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Torts--Negligence--Last Clear Chance (Chadwick v. City of New York, 301 N.Y. 176 (1950))

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was defective when it first reached defendant's hands and that defendant failed to discover the defect; or, (2) defendant's handling of the bottle caused the defect and that defendant permitted it to go unnoticed. But direct evidence of the above facts is generally unobtainable because of the vast number of bottles generally handled by a person in defendant's position [6] and because such facts if they did exist would be peculiarly within the knowledge of the defendant or his agents. Therefore, the rule is that direct evidence need not be introduced; [7] the plaintiff may rely on circumstantial evidence.[8]

Plaintiff attempted to prove negligence by showing that defendant's method of inspection, although it was the one customarily used in the industry, was not the best and that there were other tests that would have exposed a thermal shock fracture in the bottle. If all of plaintiff's evidence is accepted as true, the instant case is correctly decided since the applicable rule of law under this given set of facts is that defendant merely perform the ordinary tests used by the rest of the industry.[9] Defendant is not bound to use a better method simply because one exists.[10]

The dissent argued that the defendant's negligence is a question of fact for the jury to decide, on the ground that the customary way of doing things may be the negligent way [11] and that the industry should not be protected from liability by a custom which it has developed for its own exemption.[12]

While the majority opinion is logically in accord with *stare decisis,* it is submitted that the dissent is sociologically sound in that it demands that more than a minimum protection be afforded the public.

TORTS — NEGLIGENCE — LAST CLEAR CHANCE. — Plaintiff's intestate, a ten year old boy, accompanied by his twelve year old brother, hitched a ride on defendant's truck. The boys crouched on a step fastened to the right front fender, out of the driver's sight, and held onto a perpendicular rod attached to the body of the truck

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[6] Licari v. Markotos, 110 Misc. 334, 180 N. Y. Supp. 278 (Sup. Ct. 1920).

[7] Saglimbeni v. West End Brewing Co., 274 App. Div. 201, 80 N. Y. S. 2d 635 (3d Dep't 1948), *aff'd,* 298 N. Y. 875, 84 N. E. 2d 638 (1949).

[8] *Ibid.*

[9] Smith v. Peerless Glass Co., 259 N. Y. 292, 181 N. E. 576 (1932); Curley v. Ruppert, 272 App. Div. 441, 71 N. Y. S. 2d 578 (1st Dep't 1947); Luciano v. Morgan, 267 App. Div. 785, 45 N. Y. S. 2d 502 (2d Dep't 1943).

[10] Garthe v. Ruppert, 264 N. Y. 290, 190 N. E. 643 (1934).

[11] Shannahan v. Empire Eng. Corp., 204 N. Y. 543, 98 N. E. 9 (1912); Bennett v. Long Island R. R., 163 N. Y. 1, 57 N. E. 79 (1900).

[12] *Ibid.*

just back of the cab. As the truck turned onto a bumpy unpaved road decedent was bounced from his perch, but clung to the handhold with his feet dragging in the roadway for a distance of three hundred feet. Finally he lost his grip and fell under the rear wheel, thereby sustaining fatal injuries. After the fall the driver continued on for about another two hundred feet. Decedent's brother testified that when decedent slipped, he, the brother, began banging on the cab window and screaming "Stop." The defendant's driver testified that he saw a little hand banging on the window and "so I figure something is in danger, must be, to be there . . . I stopped immediately right then." The Appellate Division affirmed the trial court's dismissal of the complaint. *Held,* reversed and a new trial granted. It was for the jury to determine whether the defendant's driver had in fact become actually aware of the danger, and whether he then ignored the warning in an unreasonable manner when he still had a last clear chance to avoid the accident. *Chadwick v. City of New York,* 301 N. Y. 176, 93 N. E. 2d 625 (1950).

The doctrine of last clear chance subjects the strict rule of contributory negligence to the qualification that the negligence of the plaintiff will not bar his recovery for injuries sustained if it be shown that the defendant, by the exercise of reasonable care and diligence, might have avoided the accident.[1] The reason for the rule lies in causation; the subsequent failure of the defendant to use due care becoming the sole proximate cause of the injury.[2] In New York and other minority jurisdictions, the application of this doctrine is restricted to situations wherein the knowledge of the peril has been brought home as an actual fact to the defendant, and he has then failed to exercise due care to prevent the injury while there was still a clear chance to so do.[3] Thus the three essential factors which must be found by the jury in order to apply the doctrine are (1) actual knowledge of the peril, (2) subsequent failure to use due care, and (3) injury proximately caused by this subsequent failure.[4]

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[1] Grand Truck Ry. v. Ives, 144 U. S. 408, 429 (1892).

[2] *See* Storr v. New York Central R. R., 261 N. Y. 348, 351, 185 N. E. 407, 408 (1933); see Note, 171 A. L. R. 365 (1947).

[3] Elliott v. New York Rapid Transit Corp., 293 N. Y. 145, 56 N. E. 2d 86 (1944); Hulsey v. Illinois Cent. R. R., 242 Ala. 136, 5 So. 2d 403 (1942); Gates v. Boston & Maine R. R., 93 N. H. 179, 37 A. 2d 474 (1944); Rew v. Dom, 160 Ore. 368, 85 P. 2d 1031 (1938); "The doctrine of the last clear chance, however, is never wakened into action unless and until there is brought home to the defendant to be charged with liability a knowledge that another is in a state of present peril, in which event there must be reasonable effort to counteract the peril and avert its consequences . . . . Knowledge may be established by circumstantial evidence, in the face even of professions of ignorance . . . but knowledge there must be, or negligence so reckless as to betoken indifference to knowledge." Woloszynowski v. N. Y. Central R. R., 254 N. Y. 206, 208, 172 N. E. 471, 472 (1930).

[4] Elliott v. New York Rapid Transit Corp., 293 N. Y. 145, 56 N. E. 2d 86 (1944).

The burden of proof is on the plaintiff to show that the defendant had actual knowledge of the situation,[5] and that the defendant's subsequent negligence was the cause of the injury.[6] This knowledge, although it must be actual, may be established by circumstantial evidence [7] even in the face of professed ignorance. In establishing causation it must be found that defendant had a last clear chance, and not merely a last possible chance,[8] and that defendant had sufficient time and present ability to prevent the injury.[9] Defendant need not risk injury to self or others,[10] nor must he use the best possible means since he is required only to act reasonably, not infallibly.[11] The doctrine is not applicable when it is found that defendant has done all in his power to prevent the injury; [12] likewise, it is not applicable when the negligent act of the plaintiff continues up until the time of the injury so that the negligence of the plaintiff coincides with that of the defendant and both combined operate as the efficient cause of the injury.[13]

In the instant case the defendant made the novel contention that even though the rapping on the window may have given rise to the inference that the decedent's brother was in peril, it would not warrant an inference that the decedent, unseen by the defendant's driver, was also in danger. The court in rejecting this contention held that the doctrine of last clear chance may not be limited categorically to situations wherein the defendant has precise knowledge of both the exact nature of the danger and of the particular individual threatened so long as there is proof that defendant actually knew that someone was in danger. The standard of conduct required is that of the ordinary reasonable man,[14] and if the jury finds actual knowledge of peril sufficient to move a reasonable man to exercise due care, the defendant is then bound to use such care to avoid injury.[15] The determination of the court in respect to this contention of the defendant is one of first impression and may well prove a landmark in the application of the last clear chance doctrine in New York.

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[5] Panarese v. The Union Ry., 261 N. Y. 233, 185 N. E. 84 (1933).

[6] *Ibid.*

[7] Woloszynowski v. N. Y. Central R. R., 254 N. Y. 206, 172 N. E. 471 (1930); *cf.* Bragg v. Central New England Ry., 228 N. Y. 54, 126 N. E. 253 (1920).

[8] Shultes v. Halpin, 205 P. 2d 1201 (Wash. 1949).

[9] Zickefoose v. Thompson, 347 Mo. 579, 148 S. W. 2d 784 (1941).

[10] *Ibid.*

[11] Chesapeake and O. Ry. v. Switzer, 275 Ky. 834, 122 S. W. 2d 967 (1938); Woloszynowski v. N. Y. Central R. R., 254 N. Y. 206, 172 N. E. 471 (1930).

[12] Wright v. Union Ry., 224 App. Div. 55, 229 N. Y. Supp 162 (1st Dep't 1928), *aff'd*, 250 N. Y. 526, 166 N. E. 310 (1929).

[13] Panarese v. The Union Ry., 261 N. Y. 233, 185 N. E. 84 (1933); Wright v. Union Ry., *supra* note 12.

[14] *Ibid.*

[15] Elliott v. New York Rapid Transit Corp., 293 N. Y. 145, 56 N. E. 2d 86 (1944); Panarese v. The Union Ry., 261 N. Y. 233, 185 N. E. 84 (1933).

It is submitted that in the instant case the testimony of plaintiff's witness and decedent's driver as to the warning given, together with the evidence pertaining to the driver's reaction to this warning, created issues of fact for the jury.

TORTS — RIGHT OF AN UNEMANCIPATED MINOR CHILD TO SUE PARENT IN TORT.—An unemancipated minor child was killed when a truck driven by his father plunged from a dangerous mountain road into a river. The father, who was intoxicated, forced his son to accompany him in the truck. The child's administrator brought an action for wrongful death [1] against the father's administrator. *Held,* judgment for plaintiff affirmed. An unemancipated minor child may maintain an action for damages against his parent for a "willful" tort. *Cowgill v. Boock,* 218 P. 2d 445 (Ore. 1950).

In most jurisdictions it is an established rule that an unemancipated minor child may not maintain an action in tort against his parent.[2] Some of these courts, however, have cautiously limited their holdings to negligent torts.[3]

This immunity doctrine and its rationale was first clearly laid down in *Hewlett v. George* [4] which was an action for false imprisonment, the court holding: "But, so long as the parent is under obligation to care for, guide and control, and the child is under reciprocal obligation to aid and comfort and obey, no such action as this can be maintained. The peace of society, and of the families composing society, and a sound public policy, designed to subserve the repose of

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[1] ORE. COMP. LAWS ANN. § 8-903 (1940): "When the death of a person is caused by the wrongful act or omission of another, the personal representative of the former . . . for the benefit of the estate of the deceased may maintain an action at law therefor against the latter, if the former might have maintained an action, had he lived, against the latter, for an injury done by the same act or omission . . . ."

[2] Rambo v. Rambo, 195 Ark. 832, 114 S. W. 2d 468 (1938), 24 VA. L. REV. 928; Mesite v. Kirchstein, 109 Conn. 77, 145 Atl. 753 (1929); Smith v. Smith, 81 Ind. App. 566, 142 N. E. 128 (1924); Hewlett v. George, 68 Miss. 703, 9 So. 885 (1891); Mannion v. Mannion, 3 N. J. Misc. Rep. 68, 129 Atl. 431 (1925); Small v. Morrison, 185 N. C. 577, 118 S. E. 12 (1923), 23 COL. L. REV. 686, 8 MINN. L. REV. 71; Matarese v. Matarese, 47 R. I. 131, 131 Atl. 198 (1925); Wick v. Wick, 192 Wis. 260, 212 N. W. 787 (1927); see Notes, 31 A. L. R. 1157 (1924), 71 A. L. R. 1071 (1931), 122 A. L. R. 1352 (1939); McCurdy, *Torts Between Persons in Domestic Relations,* 43 HARV. L. REV. 1030 (1930).

[3] *See* Bulloch v. Bulloch, 45 Ga. App. 1, 163 S. E. 708, 711 (1932); Luster v. Luster, 299 Mass. 480, 13 N. E. 2d 438, 440 (1938), 7 FORD. L. REV. 459, 86 U. OF PA. L. REV. 909; Cannon v. Cannon, 287 N. Y. 425, 40 N. E. 2d 236, 238 (1942).

[4] 68 Miss. 703, 9 So. 885 (1891).