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# Ohio Pleading Practice--The Motion to Strike and the Motion to Make Definite and Certain

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## Erratum

Page 536, Appendix II, line 24. For "eighty-five thousand dollars ($85,000.00)" read "seven thousand dollars ($7,000.00)."

# Ohio Pleading Practice—The Motion to Strike and the Motion to Make Definite and Certain

*Samuel Sonenfield and Joseph Kalk*

## INTRODUCTION

TO THE ATTORNEY for the plaintiff, the granting of a motion by the defendant to strike or a motion to make definite and certain, is a most vexing problem. It involves the redrafting of a pleading on which he has already spent considerable time. It means he must expend additional time to "clean-up" a petition — time which might easily have been conserved had he drafted his original pleading in conformity with Ohio pleading practices. Because of the contingent fee arrangement which prevails in much legal work today, this involves time and money for which he will realize no additional compensation; additional time *to save* his fee. It is from such a "practical" viewpoint that plaintiffs' attorneys ought to pay heed, to some extent at least, to pleading rules.

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To defendants' attorneys, because of the widespread practice in this state of sending the pleadings into the jury room, the filing of such motions is often an indispensable strategic measure, intended to protect their clients' rights from being prejudiced by inflammatory, argumentative pleadings which would give the plaintiff an opportunity to continue to "argue" his case in the jury room.

These "practical" considerations, however great, are not, in the final anaylsis, the bases for granting such motions. The real reason can be found in an examination of the purposes of pleading.

Pleadings have moved a long way from the declarations at common law, yet, a basic thread of similarity obtains — *i.e.,* notice. A fundamental purpose of any pleading is to put the adverse party on notice of the claims, defenses, issues and matters which he must be prepared to

meet, should the case reach the trial stage. It therefore follows that pleadings are to contain such allegations, and only such allegations, as are necessary to put the adverse party on notice. To plead less may be to fail to state a cause of action or a defense; to plead more is to exceed the permitted scope of the pleadings; to plead them ambiguously is utterly to fail to satisfy the requisites of notice. The first of these failures is attacked by demurrer; the second by a motion to strike; the last, by a motion to make definite and certain. The code demurrer is not within the scope of this paper.

## MOTION TO STRIKE

The motion to strike is the proper tool for deleting objectionable matter from a pleading — matter which is objectionable because it is inflammatory, repetitious or obscene, or because it fails to allege *facts,* but rather, sets forth conclusions of law or evidentiary matter. The recognition of such a motion in the code states, is tacit approval of a party's absolute right to make his adversary conform, at some point, to the rules of pleading. In other words, the motion to strike reaches the pleading which contains more than is permitted to satsify the purposes of pleading.

## MOTION TO MAKE DEFINITE AND CERTAIN

The motion to make definite and certain does not reach the "surplusage" in a pleading, but rather seeks to *add* allegations of fact to a pleading, sufficient as against a demurrer, but too vague or incomplete fully to apprise the adverse party of the claims made.

These procedures by no means create a dichotomy. It is seldom the task of the pleader to determine whether one motion *or* the other will lie in a given situation, but rather, which of the motions will better serve his purposes in the case at hand. It is not infrequent that *both* motions will lie to correct the same error in pleading. In such a case, the motion to strike would seem preferable, for this *removes* objectionable matter, and if in so doing the pleading is left inadequate, the pleader must supplant it with sufficient, properly pleaded matter again to state a cause of action. On the other hand, objectionable matter may be made definite and certain, and still remain objectionable.

This is not the only danger. Once having sought the assistance of the court to compel the adverse party to expand his pleading, one may not then be in a position to complain that the matter he sought to have more fully stated was objectionable in the first instance.

With this introduction, we proceed to our discussion of the purposes and applications of the motions to strike and motions to make definite and certain. There is one *caveat*: pleading problems seldom reach the

higher courts in this state, from the natural reluctance of a party to rely on his pleading and forego an argument on the merits. The cases on which one must generally rely for authority are *nisi prius* cases, sprinkled occasionally with decisions in the courts of appeals. It must also be borne in mind that since these issues seldom face the appellate courts, much of what is found in their opinion is *obiter dictum,* but it is nonetheless some guide, albeit uncertain, to what these courts may do if faced with the problem in the future.

## THE MOTION TO STRIKE

### *Conclusions of Law*

Perhaps the most common pleading issue to face the courts, and the one which appears to have reached the appellate levels most frequently, is the determination whether given allegations are conclusions of law, which are not properly pleaded,[1] or whether they constitute ultimate facts, and as such are properly pleaded. In the personal injury petition, perhaps the most flagrant violation of the rule prohibiting the pleading of legal conclusions is the unchecked use of the terms "negligent,"[2] "careless,"[3] "unlawful,"[4] or "reckless."[5] It has been argued that when these terms are followed by allegations of operative facts, they are not conclusions of law, but rather, they constitute "mixed" conclusions of law *and* fact. As such, it is argued, they are not subject to a motion to strike.[6]

It was this problem which faced the court in *Mays v. Morgan.*[7] The court held that *as against a demurrer,* such allegations standing alone are sufficient, but as against a motion to strike these terms cannot be retained by merely adding other allegations of fact. The court gave short shrift to the "mixed conclusion" argument of the plaintiff, and granted a motion to strike. In effect, the court held that these terms, however used, are conclusions of law, and are incapable of conversion into factual conclusions. If the words which follow sufficiently state the claim, then the terms are unnecessary; if the words which follow are not sufficient to

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1. Winzeler v. Knox, 109 Ohio St. 503, 143 N.E. 24 (1924); Heim v. Deshler-Wallick Hotel Co., 41 N.E.2d 580, 581 (Ohio Ct. App. 1941).

2. Lake Erie & W. Ry. Co. v. Mackey, 53 Ohio St. 370, 41 N.E. 980 (1895); Mays v. Morgan, 145 N.E.2d 159 (Ohio C.P. 1957); Sieber v. Brown, 7 Ohio Supp. (N.E. Reporter) 113 (C.P. 1941).

3. Mays v. Morgan, 145 N.E.2d 159 (Ohio C.P. 1957).

4. Gibbons v. B. & O. R.R., 92 Ohio App. 87, 109 N.E.2d 511 (1952).

5. See Harris v. Webb, 22 Ohio N.P. (n.s.) 359, 31 Ohio Dec. 387 (C.P. 1919).

6. 41 AM. JUR. *Pleading* § 17 (1942).

7. 145 N.E.2d 159 (Ohio C.P. 1957).

state the claim, then the plaintiff would be relying for a statement of his cause of action on legal conclusions.

Other examples of phraseology commonly employed in personal injury petitions which have been held objectionable as constituting legal conclusions are "exercise of ordinary care to avoid the accident,"[8] "created a nuisance,"[9] "constituted a dangerous condition,"[10] "high, excessive rate of speed,"[11] "without due and proper control,"[12] "without due regard for the safety of the person and property of plaintiff,"[13] "guilty of negligence"[14] or the allegation that the particular suit is brought under an act of Congress.[15] It is quite evident that each of the foregoing is objectionable for a common reason — each fails to set forth "facts," but states the pleader's conclusion drawn from some unpleaded fact. It is equally apparent that to supplement such allegations by the addition of operative facts will *not* cure the defect, for the pleading will still contain averments of conclusions which are in the exclusive province of the trier of facts to deduce. Such conclusions, even though supplemented, ought to be stricken.

The test in such cases ought not to be a search of appellate authority governing the specific allegation under scrutiny, but rather, it ought to be a determination of whether the allegation in the particular pleading recites an evaluation drawn from other facts. If this is the case, the "other facts" are the *only* proper allegations. This test was applied to a petition containing the term "unlawful." The court reasoned that in its context, this word could be equated with "negligent," and, as such, stated a conclusion which could properly be deduced from the operative facts. A motion to strike was granted, and the plaintiff was instructed to plead those operative facts from which he drew his conclusion, but not the conclusion itself.[16]

From an intelligent application of the foregoing test, it would appear that not only "negligent," "careless," "unlawful," and "reckless" should be stricken, but also "improper," "unreasonable," "dangerous," "due care,"

8. Noseda v. Delmul, 123 Ohio St. 647, 176 N.E. 571 (1931).

9. Miller v. City of Dayton, 70 Ohio App. 173, 41 N.E.2d 728 (1941).

10. *Ibid.*

11. Harris v. Webb, 22 Ohio N.P. (n.s.) 359, 31 Ohio Dec. 387 (C.P. 1919).

12. *Ibid.*

13. *Ibid.*

14. Hardware Mutual Insurance Co. v. McGinnis, 119 N.E.2d 698 (Ohio C.P. 1954).

15. Hadfield-Penfield Steel Co. v. Sheller, 108 Ohio St. 106, 141 N.E. 89 (1923). Quaere: Is the allegation commonly found in the wrongful death action that the case "is brought under the statute in such cases provided" proper?

16. Gibbons v. B. & O. R.R., 92 Ohio App. 87, 109 N.E.2d 511 (1952).

and the whole myriad of cliches commonly employed in petitions to characterize a defendant's conduct ought likewise to be stricken. In each case, the term which is not approved represents an evaluation drawn from facts, pleaded or unpleaded, which the jury is capable of making or not making under proper instructions from the court. The persuasiveness, convenience or ease of pleading in this manner ought not to be used to justify such practices; *a fortiori,* neither should their use by the form books be of any significance.

From the decided cases, it is often difficult to determine whether the remedy available in such cases is a motion to strike, a motion to make definite and certain, or both.[17] In any event, where an obvious conclusion of law is attacked, a motion to strike is available as a remedy. Where the other motion is likewise available, the former would seem to be more desirable, for the latter seeks the operative facts *in addition* to the conclusion, while the motion to strike seeks to obviate the conclusion altogether, and it would seem incumbent on the pleader to supplant it with the operative facts in order to state a cause of action.

### *Specifications of Negligence*

Perhaps the most difficult pleading question to plague the courts in recent years has been the propriety of "specifications of negligence." It has become common practice for the statement of facts in a petition filed in a case arising out of an automobile accident to be followed by:

> Defendant was negligent in the following respects and particulars:
> 1. In that he failed to keep his car under control.
> 2. In that he failed to keep a proper lookout for other persons lawfully using the road, especially the plaintiff.
> 3. In that he failed to bring his car to a stop within the assured clear distance ahead.
> 4. Etc., etc., etc.

Usually, the itemized statements repeat the language of a statute, but this is not a necessary element to constitute a "specification." So common is this practice that it has been adopted by some of the form books. But the mere fact that the profession indulges in such practices ought not add propriety to poor pleading. In *Brown v. Pollard,* Judge Bell takes the position that:

> Such specifications can be intended for but one of two reasons: either they are designed to influence, perhaps prejudice, the jury; or they are intended to inform the court of what he is expected to charge. If for the

17. See Dudakunst v. McDonald, 13 Ohio Supp. (N.E. Reporter) 25 (C.P. 1943); Russell v. Lake Shore & M.S. R.R., 6 Ohio N.P. (n.s.) 353, 17 Ohio Dec. 435 (C.P. 1907). See Notes 33 and 34 *infra.*

> former reason, they are improper; if for the latter, they are in most cases unnecessary.[18]

It will be admitted that Judge Bell is a pioneer in this field, but he does not hold the fort alone. The view has been taken by others that:

> The proper place for counsel to argue [the specifications of negligence] is to the Jury, not in his petition.[19]

The authors admit that the view stated above is not universally accepted in this state. Some courts of common pleas have decided to await a ruling from the Supreme Court, or at least from their respective courts of appeals,[20] before they will accept such a rule. The problem is that few, if any, pleading questions ever reach the appellate level, for in order for a defendant to appeal such rulings at the time they are made by the trial court, he may have to forego his defenses on the merits. Since the *real* defendant in the usual case is an insurance company, this is not likely to happen, for although it may have a casual interest in pleading problems, it does not extend *that* far. It is therefore apparent that usually all that we can expect from the higher courts is dicta.

Recently, in *Dansby v. Dansby*,[21] the Supreme Court pointed out:

> We do not ascribe propriety to the practice merely because of its indulgence by the practitioners.[22]

It will be admitted that the foregoing reference to specifications of negligence is *obiter dictum*,[23] which is perhaps the strongest thing we can expect, but it nevertheless indicates the feeling of at least *one* member of that bench, if not all who concurred, on this controversial pleading problem.

In the usual case, the specifications are no more than a reiteration of the facts stated earlier in the petition, and where this is the case, they should be stricken as repetitious.[24] A plaintiff has a *duty* to state a cause of action, but he only has the *right* to state it *once*.

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18. 112 N.E.2d 692 (Ohio C.P. 1953); *accord*, Mecum v. Beshore, 119 N.E.2d 682 (Ohio C.P. 1954); Hardware Mutual Insurance Co. v. McGinnis, 119 N.E.2d 698 (Ohio C.P. 1954).

19. Uccello v. Interstate Truck Service, Inc., 126 N.E.2d 77, 80 (Ohio C.P. 1954).

20. *E.g.*, this apparently is the present position of the Court of Common Pleas of Cuyahoga County.

21. 165 Ohio St. 112, 133 N.E.2d 358 (1956).

22. *Id.* at 113, 133 N.E.2d at 359.

23. The case dealt with a divorce petition, which alleged as grounds for divorce the naked language of the statute. The only issue actually before the court for its determination was the sufficiency of such allegations as against a motion to make definite and certain.

24. McCune v. Industrial Nucleonics Corp., 109 N.E.2d 679 (Ohio Ct. App. 1951).

Quite frequently, the specifications are couched in the naked terms of a statute, and where this is the case, they fail to allege *facts,* but rather, allege conclusions, and should be stricken on this ground.[25]

Most frequently, the specifications are so phrased as to persuade the jury. Where this is the case, they are clearly improper and should be stricken as argumentative allegations.[26]

It must be noted that the *form* of the pleading is not the determinative fact. The mere numbering of averments is not *per se* defective pleading. The specifications to which exception is taken in this article are those wherein the foregoing defects of redundancy, conclusory, or argumentative nature inhere.

It is the opinion of the authors that the "specifications of negligence" is a mongrel pleading practice,[27] and ought not to be condoned. There is ample authority for any court to follow in striking such allegations.

### *Pleading In the Words of a Statute*

Closely related to the problem concerning the "specifications of negligence" discussed in the foregoing section, is the problem of the pleading which adopts the language of a statute. This is the usual form adopted by the draftsman in alleging these so-called "specifications."

It is generally held that this form of pleading is bad, but the exact remedy for this defect appears somewhat uncertain.[28] In some instances, motions to make definite and certain have been granted, whereby additional facts are elicited to show the underlying conduct which allegedly coincides with the words of the statute. In *Dansby v. Dansby,*[29] the court said:

> Such an abbreviated and unartistic pleading as the mere statement of statutory grounds does not so advise him [the adverse party] and constitutes an open invitation to him . . . to make definite and certain.[30]

But where a petition contained an averment that the defendant operated his car ". . . at greater speed than was possible to permit him to bring his care to a stop within the assured clear distance ahead,"[31] the court

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25. Dansby v. Dansby, 165 Ohio St. 112, 133 N.E.2d 358 (1956).

26. *See* McCune v. Industrial Nucleonics Corp., 109 N.E.2d 679 (Ohio Ct. App. 1951).

27. Oliver v. Chesapeake and Ohio Ry., 132 N.E.2d 646 (Ohio C.P. 1955).

28. Dansby v. Dansby, 165 Ohio St. 112, 133 N.E.2d 358 (1956); Goldsberry v. Lefevre, 24 Ohio L. Abs. 146 (Ct. App. 1937).

29. 165 Ohio St. 112, 133 N.E.2d 358 (1956).

30. *Id.* at 114, 133 N.E.2d at 359.

31. Goldsberry v. Lefevre, 24 Ohio L. Abs. 146 (Ct. App. 1937).

concluded that this was a mere statement of statutory grounds in the exact words of the statute, and held that:

> In this situation the trial court properly *struck* that portion of the petition which was but a copy of the statute. [Emphasis ours].[32]

A similar pleading was involved in *Dudakunst v. McDonald.*[33] Also ruling on a motion to *strike,* the court held that the motion ought to be *treated* as a motion to make definite and certain, and granted *this* relief. In effect, the court overruled the defendant's motion to strike, and *sua sponte* required the plaintiff to make his petition definite and certain.[34]

It would seem to follow that all that a defendant need do is *point out* the statutory language employed, and the court will determine whether it shall be stricken or made definite and certain, and this, without regard to what relief the defendant has asked.

No doubt there are times when the statutory language is the best suited, or perhaps the clearest and most concise manner of stating what the pleader would like to say. Where this is true, it should not be an excuse for pleading no additional facts. Here, not only is the pleading objectionable in that it fails to apprise the adverse party of those matters on which he may be expected to defend, but it is equally defective in that it is no more than a legal conclusion.[35]

The remedy in these instances ought to fit the fault to which it is directed. Not only should the court require such allegations to be made definite and certain, but it ought to go further and *strike* the naked statutory language relied upon to state a cause of action. In this way, notice to the adverse party will be effected, and in so doing, the statutory language will have become mere surplusage, and will already have been stricken.

### *Redundancy, Surplusage and Verbosity*

A most vexing problem which often appears in pleading is that of redundancy. The Code provides that a petition shall set forth facts constituting a cause of action in concise language.[36] This would seem to be intended to limit excess verbosity, in an effort to speed up the judicial process, and to lessen the load of the courts in reading the same facts stated in several different ways in the same pleading.

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32. *Id.* at 151.

33. 13 Ohio Supp. (N.E. Reporter) 25 (C.P. 1943).

34. *Ibid.*

35. *Ibid.*

36. OHIO REV. CODE § 2309.33, provides in part: "If redundant, irrelevant, or scurrilous matter is inserted in a pleading, it may be stricken out on motion of the party prejudiced thereby."

Obviously, the plaintiff is bound by pleading rules to set forth sufficient facts to state a cause of action. He has, however, no duty nor any right to set forth those facts more than once, in an effort to attach undue prominence to such facts. It would seem that the Code provision is ample authority to strike such redundant language. In applying this rule, the courts ought not to look for mere differences in the language used, but rather, ought to examine the allegations attacked in an effort to determine whether they add something *new* to the petition, or whether it is merely a case of different words importing the identical factual setting.

The problem often comes up in the case of "specifications of negligence," discussed earlier.[37] In these instances, a complete factual description is followed by an itemized list of the "alleged" acts of negligence. All that is being done in such a case is to repeat facts already pleaded. By such reiteration, aided by the numbering of such specifications, which is also a common practice, the pleader apparently hopes unduly to impress the reader of the petition with the importance he has attached to these facts. Such repetitious pleading ought to be condensed on motion to strike.

Since the Code unequivocally calls for a concise statement of the cause of action, some courts have taken the view that this calls for clarity as well. In one case, a technically described situation was scrutinized. It was held that good practice would require a plaintiff to make his petition definite and certain by concisely stating *these facts in non-technical terms.*[38] While brevity may be a virtue, a pleading ought not to be drafted in such a fashion that it can only be understood by an expert in the field, and a court ought to correct such a defect, not by granting a motion to strike, but by an order to make definite and certain.

Once having pleaded those facts which constitute his cause of action, the plaintiff ought to conclude that part of his pleading. To go further would be to plead argumentative or evidentiary matter, which will be discussed in the next section. But there are cases in which the additional allegations are neither argumentative nor evidentiary, but purely surplusage. It would seem that such allegations are irrelevant, and could be stricken on that ground.[39] Just as irrelevant matter is not permitted in

37. See notes 17-29, *supra.*

38. Vogt v. Industrial Comm'n of Ohio, 66 Ohio App. 216, 31 N.E.2d 93 (1940), *rev'd on other grounds* 138 Ohio St. 233, 34 N.E.2d 197 (1941). The language in question in this case was "chronic fibrous myocarditis" and "coronary occlusion," which, the court said, "are in technical language, which could be amplified in the interest of clarity." 66 Ohio App. 216, 220, 31 N.E.2d 93, 96 (1940).

39. Sours v. Sours, 73 N.E.2d 226 (Ohio C.P. 1946), ["no driver's license"]; Bollenbacher v. Society for Savings, 62 N.E.2d 530 (Ohio Ct. App. 1945), [superfluous, immaterial matter]; Rider v. Gellenbeck, 7 Ohio Supp. (N.E. Reporter) 126 (C.P. 1941), ["sentimental value," "personal pleasure and gratification"].

evidence, so also it ought not to clutter up the issues in the pleading stage, and should be ferreted out by a motion to strike.

*Argumentative and Evidentiary Matter*

Frequently a pleader attempts to win his case in the pleading stage by inserting into his petition or answer all matter which he hopes to prove at the trial. Where this is the case, much in the way of evidence will creep into the pleading. This typically involves the allegation of more than the "operative facts," and could be classified as the statement of "supporting facts." For example, a petition may include allegations that the defendant was seen by several witnesses, prior to the accident driving in a reckless manner. This is used only for illustrative purposes, but it exemplifies the pleading of evidentiary matter.[40]

Two objections to such pleading practices seem to be apparent: (1) these matters ought not to burden the pleading stage, for their proper place is at the trial stage, and (2) such practice, if approved, would require the application of the rules of evidence to the pleadings.

Such pleading would, in fact, cause the greater part of the issues on the merits to be argued in the pleadings.

An equally sufficient reason for not allowing such matter to remain in a pleading stems from the practice of many courts of sending the pleadings into the jury room. As the jurors are not generally permitted to take notes of the trial, a pleading which presents evidentiary matter would do this for them, thereby circumventing the court's policies.

Equally defective is the pleading which contains argumentative matter.[41] This type of pleading is distinguished from evidentiary pleading in that here the pleader is attempting to persuade the reader to accept his views in preference to the views of his adversary, while in an evidentiary pleading he attempts to prove the truth of his allegations. In actual practice, it is difficult, [if not impossible,] to distinguish the two, but the same objections are applicable to both defects, thereby making the technical difference meaningless.

The real problem in such cases is the determnation whether a given allegation is defective in this area. There are conflicting decisions in Ohio on the same allegations, and apparently, *stare decisis* is of little help to the pleader who attempts to avoid the pitfalls in this area.

Perhaps the most that can be offered in this area is an attempt to

40. The rule prohibiting the pleading of evidentiary matters is clearly set forth in McCune v. Industrial Nucleonics Corp., 109 N.E.2d 679 (Ohio Ct. App. 1951); in Davis v. American Rolling Mills Co., 54 Ohio App. 298, 7 N.E.2d 238 (1936), such pleadings are vigorously denounced.

41. See notes 39-40, *supra.*

formulate certain rules of thumb, not intended to be foolproof, which may serve as an aid to the practitioner.

If, in the examination of a pleading, certain statements are questioned as being argumentative or evidentiary, the first step would certainly be to determine whether a cause of action is stated *without* the questioned allegation. If so, it is probable that the statement falls into this classification.

If a petition attempts to persuade the reader of the justice of one party's cause, or attempts to illustrate the nature and extent of damages so as to *prove* rather than merely to *state* them, or if in an answer, after stating the defense, the pleader goes further and denies his adversary's claim by offering matter to prove his defense, such matters clearly ought to be stricken, if not because they are argumentative or evidentiary, then at least for the reason that they are surplusage.

> To illustrate, suppose a petition contains the allegation that "plaintiff suffered great pain as a result of his injuries, which is evidenced by the fact that he was heard screaming violently immediately after the accident and until sedation was administered by a physician." Here the plaintiff has gone too far in attempting to plead proof of his injuries, and the allegation after the word "injuries" is subject to a motion to strike.

In short, the test is the determination of the necessity of such "supporting facts" for the statement of a sufficient cause of action or defense. If unnecessary, they are vulnerable to attack on a motion to strike.

## The Motion to Make Definite and Certain

### *Conclusions of Law*

Much of what has been said with reference to the applicability of a motion to strike a conclusion of law is equally applicable to the motion to make definite and certain.[42]

Perhaps the most useful purpose of the motion to make definite and certain as applied to conclusions of law occurs in the situation wherein the conclusion of law is sufficient to insulate the pleading from attack on demurrer, but where the "operative" facts, if elicited, would be unable to stand up under such an attack. In such a case, the motion to make definite and certain would be a necessary step preceding a demurrer, and would "prepare" the pleading for such attack.[43] This would obviate the difficulty of the well-established rule that a "demurrer cannot speak," by causing the pleader himself to furnish those facts which will cause his pleading to be found insufficient at law.

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42. See notes 1-16, *supra.*

43. See Dansby v. Dansby, 165 Ohio St. 112, 133 N.E.2d 358 (1956).

Aside from this aspect of the problem, it is suggested that in the usual case, the motion to strike is by far the better remedy for attacking a conclusion of law.

*Ambiguous Pleadings*

Clearly the most widely employed use of the motion to make definite and certain is to achieve the removal of ambiguity from a pleading. Here it may be used to elicit more detail about "operative" facts, such as speed, direction, traffic signals, or any of a myriad of facts pertaining to the cause of action or defense.[44] It must be noted, however, that in this situation the motion to make definite and certain serves the defendant more successfully than a plaintiff, due to the prevalence of general denials, which obviously, will not be made definite and certain.

But this device ought not to be thought of as a panacea. It must be used with caution. By its very nature, the motion to make definite and certain may serve to educate the adverse party by pointing out to him his pleading defects which may lead him on trial to adduce facts he did not realize he must prove by allowing him to plead additional facts which will lay the foundation for the introduction of evidence on these points at the trial, while had no such motion been filed, the pleading might not have been sufficient to admit some of this evidence.

On the other hand, as in the *Dansby* case, the pleading may be ambiguous because it is a statement, in the bare statutory terms, of a cause of action or defense. Upon clarification pursuant to the granting of a motion to make definite and certain, it may develop that no cause of action in fact exists. If this is followed by a demurrer, the motion to make definite and certain has been a most useful tool. This applicability of the motion to make definite and certain is of great value in a contract case, where, by virtue of the Statute of Frauds, a memorandum is required. If the petition is silent in this respect, it is sufficient on attack by demurrer.[45] Here, on a motion to make definite and certain, the plantiff will be required to state whether the contract is oral or written, and if oral, whether there is a memorandum of the agreement. If there is no writing pleaded in the amended petition, a demurrer should *then* be filed.

44. It must be remembered, however, that only such matters as are deemed material may be elicited on a motion to make definite and certain. In Breeckner v. Coakley, 133 N.E.2d 200 (Ohio C.P. 1954), the court refused to grant a motion seeking to determine which of two collisions, allegedly caused by concurrent tortfeasors, occurred first in point of time, since such time factor is immaterial to liability. In Spencer v. Miller, 84 Ohio App. 190, 82 N.E.2d 763 (1948), the court refused to grant a motion seeking to determine the value of the automobile immediately before and after the accident, on the grounds that to grant this motion would be to compel the pleader to plead evidence.

45. *On its face* it states a cause of action.

But this situation has its drawbacks as well. The plaintiff may have overlooked the necessity of a memorandum, and may be unable to produce it at the trial which may be as much as three years after the pleading stage. By filing such a motion, his adversary has put him on notice of his needs and he may at this early stage be able to procure a memorandum.

One last *caveat* must be mentioned. As stated earlier, after once having elicited added matter on a motion to make definite and certain, one may not be in a position to complain if such matter is damaging to his case.

> To illustrate, suppose that the petition contains the allegation that "plaintiff suffered much pain as a result of his injuries." If the defendant files a motion to make definite and certain seeking the nature and extent of the injuries, he may not be in a position to complain if the plaintiff then alleges "plaintiff's arm was pinned under the car causing much pain, so great that plaintiff was heard screaming violently until sedation was administered by a physician." Had this been in the *original* pleading, it probably would have been stricken on a motion by the defendant.

It is apparent that in this area, the motion to make definite and certain, while a most useful tool, is lined with pitfalls for the unwary. Its use should be tempered with a good measure of caution.

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## APPENDIX I

### A MODEL PERSONAL INJURY PETITION

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| STATE OF OHIO<br>COUNTY OF CUYAHOGA | IN THE COURT OF COMMON PLEAS |
| John Doe,<br>123 First Avenue<br>Cleveland, Ohio,<br>Plaintiff,<br>-v-<br>Richard Roe,<br>567 Second Avenue<br>Cleveland, Ohio,<br>Defendant. | No. 805,567<br><br>PETITION FOR MONEY ONLY |

John Doe, plaintiff, says that First Avenue is a duly dedicated public highway, running in a general northerly-southerly direction, in the City of Cleveland, County of Cuyahoga, State of Ohio, and that Second Avenue is likewise a duly dedicated public highway running in a general easterly-westerly direction, in said city; that said highways intersect at approximately right angles at a point within the city limits of the City of Cleveland, and that a traffic signal, commonly called a stop sign, exists at said intersection, directing the east-west traffic to stop before entering said intersection.

On or about January 1, 1959, at about 2 o'clock in the afternoon, plaintiff was travelling in a northerly direction along First Avenue, at a rate of speed approximating 20 miles per hour, and as he entered said intersection, defendant Richard Roe, travelling in a westerly direction on Second Avenue, at a rate of speed approximating 60 miles per hour, failed to bring his vehicle to a stop before entering said inter-

section, and failed to give warning of this to plaintiff, and failed to decrease the speed of his vehicle or alter its course. As a result of defendant's failure to do any of the above acts, defendant's vehicle collided with plaintiff's vehicle, causing plaintiff to be thrown about in his vehicle, to his injury, and causing damage to plaintiff's vehicle and to plaintiff's person, all of which will be more specifically pointed out below.

As a result of being so thrown about in his vehicle, plaintiff suffered numerous cuts, bruises and contusions of the face, arms and legs, a compound fracture of the right forearm and left ankle, cervical and lumbar whiplash, and a fracture of the skull.

As a result of these injuries, plaintiff was required to expend funds in the amount of two thousand eight hundred and seventy-five and 98/100 dollars ($2,875.98) for medical services, and was unable to perform his regular duties as a tool and die maker for a period of six months following said collision, and is presently unable to work a full, regular working week, although there is demand for his services.

Plaintiff is suffering, and from what is presently determinable, will continue to suffer from chronic headaches, a pain in the right forearm and left ankle, and is permanently scarred about the face, arms and legs.

Also as a result of said collision, plaintiff's automobile, which had a market value of two thousand dollars ($2,000.00) before said collision, was totally demolished, having only a scrap value of fifty dollars ($50.00) thereafter.

Plaintiff says that as a result of all the foregoing he has been damaged in the sum of eighty-five thousand dollars ($85,000.00).

WHEREFORE plaintiff prays judgment against the defendant herein in the amount of eighty-five thousand ($85,000.00) dollars, and his costs in this action.

## APPENDIX II

## A MODEL CONTRACT PETITION

(For the sake of brevity, headings have been omitted in the following pleading.)

John Doe, plaintiff, says that on or about January 2, 1957, in the City of Cleveland, County of Cuyahoga, State of Ohio, he and defendant, Richard Roe, entered into an agreement, in writing, wherein plaintiff promised to pay to defendant the sum of five thousand ($5,000.00) dollars on the fifteenth day of January 1957, and defendant promised to convey on that date certain real estate, more specifically described below, to plaintiff herein by a general warranty deed.

Plaintiff further says that on or about January 15, 1957, he tendered to defendant the sum of five thousand ($5,000.00) dollars and demanded that defendant execute said general warranty deed; that defendant refused, and continues to refuse to accept such tendered money, and refused and continues to refuse to execute said general warranty deed to plaintiff or in any other way convey the property herein involved to the plaintiff.

Plaintiff further says that, to the best of his knowledge, defendant is the sole and undisputed owner of the real estate in question, to wit:

[Enter legal description of real estate]

Plaintiff further says that on or about January 15, 1957, said real estate had a current market value of five thousand ($5,000.00) dollars, and that at or about the time when this action was commenced the value of said real estate, measured by the current market price, was twelve thousand ($12,000.00) dollars, and that as a result of the failure of defendant to fulfill the promises set forth above, plaintiff has been damaged in the amount of seven thousand ($7,000.00) dollars.

WHEREFORE, plaintiff prays judgment against the defendant herein in the amount of eighty-five thousand dollars ($85,000.00), and his costs in this action.