

# DEFENSIVE PLEADING IN NEGLIGENCE ACTIONS

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The "defensive pleading" is the answer.<sup>1</sup> It usually contains admissions<sup>2</sup> of some of the allegations of the petition and a denial of others; it may also contain one or more affirmative defenses.<sup>3</sup> Our consideration logically, therefore, is of (1) admissions, (2) denials, and (3) affirmative defenses. We shall limit our discussion to Ohio practice except for a brief mention of federal practice in removed cases at the end of the article. A scholarly treatise on this subject is not possible—the rules are relatively simple and can be gleaned from the decided cases and text authorities by one lawyer as well as by the next. It may, however, prove convenient to have the principles utilized in preparing most answers in negligence cases brought together. More importantly, defensive pleading is largely a matter of tactics and we shall suggest some considerations born of experience which may prove useful in putting into practice the rules governing the preparation of answers.

## ADMISSIONS

The pleader need admit nothing in his answer. There is no "good faith" requirement in the Ohio Revised Code.<sup>4</sup> In good conscience the pleader should admit matters that are not controverted but, as a practical matter, what is admitted is usually determined by tactical considerations.

Allegations of the petition which the defendant feels plaintiff may

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<sup>1</sup> It is, of course, desirable to "clean up" the petition before answer. Improper allegations of any type, including, among others, improper specifications of negligence and improper elements of damage, may be attacked by motion. The filing of other types of motions or a demurrer may be in order. Whether any of these are filed or whether the defendant goes straight to his answer will depend upon the quality of the petition and also upon questions of strategy such as "educating the plaintiff" which fall outside the scope of this article. We assume, therefore, for purposes of this article that no grounds exist for motion or demurrer or that such have been filed and disposed of and that the pleader is at the answer stage.

<sup>2</sup> It sometimes contains averments in the nature of admissions. We discuss these below under "Admissions."

<sup>3</sup> It sometimes contains "affirmative averments," which, while not "affirmative defenses," we discuss below under that heading.

<sup>4</sup> Cf. Fed. R. Civ. P. 8(b).

have difficulty in proving are often denied. An example is "agency." Inaccessibility of the master's office and the unavailability of the alleged servant may present a plaintiff with difficulties of proof. Even though defendant's counsel feels that his adversary may ultimately be able to establish "agency," he may choose to leave to him the task of doing so and, therefore, not admit it.

There are certain types of negligence actions in which some pleaders likewise admit very little with the hope that the plaintiff will fail to prove all of the essential elements of his case. "Floor-slipping" cases—cases involving falls in business establishments—are in this category. Frequently the defendant knows little of its own knowledge concerning the alleged occurrence and can, therefore, justify denying everything except its corporate capacity. Even if it knows somewhat more, it may choose "to put plaintiff to his proof" as to his status at the time of the alleged fall and all of the circumstances surrounding it. The same tactical consideration applies in most cases involving injury while on the premises of the defendant. Plaintiff's status—whether invitee or licensee—is often of prime importance. Defendant frequently denies allegations bearing on this matter on the theory that plaintiff may fail to get his proof on this issue in its most favorable posture.

The extent to which plaintiff's allegations are admitted is often dictated by the desire to present an appearance of candor to the jury. To deny that which will unquestionably be established may place the defendant in an untenable position when attention is called in closing argument to his denial of facts that were really indisputable. Formal matters—the representative capacity of the plaintiff, the corporate capacity of either party, the facts as to streets and highways—should be admitted. So, also, should the direction of travel of vehicles, that a collision occurred, and that plaintiff sustained injuries, if such is the fact, although the nature and extent of the injuries are being denied.

There are often allegations in a petition which are close to what defendant is prepared to admit as the facts, but as to which an admission goes too far while a denial may be used to his disadvantage. The solution lies in using an averment that is in the nature of an admission, *e.g.*, defendant avers the facts as he claims them to be. When his averment is measured against the corresponding allegation of the petition, he will usually be found to have, in effect, admitted it in part and denied it in part. The same problem may arise from the form in which allegations of a petition are cast. Defendant is prepared to admit the substance of the allegation but he does not care to admit it as pleaded. An averment may be used to accomplish the desired result.

## DENIALS

Denials under our Ohio Revised Code may be general or specific.<sup>5</sup> The usual pleading form in negligence cases is to begin the answer with any admissions and any averments in the nature of admissions and to follow these with a separate paragraph containing a general denial. The only reason for a specific denial is emphasis; a pleader may want, for example, specifically to deny that he was negligent. We question that such form of pleading accomplishes much, if anything, and a general denial should suffice for most purposes. If specific denials are used along with a general denial, one caveat is to see that they are not employed so as to constitute a waiver of the general denial. Thus, in *Hermanies v. Standard Oil Company*<sup>6</sup> plaintiff alleged that defendant operated its truck through Petrie, its employee, who was acting within the scope of his employment. Defendant admitted that Petrie was operating the truck, denied generally the allegations of the petition, and then specifically denied the allegation of failure to stop and that plaintiff was injured to the extent claimed. Plaintiff offered no evidence that Petrie was operating the truck for defendant at the time of the collision. After a verdict for plaintiff, defendant moved for judgment notwithstanding the verdict and urged that there was no proof of "agency." This motion having been overruled and, in due course, an appeal prosecuted, the court of appeals stated the issue as follows:

This contention of counsel presents for determination the question of whether under the pleadings, as interpreted by defendant's conduct, the authority of Petrie to represent the defendant was an issue of fact.

The court noted that Ohio Revised Code section 2309.13(A) provides that the denial must be a general "or" a specific denial and said that pleading both is unauthorized; that, if both are pleaded, the general denial is limited by the specific denials; that, in such case, the defendant must elect upon which it will stand; that in the case before the court defendant elected by its conduct to rely upon the specific denials; and that it had, therefore, not put in issue Petrie's authority. The form in which the denials were pleaded and defendant's conduct are strong factors in this case and including a special denial in an answer prior to make a general denial should seldom have the result of denying to defendant the advantage of the latter.

A general denial controverts all allegations of the petition not admitted to be true,<sup>7</sup> except the capacity of a corporate plaintiff

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<sup>5</sup> Ohio Rev. Code § 2309.13(A) (1953).

<sup>6</sup> 102 Ohio App. 143, 131 N.E.2d 233 (1955).

<sup>7</sup> See 43 Ohio Jur. 2d, 160-161.

which must be specially denied to be put in issue.<sup>8</sup> Such a denial may under certain circumstances raise the issue of lack of *in personam* jurisdiction over the defendant. This arises when plaintiff sues a resident and a non-resident of a county as joint or concurrent tort feorsors. Jurisdiction over the latter exists only if it continues over the former, and a judgment can properly be rendered against the latter only if it is also rendered against the former.<sup>9</sup> The non-resident defendant puts the matter of jurisdiction over him in issue by pleading a general denial and such pleading fully protects him if a judgment is not entered against the resident defendant.<sup>10</sup> By a general denial defendant puts plaintiff to his proof as to the essential ingredients of his cause of action—negligence, proximate cause, and damages. The usual matter of concern with a general denial is not its effect as to the plaintiff but the scope of the defense it permits to the defendant.

The classic statement of the Ohio rule in this regard is that under a general denial:

Defendant [can] offer any competent evidence tending to show that he did not cause the injury, and that it did not result from his negligence.<sup>11</sup>

Obviously, he can show that he was not negligent, that his negligence was not the proximate cause of the collision, or that the injuries claimed did not result from the accident. Equally obviously, perhaps, he can show that the injuries were caused by the negligence of a third party<sup>12</sup> because, if such is the case, plaintiff's claim that defendant caused them has failed. Not so obviously, but nevertheless the fact under Ohio practice, is that defendant can also show under a general denial that the plaintiff was guilty of contributory negligence<sup>13</sup> or that the plaintiff assumed the risk.<sup>14</sup> Such is the rule even though the burden of proof as to these two matters is on the defendant and they would, therefore, normally have to be pleaded as affirmative defenses. The Ohio courts have, however, circumvented the necessity of such pleading by the statement that the issues of contributory negligence and assumption of risk should be submitted to the jury even though the pleadings do not raise the issues if they arise in the case by virtue of

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<sup>8</sup> *Brady v. National Supply Co.*, 64 Ohio St. 267, 60 N.E. 218 (1901).

<sup>9</sup> *Gorey v. Black*, 100 Ohio St. 73, 125 N.E. 126 (1919).

<sup>10</sup> *Bucurenciu v. Ramba*, 117 Ohio St. 546, 159 N.E. 565 (1927).

<sup>11</sup> *Hanna v. Stoll*, 112 Ohio St. 344, 147 N.E. 339 (1925); see 39 Ohio Jur. 2d "Negligence" §§ 132, 163.

<sup>12</sup> *Schreiber v. National Smelting Co.*, 157 Ohio St. 1, 104 N.E.2d 4 (1952).

<sup>13</sup> *Shapiro v. Kilgore Cleaning & Storage Co.*, 80 Ohio L. Abs. 504, 156 N.E.2d 866 (1959); 39 Ohio Jur. 2d "Negligence" § 133.

<sup>14</sup> *Centrello v. Basky*, 164 Ohio St. 41, 128 N.E.2d 80 (1955).

the evidence.<sup>15</sup> Finally, it is also obvious that certain matters—statutes of limitations<sup>16</sup> and release,<sup>17</sup> for example—cannot be brought within the scope of a general denial and must be pleaded if they are to be availed of by the defendant.

#### AFFIRMATIVE DEFENSES

The defendant, having prepared his answer through his admissions and his general denial, is confronted with the question of what, if any, affirmative defenses are to be pleaded. This determination will be dictated by the legal requirement of pleading such defenses (for example, a release) or by tactical considerations. By "tactical considerations" we mean that the fact that a defendant need not plead a defense specially in order to avail himself of it (for example, contributory negligence) does not mean that he may not desire to do so. Pleading it emphasizes it, enables defendant's counsel to read it to the jury from a typed document in opening statement, and will lead to its being reemphasized when the court outlines the pleadings to the jury in his charge. We turn now to a discussion of those defenses which the defendant need not plead but which he may decide to plead for tactical reasons, and some of the defenses which he must plead if he is to avail himself of them.

Before turning to what are strictly affirmative defenses a word on "affirmative averments" is in order. We have discussed above averments in the nature of admissions. A related averment is one in which the defendant brings into his answer his contrasting version of certain facts from those as pleaded in the petition. For example, in a pedestrian case, after admitting that his automobile was proceeding in a certain direction, defendant may want to soften the effect of an admission that it struck the plaintiff. He does so by averring that, when his automobile had reached a point which was approximately 100 feet south of the cross-walk, the plaintiff, suddenly and without warning, ran from between two parked automobiles into the path of defendant's automobile, that he applied his brakes and turned his automobile sharply to his left in an attempt to avoid striking plaintiff but that he was unable to do so. The possible tactical advantage of such an averment is plain.

#### *Contributory Negligence*

The defendant after denying his negligence by his general denial says that "if it should be made to appear that he was negligent in any

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<sup>15</sup> See notes 13 and 14, *supra*.

<sup>16</sup> See notes 46-49, *infra*.

<sup>17</sup> *Infra*, note 50.

of the particulars alleged in the petition, which he denies, plaintiff was guilty of negligence which directly and proximately contributed to cause the collision and any injuries and damages sustained by plaintiff." The defense should be pleaded conditionally, that is, "if it should be made to appear" that defendant was negligent, because it has been held that a denial of negligence and an unconditional allegation of contributory negligence are inconsistent defenses and require an election by the pleader.<sup>18</sup>

The defendant need not go beyond the general form of allegation indicated above. It is unnecessary for him, in contrast to plaintiff's pleading of his cause of action, to allege the specific facts upon which the defense of contributory negligence rests.<sup>19</sup> By the same token, the defendant need not plead any specifications of contributory negligence in contrast to the common practice of pleading specifications of negligence in the petition. The usual practice is to plead in the general form indicated above.

There is one possible exception to the rule that the defendant need not plead contributory negligence to avail himself of it. The Ohio Supreme Court said recently that if "the defendant contemplates requesting a special verdict and relies on the affirmative defenses of contributory negligence and assumption of risk, the better and safer practice" is to plead such defenses.<sup>20</sup> We are unable to see why the manner of taking the jury's verdict should affect a matter of pleading. The jury determines certain issues, and these are the same whether the verdict be general or special and, as to the issues of contributory negligence and assumption of risk, they are in the case if brought there by the evidence regardless of the pleadings.<sup>21</sup> We doubt that the supreme court means that a defendant who has failed to plead these defenses and who requests a special verdict will be precluded from having such issues included in the form of verdict but rather is seeking all possible help for the trial court when it is called upon to submit a case to the jury for a special verdict.

Finally, what of the tactical considerations of pleading contributory negligence? If a defendant intends to urge contributory negligence, he should plead it. He is seldom "tipping his hand." Plaintiff's counsel will be aware of the possible claim in this regard. We pointed out above how pleading the defense emphasizes it.

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<sup>18</sup> Cincinnati Traction Co. v. Stephens, 75 Ohio St. 171, 79 N.E. 235 (1906); Bakas v. Casparis Stone Co., 14 Ohio N.P. (n.s.) 577 (1913); Ellison v. Pullman Co., 7 Ohio L. Rep. 330 (1909).

<sup>19</sup> Knisely v. Community Traction Co., 125 Ohio St. 131, 180 N.E. 654 (1932).

<sup>20</sup> Miller v. McAllister, 169 Ohio St. 487, 160 N.E.2d 231 (1959).

<sup>21</sup> See notes 13 and 14, *supra*.

### *Assumption of Risk*

The Ohio Supreme Court said in *Jones v. Erie Rd. Co.*<sup>22</sup> that "in order for the defendant to avail itself of (the defense of assumed risk) it was necessary to plead it specially." Relatively recently, however, the supreme court, without expressly overruling the above case but calling attention to it so that it could not be thought to have been "ignored," held that:

Even though the pleadings do not raise assumption of risk as an issue, where it enters the case by virtue of the evidence, the court should charge on that subject.<sup>23</sup>

It would seem, therefore, that the present law of Ohio is that assumption of risk need not be pleaded to be relied upon but, interestingly, in the case referred to above<sup>24</sup> involving the pleading of this defense when a special verdict was to be requested, the court, having said that it should be pleaded, cited the *Jones* case with an ubiquitous "cf" and made no reference to the *Centrello* case. It would seem that the court might more appropriately, if the *Centrello* case is the law, have cited it with a "cf" rather than the *Jones* case.

The same tactical considerations which we discussed above in connection with pleading contributory negligence apply here; if the pleader is really serious about the defense, he should plead it.

### *Sole Negligence of the Plaintiff*

It is clear that a defendant need not allege sole negligence of the plaintiff to prove it. A general denial is adequate for such proof.<sup>25</sup> In fact, it has been said that such an allegation is surplusage,<sup>26</sup> but most courts permit it to stand as against a motion to strike.<sup>27</sup> It is pleaded for purely tactical purposes. Whatever may be said of its being surplusage technically, it is undeniable that it adds strength to an answer and draws the issue more sharply to be able to say that "the collision was not caused by any negligence of the defendant but was solely caused by and the result of plaintiff's own carelessness and negligence." Tactically, it is well not to so plead in a case in which it is anticipated that the proof of defendant's negligence will be strong

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<sup>22</sup> 106 Ohio St. 408, 140 N.E. 366 (1922).

<sup>23</sup> *Centrello v. Basky*, *supra* note 14, at 82.

<sup>24</sup> *Miller v. McAllister*, *supra* note 20.

<sup>25</sup> See 39 Ohio Jur. 2d "Negligence" § 135.

<sup>26</sup> *Ibid.*

<sup>27</sup> The following unreported rulings of the Common Pleas Court of Franklin County, Ohio, have permitted allegations of plaintiff's sole negligence: *Wills v. Huffman-Wolf*, No. 192519 (1955); *Short v. Farley & Son*, No. 192980 (1955); *Price v. Big Bear Stores*, No. 188785 (1954). *Contra*: *Moberly v. Heigle*, No. 188577 (1954); *Brown v. Lerch*, No. 186592 (1953).

and that of plaintiff's weak. It is better in such instance to plead contributory negligence. When, however, the reverse is true—when defendant's negligence, if any, is weak and plaintiff's strong—the allegation of sole negligence is preferable to that of contributory negligence.

A statement in the cases that may give some cause for concern is that the issue of contributory negligence is not presented by a plea of sole negligence.<sup>28</sup> In fact, it has been said that they are incompatible defenses.<sup>29</sup> This does not mean, however, that the defense of contributory negligence is lost to the defendant by his pleading sole negligence. If the evidence will support a charge on contributory negligence, he is entitled to it under the rule which we have discussed above. In a word, plaintiff cannot recover if the negligence is solely his, nor can he recover it if is partly defendant's and partly his, and these substantive rules are unaffected by how defendant may plead so long as the principle obtains that the defense of contributory negligence is available to the defendant if brought into the case by the evidence.

#### *Negligence of a Third Party*

A is a passenger in B's automobile when it collides with C's automobile. A sues C. As we pointed out above, C can show under a general denial that the collision was caused by the negligence of B.<sup>30</sup> What we have said, however, as to emphasizing the sole negligence of a plaintiff by pleading it applies equally here. An affirmative defense by C that the collision was not caused by his negligence but by the negligence of B clearly sharpens the issue and better enables C to urge his contention that not his, but B's, negligence caused the collision. The same considerations as to the propriety of such a defense which we discussed under sole negligence of the plaintiff apply here also and the courts have similarly resolved attempts to strike the two types of allegations.<sup>31</sup>

#### *Statutes and Ordinances*

The court takes judicial notice of statutes upon which a defendant relies just as it does of those upon which plaintiff relies.<sup>32</sup> While

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<sup>28</sup> *Rayland Coal Co. v. McFadden*, 90 Ohio St. 183, 107 N.E. 330 (1914); *Bickley v. Sears, Roebuck & Co.*, 62 Ohio App. 180, 23 N.E.2d 505 (1938).

<sup>29</sup> *Sharp v. Russell*, 37 Ohio App. 306, 174 N.E. 617 (1930).

<sup>30</sup> See *Schreller v. National Smelting Co.*, *supra* note 12.

<sup>31</sup> *Thompson v. Ulrich*, No. 182180, Common Pleas Court of Franklin County, Ohio (1951). However, a motion to strike the alleged negligence of a co-defendant was sustained by the same court in *Volpe v. Evans, et al.*, No. 204697 (1960).

<sup>32</sup> *Hadfield-Penfield Steel Co. v. Sheller*, 108 Ohio St. 106, 141 N.E. 89 (1923); see 39 Ohio Jur. 2d *Negligence* § 121.

a municipal court takes judicial notice of the ordinances of the city in which it sits,<sup>33</sup> in the court of common pleas a plaintiff must plead and prove any ordinances upon which he relies.<sup>34</sup> In the court of common pleas, however, a defendant may offer an ordinance which tends "to meet the charge of negligence against the defendant and as reflecting upon the care exercised by the plaintiff" without having pleaded it.<sup>35</sup> An ordinance which furnishes a basis for a claim of contributory negligence or assumption of risk may, therefore, be offered by the defendant even though not pleaded.<sup>36</sup>

The general practice is not to plead an ordinance upon which defendant relies. If, however, our reason for pleading contributory negligence and assumption of risk, namely, to emphasize them is sound, there may be instances in which a defendant may wish to plead an ordinance for the same reason.

#### *Administrative Rulings and Regulations*

We have found no Ohio cases involving the necessity of a defendant's pleading administrative rulings or regulations but there is a case holding that a plaintiff need not do so. In *Claypool v. Mohawk Motor, Inc.*, the Court of Commons Pleas of Lucas County charged on P.U.C.O. regulations which were neither pleaded nor introduced in evidence. The court of appeals affirmed and in an unpublished opinion said that the trial court could take judicial notice of such regulations, which meant that they did not have to be pleaded or proved.<sup>37</sup> The court of appeals also held that a charge that the violation of such regulations "would constitute negligence on its (defendant's) part" was not error but the supreme court reversed, holding that such violation should be considered only as a factor together with other evidence in determining the issue of negligence of the defendant.<sup>38</sup> While the holding of the supreme court would indicate that it approved of the decision below that there was no necessity of pleading the regulations since it could not reach the effect of the regulations until they were properly in the case, there is nothing in the opinion in any way bearing on this point. If we accept the determination of the court of appeals on this point as good law, it would follow *a fortiori* that a defendant

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<sup>33</sup> *Gates v. City of Cleveland*, 18 Ohio C.C.R. (n.s.) 349 (1911).

<sup>34</sup> See 39 Ohio Jur. 2d "Negligence" § 121, n.9 and cases there cited.

<sup>35</sup> *Hanna v. Stoll*, 112 Ohio St. 344, 147 N.E. 339 (1925); *Knisely v. Community Traction Co.*, 125 Ohio St. 131, 180 N.E. 654 (1932); see 39 Ohio Jur. 2d "Negligence" § 121.

<sup>36</sup> *Ibid.*

<sup>37</sup> See 2 Fess, Instructions to Juries in Ohio 225, n.42.

<sup>38</sup> 155 Ohio St. 8, 97 N.E.2d 32 (1951).

need not plead such regulations. It has, however, been our experience that plaintiffs, when relying on administrative rulings and regulations, have usually pleaded them. It would seem on principle that this might be required. If, however, plaintiff must do so, it still might not be necessary for a defendant to do so if the situation were analogized to the pleading of ordinances. Perhaps such analogy is not apt because a plaintiff would normally take pertinent ordinances into account and therefore be less likely to be surprised by defendant's reliance on them than he would by reliance on administrative rulings or regulations. In the absence of case law more definitive than we now have, it may be wise to plead any such rulings or regulations upon which reliance is placed.

### *Custom and Usage*

A general custom or usage need not be pleaded,<sup>39</sup> but a special custom or scope of a particular trade must be pleaded.<sup>40</sup> These rules are said to apply to either party.<sup>41</sup> The same tactical considerations apply, however, with respect to pleading a general custom or usage as in some of the other matters discussed above where they may be shown under a general denial. The general custom or usage may be of such significance in the case that defendant desires to give it particular emphasis and he achieves this by pleading it specially.

### *Lack of Jurisdiction Over Defendant*

We have seen above that a non-resident defendant joined with a resident defendant as a joint or concurrent tortfeasor may avail himself of the defense of the lack of *in personam* jurisdiction under a general denial.<sup>42</sup> The non-resident defendant may, however, for the same tactical reason to which we have been referring—namely, emphasis—decide to plead the lack of jurisdiction affirmatively. If he does so, he will usually do it as the first defense in his answer by denying that the incident in question was caused by the joint and concurrent negligence of the defendants and averring that the court has no jurisdiction over him, the non-resident defendant. If he has done this and if the case is submitted to the jury as to both defendants, the non-resident defendant may request and is entitled to a special charge that, if the jury determines that the resident defendant is not liable, it must then find that the court has no jurisdiction over

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<sup>39</sup> See 39 Ohio Jur. 2d "Negligence" § 122.

<sup>40</sup> *Palmer v. Humiston*, 87 Ohio St. 401, 101 N.E. 283 (1913); *Cleveland, C. C. & St. L. R. Co. v. Potter*, 113 Ohio St. 591, 150 N.E. 44 (1925).

<sup>41</sup> *Ibid.*

<sup>42</sup> *Bucurenciu v. Ramba*, *supra* note 10.

the non-resident defendant, must return its verdict so stating, and must consider the case no further as to such defendant.<sup>43</sup>

We come now to those matters which must be pleaded specially if defendant is to rely upon them.

#### *Unavoidable Accident* •

A court of appeals has said that:

Our theory and idea of the rule of unavoidable accident is that the court may charge upon the subject of unavoidable accident only when this matter is raised by the pleadings, *or* when the defense and the evidence in the trial clearly tend to show or infer that the accident which occurred was one which was clearly unavoidable.<sup>44</sup> (Emphasis added.)

This is applying the same rule as in the case of contributory negligence—the defense is available if raised by the evidence. Shortly after this case was decided a case was certified to the supreme court as being in conflict with it. In the course of the opinion in the certified case the supreme court said:

Under this state of the law, how must the pleader invoke the defense of unavoidable accident? Simple enough. He must admit the accident in question, and aver that plaintiff was not negligent in any respect, and that he (defendant) was not negligent in any respect.<sup>45</sup>

As “simple” as this sounds, it loses some of the simplicity when one notes the second and third syllabi of this case:

Unavoidable accident occurs only when the disaster happens from natural causes, without negligence or fault on either side.

The plea of unavoidable accident is diametrically opposed to the theory of negligence in any form.

If defendant has pleaded a denial that he was guilty of negligence and if “unavoidable accident is diametrically opposed to the theory of negligence,” why can he not show unavoidable accident in support of his denial of negligence? In the face of the *Uncapher* case a safe course requires pleading unavoidable accident but, on principle, it should not have to be pleaded but should be provable under a general denial.

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<sup>43</sup> Such a separate defense was used and such a special charge given in the case of *Fraday, Admx. v. National Cylinder Gas Co.*, No. 20928, Court of Common Pleas of Knox County, Ohio (unreported, 1956).

<sup>44</sup> *Williams v. Burrell*, 43 Ohio App. 341, 345, 182 N.E. 889, 890 (1932).

<sup>45</sup> *Uncapher v. Baltimore & O. R. Co.*, 127 Ohio St. 351, 359, 188 N.E. 553, 556 (1933).

### *Blackout*

What we have just said as to unavoidable accident applies as to "blackout." A court of appeals has held that it should be pleaded<sup>46</sup> but again, on principle, it is the antithesis of negligence and on this theory should be provable under a denial of negligence. The justification, however, for requiring it to be pleaded, as is true of unavoidable accident, is that a plaintiff is entitled to be advised if defendant is going to rely on this type of defense. Evidence of non-negligence, of ordinances indicating the propriety of defendant's conduct, and even of contributory negligence are all within the usual frame-work of a negligence case and it is not asking too much to require plaintiff to be prepared to meet them, but unavoidable accident and "blackout" are unusual defenses, and common fairness—a principle that sometime affects rules of pleading—dictates that they be pleaded.

### *Statute of Limitations*

If the bar of the statute of limitations appears on the face of the petition, a demurrer lies;<sup>47</sup> otherwise, it must be raised by proper plea,<sup>48</sup> that is, by way of an affirmative defense in the answer. If raised in neither way, it is waived.<sup>49</sup> But when is such waiver effective? It would seem that the defense may be interposed at any time until trial which means that, even though a defendant has answered and not pleaded the statute, he may amend to do so if he does so before trial.<sup>50</sup>

### *Release and Covenant not to Sue*

If defendant contends that plaintiff has released his claim, he must plead this specially.<sup>51</sup>

A party makes his claim against two defendants or perhaps has filed his action against them. One of the two settles the claim or cause of action against him and the claimant executes a so-called covenant not to sue rather than a full release. This is, in effect, a pro tanto release of the claims or causes of action against both defendants and the defendant other than the one taking the covenant may have any recovery against him reduced by the amount paid.<sup>52</sup>

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<sup>46</sup> *Scott v. Long*, 110 Ohio App. 516, 169 N.E.2d 700 (1959).

<sup>47</sup> Ohio Rev. Code § 2309.08(I) (1953).

<sup>48</sup> Ohio Rev. Code § 2305.03 (1953).

<sup>49</sup> *Sheets v. Baldwin's Admrs.*, 12 Ohio 120 (1843); *Vore v. Woodford*, 29 Ohio St. 245 (1876).

<sup>50</sup> *Horton v. Horner*, 14 Ohio 437 (1846); *Hosterman v. First Nat. Bank & Trust Co.*, 79 Ohio App. 37, 68 N.E.2d 325 (1946).

<sup>51</sup> *Zander v. Fanslaw*, 29 Ohio App. 259, 162 N.E. 745 (1928).

<sup>52</sup> *Hillyer v. City of East Cleveland*, 155 Ohio St. 552, 99 N.E.2d 772 (1951).

To do so, he pleads that the payment was made and the claim settled or the case dismissed as to the other defendant.

Normally a defendant will avail himself of such plea. The covenant is, however, usually drawn in language that is quite self-serving to plaintiff—he reserves all of his rights against the remaining defendant and his right to prosecute his action against him. Such document may leave the impression that the defendant who is being released was only slightly at fault and the amount of the payment may serve to fortify this impression. Moreover, if a party who the jury might expect to be in the case has not been joined or, if joined, has been dismissed, they may conjecture that he “has bought his peace” and may fix the price of the bargain at more than it actually was. The remaining party may decide that to permit them to so speculate will be to his advantage. If so, he will not plead the payment and covenant.

#### MISCELLANEOUS MATTERS

We propose to discuss the use of joint or separate answers for master and servant, cross-petitions, and pleading in the federal court in removed cases.

##### *Joint or Separate Answers*

A vehicle owned by a corporation is being driven at the time of the accident by its employee under circumstances where it is quite clear that he is a servant acting within the scope of his employment. It has become the practice, however, in many parts of the state for plaintiff to join the corporation and its employee as parties defendant and to allege that the defendants were operating the vehicle. This tactic originated in order to permit the defendant to call the employee defendant for cross-examination at the trial and has persisted in spite of the fact that since the enactment of Ohio Revised Code section 2317.52 the reason for doing so no longer exists to the same extent. Such type of pleading has generally proved impervious to a motion to make definite and certain by stating who was operating the vehicle<sup>53</sup> and, if it was the individual defendant, his relationship to the corporate defendant, although there has been a recent case to the contrary.<sup>54</sup> If, of course, plaintiff can be forced to plead that the vehicle was being operated by the servant acting in the scope of his employment, a motion to require the plaintiff to elect as to which defendant he will proceed against is in order. Assuming, however, that, when the time comes to answer, the petition charges the “defendants” with negli-

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<sup>53</sup> Davis v. Montei, 38 Ohio L. Abs. 147, 49 N.E.2d 584 (1942).

<sup>54</sup> Shrewsbury v. Wilson, 113 Ohio App. 556, 179 N.E.2d 558 (1960).

gence, the question is posed for the pleader as to whether he shall file a joint answer on behalf of the two defendants or a separate answer for each. The latter course is frequently followed so that when the plaintiff is required to elect, usually at the end of his case, as to against which defendant he will proceed, and the case thereafter proceeds against the other defendant, his or its answer is completely appropriate to the issue as then presented. Moreover, if there is in fact no real issue as to "agency," defendants in their answer may aver that the one defendant was the driver and was acting within the scope of his employment and, in the absence of replies denying these allegations, a motion to elect is in order before any evidence is taken.

### *Cross-Petitions*

A cross-petition is permitted as a part of the answer of a defendant who desires to assert a cause of action against the plaintiff for the damages which he, the defendant, sustained.<sup>55</sup> Whether he asserts it usually depends upon tactical considerations. There are many lawyers who believe that a "good offense is the best defense" and, therefore, use cross-petitions quite frequently. One rationale for doing so is that the trier of fact, faced with claims by both parties, will tend to "wash them out" by allowing recovery to neither. If used on either of these theories, the cross-petition is being used as a "defensive pleading." Such use, however, has its limitations. For example, if defendant's liability is clear, a cross-petition should not be pleaded. Likewise, if plaintiff has sustained serious personal injuries and defendant has sustained minor property damage, a cross-petition should not be pleaded. While cross-petitions are sometimes used in personal injury cases, their more frequent use is in property damage cases and, in such cases, in the absence of clear liability of the defendant, their use is strongly indicated.

### *Pleading in Federal Court*

Finally, we shall consider briefly the answer in the federal court in a case removed from the state court. While it is quite unusual for an answer to have been filed prior to removal, since Rule 81(c) of the Federal Rules of Civil Procedure provides that "repleading is not necessary unless the court so orders," if an answer has been filed prior to removal, it should give the defendant the same rights in the federal court that he would have had under it in the state court. The Federal Rules of Civil Procedure govern the form of an answer filed after removal and there are certain differences from the pleading rules discussed above. Rule 8(b) makes questionable the type of averment

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<sup>55</sup> Ohio Rev. Code § 2309.13(C) (1953).

in the nature of admissions which we discussed above because it provides that "a party . . . shall admit or deny the averments upon which the adverse party relies." While a general denial is permitted under Rule 8(b), it is not to be used "unless the pleader intends in good faith to controvert all the averments of the preceding pleading." Otherwise his denials must be specific, which means, of course, that they must be limited to those matters which the pleader cannot admit. Moreover, the general denial is "subject to the obligations set forth in Rule 11." One of these is that "there is good ground to support" the pleading and, if this obligation is violated, the pleading is subject to being stricken as sham and the attorney signing it is subject to disciplinary action. All of this adds up to the fact that a general denial should not be lightly pleaded in the federal court!

Those matters which must be pleaded affirmatively are stated in Rule 8(c) entitled "Affirmative Defenses." Those that we saw above must be so pleaded in the state court—for example, release and statute of limitations—must be so pleaded, but in addition some that we saw need not be so pleaded in the state court must be pleaded in the federal court, *e.g.*, assumption of risk and contributory negligence.

#### CONCLUSION

Certain defenses to be availed of must be pleaded. Others are available whether or not pleaded. There is much of tactics, however, in the form of the answer used and in the content placed in it. The following of a stereotyped form that has served well in earlier cases may not be best for the case at hand. It is well to consider each defensive pleading as being *sui generis*. The pleader may ultimately use the usual form but he should do so only after he concludes that a changed pleading does not better meet the situation at hand.