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The Doctrine of "The Last Clear Chance"

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tor for reasonable costs incurred in the performance of the contract. There is, therefore, ample authority on the part of the Government to disallow unreasonable costs or profits earned under CPPC subcontracts without resorting to the necessity of reading into the law a provision with respect to subcontracts which does not appear therein. By disallowing the portion of a CPPC subcontract considered unreasonable, the original purpose of Congress will have been fulfilled. The disallowance of the entire amount of subcontracts solely because they are on a CPPC basis, without any consideration of the value of the goods and services rendered the Government, would be taking advantage of a technicality in direct violation of the trust relationship inherent in every CPFF prime contract.

Congress has repeatedly recognized that the present emergency involving our national defense, calls for a high degree of cooperative confidence and trust by each contracting party in the other to insure the successful accomplishment of vital war contracts. This policy is expressed in the Contract Settlement Act of 1944,[13] wherein it is provided that "Whenever any formal or technical defects or omission in any prime contract, or in any grant of authority to an officer or agent of a contracting agency who ordered any materials, services, and facilities might invalidate the contract or commitment, the contracting agency (1) shall not take advantage of such defect or omission; (2) shall amend, confirm, or ratify such contract or commitment without consideration in order to cure such defect or omission; and (3) shall make a fair settlement of any obligation thereby created or incurred by such agency, whether expressed or implied, in fact or in law, or in the nature of an implied or quasi contract."

If the Comptroller General's decision in the *Day and Zimmerman* case were applied to the numerous subcontracts entered into on a CPPC basis, the Government would be prohibited from reimbursing contractors for any portion of the cost of such subcontracts regardless of the fact that the prices were reasonable and that the goods had been received and used by the Government. Unless the decision in the *Day and Zimmerman* case is reversed, war contractors will sustain a loss of millions of dollars, in direct violation of the expressed intent of Congress to conduct war contracting on a fair and equitable basis.

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THE DOCTRINE OF "THE LAST CLEAR CHANCE"

As an outgrowth of society's high regard for persons and property, the doctrine of "the last clear chance" was formulated in England and later adopted by the courts of the United States. In effect, the rule prescribes a course of conduct demanded by society when situations arise wherein one of its members, through negligence or

[13] PUBLIC LAW 395, 78th Cong., c. 358, 2d Sess.

otherwise, finds himself in a perilous and dangerous situation with no means of escape from the danger, and the other has it within his power and control to aid him in averting the peril by controlling his own negligence, thereby negativing the ill effects of the negligence of the other. In the course of events, society, manifesting itself through law, regards the one confronted with the peril, when incapable of saving himself, as helpless and at the mercy of the other, and demands that the other act with dispatch and come forth with his aid and assistance if he has knowledge of the perilous situation and controls the means of avoiding it.

In one of the earliest leading English cases, *Davies v. Mann*,[1] the doctrine of "the last clear chance" was formulated and applied. In that case the plaintiff turned his donkey out to graze along the public highway where defendant through his negligent driving ran his cart over the animal. It was held that although plaintiff had been negligent in permitting the donkey to be upon the road, nevertheless, after the animal's peril was discovered by the defendant and it was obvious that the plaintiff was powerless to avert the danger to his property, defendant's subsequent failure to employ proper care made him liable. It will be noted that discovery of the peril was the determining factor in this case which, in spite of plaintiff's negligence, brought into being defendant's duty of care and made his negligence the proximate cause of the harm. This duty sprang from defendant's knowledge that plaintiff's property was in a perilous situation and that plaintiff was helpless to save it from damage while defendant had it within his means to save the same from destruction by controlling his cart and avoiding contact with the animal. Thus, but for his negligence the accident might not have occurred.

The doctrine of "the last clear chance" as developed by the English courts, has found application in a large number of American states, but there is a sharp division on the extent of its application. The majority of jurisdictions allow a wider scope to the principle of "last clear chance" and hold the defendant to the duty of ascertaining the plaintiff's perilous predicament if, in the exercise of reasonable care, it would have been discovered and, if the relation of the parties is such that the defendant owes to the plaintiff the duty of reasonable vigilance. Under this rule, a plaintiff who has negligently exposed himself to a danger from which he is unable at the time of the accident to extricate himself, may hold a defendant who as a reasonable man *should have discovered* the plaintiff's danger at any time after the situation has gotten beyond the plaintiff's power to save himself, if such discovery would have enabled the defendant by the exercise of reasonable care, to have avoided the accident.[2] The one exception

[1] 10 M. & W. 546, 152 Eng. Repr. 588 (1842); *cf.* Radley v. London & N. W. R. R. Co., L. R. 1 App. Cas. 754 (1875).

[2] Teakle v. San Pedro & L. A. R. R. Co., 32 Utah 276, 90 Pac. 402, 10 L. R. A. (N. S.) 486 (1907); BOHLEN, CASES ON TORTS (3d ed.) 538; HARPER, LAW OF TORTS § 138, p. 304.

to this rule is a trespasser. In that case the duty under the doctrine does not come into being because there is no legal relation between the parties.

The minority, New York included, confine it to situations in which the defendant *actually discovers* the plaintiff's perilous situation and thereafter fails to use with reasonable care his ability and facilities to avoid the accident. This doctrine is sometimes known as the doctrine of "discovered peril". If the defendant fails to discover the plaintiff's peril, the plaintiff's contributory negligence will disentitle him to recover as it is an effectual insulation to the defendant's negligence. Such a qualification makes the situation akin to cases in which the defendant has been guilty of reckless and wanton misconduct and the result reached is the same, for mere contributory negligence on the part of the plaintiff will not bar a recovery if the defendant's misconduct has been so gross. Such conduct differs from negligence in that the actor knows and is fully conscious that his conduct involves a grave risk, whereas in merely negligent conduct the actor does not realize the danger to others but, as a reasonable man, should recognize the nature and extent of the risk involved. There is a shade of difference between gross negligence and negligence imputed to a defendant under the doctrine of "the last clear chance". Gross negligence in its essence infers indifference to the consequences arising out of a hazard created by the actor whether aware of the peril or not. It implies the doing of an act and irresponsibility as to the consequences ensuing therefrom and dangers caused thereby. It implies indifference to duty and gross disregard of the rights of others. Negligence arising through the application of the doctrine of "the last clear chance" is not negligence in essence, but becomes negligence only when there is an awareness of the dangerous position of another and there is at the same time an opportunity to sidetrack the peril. It becomes negligence only because the law places a duty where none ordinarily existed.

A most recent New York case, *Elliott v. N. Y. Rapid Transit Corporation*,[3] decided June 14, 1944, best illustrates the interpretation given the doctrine by the New York courts.

In that case, deceased in a four plus alcoholic condition (52% alcohol in the brain) boarded one of defendant's elevated trains on the 5th Avenue Culver line in Brooklyn, and, because of his condition, mistakenly alighted from the train one station beyond the station nearest his home. When the train stopped, the conductor, being aware of his condition, saw the deceased stagger out of the car, and, when the deceased stopped to speak to him, told him to step away, and shut the gates, at the same time giving the motorman the signal to go ahead. When the train had gone one foot, deceased realizing his mistake took hold of two stanchions extending from the platform to the roof of the first and second cars, at a height of about 6 feet

[3] 293 N. Y. 145, 56 N. E. (2d) 86 (1944).

3 inches. He was carried with his feet "dangling" for 53 feet before he lost his hold and fell to the catwalk and thence to the street, while the train continued on for 27 feet before the emergency brake brought it to a standstill. At the trial it was shown that a pull upon the emergency brake cord, only one step away from the conductor, would have stopped the train within 20 to 25 feet, and that the emergency brake cord was operated without relation to the motorman so that a pull upon the brake cord took control of the train from the motorman, and placed it at the disposal of the conductor whose actions under the circumstances meant life or death to helpless plaintiff.

The court said that "the doctrine of last clear chance" is predicated upon the fact that knowledge of the *peril* as an actual fact has been brought home to the person charged with the subsequent negligence. As was stated by Justice Cardozo in the case of *Woloszynowski v. New York Central R. R. Co.*:[4]

> 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[5] . . . , but knowledge there must be, or negligence, so reckless, as to betoken indifference to knowledge.

The Court of Appeals, in reversing the judgment of the Appellate Division which had affirmed the judgment of the Supreme Court dismissing the complaint on the merits, said that the instant case fell squarely within the province of the doctrine of "the last clear chance". There, plaintiff had made out a *prima facie* case by showing:

(1) That the conductor had knowledge of decedent's perilous situation, which knowledge plaintiff established beyond doubt by the conductor's own testimony taken upon an examination before trial.

(2) That with knowledge of the perilous situation defendant failed to use reasonable care. This the plaintiff was able to establish (*prima facie*) by showing that although the train could have been brought to a stop within 20 or 25 feet if reasonable care was used, the conductor allowed the train to move *53 feet after he knew of the peril before he pulled the emergency brake,* and that thereafter the train travelled 27 feet before coming to a full stop.

(3) That the failure to use reasonable care was the proximate cause of the accident and was a question of fact to be determined by the jury on a new trial. However, the court implied that upon such trial, the jury would have no serious difficulty in settling this issue by quoting the comments on "proximate causation" made by Judge Pound in the case of *Storr v. N. Y. C. R. R. Co.*[6] wherein he said:

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[4] 254 N. Y. 206, 172 N. E. 471, 472 (1930), cited *infra* note 9.

[5] Wright v. Union Ry. Co., 250 N. Y. 526, 229 N. Y. Supp. 162 (1928); *cf.* Bragg v. Central N. E. Ry. Co., 228 N. Y. 54, 145 N. Y. Supp. 1049 (1920).

[6] 261 N. Y. 348, 185 N. E. 407 (1933).

If one by a negligent act places himself or his property in a position of danger his negligence does not contribute to defeat his recovery if the situation was known to the defendant in time to avert the consequences of plaintiff's own negligence. In such case defendant's negligence is the sole cause of the injury. It must not run on "inert and callous" and cause an accident which proper care might have avoided.

Because the doctrine of "the last clear chance" is an exception to the general rule of contributory negligence, the New York application of strict construction can well be understood and certain determining factors must be present before the courts will apply it.

(1) Plaintiff's peril must be absolute, apparent, and he must be without present means of escape. If plaintiff can avoid the danger, even though seemingly perilous, the duty of saving himself takes precedence over defendant's duty to come to his aid.[7]

(2) Defendant must have absolute knowledge of the peril and a sufficient opportunity to avoid it else the doctrine of "the last clear chance" is not applicable.[8]

(3) Defendant must, if he is able, attempt to avoid the peril once knowledge of it is brought to his attention; he is not liable, after an attempt in good faith, for errors of judgment.[9]

It is very difficult for students of the law to reconcile the doctrine of "the last clear chance", which is an exception to the contributory negligence rule, with the general rule itself. Under the contributory negligence rule, a plaintiff who has aided in the happening of a wrong is barred from maintaining a civil action for damages principally because there is a reluctance on the part of the law to apportion a mutual wrong. The "clean hands" doctrine will not permit a negligent plaintiff to recover for his own wrong, and the policy of the state makes the personal interests of parties dependent upon their care and prudence.

Keeping both rules in mind, it can readily be seen that the exception must of necessity remain within its defined limits so as to prevent an eventual abrogation of the principal rule—this explains the New York policy of strict construction. It would seem, therefore, that we are confronted with two rules—both inconsistent with each other. Negligence in one case destroys the cause of action, while in the other case, even though negligence is conceded, the cause of action may be maintained. This seemingly irreconcilable discrepancy in the law may best be explained by comparing the circumstances arising under each case. In the first case, plaintiff's negligence occurs simultaneously with defendant's, or is so close to the happening of the event complained of, that defendant is either taken by surprise or else is not aware of the existing peril in time to avoid its harmful consequences.

[7] Panarese v. Union Ry. Co., 261 N. Y. 233, 185 N. E. 401 (1933).
[8] Wright v. Union Ry. Co., 250 N. Y. 526, 166 N. E. 310 (1928).
[9] Woloszynowski v. N. Y. C. R. R. Co., 254 N. Y. 206, 172 N. E. 471 (1930), cited *supra* note 4.

In that case, as between two wrongdoers the negligence of the plaintiff is the proximate cause of the harm and he cannot be heard to complain. In the other case, however, the plaintiff's negligence, continuing or otherwise, is known to the defendant in time to avoid the harmful consequences, and by means of the creation of a new legal duty the courts reason that the moment the defendant learns of plaintiff's precarious predicament, if he has the opportunity to aid, there is a shifting of responsibility from plaintiff to defendant. The defendant's conduct under such circumstances, if reasonable care is not used, becomes the proximate cause of the harm and the basis of defendant's liability, all of which is in keeping with the policy of this state not to condone, tolerate or even countenance *"inert and callous"* conduct.

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STATES' RIGHTS AND FIRE INSURANCE REGULATION

In recent years the States' Rights doctrine had been a relatively unimportant political factor only treated by the dissenting opinions [1] of Justices Holmes and Brandeis who sought to protect and define the rights of the states to regulate industry and commerce in the public interest. The revival of the doctrine as a political and economic issue occurred during the past decade when opponents of the social legislation, inaugurated to meet the crises of depression and war, used this doctrine as a weapon to discredit these laws as tending to usurp the powers of the states.[2] Recent examples of this type of attack have been the defeat of the Federal Ballot Bill [3] and the scrapping of the bill providing for federal supervision and administration of compensation to returning servicemen.[4] On the constitutional scene the *United States v. South-Eastern Underwriters' Association* case [5] brought this conflict to a head. The response evoked by this decision affords an excellent illustration of the fact that the present controversy conforms to the historical pattern of the States' Rights doctrine being used as a political weapon and as a means of beclouding the true nature of the economic interests involved.[6]

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[1] Tyson Brothers United Ticket Offices, Inc. v. Banton, 296 U. S. 315, 71 L. Ed. 718 (1926); Weaver v. Palmer, 270 U. S. 402, 70 L. Ed. 654 (1925); Western Union v. Kansas, 216 U. S. 1, 54 L. Ed. 355 (1909); Madisonville Traction Co. v. St. Bernard Mining Co., 196 U. S. 239, 49 L. Ed. 462 (1904); *cf.* Hopkins Federal Savings & Loan Ass'n v. Cleary, 296 U. S. 315 (1935).

[2] *See* COUDERT, F. R., THE NEW DEAL AND THE SUPREME COURT (1936).

[3] GREEN-LUCAS BILL § 1612.

[4] MURRAY-KILGORE-CELLER BILL § 2061.

[5] United States v. S.E.U.A., 322 U. S. 533, 64 Sup. Ct. 1162 (1944).

[6] For historical treatment see THE STATES' RIGHTS FETISH, SCHLESINGER NEW VIEWPOINTS IN AMERICAN HISTORY (1926) 220-244.