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Proximate Cause--Contributory Negligence--The Last Clear Chance Doctrine--Chesapeake and Ohio Railway Company v. Poe

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This system avoids the material changes in road location which are frequently necessary in Kentucky. Often by these relocations of roads, land is left without any practical access to a highway. Therefore, we need a liberal interpretation of the statutes and Constitution in order to obtain reasonable results based on present needs. The problem will become more acute in the future, and it is necessary that our courts apply and interpret the law in the manner consistent with the growth and expansion of our Commonwealth as a whole.

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PROXIMATE CAUSE—CONTRIBUTORY NEGLIGENCE—THE LAST CLEAR CHANCE DOCTRINE—CHESAPEAKE AND OHIO RAILWAY COMPANY v. POE

The Kentucky Court of Appeals reached a somewhat startling conclusion in the recent case of *Chesapeake and Ohio Railway Company* v. *Pope*.[1] In this case, one Homer Ross Pope sought to recover damages for the loss of a leg suffered when he was hit by a train of the defendant railway while attempting to cross in front of it. Plaintiff had been talking to a friend near the tracks and was aware of the fact that the train was coming. He decided to cross in front of it although he knew that he was giving himself a margin of only a few seconds, and that he would have to run in order to escape injury. Pope, a mail carrier, had crossed the track many times before the accident, and would have made it safely across on the occasion in question if his foot had not caught in a hole negligently left there by the defendant company. This hole, 3½ to 4 inches in length, was about 6 inches deep and situated next to the inside of the outer rail on the eastbound track. There was evidence to the effect that if Pope had had a few more seconds he could easily have stood up and freed his foot, but the train was so close that perhaps the better alternative was for him to move his body out of the way and not run the risk of it being crushed when he attempted to arise. He based his recovery upon the statutory negligence of the defendant company in allowing the hole in the right-of-way to remain unrepaired.[2]

Defendant traversed the plaintiff's allegations and pleaded contributory negligence on the part of the plaintiff. This negligence

[1] 296 Ky. 254, 176 S. W. (2d) 876 (1943).

[2] KRS 277.060(2) provides that "every railroad company shall restore to its former condition, as near as may be, any . . . highway, street . . . upon which it has constructed its road, and shall maintain the same in that condition within the right of way of the railroad company. It shall construct suitable road and street crossings for the passage of traffic by putting down planks or other suitable material between and on each side of the rails, the top of which shall be at least as high as the top of the rails."

consisted in attempting to cross in front of the rapidly oncoming train, of whose approach he was aware. Evidence showed that the engineer stopped his train as soon as possible after discovering that Pope was caught upon the track. Judgment was given in favor of the plaintiff, the decision resting upon the theory that but for the negligence of the defendant the accident would not have occurred; further, that this negligence "supervened" thus cutting off the prior negligence of the plaintiff, so that his negligence thus became only the remote cause of the accident and did not bar his recovery. The dissenting opinion by one judge, in which a second judge concurred, is particularly enlightening. It expresses the opinion that Pope was guilty of contributory negligence as a matter of law, and that his negligence in attempting to cross in front of a fast moving train could not have exhausted itself in the space of a few seconds, which was the time that Pope was held before he was hit by the train.

Several problems are raised by this decision. Among them is the distinction between proximate and remote cause and the matter of liability arising from this distinction. We are required to analyse the nature of a supervening act and must also consider whether the plaintiff's conduct was a substantial factor in causing the injury. Mentioned in the opinion, but not discussed, is the doctrine of the last clear chance. It would, perhaps, have been appropriate if the Court had compared our American doctrine with that of the English in view of the result that the Court reached.

One of the first elements to be brought out in a discussion of this case is the fact that the *sine qua non*, or "but for," rule can be applied just as reasonably to the plaintiff's as to the defendant's act. The Court holds that but for the negligence of the railway company in allowing the hole to remain unrepaired, the plaintiff would not have been injured. This statement is true, but it is also misleading, for it can as soundly be stated that but for the negligence of the plaintiff in crossing in front of the train he would not have been injured. Both negligent acts were substantial factors in causing the accident. In similar cases, where the plaintiff's negligence has been a causal factor in his injury, the Kentucky Court has usually not allowed recovery,[4] nor have other jurisdictions in like circumstances.

[4] Pearless Mfg. Corp. v. Davenport, 281 Ky. 654, 136 S. W. (2d) 779 (1940) (defendant negligent in construction of platform but injury would not have happened but for negligence of plaintiff); Gaines' Adm'x. v. City of Bowling Green, 235 Ky. 800, 32 S. W. (2d) 348 (1930) (city negligent in not putting lights on ditch, but for plaintiff's negligent act injury would not have occurred); Louisville & Nashville R. R. Co. v. Napier, 223 Ky. 417, 3 S. W. (2d) 1070 (1928) (defendant negligent in maintenance of equipment, but injury would not have occurred but for plaintiff's negligence); Griffin v. Chesapeake and Ohio Ry. Co., 169 Ky. 522, 184 S. W. 888 (1916) (defendant negligent in blocking crossing, but injury would

The question in this case is whether the plaintiff's negligence was superseded by the defendant's negligence. An intervening force is defined in The Restatement of Torts as "one which actively operates in producing harm to another *after* the actor's negligent act or omission has been committed."[5] In the present case, the Court held that the negligence of the defendant was the supervening force which took effect after the negligence of the plaintiff. This is a difficult point to understand, for the negligence of the defendant was a continuing factor, one that was always present, as opposed to one that could have occurred only after the plaintiff's negligent act. In order for the defendant to do a negligent act that would supersede that of the plaintiff it would have to follow after the act of the plaintiff. An example of such an act would occur if an engineer should negligently fail to apply the brakes of a train immediately upon his discovery that a person would be unable to get off of the tracks before the engine reached the spot where that person might be caught. In the principal case it would be difficult to say that the negligence of the defendant supervened in the space of a few seconds and cut off entirely all of the prior negligence of the plaintiff. If any act intervened and contributed to the cause of the accident it was the plaintiff's own act as it was later in point of time. The negligence of the defendant was always present and was not something new that grew up suddenly following the act of the plaintiff.

In view of the facts of the case it is difficult to hold that the plaintiff was not contributorily negligent as a matter of law. His act fits the definition of contributory negligence given in The Restatement of Torts, as it was "conduct on . . . (his) part which (fell) below the standard to which he should (have conformed) for his own protection and (it was) a legally contributing cause, cooperating with the negligence of the defendant in bringing about plaintiff's harm."[6] in earlier Kentucky cases,[7] and in decisions from

not have occurred but for plaintiff's act); Louisville and Nashville R. R. Co. v. Keiffer, 132 Ky. 419, 113 S. W. 433 (1908) (defendant negligent in not properly warning plaintiff of danger, but injury would not have occurred but for negligence of plaintiff).

[4] Murphy v. Shibiya, 125 Neb. 487, 250 N. W. 746 (1933) (defendant negligent in manner in which he parked his car, but injury would not have occurred but for negligence of plaintiff in not warning husband of danger); Wingrove v. Home Land Co., 120 W. Va. 100, 196 S. E. 563 (1938) (defendant negligent in upkeep of premises, but death would not have resulted but for plaintiff's failure to acquire proper medical attention); Rusczck v. Chicago and N. W. Ry. Co., 191 Wis. 130, 210 N. W. 361 (1926) (defendant negligent in not giving proper warning, but death would not have occurred but for plaintiff's negligence in attempting to cross tracks of whose condition he was aware).

[5] RESTATEMENT, TORTS (1938) sec. 441(1).

[6] RESTATEMENT, TORTS (1938) sec. 463.

[7] Louisville and Nashville R. R. Co. v. Lefever's Adm'x., 288 Ky. 195, 155 S. W. (2d) 845 (1941) (where plaintiff crossed in front

other states,[8] a plaintiff has been automatically barred from recovery on the basis of contributory negligence when he has attempted to cross in front of a train which he knew was approaching.[9]

The common law did not allow recovery by a plaintiff who had been contributorily negligent, but since this has often worked an injustice some states have passed statutes permitting the courts to mitigate the damages according to the comparative degree of negligence of the parties. Courts generally disliking the strict rule of contributory negligence, have also sought to avoid its results by the doctrine of the last clear chance whenever it is applicable. By this doctrine a plaintiff may recover, if his negligence preceded that of the defendant, and if the defendant knowing of the plaintiff's negligence is the last one who may avoid the accident. This will be effective, however, only if the defendant knows or should, by the exercise of reasonable care, know of the peril of the helpless or non-perceiving plaintiff and has an opportunity to avoid it after acquiring knowledge of the situation.[10] Unless it can be proved that the defendant could have avoided the injury but for his later negligence, the negligence of the plaintiff will be a defense against his liability.[11]

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of train he knew was approaching); Louisville and Nashville R. R. Co. v. Mitchell's Adm'x., 276 Ky. 671, 124 S. W. (2d) 1025 (1939) (where plaintiff crossed in front of train known to be approaching); Franklin v. Louisville and Nashville R. R. Co., 267 Ky. 577, 102 S. W. (2d) 1010 (1937) (where plaintiff crossed while signal lights were flashing); Barrett's Adm'r. v. Louisville and Nashville R. R. Co., 206 Ky. 662, 268 S. W. 283 (1924) (where plaintiff crossed in front of train he knew was approaching).

[8] Conrad v. Wheelock et al, 24 F. (2d) 996 (S. D. Ill. 1928); Bunton v. Atchison T. and S. F. Ry. Co., 100 Kan. 165, 163 Pac. 801 (1917); Akerson v. Great Northern Ry. Co., 158 Minn. 369, 197 N. W. 842 (1924); Chicago, R. I. and P. Ry. Co. v. Jones et al, 166 Okla. 291, 27 P. (2d) 593 (1933); Feudale v. Hines, 271 Pa. 199, 114 Atl. 497 (1921).

[9] Compare Samkiwicz v. Atlantic City R. R. Co., 82 N. J. L. 478, 81 Atl. 833 (1911) (which holds that running in front of an oncoming train when lights are flashing does not necessarily constitute contributory negligence) with cases cited *supra* note 8.

[10] Clere's Adm'r. v. Chesapeake and Ohio Ry. Co., 253 Ky. 700, 70 S. W. (2d) 16 (1934) (where engineer with proper lookout could have seen at 400 feet the stalled automobile on tracks); Pollard v. Oregon Short Line R. R. Co., 92 Mont. 119, 11 P. (2d) 271 (1932) (where engineer saw stalled truck on tracks at distance of 500 feet but did not stop); Adams v. Thompson, ——Mo.—— 178 S. W. (2d) 779 (1944); Clark v. Boston and Maine R. R. Co., 87 N. H. 434, 182 Atl. 175 (1935) (when train was 192 feet from plaintiff, who was standing upon the tracks, question of last clear chance sent to jury, since defendant could have stopped in 100 feet).

[11] Ellerman v. Pacific Electric Ry. Co., 7 Cal. App. (2d) 385, 47 P. (2d) 521 (1935) (defendant not liable since he applied brakes as soon as he realized plaintiff's peril); Landers v. Erie R. R. Co., 244 Fed. 72 (C. C. A. 6, 1917) (where defendant could not have avoided injury since interval of time between catching of plain-

In contrast to this rule in the United States is the English rule as exemplified by the decision in *British Columbia Electric Railway Company* v *Loach.*[12] In that case the decedent while riding in a wagon was killed by the defendant's train. He was negligent in crossing in front of the train without looking in either direction or stopping. Due to the prior negligence of the defendant in starting out with defective brakes and due to his excessive speed, the train could not be stopped soon enough to avoid hitting the wagon. The jury found that had the brakes been good the engineer could have stopped between the time when he discovered the wagon on the tracks and the time that it took the train to reach the wagon. The court decided in favor of the plaintiff, holding that it was the defendant's negligence in taking the train out of the barn in the morning with defective brakes that caused the injury, and that therefore the plaintiff's negligence had no effect upon the accident as the defendant could not have stopped under the circumstances. The effect of this rule is that while the original negligence of the defendant prevents him from having the last clear chance, this resting in the plaintiff, he is still held liable for an act which may or may not be foreseeable, but over which he does not have any control at the time that it occurs.

This rule has been repudiated in Kentucky by the case of *Braden's Administratrix v. Liston.*[13] In that case the plaintiff's decedent negligently stepped into the street and was hit by the defendant, who was driving a car with defective brakes. The Court held that the defendant was required to use only ordinary care with the means he then had available to avoid hitting the decedent, and gave judgment for the defendant. While these two cases are certainly parallel they reach different results, and, assuming that the American doctrine of the last clear chance is correct, it can be said that the decision in the second case is the sounder of the two.

The English and Kentucky cases are parallel to the case under discussion. The negligence of the defendant in allowing the hole to remain in the right-of-way corresponds to the negligence of the defendants above in having defective brakes. In all three cases the plaintiff negligently stepped in front of the oncoming vehicle and was injured even though the respective defendants did the best that they could do under the circumstances to avoid the accident. In all cases the defendant's negligence was a continuing one that would not have caused the injury had it not been for the later negligence of the plaintiffs. The American doctrine of last clear chance means literally the last and clear chance. In none of these

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tiff's foot upon track and the collision was too short); Thing v. Southern Pacific Co., 31 F. (2d) 36 (C. C. A. 9, 1929) (where defendant warned plaintiff of his oncoming railroad motor car and applied brakes as soon as possible).

[12] 1 A. C. 719 (1916).

[13] 258 Ky. 44, 79 S. W. (2d) 241 (1934).

three cases did the defendant have the last clear chance, yet in the English case and in the Pope case the courts decided in favor of the plaintiffs.

In view of the great weight of authority in the United States it would seem that this decision is incorrect. The accident would not have ocurred but for the negligence of the plaintiff, which was, therefore, a substantial factor in producing the injury. Since he knew of the approach of the train and of the few seconds that he was allowing himself, it would appear that he did not act as a reasonable man under the circumstances. On the other hand, the negligence of the defendant was a continuing act, and as he did not have the last clear chance, but did all that it was possible for him to do under the circumstances, he should not be held liable.

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