

PROBLEMS OF PLAINTIFF IN PLEADING NEGLIGENCE

ROBERT KOVACH*

In a case based upon negligence the plaintiff, under code or common law pleading, must plead facts in his petition showing (1) that the defendant owed a duty to the plaintiff, (2) that the defendant breached the duty, and (3) that as a result of such breach of duty the plaintiff suffered damage.¹ Ordinarily the plaintiff will have little difficulty in meeting the first and third requirements, for as far as the first is concerned, all he need do is plead facts clearly showing the relationship which existed between himself and the defendant just prior to and at the time of the injury—from which relationship the existence and nature of the duty can be determined;² and as far as the third is concerned, all he need do is employ proper language indicating that the damage he suffered was the direct result of the defendant's breach of duty.³ It would seem that any failures to comply with the first and third requirements are usually the result of inadvertance, *i.e.*, failure of the plaintiff to focus his attention upon such requirements when he is drafting the petition.⁴

The requirement that facts be pleaded showing that the defend-

* Professor of Law, Franklin University Law School, Columbus, Ohio.

¹ Clark, Code Pleading 298 (2d ed. 1947); Shipman, Common Law Pleading 214 (2d ed. 1923).

² "Thus, in an action for negligent injury it must appear that the plaintiff was in a situation where defendant owed him a duty to exercise due care for his safety, as that defendant was in control of machinery or other agency causing danger to the plaintiff, for which the defendant was responsible. A bare allegation that the defendant owed a legal duty to plaintiff is a mere conclusion of law and worthless; the facts creating the duty must be alleged, as that the relation of passenger and carrier existed. The existence of defendant's duty toward the plaintiff must appear from facts or circumstances from which the law infers such duty, as where the defendant's liability is based upon his ownership or control of the premises upon which the injury occurred and his duty to furnish employees a safe place to work." Shipman, *op. cit. supra* note 1, at 214-5. The manner of pleading facts showing the existence of the defendant's duty which sufficed at common law, it is submitted, should also suffice under code pleading. See also Clark, *op. cit. supra* note 1, at 298-9; James, "Scope of Duty in Negligence Cases," 47 Nw. U.L. Rev. 778, 779-780 (1953).

³ "Whereby' and 'by means of the premises' are frequently used to charge that injury resulted from the defendant's act to plaintiff's person or property, and that the negligence was the proximate cause of the injury." Shipman, *op. cit. supra* note 1, at 217. See also Clark, *op. cit. supra* note 1, at 299.

⁴ For extreme cases holding that plaintiff failed in these respects, see Knowles v. Wolman, 141 Me. 120, 39 A.2d 666 (1944) (failure to allege duty); City of Logansport v. Kihm, 159 Ind. 68, 64 N.E. 595 (1902) (failure to allege causation).

ant breached the duty, however, is a different matter, and it would seem to pose the greatest obstacle to the plaintiff in pleading his case. The problem here is how to describe the defendant's conduct and this requires a determination of how detailed a description the plaintiff must give. In other words a plaintiff in describing the same occurrence may state that the defendant "negligently struck me," or "negligently drove his car against me" or "negligently drove his car at a speed of 100 m.p.h. on the wet pavement, and as a result, in trying to stop, skidded against me." It is obvious that in the first statement the plaintiff is simply describing the act of the defendant in a broad general way and averring that it was negligently done, whereas in the subsequent statements he is progressively giving a more detailed or specific description of the act of the defendant. Thus, the question at the outset is how detailed or specific must the facts be which are pleaded to show that the defendant breached the duty? Since this would seem to be a question that may be answered in as many ways as there are individuals answering,⁵ it is clear that the task of the plaintiff in meeting this requirement may be formidable.

Under common law pleading the plaintiff was aided by certain rules which lightened considerably the burden of his task. Thus, a general mode of pleading was allowed where great prolixity was thereby avoided;⁶ no greater particularity was required than the nature of the thing pleaded would conveniently admit;⁷ less particularity was required when the facts lay more in the knowledge of the opposite party, than of the party pleading;⁸ and things were to be pleaded according to their legal effect or operation.⁹ It was probably a combination of such rules which enabled the plaintiff in an action of trespass on the case for negligence to plead the defendant's breach of duty by simply describing the act of the defendant in broad general terms and averring that it was carelessly or negligently done. Thus, the plaintiff's declaration might contain the allegation that the defendant "having in his hands a firelock, highly charged with powder, and

⁵ Cf.: "At this point we come to the crux of the matter. How much is enough? Obviously, the codes as formulated either in New York or Illinois, give no answer to that: as many answers might be given as there are persons who attempt an answer, were it not for one thing, namely, past habits and practices of the legal profession, in Illinois and in other states. Small wonder that in England, in New York, and in other code states chaos reigned after the adoption of the 'simplified procedure.' The ancient landmarks had been swept away and no new ones had been put in their place." Cook, "Facts' and 'Statements of Fact'" 4 U. Chi. L. Rev. 233, 243-244 (1937).

⁶ Stephen, Pleading 318-320 (Tyler 3d ed. 1882).

⁷ *Id.* at 326-8.

⁸ *Id.* at 328-9.

⁹ *Id.* at 341-2.

a great quantity of wadding, *so exceedingly carelessly managed* his said firelock, that he discharged its contents into the foot of the plaintiff,"¹⁰ or that the defendant "*so carelessly, unskilfully, and improperly drove, governed and directed* his said gig and horse that . . . the said gig and horse . . . ran and struck . . . the cart and horse of the plaintiff."¹¹ It is obvious that the *specific* act of negligence of which the plaintiff complains cannot be determined by an examination of such a pleading of the breach of duty. It must have seemed clear to the common law judges that the defendant was not prejudiced by the failure of the plaintiff to point to the specific shortcoming of the defendant, the judges perhaps thinking that the defendant knew what he did and how he did it, or, if the act was committed by his agent, that the defendant had the means at his command to determine the matter and thus could adequately prepare his defense. It is true that under some circumstances the defendant was entitled to a bill of particulars in which the plaintiff would be required to be more specific, but this was a matter which rested in the sound discretion of the court, and in exercising this discretion the court would weigh the very same factors which gave rise to the above pleading rules, *i.e.*, the ability or inability of a party to furnish particulars, the knowledge of the parties, etc.¹² It would seem, then, that under common law pleading the defendant would, in the ordinary negligence case, be compelled to accept the plaintiff's pleading of the defendant's breach of duty in the form of an allegation of carelessness or negligence in the doing of an act, the act being described in broad general terms.

Under code pleading, however, a different approach has been taken, at least by some courts. In *Davis v. Guarnieri*,¹³ the plaintiff, as administrator of the estate of his wife, Angela, brought a wrongful death action against the defendant pharmacist. In his petition the plaintiff alleged that he requested the defendant to sell to him some oil of sweet almonds to be administered to his wife, Angela; that the defendant in filling the order:

did so carelessly and negligently put up said medicine, and make said sale, that instead of putting up the oil of sweet almonds, as was called for, he put up and sold to him twenty cents worth of a certain poisonous drug called the oil of bitter almonds . . . and the same was wrongfully, negligently, and carelessly sold and delivered

¹⁰ *Dalton v. Favour*, 3 N.H. 465 (1826).

¹¹ *Williams v. Holland*, 10 Bing. 112, 131 Eng. Rep. 848 (1833). See Clark, "Pleading Negligence," 32 Yale L.J. 483, 485 (1922).

¹² See Hook, "The Bill of Particulars in Illinois," 19 Ill. L. Rev. 315 (1915); Clark, *op. cit. supra* note 11. Compare Caskey, "The Bill of Particulars—A Brief for the Defendant," 27 Va. L. Rev. 472 (1941).

¹³ 45 Ohio St. 470, 15 N.E. 350 (1887).

to him for his wife by defendant . . . instead of the medicine called for;

and that Angela, after taking the oil of bitter almonds, died from its effects. It should be observed that the above-quoted allegation of the defendant's breach of duty is practically identical to that employed in the usual negligence case under common law pleading, although it may be that a more detailed description of the defendant's wrongful act is set forth than was customary at common law. It should be observed also that the defendant neither demurred nor filed a motion to make definite and certain, but was content to file an answer, which consisted in the main of an argumentative denial. During his charge, the trial judge read to the jury an Ohio statute which made it a crime to sell a poisonous drug without marking the word "poison" upon the label or wrapper containing the same, and the judge then charged the jury that if the defendant violated this statute the defendant was negligent. The defendant contended that the trial judge erred in referring to the statute and commenting thereon in his charge to the jury on the ground that negligence of that character was not charged in the petition. The Ohio Supreme Court, however, said:

It is true that this fact is not stated in the petition. It is also true that the substantive wrongful act of which the plaintiff complained, was not the omission properly to label a poisonous drug as the statute requires. The wrongful act complained of—the act which led to the injury—was carelessly selling and delivering to the plaintiff a deadly poison instead of the harmless medicine he called for.

The contention of counsel presupposes that no act of negligence can be proved except it be alleged in the petition. This position is untenable. The allegation in a pleading that the party complained against negligently committed the particular act which led to the injury whose redress is sought, furnishes the predicate for the proof of all such incidental facts and circumstances both of omission and commission as fairly tend to establish the negligence of the primary fact complained of.

This rule of pleading is abundantly established by authority. . . .

The plaintiff in the case at bar, having alleged that the defendant carelessly sold and delivered to the plaintiff a poisonous drug for harmless medicine, could safely rest the issue upon such averment. To plead specially all the facts and circumstances from which the negligence could be inferred, would be to plead evidence instead of facts.¹⁴

It may be that the *Guarnieri* case merely illustrates the proposition that under an allegation of negligence in the doing of an act pleaded, any evidence tending to show negligence in the doing of such act is

¹⁴ *Id.* at 484-6, 15 N.E. at 358.

admissible, and that a charge to the jury based upon such evidence is proper. However, while it is always dangerous to speculate as to what a court *might* have done, it is submitted that had the defendant in the *Guarnieri* case filed a motion to require the plaintiff to make the petition definite and certain by indicating more specifically the act or acts of negligence complained of, the court would *not* have sustained the motion since, in its view, "to plead specially all the facts and circumstances from which the negligence could be inferred would be to plead evidence instead of facts."¹⁵ While it may be conceded that the court's use of the word "evidence" in this context is questionable, in that by pleading the facts and circumstances from which negligence could be inferred one would really be pleading "facts" in greater detail rather than pleading "evidence,"¹⁶ it seems clear that the court would not have looked with favor upon a request by the defendant that the plaintiff be required to plead the act or acts of the defendant complained of with greater particularity. Perhaps the plaintiff's description of the defendant's act was sufficiently specific to satisfy the court, hence its view toward further particularization; but it is suggested, with great temerity, that the court in the *Guarnieri* case viewed the common law method of pleading negligence—an allegation of negligence in the doing of an act, the act being described in broad general terms—as a proper method of pleading the defendant's breach of duty under the code.¹⁷ In any event, it is submitted that such a view would be proper. Looking at the "Forms for Illustration" which the commissioners who drafted the Ohio code pleading statute appended to their "Report,"¹⁸ it becomes apparent that the commissioners did not intend to change the method of pleading negligence which sufficed at common law, and that in their view an

¹⁵ While the doctrine of *res ipsa loquitur* should be applied in cases of this character (see *Edelstein v. Cook*, 108 Ohio St. 346, 140 N.E. 765 (1923)), it is submitted that the court would have denied such a motion without using as a basis the fact that the doctrine was applicable.

¹⁶ See Cook, "Statements of Fact in Pleading Under the Codes," 21 Colum. L. Rev. 416 (1921); Clark, *op. cit. supra* note 11; Dowdall, "Pleading 'Material Facts,'" 77 U. Pa. L. Rev. 945 (1929); Cook, *op. cit. supra* note 5; James, "The Objective and Function of the Complaint," 14 Vand. L. Rev. 899 (1961).

¹⁷ The court cited with approval the following common law cases in which it was held (upon either a demurrer or a motion to make definite and certain) or stated by way of dictum that the plaintiff's general description of the defendant's act was sufficient, and the plaintiff need not plead the specific facts showing in what the negligence consisted: *Ware v. Gay*, 28 Mass. (11 Pick.) 106 (1831) (dictum); *McCauley v. Davidson*, 10 Minn. (10 Gilf.) 418 (1865) (so held on demurrer); *Clark v. Chicago, B. & Q. Ry. Co.*, 15 Fed. 588 (S.D. Iowa 1883) (so held on motion).

¹⁸ Report of the Commissioners on Practice and Pleadings, Code of Civil Procedure (1853), 235 (Appendix).

allegation of negligence in the doing of an act, the act being described in broad general terms, would be sufficient under the code.¹⁹ And it is further submitted that there is no evidence to indicate that the legislature was of a different mind.

In *The New York, C. & St. L. Rd. Co. v. Kistler*,²⁰ however, the Ohio Supreme Court apparently took a different view of the matter. The plaintiff was struck by the defendant's train at a crossing, and she sued to recover damages for the injuries which she sustained. From the opinion of the court it appears that the plaintiff alleged in her petition that the defendant:

negligently and carelessly approached and crossed said highway with said locomotive and train of cars at a high, immoderate and dangerous rate of speed, and negligently and carelessly omitted to give proper and sufficient signals or warning of the approach of said locomotive and train to said crossing, and of the existence of said crossing, and negligently and carelessly allowed and maintained obstructions to a proper view of its said train, locomotive and railroad and negligently and carelessly operated and handled its said locomotive and train of cars.

The defendant filed a motion to compel the plaintiff to make her petition definite and certain as to the acts of negligence charged, and particularly to state the facts in regard to the defendant's negligently and carelessly operating and handling the locomotive and train, and to strike out the words "at a high, immoderate and dangerous rate of speed." The trial court overruled the motion and, subsequently, rendered judgment on the verdict for the plaintiff. The defendant appealed, contending that the trial court erred in overruling its motion. After referring to the Ohio Code as to the power of a court to require pleadings to be made definite and certain by amendment,²¹ the Ohio Supreme Court said:

This means that the court shall in a proper case require the pleading to be made definite and certain. It is not a mere matter of discretion. It is a substantial right to a party to have the pleading

¹⁹ The illustrative form "For Injury to the Person" reads:

"Plaintiff says that on . . . the defendant being the owner of a stage coach, the plaintiff took passage therein at . . . to be carried to . . . that the stage was upset by the carelessness of the driver in the service of the defendant, and that the plaintiff thereby had his arm broken . . ." (Emphasis added.) *Id.* at 249.

It is obvious that this is practically identical to the method of pleading negligence under common law pleading. See notes 10-11, *supra*. See also James, *op. cit. supra* note 16, at 914.

²⁰ 66 Ohio St. 326, 64 N.E. 130 (1902).

²¹ Ohio Rev. Code § 2309.34 (1953). "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."

against him so definite and certain as to enable him to know what he has to meet, and to prepare his evidence accordingly.

The charge of negligence against the company that it "negligently and carelessly approached and crossed said highway with said locomotive and train of cars at a high, immoderate and dangerous rate of speed," and "negligently and carelessly operated and handled its said locomotive and train of cars," gave no definite or certain notice to the company as to what acts of commission or omission claimed to be negligent would be attempted to be proved or relied upon at the trial, and therefore the petition should have been required to be made definite and certain by stating the acts of commission and omission claimed to have caused the injury, so as to advise the company as to the facts claimed to have been negligently done or omitted, and to enable it to meet the same. Upon the trial the evidence should be confined to the acts of negligence so specifically and definitely averred in the petition. This is in accordance with the rule of pleading laid down in *Davis v. Guarnieri*, 45 Ohio St. 470. It was there held that the fact claimed to have caused the injury being averred, it was sufficient to state that it was negligently done. But to say that the company "negligently and carelessly operated and handled its said locomotive and train of cars," avers no fact as causing the injury, and does not aver that any fact causing the injury was carelessly done or omitted. It is a general averment at large of negligence, and the court erred in overruling the motion to make definite and certain.²²

It is clear that court in the *Kistler* case did not feel that it was departing from the views expressed in the *Guarnieri* case. If the court was merely emphasizing the distinction between a statement of fact and a conclusion of law, and was of the opinion that in the *Guarnieri* case a *fact* was alleged (selling and delivering poison instead of harmless medicine?) which the plaintiff therein could properly aver was negligently done, whereas in the case before it the *entire* allegation was merely a conclusion of *law*, then, of course, it would seem that there would be no departure—at least in principle. The only quarrel then, if any, would be with the court's view that in *Guarnieri* a statement of fact was made, whereas in the case before it *no* statement of fact was made but only a bare conclusion of law. Indeed, this view of the *Kistler* case may be bolstered to some extent by the wording of its second syllabus which reads:

In an action founded upon negligence, the petition should state the acts of commission or omission which the plaintiff claims to have caused the injury; and that statement being made, it is sufficient to aver that such acts were carelessly or negligently done, or omitted.

²² 66 Ohio St. 326, 332-3, 64 N.E. 130, 132 (1902). The court also held that it was error to refuse to strike out the words "at a high, immoderate and dangerous rate of speed."

If the court viewed the statement before it as a statement of *fact*, then its action in sustaining the motion to make definite and certain would be inconsistent with the statement made by it in the second syllabus. On the other hand, it may be that the court in *Kistler* was of the opinion that in *Guarnieri* the act of the defendant complained of was pleaded with sufficient particularity to be considered a statement of fact whereas in the case before it the act of the defendant was pleaded in such a general manner that, while it was technically a pleading of a fact, the court would treat it as the pleading of a *mere* conclusion of law, and require the plaintiff to furnish a more specific statement of the defendant's act which he *then* could aver was carelessly or negligently done. This view of *Kistler* also would reconcile the action of the court in sustaining the motion to make definite and certain with the statement made by it in the second syllabus, referred to above, and, it is submitted, is the proper view to take of the case. However, it should be observed that the court, in sustaining the motion to make definite and certain, outlawed the method of pleading negligence which was permitted at common law by requiring the plaintiff to describe the defendant's wrongful act specifically (and not in broad general terms as at common law),²³ and thus placed a pleading burden upon the plaintiff which, in many cases at least, the plaintiff cannot feasibly bear.²⁴ This, coupled with the fact that some courts seem to be banning the use of words such as "carelessly" or "negligently" in describing the defendant's act, on the theory that such words are pure conclusions of law,²⁵ may make it impossible for the plaintiff to plead his case, for in many cases the standard of care with which to measure the defendant's conduct is so uncertain that the jury must determine the standard under proper instruction from the court, and, in making such determination the jury must consider *all* of the facts and circumstances involved.²⁶ In other words it would seem to be impossible to plead

²³ While the court *stated* that it was following the rule of pleading embraced in *Guarnieri*, it is submitted that by requiring the plaintiff to plead *specific* acts of negligence, the court was really *not* following it; for the court in *Guarnieri* certainly did not disapprove of the common law method of pleading negligence. See note 17, *supra*.

²⁴ "Furthermore, it is quite possible that lack of information may prevent a pleader from being specific even though he is otherwise willing to be so." Cleary, *Cases on Pleading*, 85 (1951). "On the other hand automobile accidents happen so suddenly that it is harsh to tie plaintiff down to specific acts of negligence when he is uncertain how each witness will testify particularly since defendant in most cases has more precise knowledge of how the accident occurred than does plaintiff." Note, "Pleading—Advantages of General Allegations of Negligence," 6 *Mo. L. Rev.* 512, 515 (1941).

²⁵ See, e.g., *Mays v. Morgan*, 77 *Ohio L. Abs.* 317, 145 *N.E.2d* 159 (1957); *Hardware Mut. Ins. Co. v. McGinnis*, 68 *Ohio L. Abs.* 390, 119 *N.E.2d* 698 (1954).

²⁶ See Prosser, *Torts* 192-4 (2d. Ed. 1955).

facts showing that the specific act of the defendant was negligent without depicting the *exact* environment in which the act took place. On the other hand, it would seem to be impossible to *ever* depict the exact environment in which the defendant's act took place—especially when a dynamic situation is involved.²⁷ Perhaps what such courts have in mind is the idea that the plaintiff must plead enough facts to show that the jury *might* find that the defendant's act was negligent, but even that requires an answer to the question: "How much is enough?"²⁸

Under some circumstances at least, the fact that the defendant's conduct constituted a violation of a statute, ordinance, or a rule or regulation of an administrative body may assist the plaintiff considerably in pleading the facts showing the breach of duty owed by the defendant.²⁹ Where a statute or ordinance enacted in the interest of public safety prescribes the standard of care required in the form of a *specific* requirement, it has been held that a failure to comply therewith *is* negligence,³⁰ and plaintiff's petition need only contain facts which bring the defendant within the liability created by such law in order to plead a *prima facie* case against him.³¹ On the other hand, where an administrative rule or regulation prescribes such a standard, it has been held that a failure to comply therewith is merely a matter which may be properly submitted to and considered by a jury as bearing upon the question of negligence.³² It is unnecessary here to go

²⁷ Cf., "Many large burdens of pleading, arbitrarily assigned to one litigant, can be carried only if the pleader may allege conclusions of law. The codes which provided for fact pleading did not disturb common law burdens of pleading, some of which cannot be carried by a pleader who may not allege conclusions of law. Courts have rescued pleaders from the inescapable dilemma by magically transmuting some conclusions of law into statements of fact." Morris, "Law and Fact," 55 Harv. L. Rev. 1303, 1337 (1942). Compare McBride, "Law and Fact in the Judicial Process" 5 Ohio Op. 2d 193 (1958).

²⁸ See Cook, *op. cit. supra* note 5.

²⁹ See Morris, "The Relation of Criminal Statutes to Tort Liability," 46 Harv. L. Rev. 453 (1933); Morris, "The Role of Criminal Statutes in Negligence Actions," 49 Column. L. Rev. 21 (1949); Morris, "The Role of Administrative Safety Measures in Negligence Actions," 28 Texas L. Rev. 143 (1949).

³⁰ Claypool v. Mohawk Motor, 155 Ohio St. 8, 97 N.E.2d 32 (1951); Bush v. Harvey Transfer Co., 146 Ohio St. 657, 67 N.E.2d 851 (1946); Taugher v. Ling, 127 Ohio St. 142, 187 N.E. 19 (1933); Schell v. DuBois, 94 Ohio St. 93, 113 N.E. 664 (1916). But the plaintiff must be within the class for whose benefit the statute was passed. Kasper v. Oberlin College, 17 Ohio L. Abs. 368 (1934); Desnoyer v. Bradley, 32 Ohio N.P.(n.s.) 430 (1934). And the violation must be the proximate cause of plaintiff's injury. Crose v. Hodge Drive-It-Yourself Co. Inc., 132 Ohio St. 607, 9 N.E.2d 671 (1937); Jacobs v. The Fuller & Hutsinpillar Co., 67 Ohio St. 70 (1902).

³¹ The Hadfield-Penfield Steel Co. v. Sheller, 108 Ohio St. 106, 141 N.E. 89 (1923) (*semble*); Taugher v. Ling, 127 Ohio St. 142, 187 N.E. 19 (1933) (*semble*).

³² Claypool v. Mohawk Motor, 155 Ohio St. 8, 97 N.E.2d 32 (1951); Matz v.

into the validity of the distinction between the treatment afforded to a violation of such an ordinance or statute (*i.e.*, negligence per se) as compared to that afforded to a violation of such a rule or regulation (*i.e.*, evidence of negligence only),³³ for it is submitted that so far as the *pleading* question is concerned the distinction is immaterial, for the plaintiff need only plead facts showing a prima facie case against the defendant,³⁴ and he would be pleading such a case whether he pleaded facts showing a failure of the defendant to comply with the specific requirements of a statute, ordinance, or an administrative rule or regulation. In other words, if violation of such a rule or regulation is a matter which may properly be submitted to a jury as bearing upon the question of negligence, then, surely, if the plaintiff pleads facts showing such a violation, he has pleaded a prima facie case against the defendant, despite the fact that such a violation does not constitute negligence per se. Thus, it is obvious that if the defendant's conduct constitutes a violation of such a statute, ordinance, or rule or regulation,³⁵ the plaintiff should have little difficulty in pleading facts showing the defendant's breach of duty, for all he has to do is to plead facts showing that the defendant failed to comply with the specific requirement thereof. The only real question left in such a case is whether the plaintiff must (or even may) plead such statute, ordinance, or rule or regulation in his petition.

In Ohio the courts are required to take judicial notice of Ohio statutes, and it is, therefore, unnecessary to plead such statutes in the pleadings. In fact, in this respect the Ohio Supreme Court has indicated that "any reference to a statute, or any copy of a statute set out in full, or in substance, or even by reference, in a pleading, should properly be stricken out upon motion."³⁶ However, while Ohio courts are required by statute to take judicial notice of the statutes of every

Curtis Cartage Co., 132 Ohio St. 271, 7 N.E.2d 220 (1937). *But see* The Penna. R.R. Co. v. Moses, 42 Ohio App. 220, 182 N.E. 40 (1931) (violation of rule of I.C.C. would be negligence per se).

³³ See Morris, "The Role of Administrative Safety Measures in Negligence Actions," 28 Texas L. Rev. 143 (1949).

³⁴ Gongolewicz v. City of Cleveland, 61 Ohio L. Abs. 442 (1952); McMillan v. City of Akron, 29 Ohio Ct. App. 271, 45 Ohio C.C. Dec. 541 (1918).

³⁵ If a statute or ordinance does not prescribe a *specific* requirement, a violation of such statute or ordinance would not constitute negligence per se. See Eisenhuth v. Moneyhan, 161 Ohio St. 367, 119 N.E.2d 440 (1954); Swoboda v. Brown, 129 Ohio St. 512, 196 N.E. 274 (1935); Heidle v. Baldwin, 118 Ohio St. 375, 161 N.E. 44 (1928). *A fortiori*, a violation of an administrative rule or regulation which does not prescribe a specific requirement should not be negligence per se.

³⁶ The Hadfield-Penfield Steel Co. v. Sheller, *supra* note 31, at 111, 141 N.E. at 90. See Ohio Rev. Code § 2309.29 (1953) ("Neither presumptions of law, nor matters of which judicial notice is taken, need be stated in a pleading. . .").

state, territory, and other jurisdiction of the United States,³⁷ it is also provided by statute that:

Any party may present to the trial court any admissible evidence of the statutes of every state, territory, or other jurisdiction of the United States, but, to enable a party to offer evidence of the law in another jurisdiction or to ask that judicial notice be taken thereof, reasonable notice shall be given to the adverse parties *either in the pleadings or otherwise*.³⁸ (Emphasis added.)

Because of this statute, it was held by an appellate court that since the plaintiff failed to plead a provision of the Federal Food and Drug Act or give any notice to the adverse party that he intended to invoke the provision of the act at the trial, the trial court acted properly in advising the plaintiff *not* to argue the application of such provision of the act.³⁹ Thus, it would seem that the Ohio legislature has sanctioned reference in the pleadings to "foreign" statutes, while the Ohio Supreme Court has deemed improper any reference in the pleadings to Ohio statutes. It is submitted that reference in the pleadings to *any* statutes serves to give notice to the court and to the adverse parties of the nature of the claim involved, and should therefore be permitted.⁴⁰

While a municipal court must take judicial notice of the ordinances of its own municipality,⁴¹ and, therefore, in suits filed in such courts a plaintiff need not plead such ordinances, it has been held that a court of general jurisdiction will *not* take judicial notice of a municipal ordinance, and a plaintiff relying upon such ordinance must plead it if he desires to offer evidence thereof at the trial.⁴² And in pleading such ordinance, it has been held the plaintiff must set forth the specific provision of the ordinance upon which he relies or it will be deemed an insufficient pleading thereof, and evidence with respect to it will be excluded.⁴³ Finally, in this connection, it should be noted that in a recent case it was held that where there are two identical legislative requirements—one an Ohio statute and the other a municipal ordinance—and the plaintiff pleaded the municipal ordinance

³⁷ Ohio Rev. Code § 2317.44 (1953): "Every court of this state shall take judicial notice of the statutes of every state, territory, and other jurisdiction of the United States. . . ."

³⁸ Ohio Rev. Code § 2317.45 (1953).

³⁹ Kennedy v. General Beauty Products, Inc., 84 Ohio L. Abs. 135, 167 N.E.2d 116 (1960). See also, Price Field Pilots Club, Inc. v. Lee, 69 Ohio L. Abs. 216 (1954).

⁴⁰ *But see* McBride, "Law and Fact in the Judicial Process," 5 Ohio Op. 2d 193, 195-196 (1958).

⁴¹ Crose v. Hodge Drive-It-Yourself Co., Inc., 132 Ohio St. 607, 9 N.E.2d 671 (1937).

⁴² Schulte v. Johnson, 106 Ohio St. 359, 140 N.E. 116 (1922). But a court of general jurisdiction in reviewing a municipal court decision will take the same judicial notice as did the municipal court. Crose v. Hodge, *supra* note 41.

⁴³ Heidle v. Baldwin, 118 Ohio St. 375, 161 N.E. 44 (1928).

in his petition filed in the common pleas court, then since the court would take judicial notice of the state statute, the city ordinance pleaded was unnecessary surplusage and should be stricken from the petition.⁴⁴ While there may be no quarrel with such a ruling if the two legislative requirements are really identical, since it would be possible for a state statute and a city ordinance to be identical as far as the *wording* is concerned, and yet not be identical as far as the *purpose* is concerned,⁴⁵ it is submitted that before taking such action the court should be convinced that the two legislative requirements are identical in *all* respects.

With respect to administrative rules and regulations, an Ohio appellate court has indicated that it was required to take judicial notice of the rules and regulations issued by the Industrial Commission of Ohio concerning safety requirements to the same extent as it judicially notices statutory enactments.⁴⁶ On the other hand, in a common pleas court decision it was held that the plaintiff must plead Civil Air Regulations if he desires to rely thereon at the trial.⁴⁷ While the Ohio Supreme Court has not ruled upon this matter, it is submitted that under modern conditions of reporting legal material, judicial notice should be taken of all such rules and regulations;⁴⁸ the court should, nevertheless, permit the plaintiff to plead them in his petition because of the notice-giving function thereby served.

If the defendant's conduct has failed to measure up to some special custom or usage in any particular trade, business or profession, the plaintiff may, by pleading the existence of such custom or usage⁴⁹ and the facts which will show that the defendant's conduct failed to comply therewith, thereby plead a *prima facie* case against the defendant. While the defendant's failure to adhere to such custom or usage does not necessarily indicate that he was negligent *per se*, it

⁴⁴ *Garrison v. City Transit Co.*, 79 Ohio L. Abs. 29, 150 N.E.2d 94 (1958).

⁴⁵ In *Kasper v. Oberlin College*, *supra* note 30, a state statute required elevator doors to have electrical interlocking attachments to prevent opening of the door unless the car was at the floor level. It was held that the statute was designed to protect persons in connection with *fire or other emergencies*, and *not* to protect persons from the risk of simply opening the door and falling down the elevator shaft. Surely, an identically worded city ordinance could easily be interpreted as being designed to protect against the latter type of risk.

⁴⁶ *Ibid.*

⁴⁷ *Price Field Pilots Club, Inc. v. Lee*, *supra* note 39.

⁴⁸ *Cf. McCormick*, Evidence 694 (1954).

⁴⁹ "A special custom or usage in any particular trade, business, or profession, to be available to either party, must be specially pleaded." *Palmer v. Humiston*, 87 Ohio St. 401, 101 N.E. 283 (1913); *The Cleveland, C.C. & St. L. Ry. Co. v. Potter*, 113 Ohio St. 591, 150 N.E. 44 (1925); *Cooper v. Cannonball Transp. Co.*, 19 Ohio L. Abs. 644 (1935).

seems clear that evidence of the custom or usage and defendant's conduct should ordinarily require that the case be submitted to the jury,⁵⁰ and that fact alone should indicate that the plaintiff must be deemed to have pleaded a prima facie case.

Again, if the case is one to which the doctrine of *res ipsa loquitur* is applicable, it seems clear that the plaintiff should have little difficulty with the requirement that facts be pleaded showing the defendant's breach of duty, for by virtue of that doctrine, the plaintiff need only plead the facts calling for the application of the doctrine, and the defendant's breach of duty will be presumed.⁵¹ Thus, if such facts are pleaded, the plaintiff, in this case also, will have pleaded a prima facie case without too much trouble.

From the above it is apparent that if the case is one in which a statute, ordinance, administrative rule or regulation, or custom and usage is involved, or if the facts are such that the doctrine of *res ipsa loquitur* is applicable, the plaintiff should have little difficulty in meeting the requirement that facts be pleaded showing the defendant's breach of duty. It is also apparent, however, that absent such a case the task of meeting the requirement is one which cannot feasibly be done by the plaintiff, especially if the view of some of the judges toward the pleading of conclusions of law and the use of words like "carelessly" or "negligently" is followed.⁵²

Perhaps the solution lies in a return to the method of pleading negligence which sufficed at common law and which, it is submitted, was looked upon with favor by the court in *Guarnieri*,⁵³ but was condemned in *Kistler*.⁵⁴ It seems safe to say that *Kistler*, as the leading case for the proposition that *specific* acts of negligence must be

⁵⁰ See Prosser, Torts 135-7 (2d ed. 1955).

⁵¹ See *Fink v. The New York C. R.R. Co.*, 144 Ohio St. 1, 56 N.E.2d 456 (1944) (Railroad car derailed—doctrine applied—dictum that doctrine is applicable irrespective of whether petition contains allegations of specific acts of negligence); *Beeler v. Ponting*, 116 Ohio St. 432, 156 N.E. 599 (1927) (doctrine, being a rule of evidence, need not be pleaded). Compare *Winslow v. The Ohio Bus Line Co.*, 148 Ohio St. 101, 73 N.E.2d 504 (1947) (doctrine not applicable where petition and proof disclose that plaintiff had knowledge of the facts and circumstances showing the claimed negligence). That *Winslow* hasn't changed the Ohio rule concerning the effect of pleading specific acts of negligence on the right to invoke the *res ipsa loquitur* doctrine, see *Rigney v. The Cincinnati St. Ry. Co.*, 99 Ohio App. 105, 131 N.E.2d 413 (1954). *But see* the dissenting opinion of Fess, J. in *Hartford Fire Ins. Co. v. Henry J. Spieker Co.*, 103 Ohio App. 455, 146 N.E.2d 138 (1957).

⁵² See notes 24-27, *supra*.

⁵³ *Davis v. Guarnieri*, *supra* note 13. Judge Clark long ago expressed the view that the reaction from code pleading "must necessarily be towards the common law." Clark, "Pleading Negligence," *op. cit. supra* note 11, at 484.

⁵⁴ *The New York, C. & St. L. R.R. Co. v. Kistler*, *supra* note 20.

pleaded by the plaintiff and that the evidence must be confined to such specific acts pleaded,⁵⁵ is responsible for the widespread practice of counsel in negligence cases of pleading specifications of negligence—a practice which has been resoundingly condemned by some of the courts.⁵⁶ While it may be that the courts in such cases are not intending to prohibit a plaintiff from pleading as many specific *acts* of negligence as the circumstances justify, and are incensed only because of the presence in the petition of repetitious allegations, inflammatory language or conclusions of law,⁵⁷ nevertheless they do seem impatient with counsel for filing the lengthy petitions which the pleading of many specific acts requires, in view of the code requirement that the petition contain a statement of facts constituting a cause of action “in ordinary and concise language.”⁵⁸ But, as was long ago observed, since counsel will be unwilling to be restricted with respect to the evidence he may offer at the trial, he will naturally plead as many specific acts as he can think of for there is no penalty for pleading too many grounds of recovery.⁵⁹ And, as was further observed long ago, the more of such specific acts the plaintiff pleads, the less the defendant will know about the plaintiff’s case against him.⁶⁰ Clearly, the notice-giving function, supposedly served by the pleading of specific acts of negligence, may be easily sidestepped by the plaintiff if he so desires.

It would also seem clear that while under the code a plaintiff must plead “facts” constituting a cause of action in his petition, neither the commissioners who drafted the code, nor the legislature

⁵⁵ See *O’Leary v. Penna. R.R. Co.*, 70 Ohio L. Abs. 133, 127 N.E.2d 377 (1953); *Heil v. Proctor*, 12 Ohio App. 35 (1919); *The Cincinnati, L. & N. Ry. Co. v. Shurts*, 10 Ohio App. 226 (1918); *Mays v. Morgan*, *supra* note 25; *Hardware Mut. Ins. Co. v. McGinnis*, 68 Ohio L. Abs. 390, 119 N.E.2d 698 (1954); *Brown v. Pennsylvania Greyhound Lines, Inc.*, 29 Ohio Ops. 442 (1944); *McBride*, *op. cit. supra* note 40, at 195. *But see*, *New York, C. & St. L. Ry. Co. v. Gulla*, 15 Ohio C.C.R.(n.s.) 540, 24 Ohio C.C. Dec. 101 (1911); *The Pennsylvania Co. v. Gulling*, 5 Ohio App. 183, 25 Ohio C.C.R.(n.s.) 326 (1916), *motion to certify overruled*, 5 Ohio App. 41, 14 Ohio L. Rep. 180 (1916).

⁵⁶ See *Mays v. Morgan*, *supra* note 25. *Uccello v. Interstate Truck Service, Inc.*, 70 Ohio L. Abs. 211, 57 Ohio Ops. 334, 126 N.E.2d 77 (1954); *Hardware Mut. Ins. Co. v. McGinnis*, *supra* note 55.

⁵⁷ See *Mays v. Morgan*, *supra* note 25.

⁵⁸ Ohio Rev. Code § 2309.04 (1953):

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; . . .

⁵⁹ *Clark*, *op. cit. supra* note 11, at 487 and 489.

⁶⁰ *Clark*, *op. cit. supra* note 11, at 489. “Observe, however, that a plethora of information may tend to obscure rather than enlighten. Plaintiff who specifies fifteen grounds of negligence when in fact he intends to rely only upon one has pretty effectively screened the true nature of his case.” *Cleary*, *Cases on Pleading* 85, note 1 (1951).

which adopted it, intended to absolutely exclude from pleadings words such as "carelessly" or "negligently."⁶¹ Most of the authorities who take a contrary position seem to base their arguments upon statements made by Pomeroy in his treatise on code remedies,⁶² or on statements made by other authorities who in turn relied upon Pomeroy's statements. It has been capably pointed out, however, that it is questionable whether Pomeroy took such a position, and that, in any event, such was certainly not the view of those who drafted and adopted the codes throughout the country.⁶³

It is submitted, therefore, that a return to the method of pleading negligence under the common law is warranted under the code, and at least should be permitted in a case where neither a statute, ordinance, administrative rule or regulation, or custom and usage is involved, nor the doctrine or *res ipsa loquitur* applicable. This method of pleading negligence is sanctioned under the Federal Rules of Civil Procedure,⁶⁴ and there would seem to be no evidence to indicate that defendants have been unable to adequately prepare their defense as a consequence.⁶⁵ No doubt, if permitted and if a case arises in which the defendant actually is unable to adequately prepare his case because of the generality of the charge of negligence against him, the court should and would afford him relief by sustaining his motion to make definite and certain. It is submitted, however, that the test in such cases should be the same as the test at common law when a bill of particulars was sought,⁶⁶ and the motion sustained only after a showing would have warranted relief at common law.

⁶¹ See notes 18-19, *supra*. See also James, *op. cit. supra* note 16, at 913-4.

⁶² *Ibid.*

⁶³ *Ibid.*

⁶⁴ See Fed. R. Civ. P. 84 and Form 9 in the Appendix of Forms.

⁶⁵ *But see* Bush v. Skidis, 8 F.R.D. 561 (E.D. Mo. 1948), holding that a petition framed in accordance with Form 9 should be made more definite by specifying the particular negligence relied upon. See, however, Petriken v. Chicago, R.I. & P.R. Co., 14 F.R.D. 31 (W.D. Mo. 1953), refusing to follow Bush, and holding that petition framed in accordance with Form 9 is not subject to attack by a motion to make definite and certain.

⁶⁶ See Clark, *op. cit. supra* note 11, at 488-9; Hook, *op. cit. supra* note 12, at 316-7.