence. From the pleader's point of view such allegation is eminently satisfactory, provided that it states facts sufficient to constitute a cause of action, and particularly if he is able to go to trial on the original petition. Such was the usual common law manner of pleading and unquestionably it was good against demurrer.⁴ A typical declaration for injury on the highway alleged that defendant so carelessly drove his horse that through his carelessness the plaintiff was struck and injured.⁵ The common law pleader simply stated the act of defendant and characterized it as negligently or carelessly done. If defendant truly needed more details in order to prepare his defense, the court would grant his motion for a bill of particulars.⁶ The bill, in absence of exceptional circumstances, had to be demanded before the plea.⁷ The granting of the bill rested solely on the sound legal discretion of the trial judge.⁸ Indeed, if the information sought rested within the knowledge of the moving party,⁹ or if he had not properly demonstrated his need for the bill, the appellate courts have said that the bill was improperly granted.¹⁰

1. See *Kramer v. K. C. Power and Light Co.*, 311 Mo. 369, 279 S. W. 43 (1925).

2. See *Cervillo v. Manhattan Oil Co.*, 226 Mo. App. 1090, 49 S. W. (2d) 183 (1932).

3. Since MO. REV. STAT. (1939) § 916 requires a plain and concise statement of the facts constituting a cause of action, query as to whether it would not be advisable to sustain a motion to make such petition more definite and certain.

4. CLARK, CODE PLEADING (1928) 206.

5. *Williams v. Holland*, 10 Bing. 112, 131 Eng. Rep. 848 (1833); *Croft v. Allison*, 4 B. & Ald. 590, 106 Eng. Rep. 1052 (1821); *Moreton v. Hardern*, 4 B. & C. 223, 106 Eng. Rep. 1042 (1825); Cf. 2 CHITTY, PLEADING (13 Am. Ed.) § 708.

6. CLARK, CODE PLEADING (1928) 236; Comments (1923) 32 YALE L. J. 483, (1925) 19 ILL. L. REV. 315.

7. 1 TIDD, PRACTICE (8th Ed., 1828) § 641; Comment (1925) 19 ILL. L. REV. 315.

8. *Commonwealth v. Snelling*, 15 Pick. 321 (Mass. 1824); Comment (1925) 19 ILL. L. REV. 315, 316.

9. *Gale v. Read*, 8 East 80 (K. B. 1806); Comment (1925) 19 ILL. L. REV. 315, 317.

10. *C. & N. W. Ry. v. C. & E. R. R.*, 112 Ill. 589 (1884); Comment (1923) 32 YALE L. J. 483.

In Missouri and other code states this manner of pleading has been approved as stating facts constituting a cause of action against demurrer,¹¹ upon objection to introduction of evidence in support of the petition,¹² and on appeal.¹³ Missouri opinions have held the petition sufficient after verdict¹⁴ and on objection to introduction of evidence¹⁵ if it “. . . describes the act complained of with reasonable certainty, that is with sufficient clearness to advise the defendant of the charge he is to meet, and then avers generally that such acts were negligently done . . .” Such allegation does not plead conclusions of law, since the charge that the act was “negligently” done is the ultimate fact in issue,¹⁶ and the code requirement of fact pleading is met.

However, in Missouri and in most code jurisdictions the general allegation is insufficient against a motion to make more definite and certain.¹⁷ There appears to be no definite philosophy in Missouri as to the purpose of the motion to make more definite and certain. Where negligence is alleged generally, some cases have held that defendant is entitled as a matter of course to the more specific statement of the facts upon which plaintiff relies, for these reasons: that by statute¹⁸ plaintiff must prepare a “plain and concise statement of the facts constituting a cause of action without unnecessary repetition”;¹⁹ that only by plaintiff's stating his case more specifically can defendant know how to meet the charges in his answer;²⁰ that it enables defendant to prepare his case for trial;²¹ and one opinion states that its purpose is to restrict the evidence submitted to the jury to that alleged and proved,²² which is to say that it is to

11. *Farrar v. Shuss*, 221 Mo. App. 472, 282 S. W. 512 (1926). Since it is generally presumed that the general allegation in the highway cases is sufficient against demurrer, there are no cases in which defendant stood on his demurrer to the petition. See the *dicta* and collection of cases in *Rueter v. Terminal R. R. Ass'n*, 261 S. W. 713, 715 (Mo. App. 1924). Also see form 23 in Mo. REV. STAT. (1889) § 2237. This has been omitted in later forms.

12. *Sullivan v. Mo. Pac. Ry.*, 97 Mo. 113, 10 S. W. 852 (1888); *Benham v. Taylor*, 66 Mo. App. 308 (1896).

13. *Ilgenfritz v. Mo. Power and Light Co.*, 340 Mo. 648, 101 S. W. (2d) 723 (1937); *Wyler v. Ratican*, 150 Mo. App. 474, 131 S. W. 155 (1910).

14. *Zichler v. St. Louis Public Service Co.*, 332 Mo. 902, 59 S. W. (2d) 654 (1933).

15. *Mack v. St. Louis K. C. & N. Ry.*, 77 Mo. 232 (1883); *Dieter v. Zbaren*, 81 Mo. App. 612 (1899).

16. *Crane v. Mo. Pac. Ry.*, 87 Mo. 588 (1885); BLISS, CODE PLEADING (2d ed., 1887) § 211a.

17. *Van Bibber v. Willman Fruit Co.*, 234 S. W. 356 (Mo. App. 1921); *Couture v. Gauthier*, 123 Me. 132, 122 Atl. 54 (1923); *Rathburn v. Burlington & M. River Ry.*, 16 Neb. 441, 20 N. W. 390 (1884); and cases collected in note (II) 59 L. R. A. 209; Comments (1928) 16 CALIF. L. REV. 151; (1923) 32 YALE L. J. 483; CLARK CODE PLEADING (1928) 207.

18. Mo. REV. STAT. (1939) § 916.

19. *Van Bibber v. Willman Fruit Co.*, 234 S. W. 356 (Mo. App. 1921). But does not the general allegation give precisely such a statement as the statute demands?

20. *Sommers v. St. Louis Transit Co.*, 108 Mo. App. 319, 83 S. W. 268 (1904). See 6 HOUTS, MISSOURI PLEADING AND PRACTICE (1938) 90 for Missouri forms, with particular reference to form 2396, for making a negligence petition more definite and certain, which concludes “. . . and defendant is unable to make satisfactory answer to said petitions”.

21. *Jordan v. St. Joseph Ry., L., H. & P. Co.*, 335 Mo. 319, 73 S. W. (2d) 205 (1934).

22. *Sartin v. Springfield Hospital Ass'n*, 195 S. W. 1037, 1038 (Mo. 1917).

help defendant tie plaintiff down in his petition. Other Missouri decisions have refused to sustain the motion automatically in the following cases. In a master-servant injury case where plaintiff alleged his injury was caused by the master's negligent construction and maintenance of the machine plaintiff operated, the court refused defendant's motion to make more definite and certain on the ground that, since the machine was at all times before and after the accident within defendant's control, the law should not make plaintiff's right to bring an action depend on his ability to state in a petition details he could only obtain from defendant.²³ In a similar master-servant case the motion was likewise refused since less particularity of pleading was required of plaintiff where the facts were peculiarly within the knowledge of the defendant.²⁴ In *O'Connor v. Koch*²⁵ plaintiff alleged that defendant drove his team in a furious and rapid manner so that his buggy struck the wagon of plaintiff, upsetting it and injuring plaintiff. The court held that the trial court properly denied defendant's motion to make more definite and certain because defendant would have no difficulty in ascertaining with what he was charged and could have no difficulty in answering same.

Clearly if the petition leaves defendant in doubt as to the actual charge of negligence and plaintiff is able to furnish additional information the motion ought to be granted.²⁶ On the other hand automobile accidents happen so suddenly that it is harsh to tie plaintiff down to specific acts of negligence when he is uncertain how each witness will testify, particularly since defendant in most of these cases has more precise knowledge of how the accident occurred than does plaintiff. Perhaps courts under the codes would do well to note the common law restrictions on the motion for a bill of particulars: defendant should convince the court that he needs a more detailed specification of negligence and that plaintiff is able to furnish it.²⁷ Hence the refusal of the *O'Connor*²⁸ court to grant the defendant's motion seems sound in fact and in theory.

In brief the general allegation of negligence is good in Missouri against demurrer but not against a motion to make more definite and certain, though the majority of cases on that point seem to be subject to question. Practically there are many advantages of general pleading, so far as the pleader is concerned, particularly if he is able to go to trial on his original petition. There is no danger of plaintiff tying himself down in his petition so that he will be unable to sustain the allegations of his petition. Where plaintiff generally alleges the defendant's acts and complains that they were negligently done, there is no

23. *Collinsworth v. United Zinc & Chemical Co.*, 260 Mo. 692, 169 S. W. 50 (1914).

24. *Rickaly v. O'Brien Boilerworks Co.*, 108 Mo. App. 130, 82 S. W. 963 (1904).

25. 56 Mo. 253 (1874).

26. CLARK, CODE PLEADING (1928) 207; Comment (1923) 32 YALE L. J. 483.

27. See text *supra* at notes 6 to 10.

28. *Supra*, n. 25. But see *Rosemann v. United Ry. Co. of St. Louis*, 180 S. W. 452 (Mo. App. 1915); and Comment (1928) 16 CALIF. L. REV. 151, 154. The writer of the latter expresses his hope that California courts will not continue their trend toward refusing to make the general allegation of negligence more definite and certain.

possibility of variance nor of failure to prove the cause of action alleged, if a cause in negligence is proved.²⁹ Indeed, in Missouri evidence tending to prove practically any kind of negligence may be admitted under the general petition: under such pleading our courts have allowed introduction of evidence proving the humanitarian doctrine,³⁰ *res ipsa loquitur*³¹ and any specification of negligence, fairly within the allegation, that may have caused the plaintiff's injury.³²

When his petition is filed plaintiff can avail himself of the Missouri statute for deposition and discovery.³³ The statute has been made broad in its terms: both parties are equally protected by their right to obtain a deposition from any witness either before the trial is begun, or after; the discovery examination may be as broad or broader than the examination on trial would have been;³⁴ and it has been the experience of trial lawyers using this process that witnesses' testimony on the stand is consistent with the testimony incorporated in the depositions.³⁵ The plaintiff's usual procedure is to file a petition containing a general allegation of negligence and at once proceed to take depositions to discover what the evidence will show. Plaintiff then files an amended petition setting up details of negligence disclosed by the discovery. This is done in order to have a petition which is good against motion to make more definite. Seldom will this amended petition disclose anything defendant had not already learned from the depositions. In fact, it serves to tie plaintiff down so that often he is forced to amend his petition several times, right up to the eve of trial, as he discovers what he will be able to prove on trial.

A possible haven to a pleader who has failed to prove the exact specification of negligence pleaded is the statutory provision regarding variance. The wording of the Missouri statutes indicates that plaintiff may vary from his pleadings and still recover, provided the defendant is not misled by the petition or in doubt as to its meaning,³⁶ or may even obtain a motion for a new trial if he proves a

29. In *Hughes v. Kiel*, 100 S. W. (2d) 48 (Mo. App. 1937) the petition alleged that plaintiff, a passenger in defendant's street car, was injured in a collision between defendant's street car and an automobile, and that the collision was caused by the negligence of defendant's servant in operating the said street car. The court held that proof that the plaintiff's injury was caused by the sudden stopping of the street car was more than a variance from the cause of action alleged, it was a complete failure of proof.

30. *Dieter v. Zbaren*, 81 Mo. App. 612 (1899); *Kellny v. Mo. Pac. Ry.*, 101 Mo. 67, 13 S. W. 806 (1890); *Hanlon v. Mo. Pac. Ry.*, 104 Mo. 381, 16 S. W. 233 (1891); *Frankel v. Hudson*, 271 Mo. 495, 196 S. W. 1121 (1917).

31. *Rinard v. Omaha, K. C. & E. Ry.*, 164 Mo. 270, 64 S. W. 124 (1901).

32. *Dieter v. Zbaren*, 81 Mo. App. 612 (1899), failure to watch; *Thompson v. Keyes-Marshall Bros. Livery*, 214 Mo. 487, 113 S. W. 1128 (1908), excessive speed.

33. Mo. REV. STAT. (1939) § 1917: "Any party to a suit pending in any court in this state may obtain the deposition of any witness, to be used in such suit, conditionally."

34. Mo. REV. STAT. (1939) § 1923ff. For a thorough discussion of the matter see RAGLAND, *DISCOVERY BEFORE TRIAL* (1932).

35. Mo. REV. STAT. (1939) § 1944. The deposition is read at the trial where witness resides, or is gone, out of the state, where witness is dead, where old age or other infirmity prevents witness from coming into court, where witness lives outside the city in which the suit is tried or is gone more than forty miles from the place of trial without connivance of the party requiring his testimony or if he be a professional man discharging his duties at the time of the trial.

36. Mo. REV. STAT. (1939) § 969. See Comment (1937) 2 Mo. L. REV. 357.

cause of action but fails completely to prove the cause of action as alleged.³⁷ But these statutes have not been broadly interpreted by the courts³⁸ so that it is risky to depend on them, and if general allegations are permissible, they afford a much greater haven of refuge than reliance on the variance statutes.

The form for a negligence complaint promulgated in connection with the new Federal Rules is substantially the same as the common law allegation: ". . . defendant negligently drove a motor vehicle against plaintiff . . ."³⁹ This complaint has been held good against a motion to dismiss.⁴⁰ The draftsmen of the new rules reacted against the code fact pleading to the more general allegations of the common law in order to provide more flexibility to the pleader.⁴¹ Federal Rule 12(e) allows defendant to move before answer for a bill of particulars or a more definite statement. The purpose of the motion is to make such matters sufficiently clear to enable him properly to prepare his responsive pleading "or to prepare for trial."⁴² Under the Federal Rules the bill of particulars and the more specific statement have been interpreted, except in a few cases,⁴³ as aids in preparation of defendant's answering pleading, while the information to prepare for trial is obtained by pre-trial conferences and the discovery methods.⁴⁴ The reasons given for this view are that the motion for a bill of particulars or a more definite statement are dilatory, and these remedies are less efficient than the exhaustive discovery mechanism of Rules 26 to 37 and the pre-trial conference guided and directed by the court. Therefore, the general allegation is not subject to a motion for a bill of particulars or more definite statement unless defendant persuades the court that he must have the additional details in order to enable him to answer.⁴⁵

37. MO. REV. STAT. (1939) § 1167.

38. See annotations to the sections, noted *supra* notes 36 and 37.

39. Official Form 9, 3 MOORE'S FEDERAL PRACTICE (1938) 3609. See also Official Form 10. Cf. General Allegation of Negligence in Operation of Automobile, 11 BLASHFIELD, CYCLOPEDIA OF AUTOMOBILE LAW AND PRACTICE (1927) 36, § 6826: "That at the time and place of said collision the defendant so negligently managed and operated his said automobile that, by reason thereof, he negligently drove into and against plaintiff's automobile, thereby injuring and damaging same as follows:".

40. Kadylak v. O'Brien, 32 F. Supp. 281 (W. D. Pa. 1940). In Hardin v. Interstate Motor Freight System, Inc., 26 F. Supp. 97 (S. D. Ohio 1939) the court sustained a motion to strike allegations of the petition in nature of specifications of negligence in addition to general allegation of negligence according to Form 9.

41. 1 MOORE'S FEDERAL PRACTICE (1938) 547. Federal Rule 8(a) (2) illustrates the difference: "A pleading which sets forth a claim for relief . . . shall contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief." It calls for a statement of the *claim*, showing plaintiff is entitled to relief, not of the *facts* constituting a cause of action, as under the Missouri code: see n. 3 *supra*.

42. 1 MOORE'S FEDERAL PRACTICE (1938) 654; 3 FEDERAL RULES SERVICE (1940) § 682.

43. Murphy v. E. I. DuPont DeNemours & Co., 26 F. Supp. 999 (W. D. Pa. 1939); Louisiana Farmers' Protective Union v. Great Atl. & Pac. Tea Co., 31 F. Supp. 483 (E. D. Ark. 1940). 3 FEDERAL RULES SERVICE (1940) § 682, n. 7.

44. Adams v. Hendel, 28 F. Supp. 317 (E. D. Pa. 1939); American La-France-Foamite Corp. v. American Oil Co., 25 F. Supp. 386 (D. Mass. 1938); 3 FEDERAL RULES SERVICE (1940) § 683, n. 8.

45. *Supra*, n. 44. See Comment (1940) 39 MICH. L. REV. 1032.

Examples used herein have mainly referred to general allegation of negligence in the highway accident in which case the duty is apparent. In pleading a master-servant injury, negligent maintenance of premises, or other negligence case in which the duty is not apparent, of necessity the allegations to show duty must be made.⁴⁶ Such pleadings will be less general than in the highway negligence case, but in all these cases the philosophy of the Federal Rules is best for both parties and for the court. The Missouri courts have long recognized that the general type of allegation is good against demurrer. Recognition of the Federal Rules doctrine that a more specific statement should be required only when necessary to enable defendant to prepare his answer would involve neither hardship nor revolutionary change in Missouri procedure.⁴⁷ While the state law does not include provisions for pre-trial conference, the statutes and decisions allow exceptional deposition and discovery procedure so that defendant, when in doubt, can obtain the information necessary to prepare for trial. Discovery through pleadings has been a failure⁴⁸ and it has only served to tie plaintiff down to specific allegations, to mystify defendant with a myriad of such allegations, or to cause plaintiff to go through the farce of amending his petition by adding specifications of negligence in accordance with discovery obtained by depositions.

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46. See Official Form 14, 3 MOORE'S FEDERAL PRACTICE (1938) 3613.

47. See text at n. 25.

48. RAGLAND, DISCOVERY BEFORE TRIAL (1932) c. 1; Comment (1923) 32 YALE L. J. 483.