BURDEN OF PLEADING—GUEST STATUTE AND LAST CLEAR CHANCE

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Too often problems of pleading are thought of by the practitioner as only procedural problems or matters of form without reference to the substantive law involved. Too often a petition is but a synopsis of the story related by the client followed by the prayer. Any consideration as to the burden of pleading in any type of case necessarily involves and to a large extent must be governed by a determination as to the burden of proof. Questions as to the burden of proof are questions of substantive law.

By the terms of Ohio Revised Code section 2309.04, the petition must contain a statement of facts constituting a cause of action in ordinary and concise language. Where liability is predicated on the violation of a legal duty, the petition should set forth the facts from which the obligation or duty is supposed to arise.[1] Thus the petition must aver all essential facts constituting the cause of action, varying, of course, with the nature of the case or the remedy sought.

It would seem to be axiomatic that the plaintiff has the burden of proof as to those essential facts necessary to show the violation by the defendant of a legal duty owed to the plaintiff.

By the terms of Ohio Revised Code section 2309.13, the answer may contain not only a general or specific denial of each material allegation of the petition controverted by the defendant, but also a statement in ordinary and concise language of new matter constituting a defense or counterclaim. What is "new matter" constituting a defense? It refers to something relied on by the defendant, extrinsic to matters set up by the plaintiff in the petition, which, if true, constitutes a defense to the action.[2] The term manifestly implies something not relating to denials, something which is not a mere traverse of the allegations of the petition.[3] The term "new matter" embraces matters of confession and avoidance as understood at common law.[4] While a defendant may also deny the allegations of the petition by general or specific denial, he may, in addition thereto, assert in effect that, even if prima facie liability be established by proof of the essential allega-

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1 Jurgan v. Chair Products Co., 3 Ohio L. Abs. 196 (1925); McBride v. Tyler Co., 3 Ohio L. Abs. 698 (1925).

2 Leedle v. Christie, 15 Ohio C.C.R. (n.s.) 385 (1913).

3 Corrigan v. Rockefeller, 5 Ohio N.P. 338, 8 Ohio Dec. 14 (1898).

4 43 Ohio Jur. 2d "Pleadings" § 120; 41 Am. Jur. "Pleadings" § 156.

tions of the petition, such prima facie liability is defeated by proof of the "new matter" alleged in the answer.

By way of illustration of this principle, it is clear that while a defendant by way of evidence and argument may assert that plaintiff's injuries were caused solely by his own negligence, or that they were caused solely by the negligence of a third person, such assertions and the ultimate facts in support thereof are not "new matter" but are merely a denial of the allegations of the petition.[5] The indiscriminate intermingling of new matter, general denial, and specific denial in a pleading, with no apparent attention to the order in which they are set forth, is not authorized by the Revised Code and is not approved.[6]

As a basic proposition, it is clear that a party never has the burden of pleading facts as to which he does not have the burden of proof. In certain situations an issue may arise in a case without the necessity of any pleading relative thereto. Contributory negligence[7] and assumption of risk[8] are among the exceptions to the rule that defensive matter, as to which a defendant has the burden of proof, are required to be specially pleaded.[9]

GUEST STATUTE

Prior to June 15, 1933, the right of recovery by a guest from the operator of a motor vehicle was based on the common law principles of negligence and proximate cause. At that time the guest statute became law, since recodified as Revised Code section 4515.02, providing:

> The owner, operator, or person responsible for the operation of a motor vehicle shall not be liable for loss or damage arising from injuries to or death of a guest, resulting from the operation of said motor vehicle, while such guest is being transported without payment therefor in or upon said motor vehicle, unless such injuries or death are caused by the willful or wanton misconduct of such operator, owner, or person responsible for the operation of said motor vehicle.

A similar statute is also in effect as to the operation of aircraft.[10]

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[5] Sole negligence of plaintiff: Hanna v. Stoll, 112 Ohio St. 344, 147 N.E. 339 (1925); Duncan v. Evans, 60 Ohio App. 265, 20 N.E.2d 729 (1937).

Sole negligence of third party: Montanari v. Haworth, 108 Ohio St. 8, 140 N.E. 319 (1923); Hatsio v. Red Cab Co., 77 Ohio App. 301; 67 N.E.2d 553 (1945).

[6] Zetzer v. Lundgard, 95 Ohio App. 51, 117 N.E.2d 445 (1953).

[7] Fries v. Cincinnati St. Ry. Co., 138 Ohio St. 537, 37 N.E.2d 193 (1941); Bradley v. Cleveland Ry. Co., 112 Ohio St. 35, 146 N.E. 805 (1925).

[8] Centrello v. Basky, 164 Ohio St. 41, 128 N.E.2d 80 (1955).

[9] For other exceptions see 43 Ohio Jur. 2d "Pleadings" § 138.

[10] Ohio Rev. Code 4561.151 (1955).

The case law in Ohio to date has been limited to considerations of the motor vehicle guest statute.

Where the plaintiff pleads facts showing a status as a "guest," he must both plead and prove facts sufficient to make a jury issue as to willful or wanton misconduct. His burden both of pleading and of proof in such respect is well understood. The question of what facts are sufficient as a matter of law to constitute "willful or wanton misconduct" or to permit a jury to so conclude, has been and will continue to be the subject of continuous litigation.[11] Any intelligent discussion of the substantive law in such respect, as decided by the seemingly endless reported cases on this subject, cannot be contained in a discussion as to the burden of pleading except to note that a pleader should examine such substantive law before pleading, not after.

Where the plaintiff admittedly occupies a status other than that of a "guest," which for the purposes of simplification I shall refer to as a "passenger,"[12] he has, of course, the burden of alleging and proving facts establishing negligence and proximate cause. This creates no peculiar pleading problems other than those inherent in pleading any negligence case and is relatively well understood and accepted.

A pleading problem peculiar to the guest statute does arise where the plaintiff is asserting that he is a "passenger" and defendant is asserting that plaintiff is a "guest." Must plaintiff plead facts to show that he is not a "guest being transported without payment therefor" or must defendant plead facts to show that he is such a "guest"? On this question there is some divergency of legal opinion. More accurately stated, there is some divergency of legal opinion as to where the burden of proof lies, it being accepted that the burden of pleading properly rests on the party having the burden of proof.

In *Dobbs v. Sugioka*,[13] the opinion stated that the guest statute deprived one within its terms of a right theretofore existing, is in derogation of the common law, should be strictly applied, and "hence one relying on the guest statute has the burden of clearly establishing that claimant was a guest." The *Dobbs* case has been cited as authority for the proposition that defendant should have the burden of pleading and proof as to the "guest" status of the plaintiff.[14] Actually, a careful reading of the *Dobbs* case reveals that the *facts* as to the "guest" status of the plaintiff were not in dispute. The question involved simply a judicial interpretation of the Colorado guest statute as applied to particular facts and not a determination as to the burden

11 See 6 Ohio Jur. 2d "Automobiles" §§ 226, 227.

12 For simplification, this terminology has been used in opinion of the Ohio Supreme Court. See Burrow v. Porterfield, 171 Ohio St. 28, 168 N.E.2d 137 (1960).

13 117 Colo. 126, 185 P.2d 784 (1947).

14 Note, 21 U. Cin. L. Rev. 66 (1952).

of pleading or the burden of proof as to facts. In this respect the *Dobbs* case is similar to the syllabus holding of the Ohio Supreme Court in *Clinger v. Leman*[15] that the guest statute "being in derogation of the common law, is to be strictly, albeit reasonably, construed."

In *Hasbrook v. Wingate*[16] and *Ames v. Seibert*,[17] the Ohio Supreme Court has held in the syllabi[18] that under the guest statute a person seeking to recover from another person for injuries suffered because of the latter's negligent operation of a car in which the injured person was "riding," has the burden of showing that he paid or agreed to pay for his transportation. The *Ames* holding differed from the *Hasbrook* holding only by the addition of the words "expressly or impliedly" agreed to pay. Actually the literal language employed by the Ohio Supreme Court in these two cases is too broad since it would require a "rider" who, for reasons not concerned with payment or non-payment, was not a guest,[19] to prove payment or an agreement for payment. However, these cases do seem to have decided unequivocally that the burden is on the plaintiff if riding in an automobile driven by the defendant, to prove facts which show a status other than that of a "guest without payment therefor." It would follow, therefore, that in Ohio he has the burden of alleging such facts.

The rule as to the burden of proof announced in the *Hasbrook* case and the *Ames* case is the same as that adopted in other jurisdictions with guest statutes.[20] All of the cases specifically discussing pleading have held that such burden is on the plaintiff.[21]

Should such burden, both of proof and of pleading, be on the

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15 166 Ohio St. 216, 141 N.E.2d 156 (1957).

16 152 Ohio St. 50, 87 N.E.2d 87 (1949).

17 156 Ohio St. 45, 99 N.E.2d 905 (1951).

18 The syllabi of the Ohio Supreme Court state the law decided by that court as distinguished from individual opinions which might be expressed in the body of an opinion by a judge. See 14 Ohio Jur. 2d "Courts" § 247.

19 In Lombardo v. De Shance, 167 Ohio St. 431, 149 N.E.2d 914 (1958), the opinion of Taft, J. notes that a kidnapped person or one forced against his will to ride in an automobile is not a "guest" even though no payment is made for his transportation. In Redis v. Lynch, 169 Ohio St. 305, 159 N.E.2d 597 (1959), the court in a per curiam opinion held that the petition therein raised a question of fact as to whether plaintiff's status as a guest continued beyond the point of her alleged protests as to the alleged change in course taken by the automobile.

20 Kruzie v. Sanders, 23 Cal. 2d 237, 143 P.2d 704 (1943); McDougold v. Coney, 150 Fla. 748, 9 So. 2d 187 (1942); Leonard v. Stone, 381 Ill. 343, 45 N.E.2d 620 (1943); Pilcher v. Erney, 155 Kan. 257, 124 P.2d 461 (1942); Walker v. Lloyd, 295 Mass. 507, 4 N.E.2d 306 (1936); Baker v. Costello, 300 Mich. 686, 2 N.W.2d 881 (1942); Rowe v. Rowe, 119 S.W.2d 194 (Ct. of Civil Appeals, Texas, 1938); Hayes v. Brower, 39 Wash. 2d 372, 335 P.2d 482, 25 A.L.R.2d 1431 (1951).

21 The McDougold, Walker, Baker, Rowe, and Hayes cases, *supra* note 20, also hold that the burden of pleading the non-guest status is on the plaintiff.

plaintiff? In the field of legal writing it has been asserted that the decisions so holding have not made a real analysis of the problem and that since the guest statute deprives one of rights under the common law, the defendant should have the burden of pleading and proof in such respect.[22] It has been argued that he who benefits from a statute has the burden of pleading and proving such statute.[23]

It is true that most of the cases so holding have not discussed the reason for such holding except to make reference to the state's civil procedure statutes which in essence require a statement of facts constituting a cause of action. Implicit within such reference is the basic legal principle that to recover damages from another, the person seeking such damages has the burden of proof as to (1) those facts which disclose the legal duty and (2) those facts which show a violation of such duty. This principle was recognized by Judge Hart in the *Hasbrook* case when he stated that:

> Since the liability of the motorist host to a person riding with him depends on the status of the latter, he, the latter, has the burden of establishing such relationship as entitles him to recover . . . .

Critics of these cases, in my opinion, have failed to distinguish between matters of construction or interpretation of the statute, where the fact that a statute is in derogation of the common law is a matter to be considered,[24] and the unrelated questions concerning the burden of proof and the burden of pleading which involve facts. Where the legal duty only exists under certain facts and where the right of recovery is predicated on a violation of such legal duty, it should follow that the person seeking recovery should have the burden of pleading and proving the facts from which the duty arises. It would seem to make no difference in pleading or proof whether such legal duty arises from common law, is created by statute, or exists by virtue of a statutory limitation of a previous common law duty. The duty is a matter of *law* in any event. The *facts* to bring a person within the benefits flowing from a violation of the duty is a matter of *pleading* and *proof*.

It also has been asserted that to require a plaintiff to plead and prove a "non-guest" status is to require him to support the negative and that such would violate the accepted principle that he who affirmatively asserts has the burden. This specific assertion also has been rejected.[25] Here we are dealing in a matter of semantics. Where a

22 Note 21, U. Cin. L. Rev. 66 (1952). The question was also considered in 30 Ill. B.J. 66 (1941).

23 In Ohio a court takes judicial notice of the statutes which therefore are neither pleaded nor proved.

24 50 Ohio Jur. 2d "Statutes" § 284.

25 Baker v. Costello, 200 Mich. 686, 2 N.W.2d 881 (1942).

plaintiff in a state with a guest statute is predicating recovery on common law negligence, his affirmative duty is to show that defendant had a legal duty of exercising such care. While, in the words of the statute, the defendant owes such duty to the plaintiff only in the event that plaintiff is not a "guest being transported without payment therefor," such language is merely a matter of legislative draftsmenship and should not obviate the necessity of affirmative proof of facts to establish the existence of such duty.

What facts are necessary to establish a "non-guest" status has been the subject of many decisions in Ohio.[26] Most of the Ohio Supreme Court decisions on this subject to the date of that opinion are noted in the opinion of Judge Matthias in *Burrow v. Porterfield.*[27] Within the limitations of the subject matter here under consideration, it is impossible to discuss the many refinements of the substantive law of Ohio as to what facts establish the "rider" in a "non-guest" status. As a matter of pleading as well as proof, however, the skilled pleader must have a basic understanding of such substantive law as a necessary predicate for successfully stating a cause of action.

It has been held that wanton misconduct and ordinary negligence are joinable in the same case.[28] Thus separate causes of action may be contained in the same petition, one basing a claim of recovery on a "non-guest" status and negligence, the other being based on a "guest" status and willful or wanton misconduct.

Last Clear Chance

The problem as to the burden of pleading facts to bring a case within the last clear chance doctrine cannot be approached entirely independently of the substantive law of such doctrine. This facet of legal reasoning, sometimes described as the "doctrine of discovered peril," "doctrine of supervening negligence," "the last opportunity," and the "humanitarian doctrine," is recognized in legal writings as being traced to the celebrated case of *Davies v. Mann.*[29] In effect, the judge by his instructions in the *Davies* case permitted the jury to conclude that the prior negligence of the plaintiff in leaving his donkey on the highway so fettered as to prevent it from getting out of the way of carriages did not preclude recovery against defendant, who subsequently drove his carriage negligently against it. In the application of the basic rule of contributory negligence—the rule that plaintiff is barred from recovery if he be negligent and if his negligence

[26] See 6 Ohio Jur. 2d "Automobiles" § 220.

[27] 171 Ohio St. 28, 168 N.E.2d 137 (1960).

[28] Universal Concrete Pipe Co. v. Bassett, 130 Ohio St. 567, 200 N.E. 843 (1936).

[29] 10 Mees. & W. 548, 152 Eng. Reprint 588, 19 Eng. Rul. Cas. 190 (1842).

also be a *proximate* cause of his own damage—the *Davies* case would appear to be merely an application of such rule, not an exception thereto. In effect, the jury was permitted to conclude that the negligence of the plaintiff was not a proximate cause of his own damage but only a remote cause.

While many cases as to last clear chance have spoken of such doctrine as an exception to the rule of contributory negligence being a bar to recovery, such cases seem to be employing the term "contributory negligence" without including the basic ingredient of proximate cause. The substantive law of last clear chance has been the subject of extensive annotations.[30]

In the ordinary case where the issue of potential contributory negligence is involved, the court defines the term proximate cause in general principles—as being the natural and probable consequence of the negligence claimed.[31] In cases involving last clear chance, however, the issue of proximate cause has been explained in more specific terms and the jury told, in effect, that if it finds that plaintiff's injuries or damages were proximately caused by the subsequent negligence of the defendant under the applicable principles of last clear chance, the prior negligence of plaintiff in placing himself in a position of peril should be (or in some cases might be) considered as a matter of law a remote and not a proximate cause. It would appear that the doctrine of last clear chance is only the application of the rule of remote cause as contrasted with proximate cause in its specific application to certain facts, and thus is merely an expanded or detailed further definition of those terms as applicable to "prior" or "subsequent" negligence.

The scope of last clear chance and its applicability to a given set of facts is a matter as to which there is little uniformity of opinion. There is basic agreement that plaintiff must be in a position of "peril." There is disagreement as to whether the doctrine only extends to cases where defendant actually had knowledge of the position of "peril" and thereafter failed to exercise ordinary care (when the exercise of ordinary care after discovery would have avoided injury) or whether it also includes situations where defendant in the exercise of ordinary care should have discovered plaintiff's position of "peril." There is also disagreement as to the extent of the doctrine as applied to the question of whether plaintiff must be in a position where he could not physically extricate himself from such position of peril or whether the plaintiff is merely charged with the duty of ordinary care at such time (and assuming prior negligence in getting himself in

[30] See 92 A.L.R. 47; 119 A.L.R. 1041; 171 A.L.R. 365.

[31] 39 Ohio Jur. 2d *Negligence* §§ 29, 30, 31.

that position). Disagreement also exists as to what constitutes a position of "peril" and the extent to which defendant must recognize the full scope of such "peril."[32]

Prior to *Cleveland Ry. Co. v. Masterson*,[33] considerable confusion existed in the reported Ohio cases as to whether last clear chance was applicable on the basis that defendant in the exercise of ordinary care should have discovered plaintiff's position of peril.[34] That case held unequivocally that last clear chance is only applicable where defendant "did not, after becoming aware of plaintiff's perilous situation exercise ordinary care to avoid injuring him" and that an instruction that plaintiff's negligence "would not preclude recovery if defendant failed to exercise ordinary care 'after he saw or in the exercise of ordinary care should have seen' the plaintiff in a dangerous situation, is erroneous." The requirement of actual knowledge has been followed in subsequent cases.[35]

Ohio seemingly does not require that the plaintiff be in a position of "peril" from which it is physically impossible to escape. Where a plaintiff came upon an interurban track and there stalled her car and instead of immediately leaving it, as did some of her passengers, attempted to start it and then too late attempted to get out, the last clear chance doctrine has been applied where defendant failed "to reasonably exercise his 'last clear chance' to avoid injury after becoming aware of plaintiff's perilous position."[36] The court held that the test to be applied to the plaintiff in relation to the attempted escape was "what an ordinarily prudent person, faced with the same or similar emergency . . . would have done."[37]

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[32] See A.L.R. annotations, *supra* note 30.

[33] 126 Ohio St. 42, 183 N.E. 873, 92 A.L.R. 15 (1932).

[34] See Railroad Co. v. Kassen, 49 Ohio St. 230, 31 N.E. 282 (1892). Compare paragraph 3 of syllabus, "after becoming aware of the danger," and paragraph 1, "after he became aware, or ought to have become aware, of the plaintiff's danger"; Erie Ry. Co. v. McCormick, 69 Ohio St. 45, 68 N.E. 571 (1903) ("after knowledge of peril"); Drown v. Northern Ohio Traction Co., 76 Ohio St. 234, 81 N.E. 326 (1907) (Doctrine seemingly limited in per curiam opinion to situations where "after they see his danger," "after having notice of plaintiff's peril could have avoided the injury"); West v. Gillette, 95 Ohio St. 305, 116 N.E. 521 (1917) (Syllabus refers to "actual knowledge" but as pointed out by Jones, J., in dissent, trial court in charge used language "after he had discovered, or by the exercise of ordinary care, ought to have discovered," and judgment for plaintiff affirmed); Penn. Co. v. Hart, 101 Ohio St. 196, 128 N.E. 142 (1920); Cleveland Ry. Co. v. Wendt, 120 Ohio St. 197, 165 N.E. 737 (1929) ("ought to have seen" principle rejected in opinion of Jones, J.—not contained in syllabus).

[35] Brock v. Marlatt, 128 Ohio St. 435, 191 N.E. 703 (1934); Schaaf v. Coen, 131 Ohio St. 279, 2 N.E.2d 605 (1936); Cole v. New York Central Ry. Co., 150 Ohio St. 175, 80 N.E.2d 854 (1948).

[36] Schaaf v. Coen, 131 Ohio St. 279, 2 N.E.2d 605 (1936).

[37] Since no antecedent negligence of plaintiff is referred to in the case except the

To apply the doctrine of last clear chance, the negligence of the plaintiff must be antecedent and an instruction on that issue is not proper where the negligence of the defendant and that of the plaintiff are concurrent.[38]

One of the chief difficulties with the question of last clear chance is ascertaining the proper method of placing it in issue. The matter of pleading as applied to last clear chance is the subject of an extensive annotation[39] and of a law review note.[40]

In Ohio it now is well settled that the plaintiff, in order to rely on last clear chance, has the burden of alleging facts in his petition giving rise thereto. In *Drown v. Northern Ohio Traction Co.*,[41] the third paragraph of the syllabus reads:

> Since the plaintiff can recover only upon the allegations of his petition, he cannot recover upon negligence which warrants the application of the rule of "last chance" without alleging it in his petition.

In the *Masterson* case,[42] the third paragraph of the syllabus states in part:

> A petition, setting forth a state of facts as a basis for the application of the doctrine of last chance but which, in that connection, merely alleges that defendant saw or could have seen the plaintiff in a perilous situation is insufficient to invoke the rule; . . . .

While the last clear chance rule presupposes antecedent fault or negligence on the part of the plaintiff,[43] the *Masterson* case also held that a plaintiff might plead in the same petition a case of ordinary negligence and also plead a state of facts invoking the last clear chance rule, and recover on whichever aspect the proof in the case assumed. The opinion of Jones, J., states that there is no inconsistency in such pleadings "nor need the pleader confess his own negligence in order to invoke the rule." Thus it would appear that while plaintiff need not necessarily allege the antecedent facts which caused him to be placed in a perilous situation to invoke last clear chance, he must

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failure to leave the stalled car before she actually did, and since it was held that the trial court was in error in directing a verdict because such conduct was not necessarily negligence, quaere, is this case actually one of last clear chance in the sense this term is customarily used? Last clear chance assumes that plaintiff *by his own fault or negligence* has placed himself in a perilous position. See syllabi in Masterson case and Brock case.

38 Cleveland Ry. Co. v. Wendt, 120 Ohio St. 197, 165 N.E. 737 (1929); Brock v. Marlatt, 128 Ohio St. 435, 191 N.E.2d 703 (1934).

39 25 A.L.R.2d 257.

40 Note 3 W. Res. L. Rev. 87 (1951).

41 76 Ohio St. 234, 81 N.E. 326 (1907).

42 126 Ohio St. 42, 183 N.E. 873, 92 A.L.R. 15 (1932).

43 Cleveland Ry. Co. v. Wendt, *supra* note 38; Brock v. Marlatt, *supra* note 38.

allege facts which support a conclusion (1) that he was in a perilous situation, (2) that defendant was actually aware of such peril, and (3) that defendant by the exercise of ordinary care after such discovery should have avoided the accident but defendant, after such discovery, failed to exercise ordinary care.

By the use of the alternative pleading thus permitted, plaintiff can allege facts to support an eventual argument that he was not negligent in any respect but that even if he be found to be negligent, such negligence was antecedent to his position of peril, that the subsequent negligence of the defendant under last clear chance was the sole proximate cause of the injury or damage, and that plaintiff's antecedent negligence was not a proximate cause.

In some jurisdictions the courts have taken the position that last clear chance need not be specially pleaded and that it can be raised under a petition charging in general terms negligence which was the proximate cause of the injury.[44] Many of these decisions seem to turn on the question of whether a general allegation of negligence is permitted, a procedural pleading problem not peculiar to last clear chance. Others seem to emphasize the concept that last clear chance, being concerned with the question of proximate cause as it would apply to plaintiff's negligence, is in effect defensive matter to an affirmative claim by defendant of contributory negligence on the part of plaintiff. Even where the procedural statutes of a state permit a general allegation of negligence, however, where the plaintiff in his petition alleges specific acts of the defendant which clearly do not call for the application of the doctrine of last clear chance, there is authority for the proposition that he will be limited to the proof of such facts and may not, on the basis of such pleading, import the issue of last clear chance into the case.[45] Many other jurisdictions take the position, as held in Ohio in the *Drown* case and the *Masterson* case that before the plaintiff can rely on last clear chance, he must plead facts giving rise thereto in his petition.[46]

Some jurisdictions have taken the position that in order to invoke the doctrine, the plaintiff must confess initial negligence in creating his perilous situation and avoid this admission by alleging facts setting up the defendant's subsequent negligence.[47] Most jurisdictions, however, have held that such an admission need not be made and are in accord with the rule of the *Masterson* case in such respect.[48]

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44 See cases listed 25 A.L.R.2d at pages 265-267.

45 See cases listed 25 A.L.R.2d at page 273, 274.

46 See cases listed 25 A.L.R.2d at pages 259, 260.

47 See cases listed 25 A.L.R.2d at page 288.

48 See cases listed 25 A.L.R.2d at page 289.

It has been suggested that a very simple solution to the problem of pleading of last clear chance is to permit a plaintiff to raise the issue by way of reply.[49] This assertion is based on the premise that since contributory negligence is an affirmative defense and since a reply consisting of the elements of last clear chance meets such defense, it properly should be contained in the reply. Actually, however, last clear chance is more than a defense to a claim of contributory negligence. It also is a cause of action in and of itself.

This can be illustrated by reference to antecedent and subsequent negligence. Plaintiff, by alleging facts claiming antecedent negligence on the part of defendant, seeks to recover based on such facts. In the words of Revised Code section 2309.04, this is his statement of facts constituting his cause of action. By way of defense to this claim, defendant's answer alleges antecedent negligence on the part of plaintiff which, if established, would be a complete defense to the only negligence alleged in the petition—antecedent negligence of the defendant. Then, by way of reply, plaintiff alleges other subsequent facts to bring into play last clear chance—alleging his perilous situation, the defendant's knowledge thereof, and the defendant's failure thereafter to exercise ordinary care.

While proof of *subsequent* negligence on the part of defendant as last clear chance may have the effect of removing plaintiff's *antecedent* negligence as a dispositive element in the case, it likewise would have the effect of removing *defendant's antecedent* negligence as a dispositive element in the case, and liability would be predicated *solely* on defendant's *subsequent* negligence. In other words, the subsequent negligence of defendant does not merely erase the antecedent negligence of the plaintiff as a matter of proximate cause, and thus permit the plaintiff to recover on the allegations of his petition—antecedent negligence of the defendant. In the eyes of the law the antecedent negligence of the plaintiff is a complete defense to any cause of action based on the antecedent negligence of the defendant. It is not a defense to a cause of action based on the subsequent negligence of the defendant under the doctrine of last clear chance. Thus, the very negligence which would be the basis of recovery and the only basis for such recovery would not be contained in the petition but only in the reply. In Ohio, however, a plaintiff is entitled to recover only on the causes of action set out in his petition, and if he seeks to introduce new causes of action in his reply, it is a departure.[50]

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[49] Note 3 W. Res. L. Rev. 87 (1951).

[50] Defiance Water Co. v. Defiance, 68 Ohio St. 520, 67 N.E. 1052 (1903); Mehurin v. Stone, 37 Ohio St. 49 (1881); Millersport Woolen Mills Co. v. Titus, 35 Ohio St. 253 (1879); Durbin v. Fisk, 16 Ohio St. 533 (1866).

While there are some cases holding that last clear chance may first be raised by reply, some of these are in states where such could be proved under the general allegations of negligence in the petition. Others hold that such is a departure on the basis that the reply set up an independent right of recovery which relegated the antecedent negligence of both the plaintiff and the defendant to the background.[51]

While the Ohio cases holding that facts giving rise to last clear chance must be pleaded in the petition have not discussed in detail the reason for such requirement, it would appear that these cases necessarily hold that the facts which give rise to this doctrine are the facts "constituting his cause of action" within the purview of Revised Code section 2309.04, and are facts as to which plaintiff has both the burden of proof and the burden of pleading.

[51] See 25 A.L.R.2d at pages 277-279.