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Pleadings -- General Allegation of Negligence

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be admitted to enlarge or extend the obligation of another jointly or jointly and severally bound. Logically and upon principle there can be but one answer. No such authorization or agency exists, or can be implied, from the joint contract as will authorize one to act for and bind the others so as to renew or extend their liability, where the relationship is merely that of joint debtors. If resort were had to principle instead of precedent it is difficult to see how the unauthorized payment by one could bind his co-debtor.[27] It also appears that there is no practical reason why a part payment by the principal should toll the statute as to a surety but not as to a guarantor, since both the surety and the guarantor, in the real sense, serve the same purpose—to secure the debt of the debtor. Since N. C. GEN. STAT. §1-27 (1943) is piecemeal legislation, it is suggested that the statute be amended to provide that a payment by a party to an obligation, whether payment be made before or after the statute of limitations has barred the obligation, shall set the statute running over again only as to the party making the payment.

PERRY C. HENSON.

Pleadings—General Allegation of Negligence

Until recently it was a settled rule in North Carolina that a general allegation that defendant was negligent was an insufficient pleading of the facts which constituted plaintiff's cause of action,[1] and as such was subject to demurrer.[2] This rule underwent a change in the recent case of *Davis v. Rhodes*,[3] a negligent wrongful death action. There the questioned allegation was "that defendant unlawfully, recklessly and negligently struck and collided" with the motor scooter on which the intestate was riding. This general allegation was held sufficient.

This change was discussed in a recent note,[4] where it was pointed

[27] Campbell v. Brown, 86 N. C. 376 (1882).

[1] Whitehead v. Carolina Telephone & Telegraph Co., 190 N. C. 197, 129 S. E. 602 (1925) (plaintiff used phone to report fire but could not secure connections; an allegation that defendant was negligent in not responding to his call was held insufficient); Thomason v. Durham & Northern R. R., 142 N. C. 318, 55 S. E. 205 (1906) (allegation that plaintiff suffered damage "from smoke, noise, odors and vibrations resulting from operation of defendant's railroad"; *held*, no cause of action stated); Conley v. Richmond & Danville Ry., 109 N. C. 692 14 S. E. 303 (1891) (averment stated that intestate was killed and slain by the negligence of defendant; held too general); *cf.* Lanier v. Roper Lumber Co., 177 N. C. 200, 98 S. E. 593 (1919) (plaintiff alleged that he was "induced to sign a deed by fraud"; *held*, insufficient); Citizens Bank v. Cahagan, 210 N. C. 464, 187 S. E. 580 (1936) (allegation that a certain sum was then due and owing held insufficient).

[2] "The 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] 29 N. C. L. REV. 89 (1950).

out that perhaps the change was not too drastic, concluding that in the future the court would possibly hold general allegations sufficient only in negligence actions, and might further restrict such general pleading to negligence actions involving wrongful death. Thus, future pleaders of negligence actions, not involving wrongful death, were left in doubt as to whether a cause of action could be stated by alleging negligence generally. Following the *Davis* decision, the court could have further liberalized its requirements so as to attain that degree of conciseness allowed by the federal courts.[5]

However, in *Fleming v. Carolina Power & Light Co.*,[6] the court did not see fit to so liberalize; instead it reverted to the old rule that a general allegation is insufficient.[7] In this case, the plaintiff owned a warehouse to which defendant supplied electric current. During a storm some of the electric wires outside the warehouse broke; there were red hot wires going into the structure, and flashing wires dangling loose. Suddenly, plaintiff's warehouse burst into flames from a fire of unknown origin starting on the inside of the structure.[8] Action was brought on two theories of negligence; first, a very particularized allegation that the defendant was negligent in not shutting off the current, and, second, a general allegation "that defendant negligently permitted electric current in such volume as to set fire to plaintiff's warehouse to pass through its wires." At the trial, plaintiff proceeded only with respect to the first theory and did not introduce evidence to substantiate the second theory. The trial judge refused to charge the jury on the second theory.[9] After a verdict was rendered for defendant on the first theory, plaintiff appealed, contending the judge erred in refusing to charge the jury on the second.[10]

[5] "A pleading . . . shall contain a short and plain statement of the claim showing the pleader is entitled to recover." 28 U. S. C. §8 (1950). This allows an allegation of negligence to take on this form: ". . . defendant negligently drove a motor vehicle against the plaintiff" who was thereby injured. FED. R. CIV. P., form 9.

[6] 232 N. C. 457, 61 S. E. 2d 364 (1950).

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

[8] It seems the doctrine of res ipsa loquitur might apply to these facts. See, McAllister v. Pryor, 187 N. C. 832, 123 S. E. 177 (1922); Turner v. Southern Power Co., 154 N. C. 131, 69 S. E. 767 (1910). However, plaintiff could not successfully invoke this doctrine here because he could not show that the fire originated from electricity. The doctrine of res ipsa loquitur will not lie where more than one inference can be drawn as to the cause of the injury. See, Corum v. R. J. Reynold's Tobacco Co., 205 N. C. 213, 171 S. E. 78 (1933); Springs v. Doll, 197 N. C. 240, 148 S. E. 251 (1929).

[9] "Where there is any evidence to support a plaintiff's claim it is the duty of the judge to submit the question to the jury, who are the judges of its weight." Wittkowsky & Ritch v. Wasson, 71 N. C. 451, 454 (1874).

[10] It is not enough to say that there was some evidence, a mere scintilla, for there must be evidence on which the jury might reasonably conclude that there was negligence. Smith v. Duke University, 219 N. C. 628, 14 S. E. 2d 643 (1941); Jones v. Bagwell, 207 N. C. 378, 177 S. E. 170 (1934).

The court affirmed for two reasons; that the allegation did not specify wherein the negligence consisted,[11] and, as plaintiff had offered no proof to substantiate the allegation, he could not proffer an efficacious appeal because "an appeal ex necessitate follows the theory of the trial."[12] Hence, plaintiff had no basis for an appeal.[13]

This latter reason alone would be sufficient to defeat plaintiff, and the reason that the allegation is too general was not necessary, yet, it was powerfully stated. Consequently, it seems probable that the court inserted it to serve notice on future pleaders that a general allegation of negligence is an insufficient pleading of a cause of action.

In the future, the *Davis* case will probably be limited to its facts and North Carolina will probably require specific allegations of negligence. It should be noted, however, that the *Fleming* case made no mention of the *Davis* case, and the latter was decided on demurrer while the former was not. Even so, cautious pleaders of negligence should make specific allegations of the manner in which the defendant was negligent.

RICHARD L. GRIFFIN.

Pleadings—Overruling of Demurrer for Misjoinder of Parties and Causes—Effect of Reversal on Appeal

The question was recently presented[1] as to whether an action was still pending after the North Carolina Supreme Court had reversed the lower court's judgment[2] overruling a demurrer for misjoinder of parties and causes of action.[3]

After the first opinion was certified down, but before the lower court had acted in accordance therewith,[4] plaintiffs moved for leave to file an amended complaint.[5] When the motion came before him, the resident judge concluded that the Supreme Court had sustained the

[11] The complaint did set out a cause of action on another theory of negligence.
[12] Fleming v. Carolina Power & Light Co., 232 N. C. 457, 463, 61 S. E. 2d 364, 369 (1950).
[13] Coral Gables, Inc. v. Ayres, 208 N. C. 426, 181 S. E. 263 (1935); Edgerton v. Perkins, 200 N. C. 650, 158 S. E. 197 (1931).

[1] Teague v. Siler City Oil Co., 232 N. C. 469, 61 S. E. 2d 345 (1950).
[2] Teague v. Siler City Oil Co., 232 N. C. 65, 59 S. E. 2d 2 (1950).
[3] N. C. GEN. STAT. §1-123 (1943) determines what causes of action may be joined. For a thorough discussion of joinder of parties and causes, see Brandis, *Permissive Joinder of Parties and Causes in North Carolina*, 25 N. C. L. REV. 1, 16 (1946).
[4] See MCINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE IN CIVIL CASES §694 (1929) for the disposition of a case on appeal.
[5] N. C. GEN. STAT. §1-163 (1943) allows amendments in the discretion of the court. N. C. GEN. STAT. §1-131 (1943) which gives the right to move for leave to amend when a demurrer is sustained, has no application to cases in which the action has been dismissed for misjoinder of parties and causes. Grady v. Warren, 202 N. C. 638, 163 S. E. 679 (1932).