Michigan Law Review

Volume 36 | Issue 6

1938

NEGLIGENCE - CONTRIBUTORY NEGLIGENCE - LAST CLEAR CHANCE - DISCOVERED PERIL - RAILROAD GROSSING ACCIDENT

Michigan Law Review

NEGLIGENCE — CONTRIBUTORY NEGLIGENCE — LAST CLEAR CHANCE — DISCOVERED PERIL — RAILROAD CROSSING ACCIDENT — Plaintiff's decedent was killed in a collision, between his car and defendant's train, which occurred at a crossing in a small town. Crossing signals were in operation, and deceased drove onto the track with his attention on a switching train at his right. A passenger train came along from his left at an excessive speed and without signalling. The engineer testified that, after he saw decedent, he could have stopped the train, or slowed down enough so that decedent could have crossed safely. *Held*, plaintiff entitled to recover. *Missouri Pac. R. R. v. Huffman*, (Ark. 1937) 108 S. W. (2d) 479.

As a general rule, a plaintiff whose negligence contributed to his injury cannot recover from a negligent defendant.[1] The doctrine of last clear chance was evolved to relieve from the harshness of this rule.[2] Some courts have attempted to explain the doctrine on the basis that defendant's negligence was the proximate cause of plaintiff's injury, while plaintiff's negligence was a remote cause.[3] This has led to refinements and distinctions of questionable logic and value.[4] All courts apply the doctrine where defendant discovers plaintiff's posi-

[1] HARPER, TORTS, § 132 (1933); Butterfield v. Forrester, 11 East 60, 103 Eng. Rep. 926 (1809).

[2] Davies v. Mann, 10 M. & W. 546, 152 Eng. Rep. 588 (1842); West v. Gillette, 95 Ohio St. 305, 116 N. E. 521 (1917), where the court makes a good statement of the theory behind last clear chance: it is a humane modification of the strict rule which bars from recovery a plaintiff injured by defendant's negligence whenever negligence on the part of plaintiff contributed to the injury.

[3] OHIO OPIN. 74 (1936); 55 L. R. A. 418 (1902); 7 L. R. A. (N. S.) 132 (1907); 9 VA. L. REV. 237 (1923).

[4] Such a refinement is found when, in a case where defendant did not actually see plaintiff, no recovery is allowed unless the surrounding circumstances were such as to reduce plaintiff's negligence from a cause to a condition. Dyerson v. Union Pac. R. R., 74 Kan. 528, 87 P. 680 (1906); Roanoke Ry. & Electric Co. v. Carroll, 112 Va. 598, 72 S. E. 125 (1911). Washington allows recovery if defendant actually sees the peril, even though plaintiff's negligence continues to the time of injury; but where defendant did not actually see the peril, then plaintiff is barred if his negligence continued till the time of injury. Leftridge v. City of Seattle, 130 Wash. 541, 228 P. 302 (1924).

tion of peril in time to avoid the injury by the exercise of due care.[5] Here, defendant is in control of the situation, and should be held liable for failure to exercise due care. This is the doctrine of discovered peril. Some courts refuse to go beyond this.[6] Others take a second step. Though they require that defendant be aware of plaintiff's presence, they then apply an objective standard, and hold defendant for constructive realization of plaintiff's peril. That is, defendant is deemed to realize plaintiff's peril, if an ordinary person under the same circumstances, by exercising due care, would have realized it.[7] This objective standard was apparently followed in the case at bar. The engineer of the train may not in his own mind have realized decedent's peril, but there was nothing to indicate that deceased would stop, and under such circumstances, it could be found that the ordinary man, in the exercise of due care, would have realized plaintiff's peril. A few courts, in the railroad cases, have allowed the engineer to assume that an approaching person would not attempt to cross in front of the train, but the objective standard is sufficient without resort to such an assumption.[8] The instant case was a clear application of discovered peril: defendant was aware of the decedent, and judging objectively, aware of his peril; had defendant then exercised due care, no collision would have occurred.

[5] HARPER, TORTS, § 138 (1933).

[6] In Thompson v. Los Angeles & S. D. B. Ry., 165 Cal. 748, 134 P. 709 (1913), where defendant actually saw plaintiff, it was held error to instruct the jury on the basis of constructive realization of plaintiff's peril. See also Emmons v. Southern Pac. Ry., 97 Ore. 263, 191 P. 333 (1920).

[7] 21 CAL. L. REV. 257 (1933); 2 TORTS RESTATEMENT, § 479 (b) (ii) (1934); Smith v. El Paso & N. E. R. R., (Tex. Civ. App. 1933) 67 S. W. (2d) 362; Schaff v. Copass, (Tex. Civ. App. 1924) 262 S. W. 234; Nichols v. Chicago, B. & Q. R. R., 44 Colo. 501, 98 P. 808 (1908).

[8] Assumption allowed: Green v. Los Angeles Terminal Ry., 143 Cal. 31, 76 P. 719 (1904); Wallis v. Southern Pac. Ry., 184 Cal. 662, 195 P. 408 (1921). *Contra:* Logan v. Chicago, B. & Q. R. R., 300 Mo. 611, 254 S. W. 705 (1923).