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LAST CLEAR CHANCE AND DEFENDANT'S ANTECEDENT NEGLIGENCE

The doctrine of last clear chance is one of the principal methods by which the courts have modified the strictness of the rule that contributory negligence precludes a plaintiff from recovering from a negligent defendant. The basic doctrine is that the defendant is liable notwithstanding the plaintiff's negligence if the defendant discovered the plaintiff in a position of helpless peril in time to have avoided injuring the plaintiff had the defendant exercised reasonable care after such discovery. Many courts have extended the doctrine to allow the plaintiff to recover where the defendant should have discovered the plaintiff's peril but negligently failed to do so, and a few courts allow recovery where the plaintiff was merely negligently unaware of his own peril.[1] The doctrine had its origin in the stress placed upon the time sequence, since it was felt that a plaintiff should not be denied a recovery because of his contributory negligence when the defendant had the later opportunity to avoid the injury. Therefore, in its general application, the defendant is liable only if his failure to avoid injuring the plaintiff was due to some negligence on his part after he discovered or should have discovered the plaintiff's peril; the defendant's negligence must follow or at least concur with that of the plaintiff.

British Columbia Electric Ry. v. *Loach*[2] was a case which departed from this general application. In this case, decided in 1916 by the Privy Council, the defendant's streetcar was traveling at a negligent rate of speed and had defective brakes. The plaintiff negligently started to cross the defendant's car tracks at a public crossing. Although the driver of the streetcar saw the plaintiff's peril as soon as he could have reasonably been expected to and immediately applied the brakes, he was unable to avoid hitting the plaintiff because of the defective brakes and excessive speed. The court held that, while the negligence of the defendant was antecedent to that of the plaintiff, it was the "ultimate" negligence, and the defendant had the last clear chance.[3] The English court, in this case, extended its application of the last clear chance doctrine to that situation where the defendant, after he discovered the plaintiff's peril, could have avoided injuring the plaintiff by exercising reasonable care had not his negligence before that time made it impossible for him to avoid such injury.

Although a majority of American jurisdictions have refused to accept the doctrine of the *Loach* case,[4] a few have held the defendant liable in such a situation. In most of the cases which have so held, the defendant's negligence consisted of operating his train, streetcar, or automobile negligently in one of these four respects: with an inadequate headlight, with defective brakes, with dangerous equipment, or at an excessive speed.

In *Lloyd* v. *Albermarle & R. R.*,[5] the engineer of the defendant's train did not see the plaintiff, who was in a helpless position on the defendant's trestle due to his own negligence, because the defendant had ngligently failed to provide its train with a proper headlight. The Supreme Court of North Carolina held the defendant liable under the last clear chance doctrine. The Vermont court, in an almost identical fact situation, also allowed the plaintiff to recover.[6] These cases,

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[1] PROSSER, TORTS sec. 54 (1941).

[2] [1916] 1 A. C. 719 (P. C.)

[3] The Canadian courts have disagreed as to whether this case is authority for allowing recovery where the defendant's only negligence was excessive speed. That it is, Jeremy and Jeremy v. Fontaine, [1931] 3 W. W. R. 203 (Alta.); Critchley v. Canadian Northern Ry., [1917] 2 W. W. R. 538, 34 D. L. R. 245 (Alta.). That it is not: Smith v. City of Regina, [1917] 1 W. W. R. 1444, 34 D. L. R. 238, aff'd, [1918] 2 W. W. R. 1010, 11 Sask. L. R. 291, 42 D. L. R. 647 (Sask.).

[4] PROSSER, TORTS sec. 54 (1941).

[5] 118 N. C. 1010, 24 S. E. 805 (1896).

where the defendants negligence was an omission which made it impossible to discover the plaintiffs in peril, have been accepted by some authorities as consistent with previous views of last clear chance, either on the ground that the defendants were under a duty to maintain a proper lookout and they should not have been allowed to avoid this duty by their failure to provide adequate equipment to make this lookout effective,[7] or on the ground that the defendants were guilty of "continuing negligence" and were thus negligent after they should, in the exercise of due care, have discovered the plaintiffs in peril.[8]

In *Little Rock Traction & Electric Co.* v. *Morrison*,[9] the Supreme Court of Arkansas held that the plaintiff could recover on the last clear chance theory if the defendant was negligent in having an inexperienced motorman or defective brakes, and in *Thompson* v. *Salt Lake City Rapid-Transit Co.*[10] the Utah court allowed a recovery where the plaintiff was negligent, but the defendant was unable to avoid the injury because of defective brakes and a defective motor. In Ohio, a defendant railroad has been held liable because its train was improperly equipped with air brakes, a statutory violation, even though the plaintiff was also negligent,[11] and in *Weitzman* v. *Nassau Electric R. Co.*,[12] a New York case, the court said that while it was not necessary to the decision of the case, the law in New York was that the plaintiff could recover despite contributory negligence if the injury could have been avoided had the defendant's streetcar been properly equipped with brakes.[13]

In two North Carolina cases, the defendants were held liable, despite the contributory negligence of the plaintiffs, where the injuries were due to dangerous equipment on the defendants instrumentalities. In *Smith* v. *Charlotte Electric Ry.*,[14] the defendant's streetcar had an inadequate and dangerous fender, and in *Greenlee* v. *Southern Ry.*,[15] the defendant's train was not equipped with self-couplers as required by statute.

The Montana court and the Missouri court have each held that a negligent plaintiff may recover if the defendant's train was traveling at an excessive rate of speed and the injury could have been prevented had the train been traveling at a reasonable speed when the plaintiff's peril was discovered or should have been discovered.[16] The decisions in *Hall* v. *Ogden Street Ry.*,[17] a Utah case, and

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[6] Dent v. Bellows Falls & S. R. St. Ry., 95 Vt. 523, 116 Atl. 83 (1922).

[7] See HARPER, TORTS sec. 139 (1933); REST., TORTS, EXPLANATORY NOTES sec. 15, comment f, p. 74 (Tent. Draft No. 10, 1933), "But where the defendant's antecedent negligence consists in a failure to provide adequate equipment to discover the helpless peril of the plaintiff, there is liability notwithstanding the defendant used all facilities within his power to avoid the harm after actual discovery. His failure to discover by reason of his negligently defective equipment brings him within the rule of failing to use due care after the plaintiff's peril ought to have been discovered. Section 15 imposes an affirmative duty to employ reasonable care to discover a negligent plaintiff's peril, 'but the duty would not be discharged by vigilant watch in the absence of means to make the look-out effectual' "

[8] See Note, 92 A. L. R. 47 58 (1934).

[9] 69 Ark. 289, 62 S. W 1045 (1901).

[10] 16 Utah 281, 52 Pac. 92 (1898).

[11] Fairport P & E. R. Co. v. Meredith, 46 Ohio App. 457, 189 N. E. 10 (1933), *aff'd.*, 292 U. S. 589 (1934) (applying state law).

[12] 33 App. Div. 585, 53 N. Y. Supp. 905 (2d Dep't. 1898).

[13] *Id.*, at ., 53 N. Y. Supp. at 906.

[14] 173 N. C. 489, 92 S. E. 382 (1917).

[15] 122 N. C. 977 30 S. E. 115 (1898).

[16] Neary v. Northern Pac. Ry., 41 Mont. 480, 110 Pac. 226 (1910); Goben v. Quincy O. & K. C. R. Co., 206 Mo. App. 5, 226 S. W 631 (1920); Moore v. St. Louis Transit Co., 95 Mo. App 728, 75 S. W. 699 (1902), *aff'd.*, 194 Mo. 1, 92 S. W 390 (1906) (streetcar).

[17] Utah 243, 44 Pac. 1046 (1896).

Baltimore Consolidated Ry. v. *Rifcowitz*,[18] a Maryland case, might be explained on the ground that the defendant failed to maintain a proper lookout, but the court, in each case, discussed the defendant's negligent speed before the plaintiff was imperiled, and implied that the jury might consider such negligence even if the plaintiff was negligent also. This was also implied by the Colorado Supreme Court in *Colorado & Southern Ry.* v. *Western Light & Power Co.*[19] The Kentucky Court of Appeals, in *Kelly* v. *Marshall's Adm r.*,[20] approved an instruction allowing the plaintiff to recover, even if guilty of contributory negligence, if the defendant could have avoided the injury had his car been running at a reasonable rate of speed. In *Stephens* v. *Glass*,[21] another Kentucky case, the plaintiff drove his car from a side road onto the highway, and the defendant was unable to avoid hitting him because the defendant's automobile was traveling at an excessive rate of speed. The court held that the plaintiff could recover, even if negligent, because the plaintiff's negligence would not have produced the collision except for the negligence of the defendant and, thus, was not the proximate cause of the injury.[22] The court, in that case, while treating it as an ordinary proximate cause question, seems to have applied the last clear chance doctrine where the defendant's negligence was antecedent to the plaintiff's.[23]

These last two cases were the only cases found by the writer in which the defendant was held liable on the last clear chance theory for his antecedent negligence where his instrumentality was an automobile.

A case which does not fall into any of the typical situations discussed before is *Brotherton* v. *Manhattan Beach Improvement Co.*,[24] a Nebraska case. The defendant, in that case, operated a bathing beach, but did not have a lifeguard at the beach. When informed that the plaintiff's intestate, who had been swimming there, was missing, the defendant did not institute a search for some time. The court ruled that the defendant could be held liable even if the plaintiff's intestate had been negligent, because the defendant should have had a lifeguard present when decedent "placed himself in such a situation that his life was in danger," or at least should have instituted a search when informed that plaintiff's intestate was missing. Although the court stressed the failure of the defendant to act after notice, it appears from the court's repeated reference, in its opinion, to the defendant's failure to have a lifeguard that such failure might, in itself, have been sufficient negligence to hold the defendant liable despite any contributory negligence.

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[18] 89 Md. 338, 43 Atl. 762 (1899).

[19] 73 Colo. 107 214 Pac. 30 (1923).

[20] 271 Ky. 666, 120 S. W. 2d 142 (1938). The court also asserted that the defendant was negligent in that he " at no time slackened the speed of the taxi." Failure of the defendant to slacken speed *after* discovery of the plaintiff would seem to be irrelevant to the cause of the injury unless the defendant could thereby have avoided the injury. If he could have, then this is an ordinary last clear chance case and not one in which defendant was held liable for his antecedent negligence.

[21] 296 Ky. 90, 176 S. W 2d 139 (1943).

[22] In this case, the trial court seems to have left the case to the jury under the broad issue of proximate cause, and the Court of Appeals found a support for the jury's verdict by taking a sort of judicial notice that " it has been the experience of this court that excessive speed at which automobiles travel the highways of the country is by far the greater cause of highway collisions " *Id.*, at 93, 176 S. W. 2d at 141.

[23] See Note, 33 Ky. L. J. 132 (1944) for a view that another Kentucky case, Chesapeak & O. Ry. v. Pope, 296 Ky. 254, 176 S. W 2d 876 (1943), is an application of the last clear chance doctrine where defendant's negligence was antecedent, although the Kentucky Court of Appeals treated it as an ordinary proximate cause question.

[24] 18 Neb. 563, 67 N. W 479 (1896).

While some of the states mentioned above seem to have allowed recovery where the defendant's negligence was antecedent, in a few of them there are conflicting decisions. In New York, where it was said by way of dictum in the *Weitzman* case[25] that recovery would be allowed if the defendant's instrumentality had defective brakes, a later New York case denied recovery in such a situation.[26] In Kentucky, where recovery has been allowed when the defendant's speed was excessive, recovery has been denied in cases of excessive speed decided both before and since those in which recovery was allowed,[27] although there has been no express reversal, and the Kentucky court has also refused to hold the defendant liable in other situations where his negligence was antecedent.[28] In Missouri, where recovery has been allowed because of the defendant's excessive speed, it has also been denied.[29]

The rule of the *Loach* case[30] is now the law in England and Canada.[31] The extreme to which it has been applied is shown by *Stebbe* v. *Laird*,[32] a case decided by the Manitoba court. In that case, the plaintiff's intestate was one of a group of children walking along the side of a highway. The defendant, approaching the group in his automobile, sounded his horn while seventy-five yards away but did not again sound it. As he was about to pass the group, the plaintiff's intestate walked in front of his car, and although the defendant turned his car to avoid hitting her, the side of it did hit her. The court held that the plaintiff could recover even though there was contributory negligence, because the defendant had not given sufficient warning of his approach.

It is submitted that the law applied to the cases discussed, excepting the cases involving an inadequate headlight,[33] cannot logically be made a part of the last clear chance doctrine, since the defendant does not, in fact, have the last chance. At the time that the plaintiff is negligent, it is no longer within the power of the defendant to avoid the injury.

However, it is a matter of public policy whether the defense of contributory negligence should be further weakened by accepting such a rule of law. As long as we impose a duty of vigilance upon a defendant, it would seem that we should not excuse him because he negligently lacked the means to accomplish the very thing for which we require that vigilance. In the cases allowing recovery, it may be that the defendant's fault involved a greater risk than the plaintiff's, and the decisions represent attempts by the courts to apply a sort of comparative fault rule.[34] If this is correct, while the decisions may be desirable upon their facts, a general application of the *Loach* rule would no more accomplish such a result than does the last clear chance doctrine as conventionally applied, since then, a plaintiff could recover although his fault is greater than the defendant's.

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[25] Weitzman v. Nassau Electric R. Co., *supra*, note 13.

[26] Csatlos v. Metropolitan St. Ry., 70 App. Div. 606, 75 N. Y. Supp. 583 (1st Dep't. 1902).

[27] Hewitt's Adm'r. v. Central Truckaway System, 302 Ky. 459, 194 S. W. 2d 999 (1946); Braden's Adm'x. v. Liston, 258 Ky. 44, 79 S. W. 2d 241 (1934).

[28] Swift & Co. v. Thompson's Adm'r., 308 Ky. 529, 214 S. W. 2d 758 (1948); *see* Chesapeake & O. Ry. v. Conley's Adm'x., 261 Ky. 669, 676, 88 S. W. 2d 683, 686 (1935).

[29] Sullivan v. Missouri Pac. Ry., 117 Mo. 214, 23 S. W. 149 (1893).

[30] British Columbia Electric Ry. v. Loach, *supra*, note 2.

[31] MacIntyre, *Rationale of Last Clear Chance*, 53 HARV. L. REV. 1225, 1248 (1940).

[32] [1938] 1 W. W. R. 173 (Man.).

[33] See *supra*, notes 7 & 8.

[34] See MacIntrye, *supra*, note 31 at 1249.