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Raising the Contributory Negligence Issue

A majority of American jurisdictions have sustained the proposition that the issue of contributory negligence may be properly raised by an affirmative plea.¹ Moreover, the courts of these jurisdictions have made statements to the effect that contributory negligence is an affirmative defense which *must* be specially pleaded.²

¹ *Railway Exp. Agency, Inc. v. Mallory*, 168 F.2d 426 (5th Cir.), cert. denied 335 U.S. 824, 69 Sup. Ct. 48 (1948); *Louisville & N.R.R. v. Maddox*, 236 Ala. 594, 183 So. 849 (1938); *Luffy v. Lockhart*, 37 Ariz. 488, 295 Pac. 975 (1931); *Martinelli v. Poley*, 210 Cal. 450, 292 Pac. 451 (1930); *Bragdon v. Hexter*, 86 Colo. 435, 282 Pac. 568 (1929); *Cline v. Powell*, 141 Fla. 119, 192 So. 628 (1939); *Universal Credit Co. v. Service Fire Ins. Co. of New York*, 69 Ga. App. 357, 25 S.E.2d 526 (1943); *Madron v. McCoy*, 63 Idaho 703, 126 P.2d 566 (1942); *Henderson v. National Mutual Casualty Co.*, 164 Kan. 109, 187 P.2d 508 (1947); *French v. T.S.C. Motor Freight Lines*, 39 So.2d 363 (La. App. 1949); *Collins v. Croteau*, 322 Mass. 291, 77 N.E.2d 305 (1948); *Gerber v. Schutte Investment Co.*, 354 Mo. 1246, 194 S.W.2d 25 (1946); *McCartan v. Park Butte Theater Co.*, 103 Mont. 342, 62 P.2d 338 (1936); *Tempel v. Proffett*, 122 Neb. 249, 240 N.W. 285 (1932); *Dragan v. Grossman*, 116 N. J. Law 182, 182 Atl. 848, (Sup. Ct.), *aff'd* 117 N. J. Law 147, 187 Atl. 373 (Ct. Err. & App. 1936); *George v. Jensen*, 49 N.M. 410, 165 P.2d 129 (1946); *Dalrymple v. Sinkoe*, 230 N.C. 453, 53 S.E.2d 437 (1949); *G.A. Nichols Co. v. Lockhart*, 191 Okla. 296, 129 P.2d 599 (1942); *Lawrence v. Southern Ry.*, 169 S.C. 1, 167 S.E. 839 (1933); *Pollari v. Salt Lake City*, 111 Utah 25, 176 P.2d 111 (1947); *Hart v. Clapp*, 185 Wash. 362, 54 P.2d 1012 (1936) Some states have statutory provisions to the effect that contributory negligence must be pleaded. ARIZ. CODE ANN. § 21-406 (1939); N.C. GEN. STAT. § 1-139 (1943); N.H. REV. LAWS, c. 384, § 13 (1942); VA. CODE ANN. § 8-112 (1950) The Federal Rules of Civil Procedure requires an affirmative pleading of contributory negligence. FED. R. CIV. P. 8(c). Where contributory negligence is pleaded affirmatively it has generally been held that facts constituting such negligence must be set forth. *Pankey v. City of Mobile*, 250 Ala. 566, 35 So.2d 497 (1948); *Preston v. Hubbell*, 87 Cal. App.2d 53, 196 P.2d 113 (1948); *McLeod Construction Co. v. Cooper*, 101 Fla. 441, 134 So. 224 (1931); *Quatray v. Wicker*, 16 La.App. 515, 134 So. 313 (1931); *Waller v. Hill*, 183 Ore. 53, 190 P.2d 147 (1948) A Nevada case holds that the defendant must plead contributory negligence with the same particularity required of the plaintiff in pleading negligence. *Wells, Inc. v. Shoemaker*, 64 Nev. 57, 177 P.2d 451 (1947) On the other hand, the federal courts have held that a simple plea that the plaintiff was guilty of contributory negligence is sufficient and that contributory negligence need be pleaded only well enough to inform the plaintiff that it is to be relied upon as a defense. *American Motorists Ins. Co. v. Napoli*, 166 F.2d 24 (5th Cir. 1948); *Sharp v. Pennsylvania-Reading Seashore Lines*, 1 F.R.D. 16 (D.N.J. 1939) Kentucky requires only a general allegation of contributory negligence. *Nelson's Adm v. Southern Ry.*, 302 Ky. 243, 194 S.W.2d 518 (1946); *Chesapeake & O. Ry. v. Smith*, 101 Ky. 104, 39 S.W. 832 (1897) In any event, the pleading need not be labeled as a contributory negligence plea. *Friddle v. Southern Pac. Co.*, 126 Cal. App. 388, 14 P.2d 568 (1932); *Dragan v. Grossman*, 182 Atl. 848, (Sup. Ct.), *aff'd* 117 N. J. Law 147, 187 Atl. 373 (Ct. Err. & App. 1936).

² Cases cited note 1 *supra*. If taken without qualification, the statements referred to are likely to lead to the mistaken conclusion that contributory negligence can never become an issue except by affirmative pleading. The Supreme Court of Utah has properly expressed the rule by holding that there must be an affirmative plead-

In a few jurisdictions the issue may be raised by a general denial. However, in these jurisdictions there are usually particular reasons why the defense need not be affirmatively pleaded.³ For instance, in Wisconsin the doctrine of comparative negligence permits the defense to be raised under a denial.⁴ A few other jurisdictions require the plaintiff to plead his own freedom from negligence and, therefore, hold that a denial puts contributory negligence in issue.⁵

It may be inferred from statements of courts adhering to the majority rule that contributory negligence must be specially pleaded if it is to be available as a defense in any instance. However, the issue may be tendered by the pleadings in manners other than by responsive pleading. A majority of American courts have held that a demurrer will raise the issue of contributory negligence if the plaintiff's negligence appears on the face of the petition.⁶

Where the affirmative plea of the contributory negligence is required it is generally held that it *admits* the defendant's negligence and seeks to

ing if the issue is to be tendered by responsive pleading. *Pollari v. Salt Lake City*, 111 Utah 25, 176 P.2d 111 (1947) As for manners in which the issue may be tendered, see page — *infra*.

³ *Greenberg v. Branciere*, 100 Conn. 596, 124 Atl. 216 (1924); *Cole v. Wilson*, 127 Me. 316, 143 Atl. 178 (1928); *St. Anthony Falls Power Co. v. Eastman*, 20 Minn. 277 (1882); *Harper v. Holcomb*, 146 Wis. 183, 130 N.W. 1133 (1911); *Jones v. Sheboygan & Fond du Lac R.R.*, 42 Wis. 307 (1877).

⁴ WIS. STAT. § 270.28 (1947). In Wisconsin it is held that the question of the plaintiff's negligence must be submitted to the jury notwithstanding the fact that the defendant has failed to plead it. *Arneson v. Buggs*, 231 Wis. 499, 286 N.W. 19 (1939). However, in Mississippi, where the doctrine of comparative negligence also has been adopted, it has been held that the defendant must specifically plead contributory negligence or ask an instruction on it in order to take advantage of the statute. MISS. STAT. § 1454 (1942); *Moore v. Abdalla*, 197 Miss. 125, 19 So.2d 502 (1944); *Gulf & S.I.R.R. v. Saucier*, 139 Miss. 497, 104 So. 180 (1925).

⁵ *Cole v. Wilson*, 127 Me. 316, 143 Atl. 178 (1928); *Greenberg v. Branciere*, 100 Conn. 596, 124 Atl. 216 (1924); *St. Anthony Falls Power Co. v. Eastman*, 20 Minn. 277 (1882). Of the courts which require plaintiff to show his freedom from negligence some have required an express negation in the complaint. *McDermott v. A.B.C. Oil Burner Sales Corp.*, 266 Ill. App. 115 (1932); *Fitzpatrick v. International Ry.*, 252 N.Y. 127, 169 N.E. 112 (1929); *Sylcord v. Horn*, 179 Iowa 936, 162 N.W. 249 (1917). Others have viewed the allegation of defendant's negligence as a sufficient negation. *Greenberg v. Branciere*, *supra*; *Harper v. Holcomb*, *supra*; *St. Anthony Falls Power Co. v. Eastman*, *supra*. Where either an express or an implied negation is required as an essential part of the pleading, it would appear that a general denial would raise the issue. *Greenberg v. Branciere*, *supra*; *Sylcord v. Horn*, *supra*. However, one Minnesota case declares that the plaintiff must have negatived his fault expressly in order for a denial to raise the issue. *Hill v. Minneapolis St. Ry.*, 112 Minn. 503, 128 N.W. 831 (1910).

⁶ *Cline v. Powell*, 141 Fla. 119, 192 So. 628 (1939); *Henderson v. National Mutual Casualty Co.*, 164 Kan. 109, 187 P.2d 508 (1949); *Atherton v. Goodwin*, 163 Kan. 22, 180 P.2d 296 (1947); *Maring v. City of Billings*, 115 Mont. 249, 142 P.2d 361 (1943); *Ramsey v. Nash Furniture Co.*, 209 N.C. 165, 183 S.E. 536 (1936); *Flatman v. Lulay Bros. Lumber Co.*, 175 Ore. 495, 154 P.2d 535 (1944).

avoid liability by showing that the plaintiff was also chargeable with negligence and that such negligence was a proximate cause of the injury.⁷

An admission of negligence imposes no undue burden on the defendant who recognizes the fact that he was negligent, and, therefore, realizes that he must rely on the doctrine of contributory negligence in order to defeat the plaintiff's claim. However, the very nature of the accident from which a negligence action arises is often such that the defendant cannot honestly state that he was or was not negligent. The requirement of an affirmative plea of contributory negligence raises the possibility that an innocent defendant will be required to admit that he was negligent in order to preserve his right to defend on the ground of contributory negligence.

In England, the Statute of 4 *Anne*, Chapter 16, Section 4, permits the defendant to set forth in his answer as many defenses as he has. Similar statutes have been enacted in many United States jurisdictions.⁸ In the absence of abrogation by statute, it would appear that the provisions of the Statute of 4 *Anne* are part of the common law in the United States by virtue of its enactment before the Constitution.⁹ Consequently, were it not for other considerations, it would appear that a defendant might enter a general denial and an affirmative plea of contributory negligence in the same answer. However, the rule permitting multiple defense pleading has been limited by the rule that the several defenses must be consistent.¹⁰ The Federal Rules of Civil Procedure have solved the difficulty by granting the defendant the right to plead as many defenses as he has *regardless of consistency*, as long as the defenses are separately stated.¹¹

⁷ *Shayne v. Saunders*, 129 Fla. 355, 176 So. 495 (1937); *Saks v. Eichel*, 167 So. 464 (La. App. 1936); *Howard v. Rowan*, 154 So. 382 (La. App. 1934); *Reed v. Mayor and City Council of Baltimore*, 171 Md. 115, 188 Atl. 15 (1936); *Cain v. Wintersteen*, 144 Mo. App. 1, 128 S.W. 274 (1910); *Birsch v. Citizens Electric Co.*, 36 Mont. 574, 93 Pac. 940 (1908); *Thayer v. Denver & R.G.R.R.*, 21 N.M. 330, 154 Pac. 691 (1916); *Cogdell v. Wilmington & W.R.R.*, 132 N.C. 852, 44 S.E. 618 (1903); *Armstrong v. Green*, 113 Okla. 254, 241 Pac. 789 (1925); *Colonial Refining Co. v. Lathrop*, 64 Okla. 47, 166 Pac. 747 (1917). California appears to have repudiated the doctrine that a plea of contributory negligence is an unqualified admission of negligence on defendant's part. "Among the authorities in California and in some other states the careless use of a familiar term has occasionally led to the inaccurate statement that the doctrine of contributory negligence is a plea of confession and avoidance." *Hoffman v. Southern Pac. Co.*, 84 Cal. App. 337, 347, 258 Pac. 397, 401 (1927).

⁸ *E.g.* IDAHO CODE § 5-616 (1947); ILL. ANN. STAT., c. 110, § 167 (Smith-Hurd, 1948); MINN. STAT. ANN. § 544.06 (1947); TENN. CODE § 8759 (Williams, 1934).

⁹ KINNANE, *ANGLO AMERICAN LAW* 327 (1932)

¹⁰ To permit a defendant to deny negligence on one hand and to admit negligence on the other raises an obvious question of consistency.

¹¹ FED. R. CIV. P. 8(e). New Mexico has also repudiated the consistency rule. N.M. STAT. ANN. § 19-101 (8) (1941)

In some jurisdictions the question of the inconsistency of a general denial and a plea of contributory negligence has been avoided by the device of alternative and hypothetical pleading.¹² The courts in these jurisdictions have reasoned variously that a hypothetical plea of contributory negligence admits negligence only for the "purpose of the plea,"¹³ that it admits the defendant's negligence but "is a denial of such negligence being the producing cause,"¹⁴ and that it admits only "that there is an issue"¹⁵ of the defendant's negligence.

Even in jurisdictions which have stated that a pleading of contributory negligence must be in the affirmative it is widely held that the defendant may have the benefit of the issue if contributory negligence appears from the evidence adduced by the plaintiff.¹⁶ In such instances the courts have generally refused to allow the defendant to introduce additional evidence of the plaintiff's negligence.¹⁷

Other courts have held that the contributory negligence issue may be raised by the defendant's evidence if the plaintiff fails to object, even though the defendant has failed to plead the defense.¹⁸

¹² *Louisville & N.R.R. v. Hall*, 87 Ala. 708, 6 So. 277 (1888); *Levenworth Light & Heating Co. v. Waller*, 65 Kan. 514, 70 Pac. 365 (1902). "A defendant may deny that he was guilty of any negligence, and at the same time consistently claim that, even if the jury should find that he has been negligent, the plaintiff would not have sustained any injury if it had not been for his own negligence as a proximate cause." *Sheets v. Southern Pac. Co.*, 212 Cal. 509, 515, 299 Pac. 71, 74 (1931).

¹³ *Crocker v. Johnston*, 43 N.M. 469, 478, 95 P.2d 214, 220 (1939).

¹⁴ *Bowen v. Kansas City*, 140 Mo. App. 695, 698, 126 S.W. 790, 791 (1910).

¹⁵ *Bomar v. Louisiana N. & S. R.R.*, 42 La. An. 1206, 1206, 9 So. 244, 245 (1890).

¹⁶ *Shipley v. Komer*, 60 F.Supp. 551 (S.D. Fla. 1945); *McIver v. Allen*, 33 Ariz. 28, 262 Pac. 5 (1927); *Curtis v. Castner*, 220 Cal. 185, 30 P.2d 26 (1934); *Dunn Bus Service, Inc. v. McKinley*, 130 Fla. 778, 178 So. 865 (1937); *McCrackin v. McKinney*, 52 Ga. App. 519, 183 S.E. 831 (1936); *Pipher v. Carpenter*, 51 Idaho 548, 7 P.2d 589 (1932); *Descombaz v. Klock*, 59 S.D. 461, 240 N.W. 495 (1932). There seems to be some uncertainty as to just how conclusively the plaintiff's evidence must show contributory negligence in order for the defendant to take advantage of this method of raising the issue. A Missouri case holds that contributory negligence must appear as an unavoidable conclusion. *Norton v. St. Louis & Hannibal Ry.*, 40 Mo. App. 642 (1890). A Montana case suggests that the evidence must raise a presumption of the plaintiff's negligence. *McCartan v. Park Butte Theater Co.*, 103 Mont. 342, 62 P.2d 338 (1936). Other courts have held that contributory negligence need appear only sufficiently to present an issue of fact for the jury. *Atlantic Coast Line Ry. v. McCormick*, 59 Fla. 121, 52 So. 712 (1910); *Chicago, B. & Q. Ry. v. Cook*, 18 Wyo. 43, 102 Pac. 657 (1909). A Missouri court of appeals found justification for the rule that the issue may be raised by plaintiff's evidence by reasoning that a plaintiff cannot complain that he has had no notice of or opportunity to meet his own evidence. *Wallower v. Webb City*, 171 Mo. App. 214, 156 S.W. 48 (1913).

¹⁷ *Crocker v. Johnston*, 43 N.M. 469, 95 P.2d 214 (1939); *Konig v. Nevada-California-Oregon Ry.*, 36 Nev. 181, 135 Pac. 141 (1913).

¹⁸ *Moeller v. Packard*, 86 Cal. App. 459, 261 Pac. 315 (1927); *Chicago & Erie R.R.*

In Ohio, as in most other jurisdictions, the issue of contributory negligence may be raised by an affirmative pleading.¹⁹ In fact, in a majority of the Ohio decisions the courts have stated that contributory negligence is an affirmative defense which *must* be specially pleaded.²⁰ On the other hand, in a few Ohio cases there are statements to the effect that contributory negligence *need not* be specially pleaded.²¹ However, the cases which state that an affirmative pleading is not required involved circumstances in which evidence of the plaintiff's negligence was introduced without objection. The courts can easily clarify the situation by stating that the defense must be specially pleaded if it is to be raised by the pleadings, but that it need not be pleaded in any manner if adduced by the evidence without objection.²²

A requirement of affirmative pleading, of course, nullifies the possibility of raising the issue of contributory negligence by a denial. However, two Ohio cases have permitted the issue to be raised by a denial where the plaintiff in his petition alleged his own freedom from negligence.²³ Notwithstanding the fact that these two cases have not been expressly overruled, they do not represent the law in Ohio. Later decisions have clearly repudiated the doctrine by holding that the allegation of freedom from negligence is immaterial to the complaint²⁴ and that the issue of the plaintiff's negligence is not, therefore, raised by a denial.²⁵

v. Monesmith, 110 Ind. App. 281, 37 N.E.2d 724 (1941); Robinson v. Kansas City Public Service Co., 345 Mo. 764, 137 S.W.2d 548 (1940)

¹⁹ Valencic v. The Akron & B.B.R.R., 133 Ohio St. 287, 13 N.E.2d 240 (1938), Bradley v. Cleveland Ry., 112 Ohio St. 35, 146 N.E. 805 (1925); Kolp v. Stevens, 45 Ohio App. 147, 186 N.E. 821 (1933); Lopa v. Smith, 37 Ohio App. 346, 174 N.E. 258 (1930); Sharp v. Russell, 37 Ohio App. 306, 174 N.E. 617 (1930); Sikora v. Bauer, 8 Ohio L. Abs. 530 (Ct. App. 1930); Dioguardi v. Ruby, 7 Ohio L. Abs. 730 Ct.App. 1929; Armleder v. Cincinnati, 16 Ohio Dec. (N.P.) 180 (1905). In Ohio the defendant who pleads contributory negligence affirmatively must set forth the facts upon which his claim is founded. Vanatta v. Baltimore & Ohio R.R., 4 Ohio N.P. (N.S.) 542 (1906) In this respect Ohio follows the general rule. Cases cited note 1 *supra*.

²⁰ Cases cited note 19 *supra*.

²¹ Gottesman v. City of Cleveland, 142 Ohio St. 410, 52 N.E.2d 644 (1944); Rohr, Adm r. v. The Scioto Valley Traction Co., 12 Ohio App. 275 1920; Martz v. Floral Products Co., 17 Ohio L. Abs. 118 (Ct. App. 1934)

²² Introduction of the issue by the evidence is discussed *infra*.

²³ Coal Company v. Estievenard, 53 Ohio St. 43, 40 N.E. 725 (1895); Dussell v. Akron St. Ry., 8 Ohio N.P. 622 (1891), *aff'd* 52 Ohio St. 649 44 N.E. 1148 (1895).

²⁴ Street Ry. v. Nolthenius, 40 Ohio St. 376 (1883); McGoldrick v. Kuebler, 36 Ohio App. 380, 172 N.E. 679 (1930); Peat v. City of Norwalk, 5 Ohio C.C. (N.S.) 614 (1903); Hill v. Lake Shore & M.S.Ry., 22 Ohio C.C. 291 (1901); Streit v. L. Hoster Brewing Co., 12 Ohio Dec. 619 (1902); Voss v. Young, 9 Ohio Dec. Repr. 48 (1883) *But cf.* Toomey v. Avery Stamping Co., 20 Ohio C.C. 183 (1900) (negating knowledge that machinery was in defective condition).

In Ohio, as in other states where it is stated that contributory negligence is required to be specially pleaded, the issue may be raised in manners other than responsive pleading. For instance, if the plaintiff's petition indicates his own culpable negligence, a demurrer will raise the issue.²⁶

Under the Ohio decisions to the effect that contributory negligence is an affirmative defense,²⁷ a defendant is faced with the same difficulty encountered by defendants in other jurisdictions which take that position.²⁸ His plea acts as an admission of his own negligence.²⁹ In addition, although Section 11315 of the Ohio General Code allows a defendant to plead as many defenses as he has, provided that those defenses are consistent, the consistency provision would appear to nullify the possibility of the defendant's including a general denial and a plea of contributory negligence in the same answer. However, in most instances the Ohio courts have been liberal in demanding only consistency in fact rather than consistency by implication of law.³⁰ Consequently, many Ohio courts have permitted a defendant to plead hypothetically³¹ although there is no code provision expressly authorizing such a plea.

²⁶ *Cincinnati Traction Co. v. Stephens*, 75 Ohio St. 171, 79 N.E. 235 (1906); *Cincinnati Traction Co. v. Forrest*, 73 Ohio St. 1, 75 N.E. 818 (1905); *Armleder v. Cincinnati*, 16 Ohio Dec. (N.P.) 180 (1905); *Nellis v. Cincinnati Traction Co.*, 3 Ohio N.P. (N.S.) 527 (1905), *rev'd on other grounds*, 81 Ohio St. 535 (1909). In New Jersey, even though it is stated that a defendant is required to plead contributory negligence affirmatively, it is held that a denial will raise the issue where the plaintiff has alleged freedom from negligence. *Devoe v. Delaware, L. & W.R.R.*, 112 N.J. Law 35 169 Atl. 637 (1933); *Titus v. Pennsylvania R.R.*, 87 N.J. Law 157, 92 Atl. 944 (1915).

²⁷ *McGoldrick v. Kuebler*, 36 Ohio App. 380, 172 N.E. 679 (1930) (the issue is raised if petition merely suggests an inference of negligence); *Orlinkowski v. Glowik*, 22 Ohio C.C. (N.S.) 266 (1908) (if it raise a presumption); *Wehrenberg v. The Cincinnati Traction Co.*, 2 Ohio N.P. (N.S.) 271 (1904) (if it suggests the inference).

²⁸ Cases cited note 17 *supra*.

²⁹ See page *supra*.

³⁰ *Bush v. Harvey Transfer Co.*, 146 Ohio St. 657, 67 N.E.2d 851 (1946); *Bradley v. Cleveland Ry.*, 112 Ohio St. 35, 146 N.E. 805 (1925); *Hoyer v. Lake Shore Electric Ry.*, 104 Ohio St. 467, 135 N.E. 627 (1922); *Cincinnati Traction Co. v. Forrest*, 73 Ohio St. 1, 75 N.E. 818 (1905); *Kolp v. Stevens*, 45 Ohio App. 147, 186 N.E. 821 (1933); *Bakas v. Casparis Stone Co.*, 14 Ohio N.P. (N.S.) 577 (1913).

³¹ *Lichtenstein v. Hudepohl Brewing Co.*, 11 Ohio C.C. (N.S.) 441 (1908); *McCaskey Register Co. v. American Case & Register Co.*, 8 Ohio N.P. (N.S.) 415 (1909).

³² *Scarinzi v. Farkas*, 80 Ohio App. 409, 75 N.E.2d 86 (1947); *Thomas v. Pennsylvania R.R.*, 70 Ohio App. 191, 45 N.E.2d 776 (1942); *Lemon v. Wiltberger*, 2 Ohio L. Abs. 123 (Ct. App. 1923); *Bakas v. Casparis Stone Co.*, 14 Ohio N.P. (N.S.) 577 (1913); *Nellis v. Cincinnati, D. & T. Traction Co.*, 3 Ohio N.P. (N.S.) 527 (1905), *rev'd on other grounds*, 81 Ohio St. 535 (1909); *Latham v. Columbus Ry. & Light Co.*, 19 Ohio Dec. (N.P.) 333 (1909); *Finn v. Cincinnati, Milford &*

The desirability of hypothetical pleading from the standpoint of the defendant in a negligence action is unquestionable. The device enables him to rely on the defense of contributory negligence if it develops that such is his true and proper defense, but requires the plaintiff to sustain the burden of proof on the issue of negligence even in such a case. Moreover, the advantages of alternative and hypothetical pleadings are unlimited from the standpoint of efficient administration of justice. As was stated in one Ohio case:³²

It is certainly not consistent with the spirit and intention of the code that a party having one or the other of two good defenses, without the means of knowing, otherwise than from the developments to be made upon the trial, which of the two, in fact or in law, is his true defense, shall, at his peril, be compelled to elect in advance on which he will rely, to the exclusion of the other. When from the nature of the case, it is rendered uncertain which of two grounds of defense is his true and proper one, it is competent for the defendant in his answer to set them both up, provided they will admit of being stated in such form that the answer can be sworn to without falsehood, and in good faith.

Undoubtedly, alternative and hypothetical pleading has greatly minimized the importance of the consistency rule in Ohio, but still it has not solved the problem of raising the issue of contributory negligence. The Ohio courts have held that the defense of contributory negligence may be raised by the evidence as well as by the pleadings. This is true whether the plaintiff's own evidence raises a presumption or inference of negligence on his part³³ or whether the defendant introduces evidence of the plaintiff's negligence without pleading it affirmatively and the plaintiff fails to object.³⁴

Loveland Traction Co., 7 Ohio L. Rep. 76 (1909); Lichtenstein v. Hudepohl Brewing Co., 11 Ohio C.C. (N.S.) 441 (1908) However, the pleading must be worded conditionally. Bakas v. Casparis Stone Co., *supra*; Fruckey v. West, 12 Ohio N.P. (N.S.) 45 (1911); Ellison v. Pullman Co., 7 Ohio L. Rep. 330 (1909); Finn v. Cincinnati, Milford & Loveland Traction Co., *supra*; Lichtenstein v. Hudepohl Brewing Co., *supra*. Defendant's negligence is not admitted in conditional pleadings. Scarinzi v. Farkas, *supra*.

³² Fruckey v. West, 30 Ohio Dec. (N.P.) 484, 487 (1911)

³³ Marsh v. Koons, 78 Ohio St. 68, 84 N.E. 599 (1908) (where it raises a presumption of negligence on plaintiff's part); Thompson v. Kerr, 39 Ohio L. Abs. 113, 51 N.E.2d 742 (Ct. App. 1942) (presumption or inference); Kinney v. Schmidt, 13 Ohio L. Abs. 582 (Ct. App. 1932) (inference); City of Cincinnati v. Frazer, 18 Ohio C.C. 50 (1899) (presumption); *see* Thomas v. Pennsylvania R.R., 70 Ohio App. 191, 45 N.E.2d 776 (1942) (presumption) The courts have made various statements as to the degree of proof necessary to remove the effect of this evidence. Thomas v. Pennsylvania Ry., *supra* (the proof must remove the presumption); Thompson v. Kerr, *supra* (such proof as is sufficient to equal or counterbalance the presumption); Kinney v. Schmidt, *supra* (the proof must counterbalance the inference of contributory negligence by a fair consideration of all the evidence); Cincinnati v. Frazer, *supra* (burden on plaintiff to remove the presumption of contributory negligence)

³⁴ McKinnon v. Pettibone, 44 Ohio App. 147, 184 N.E.707, *aff'd* 125 Ohio St.

Defense attorneys, ever mindful of the importance of court room psychology and of the value of maintaining their clients in positions above reproach, are reluctant to admit negligence even hypothetically.³⁵ Thus, there developed among Ohio defense attorneys the practice of entering a denial in the same answer with a plea to the effect that the injury, if any, was occasioned solely and proximately by the negligence of the plaintiff.³⁶

Many defense attorneys thought that the advantages of the sole negligence plea were twofold. In the first place, they realized that it would enable them to insert in the pleadings a statement which, because of its effect on the jury, might prove very damaging to the plaintiff's case. Secondly, they thought such a plea essential to the introduction of evidence on the issue of the plaintiff's sole negligence.³⁷

It is true that in Ohio, if the defendant is allowed to introduce evidence that the plaintiff's negligence was the sole proximate cause of the injury, then, even if it appears from the defendant's evidence merely that the evidence of each was the proximate cause, the case is considered a proper one for application of the doctrine of contributory negligence.³⁸ But it also

605, 183 N.E.786 (1932); *Osseforth v. The Cincinnati Traction Co.*, 9 Ohio N.P. (N.S.) 360 (1910) (however, this court demanded an amendment of the pleading to conform with the proof before an instruction on contributory negligence would be given).

³⁵ The adversary system is another reason for this reluctance. Unfortunately, the defense attorney feels it is his duty to compel the plaintiff to prove every material allegation even though he knows that the facts which plaintiff has alleged are true.

³⁶ *Glass v. Wm. Heffron Co.*, 86 Ohio St. 70, 98 N.E. 923 (1912); *Van Duzen Gas & Gasoline Engine Co. v. Schelies*, 61 Ohio St. 298, 55 N.E. 998 (1899); *The Springfield Gas Co. v. Herman*, 46 Ohio App. 309, 188 N.E. 733 (1933); *McKinnon v. Pettibone*, 44 Ohio App. 147, 184 N.E. 707 (1932); *Nier v. Kroger Grocery & Baking Co.*, 19 Ohio L. Abs. 281 (Ct. App. 1935); *Jones v. Garfield*, 14 Ohio L. Abs. 145 (Ct. App. 1932); *Wuest v. Cincinnati*, 13 Ohio N.P. (N.S.) 249 (1912). The defendant does not assume the burden of proof by pleading sole negligence. *Montanari v. Haworth*, 108 Ohio St. 8 (1923); *Springfield Gas Co. v. Herman*, *supra*; *Cincinnati St. Ry. v. Adams*, 33 Ohio App. 311, 169 N.E. 480 (1929). This plea has found favor in some foreign jurisdictions. *Dragan v. Grossman*, 116 N.J. Law 182, 182 Atl. 848 (1936); *Wallace v. Portland Ry. Light & Power Co.*, 103 Ore. 68, 71, 204 Pac. 147, 149 (1917) " It seems absurd to say that while, under a plea that plaintiff's negligence was partly the cause of the accident, defendant may offer proof and have an instruction upon the theory of contributory negligence of the plaintiff, yet if he goes a step further, and pleads that the plaintiff's negligence was wholly the proximate cause, his testimony to the effect that it was partly the cause must be disregarded."

³⁷ However, as is seen *infra* p. —, the "sole negligence" plea is surplusage and, therefore, should in no way govern the admissibility of evidence.

³⁸ *Rayland Coal Co. v. McFadden*, 90 Ohio St. 183, 107 N.E. 330 (1914); *Behm v. Cincinnati, D. & T. Traction Co.*, 86 Ohio St. 209, 99 N.E. 383 (1912); *Glass v. Wm. Heffron Co.*, 86 Ohio St. 70, 98 N.E. 923 (1912); *Kramer v. Blake*, 18 Ohio C.C. (N.S.) 77 (1910). The evidence offered by the defendant will seldom be sufficient to show the sole negligence of the plaintiff to the extent that reason-

has been held that a plea of sole negligence "adds nothing"³⁹ to a general denial, that it is mere "surplusage,"⁴⁰ and that it will be stricken on timely motion by the plaintiff.⁴¹ As a basis for such a holding the courts have reasoned that a defendant need not plead that negligence of the plaintiff or of a third party was solely responsible for the injury, for a defense of that nature tends to disprove the defendant's culpable negligence, and is, therefore, admissible under a denial.⁴²

On the one hand it has been held that, where a defendant alleges that the injury was a result of the plaintiff's sole negligence, but falls short of proving the allegation, he is entitled to an instruction on contributory negligence.⁴³ On the other hand it has been held that the sole negligence plea accomplishes nothing.⁴⁴ It follows that evidence of the plaintiff's sole negligence must be admissible under the denial portion of the answer. The practical effect of the Ohio decisions is that the defendant who wishes to assure himself of the availability of the defense of contributory negligence need only deny the plaintiff's allegations.

Thus, in Ohio defendants have an unwarranted advantage in raising the issue of contributory negligence. The basic injustice of the situation lies in the fact that the plaintiff may never be advised by the pleadings that he is to meet a defense consisting of new matter which has not been pleaded. One Ohio case⁴⁵ has even gone so far as to indicate that it is not necessary for the plaintiff to be forewarned of the defense of contributory negligence.

able minds cannot disagree on the point. Thus, the possibility of contributory negligence ordinarily must be charged upon by the judge.

³⁹ *Babcock v. Prudential Ins. Co. of America*, 42 Ohio L. Abs. 271, 274, 60 N.E.2d 495, 497 (Ct. App. 1944).

⁴⁰ *Smith v. Thoms*, 55 Ohio App. 174, 176, 9 N.E.2d 172, 173 (1936); *Cincinnati St. Ry. v. Adams*, 33 Ohio App. 311, 314, 169 N.E. 480, 482 (1929); *Behrens v. Warrick*, 32 Ohio L. Abs. 437, 443 (Ct. App. 1940); *Goldstein v. Klein*, 11 Ohio N.P. (N.S.) 1, 8 (1911); *Latham v. Columbus Ry. & Light Co.*, 19 Ohio Dec. (N.P.) 333, 335 (1909).

⁴¹ *Gottesman v. City of Cleveland*, 46 Ohio L. Abs. 474, 70 N.E.2d 149 (1946)

⁴² *Taylor v. City of Cincinnati*, 143 Ohio St. 426, 55 N.E.2d 724 (1944); *Augusta v. Paradis*, 61 Ohio App. 323, 22 N.E.2d 578 (1939); *Smith v. Thoms*, 55 Ohio App. 174, 9 N.E.2d 172 (1936); *Babcock v. Prudential Ins. Co. of America*, 42 Ohio L. Abs. 271, 60 N.E.2d 495 (Ct. App. 1944); *Behrens v. Warrick*, 32 Ohio L. Abs. 437 (Ct. App. 1940); *Gottesman v. Bohm*, 20 Ohio L. Abs. 69 (Ct. App. 1935); *Nier v. Kroger Grocery & Baking Co.*, 19 Ohio L. Abs. 281 (Ct. App. 1935); *Haylett v. McCreary*, 12 Ohio L. Abs. 550 (Ct. App. 1932); *Goldstein v. Klein*, 11 Ohio N.P. (N.S.) 1 (1911); *Latham v. The Columbus Ry. & Light Co.*, 8 Ohio N.P. (N.S.) 185 (1909); *Fruckey v. West*, 30 Ohio Dec. (N.P.) 484 (1911); *Cincinnati, D. & T. Traction Co. v. Sanders*, 22 Ohio C. Dec. 413 (1909).

⁴³ See note 37 *supra*.

⁴⁴ Cases cited note 41 *supra*.

⁴⁵ *Martz v. Floral Products Co.*, 17 Ohio L. Abs. 118, 123 (Ct. App. 1934).