Last Clear Chance and the Humanitarian Doctrine in Kentucky

John C. Bagwell

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NOTES

LAST CLEAR CHANCE AND THE HUMANITARIAN DOCTRINE IN KENTUCKY.

It is a well settled principle of law that one who is injured by the negligent conduct of another cannot complain where his own negligence has contributed to his injury.1 This principle of law will permit the defendant to escape on account of the contributing unreasonable conduct of the plaintiff.2 But this plea of contributory negligence, even though widely accepted, has not been so easy for the defendant. Since the day of Davies v. Mann,3 the doctrine of last clear chance has haunted the confines of contributory negligence, and ever since the courts have wrestled vainly to effect a compromise between the two. The former is relied upon by the plaintiff, while the latter plea of contributory negligence is utilized by the defendant. If the plaintiff had the last chance to get out of the way and failed, it would merely be a continuation of his contributory negligence; hence there would be no point in the defendant trying to bring in the last clear chance.

The following are suggested ways out of the clash between contributory negligence and the doctrine of last clear chance:

(1) An interpretation of Davies v. Mann4 by saying that the plaintiff's negligence in leaving the donkey in the road was not the cause but the occasion for the injury. It follows that this is not a case to apply the principle of contributory negligence. The only question is whether the defendant could have prevented the injury by ordinary care. If he could, his negligence is the sole cause of the injury.5

(2) Contributory negligence applies only in cases of simultaneous negligence, while the doctrine of last clear chance applies only to cases of successive negligence.6

(3) The last clear chance doctrine is applicable only where

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1 The contributory negligence of the plaintiff must be a substantial cause to defeat him. Burdick, Law of Torts, Fourth Ed. p. 522.
2 6 Univ. of N. C. L. R. 3.
3 *10 M. & W. 546 (1842).
4 Supra note 3.
negligence of the defendant is proximate and negligence of the
plaintiff is remote. In other words, proximate cause is the test
of applicability of last clear chance. This really lines up with
No. 1, supra.7

(4) The doctrine of last clear chance simply furnishes a
test of proximate cause. This is just the reverse of No. 3 supra.8

(5) The last opportunity which the defendant ought to
have had is equivalent in law to the one which he actually had.
This is an extreme case in that the plaintiff wins though guilty
of contributory negligence, and in fact has the last clear
chance.9

Without going into the difficulties with which the terms
“simultaneous” and “successive” are fraught, it is believed
that the best one of the five suggestions is to be found in the
case of Nieboer v. Detroit Electric Ry.10 A collection of cases
in A. L. R.11 seem to bear out the statement that in order to
have a situation to which the doctrine of last clear chance will
apply, the defendant’s negligence must have intervened or con-
tinued after the negligence on the part of the plaintiff or
deceased has terminated.12 It should be noted that the case of
Davies v. Mann,13 where the doctrine of last clear chance orig-
inated, was one of successive negligence. With this much in
mind, the question arises: To what situations will the doctrine
of last clear chance apply? The following situations are sub-
mitted:14

1 Drown v. Northern Ohio Traction Co., 76 Ohio St. 234, 81 N. E.
326.
* Fuller v. Illinois Central R. Co., 100 Miss. 705, 56 So. 783.
The deceased was guilty of contributory negligence in failing to look
out for the car before entering upon the track. The defendant com-
pany was guilty of negligence in running at an excessive rate of speed
with defective brakes. The driver of the car saw the plaintiff in ample
time to stop had his brakes been good. The Privy Council held the
company liable, notwithstanding the contributory negligence of the
deceased. This is the leading case in England qualifying the doctrine
of last clear chance.
10 Supra note 6.
12 See the situation where the plaintiff is allowed to recover under
the humanitarian doctrine, infra. A case like Butterfield v. Forrester,
10 East 60, does not fall within the last clear chance, for there the
defendant’s negligence had ceased when the plaintiff negligently drove
his horse into the obstruction in the highway.
13 Supra note 3.
14 29 Y. L. J. 896
(1) The plaintiff has placed himself (or his property) in a position of helpless peril from which in all likelihood he cannot even at the last moment extricate himself. The defendant has notice of such peril in time, by the exercise of ordinary care, to avoid injury to the plaintiff.

(2) The plaintiff could by the use of care remove himself from the position of peril in which he has negligently placed himself, but he negligently remains unconscious of his peril. The defendant has notice of the plaintiff's peril and of plaintiff's unconsciousness thereof in time, by use of care on his (defendant's) part, to avoid injury to the plaintiff.

(3) The plaintiff as in the first situation, has negligently placed himself in a position of helpless peril from which he probably cannot at the last moment extricate himself. The defendant is not aware of plaintiff's peril, yet by using due care (under a duty, of course) he could have discovered it in time to enable him, by the use of care, to avoid injury to the plaintiff.

(4) The plaintiff, as in the second situation, has by his negligence placed himself in a position of peril, from which however, he could by the use of care at the last moment extricate himself. The defendant, had he used care, could have discovered plaintiff's peril and could have avoided the injury to him.

(5) The plaintiff negligently places himself in a position from which he could, by the use of care, remove himself. The defendant, by some prior act of negligence, cannot, by the use of utmost care at the time, avoid injury to the plaintiff.

Recovery by the plaintiff is generally allowed in the first three situations. Recovery in the fourth situation is allowed in a few jurisdictions, notably Missouri, under the humanitarian

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28 See note to 29 Y. L. J. 896, to the effect that the doctrine applies alike to property and personal injuries.
29 If the plaintiff is a trespasser, his recovery will depend on the local law as to duty to trespassers. If there is no duty owing to unseen trespassers, neither contributory negligence nor last clear chance is applicable.
30 Of course, in a case of this kind, if defendant's acts are so wanton and reckless as to be willful, it is not a case of negligence at all, and neither contributory negligence nor last clear chance apply. Rowen v. N. Y., N. H. & H. R. Co., 59 Conn. 364, 21 Atl. 1073.
31 A situation as found in the British Columbia Ry. Co. v. Loach, supra note 9.
32 See cases in 29 Y. L. J. 896 supra note 14.
In the case of British Columbia Ry. Co. v. Loach, a recent case in the British Privy Council, the plaintiff was permitted to recover under situation five. Professor Bohlen states the American position: "So the overwhelming weight of authority in America is to the effect that a precedent act of negligence, whether of commission or omission, whereby the defendant has put it out of his power to avert the accident after discovering that it is impending, does not make him responsible to a plaintiff who has, through his negligence, exposed himself to the peril, and, this is so though the plaintiff's negligence consists not merely of an inadvertence or absent-mindedness which precludes him from exercising his power of self-protection, but is some more or less deliberate act which placed him in a helpless position in the path of the danger." Professor Bohlen goes on to say that those jurisdictions which have accepted the humanitarian view might properly take this final step. They have already repudiated the theory of allowing recovery only where the defendant's negligence is subsequent to the plaintiff's.

Where does the last clear chance leave off and where does the humanitarian doctrine begin? The Missouri case of Bechenwald v. Metropolitan St. Ry. Co. gives the following statement of the latter doctrine: "Where the injury produced by the concurrent negligence of both plaintiff and defendant, if the defendant before the injury discovered or by the exercise of ordinary care could or might have discovered the perilous situation in which the plaintiff was placed by the concurring negligence of both parties and neglected to use the means at his command to prevent the injury, then his plea of contributory negligence shall not avail him." The critical point of difference between the two doctrines is that the phrase "could or might have discovered" imposes a duty on the defendant to discover the plaintiff's situation even though his (plaintiff's) negligence continues up to the time of the injury. It is clear that if the plaintiff's negligence has ceased before the defendant's the case falls within situation (3) supra, and is nothing

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20 See Clark, Tort Liability for Negligence in Missouri, Mo. Law Bul. Law Series 12, p. 3.
21 Supra note 9.
23 121 Mo. App. 595 (1906).
more than a case where the defendant has the last clear chance, being under a duty to discover the plaintiff's position of helpless peril. In other words, under the humanitarian view, the plaintiff and defendant are equally guilty of inadvertence continuing until the opportunity to control the event is over. In fact, the doctrine of last clear chance is not applicable, for neither of the parties has the last chance. This humanitarian doctrine is variously referred to as a qualification, or refinement or extension of the doctrine of last clear chance. At any rate, the application of the two rules gives widely different results.

Which of the two doctrines does the Kentucky Court apply? In *Ross v. Louisville Taxicab and Transfer Co.*, the plaintiff was attempting to cross a street thirty-eight feet wide. He saw the taxicab coming three hundred feet away, but went ahead and was struck by the cab when about two-thirds of the way across. Nothing prevented the chauffeur from seeing him, as he was in plain view from the time he started across. The court said: "The rule is that though the plaintiff may have been negligent in crossing the street, still he may recover if after his peril is discovered or by ordinary care should be discovered, the driver of the vehicle by ordinary care may avoid the injury to him." The court said this rule was adopted in 1856, and had been consistently followed since. But what is this rule? It is necessary to look closely to the facts of each case. Under these facts, this is plainly the humanitarian doctrine. The plaintiff may recover here even though he was negligent right up to the time of the accident and the defendant did not even discover him. He should have discovered, the court says. The last clear chance is not applicable here. Either the plaintiff loses under the rule of contributory negligence, or else he recovers under the humanitarian doctrine, which imposed a duty on him to discover the plaintiff's concurrent negligence.

In the *Ross* case the court says the last clear chance doc-

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24 Such a case is illustrated where a drunken trespasser is killed while asleep on the defendant's track at a point where a lookout duty existed. Recovery has been allowed under the doctrine of last clear chance, upon the ground that the deceased's negligence terminated upon his lying down on the track. *Pickett v. Wilmington & W. R. Co.*, 117 N. C. 616, 25 S. E. 264.

25 202 Ky. 828.

26 The case was sent back for a new trial in accordance with the instruction here.

27 Supra note 25.
trine referred to in *L. & N. R. R. Co. v. Trisler*,²⁸ is a very different thing from the rule laid down in the Ross case. In the Trisler case the plaintiff, an employee of the defendant company, was walking alongside track No. 3 near the station at Lexington. The defendant’s train usually came in on either track 1 or 2, but this time it came in on No. 3. The engineer saw the plaintiff, but gave no signal until within seven or eight feet, just after plaintiff stepped on the track where he was struck. The court ruled that the evidence showed clearly that the plaintiff had a right to believe it perfectly safe to walk on track No. 3, when the train usually came in on either 1 or 2. In other words, the court ruled that the plaintiff was not guilty of negligence and permitted him to recover. The defendant company tried to invoke the doctrine of last clear chance, and the court said it had never applied in this state. Obviously, there are two reasons why the doctrine would not apply here; first, because (as pointed out in the first part of the paper) it has no function to perform for the defendant, and second, the court ruled here that the plaintiff was not guilty of any negligence. It is simply a case where the defendant is the only one guilty of misconduct.

The rule in *Ross v. Louisville Taxicab & Transfer Co.*²⁹ was said to have originated in 1856, and to have been consistently followed since. The 1856 case referred to is *L. & N. R. R. Co. v. Yandell.*³⁰ The plaintiff sued the defendant company for injury to his slave caused by the negligence of the defendant’s employees. The court said: “In regard to the second instruction asked by the defendants, we would merely remark, that if, as supposed in the instruction, the slave, Henry, voluntarily took a perilous position, and thereby contributed to the injury, still, it might have been prevented by the observance of due and proper care and caution by the conductor and engineer—that is, by the exercise of ordinary care and prudence by them, the defendants are not exonerated from responsibility.” This appears to be a statement of the humanitarian doctrine. It says in effect, that even though the slave was negligent and contributed to his own injury, yet the plaintiff can recover if the

²⁸ 140 Ky. 451.
²⁹ Supra note 25.
defendants could have prevented the injury by the exercise of ordinary care.31

In L. & N. R. R. Co. v. Lowe,32 the plaintiff, a car inspector for defendant, was walking down the track facing the direction from which a train was due. Employees of the company ran over plaintiff from behind with an engine. It appeared that the plaintiff kept a lookout ahead, expecting a train from that direction, but did not attend to what was going on behind him. The evidence as to a signal was conflicting. The plaintiff recovered and the defendant excepted to an instruction which was in substance as follows: Plaintiff could not recover if but for his negligence the injury would not have happened, unless appellant’s agents in charge of the engine and tender knew, or could by ordinary care have known, of the peril in which his negligence had placed him, and thereafter failed to observe reasonable care to avoid the injury which ensued.” The Court of Appeals found no error in this instruction.33 The plaintiff’s negligence here, under the instruction, could continue right down to the time of the accident, or, in other words, concur with the negligence of the defendant, yet the plaintiff could recover even though the defendant did not in fact know of the former’s peril. This is a clear statement of the humanitarian doctrine. Last clear chance will not apply, for neither of them has the last chance.

So far it appears that the humanitarian rule has been applied in this state, but the cases are not clear on what is being applied. As pointed out heretofore, the court in L. & N. R. R. Co. v. Trisler34 said the last clear chance doctrine had never applied. In Blackman v. Streicher35 the court held that the lower court’s refusal to instruct on the last clear chance doctrine was proper. The instruction so labeled read thus: ‘‘The court instructs the jury that even though they may believe defendant was guilty of negligence that contributed to cause or bring about his injuries if they further believe defendant saw plaintiff’s

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31 The case was sent back for a new trial in accordance with this opinion. Since the facts do not show whether the engineer and conductor knew or merely should have known of the slave’s perilous condition, the case might be interpreted otherwise, but the interpretation here seems to be a fair one.
32 118 Ky. 260.
33 The case was reversed on other grounds.
34 Supra note 28.
35 205 Ky. 773.
peril in time to have avoided striking him by the exercise of ordinary care after defendant had discovered the plaintiff’s peril, if he did so discover it, then the jury should find for the plaintiff notwithstanding his own negligence if any.” This is the last clear chance and differs markedly from the doctrine applied in the preceding case, in that this is *discovered peril* and not “should have discovered.” The facts in this case were similar to those in *Ross v. Louisville Taxicab & Transfer Co.* The reason given for refusal to instruct on last clear chance was the absence of evidence that defendant saw or knew of plaintiff’s presence on the street until the moment the car struck him. The case was decided for the defendant and seems inconsistent with the holding in the Ross case.

The recent case of *Peak v. Arnett* says that it is not disputed that the doctrine of last clear chance prevails in this state. The doctrine is correctly stated in these words: “... if the driver for the defendants discovered the peril of the appellant in time, by the exercise of ordinary care, to avoid injuring him and failed to do so, and thereby caused the injury to the plaintiff, then the law was for the plaintiff.” But the court said the doctrine had no application to a case like the principal one where the plaintiff stepped suddenly in front of defendant’s moving car. The statement is perfectly true that the doctrine has no application to such facts, but do the cases cited support the assertion that the doctrine prevails in this state? The first case cited is *Louisville Ry. Co. v. Broaddus* in which the court said the instruction upon contributory negligence should be modified, if there was evidence to warrant such, to permit plaintiff to recover, although he was negligent, if the defendant saw, or by the exercise of ordinary care *could have seen* the peril of plaintiff in time to have avoided injury to him. It need hardly be said that this is not the last clear chance. No better statement of the humanitarian doctrine can be found.

In the second case cited, the court uses the term “last clear chance,” and in reversing the judgment for a new trial, says that if, on the next trial, the evidence was substantially as

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25 Supra note 25.
26 233 Ky. 756, 26 S. W. (2d) 1035 (1930).
27 180 Ky. 298.
it was on the first (showing contributory negligence) the question of last clear chance should be submitted to the jury. Since no statement is made as to what the court regards the doctrine to be, the case really shows nothing about the status of the question in this state. The next case of Manwaring v. Geisler uses the expression "last clear chance," but it, like the preceding one, offers little help, for it simply says that under the averments of negligence instruction on the doctrine is not authorized. The other case cited in support of the statement that the last clear chance doctrine prevails in Kentucky is Paducah Traction Co. v. Walker. The doctrine there laid down, though called the last clear chance, is exactly the same as recited in Louisville Ry. Co. v. Broaddus. The conclusion to be drawn from these four cases is that they do not show an application of last clear chance, but on the contrary, two of them show positively that the humanitarian rule is the law.

There are numerous other cases in which the humanitarian doctrine has been upheld.

SUMMARY: Courts have offered several ways to get around the clash between contributory negligence on the one hand and last clear chance on the other. The most plausible of these seems to be found in Nieboer v. Detroit Electric Ry. Contributory negligence applies to cases of simultaneous negligence, while last clear chance is applicable only to cases of successive negligence where defendant's negligence intervenes or continues after the plaintiff's negligence has terminated. Hence, the plaintiff is the only one to invoke the doctrine.

The last clear chance has been extended in a few jurisdictions to permit recovery under what is called the "humanitarian rule." A party losing under the last clear chance can recover by application of the latter. The real point of distinction between the two is that under the humanitarian doctrine the plain-

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*196 Ky. 110.
*169 Ky. 721.
*Supra note 38.
*Supra note 6.
tiff is actively negligent, not helpless, and could by waking up to his condition remove himself from danger, while the defendant is unaware of plaintiff's peril, yet if he had used care he could have discovered plaintiff's condition in time to avoid the injury. Under such a state of facts the plaintiff is allowed to recover.

The Kentucky court uniformly applies the humanitarian doctrine. The origin apparently dates back to the 1856 case of L. & N. R. R. Co. v. Yandel. Some cases specifically say the doctrine of last clear chance has never applied in this state, (L. & N. R. R. Co. v. Trisler), while a recent case says there is no doubt but that it is the rule. Another case recites the doctrine perfectly but holds it not applicable to the facts. The safe conclusion seems to be that the courts have uniformly applied the humanitarian doctrine, but have frequently labeled it the last clear chance. The usual phrase used in instructing the jury is that the plaintiff may recover despite his negligence (active right up to the moment of the injury), if the defendant discovered or could have discovered the plaintiff's perilous condition in time to avoid the injury, by the use of ordinary care. Under such a rule, the injured party may run amuck while a negligent defendant, not knowing of his negligence, must pay. Obviously, too much advantage is given to the injured party.

JOHN C. BAGWELL.

* Supra note 30.
* Supra note 28.
* Supra note 37.
* Supra note 35.
* Supra note 25.