Volume 49 | Issue 1 Article 5

December 1942

Last Clear Chance--Some Further Observations

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LAST CLEAR CHANCE—SOME FURTHER OBSERVATIONS

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SOME eleven years ago the writer endeavored to collect and analyze all the West Virginia cases decided prior to 1931 which dealt with the doctrine of last clear chance.[1] Since that time fourteen cases involving it have been decided.

Statistically, the record of the trial courts is unimpressive. Of the fourteen cases, three have been reversed because of erroneous instructions attempting to apply the doctrine;[2] one has been reversed for failure to instruct upon it;[3] five have been reversed because of lack of evidence and one affirmed for the same reason (no sufficient interval of time);[4] and four have been affirmed as proper applications of the doctrine.[5]

The fact that quite recent decisions have reversed extraordinarily competent trial judges, in cases tried by able counsel, indicates the confusion and misunderstanding of the profession. It is this fact, plus the fact that this is the centennial of *Davies v. Mann*,[6] which has prompted the writer, (with the hope that it will be instructive rather than merely interesting),[7] to write this article. Its object is to state the present position of the court and to make a comparison thereof with the principles promulgated by the *Restatement of Torts*.[8]

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1 Donley, *Observations on Last Clear Chance in West Virginia* (1931) 37 W. VA. L. Q. 362.

2 Meyn v. Dulaney-Miller Auto Co., 118 W. Va. 545, 191 S. E. 558 (1937); Lynch v. Alderton, 20 S. E. (2d) 657 (W. Va. 1942); Bowman v. Monongahela West Penn Public Service Co., 21 S. E. (2d) 148 (W. Va. 1942).

3 Fielder v. Service Cab Co., 122 W. Va. 522, 11 S. E. (2d) 115 (1940).

4 Juergens v. Front, 111 W. Va. 670, 163 S. E. 618 (1932); Nutter v. C. & O. Ry., 113 W.Va. 94, 116 S. E. 815 (1932); Milby v. Diggs, 118 W. Va. 56, 189 S. E. 107 (1936); Morton v. Baber, 118 W. Va. 457, 190 S. E. 767 (1937); Bean v. Baltimore & O. R. R., 121 W. Va. 105, 1 S. E. (2d) 881 (1939); Ray v. Clawson, 14 S. E. (2d) 259 (W. Va. 1941).

5 Smith v. Gould, 110 W. Va. 579, 159 S. E. 53 (1931); Davenport v. Haupt, 113 W. Va. 595, 169 S. E. 333 (1933); Jacobson, Adm'x v. Hamill, 120 W. Va. 491, 199 S. E. 593 (1938); Emery v. Monongahela West Penn Public Service Co., 111 W. Va. 699, 163 S. E. 620 (1932) (*rev'd on other grounds*).

6 10 M. & W. 546 (1842).

7 In Smith v. Gould, *supra* note 5, at 587, 159 S. E. at 57, the court said that the writer's former article, *supra* note 1, was "interesting".

8 "Sec. 479. DEFENDANT'S LAST CLEAR CHANCE.

A plaintiff who has negligently subjected himself to a risk of harm from the defendant's subsequent negligence may recover for harm caused thereby if, immediately preceding the harm,

(a) the plaintiff is unable to avoid it by the exercise of reasonable

The plainest type of case may be used as a basis for discussion. It is that of the plaintiff who has negligently placed himself in a position of helpless peril, *i. e.*, one from which (whether conscious thereof or not) he cannot extricate himself. His position is actually discovered and his peril realized by the defendant, who thereafter fails to use the means then at hand to avoid the injury. For example, the plaintiff has negligently stumbled and is lying senseless upon defendant's public railroad crossing. The engineman sees the plaintiff but negligently fails to apply the brakes in time to avoid striking him. Liability is imposed, for in a sense the plaintiff is at the mercy of the defendant.[9]

The next type of case is equally clear. Suppose that the engineman does not see plaintiff, but had the former discharged his duty of care to maintain a vigilant watch, he would have seen the plaintiff in time to have applied the brakes so as to avoid the injury. Here, also, liability is imposed. The defendant may be in no better position if the engineman testifies that he looked vigilantly, but did not in fact see the plaintiff, if, judged objectively, a hypothetical, ordinary engineman would have seen under the same or similar circumstances.[10] *Emery v. Monongahela West Penn Pub-*

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vigilance and care, and
(b) the defendant
(i) knows of the plaintiff's situation and realizes the helpless peril involved therein; or
(ii) knows of the plaintiff's situation and has reason to realize the peril involved therein; or
(iii) would have discovered the plaintiff's situation and thus had reason to realize the plaintiff's helpless peril had he exercised the vigilance which it was his duty to exercise, and
(c) thereafter is negligent in failing to utilize with reasonable care and competence his then existing ability to avoid harming the plaintiff.''

''Sec. 480. LAST CLEAR CHANCE; NEGLIGENTLY INATTENTIVE PLAINTIFF.

A plaintiff who, by the exercise of reasonable vigilance could have observed the danger created by the defendant's negligence in time to have avoided harm therefrom, may recover if, but only if, the defendant
(a) knew of the plaintiff's situation, and
(b) realized or had reason to realize that the plaintiff was inattentive and therefore unlikely to discover his peril in time to avoid the harm, and
(c) thereafter is negligent in failing to utilize with reasonable care and competence his then existing ability to avoid harming the plaintiff.''

9 HARPER, TORTS (1933) § 139.

10 ''The law ordinarily charges a person of unimpaired vision with seeing an object 'which if he had used his senses, he in the nature of things must have seen' ''. Craft v. Fordson Coal Co., 114 W. Va. 295, 171 S. E. 886 (1933).

lic Service Co.,[11] and *Fielder v. Service Cab Co.*,[12] are representative of the case of actually discovered peril, and *Davenport v. Haupt*[13] of the case of peril which could have been discovered. In result, at least, they are in accord with the principles laid down in the *Restatement.*

So much seems clear enough, but here the difficulties begin. If the locomotive brakes are defective so that the train cannot be stopped by applying them immediately after the plaintiff's peril is discovered and realized (actually or constructively), there is no liability, even though it be shown that efficient brakes would have permitted avoidance of the injury. It is said that there is, in fact, no clear chance to avoid the harm. The defendant will not be held liable for its antecedent negligence in failing to provide proper brakes.[14]

On the other hand, the *Restatement* takes the position that if the locomotive headlight is defective (but the brakes sufficient) the defendant is liable if a proper headlight would have revealed plaintiff's peril in time to permit avoidance of the injury by application of the proper brakes.[15] In the inaccurate language of the street, it will be asked: why should it be "more negligent" to operate a locomotive with defective headlights than with defective brakes? The answer given by cases so holding[16] is that the duty of vigilance to discover the helpless peril of others is a "continuing" one and cannot be fulfilled in the absence of means to make that vigilance effective. But, it is said, the duty to apply brakes is not a continuing one; it arises only when the helpless peril of others is actually discovered, or should have been discovered, and the peril realized. And that duty is fulfilled by applying them; by using the *then* available means to avoid the injury.[17] The validity of this distinction is doubtful. If the duty to avoid discovered peril is fulfilled even in the absence of means to make that avoidance

[11] *Supra* note 4.
[12] *Supra* note 3.
[13] *Supra* note 5.
[14] 2 RESTATEMENT, TORTS (1934) 1256, comment f.
[15] *Ibid.* HARPER, TORTS 308.
[16] Dent v. Bellows Falls Ry., 95 Vt. 523, 116 Atl. 83 (1922); Lloyd v. Albermarle Ry., 118 N. C. 1010, 24 S. E. 805 (1896). See COMMENTARIES ON RESTATEMENT OF TORTS, Tentative Draft No. 10, § 15, page 71.
[17] The West Virginia court apparently rejects the rule of antecedent negligence. See Juergens v. Front, *supra* note 4, and the other cases cited therein, that the doctrine "implies a sufficient interval of time for both appreciation of the dangerous situation and effective effort to relieve it". No exception is stated to cover the case wherein the effort would have been effective, in the given interval of time, had there been no antecedent negligence.

effective, it would seem to be equally true that the duty of vigilance is fulfilled even in the absence of means to make that vigilance effective.[18]

Some rather anomalous results follow from the logic of these principles. "Under the formula, it will be seen, it is sometimes true that the *greater* the defendant's negligence, the *less* its liability. The trolley company may be held for its motorman's failure to look. But if we add to this failure enough other negligence (*e. g.*, as to speed, or equipment) so that looking would not do any good, the trolley company will be let off. Similarly, if the motorman does look and is careful, the company cannot be held where defective equipment renders his care unavailing. It is 'in a better position when [it has] supplied a bad brake but a good motorman, than when the motorman [is] careless but the brake efficient.' "[19]

So much, then, for the cases in which the plaintiff, conscious or unconscious of his peril, cannot extricate himself therefrom. Still greater difficulty and confusion have arisen in the other type of case: that of the negligently inattentive plaintiff. He has placed himself in a position of peril, not a helpless one, but one from which, up to a point, he could have escaped had he performed his duty of vigilance to discover his situation. Plainly, if the defendant does not actually perceive[20] the plaintiff's situation, and also actually realize, or — as a reasonable man — should realize, that the plaintiff is inattentive and thus in peril, there is no liability. There are what may be termed concurrent breaches of equally balancing duties of vigilance. To hold otherwise would require the defendant to exercise greater vigilance to discover the plaintiff's situation than the latter is required to exercise to discover it.[21] But, if the defendant actually sees the plaintiff's situation and realizes, or, as a reasonable man under the circumstances should realize the plaintiff's inattention, then a new duty arises to exercise the then available means to avoid the injury.

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[18] The position taken by the Restatement is supported by HARPER, *op. cit. supra* note 9, but is said to be *contra* to the weight of authority: James, *Last Clear Chance: A Transitional Doctrine* (1938) 47 YALE L. J. 704, 714.

[19] *Id.* at page 710, quoting from British Columbia El. Ry. v. Loach, [1916] 1 A. C. 719, 727.

[20] While the rule requires actual knowledge upon the part of the defendant, under the rule of Craft v. Fordson Coal Co., 114 W. Va. 295, 171 S. E. 886 (1933), his denial of knowledge may be useless.

[21] This is the basic criticism to which Smith v. Gould, 110 W. Va. 579, 159 S. E. 53 (1931), is subject. While the court still pays lip service to that case, it was limited to the situation of discovered peril by Meyn v. Dulaney-Miller Auto Co., 118 W. Va. 545, 191 S. E. 558 (1937).

It is important to note the separation in fact and in time between the *physical act* of perceiving the plaintiff's situation, and the *mental process* of realizing the peril involved. Thus, a motorist approaching a pedestrian who is crossing a street may, in the absence of indications to the contrary, rightfully assume that he will not step into, or will step out of, the path of the car.[22] As the car approaches and the pedestrian continues in a situation of increasing danger, a place will be reached at which the motorist should realize that it is developing to the point of peril unless appropriate action be taken. The mere blowing of the horn may be an act which, under the given circumstances, will be considered a sufficient discharge of the duty to exercise reasonable care to avoid harm. However, if this produces no perceptible effect upon the pedestrian, further reasonable measures to avoid the injury will be required within the then existing ability of the motorist.

The case of *Smith v. Gould*[23] has had a disturbing and unsettling effect upon the doctrine in this state. If, as Hatcher, J., contended in the dissenting opinion, the facts are those of a case of mutual unconsciousness of peril, then the decision cannot be supported either upon principle or sound authority. Quite ironically, in that case the defendant's liability is traceable to the fact that he used *some* care but not enough. If he had failed to look at all, being completely careless, or had falsely so testified, he could have escaped liability. A cynical observer might cite this as an example of the law's reward for carelessness or for perjury. However, it must be remembered that the plaintiff was also careless; and that the validity of a legal principal is to be tested by its application to the facts proved at the trial rather than as they are.

Nevertheless, in West Virginia, in cases of this type, the defendant who says that he looked but did not see may be in a worse position than the defendant who made no effort whatever to look. "The law ordinarily charges a person of unimpaired vision with seeing an object 'which if he had used his senses, he in the nature of things must have seen' ".[24]

Whatever support *Smith v. Gould* may have given to a doctrine imposing liability in cases of mutual unconsciousness was

[22] *Cf.* Nutter v. C. & O. Ry., 113 W. Va. 94, 166 S. E. 815 (1932), to the effect that a locomotive engineman is under no duty to anticipate that the plaintiff would step into the path of the train.

[23] *Supra* note 5.

[24] Craft v. Fordson Coal Co., 114 W. Va. 295, 171 S. E. 886 (1933). How far this principle will be extended is yet undetermined.

withdrawn by *Meyn v. Dulaney-Miller Auto Co.*,[25] the actual decision in which, as set forth in the opinion and embodied in the syllabus, is limited in conformity to the rules of Sec. 480 of the Restatement. A *dictum* also cites with approval the rules of Sec. 479, which *dictum* was in turn approved in the subsequent case of *Fielder v. Service Cab Co.*[26] Thus, it seemed that these two cases had settled the doctrine in this state in conformity with the rules of the *Restatement.* It remains to be seen, however, when the question is squarely presented in the future, whether or not the court will follow the distinctions between the various kinds of antecedent negligence, hereinbefore discussed.

Although the doctrine was seemingly thus settled, a disturbing confusion is found in the language of the syllabus of the subsequent case of *Lynch v. Alderton.*[27] The opinion, however, is clear and well considered. The syllabus states that the doctrine will apply "where and only where such defendant, with knowledge of, or in circumstances where, by the exercise of reasonable prudence, he should have knowledge of the plaintiff's peril, his inability to extricate himself therefrom, or that he was apparently oblivious of his danger, and then fails to exercise reasonable care in the surrounding circumstances to avoid injury to the plaintiff; or where a negligent plaintiff, in a position of peril, can escape therefrom, but the defendant actually saw the plaintiff's peril in time to avert his injury and failed to take steps necessary to do so".

The confusion arises as a matter of grammatical construction. Thus, the syllabus[28] can be interpreted to read, in part: "where the defendant should have knowledge of the plaintiff's peril and that he was apparently oblivious of his danger". This would permit recovery in mutual unconsciousness cases, where the plaintiff is oblivious of his danger and the defendant was likewise oblivious but should have known of the plaintiff's situation. Furthermore, the last clause of the syllabus, literally construed, would permit recovery by a plaintiff who is able to escape from his peril. This language must be taken to refer to a case in which the plaintiff was actually unaware of his peril, but *had he been aware,* he could have escaped, *i. e.,* the negligently inattentive plaintiff.

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[25] *Supra* note 2.
[26] *Supra* note 3.
[27] *Supra* note 2.
[28] The writer leaves to others the decision of the question "Is the syllabus the law of the case?" See Hardman, *"The Syllabus Is The Law"—Another Word by Fox, J.* (1941) 48 W. Va. L. Q. 55.

The rule was again rephrased in *Bowman v. Monongahela West Penn Public Service Co.*,[29] thus: " . . .if, as a proximate consequence of his own contributory negligence, plaintiff is confronted with an imminent danger of which he is obviously oblivious or from which he plainly cannot extricate himself, it is the duty of the defendant, if conscious of plaintiff's peril, or if by the exercise of reasonable care he should be so conscious, to exercise reasonable care under the circumstances to avoid injuring him."

Here, again, as a matter of grammatical construction, this could be interpreted to read, in part, that where a plaintiff is in "imminent danger of which he is obviously oblivious," it is the duty of the defendant to avoid injuring him, if the latter, by the exercise of reasonable care, *should* be conscious of plaintiff's obliviousness to peril. This is open to the same objection previously stated. It would allow recovery in the mutual unconsciousness type of case.

The *Bowman* case was reversed upon the ground that the instruction omitted reference to the defendant's realization of the plaintiff's peril, or his lack of care in not having realized it. It is significant that, in the syllabus of the *Lynch* case, the words "realization" or "realize" do not appear. Consequently, it may be that the trial court, relying upon that syllabus as a complete statement of the doctrine, was thus led into error in giving the instruction.

It is submitted that much of the current misunderstanding is traceable to the notion that there is but *one* doctrine of last clear chance which will apply to all types of cases. Analysis shows that different rules apply to (a) the case of the plaintiff who, attentive or inattentive, cannot extricate himself, and (b) the case of the plaintiff who is in a perilous position by reason of his inattentiveness.

Thus, in the *Bowman* case, one of actually discovered peril from which the plaintiff could not extricate herself, the court cites in support of its decision the *Lynch* case, one of an inattentive plaintiff of whose situation the defendant could not have become aware by the exercise of due care.

On the whole, it is submitted that the court has reached correct results in its applications of the doctrine,[30] with the exception

[29] *Supra* note 2.

[30] It is curious that the doctrine was not mentioned in the case of Connelly v. Virginian Ry., 20 S. E. (2d) 885 (W. Va. 1942), holding that a railroad company is not liable for the death of a trespasser who was struck while asleep

of *Smith v. Gould.* However, a lack of uniformity in stating the doctrine has apparently misled the trial courts. It is believed that the least confusing statement is that contained in *Meyn v. Dulaney-Miller Auto Co.* Much would be gained if the court would adopt and strictly adhere to a formula for stating the doctrine in instructions. This would eliminate a prolific source of reversals and new trials, and the chance for error would be confined to the determination of whether or not the evidence justified an instruction.

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on the end of a railroad tie, until actual discovery of his presence in time to avoid striking him. Riley, J, dissented upon the ground (a) that there was a duty of vigilance to discover a helpless trespasser, and (b) that the evidence showed that the defendant's employees were actually maintaining a lookout and had an unobstructed view of the the track for such a distance as would have enabled them to stop the train. Nor, was any mention made in the opinion or in the dissent of the rule of Craft v. Fordson Coal Co., 114 W. Va. 295, 171 S. E. 886 (1933). If, applying that rule, the trainmen are chargeable with having seen what was plainly visible, the point at which they could have seen the decedent becomes, in law, the point at which they actually did see him (their denial to the contrary being of no legal effect). It is from this point, then, that the interval of time should be measured to determine whether (a) the trainmen realized or should have realized the decedent's helpless peril and (b) thereafter the trainmen were negligent in failing to stop the train.