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The Burden of Pleading Contributory Negligence in Kentucky

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NOTES AND COMMENTS

THE BURDEN OF PLEADING CONTRIBUTORY NEGLIGENCE IN KENTUCKY

I.

THE BURDEN AND PROVING CONTRIBUTORY NEGLIGENCE

Who must bear the burden of pleading contributory negligence in Kentucky today? If the burden is on the defendant, can he plead contributory negligence in his answer along with a general denial of negligence? Must contributory negligence even be pleaded in order for a defendant to avail himself of it? To some legal scholars and practicing attorneys these problems may seem too well settled to admit of any controversy, but an examination of the cases along these lines may suggest otherwise. Others may say that under our modern rules of pleading which so freely permit amendment in case of error, this problem merits no detailed consideration. However, most if not all courts even today prohibit the amendment of pleadings beyond a certain stage of a trial. Even so, prior knowledge of the correct procedure would doubtless save much time and avoid embarrassment.

Perhaps, at this point, it should be stated that insofar as is practicable or possible, the two problems (1) the burden of *pleading* contributory negligence, and (2) the burden of *proof* of contributory negligence will be treated separately in this note. While it is true that the burden of pleading contributory negligence usually carries concomitantly the burden of proving facts to substantiate that plea, this is not the status of the law in every case.¹ Further, it might be noted that although these two problems appear so closely related as to seemingly defy intelligent separation, they relate to different stages of a proceeding. It is felt that much confusion has resulted from the failure to separate and distinguish between these two problems. Hence, an attempt will first be made to analyze the problem of who must plead contributory negligence, and then the question of who must prove contributory negligence will follow.

Judge Clark² states that there are at least three rules as to the pleading of contributory negligence now followed in the various jurisdictions:

“ first, the plaintiff has the burden of showing [proving] such freedom from contributory negligence, but no express allegation is necessary in the complaint, since the charge that the action [sic] was caused by the defendant's negligence in effect contains the other allegation; *second*, the plaintiff has both the burden of alleging and of proving freedom from contributory negligence; *third*, contributory negligence is a defense, to be alleged and proved by the defendant.” (Italics writer's).³

Under the first rule quoted, the burden of pleading freedom from contributory negligence rests on the plaintiff. The plaintiff discharges this burden by pleading

¹ 9 WIGMORE, EVIDENCE sec. 2507 (3d ed. 1940).

CLARK ON CODE PLEADING sec. 47, p. 304 (1947).

³ *Ibid.*

that his injury was due to the defendant's negligence. From a plea that the injury was due to the defendant's negligence is implied the idea that the plaintiff's negligence did not cause or contribute to his own injury; hence, the plaintiff pleads by implication that he was free of contributory negligence.⁴ Under the second rule the plaintiff must expressly plead freedom from contributory negligence. As stated, under the third rule, the defendant must expressly plead contributory negligence on the part of the plaintiff.

Judge Clark⁵ states that Kentucky follows the third rule which says that contributory negligence is a defense to be alleged and proved by the defendant. Also, it might be noted that Clark considers this rule to be generally less harsh than either of the other two rules.⁶

In a few clearly defined situations, statutes in Kentucky govern the pleading of contributory negligence. These statutes offer strong evidence that the burden of pleading contributory negligence is on the defendant in this state. However, most of the expressions of the rule governing this subject in Kentucky are to be found in judicial opinions. An examination of the cases will now be made to determine if this writer has placed Kentucky in the proper category.

It seems that the Kentucky Court in 1872 first faced the issue of who must plead contributory negligence, as such,⁸ in the case of *Louisville and Portland Canal Co. v. Murphy, Adm.r.*⁹ There, the plaintiff, as administrator of deceased, brought an action alleging that defendant's negligence caused the death of his child. Defendant filed a general demurrer to the petition alleging that the petition did not state a cause of action as it failed to allege freedom from contributory negligence on the part of the deceased child. The Court answered the defendant's allegation as follows:¹⁰

"The petition is not defective for the reason insisted upon by appellant's counsel, in failing to allege that there was no negligence on the part of appellee's intestate contributing to the injury complained of. The latter [plaintiff] was not compelled to anticipate the defense in the case, and for the purposes of pleading it is enough for each party to make out his case, and matter which should come more properly from the other side need not be stated."¹¹

⁴ *Ibid.*

⁵ *Id.* at p. 304, n. 72.

⁶ *Id.* at p. 305.

⁷ KY. REV. STAT. sec. 277.320 (1948). In a suit by an employee or his representative against a railroad this statute in effect denies a defendant railroad the right to plead contributory negligence if the violation by the railroad of a safety statute caused the injury or death complained of. KY. REV. STAT. sec. 342.410 (1948) known as the Workmen's Compensation Act states that if an employer is affected by the act and he fails to elect to operate under it, then he cannot avail himself of the defense of contributory negligence in an action by an employee for injuries arising out of the course of his employment. KY. REV. STAT. sec. 342.415 (1948) also a part of the Workmen's Compensation Act, provides that an employee who is affected by the act but who fails to select to operate under it, is subject to the defense of contributory negligence and other common law defenses in an action against his employer for injuries incurred in the course of his employment.

⁸ It should be noted that prior to this time, the action of negligence was called an action of trespass on the case. Therefore, the defense of contributory negligence was never faced.

⁹ 72 Ky. (IX Bush) 522 (1872).

¹⁰ *Id.* at 529.

¹¹ *Ibid.* The court cited the matter in double quotes as coming from 1 CHITTY, 222.

From this language of the Court at least two deductions are possible without doing violence to the opinion. First, a petition *may* state a good cause of action for negligence without alleging that the plaintiff, himself, was free of contributory negligence. Second, contributory negligence is a matter of defense which should more properly be pleaded by the defendant.

In another action for negligence, a few years later,¹² the Court adopted the rule set forth above as it refused to require the plaintiff to allege freedom from contributory negligence in order to state a good cause of action. In 1880, the Court again reaffirmed the view previously expressed.¹³

Some abstruse language in *Bogenschutz v. Smith*¹⁴ has been cited as holding that the burden is on the plaintiff to allege freedom from contributory negligence. If the case is authority for such a position, it seems to be the first case in Kentucky which places such a burden on the plaintiff. Assuming that such is true, then this view represents a deviation from or an exception to the law as originally adopted.

A few years later the Court in *Lexington and Carter County Mining Co. v. Stephens Admr*,¹⁵ stated that in all cases where a servant seeks to recover from his employer for *injuries* incurred by reason of the employer's negligence, he must allege that he was unaware of the danger, and could not in the exercise of ordinary diligence have known of the danger in time to have prevented it. However, this particular case was an action by the servant's administrator against the employer for negligence which allegedly caused the *death* of the servant. Because this was an action for wrongful death, the court held that it was unnecessary for the plaintiff to plead freedom from contributory negligence. Thus, in an action by a servant or his representative against an employer a distinction was drawn between whether the action was for *injuries* or for *wrongful death*. Although it must be recognized as dictum only,¹⁶ the court emphatically stated that if the action was by a servant against his employer for injuries only, the servant must aver facts¹⁷ which in effect constitute a plea of freedom from contributory negligence.¹⁷ As reasons for such a distinction it was stated that the action for injuries was authorized by common law whereas recovery for wrongful death was gov-

¹² Paducah and Memphis R.R. Co. v. Hoehl, 75 Ky. (XII Bush) 41, 47 (1876). Here the court stated: "it seems to us that it is reversing a well recognized rule of pleading in requiring the plaintiff to *allege* and prove the non-existence of facts that when established would constitute a defense to his own action." (Italics writer's)

¹³ Ky. Central R.R. Co. v. Thomas Admr, 79 Ky. (II Rodman) 160, 164 (1880).

¹⁴ 84 Ky. 330, 340, 1 S.W. 578, 580 (1886). The language referred to is as follows: "It is true, contributory neglect was pleaded as a defense; but it is purely a matter of defense, and cannot supply an allegation essential to the statement of a cause of action. As to the one the burden of proof is on the plaintiff while as to the other it is on defendant. A verdict may cure an ambiguity in pleading, but does not avail if there be an omission to allege a matter which is material to make out a cause of action."

¹⁵ 104 Ky. 502, 507, 47 S.W. 321, 323 (1898).

¹⁶ *Id.* at 508, 47 S.W. at 323. The facts which must be alleged are: "that he was not aware of the danger, and that he could not with ordinary diligence have known of the danger or risk that he was incurring in time to have prevented the injury."

¹⁷ This may be a clear statement of the rule which the court attempted to state in the *Bogenschutz* case, *supra*, note 14. At any rate, counsel for the defendant in this case cite that case as authority for this proposition.

erned by statute which by implication placed the *onus* on the defendant to plead contributory negligence. In an action for *injuries*, this reasoning may be subject to serious doubt, for it is not clear that the common law placed any burden on the plaintiff to plead freedom from contributory negligence. The reasoning behind the statute and the opinion of the court which placed the burden of pleading contributory negligence on the defendant in actions for *death* seems sound and in harmony with Kentucky's rule.¹⁸

As reasoning for this rule in wrongful death actions the court said: "the injured party being dead, it would be impossible to prove that he was not aware of the danger, or that he could not with reasonable diligence have ascertained the danger."¹⁹ And since the burden of proof generally follows the burden of pleading, why make the deceased's representative plead contributory negligence?

Ten years later, the court stated that, "In pleading it is not unusual to charge that, plaintiff, while in the exercise of due care for his own safety, was injured by the defendant's negligence in certain named particulars but such an allegation is not necessary,"²⁰ citing the case of *Louisville and Portland Canal Co. v. Murphy, Adm r*²¹ as authority for this proposition. Therefore, if there was a departure from the original rule in the case hereinbefore discussed, the court has certainly returned to its former position in this case. These cases may be reconciled on the basis that the rule in the *Lexington* case²² which may have placed the burden on the plaintiff in case of injuries resulting from negligence is true only where the relationship of employer and employee exists between the defendant and the plaintiff. Stated more concisely, the rule or exception to the general rule, so far as present development discloses, applies only in that particular fact situation. Whether or not such a distinction is sound will be determined later.

A year later, the court²³ expressed some language which could be construed by inference to affirm the seemingly errant ideas stated in the *Lexington* case.²⁴ Some years later, in *Southern Mining Co. v. Lewis Adm r*,²⁵ which was also an action by the employee's administrator against the employer for negligence which allegedly caused employee's death, the court once again seems to have considered itself as approving the rules in the *Lexington* case.²⁶ It must be admitted that the court did not expressly state or approve the rule that the burden is on the plaintiff to plead freedom from contributory negligence, perhaps because this was also an action for a *death*, thus rendering it superfluous.

From the foregoing material, the question posed at the outset of this note, *i.e.*, upon whom is the burden of pleading contributory negligence in Kentucky,

¹⁸ The rule referred to here is the third rule quoted from Clark. See note 2, *supra*.

¹⁹ *Lexington & Carter County Mining Co., v. Stephens Adm r*, 104 Ky. 502, 508, 47 S. W. 321, 323 (1898).

²⁰ *Bevis v. Vanceburg Telp. Co.*, 132 Ky. 385, 388, 113 S.W. 811, 812 (1908).

²¹ See note 9 *supra*.

²² See note 15 *supra*.

²³ See *Cincinnati, N. O. & T. P. Ry. Co. v. Yocum's Adm r*, 137 Ky. 117, 123, 123 S.W. 247, 249 (1909) where the court said: "Nor does the fact that the action was brought under the statute for the destruction of life change this rule. The only difference is that in such cases the burden is upon the defendant to show the contributory negligence that is relied upon to defeat a recovery."

²⁴ See note 15 *supra*.

²⁵ 167 Ky. 20, 179 S.W. 1067 (1915). Both the *Lexington* case, see note 15, *supra*, and the *Cincinnati* case, see note 23, *supra*, were cited in this case.

²⁶ See note 15 *supra*.

must be answered. Except for one probable inconsistency in the cases which seems to place the burden on the plaintiff to plead what amounts to freedom from contributory negligence,²⁷ the law on this point seems rather clear. The plea of contributory negligence is one in the nature of a plea of confession and avoidance.²⁸ It is not necessary for a plaintiff to plead freedom from contributory negligence in order to set forth a good cause of action for negligence.²⁹ Even if a plaintiff does plead such it is superfluous.³⁰ Contributory negligence is thus a matter of defense which must be pleaded by the defendant in order for him to rely on it as a defense.

Now, what has happened to the dictum in the *Lexington* case³¹ which, in effect, stated that a plaintiff employee must allege freedom from contributory negligence in an action for injuries caused by a defendant employer's negligence? This statement is obviously repugnant to the conclusions reached in the preceding paragraph. It may be of some importance to note that the last case which seems to give any credence to this apparent inconsistency was decided in 1915.³² Also, it should be remembered that this exception was evidently confined to suits between employee and employer.³³ In 1914, the legislature of Kentucky adopted the Workmen's Compensation Act.³⁴ This Act as amended in 1916 in substance provided that if an employer was affected by this law and he failed to elect to operate under it, he (the employer) could not, in an action by the employee or his representative for personal injury or death arising out of the course of his employment, avail himself of the defenses of contributory negligence, assumption of risk, or negligence of fellow servant.³⁵ Further, the Act provided that if the employee was affected by the act and he failed to elect to operate under it, the employer or his representative would, in any suit at law for personal injury or death arising out of the course of his employment, be subject to the defenses of contributory negligence, assumption of risk, and negligence of a fellow servant, as such defenses exist at common law.³⁶ Obviously, these are inducements designed to coerce all who are affected by the act to operate under it. If both employer and employee do elect to operate under the Act, then the act governs any claims or suits arising between them. Therefore, this apparent inconsistency may have vanished with the enactment of the Workmen's Compensation Act. No case reiterating the exception has been found by the writer since the Act was adopted. As noted before it appeared that this exception was confined to suits between employee and employer. It is true that this Act does not attempt to

²⁷ See the dictum in the *Lexington* case, note 15 *supra*.

²⁸ Ky. Central R. R. Co. v. Thomas Adm r, 79 Ky. (II Rodman) 160, 164 (1880), Newport, L. & A. Turnpike Co. v. Pirmann, 26 Ky. L. Rep. 933, 82 S.W. 976 (1904).

²⁹ *Bevis v. Vanceburg Telp. Co.*, 132 Ky. 385, 388, 113 S.W. 811, 812 (1908).

³⁰ *Ibid.*

³¹ See note 15 *supra*.

³² *Southern Mining Co. v. Lewis Adm r*, 167 Ky. 20, 179 S.W. 1067 (1915).

³³ Three cases seem to give support to this idea and they were suits by an employee or his representative against the employer. The three cases referred to are: *Lexington & Carter County Mining Co. v. Stephens Adm r*, 104 Ky. 502, 47 S.W. 321 (1898), *Cincinnati N. O. & T. P. Ry. Co. v. Yocum's Adm r*, 137 Ky. 117, 123 S.W. 247 (1909), and *Southern Mining Co. v. Lewis Adm r*, 167 Ky. 20, 179 S.W. 1067 (1915).

³⁴ Supp. to 1909 Ky. STAT. (Thum 1915), secs. 4880-4954.

³⁵ Ky. STAT. (Carroll 5th ed.) Vol. III (1918 Supp.), sec. 4960,

³⁶ *Id.* at sec. 4961.

affect every employer-employee relationship. Those employers employing less than six persons and certain other enumerated classes were originally excepted from the provisions of this Act.³⁷ In a suit arising between an employee and employer of this type it is not known what rule would govern. If this exception ever actually existed, would it exist today in these cases not covered by the Workmen's Compensation Act? The writer believes that if the question of burden of pleading arose today in a suit between employee and employer which was not covered by the Workmen's Compensation Act, the court should logically and probably would say that the burden was on the defendant to plead contributory negligence. The dictum exception which apparently placed the burden on the plaintiff is inconsistent with the general rule. Furthermore, it is not blessed with reason and if it has not already been discarded, it should be forgotten at the earliest opportunity.

Therefore, in answer to the first question again, the general rule is that the burden lies on the defendant to plead contributory negligence. It is not necessary that the plaintiff plead freedom from contributory negligence to state a good cause of action. Clark and the other writers were correct in their categorization of Kentucky.

A few observations are pertinent to preface the answer to the second question set forth at the beginning of this note. The Kentucky Code prohibits inconsistent pleadings.³⁸ However, alternative pleadings are permitted if a pleader states that either one or the other is true and he knows not which.³⁹ Pleadings or defenses are inconsistent when the truth of one if admitted would necessarily disprove the other.⁴⁰ Is an answer of contributory negligence so inconsistent with a general denial that the truth of either if admitted would necessarily disprove the other? Analytically speaking, they are inconsistent.⁴¹ Contributory negligence presupposes negligence on the part of the defendant. Therefore, a general denial of negligence by the defendant in the same answer is inconsistent with a plea of contributory negligence. However, abundant case authority in Kentucky supports the conclusion that these two pleas are not, from a practical angle, considered inconsistent and may be pleaded in the same answer.⁴² Under this view, a plea of contributory

³⁷ Supp. to 1909 KY. STAT. (Thum 1915), sec. 4893. The act now affects all employers employing three or more persons regularly. See KY. REV. STAT. sec. 342.005 (1948).

³⁸ KY. CODE, CIV. PROC. ANN. sec. 113-4 (1948).

³⁹ *Ibid.*

⁴⁰ *Caruso v. Brown*, 142 Ky. 76, 133 S.W. 948 (1911). In this case the Court stated: "For the purpose of determining whether defenses are inconsistent or not, the law divides them into two classes: First, those which are inconsistent and contradictory in point of fact; second, those which are merely technically inconsistent by implication of law. Where the defenses involve mere logical inconsistencies or inconsistencies by implication of law, they may be pleaded together; but defenses contradictory or repugnant in fact cannot be joined. In other words, a defendant will only be required to elect between defenses where the facts stated in the pleadings are so inconsistent that if the truth of one defense be admitted it would disprove the other."

In the opinion of the writer this is nothing more than a convenient distinction to justify any result the court desires to reach.

⁴¹ CLARK ON CODE PLEADING, sec. 47, p. 307 (1947).

⁴² *Louisville & N. R. Co. v. Marshall's Adm'x*, 289 Ky. 129, 158 S.W. 2d 137 (1942); *Sutherland v. Davis*, 286 Ky. 743, 151 S.W. 2d 1021 (1941); *Peerless Mfg. Corporation v. Davenport*, 281 Ky. 654, 136 S.W. 2d 779 (1940); *Donahue v. Louisville & N. R. Co.*, 274 Ky. 364, 118 S.W. 2d 716 (1938); *Great Atlantic & Pacific Tea Co. v. Eiseman*, 259 Ky. 103, 81 S.W. 2d 900 (1935); *Canton, Cadiz*

negligence is not considered an admission of negligence on the part of the defendant. No case has been found concerning a general denial and a plea of contributory negligence in the same answer which referred to any particular statute or code provision regarding inconsistent defenses even though this code provision has existed since 1876.⁴³ No statement has been found which would indicate that a plea of contributory negligence and a general denial of negligence in the same answer are considered alternative pleadings. To clarify, when a defendant pleads both contributory negligence and a general denial in the same answer, he does not say that either one or the other is true and he knows not which, but he says that both are true. Thus, it appears that for three quarters of a century, the court has disregarded this code provision prohibiting inconsistent pleas. Even though these two defenses in the same answer are logically inconsistent, this has been ignored and the defendant given more latitude in defense. This is a practical and commendable result. In a somewhat analogous situation, the court has held that in an action of slander, a denial by the defendant that he spoke the words and the allegation that the words are true, are not inconsistent defenses.⁴⁴ In an equally analogous situation the court has held in an action for slander that a defendant could not plead a general denial and in the same answer plead a privilege as these defenses are inconsistent under this code provision.⁴⁵ There seems to be no valid grounds for such a distinction. A plea that the words are true is as much inconsistent with a general denial as a plea of privilege. These two holdings are repugnant. Both should be held inconsistent if either is. A more practical and better result would be to hold that neither of the two is inconsistent with a general denial. The defendant should not be hamstrung by such a strict, narrow rule of logic. It is simply a matter of policy and progressive policy would give the defendant this latitude in pleading and proof. As a procedural matter, these two defenses should be set forth in separate paragraphs of the answer.⁴⁶

Another point on pleading contributory negligence might be noted at this stage before proceeding to the third question. The plaintiff in *Newport, L. & A. Turnpike Co. v. Pirmann*⁴⁷ brought an action against the defendant for negligence. Defendant apparently intending and attempting to plead contributory negligence without admitting negligence on his part, pleaded that the plaintiff's injury occurred from "his own carelessness and negligence."⁴⁸ The Court stated that this was not a plea of contributory negligence. This is a rather narrow and harsh view to take toward such a plea. The reasoning underlying such a holding may be that the defendant failed to admit any negligence on his part on which contributory negligence could be predicated. Or the court may have seized upon the word "contributory" to uphold their view. To clarify, the court may have reasoned that an injury caused *solely* by the plaintiff's negligence was not an injury to which the plaintiff's negligence could have "contributed." Hence this was not a plea of *contributory* negligence, but a plea of *sole* negligence. Whatever their reason-

& Hopkinsville Turnpike Co. v. McIntire, 105 Ky. 185, 48 S.W. 980 (1899); East Tennessee Coal Co. v. Dobson, 12 Ky. L. Rep. 508 (1890); Cin. N. O. & Tex. Pac. Ry. Co. v. Wright, 11 Ky. L. Rep. 234 (1889).

⁴³ KY. CODES OF PRAC., CIV. AND CRIM. sec. 113-4 (1876).

⁴⁴ Whittaker v. McQueen, 128 Ky. 260, 108 S.W. 236 (1908).

⁴⁵ Rooney v. Tierney, 82 Ky. 253 (1884).

⁴⁶ Cin. N. O. & Tex. Pac. Ry. Co. v. Wright, 11 Ky. L. Rep. 234 (1889).

⁴⁷ 26 Ky. L. Rep. 933, 82 S.W. 976 (1904).

⁴⁸ *Id.* at 933, 82 S.W. at 976.

ing may have been, a liberal view more consonant with the first rule enumerated should be adopted. A plea by the defendant that the plaintiff's injury was due solely to his own (plaintiff's) negligence should for practical reasons be considered a plea of contributory negligence.

Now, must a defendant even plead contributory negligence in order to avail himself of this defense in Kentucky? It must be recognized that the answer to this question must necessarily affect the answers to the first two questions. Therefore, the answer to this problem was reserved for last. Only one case has been found which is relevant to this question. In *Nelson's Adm'x v. Southern Ry. Co.*,⁴⁹ the court quite blandly stated that "Even when contributory negligence has not been pleaded, the defendant, having denied the general allegation of negligence, may show any specific act of negligence on the part of the plaintiff to refute the allegation of the petition."⁵⁰ No cases were cited as authority for this statement. The most reasonable interpretation to be garnered from this statement appears to be that a defendant may prove contributory negligence without pleading it, provided he has entered a general denial. If this analysis is correct, the case seems out of line and perhaps contrary to the weight of authority. If this statement represents the law in Kentucky today, then the answers to the first two questions are vitally altered. Since this would render it unnecessary to plead at all, the issue of contributory negligence, obviously neither party would have the burden. The question of whether a general denial of negligence and a plea of contributory negligence may be combined in a single answer vanishes because under the above case it is necessary only to interpose a general denial of negligence in order to prove contributory negligence. Whether or not the above speculations are true cannot be answered at this time. So far, no one has asked the court if it meant what it said. In the event the court chooses to withdraw this thrust at its next opportunity, then the rules set forth herein first govern.

II

THE BURDEN OF PROVING CONTRIBUTORY NEGLIGENCE

The problem of who must prove contributory negligence once it has been pleaded deserves and receives far more attention from courts and practicing attorneys than the question of who must plead contributory negligence. Discharge of the burden of pleading contributory negligence is a relatively minor matter once it has been determined which party must plead it. Discharge of the burden of proof, however, may not be so simple. The collection of evidence to prove a particular point usually entails far more time than the simple submission of a plea. Therefore, it may be quite important to determine as far in advance as possible upon whom the onus of proof falls so as to insure time for adequate preparation.

Two reasons may be assigned to support the necessity of a rather detailed inspection to determine who must prove contributory negligence. First, as hereinbefore stated, caution should be exercised before asserting that the burden of proof follows the burden of pleading. This may be true as a general rule, but,

⁴⁹ 302 Ky. 243, 194 S.W. 2d 518 (1946).

⁵⁰ *Id.* at 248, 194 S.W. 2d at 521.

it has a rather technical meaning which should be observed and understood in its statement. Second, even if the burden of proof did follow the burden of pleading, it must be admitted that a rather elusive position was reached regarding upon just whom the burden of pleading does rest in view of the language in the *Nelson* case.⁵¹

In order to better understand what courts mean when the term "burden of proof" is used and to properly analyze the apportionment of this burden by the court, a general analysis of this burden should prove helpful. "Burden of proof" is an ambiguous term if no further words of elaboration are added. Actually it may be used to indicate one or both of two meanings and it is often a failure to distinguish between these two senses of the term that results in confusion in practical application. First, it may be used in the sense that it means the risk of non-persuasion of the jury.⁵² Second, it may be used to indicate the duty or burden of producing evidence to the judge.⁵³ Wigmore justifies this double aspect categorization of the phrase by carrying the reader through the various stages of a jury trial and pointing out the role of each sense of the burden.⁵⁴

The second meaning, that of producing evidence to the judge, is a duty of satisfying the judge that the party has produced sufficient evidence to warrant submission of the case to a jury.⁵⁵ If this burden is not satisfied then the party on whom it rests renders himself liable to a directed verdict or non-suit by the judge without the jury's consideration of the evidence. Hence, this is a duty toward the judge alone which must be fulfilled before the jury is even allowed to consider the case.

Once this duty toward the judge is satisfied the burden of proof in the sense of risk of non-persuasion becomes important. This is a duty toward the jury alone which become active only after satisfaction of the first burden to the judge. When the proponent (a term convenient for designating the party having the risk of non-persuasion) has gotten before the jury, he now bears only the risk of non-persuasion. "In this second stage of the trial, with the evidence before the jury, the only burden operating is that which concerns the jury, — the risk of non-persuasion; and not that which concerns the judge, — the duty of producing evidence."⁵⁶

The burden of proof in the sense of producing evidence to the judge may shift from side to side during a trial.⁵⁷ The burden of proof in the sense of risk of non-persuasion of the jury never shifts, since no fixed rule of law can be said to shift.⁵⁸ Each party may have his own burden in this sense simultaneously through apportionment by pleading rules but in reality this burden never shifts.

In the application of these principles to the particular subject of contributory negligence, Wigmore concludes that: "The fact of contributory negligence, sufficient in law to defeat a plaintiff, is regarded by the orthodox common law view as a part of the defendant's burden (or risk of non-persuasion) [but], like so many other instances of that burden, this is in reality a question of plead-

⁵¹ See note 49 *supra*.

⁵² 9 WIGMORE, EVIDENCE sec. 2485 (3d ed. 1940).

⁵³ 9 *id.* sec. 2487.

⁵⁴ *Ibid.*

⁵⁵ 9 *id.* sec. 2487 (2) (a).

⁵⁶ 9 *id.* sec. 2487 (2) (b).

⁵⁷ 9 *id.* sec. 2489 (b).

⁵⁸ 9 *id.* sec. 2489 (a).

ing. Yet even by the orthodox rule, the second burden, or duty of producing evidence, may be shifted by facts which raise a presumption of negligence, and these facts may appear from the testimony adduced by the plaintiff himself, or even from the allegations of his declaration. Hence it happens that even in the jurisdictions maintaining the orthodox rule, the burden is sometimes said to be upon the plaintiff in certain exceptional cases of the above sort,—the distinction between the two burdens not being strictly observed.⁵⁹

Perhaps, at this point it might be helpful to illustrate in a more detailed manner just how these principles should operate. Assume an ordinary action of negligence. At the outset of the trial, the plaintiff has the burden of proof in both senses.⁶⁰ He has the first active burden in the sense of producing evidence to the judge to satisfy him that there is enough evidence of the defendant's negligence to warrant submission of the case to the jury.⁶¹ Of course, if the plaintiff fails to satisfy the burden in this sense, he loses at the outset by a non-suit or a directed verdict.⁶² Once the plaintiff has satisfied this burden, he still has the burden of proving defendant's negligence to the jury in the sense of risk of non-persuasion.⁶³ Now, assume that the plaintiff satisfies the first burden in the sense of producing evidence to the judge. At this point, the plaintiff has passed the judge. For illustrative purposes, assume now that the defendant pleads contributory negligence to defeat the plaintiff's case. The burden of proof in both senses now rests on the defendant. He must first satisfy the burden in the sense of producing evidence to the judge. Once this preliminary burden is satisfied, the defendant still has the burden of proving contributory negligence in the sense of risk of non-persuasion of the jury.

As suggested before some confusion has arisen from a failure to distinguish between the two senses of this burden. Assume that either the plea or proof of the plaintiff indicates that he was contributorily negligent. Some cases say without further explanation that here the burden is on the plaintiff to prove that he was in the exercise of ordinary care.⁶⁴ From the language of the cases one might erroneously get the impression that the burden of proving the absence of contributory negligence in the sense of risk of non-persuasion of the jury rests on the plaintiff. However, the burden resting on the plaintiff is the burden in the sense of producing evidence to the judge to overcome this presumption of contributory negligence. This burden in the sense of going forward with the evidence needs no plea to support it. Therefore, the plaintiff should in an action for negligence never be required to plead freedom from contributory negligence or the exercise of due care on his part. Now, assume that the plaintiff satisfies this burden of proof in the sense of producing evidence to the judge. If the defendant wishes to avail himself of the defense of contributory negligence, he should be required to plead it. Once he has pleaded it, the burden of proving contributory negligence in the sense of risk or non-persuasion of the jury rests on the defendant as the burden in this sense follows the burden of pleading.

An effort will now be made to utilize this discussion of "burden of proof" in a search to determine whether or not these principles have been properly applied

⁵⁹ 9 *id.* sec. 2507.

⁶⁰ 9 *id.* sec. 2487 (a).

⁶¹ 9 *id.* sec. 2487 (2).

⁶² *Ibid.*

⁶³ 9 *id.* sec. 2487 (2) (b).

⁶⁴ See note 59 *supra*.

in apportioning the burden of proving contributory negligence in Kentucky. As previously stated, Clark has placed Kentucky in his third category which says that contributory negligence is a defense to be alleged and proved by the defendant.⁶⁵ Statutes governing actions for injuries incurred in particular situations lend support to this view,⁶⁶ but once again almost all rules relating to this problem in Kentucky are a product of the judiciary and another resort to the cases appears necessary.

It seems that the court first met this problem in 1876 and placed the burden of proving contributory negligence in the sense of risk of non-persuasion on the defendant.⁶⁷ After courteously recognizing the existence of a conflict of authority on this point, the Court stated, "it seems to us that it is reversing a well recognized rule of pleading in requiring the plaintiff to allege and prove the non-existence of facts that when established would constitute a defense to his own action.

When the plaintiff has shown the negligence of the defendant, and the injury caused by it, the cause of action is made out, and unless his own proof shows contributory negligence on his part he is entitled to recover."⁶⁸

An examination of this language reveals some orthodox conclusions. A plaintiff can sustain a cause of action for negligence without alleging or proving the non-existence of contributory negligence on his part. When a plaintiff has alleged and proved the negligence of the defendant and the injury caused by such negligence he is entitled to recover, if the defendant presents no evidence to defeat the plaintiff's case. Here, it seems reasonable to assume that the court is using the term "burden of proof" in the sense of risk of non-persuasion of the jury because the burden in this sense should and does fall on the party on whom the burden of pleading rests. Therefore, the burden of proving contributory negligence in the sense of risk of non-persuasion rests on the defendant.

Just what follows from the statement by the court that, "unless his own [plaintiff's] proof shows contributory negligence on his part he is entitled to recover"⁶⁹ is a matter of conjecture. What if the plaintiff's own proof does show contributory negligence on his part? Further, what if the plaintiff's petition or plea indicates contributory negligence on his part? No answer to these two questions appears in the case. It is here that laxity in terminology has resulted in confusion of the two different senses of the burden of proof. Actually, if these facts appear in the plaintiff's petition or proof they raise a presumption of negligence on the plaintiff's part and the burden of producing evidence to the judge to overcome this presumption rests on the plaintiff.⁷⁰ Even if the plaintiff's own plea does show negligence on his part, he still should not be required to specifically negative negligence or allege the exercise of due care on his part in his plea. As stated above, if his plea does indicate negligence on his part, this raises a presumption of contributory negligence and places the burden in the sense of producing evidence to the judge on the plaintiff. The burden in this sense does not require a plea to support it. If the plaintiff overcomes this presumption, the original burden of proving defendant's negligence or burden in the sense of risk of non-persuasion of the jury still rests on the plaintiff. If the defendant later pleads contributory

⁶⁵ See note 5 *supra*.

⁶⁶ See note 7 *supra*.

⁶⁷ Paducah and Memphis R. R. Co. v. Hoehl, 75 Ky. (XII Bush) 41 (1876).

⁶⁸ *Id.* at 47.

⁶⁹ *Ibid.*

⁷⁰ See note 59 *supra*.

negligence, the burden of proving it in the sense of risk of non-persuasion rests on him.

A few years later, the Court seemed to affirm its original view that the burden of proving contributory negligence in the sense of risk of non-persuasion rests on the defendant.⁷¹

Eleven years later, the Court stated in a rather cursory manner that "the burden of showing contributory negligence is always on the defendant."⁷²

It should be noted that here as in every other case, the court, if it considers this burden of proof has two senses, has not seen fit to state the manner or sense in which it is using the term "burden of proof."

One year later, these previous views were reaffirmed.⁷³ In this case it is rather interesting to note that the court considered it improper practice, though not cause for reversal, to instruct the jury that either party had a particular burden of proof.⁷⁴ The weight which can be attached to such a statement is unknown.⁷⁵

Once again, the apparent inconsistency which seemed to place the burden of pleading freedom from contributory negligence on the plaintiff in the *Lexington* case arises.⁷⁶ The Court stated: "It may be said that, in all cases where a servant is suing an employer to recover for injuries sustained by reason of the negligence of the employer, *it is incumbent upon the plaintiff to aver and show that he was not aware of the danger, and that he could not with ordinary diligence have known of the danger or risk that he was incurring in time to have prevented the injury.*"⁷⁷ (Italics writer's). Once again this must be recognized as dictum only as this was a suit for wrongful death and not for injuries.

If the above statement represented a deviation from its original position, the court returned to its former position ten years later, when probably the most

⁷¹ Ky. Central R. R. Co. v. Thomas Adm r., 79 Ky. 160, 164 (1880), where the Court said: "Contributory negligence is a defense which confesses and avoids the plaintiff's case, and must be made out by showing affirmatively, not only that the plaintiff was guilty of negligence, but that such negligence cooperated with the negligence of the defendant to produce the injury."

⁷² Cahill v. The Cincinnati, New Orleans & Texas Pacific Rwy. Co., 13 Ky. L. Rep. 714, 718 (1891).

⁷³ L. & N. R. R. Co. v. Hofgesang, 13 Ky. L. Rep. 829 (1892). where the Court said: "The court properly refused to instruct the jury that the burden was on plaintiff to show that he was free from any negligence which contributed to the causing of the injury. The burden is upon the defendant to show contributory negligence."

⁷⁴ L. & N. R. R. Co. v. Hofgesang, 13 Ky. L. Rep. 829 (1892). "It is not proper in any civil case to tell the jury in terms that the burden is on the one party or the other; and while the giving of such an instruction may not be cause of reversal it is the better practice to simply tell the jury to decide as they believe from the evidence the fact to be without telling them upon which party the burden is."

⁷⁵ STANLEY, INSTRUCTIONS TO JURIES IN KENTUCKY, sec. 22 (1940) seems to agree with the Court. "It is a fundamental rule that the jury should not be specifically instructed that the burden of proof is upon one of the parties or that the presumption of law is against him; but the instructions should be so framed as to indicate the burden without specially referring to it." This appears rather anomalous to the writer. It seems as though the court is requested to tell the jury *indirectly* what it is forbidden to tell them *directly*. However, if Stanley and the case are correct in their interpretations, this rule may still be in force in Kentucky.

⁷⁶ Lexington & Carter County Mining Co. v. Stephens Adm r., 104 Ky. 502, 47 S.W. 321 (1898).

⁷⁷ *Id.* at 508, 47 S.W. at 323.

exhaustive decision on this problem was rendered by the court in *Bevis v. Vanceburg Telephone Co.*⁷⁸ In this case the jury was instructed that before the plaintiff was entitled to recover "they [the jury] should believe from the evidence that the plaintiff was herself in the exercise of ordinary care for her own safety, in addition to believing the establishment of the various ingredients of actionable negligence on the part of the defendant."⁷⁹ On appeal, the court held that the interpolation of the condition as to plaintiff's exercising due care for her own safety was error. The opinion states that in this case there was a plea of contributory negligence but as there was no evidence to support it, the trial court did not instruct the jury on that point. It may be questioned whether this was not actually an instruction on contributory negligence.

From this opinion may be drawn the conclusion that it is not necessary to a plaintiff's recovery that he allege and prove that he was exercising ordinary care for his own safety. It is not even necessary that the plaintiff did in fact exercise due care for his own safety. If the plaintiff has shown that he was injured by the defendant's negligence he is entitled to a verdict even though he was not exercising ordinary care for his own safety, unless the failure to do so was a proximate cause of the injury.⁸⁰

In a case in 1909, the Court again stated that the plaintiff could not recover even though the defendant was negligent if the plaintiff's injury was caused by his own negligence.⁸¹ Once again, in this case there appears some language similar to the dictum in the *Lexington* case where the Court in effect stated that the burden was on the plaintiff to negative contributory negligence in order to recover.⁸²

In 1915, this anomalous principle seems to have still been considered in effect.⁸³ Whether or not this apparent inconsistency which seemed to place the burden of proving freedom from contributory negligence on the plaintiff vanished with the enactment of the Workmen's Compensation Act is unknown. This was advanced as a possibility in the section on burden of pleading. The orthodox view

⁷⁸ 132 Ky. 385, 113 S.W. 811 (1908).

⁷⁹ *Id.* at 387, 113 S.W. at 811.

⁸⁰ In *Bevis v. Vanceburg Telephone Co.*, 132 Ky. 385, 389, 113 S.W. 811, 812 (1909), the Court stated: "If the plaintiff in this case was injured by the negligence of the defendant sued upon, she was entitled to recover a verdict, although she was not exercising ordinary care for her own safety, unless her failure to do so was *the* proximate cause of the injury." (Italics writer's.) This language indicates that the contributory negligence of the plaintiff must be the sole cause of the alleged injury to defeat the plaintiff. It is doubtful that the Court meant such. No other case seems to have used this exact language. Other cases indicate the following rule to the law in Kentucky. If it appears that the plaintiff's negligence so far contributed to his own injury that but for such negligence the injury would not have occurred, then the plaintiff cannot recover. *L. & N. R. R. Co. v. Cooper*, 164 Ky. 489, 494, 175 S.W. 1034, 1036 (1915), *Newport, L. & A. Turnpike Co. v. Pirmann*, 26 K. L. Rep. 933, 933, 82 S.W. 976, 976 (1904), *Ky. Central R. R. Co. v. Thomas Adm'r*, 79 Ky. 160, 163 (1880), *Paducah & Memphis R. R. Co. v. Hoehl*, 75 Ky. (XII Bush) 41, 45 (1876).

⁸¹ *Cincinnati, N. O. & T. P. Ry. Co. v. Yocum's Adm'r.*, 137 Ky. 117, 123, 123 S.W. 247, 249 (1909).

⁸² See note 23 *supra*.

⁸³ *Southern Mining Co. v. Lewis' Adm'r.*, 167 Ky. 20, 25, 179 S.W. 1067, 1069 (1915), where the Court said: "In an action for death by wrongful act the burden is upon the defendant to show the contributory negligence upon which it relies."

placing the burden of proving contributory negligence on the defendant appears to have been restated in 1935.⁸⁴

However, two years later some obscure language appeared. "It is elementary that the evidence introduced must not only tend to show negligence on the part of the defendant, but that such negligence must likewise appear to be the proximate cause of the resulting injury. Similarly, the injured party must himself be free of contributory negligence."⁸⁵ Just what is meant by the statement that "the injured party must himself be free of contributory negligence" is questionable. This ambiguous statement was repeated three years later.⁸⁶ Of course, the plaintiff must be free of contributory negligence, but is the burden on the plaintiff to plead and prove that he was free of contributory negligence? Taken literally, these two cases lend support to this idea, but such is hardly consonant with the orthodox views previously expressed by the Court. The *Nelson* case alluded to in the section on burden of pleading offers some slight evidence that the burden of proving contributory negligence is on the defendant in some form or sense.⁸⁷ This language is, however, rather vague and it offers no panacea.

Conceding that portions of the following are conjectural, an attempt will now be made to summarize the law of Kentucky governing the apportionment of the burdens of pleading and proving contributory negligence. The defendant must plead contributory negligence if he hopes to rely on it as a defense.⁸⁸ Once the defendant had pleaded contributory negligence the burden of proof, in the ordinary sense of the term, or the sense of risk of non-persuasion, rests on the defendant.⁸⁹ The plaintiff is never required to plead the exercise of due care or freedom from contributory negligence on his part in order to state a good cause of action.⁹⁰ Cases say that the plaintiff must be free of contributory negligence in order to recover⁹¹ but evidently this statement refers to plaintiff's substantive cause of action. If indications of contributory negligence do not appear from the plaintiff's plea or proof and the defendant fails to raise the issue then the plaintiff's freedom from contributory negligence is apparently presumed without any necessity of proof on the point by the plaintiff. If evidence of contributory negligence appears either in the plaintiff's plea or proof, then the plaintiff still is not required to plead exercise of due care. But, if contributory negligence appears from either the plaintiff's plea or proof, a presumption of contributory negligence arises there-

⁸⁴ *Owen Motor Freight Lines v. Russell's Admr.*, 260 Ky. 795, 803, 86 S.W. 2d 708, 712 (1935), where it was stated, "in this jurisdiction a defendant pleading contributory negligence assumes the burden of proving it."

⁸⁵ *C. & O. Ry. v. Bryant's Admr.*, 272 Ky. 339, 342, 114 S.W. 2d 89, 91 (1937).

⁸⁶ *Peerless Mfg. Corp. v. Davenport*, 281 Ky. 654, 658, 136 S.W. 2d 779, 781 (1940). "To entitle appellee [plaintiff] to recover it was necessary to show negligence upon the part of the appellee (sic) [defendant] as the proximate cause of his injuries and he must himself be free of contributory negligence." The defendant below was the appellant.

⁸⁷ See notes 49 and 50 *supra*.

⁸⁸ It should be emphasized that this is the opinion of the writer as this problem was not entirely resolved in view of the seemingly contrary language in some of the cases cited herein.

⁸⁹ Attention is called to the fact once again that the Kentucky Court has never stated that it feels the "burden of proof" has two separate senses as does Wigmore.

⁹⁰ This conclusion was reached negatively. No case has been found which required the plaintiff to plead the exercise of due care or freedom from contributory negligence on his part.

⁹¹ See notes 83 and 84 *supra*.

from and the plaintiff has the burden in the sense of producing evidence to the judge to overcome this presumption in order to succeed. It seems that Kentucky has followed the general pattern set forth by Wigmore without adopting the language therein.

In conclusion, perhaps a few words should be said as to the justice of the above deductions. Who ought to have the burden of proving contributory negligence? Should the plaintiff be required, as an element of his cause of action, to negative contributory negligence on his part in his plea, and prove that he was in the exercise of due care? It has been argued that "When a plaintiff seeks to possess himself of money from a defendant's pocket, that plaintiff should be saddled with a complete and not merely a partial duty to show that he is entitled to that money. If he was negligent, and if his negligence contributed to the happening of the accident, he should not be entitled to a cent. Contributory negligence on his part would be no less effective than freedom from negligence on the defendant's part to defeat his action. Absence of contributory negligence no less constitutes a part of his cause of action than does negligence of the defendant."¹⁰² It might, however, be argued with equal force and more reason that the burden ought to be on the defendant. Just how many elements must the plaintiff negative to make out a cause of action? If the plaintiff is required to negative contributory negligence, should he also be required to anticipate his possible failure to succeed on this point and plead last clear chance? How many possibilities must the plaintiff anticipate and negative in order to make out a cause of action for negligence? It seems that evidence of contributory negligence in most cases would be equally available to the defendant and it is no more than just to place the burdens of pleading and proving such matter on him to defeat the plaintiff's case.

GLADNEY HARVILLE

RES GESTAE IN KENTUCKY

The use of Latin words and phrases is very often the only means by which a concept can be designated or described in the legal profession. The subpoena, mandamus and habeas corpus are of such nature. This is due to the fact that for many years Latin was the exclusive language in the legal profession, and there is no English equivalent for such terms. Fundamentally there is no sound objection to their use when they convey a clear and distinct legal meaning. They become objectionable when their meaning is obscured by attempting to include within the term numerous different and distinct legal principles. Subject to such an objection is the term *res gestae* as used in connection with the admission of hearsay evidence. The Kentucky Court of Appeals has used this term freely. With a view toward at least discovering the sense in which it is used by the Court, or possibly advocating that it be discarded, the writer proposes to examine some Kentucky cases wherein the term has been used.

Res gestae is defined by Ballentine as "Matter incidental to the main fact and explanatory of it, including acts and words which are so closely connected therewith as to constitute a part of the transaction, and without a knowledge of

¹⁰² 1 SHEARMAN AND REDFIELD ON NEGLIGENCE sec. 124 (Rev. ed. 1941).