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Negligence: Application of the Last Clear Chance Doctrine to Inattentive Defendants

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A remedy for this confusion might be provided by the Florida Legislature. A statute expressly stating that a residuary clause either does or does not pass insurance proceeds would suffice. Pending the appearance of a legislative or judicial mandate on the problem, the only practical solution of the problem is careful drafting of wills. A specific bequest of the proceeds of insurance payable to the insured or his estate circumvents the problem and makes unnecessary an evaluation of the *Sloan* and *Lowe cases.*

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NEGLIGENCE: APPLICATION OF THE LAST CLEAR CHANCE DOCTRINE TO INATTENTIVE DEFENDANTS

Springer v. Morris, 74 So.2d 781 (Fla. 1954)

Plaintiff, while crossing a street at night, was struck and seriously injured by defendant's automobile. Defendant testified that he was talking to passengers in the back seat of his car and did not see plaintiff until the instant of impact. Evidence indicated that plaintiff did not see the approaching vehicle, although the street was straight, level, and well lighted. The trial court, in instructing the jury on the doctrine of last clear chance, charged that a verdict for plaintiff would be proper if the defendant saw or *should have seen* the plaintiff in time to avoid the accident. Defendant appealed from a verdict for plaintiff, assigning as error the trial court's instruction. HELD, defendant had the last clear chance to avoid the accident, even though he did not discover the danger to plaintiff. Judgment affirmed.

The doctrine of last clear chance is generally stated as follows: A plaintiff who has negligently placed himself in a position of peril, and is either unconscious of his danger,[1] or unable to avoid it,[2] or both,[3] may nevertheless recover from a defendant who inflicts injury if the defendant could have avoided the injury after discovering plain-

[1]Wawner v. Sellic Stone Studio, 74 So.2d 574 (Fla. 1954); Becker v. Blum, 142 Fla. 60, 194 So. 275 (1940).

[2]Consumers Lumber & Veneer Co. v. Atlantic C.L.R.R., 117 F.2d 329 (5th Cir. 1941).

[3]Merchants Transportation Co. v. Daniel, 109 Fla. 496, 149 So. 401 (1933).

tiff's situation.[4] Since its inception in England[5] and its later adoption by American courts, the doctrine has developed complicated legal variants and has been the subject of much controversy.[6]

Most writers have considered the rule as a qualification of the strict law of contributory negligence[7] and as a transition on the road to apportionment of damages.[8] Courts place much emphasis on the time sequence of the negligent acts, and in that respect the doctrine is considered as a phase of the law of proximate cause.[9] "The commission of the last or immediate negligent act renders all antecedent acts of negligence remote and immaterial."[10] Although some states reject the doctrine by name, they nevertheless apply it under the guise of "wantonness" or "willful misconduct."[11]

The minority of jurisdictions adhere to the strict rule of "discovered peril,"[12] by which the defendant is liable under the last clear chance doctrine only if he actually discovers the danger to the plaintiff and thereafter fails to use reasonable care.[13] Most jurisdictions, however, follow the *Restatement of Torts,* which applies the rule in two situations:[14] (1) when the plaintiff is in a position of helpless peril, and (2) when the plaintiff is physically able to escape injury but is negligently inattentive. Under the first category the courts allow recovery when the defendant was actually aware of the plaintiff's peril, or in the exercise of reasonable care should have been aware of it.[15] Under

[4]Schoen v. Western Union Tel. Co., 135 F.2d 967 (5th Cir. 1943).

[5]Davies v. Mann, 10 M. & W. 546, 152 Eng. Rep. 588 (1842).

[6]See, *e.g.,* DeMuth, *Derogation of the Common Law Rule of Contributory Negligence,* 7 ROCKY MT. L. REV. 161 (1935); MacIntyre, *The Rationale of Last Clear Chance,* 53 HARV. L. REV. 1225 (1940).

[7]*E.g.,* PROSSER, HANDBOOK OF THE LAW OF TORTS 408 (1941).

[8]James, *Last Clear Chance: A Transitional Doctrine,* 47 YALE L.J. 704 (1938).

[9]Williams v. Sauls, 151 Fla. 270, 9 So.2d 369 (1942); Panama City Transit Co. v. Du Vernoy, 159 Fla. 890, 892, 33 So.2d 48, 50 (1947) (dictum).

[10]Williams v. Sauls, 151 Fla. 270, 279, 9 So.2d 369, 371 (1942).

[11]See, *e.g.,* Nattens v. Grolier Society, Inc., 195 F.2d 449 (7th Cir. 1952); Walldren Express & Van Co. v. Krug, 291 Ill. 472, 126 N.E. 97 (1920).

[12]Engle v. Cleveland, C., C. & St. L. Ry., 197 Ind. 263, 149 N.E. 643 (1925); Hamlin v. Roundy, 96 N.H. 123, 71 A.2d 419 (1950); Storr v. New York Cent. R.R., 261 N.Y. 348, 185 N.E. 407 (1933); Cleveland Ry. v. Masterson, 126 Ohio St. 42, 183 N.E. 873 (1932).

[13]Woloszynowski v. New York Cent. R.R., 254 N.Y. 206, 172 N.E. 471 (1930); Patterson v. George F. Alger Co., 112 N.E.2d 65 (Ohio App. 1952).

[14]RESTATEMENT, TORTS, §§479-80 (1934).

[15]Smith v. Gay, 190 F.2d 719 (4th Cir. 1951); Consumers Lumber & Veneer Co. v. Atlantic C.L.R.R., 117 F.2d 329 (5th Cir. 1941); Miller v. Ungar, 149 Fla. 79, 5 So.2d 598 (1941); Conant v. Bosworth, 332 Mich. 51, 50 N.W.2d 842 (1952).

the second category the defendant is generally not liable unless he actually discovered the plaintiff's situation.[16]

The Florida Court has previously applied the doctrine in a manner similar to that advocated by the *Restatement* and has denied recovery to an inattentive plaintiff when the defendant was also inattentive.[17] In one such situation the Court said that the "concurrent negligence" of the parties barred recovery.[18]

Since both parties in the instant case were negligently inattentive, the Court, in applying the doctrine to the defendant's detriment, selected a course contrary to the weight of authority and previous Florida cases. The further liberalization of the doctrine by this decision is indicative of the trend to reject rigid legal rules in favor of concepts that enhance plaintiff's opportunity to recover.[19] This extension cannot be supported by logical analysis. A last clear chance that the defendant should have had but did not have is not equivalent to the last clear chance that he actually had. On the other hand, if the defendant is liable only for that which he discovers, the inattentive motorist is in a better legal position than the attentive driver. To resolve this dilemma, some writers have suggested that the doctrine be discarded.[20]

Although the last clear chance doctrine relieves the plaintiff from the harsh rule of contributory negligence, it is equally harsh in shifting the entire loss to the defendant when the plaintiff should rightfully bear at least part of the burden. A possible solution lies in the comparative negligence statutes adopted by some jurisdictions,[21] which provide that the plaintiff's negligence shall not bar his recovery but that recoverable damages must be diminished in proportion to the extent of his negligence in causing the injury.[22] Admiralty has provided a similar solution by dividing damages between the parties.[23]

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[16]Lindsay v. Thomas, 128 Fla. 293, 174 So. 418 (1937); Drown v. Northern Ohio Traction Co., 76 Ohio St. 234, 81 N.E. 326 (1907).

[17]Yousko v. Vogt, 63 So.2d 193 (Fla. 1953); Turner v. Seegar, 151 Fla. 643, 10 So.2d 320 (1942); Becker v. Blum, 142 Fla. 60, 194 So. 275 (1940).

[18]Yousko v. Vogt, 63 So.2d 193 (Fla. 1953).

[19]James, *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 YALE L.J. 549 (1948).

[20]See, *e.g.*, MacIntyre, *supra* note 6.

[21]*E.g.*, GA. CODE §105-603 (1933); NEB. REV. STAT. §25-1151 (1943); WIS. STAT. §331.045 (1953).

[22]Cline v. Powell, 141 Fla. 119, 192 So. 628 (1939); Walker v. Kroger Grocery & Baking Co., 214 Wis. 519, 252 N.W. 721 (1934).

[23]The Varanger v. The Dora Weems, 45 F.2d 608, 613 (4th Cir. 1930) (dictum).