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Torts--Last Clear Chance Doctrine--Last Possible Chance (Shultes v. Halpin, 205 P.2d 1201 (Wash. 1949))

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TORTS — LAST CLEAR CHANCE DOCTRINE — LAST POSSIBLE CHANCE.—Plaintiff made a left hand turn at an intersection into the path of defendant's car which was approaching from the south. A collision occurred resulting in injury to the plaintiff. From the uncontradicted evidence it appeared that defendant was negligent in driving at an unreasonable rate of speed and in failing to observe the caution light at the intersection. The defendant was unaware that the plaintiff intended to make a left turn until he was within fifty feet of the intersection, or only two seconds away in time. The lower court gave judgment to the plaintiff holding that the defendant observed the plaintiff in sufficient time to have averted the collision. *Held,* judgment reversed. The plaintiff was guilty of contributory negligence in that, as the disfavored driver,[1] he failed to yield the right of way as required by law. The doctrine of last clear chance does not apply since this doctrine contemplates a last *clear* chance not a last *possible* chance. *Shultes v. Halpin,* — Wash. —, 205 P. 2d 1201 (1949).

The doctrine of last clear chance, stated broadly, is that the negligence of the plaintiff does not preclude a recovery for the negligence of the defendant where it appears that the defendant, by the exercise of reasonable care, might have avoided the injury to the plaintiff notwithstanding the plaintiff's negligence.[2] The necessary elements[3] for the application of the doctrine[4] are: (1) that the plaintiff, through his own negligence, is in a position of peril; (2) that the defendant becomes aware, or ought to become aware,[5] of the plaintiff's peril; (3) that the defendant has the opportunity by the exercise of reasonable care to avoid the accident; and (4) that he fails to exercise such care. It is in relation to the opportunity that the defendant has to avoid injuring the plaintiff that the distinction between last *clear* chance and last *possible* chance becomes important.

It has been stated that "the last clear chance implies thought, appreciation, mental direction, and the lapse of sufficient time to effec-

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[1] WASH. REV. STAT. ANN. §§ 6360-89 (Rem. Supp. 1947).

[2] Grand Trunk Ry. v. Ives, 144 U. S. 408 (1892); Locke v. Puget Sound International Ry. & Power Co., 100 Wash. 432, 171 Pac. 242 (1918).

[3] Palmer v. Tschudy, 191 Cal. 696, 218 Pac. 36 (1923); Caplan v. Arndt, 123 Conn. 585, 196 Atl. 631 (1938).

[4] The burden of proving the Last Clear Chance is on the plaintiff. Dwinelle v. Union Pac. R. R., 104 Colo. 545, 92 P. 2d 741 (1939). *Contra:* Gregory v. Maine Cent. R. R., 317 Mass. 636, 59 N. E. 2d 471 (1945). See Note, 159 A. L. R. 724 (1945).

[5] In a minority of the jurisdictions the defendant must have actual knowledge of the plaintiff's peril. 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); Elliott v. New York Rapid Transit Corp., 293 N. Y. 145, 56 N. E. 2d 86 (1944); Rew v. Dorn, 160 Ore. 368, 85 P. 2d 1031 (1938). For an exhaustive classification and discussion of the cases, see Notes, 92 A. L. R. 47 (1934); 119 A. L. R. 1041 (1939); 171 A. L. R. 365 (1947).

tively act upon the impulse to save another from injury." [6] There must be both a "distinct sequence of events" [7] which gives the injuring party sufficient time to avoid the consequences of the injured party's negligence and a present ability [8] to avert the injury. The defendant is not required to act infallibly when confronted with an emergency.[9] In such cases where the circumstances afford the defendant only a possible chance to avert the injury, the negligence of both parties is said to be "substantially concurrent" [10] and the case is governed by the ordinary rules of negligence and contributory negligence.[11] Thus it has been held that no clear opportunity to avert the injury existed where there was a lapse of only a few seconds between the time defendant became aware of plaintiff's peril and the time of the injury; [12] where the defendant could not avoid the casualty except at the risk of injury to himself or others; [13] where the defendant, confronted with an emergency brought about by plaintiff's negligence, failed to employ the best possible means to avoid the injury.[14]

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[6] Barnes v. Ashworth, 154 Va. 218, 153 S. E. 711, 720 (1930).

[7] Johnson v. Sacramento Northern Ry., 54 Cal. App. 2d 528, 129 P. 2d 503 (1942).

[8] Zickefoose v. Thompson, 347 Mo. 579, 148 S. W. 2d 784 (1941). *Contra:* Kelly v. Marshall's Adm'r, 274 Ky. 666, 120 S. W. 2d 142, 149 (1938) (where the court approved an instruction to the jury which permitted the application of the doctrine if the driver of the car discovered the plaintiff's peril in time to have avoided the accident "had his car been running at a reasonable rate of speed").

[9] Chesapeake & O. Ry. v. Switzer, 275 Ky. 834, 122 S. W. 2d 967 (1938). "It should and must be emphasized that a plaintiff is not entitled to recover under this doctrine upon a mere peradventure. He has no right to hold the defendant liable merely upon showing that perhaps, if the defendant's agents had responded properly, promptly, instantaneously, he might have been saved. The burden is upon him to show affirmatively by a preponderance of evidence which convinces the average mind that by the use of ordinary care, after his peril was discovered, there was in fact a clear chance to save him. It is insufficient to show that there was a mere possibility of so doing." Washington & O. D. Ry. v. Thompson, 136 Va. 597, 118 S. E. 76, 78 (1923).

[10] St. Louis Southwestern Ry. v. Simpson, 286 U. S. 346 (1932); 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 (1928).

[11] See note 7 *supra*.

[12] Schoen v. Western Union Telegraph Co., 135 F. 2d 967 (C. C. A. 5th 1943); Bagwell v. Pacific Electric Ry., 90 Cal. App. 114, 265 Pac. 517 (1928); Bailey v. Reggie, 22 So. 2d 698 (La. App. 1945); Hutchinson v. Thompson, 167 S. W. 2d 96 (Mo. App. 1942); Ingram v. Smoky Mountain Stages, Inc., 225 N. C. 444, 35 S. E. 2d 337 (1945); Gaudette v. McLaughlin, 88 N. H. 368, 189 Atl. 872 (1937); Kurn v. McCoy, 187 Okla. 210, 102 P. 2d 177 (1940); Malone v. City of Plainview, 127 S. W. 2d 201 (Tex. Civ. App. 1939); Virginia Stage Lines v. Lesny, 175 Va. 351, 8 S. E. 2d 259 (1940); Erickson v. Barnes, 6 Wash. 2d 251, 107 P. 2d 348 (1940); Lynch v. Alderton, 124 W. Va. 446, 20 S. E. 2d 657 (1942).

[13] Zickefoose v. Thompson, *supra* note 8.

[14] Woloszynowski v. N. Y. C. R. R., 254 N. Y. 206, 172 N. E. 471 (1930) (the fireman observed the plaintiff in a position of peril at a distance of 160 to 200 feet from the oncoming train. He shouted a warning to the engineer

Although the distinction between a *clear* and a *possible* chance would appear to be one readily perceived, the courts apparently have not always borne it in mind.[15] In the instant case, since the defendant had only two seconds in which to avert a collision, it is apparent that his opportunity of averting the injury could only be classified as a mere possibility. Since the defendant is only required to exercise reasonable care in averting the consequences of the plaintiff's negligence he cannot be regarded as negligent in failing to realize such a possibility. To hold otherwise would, under the guise of the doctrine of last clear chance, abrogate the rule of contributory negligence.

J. P. K.

WORKMEN'S COMPENSATION—INJURY ARISING OUT OF AND IN THE COURSE OF THE EMPLOYMENT—HORSEPLAY AND PRACTICAL JOKING.—This proceeding was instituted under the Workmen's Compensation Laws [1] by the widow of the deceased, a trucker in the employ of defendant, for an award of disability compensation and death benefits. Decedent's death was caused by his having drunk from a bottle labeled whiskey, but which contained a poison. The occurrence took place in the maintenance room of the employer's plant, during the decedent's working hours, on New Year's Eve. The evidence shows that general drinking from open view liquor bottles throughout the plant was customary at that time of the year because of the approaching New Year holiday. The evidence further indicated that the fatal episode was caused by decedent having been made the "butt of a joke" by his fellow employees. *Held,* for claimant. Decedent's death was due to "injuries from an accident which arose out of and in the course of his employment." *McCarthy v. Remington Rand, Inc.,* — App. Div. —, 88 N. Y. S. 2d 456 (3d Dep't 1949).

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who then applied the air brakes, but not in time to avert the injury. The plaintiff attempted to invoke the doctrine of last clear chance contending that, had the fireman jumped across the cab and applied the brakes himself, seconds would have been saved and the injury averted. The court held that the fireman's failure to apply the brakes was at most an error in judgment in an emergency for which the defendant could not be held liable).

[15] *See* Nielsen v. Richman, 68 S. D. 104, 299 N. W. 74, 76 (1941) (dissenting opinion); Smith v. Gould, 110 W. Va. 579, 159 S. E. 53, 59 (1931) (dissenting opinion).

[1] N. Y. WORKMEN'S COMPENSATION LAW § 10, which requires every employer subject to the chapter to pay or provide compensation to his employees for their disability or death "arising out of and in the course of" their employment. This compensation is awarded without regard as to fault, except when the injury is caused wilfully or solely by intoxication.