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# Proximate Cause, Settlement, Last Clear Chance, Standard of Care in Emergencies

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# NOTES

## PROXIMATE CAUSE, SETTLEMENT, LAST CLEAR CHANCE, STANDARD OF CARE IN EMERGENCIES

In *Moreland* v *Stone,* 297 Ky 521, 166 S.W (2d) 998 (1942), the holding in the case is based upon the following set of facts assumed to be in evidence One Larrison was driving a truck on the sixteen feet wide highway between Winchester and Irvine, Kentucky Just as he was approaching a left curve in the road, one Snowden started around him in another truck. The court assumes from the evidence that Snowden was already alongside Larrison when the defendant appeared, coming from the opposite direction. On discovery by defendant of his predicament he believed he would be unable to stop in time to avoid a collision and there was not adequate space on the highway for all three. Defendant accordingly turned to the right off the road onto a cross-road. In doing so he struck an old woman, plaintiff's intestate, sitting near the highway in a chair and killed her instantly Plaintiff sued Stone and Snowden jointly for damages for wrongful death, but before trial he settled with Snowden for the nominal sum of $100 and prosecuted the action against defendant Stone only Defendant obtained from the trial court an emergency instruction to the jury under which the jury exonerated defendant from liability for negligence. The theory was that, being faced with an emergency, he used the ordinary care that a prudent man should exercise when faced with a similar emergency and so was not liable for the result.[1]

The writer of this note has not seen the record, but he is informed by the courtesy of one of the attorneys in the case that the evidence was not reported officially and that the trial judge declined his help in making up the bystander's bill. Accordingly the attorney for each side wrote out and submitted the facts which he considered were established by the evidence. The court thereupon incorporated both statements in the bill of exceptions.

[1] Evans, *Standard of Care in Emergencies* (1943) 31 Ky. L. J. 207.

The plaintiff settled before trial with Snowden for a nominal sum in the belief that the evidence would show that Snowden was not alongside Larrison but had only started around and was dropping back. The inference, then, is that defendant had plenty of space on the highway and that Snowden's conduct was not sufficient to drive defendant from the road.

Why did not defendant also plead payment by his concurrent tort-feasor, Snowden? He might well anticipate that he could not establish an emergency One reason may be that he felt it unwise to plead that he was a tort-feasor, though such a plea, while formally inconsistent with his claim of non-negligence, is permissible inasmuch as he cannot in advance surely know what the evidence will prove. It is also true that a settlement is not the equivalent of a satisfied judgment. The defendant Stone paid the sum of $100 in consideration of the dismissal of himself as a party defendant. This probably should be construed as a dismissal with prejudice. It would seem, therefore, that Snowden would not be prevented from suing defendant for contribution,[2] nor would it prevent defendant, in the event that he should be cast in damages, from suing Snowden for contribution. Perhaps defendant exercised the better strategy, especially since plaintiff's case turned out as it did. If defendant and Snowden were joint tort-feasors, each would be liable individually for the whole loss, inasmuch as damages for wrongful death are not apportionable.[3]

It seems that defendant did not plead contributory negligence properly to interpose it as a defense. One is surprised that it was not pleaded. The court intimates that there is no evidence of it. Yet the evidence most favorable to her placed the decedent, an old woman of 86, at some 8 to 10 feet from the road, sitting in a chair. After the court held that contributory negligence was not properly pleaded and had decided to give the emergency instruction, plaintiff asked for a last clear chance instruction, because he considered that the emergency instruction given permitted the jury to believe that the decedent was too close to the highway There was no pleading directly in support of the emergency instruction but that has been held to be un-

[2] K. R. S. sec. 412.030.

[3] See PROSSER, TORTS (1941) 330.

necessary [4] Plaintiff, however, was misled in his belief[5] that the emergency instruction is a novelty in Kentucky,[6] his contention being probably that it was new in this factual situation.

The problem of causation was not discussed by the court. The evidence was conflicting. Defendant attempted to show that Snowden was beside Larrison at the time defendant turned from the highway, that defendant was travelling 30 miles per hour; that Snowden and Larrison were driving at 30–35 miles per hour; and that defendant saw the two trucks when he was only 40 feet away from them on the apex of the curve, when he put on his brakes and left the road, going up a side road which intersected the main highway at that point. Plaintiff's evidence was to the effect that Snowden had only started around Larrison and that he was dropping back and that, therefore, there was no occasion for defendant to leave the road, that even if decedent were closer to the highway than was prudent, yet defendant had the last clear chance to avoid the catastrophe if he had exercised the care which due prudence demanded. The act of Snowden was (a) either the direct and unbroken cause[7] or (b) defendant's act was a dependent intervening cause which was foreseeable by Snowden.[8] For the consequence of this intervening act defendant was not liable, due to the emergency Plaintiff, however, denies the proposition that Snowden's act was causal. It was only the occasion for defendant leaving the highway It was negligent of defendant, he asserts, to fail to observe that Snowden was falling back behind the other truck.[9]

This case is interesting in many ways, first, because of the condition of the record as it came to the appellate court, then because of the settlement which, as matters turned out, prevented plaintiff from continuing the suit against Snowden for substantial damages, and finally, because of the possible elements of contributory negligence which defendant failed to plead and

[4] McKeever v. Batcheler, 219 Iowa 93, 257 N. W 567 (1934). Cf. Evans, *supra* note 1, at note 6.

[5] Moreland v. Stone, 292 Ky. 521, at 525.

[6] See Louisville Taxicab Co. v. Ramey, 222 Ky. 286, 288, 300 S. W 890, 891 (1928).

[7] See Scott v. Shepherd, 2 W Bl. 892, 96 Eng. Rep. 525 (K. B. 1773).

[8] See RESTATEMENT, TORTS, sec. 443.

[9] See RESTATEMENT, TORTS, secs. 431-435, 440-443.

the last clear chance, of which plaintiff was not allowed to make use. There appears to be no reason why plaintiff's request for a last clear chance instruction should not have been given, in view of the sharp conflict in testimony This is one more of the growing list of cases involving the emergency doctrine.

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