Torts—Application of Last Clear Judgement

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damage, which was properly the subject of a separate action. The
dissent of Judge Calhoun stated the constitution limited eminent
domain compensation to land taken (or damaged) only for public
use; and since the land was not damaged pursuant to the public
use, recovery in eminent domain was barred. The dissent further
stated liability in this case should have been based on negligence;
and therefore, the Court of Claims was the proper avenue of
recovery.

This case is in accord with the trend of West Virginia decisions
which have awarded mandamus to compel eminent domain pro-
cedings involving damage to non-residual property. The facts of
this case were similar to those in State ex rel. Lynch v. State Road
Commissioner, 151 W. Va. 858, 157 S.E.2d 329 (1967), which
unanimously reached the same result.

**Torts—Application of Last Chance Doctrine**

Plaintiff was a passenger in an automobile driven by the
defendant when it was involved in a collision with a second auto-
mobile. Plaintiff instituted an action for the recovery of damages
for injuries sustained in the accident. The Circuit Court of Monon-
galia County directed a verdict in favor of the plaintiff on the
question of liability. On appeal the defendant contended that, while
she was negligent, the driver of the second automobile had the last
clear chance to avoid the collision, and that the plaintiff's cause
of action, if any, was against the other driver and not against the
defendant. *Held*, affirmed. The defendant's assertion of the last clear
chance doctrine was improper and no error was committed in
directing the verdict for the plaintiff. *Edwards v. Lynch*, 175 S.E.2d

It is generally recognized that the doctrine of last clear chance
arises only when the plaintiff is guilty of contributory negligence.
The doctrine cannot be invoked between defendants who were
concurrently negligent except in Pennsylvania. See 65A C.J.S.
citing *Greene v. Charlotte Chemical Laboratories, Inc.*, 254 N.C.
680, 120 S.E.2d 82 (1961), stated that "[a] defendant may not
rely upon the doctrine by asserting the negligence of a joint tort-
feasor who has not been sued by the plaintiff." (emphasis added).
This statement was apparently phrased to conform to the factual
situation existing in the *Edwards* case, but is somewhat misleading on its face. The *Greene* case held that the doctrine could not be applied as between *co-defendants*. It is clear that if the doctrine cannot be applied to determine ultimate liability between codefendants, it cannot be asserted as a defense where only one of the joint tortfeasors is sued.

Earlier West Virginia decisions have held that the last clear chance doctrine may be invoked where (1) the plaintiff, through his own negligence, has placed himself in a dangerous position, (2) he is either unaware of the danger or unable to escape it, and (3) there is sufficient opportunity for the defendant, by the exercise of due care, to discover the danger and avoid the situation. *See Bowman v. Monongahela West Penn Public Service Co.*, 124 W. Va. 504, 21 S.E.2d 148 (1942).