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bargaining may have been encouraged by the willingness of the Fifth Circuit to set aside N.L.R.B. orders.[67] Although that court has secured compliance by using its contempt power to mediate,[68] it is possible that a sympathetic approach toward the statutory obectives and a stiffening of the contempt penalties might have a more constructive effect upon the willingness of Southern textile employers to bargain collectively.

(4) The discretionary injunction power of the General Counsel[69] might be used to secure the compliance with national policy of especially recalcitrant employers in the region. The speed of injunction could help offset the deadly effects of long delays, often destructive of collective bargaining, regardless of the final legal outcome.[70]

M. H. Ross.

Pleadings—General Allegation of Negligence—Sufficiency Against Demurrer

There has been much confusion in the North Carolina courts concerning the necessary requirements of complaints[1] to withstand demurrer for failure to state a cause of action[2] in actions for negligence. In the recent case of *Davis v. Rhodes*,[3] an action for wrongful death, complaint alleged "that defendant unlawfully, recklessly, and negligently struck and collided" with the motor scooter on which the intestate was riding. Defendant answered, denying negligence. Thereafter, plaintiff was allowed to amend his complaint. This amendment, filed more than one year after the death of the intestate, particularized the acts of negligence relied upon. Defendant then demurred to the original complaint for failure to state a cause of action, and moved to dismiss the action as the amendment was filed more than one year after the death of the intestate.[4] The trial court sustained the demurrer and dismissed the action;

[67] N.L.R.B. petition for writ of certiorari, p. 13, N.L.R.B. v. Atlanta Metallic Casket Co., 173 F. 2d 758 (5th Cir. 1949).

[68] N.L.R.B. v. Corsicana Cotton Mills, 178 F. 2d 344 (5th Cir. 1949), 178 F. 2d 347 (5th Cir. 1949), 179 F. 2d 234 (5th Cir. 1950). Court allowed employer to escape contempt penalty but kept case on docket and read transcripts of negotiations, noting results of its mediation in later opinions.

[69] 61 STAT. 136, 29 U. S. C. §160j (Supp. 1947).

[70] MILLIS AND BROWN, FROM THE WAGNER ACT TO TAFT-HARTLEY 119 (1950); EXECUTIVE COUNCIL REPORT 6TH BIENNIAL CONVENTION TWUA-CIO 33 (1950) (court rulings are often "hollow victories"). See footnote 30, *supra*, for length of delays.

[1] A complaint must contain a plain and concise statement of the facts constituting a cause of action. N. C. GEN. STAT. §1-122 (1943).

[2] Defendant may demur to the complaint when it appears upon the face thereof that the complaint does not state facts sufficient to constitute a cause of action. N. C. GEN. STAT. §1-127 (1943).

[3] 231 N. C. 71, 56 S. E. 2d 43 (1949).

[4] N. C. GEN. STAT. §28-173 (1943) (. . . action . . . to be brought within one year after such death). Where the original complaint does not state a cause of action, an amendment, if it be good and available, would relegate the plaintiff to

plaintiff appealed.

The Supreme Court, with Justice Barnhill writing the opinion for a unanimous court, held that the original complaint constituted a defective statement of a good cause of action, and that the defendant's remedy, after answer, was not by demurrer, but by motion to make more definite.

The principle that a complaint which states a good cause of action in a defective manner is not subject to demurrer is well established in the North Carolina courts, but its application to the complaint in the instant case is not consistent with its application in the past, and is inconsistent with other established rules of pleading in our courts.

For purposes of demurrer, the complaint alleged only that the defendant collided with the rear of the vehicle on which the intestate was riding, the averments of negligence, recklessness, and unlawfulness being conclusions of fact or law and not admitted by demurrer.[5] Applying to these allegations the oft quoted maxim that "the allegations in a complaint do not constitute a cause of action for the want of some essential averment,"[6] it can be seen that no facts are stated which give rise to a cause of action. An essential element of an action for negligence is the breach of some duty.[7] The above allegations possibly imply a duty to use due care, but they neither state nor imply facts indicating a breach of this duty. Negligence is not presumed from the mere fact that the intestate was killed, or that there was a collision.[8] The North Carolina Supreme Court has consistently refused to sustain a complaint against demurrer which did not contain facts showing a duty and breach thereof.[9]

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the position of having thereby for the first time stated a cause of action against the demurring defendants, and the fact that the action now sought to be maintained on the amended complaint originated more than one year after the death of the intestate can be taken advantage of by demurrer. George v. Atlanta and Charlotte Airline Ry., 210 N. C. 58, 185 S. E. 431 (1936); Webb v. Eggleston, 228 N. C. 574, 46 S. E. 2d 700 (1948).

[5] The office of demurrer is to test the sufficiency of the pleadings, admitting for the purpose the truth of the allegations of fact contained therein, and ordinarily relevant inferences of fact necessarily deducible therefrom are also admitted, but the principle does not extend to admissions of conclusions or inferencs of law. Ferrell v. Worthington, 226 N. C. 609, 39 S. E. 2d 812 (1946); Newton v. Chason, 225 N. C. 204, 34 S. E. 2d 70 (1945); Smith v. Smith, 225 N. C. 189, 34 S. E. 2d 148 (1945).

[6] Conley v. Richmond & D. R. R., 109 N. C. 692, 14 S. E. 303 (1891). That the pleader must allege all the material ultimate facts upon which his cause of action is based has become axiomatic. If all such facts are not alleged a demurrer will be sustained. Ledwell v. Proctor, 221 N. C. 161, 19 S. E. 2d 234 (1942).

[7] Rountree v. Fountain, 203 N. C. 381, 166 S. E. 329 (1932); Taylor v. Seaboard Air Line Ry., 145 N. C. 400, 59 S. E. 129 (1907); Thomason v. Seaboard Air Line Ry., 142 N. C. 318, 55 S. E. 205 (1906).

[8] Rountree v. Fountain, 203 N. C. 381, 166 S. E. 329 (1932); Swainey v. Great A. & P. Co., 202 N. C. 272, 162 S. E. 557 (1932); Burke v. Carolina Coach Co., 198 N. C. 8, 150 S. E. 636 (1929).

[9] Harris v. Winston-Salem Southbound Ry., 220 N. C. 698, 18 S. E. 2d 204 (1941); Daniels v. Montgomery Ward & Co., 217 N. C. 768, 9 S. E. 2d 388

The practice of sustaining complaints against demurrer when they contain a defective statement of a good cause of action has been limited to those complaints which contain, expressly or by implication, some recital of specific acts which give rise to the cause of action. This is true of the cases cited in support of the *Davis* decision.[10] This practice has been applied to actions involving negligence,[11] false imprisonment,[12] contract,[13] and many others.[14]

The practical effect of the *Davis* decision is to modify greatly the former requirement as to what factual allegations constitute a cause of action for negligence. The omission of the acts giving rise to the action is not fatal, but is at worst a defective statement of a good cause of action, which allows any required amendments to relate back to the original complaint.[15] The net result is to give the pleader in actions for negligence the privilege of "notice pleading" as allowed by the Federal Rules of Civil Procedure.[16] This is of great importance to the

(1940); George v. Atlanta & Charlotte Air Line Ry., 207 N. C. 457, 177 S. E. 324 (1934); Ballinger v. Thomas, 195 N. C. 517, 142 S. E. 761 (1928); Taylor v. Seaboard Air Line Ry., 145 N. C. 400, 59 S. E. 129 (1907); Thomason v. Seaboard Air Line Ry., 142 N. C. 318, 55 S. E. 205 (1906); Conley v. Richmond & D. R. R., 109 N. C. 692, 14 S. E. 303 (1891).

[10] Presnell v. Beshears, 227 N. C. 279, 41 S. E. 2d 835 (1947) (negligence set out in detail and sufficient allegation of agency); Livingston v. Essex Investment Co., 219 N. C. 416, 14 S. E. 2d 489 (1941) (allegation that brick were improperly encased in mortar); Foy v. Stephens, 168 N. C. 438, 84 S. E. 758 (1915) (allegations were sufficient to give rise to action for fraud, but there was no direct allegation of fraud; held sufficient against demurrer); Dockery v. Hamlet, 162 N. C. 118, 78 S. E. 13 (1913) (sufficient allegation of indebtedness); Eddleman v. Lentz, 158 N. C. 65, 72 S. E. 1011 (1911) (allegation that judgment had been assigned "for value and without recourse" held sufficient allegation of payment); Gillikin & Gaskell v. Lake Drummond Canal Co., 147 N. C. 39, 60 S. E. 654 (1908) (allegation that barge obstructed canal); Blackmore v. Winters, 144 N. C. 212, 56 S. E. 874 (1907) (allegation of amount of rent, demand, and failure to pay held sufficient allegation of indebtedness); Seaboard Air Line Ry. v. Main, 132 N. C. 445, 43 S. E. 930 (1903) (indirect allegation of necessary facts); Allen v. Carolina Cent. Ry., 120 N. C. 548, 27 S. E. 76 (1897) (allegation of defective brake).

[11] See note 9 *supra*; Cunningham v. Hayes, 214 N. C. 456, 199 S. E. 627 (1938); Piner v. Richter, 202 N. C. 573, 163 S. E. 561 (1932); Lee v. Caveness Produce Co., 197 N. C. 714, 150 S. E. 363 (1929); Gillikin & Gaskell v. Lake Drummond Canal Co., 147 N. C. 39, 60 S. E. 654 (1908); Allen v. Carolina Cent. Ry., 120 N. C. 548, 27 S. E. 76 (1897); Conley v. Richmond & D. R. R., 109 N. C. 692, 14 S. E. 303 (1891).

[12] Brewer v. Wynne, 154 N. C. 467, 70 S. E. 947 (1911).

[13] Hawkins v. Federal Land Bank of Columbia, 221 N. C. 75, 18 S. E. 2d 823 (1942); Sohmer v. Felton Beauty Supply Co., 214 N. C. 522, 199 S. E. 711 (1938).

[14] Jones v. Jones Lewis Furniture Co., 222 N. C. 439, 23 S. E. 2d 309 (1942) (breach of warranty); Eddleman v. Lentz, 158 N. C. 65, 72 S. E. 1011 (1911) (action by sureties to set aside conveyances of insolvent defendant); Ladd v. Ladd, 121 N. C. 118, 28 S. E. 190 (1897) (divorce action).

[15] Bailey v. Roberts, 208 N. C. 532, 181 S. E. 329 (1935); Renn v. Seaboard Air Line Ry., 170 N. C. 128, 86 S. E. 964 (1915); Eddleman v. Lentz, 158 N. C. 65, 72 S. E. 1011 (1911); Ladd v. Ladd, 121 N. C. 118, 28 S. E. 190 (1897).

[16] ". . . a very brief statement, designed merely to give notice of the claim to the opponent." CLARK, CODE PLEADING §11 (2d ed. 1947); MCINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE §346 (1929); FED. R. CIV. P., form 9

pleader for two reasons: (1) If, through oversight or lack of sufficient facts at the time of drafting, the complaint contains only a simple allegation that "X negligently drove his automobile and as a result struck Y," this allegation will satisfy any statute of limitations or condition precedent to the action, so that a demurrer interposed after the expiration of the time limit will not cause the action to be dismissed,[17] and plaintiff may or may not be ordered to amend the complaint; (2) if specific acts of negligence are alleged, the proof is likely to be confined to those acts alone,[18] but if a general allegation is made, and the opposing counsel does not object, there will be no confining bounds for the proof that is later presented, and the complaint can subsequently be amended to include any acts of negligence which were proved at the trial.[19] If an objection is made, it will not be fatal, but will only necessitate an amendment.

There was no indication in the *Davis* decision as to how far the Court was prepared to extend this privilege of "notice pleading," but in view of the unequivocal position taken by the Court in dealing with other types of action,[20] it appears that the pleader in the future should not rely on this precedent except in actions involving negligence. Whether the decision will apply to actions other than those for negligent wrongful death will be determined only by subsequent cases.

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(. . . defendant negligently drove a motor vehicle against plaintiff . . .); Watson v. World of Mirth Shows, 4 F. R. D. 31 (S. D. Ga. 1944) (. . . to state a cause of action for negligence it is only necessary to allege that defendant acted negligently and as a result plaintiff was injured).

[17] Renn v. Seaboard Air Line Ry., 170 N. C. 128, 86 S. E. 964 (1915); Lefler v. Lane, 170 N. C. 181, 86 S. E. 1022 (1915); Dockery v. Hamlet, 162 N. C. 118, 78 S. E. 13 (1913); Lassiter v. Norfolk & C. R. R., 136 N. C. 89, 48 S. E. 642 (1904); Ladd v. Ladd, 121 N. C. 118, 28 S. E. 190 (1897).

[18] McCoy v. Carolina Cent. Ry., 142 N. C. 383, 387, 55 S. E. 270, 272 (1906). ". . . proof without allegation is as unavailing as allegation without proof." Ingold v. Phoenix Assur. Co., 230 N. C. 142, 52 S. E. 2d 366 (1949); Stafford v. Yale, 228 N. C. 220, 44 S. E. 2d 872 (1947).

[19] N. C. GEN. STAT. §1-168 (1943); Deligny v. Tate Furniture Co., 170 N. C. 189, 86 S. E. 980 (1915).

[20] See notes 6 and 9 *supra*. In one subsequent decision, Steel v. Locke Cotton Mills, 231 N. C. 636, 58 S. E. 2d 620 (1950), an action for mandamus by a stockholder for payment of preferred dividends, complaint alleged surplus and net profits available for dividends on January 1, 1949, but did not allege such surplus and profits at date of commencement of action. Demurrer for failure to state a cause of action was sutained, the court holding that "a fact essential to a cause of action is not alleged when it is only to be inferred as a conclusion from other facts specifically averred, which are not inconsistent with the opposite conclusion."