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## SELECTED PROBLEMS IN OHIO PLEADINGS

### PLEADING INJURIES AND DAMAGES IN TORT ACTIONS

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The statutory law in regard to pleading injuries and damages in tort actions in Ohio is limited to a few sections of the Revised Code<sup>1</sup> and are the same sections that apply to pleadings in general. The allegations should be stated in ordinary and concise language, be definite and certain, and not contain any redundant, irrelevant or scurrilous matter.

The elements to be covered in pleading injuries and damages should closely follow the recommended charges to the jury for trial courts published by the Ohio Common Pleas Judges' Association on the same subject.<sup>2</sup> They are as follows:

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<sup>1</sup> Ohio Rev. Code § 2309.04:

Content of petition.

The first pleading shall be the petition by the plaintiff, which must contain:

(A) A statement of facts constituting a cause of action in ordinary and concise language;

(B) A demand for the relief to which the plaintiff claims to be entitled. If the recovery of money is demanded, the amount shall be stated; and if interest is claimed, the time for which interest is to be computed shall be stated.

Ohio Rev. Code § 2309.33:

Matter which may be stricken out.

If redundant, irrelevant, or scurrilous matter is inserted in a pleading, it may be stricken out on motion of the party prejudiced thereby. Obscene words may be stricken from a pleading on the motion of a party or by the court of its own motion.

Ohio Rev. Code § 2309.34:

Amendment.

When the allegations of a pleading are so indefinite and uncertain that the precise nature of the charge or defense is not apparent, the court may require the pleading to be made definite and certain by amendment.

<sup>2</sup> See "Ohio Jury Instructions" (revised 1961) prepared and published by the Ohio Common Pleas Judges' Association, The W. H. Anderson Company, Cincinnati, Ohio, Chapter 23 "Damages," §§ 23.00, 23.10, and 23.20.

1. The nature and extent of the plaintiff's injuries.<sup>3</sup>
2. The effect upon the plaintiff's physical health.
3. Pain that was suffered.
4. The ability or inability to perform usual activities.
5. Time and wages that were lost.
6. Impairment of earning capacity.
7. Reasonable cost of all necessary medical and hospital expenses incurred.
8. Future expenses and pain reasonably certain to be incurred.
9. Aggravation of a pre-existing injury, disease or condition.
10. Acceleration of a prior injury, disease or condition.

Although hundreds of motions are filed daily throughout Ohio<sup>4</sup> and rulings are made thereon, case law concerning the pleading of injuries and damages is practically non-existent as these decisions, except in rare instances, go unreported and indeed are not even known to members of the local Bar except through chance or unusual circumstances.

Because of the foregoing situation, the writer of this article decided to submit a questionnaire to the trial judges of Ohio and to a select group of attorneys whose primary practice is devoted to the preparation and trial of tort actions. It was felt that a compilation and comment upon their observations, views, and opinions in regard to the pleading of injuries and damages in tort actions would be of more value to the student and to the organized Bar than a repetitive discussion of the few reported decisions already available. The printed questionnaire<sup>5</sup> consisting of twelve parts and covered by a personal

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<sup>3</sup> In the case of *DeTunno v. Shull*, 166 Ohio St. 365, 367 (1957), the Ohio Supreme Court approved the trial court's charge to the jury which was: "The plaintiff, Thomas DeTunno, is not entitled to recover any damages for injuries which have not been set forth in the allegations of the petition."

<sup>4</sup> It was stated in an interview between the writer of this article and one of the senior law clerks of the motion docket of Cuyahoga County on October 31, 1961, that approximately two thousand motions and demurrers are filed each year and that about one-fifth of them are directed toward injuries and damages.

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QUESTIONNAIRE

- (1) The filing of motions (does, does not) delay assignment of cases for trial in our county.
- (2) The approximate percent of petitions for personal injuries to which a motion or demurrer is filed is .....
- (3) The approximate percent of these motions or demurrers which are directed either in whole or in part to allegations concerning personal injuries and damages is .....
- (4) The use of discovery procedures such as interrogatories, depositions, and motions to produce is:  
     limited ..... moderate ..... widespread .....
- (5) There is a trend toward "notice pleading" such as is found in Form 9

letter was sent to each common pleas judge in Ohio.<sup>6</sup> The response, while not complete, was most heartening and represents in the opinion of the writer an accurate view of the law of Ohio today in regard to our problem.<sup>7</sup>

The same questionnaire was sent to the selected group of attorneys<sup>8</sup> and their response was felt to be equally accurate.<sup>9</sup>

of the Federal Rules of Civil Procedures, *i.e.*, broad general allegations regarding injuries and damages.

Yes ..... No .....

(6) The number or percentages of motions directed toward pleading of injuries and damages today, as compared with five years ago is:

greater ..... less ..... about the same .....

(7) It is accepted practice for attorneys to separately number the various allegations concerning injuries.

Yes ..... No .....

(8) It is preferable to use (medical terms, lay language, both) in describing injuries to the plaintiff.

(9) It is preferable to describe (in detail, in general terms) allegations of injuries to the plaintiff.

(10) Practices or allegations in pleading injuries and damages which the Court commends are:

(11) Practices or allegations in pleading injuries and damages which the Court frowns upon are:

(12) Other comments in regard to pleading injuries and damages:

(Signed) .....

This information can be used for compilation and analysis, however, I would prefer not being quoted.

<sup>6</sup> Questionnaires were sent to one hundred forty-three Ohio Common Pleas judges from eighty-eight counties. (Judges of the Domestic Relations Courts and Juvenile Courts were not included.) The list was secured from the Ohio Legal Directory, 1961 Edition, The W. H. Anderson Company, Cincinnati, Ohio.

<sup>7</sup> Sixty-five Common Pleas judges from the following forty-six counties responded:

Ashland	Hancock	Madison	Putnam
Belmont	Highland	Mahoning	Sandusky
Brown	Hocking	Marion	Seneca
Butler	Holmes	Medina	Stark
Clark	Jackson	Mercer	Tuscarawas
Clinton	Jefferson	Monroe	Warren
Crawford	Knox	Montgomery	Washington
Cuyahoga	Lake	Morgan	Wayne
Franklin	Lawrence	Morrow	Williams
Greene	Licking	Muskingham	Wood
Guernsey	Lorain	Paulding	
Hamilton	Lucas	Pickaway	

<sup>8</sup> Questionnaires were sent to eighty-one lawyers, from forty-seven counties, who appeared in "Markham's Negligence Counsel," 1961-1962 Edition, Markham Publishing Corporation, Stamford, Connecticut.

<sup>9</sup> Forty-five lawyers from thirty-one counties answered the questionnaires. Although no claim is made to the kind of accuracy practiced by professional researchers or na-

In discussing any differences between the metropolitan and rural counties in this article the following arbitrary division was made: metropolitan counties—Cuyahoga, Franklin, Hamilton, Lorain, Lucas, Mahoning, Montgomery, and Summit; rural counties—all the rest.

WHERE THE FILING OF MOTIONS DIRECTED TO THE PLEADINGS DELAYS THE ASSIGNMENT OF CASES FOR TRIAL, THERE IS A SUBSTANTIAL DIFFERENCE IN THE NUMBER OF MOTIONS FILED AND THEIR SUBJECT MATTER AS COMPARED WITH COUNTIES WHERE THE FILING OF MOTIONS DOES NOT RESULT IN DELAY OF ASSIGNMENT OF CASES FOR TRIAL

Although there are many different plans and local variations for getting cases assigned for trial, once a petition has been filed, there are in fact only two distinct methods:

- (1) the case does not get onto a trial calendar or assignment list until the pleadings are in satisfactory condition and the issues have been joined;
- (2) the petition gets a number when it is filed, the cases are tried in numerical order, and the pleadings are cleared up as the case progresses to its ultimate trial date.

The first three inquiries of the questionnaire<sup>10</sup> were designed to determine how many, what kind, and under what circumstances motions are filed to petitions dealing with injuries and damages.

Forty-one percent of the judges reported that the filing of motions directed to the pleadings delayed the assignment of cases for trial in their counties. Fifty-nine percent stated that the filing of such motions did not delay the assignment of cases for trial.

Fifty-two percent of the answering lawyers reported that the filing of motions directed toward the pleadings delayed the assignment of cases for trial in their counties. Forty-eight percent stated that such motions did not delay the assignment of cases for trial. Since this is a question of fact and not one of opinion, the small differences in the percentages between the judges and the lawyers results in our opinion from answers received based upon a different combination of counties by the two legal groups.

In those counties wherein the assignment of a case is delayed by the filing of a motion directed to pleading injuries or damages, both the judges and the lawyers find that motions or demurrers are filed in seventy-one percent of all cases. In those counties, however, where the assignment of a case is not delayed by the filing of a motion directed to a personal injury pleading, the judges tell us that motions

tional polls, it is common knowledge that even in those instances often only a handful of persons are involved in the sample.

<sup>10</sup> See note 5, *infra*.

and demurrers are filed in only fifty-two percent of all the cases. In the opinion and experience of the lawyers this figure is even lower—forty-seven percent of all cases.

The first conclusion we think that can be drawn from these figures is that where the filing of a motion delays the assignment of a case for trial a substantial number or percent of motions and demurrers filed will be for the purposes of delay rather than clarification of the issues or based upon sound legal grounds.

A significant and interesting fact emerges from a review of the figures pertaining to the percent of motions or demurrers directed only to personal injuries and damages. Although as we have seen above, many more motions are filed where there is a chance for delay, the percent of motions filed which are directed only to injuries or damages is about the same in all counties. The number involved is approximately twenty percent.<sup>11</sup> This would seem to indicate that motions directed to injuries or damages are not involved in the delaying tactics of counsel. Conversely, motions and demurrers used for delaying purposes do not usually involve injuries or damages.

Inasmuch as one out of every five petitions for personal injuries involves motions or demurrers directed toward injuries or damages it would seem that skill and knowledge in this respect is a must for the practicing tort lawyer. This is as true today as it has been in the past as we learned from Question no. 6.<sup>12</sup> The number or percentage of motions directed toward the pleading of injuries or damages is as great or greater than it was five years ago.<sup>13</sup>

GENERALLY SPEAKING IT IS NOT ACCEPTED PRACTICE FOR ATTORNEYS  
TO SEPARATELY STATE AND NUMBER THE VARIOUS ALLEGATIONS  
CONCERNING INJURIES

Question no. 7<sup>14</sup> was designed to learn whether or not in pleading injuries it was accepted practice to separately state and number the various allegations concerning injuries to the plaintiff.

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<sup>11</sup> In the judges' opinion, where the filing of a motion delays the assignment of a case for trial, thirty-one percent of all motions filed involve either injuries or damages. Where the filing of a motion or demurrer does not delay the assignment of cases for trial the judges report that nineteen percent of all motions or demurrers filed are directed toward injuries and damages. The lawyers report twenty-three percent and twenty percent respectively.

<sup>12</sup> See note 5, *infra*.

<sup>13</sup> The judges answered as follows: Sixteen percent found the number or percentage of motions greater, seventy-one percent about the same, seven percent less, and six percent with no opinion or information.

The lawyers reported: Fourteen percent greater, fifty-six percent about the same, twenty-eight percent less, and two percent with no opinion.

<sup>14</sup> See note 5, *infra*.

It was the statement of seventy-four percent of the judges replying to the questionnaire that such a practice was not acceptable in their counties. An even higher percentage, seventy-seven percent, of the lawyers polled wrote that such a practice was likewise not acceptable in their jurisdictions.

While there was no substantial difference in the total results or percentages between the metropolitan and rural areas as seen through the eyes of both the judges and the lawyers concerning whether or not such a practice was acceptable, there was some evidence that in counties having more than one judge there was likely to be a variance of opinion and practice within the court itself. This conclusion seems inescapable when lawyers and judges from the same county reported opposite findings on whether or not such a practice was acceptable in their jurisdiction.<sup>15</sup>

IN DESCRIBING INJURIES IN THE PETITION IT IS PREFERABLE TO USE  
LAY LANGUAGE OR LAY LANGUAGE AND MEDICAL TERMS BUT NOT  
MEDICAL TERMS ALONE

It was the purpose of Question no. 8<sup>16</sup> to determine whether injuries sustained by a plaintiff should be pleaded in medical terms or lay language or both.

Only five percent of the judges and lawyers replied that it was preferable to plead injuries in medical terms; forty-eight percent of the judges preferred lay language to describe injuries, while forty-seven percent said a combination of lay language and medical terms was preferable to them. A very high percentage of the lawyers, sixty-nine percent, felt that lay language and medical terms were preferable, while a much smaller number, twenty-six percent, thought that lay language alone was the best.

IN DESCRIBING INJURIES IN THE PETITION THERE IS A DIFFERENCE  
OF OPINION AS TO WHETHER SUCH INJURIES SHOULD BE DESCRIBED  
IN GENERAL TERMS OR IN DETAIL

It was the purpose of Question no. 9<sup>17</sup> to determine whether injuries should be described in detail or in general terms.

Sixty-one percent of the judges stated that it was preferable in their opinion to describe the plaintiff's injuries in general terms while thirty-nine percent thought that injuries stated in detail would be

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<sup>15</sup> Approximately thirty-five percent of both the judges and lawyers polled from the Metropolitan areas said that such a practice was acceptable while approximately sixty-five percent of both groups said such a practice was not acceptable.

<sup>16</sup> See note 5, *infra*.

<sup>17</sup> See note 5, *infra*.

better. A majority of the lawyers replying thought otherwise as fifty-four percent stated that injuries should be set forth in detail, while forty-six percent agreed with the majority of the judges that injuries ought to be pleaded in general terms.

PRACTICES IN PLEADING INJURIES AND DAMAGES WHICH THE TRIAL COURTS OF OHIO COMMEND OR FROWN UPON WERE MANY AND VARIED

Practices in pleading injuries which the trial courts of Ohio commend are, that the language be brief<sup>18</sup> and concise,<sup>19</sup> simple<sup>20</sup> and clear,<sup>21</sup> complete<sup>22</sup> and accurate.<sup>23</sup>

Practices in pleading damages which the trial courts of Ohio commend are, that the demand for damages be realistic<sup>24</sup> and that the various items of expense be itemized.<sup>25</sup> The attorneys of Ohio replying are in agreement with the judiciary, both as to injuries<sup>26</sup> and damages.<sup>27</sup>

Practices in pleading injuries and damages which the court frowns upon are, inflammatory adjectives,<sup>28</sup> excessive claims,<sup>29</sup> vague statements,<sup>30</sup> technical terms,<sup>31</sup> repetition,<sup>32</sup> minute details,<sup>33</sup> and care-

18 "Brevity," "shorter pleadings," "short, simple, direct and colorful recitation of the facts is best."

19 "Ordinary concise language."

20 "State allegations simply and concisely," "short simple statements," "simple, direct language."

21 "Conciseness and clarity."

22 "Complete and concise statement."

23 "Pleading with accuracy."

24 "Realistic figures in damages."

25 "Itemizing various items of expense."

26 "Brevity and simplicity," "clear, complete, and concise form," "brevity and clarity."

27 "Giving an itemized list of hospital and doctor bills," "exact statement of special damages items," "pleading a reasonable amount of damages."

28 "Inflammatory words and phrases," "use of numerous 'horror' adjectives," "omit adjectives," "avoid inflammatory adjectives," "avoid inflammatory adjectives and adverbs," "avoid superlatives such as excruciating pain and suffering."

29 "Praying for huge sums of money which counsel knows is not justified," "puffing the amount of damages," "large amounts asked for in damages which are not supported by the evidence," "omit overstatements," "unrealistic claims for damages," "claims for excessive damages," "claiming too much injury and damage from a subsequent accident when the real trouble comes from a previous accident," "damages in dollar amounts should be realistic rather than astronomical."

30 "Vague statements which result in argument on trial as to whether a particular injury is or is not pleaded."

31 "Use of labels such as whiplash injury," "avoid technical terms," "excessive use of medical terminology," "excessive use of medical terms."

32 "Avoid repetition," "avoid verbosity," "embellished language."

33 "Pleading injuries and damages so as to have them read like a hospital chart or

less draftsmanship.<sup>34</sup> Here again the answering attorneys were in agreement with the court.<sup>35</sup>

GENERAL COMMENTS, COMPLAINTS, OBJECTIONS, AND ADVICE FROM  
THE BENCH AND BAR IN REGARD TO PLEADING INJURIES  
AND DAMAGES

While one trial judge stated that he had not seen over ten good petitions in the last three years<sup>36</sup> and another observed that lawyers draw pleadings as though they were being paid by the word,<sup>37</sup> most who commented agreed that generally speaking the art of pleading is improving.<sup>38</sup>

Likewise, while a few attorneys voiced complaints of delay in ruling on motions<sup>39</sup> or wasted professional time in a useless ceremony in semantics,<sup>40</sup> most likewise agreed that there has been a gradual improvement in pleading injuries and damages in the past several years.<sup>41</sup>

The trial lawyer's known fear of the unknown undoubtedly prompted observations that pleadings should be both flexible<sup>42</sup> and broad<sup>43</sup> and should allow for unforeseen developments.

Looking to the future and for an improvement in pleading injuries and damages, Judge William K. Thomas from Cuyahoga County, one of the state's leading jurists, summed up the feeling of several trial judges when he urged adoption of the practice of not sending

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doctor's report," "describing therapy undergone by the plaintiff," "don't copy medical report from a physician verbatim," "minute description of operative procedures or treatment."

<sup>34</sup> "Careless draftsmanship," "poor spelling," "some lawyers and secretaries apparently fail to proof read their pleadings," "try for better lay-out on the paper."

<sup>35</sup> The matters most frequently mentioned as being objectionable to the court in the opinion of the attorneys were repetition, excessive detail, use of extremely technical language, and pleading a ridiculous amount of damages.

<sup>36</sup> "In the last three years I have not seen over ten good petitions."

<sup>37</sup> "Lawyers are not yet trained to actually set out the true facts but draw pleadings as though they were being paid by the word."

<sup>38</sup> "Generally speaking, pleading is improving."

<sup>39</sup> "There is considerable delay in ruling upon motions filed to pleadings."

<sup>40</sup> "Much too much professional time and energy is devoted to useless ceremony in our county."

<sup>41</sup> "In my county unless pleadings are specific to the point of absurdity, relative to injuries, proof will be excluded."

<sup>42</sup> "There has been a steady but gradual improvement in pleading injuries and damages over the past thirty years in our county."

<sup>43</sup> "Pleadings should be flexible as possible thus permitting the advocate a chance to retreat gracefully or advance boldly if there are unforeseen developments."

<sup>44</sup> "Injuries should be broadly pleaded to allow for developing still hidden injuries."



pleadings to the jury.<sup>44</sup> Judge Thomas felt such a practice would encourage notice pleadings<sup>45</sup> on the part of the plaintiff and discourage the filing of motions on the part of the defendant. Where pleadings are not sent to the jury one judge stated that ninety-five percent of all motions could be summarily over-ruled.<sup>46</sup> Questions no. 4 and no. 5 of the questionnaire<sup>47</sup> were designed to find out if there was any discernable trend in Ohio toward notice pleading and its necessary counterpart, the liberal use of discovery procedures such as interrogatories, depositions, and admissions.<sup>48</sup> While fifty-four percent of the judges state that they observed no trend in their counties toward notice pleading, forty-six percent replied that they did observe such a trend. Several held no opinion; one "wished there was" such a trend; and one frankly admitted he was not familiar with notice pleading, the Federal Rules of Civil Procedure, or Form 9.

The lawyers agreed with the judges as fifty-six percent observed

<sup>44</sup> "Adoption of the practice of not sending pleadings to the jury. There is a growing number of common pleas judges in the state who do not. This will encourage plaintiffs to use notice pleadings knowing that the petition will not be read to the jury. Also it will discourage defendants from filing motions knowing that any purple passages will not reach the jury."

Judge Thomas J. Parrino of Cuyahoga County agreed "that courts uniformly adopt a practice of not sending pleadings to the jury. This might discourage many of the practices which result in delay."

<sup>45</sup> Form 9 of the Federal Rules of Civil Procedure in setting forth the allegations concerning injuries and damages in a complaint for negligence, where a pedestrian was injured, states simply:

As a result plaintiff was thrown down and had his leg broken and was otherwise injured, was prevented from transacting his business, suffered great pain of body and mind, and incurred expenses for medical attention and hospitalization in the sum of \$1,000.00.

Typical comments from attorneys were as follows:

"It should be enough to say that the plaintiff was injured on a certain date and place and that there is reason to believe that the defendant's negligence caused it."

"The Federal Rules of Civil Procedure should be adopted by the state courts."

"I favor the adoption of the Federal Rules of pleading in our state courts."

<sup>46</sup> "At the trial this court makes up the issues for the jury and does not submit the pleadings. The result is that motions to make definite, to strike, etc. can be over-ruled in ninety-five percent of the cases without lengthy consideration by the court."

<sup>47</sup> See note 5, *infra*.

<sup>48</sup> The judges found the use of discovery procedures in Ohio today as follows:

Limited:	Forty-two percent
Moderate:	Thirty-six percent
Widespread:	Twenty-two percent

The lawyers reported the use of discovery procedures:

Limited:	Twenty-two percent
Moderate:	Forty-one percent
Widespread:	Thirty-seven percent.

no such trend in their counties while forty-four percent did find such a situation prevailing.

#### SUMMARY

In view of the foregoing facts and figures it would seem reasonable to draw the following conclusions:

- (1) Inasmuch as there was very little real difference between the bench and the bar of the metropolitan counties and the bench and the bar of the rural counties, this would seem to point toward the validity of the answers submitted as accurately reflecting the state of the law as it exists in Ohio today in regard to pleading injuries and damages.
- (2) An analysis of the answers revealed what practicing trial lawyers in Ohio have long known—that there is a distinct difference in the attitude, opinions, and decisions of the judiciary as to what the law is in regard to pleading injuries and damages not only throughout Ohio but within a specific county itself where more than one judge sits.
- (3) A significant number of judges and lawyers in Ohio recognize a trend toward notice pleading such as is found in Form 9 of the Federal Rules of Civil Procedure. Because this is true, the student and the practitioner must not only be thoroughly familiar with the detailed and somewhat formalistic pleading used in the state courts today in Ohio but must also become familiar with the Federal Rules, Form 9, and notice pleading.
- (4) There is an ever-increasing number of trial courts who do not send the pleadings to the jury. This results in shorter pleadings and fewer motions.