

1942

NEGLIGENCE - LAST CLEAR CHANCE - DISTINCTION BETWEEN THE POSSIBILITY AND THE PROBABILITY OF AVERTING THE ACCIDENT

Michigan Law Review

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Torts Commons](#), and the [Transportation Law Commons](#)

Recommended Citation

Michigan Law Review, *NEGLIGENCE - LAST CLEAR CHANCE - DISTINCTION BETWEEN THE POSSIBILITY AND THE PROBABILITY OF AVERTING THE ACCIDENT*, 40 MICH. L. REV. 608 (1942).

Available at: <https://repository.law.umich.edu/mlr/vol40/iss4/17>

This Regular Feature is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

NEGLIGENCE — LAST CLEAR CHANCE — DISTINCTION BETWEEN THE POSSIBILITY AND THE PROBABILITY OF AVERTING THE ACCIDENT — The plaintiff and her companion, both unaware of the defendant's approaching automobile, negligently drove onto a highway along which the defendant was driving at a high rate of speed.¹ When thirty to forty feet away from the plaintiff, the defendant sounded his horn, applied the brakes, and swerved his car, but was unsuccessful in avoiding the collision. The trial court directed a verdict for the defendant. *Held*, judgment for the defendant reversed since the jury might have found: that defendant should have realized plaintiff's danger when he was one hundred and twenty feet away from the plaintiff; that although less than two seconds elapsed between the time of possible realization and the collision, defendant had the last clear chance to avert the accident; and that the defendant failed to use his existing ability to avert injury to the plaintiff. *Nielsen v. Richman*, (S. D., 1941) 299 N. W. 74, certiorari denied, *Richman v. Nielsen*, 311 U. S. 705, 61 S. Ct. 172 (1941).

The doctrine of last clear chance has received much judicial attention during the period of its relatively short existence.² However, the various cases have not left the doctrine entirely free from confusion. Thus, the express statements by

¹ It is curious to note that in the normal negligence suit, the plaintiff introduces evidence to prove that the defendant was driving at an excessive rate of speed, while the defendant attempts to establish the reasonableness thereof. The moment the last clear chance doctrine is injected into the case, positions must be reversed. The more slowly defendant is shown to have been driving, the more clearly the doctrine applies.

² The doctrine may be said to have originated in the case of *Davies v. Mann*, 10 M. & W. 546, 152 Eng. Rep. 588 (1842). It was limited in New York to "discovered peril" in the case of *Woloszynowski v. New York Cent. R. R.*, 254 N. Y. 206, 172 N. E. 471 (1930). Utah broadened its scope by applying it to cases where the defendant should have discovered the plaintiff's peril. *Teakle v. San Pedro, L. A. & S. L. R. R.*, 32 Utah 276, 90 P. 402 (1907). New Hampshire extended it even further by the holding in *Cavanaugh v. Boston & M. R. R.*, 76 N. H. 68, 79 A. 694 (1911), where it was applied to a situation in which the plaintiff was not physically caught, but was unaware of his peril and the defendant knew of the plaintiff's ignorance. Missouri has gone the furthest in holding the defendant where both were unaware of the plaintiff's peril, as demonstrated in the case of *Banks v. Morris & Co.*, 302 Mo. 254, 257 S. W. 482 (1924).

the courts on the question whether a mere possibility that the defendant was able to avert an injury is sufficient to call for the application of the last clear chance doctrine are not always compatible with their actual holdings. Although it appears that no court has expressly held that a mere possibility is sufficient to excuse the plaintiff's negligence and to hold the defendant liable, yet the courts have, inadvertently or otherwise, permitted the jury to find the defendant liable when, in actuality, there was only a possibility that the defendant could have avoided the injury to the plaintiff.³ Where evidence concerning the rate of speed at which the defendant was traveling and the period of time prior to the accident at which the defendant recognized (or should have recognized) the plaintiff's peril is available, there can be no reason for a court's committing this error. Mathematical tables of unquestionable accuracy are readily obtainable from which may be ascertained the distance required to stop an automobile traveling at a given rate of speed. The tendency of the courts to slight this distinction and to submit the question to the jury without closer analysis may be explained, in part, by the fact that the more prominent issues of the defendant's knowledge and of the plaintiff's peril have been complicated by the doctrines of "imputed knowledge," "discovered peril," "mental entrapment," and "physical entrapment"; and, in part, by the fact that these more prominent issues determine to a large extent the existence of the defendant's ability to escape the accident.⁴ However, not all courts have completely ignored the distinction; on the contrary, there are a number of statements by the courts which may be construed as drawing the line between possibility and probability.⁵ But it is where the courts have

³ In the principal case we find that the dissenting judge was concerned with what he believed to be the majority's error in sending the issue of last clear chance to the jury when all the defendant had was a mere possibility of averting the accident. In the case of *Smith v. Gould*, 110 W. Va. 579, 159 S. E. 53 (1931), the plaintiff's decedent, after alighting from a bus, attempted to cross a highway. The defendant was forty to fifty feet away from the deceased when he should have become aware of the deceased's peril. The defendant was held liable on the ground that he had, in this interval of less than two seconds, the last clear chance to avert the accident. As in the principal case, the distinction between possibility and probability was drawn by the dissenting judge. See also: *Bruggeman v. Illinois Cent. R. R.*, 147 Iowa 187, 205, 123 N. W. 1007 (1909); *Chappell v. San Diego & A. Ry.*, 201 Cal. 560, 258 P. 73 (1927); *Center v. Yellow Cab Co. of Los Angeles*, 216 Cal. 205, 13 P. (2d) 918 (1932).

⁴ For example, under the doctrine of imputed knowledge the "last clear chance" becomes "ought to have had last clear chance."

⁵ Although this is obviously not the only ground which should cause the courts to observe the distinction, the time interval in which the defendant is alleged to have had the last clear chance seems to have been the factor which has called the courts' attention to the distinction most often. In *Barnes v. Ashworth*, 154 Va. 218 at 250, 153 S. E. 711 (1930), the court said, "The last clear chance implies thought, appreciation, mental direction, and the lapse of sufficient time to effectively act upon the impulse to save another from injury." Perhaps one of the more quoted cases upon this problem is that of *Washington & O. D. Ry. v. Thompson*, 136 Va. 597 at 603, 118 S. E. 76 (1923), in which the court pointed out, "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

failed to observe this distinction that the injustice to the defendant arises. In the same decision, a court has instructed the jury in terms of "might" and "could," and has used these important qualifications as synonyms.⁶ It is to be hoped that the courts will recognize more frequently the fact that the defendant's liability should rest upon such an analysis of the fact situations as these terms suggest.

defendant's agents had responded properly, promptly, instantaneously, he might have been saved. The burden is upon him to show affirmatively . . . that . . . there was in fact a clear chance to save him. It is insufficient to show that there was a mere possibility of so doing." See also: *Searles v. Public Service R. R.*, 100 N. J. L. 222, 126 A. 465 (1924).

In a state which has gone the furthest in relieving the plaintiff of the legal consequences of his own negligence, the court has seen the distinction and definitely applied it. In the case of *Rollison v. Wabash Ry.*, 252 Mo. 525 at 541, 160 S. W. 994 (1913), where the time interval was two seconds, the court held for the defendant, saying that it could not "adjudicate negligence on such pulse beats and hairsplitting, such airy nothings of surmise." In *Markowitz v. Metropolitan St. Ry.*, 186 Mo. 350 at 359, 85 S. W. 351 (1904), this distinction was made: "It requires more than the showing of a mere possibility that the accident might have been avoided in order to bring a case within the humanitarian doctrine. . . ."

⁶ *Hogan v. Nesbit*, 216 Iowa 75, 246 N. W. 270 (1933); *Bruggeman v. Illinois Cent. R. R.*, 147 Iowa 187, 123 N. W. 1007 (1909).