Michigan Law Review

Volume 56 | Issue 8

1958

# Negligence - Last Clear Chance - Evidence Insufficient as a Matter of Law

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NEGLIGENCE—LAST CLEAR CHANCE—EVIDENCE INSUFFICIENT AS A MATTER OF LAW—Plaintiff, having fallen asleep at night at the side of a narrow dirt road, was run over by defendant's automobile. He alleged that defendant was negligent in operating a vehicle at an excessive speed without proper lights. Defendant pleaded that plaintiff was contributorily negligent by being asleep in the road, and plaintiff then replied that defendant had the last clear chance to avoid the injury. On appeal from a judgment of involuntary nonsuit, *held,* affirmed, three justices dissenting. The plaintiff, by falling asleep at the side or in the middle of the road, was contributorily negligent as a matter of law, and the evidence was insufficient to allow a jury to conclude that the defendant had an opportunity to avoid the accident after he discovered or should have discovered the plaintiff's perilous position. *Barnes v. Horney,* (N.C. 1958) 101 S.E. (2d) 315.

The doctrine of last clear chance, as an antidote to the harsh rule that any negligence of plaintiff which contributes to his injury will bar his recovery, was first announced in the famous "jackass case," *Davies v. Mann.*[1] It is found to some extent in nearly all American jurisdictions,[2] and will no doubt continue until a better method is found to allocate the financial burden arising from negligence.[3] There are four categories of cases wherein the doctrine has been applied which are distinguished

1 10 M. & W. 546, 152 Eng. Rep. 588 (1842).

2 Several states reject the last clear chance doctrine but may reach similar results in a given situation by holding that contributory negligence is not a bar if defendant acts willfully and wantonly or is grossly negligent after discovering the helpless plaintiff. See Bushman v. Calumet & S. C. Ry. Co., 214 Ill. App. 435 (1919); Kasanovich v. George, 348 Pa. 199, 34 A. (2d) 523 (1943); Switzer v. Detroit Investment Co., 188 Wis. 330, 206 N.W. 407 (1925).

3 See James, "Last Clear Chance: A Transitional Doctrine," 47 YALE L. J. 704 (1938); MacIntyre, "The Rationale of Last Clear Chance," 53 HARV. L. REV. 1225 (1940). Great Britain and the Commonwealth nations have adopted comparative negligence legislation, and in this country Mississippi, Nebraska, South Dakota, and Wisconsin now have some form of general comparative negligence statute. In addition, the Federal Employers Liability Act, the Merchant Marine Act, and numerous state acts covering specific industries apportion damages on the basis of comparative negligence. See Prosser, "Comparative Negligence," 51 MICH. L. REV. 465 (1953).

by whether the plaintiff is physically helpless or merely inattentive, and by whether the defendant has *actually* discovered the peril or *should have* discovered it had he been exercising due care.[4] In the principal case the plaintiff by his own negligence had placed himself in a position of peril from which he was helpless to escape, and North Carolina is committed to the doctrine that if the defendant either discovered or in the exercise of due care should have discovered the plaintiff in such a position and subsequently failed to exercise due care to avoid the accident, the plaintiff's contributory negligence does not bar his recovery.[5] Generally, the factual determination as to whether the defendant should have discovered the plaintiff's helpless situation, whether the defendant then had the means to avoid the accident, and whether the defendant then failed to use due care to do so, is left to the jury. It is only when reasonable minds could not differ that the court should make such a determination as a matter of law. Although the North Carolina court has often affirmed nonsuits or reversed judgments for plaintiffs based on last clear chance,[6] in this case it has gone very far in taking the case away from the jury when there was substantial evidence, as indicated in the dissenting opinion,[7] which the jury could have considered. This seems to indicate a judicial distrust of the jury in this type of case, perhaps based on the feeling that juries often decide cases and award damages on some rough formula of proportional fault, despite instructions to the contrary, or on the fact that the greater number of jury verdicts in negligence actions

[4] See 92 A.L.R. 47 (1934); 119 A.L.R. 1041 (1939); 171 A.L.R. 365 (1947). Where plaintiff is physically helpless to escape the consequences of his own negligence, all states except the group mentioned in note 2, supra, will apply last clear chance if the peril is actually discovered, and probably a majority will also apply the doctrine if the peril should have been discovered by defendant in the exercise of due care. 2 HARPER AND JAMES, TORTS §22.12 (1956); 2 TORTS RESTATEMENT §479 (1934). Prosser, however, states that the greater number of courts will deny recovery if the peril is not actually discovered. PROSSER, TORTS, 2d ed., 293 (1955).

[5] Ingram v. Smoky Mountain Stages, Inc., 225 N.C. 444, 35 S.E. (2d) 337 (1945); Wade v. Jones Sausage Co., 239 N.C. 524, 80 S.E. (2d) 150 (1954).

[6] The doctrine of last clear chance has not been applied where there were no known facts concerning the accident, other than that plaintiff was somehow injured by defendant. Mercer v. Powell, 218 N.C. 642, 12 S.E. (2d) 227 (1940); Cummings v. Atlantic Coast Line R. Co., 217 N.C. 127, 6 S.E. (2d) 837 (1940). It has not been applied where the evidence showed that defendant could have had only a second or two to act. Van Dyke v. Atlantic Greyhound Corp., 218 N.C. 283, 10 S.E. (2d) 727 (1940); Matheny v. Central Motor Lines, 233 N.C. 673, 65 S.E. (2d) 361 (1951). In addition, where the evidence showed that plaintiff was not physically entrapped but only inattentive, last clear chance was not applied in Cox v. Atlantic Coast Line R. Co., 210 S.C. 32, 41 S.E. (2d) 380 (1947); Dowdy v. Southern Ry. Co., 237 N.C. 519, 75 S.E. (2d) 639 (1953).

[7] This evidence included testimony of a supervisor of roads and a state highway patrolman as to visibility along the road; photographs of the accident scene; a surveyor's profile map; defendant's own admission that he was driving with his lights on dim (low beam); and a state statute which requires that automobile headlights produce sufficient light to render a person 200 feet ahead clearly discernible. Principal case at 319.

are for the plaintiff.[8] It may be that the court wishes to retreat somewhat from the far-reaching possibilities of recovery inherent in the "discoverable peril" doctrine, but if so, this should be done explicitly. It seems clear that last clear chance, by placing all the financial burden on one of two partially negligent parties, is not the best solution to the problems arising from negligence actions. It is equally clear, however, that strict application of the contributory negligence rule is no better. The eventual solution will no doubt come in comparative negligence legislation, but until that occurs, last clear chance offers a makeshift solution, where, in certain types of cases, the jury can reach solutions which in the long run will be in accord with the wishes of the majority of the community. The courts should use restraint in taking these cases from the jury except in instances where there is no evidence of the actual circumstances of the accident; where it would have been physically impossible for the defendant to avoid the accident; or where some essential condition of the doctrine is not present.[9] If there is substantial evidence on both sides, it would be better to let the defendant take his chances with the jury than to preclude the plaintiff from recovery as a matter of law.

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[8] See 2 HARPER AND JAMES, TORTS 1257, 1261 (1956).
[9] See note 6 supra.