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Article 17

Torts--Last Clear Chance--Degree of Knowledge Required (Kumkumian v. City of New York, 305 N.Y. 167 (1953))

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of the language used that Section 337 was intended to protect the publication of *all* fair and true reports whether published maliciously or not, it is submitted that such an intendment is contrary to all principles of justice and decency, and should not be attributed to the legislature. Such an interpretation would make it possible for a malevolent judge to include harsh, sarcastic, and irrelevant defamatory matter in a judicial opinion and forward copies to the daily press and periodicals of general circulation. However true it may be that the public is entitled to know all matters of public interest, the position that a statute could be intended to protect startling vituperation and railing denunciation is untenable. Censure or removal of a judge would appear to be inadequate for conduct so malicious, resulting in great harm to individual reputation.

Although the *Pette* case decides that Section 337 would protect a judge who affirmatively acts to publish his own opinions, it is submitted that with regard to strictly unofficial publications, the requirement of freedom from actual malice should attach.

With such a qualification, the *Pette* case is undoubtedly correct in according the protection of Section 337 to a judge in the same manner as to any other individual. To further clarify the issue, it is suggested that the New York Law Journal and the New York Supplement be accorded the judicial status which they so justly deserve. It cannot be doubted that they both form a constituent part of the judicial process, being cited by attorneys and judges and circulating valuable legal information to members of the legal profession.

TORTS — LAST CLEAR CHANCE — DEGREE OF KNOWLEDGE REQUIRED.—Deceased, having negligently entered a subway tunnel, was struck by a train of the defendant six hundred feet from the nearest station. The train was stopped three times by the release of an emergency brake before an investigation was conducted which revealed the body. One of several ways that this brake could be actuated was by a mechanism, suspended before each car, striking an object on the tracks. The Court of Appeals, in granting a new trial, *held* that the doctrine of last clear chance was applicable since defendant had knowledge of facts from which he could have deduced possible danger, and yet failed to take appropriate action. *Kumkumian v. City of New York*, 305 N. Y. 167, 111 N. E. 2d 865 (1953).

Under the doctrine of last clear chance an injured plaintiff, although his contributory negligence placed him in a position of peril,[1]

[1] *See* Mast v. Illinois Cent. R. R., 79 F. Supp. 149, 160 (N. D. Iowa 1948), *aff'd*, 176 F. 2d 157 (8th Cir. 1949); Lee v. Pennsylvania R. R., 269 N. Y.

may recover from a negligent defendant who had knowledge of that peril.[2] Where the defendant has failed to exercise reasonable care to avoid the accident,[3] although he had a last clear opportunity to do so,[4] his negligence is deemed the proximate cause of the injury. Under such circumstances, the negligence of the plaintiff is considered remote.[5] In some jurisdictions, the application of last clear chance is limited strictly to situations in which the defendant had actual knowledge of the danger to the plaintiff.[6] In others, it is sufficient if the defendant had constructive knowledge [7] of the fact that the injured person, although not yet in danger, was placing himself in peril.[8] The majority view,[9] however, is between these two extremes. To determine the requisite of knowledge in these jurisdictions, an objective test is applied—namely, that the defendant could have discovered the danger to the plaintiff by the exercise of reasonable care.[10]

Until recently, New York had required actual knowledge on the part of the defendant [11] as a prerequisite to the application of last

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53, 55, 198 N. E. 629, 630 (1935); Selinsky v. Olsen, 38 Cal. 2d 102, 237 P. 2d 645, 646-647 (1951); Lund v. Pacific Elec. Ry., 25 Cal. 2d 287, 153 P. 2d 705, 710 (1944). The defense of contributory negligence dates back to the early English case of Butterfield v. Forrester, 11 East 60, 103 Eng. Rep. 926 (K. B. 1809).

[2] Storr v. New York Cent. R. R., 261 N. Y. 348, 185 N. E. 407 (1933); Dulemba v. Tribble, 325 Mich. 143, 37 N. W. 2d 894 (1949); see Jerrell v. New York Cent. R. R., 68 F. 2d 856 (2d Cir.), *cert. denied*, 292 U. S. 646 (1934).

[3] Nielsen v. Richman, 68 S. D. 104, 299 N. W. 74 (1941); *see* Caplan v. Arndt, 123 Conn. 585, 196 Atl. 631, 633 (1938).

[4] United States v. Morow, 182 F. 2d 986 (D. C. Cir. 1950); Snyder v. Union Ry., 234 App. Div. 320, 255 N. Y. Supp. 155 (1st Dep't 1932); *see* Rogers v. Interstate Transit Co., 212 Cal. 36, 297 Pac. 884, 888 (1931).

[5] *See* Rider v. Syracuse Rapid Transit Ry., 171 N. Y. 139, 147, 63 N. E. 836, 838 (1902); Nehring v. Connecticut Co., 86 Conn. 109, 84 Atl. 301, 305 (1912).

[6] Hamlin v. Roundy, 96 N. H. 123, 71 A. 2d 419 (1950); Rew v. Dorn, 160 Ore. 368, 85 P. 2d 1031 (1938).

[7] Smith v. Gould, 110 W. Va. 579, 159 S. E. 53 (1931).

[8] Perkins v. Terminal R. R. Ass'n of St. Louis, 340 Mo. 868, 102 S. W. 2d 915 (1937); see Coulson, *Last Clear Chance—Humanitarian Doctrine in Missouri*, 6 KAN. CITY L. REV. 235, for a discussion of the humanitarian doctrine in Missouri and the extreme situations to which it has been extended.

[9] See Note, 92 A. L. R. 47, 149 (1934).

[10] Puerto Rico Ry. Light & Power Co. v. Miranda, 62 F. 2d 479 (1st Cir. 1932), *cert. denied*, 289 U. S. 731 (1933); *see* Kansas City Southern Ry. v. Ellzey, 275 U. S. 236, 241 (1927); Doolan v. Werner, 130 Conn. 394, 34 A. 2d 731 (1943); Ward v. City Fuel Oil Co., 147 Fla. 320, 2 So. 2d 586, 587 (1941); Floeck v. Hoover, 52 N. M. 193, 195 P. 2d 86, 87 (1948); Virginia Ry. & Power Co. v. Smith & Hicks, Inc., 129 Va. 269, 105 S. E. 532, 534 (1921). In these jurisdictions the doctrine is not applied to situations in which the negligence of the plaintiff continues up to the time of the accident (as where he also had constructive knowledge of the danger) since such negligence cannot be considered remote; this is the major difference between these jurisdictions and those which follow the humanitarian doctrine. See Coulson, *supra* note 8 at 245.

[11] Hernandez v. Brooklyn & Queens Transit Corp., 284 N. Y. 535, 32

clear chance. However, in *Woloszynowski v. New York Cent. R. R.*,[12] Judge Cardozo initiated a trend toward a more liberal application of the doctrine by language implying that a defendant might possibly be held liable although he did not have actual knowledge of the peril.[13] Then the court in *Elliott v. New York Rapid Transit Corp.*[14] indicated that a defendant might be charged with the knowledge of danger which a reasonable man would infer from the facts brought to his attention.[15] Later, in *Chadwick v. City of New York*,[16] it was held unnecessary that a defendant have knowledge of the danger to the particular individual injured if he in fact knew that someone was in peril.[17]

The most recent extension of the doctrine appears in the principal case. The Appellate Division,[18] applying the law as heretofore existing in New York, held that the facts known to the defendant, namely, that the emergency brake had twice automatically operated, were insufficient in law to support an inference of actual knowledge that someone was in peril.[19] In reversing a dismissal of the complaint,[20] the Court of Appeals held the doctrine of last clear chance applicable. In so doing, they stated that it was a question of fact whether the failure to investigate after the second stop constituted "negligence so reckless as to betoken indifference to knowledge." [21]

In New York then, the requirement of knowledge is now satisfied by proof that the defendant had knowledge only of facts from

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N. E. 2d 542 (1940); Panarese v. Union Ry., 261 N. Y. 233, 185 N. E. 84 (1933); Storr v. New York Cent. R. R., 261 N. Y. 348, 185 N. E. 407 (1933); Wright v. Union Ry., 224 App. Div. 55, 229 N. Y. Supp. 162 (1st Dep't), *aff'd mem.*, 250 N. Y. 526, 166 N. E. 310 (1928); *see* Srogi v. New York Cent. R. R., 247 App. Div. 95, 96, 286 N. Y. Supp. 215, 217 (4th Dep't 1936).

[12] 254 N. Y. 206, 172 N. E. 471 (1930).

[13] ". . . [B]ut knowledge there must be, or negligence so reckless as to betoken indifference to knowledge." *Id.* at 209, 172 N. E. at 472.

[14] 293 N. Y. 145, 56 N. E. 2d 86 (1944).

[15] ". . . [T]he jury could have found that Dingle did not exercise due care when he failed to pull the emergency brake cord while the train moved fifty-three feet during which the deceased was *immediately before him* in a position of peril." *Id.* at 149-150, 56 N. E. 2d at 88.

[16] 301 N. Y. 176, 93 N. E. 2d 625 (1950).

[17] ". . . [I]t may not be categorically stated that its [last clear chance] applicability is limited to situations where a defendant has precise knowledge of both the exact nature of the danger and of the particular individual threatened so long as there is proof to support an inference that someone is in peril." *Id.* at 181, 93 N. E. 2d at 628.

[18] 280 App. Div. 32, 111 N. Y. S. 2d 395 (1st Dep't 1952).

[19] *Id.* at 34, 111 N. Y. S. 2d at 396. The court reasoned that there were several ways in which such brake could have been actuated, none of which would reasonably indicate danger to anyone, particularly considering the position of the train when stopped, which rendered it even more unlikely that the defendant had knowledge of danger to anyone.

[20] In the court below, although a verdict was directed for the defendant, the court overruled a motion of the defendant to dismiss the complaint.

[21] 305 N. Y. at 175, 111 N. E. 2d at 869.

which a reasonable man would infer possible danger. This interpretation of last clear chance is but one step from the majority view—that if an ordinary prudent man would have discovered the danger, regardless of the facts actually known, there is sufficient knowledge to satisfy the requirements of the doctrine. It would seem that the ultimate result of the present trend will be the application, in those cases otherwise within the scope of the doctrine, of a purely objective test of knowledge.

Some will argue that further extensions of the doctrine of last clear chance will culminate in completely obviating the defense of contributory negligence.[22] However, if the doctrine is viewed as a facet of the theory of proximate causation, it automatically limits itself to situations in which the negligence of the plaintiff can be said to be remote.[23] It is submitted that the more liberal application of the last clear chance doctrine in New York reflects a more humane attitude on the part of the courts which is wholly consistent with the present trend toward "plaintiff-mindedness." The courts are obviously attempting to ameliorate the harshness of the defense of contributory negligence by extending the application of the doctrine of last clear chance. This would be rendered to a great degree unnecessary if the doctrine of comparative negligence, which is in itself an ameliorating doctrine,[24] were adopted in this jurisdiction.[25]

WILLS—REVOCATION BY AFTER-BORN CHILD—INSURANCE POLICY "SETTLEMENT" WITHIN MEANING OF STATUTE.—Pursuant to Section 26 of the Decedent Estate Law, plaintiff sought, as an after-born child, to recover her intestate share from her father's estate. Prior to her birth, plaintiff's father executed a will, establishing a trust for her mother and sister but making no mention of, or provision for, plaintiff. Subsequently, he made plaintiff co-beneficiary of several insurance policies. On appeal, the Court *held* that the testator's designation of plaintiff as co-beneficiary of the insurance policies was a settlement under Section 26, precluding her from taking her intestate share as against her father's will. *Matter of Faber,* 305 N. Y. 200, 111 N. E. 2d 883 (1953).

At English common law, a will was presumably revoked by a subsequent marriage and birth of issue.[1] However, mere birth of issue alone, where a marriage existed at the time of the execution of

[22] *See* Panarese v. Union Ry., 261 N. Y. 233, 238, 185 N. E. 84, 86 (1933).
[23] Rider v. Syracuse Rapid Transit Ry., 171 N. Y. 139, 63 N. E. 836 (1902); Nehring v. Connecticut Co., 86 Conn. 109, 84 Atl. 301 (1912).
[24] *See* Steam Dredge No. 1, 134 Fed. 161, 168 (1st Cir. 1904).
[25] See Note, 27 ST. JOHN'S L. REV. 303 (1953).

[1] For a discussion of the common law, see Brush v. Wilkins, 4 Johns. Ch. 506, 510-16 (N. Y. 1820).