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OBSERVATIONS ON LAST CLEAR CHANCE IN WEST VIRGINIA

ROBERT T. DONLEY

One who undertakes a discussion of the doctrine of last clear chance need make no apologies to those who have had occasion to inquire, even superficially, into the subject. The perfectly bewildering assortment of cases in West Virginia applying the principle indiscriminately under the guise of proximate cause, supervening negligence, or wilful negligence, point to the necessity for an attempt at clarification. It is the purpose of this article to make that attempt, to analyze the reported cases, pointing out those believed to be incorrectly decided, and to submit definite classifications and rules of application tending to produce rational decisions in cases of this character.

The doctrine is generally conceded to have originated with the English case of Davies v. Mann. There the plaintiff fettered the fore-feet of an ass belonging to him and permitted it to graze at the side of a highway about eight yards wide. The defendant's wagon, with a team of three horses, coming at a rapid pace, ran into the ass, inflicting fatal injuries. The plaintiff was not present at the time. The defendant did not discover the presence of the ass prior to the collision with it. It was held that admitting plaintiff's negligence, he should recover, since the defendant by using ordinary care could have avoided the injury. Baron Parke disposed of the defense of contributory negligence by redefinition:

"... the negligence which is to preclude a plaintiff from recovering in an action of this nature, must be such as that he could, by ordinary care, have avoided the consequences of the defendant's negligence."

It will be noted, therefore, that the rule had its inception in a case involving (a) injury to the plaintiff's personal property, (b) the absence of the plaintiff, and (c) lack of discovery of the danger on the part of the defendant.

That the plaintiff was guilty of negligence in permitting his property to remain in the highway is admitted; that his negligence continued up to the moment of the accident is likewise beyond dispute. How then, if there is such a rule as contributory negli-

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1 10 M. & W. 546 (1842).
gence, can a recovery be permitted, where, as here, both parties are negligent and the negligence of both contributes to the harm? There has been much dispute as to whether the doctrine of last clear chance was consistent with the rule of contributory negligence, in direct conflict therewith, or an exception thereto. Much would be gained in clarity of thinking if the courts would frankly recognize it as an exception, "based as much on sound policy and justice as the rule itself."

The situations of fact to which the doctrine can be applied are definitely limited. In all cases (a) the plaintiff has negligently placed either himself or his property, or both in a position of imminent peril; (b) the plaintiff is either unconscious of his perilous situation, or unable to escape therefrom, or both; and (c) there is an "appreciable" interval of time within which the defendant, by the exercise of due care under the circumstances, could have avoided the injury, either after discovering the plaintiff's situation, or, by the exercise of due care, could have discovered it.

The books are infested with cases involving injuries to children and to animals. Strictly speaking, if the child is less than seven years of age the case does not properly come within the doctrine of last clear chance for the reason that it is too young to be capable of contributory negligence. Similarly, the owner of animals is not chargeable with negligence in permitting them to stray onto the right of way of a railroad company, or onto its

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8 Herbert F. Goodrich, Iowa Applications of The Last Clear Chance Doctrine, (1919) 5 Iowa L. Bull. 36, 38.
tracks.⁸ Certain well-defined principles in these cases can be deduced, such as the rule that it is the duty of those in charge of a railroad train to keep a reasonable lookout for children and animals trespassing on the tracks⁹, although there is no duty to discover an adult trespasser or bare licensee.

In certain other West Virginia cases, the doctrine of last clear chance is inapplicable for the reason that the defendant was not negligent,¹⁰ although the situations of fact involved are closely analogous to those in cases which do call for its application. The same observation may be made as to certain other types of cases where, again, the doctrine cannot be invoked, for the reason that the plaintiff was not negligent.¹¹

Cases arising under the Federal Employers Liability Act are not included in this discussion, since the defense of contributory negligence does not bar recovery, but may be considered in mitigation of damages.¹² All of the cases referred to will merit inspection and appear to throw light on the correct principles of last clear chance, but limitations of space preclude their discussion at this time.

We now come to a consideration of those cases wherein the doctrine is properly involved. It is thought convenient to state the fact situations constituting the essentials of each type of case.

Case no. 1. Plaintiff negligently places himself (or his property) in a position of imminent peril of which he is unconscious and from which (had he been conscious thereof) he could not have escaped. Thereafter, defendant perceives the situation in time to have avoided the injury by the exercise of due care.

Liability is unquestionably imposed in this type of case. Under such circumstances the negligence of the defendant amounts to wanton or wilful injury, and reckless disregard of the plain-

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⁹ Stuck v. Kanawha, etc., Ry. Co., supra, n. 3; and see generally cases cited in notes 3 and 4.
tiff's rights. The most familiar example is the case of one walking over a long trestle, who is unaware of an approaching train, and is unable to escape. The engineer, perceiving the situation, negligently fails to stop the train when he could have done so. No West Virginia case directly in point has been found.

Case no. 2. This is the same situation stated in Case no. 1 except that the defendant does not perceive plaintiff's position, but could have done so by the exercise of due care.

The case of Downey v. C. & O. Ry. Co.,29 while not directly in point, is analogous. Plaintiff was employed by defendant as an apprentice blacksmith and was being transported to the place of his employment. He was sitting on the cow-catcher, with his legs hanging down in front. The engine was shoving two cars ahead of it. Plaintiff was riding in this position because there were not enough seats in the box-cars for all employees being taken from the depot to the roundhouse. (This was denied). The engineer knew of plaintiff's presence and said nothing. As the train was thus proceeding it was struck by another of defendant's engines coming in a different direction. The court said:30

"... though the plaintiff may have been guilty of negligence, and although that negligence may, in fact, have contributed to the injury, yet if the defendant could in the result, by the exercise of ordinary care and diligence, have avoided the injury, the plaintiff's negligence will not excuse or relieve him from liability. It is not sufficient that the defendant sees or knows the plaintiff has negligently placed himself in a position of danger, which may possibly result in his injury, but the situation must appear to be such that, unless the defendant uses extraordinary care and efforts to avoid it, injury must, according to the ordinary course of events, result to the plaintiff."

Recovery was barred, apparently, on the ground of contributory negligence in riding on the cow-catcher, or lack of negligence of defendant. It disregarded any negligence in the collision, thus: "Whether or not the collision was the result of negligence on the part of the defendant is not involved in this question. Our only inquiry here is, was the conduct of the defendant in running its train, when it knew the plaintiff had negligently placed himself upon the pilot of its engine, wanton and reckless." There is nothing in the opinion to show the situation with reference to collision. It is submitted that the case is wrong in disregarding

28 28 W. Va. 732 (1886).
29 Ibid. at 737.
this feature. Suppose the plaintiff had been walking to work, over defendant's trestle and had been struck by train No. 2 coming in the opposite direction. There should be liability if the trainmen could have discovered his peril and avoided it. Thus, one cannot say whether, on the true facts, the case is incorrect, but it is submitted that it is wrong in principle in closing this avenue of inquiry. Of course, this assumes that the plaintiff's position of peril could, in the exercise of ordinary care, have been discovered by the trainmen in time to have avoided the collision.

Case no. 3. Plaintiff negligently places himself (or his property) in a position of imminent peril of which he is unconscious, but from which (had he been conscious thereof) he could have escaped. Thereafter, defendant perceives the situation in time to have avoided the injury by the exercise of due care.

Our court upheld a recovery in this situation in Truman v. Wink-O Products Co. There, the plaintiff, a woman sixty years of age, crossed a Charleston street diagonally. She was wearing a sun-bonnet, and "continued her course as if unaware of the approaching truck," driven by defendant's servant. He admitted seeing her when more than ninety feet away, but did not slow down, excusing his actions by saying that he thought she was "going to let me go by."

Judge Litz said:

"The verdict and judgment are clearly sustained by the evidence, and this notwithstanding the plaintiff may have been negligent in failing to exercise proper precaution for her safety."

"The mere fact of negligence will not excuse the infliction of an injury, where by due care and caution the injury may be avoided by the one inflicting it. One may negligently place himself in a situation where danger may reasonably seem imminent; yet if injury is avoidable by another through the exercise of reasonable care, the carelessness of the person affected does not excuse the infliction of an injury."

A similar case is that of Deputy v. Kimmel. In some of the cases it is extremely difficult to determine whether the plaintiff

96 W. Va. 256, 122 S. E. 745 (1924).
Ibid. at 358.
73 W. Va. 525, 80 S. E. 919 (1914). There the plaintiff, a child 10 years old, and two other children started to cross a public street, at an intersection. They were absorbed in looking at pictures and were struck by the defendant's car. The latter saw the boys approaching the crossing when some 30 feet from the place of the collision. There seems to have been no particular act of negligence, beyond failing to stop the car before striking the plaintiff, since defendant was not exceeding the speed
was unconscious of his peril. Even so, where an adult is walking on the tracks of a railroad, apparently in full possession of his faculties, there is no duty to stop unless the trainmen become "aware" of the peril. Thus, in Raines v. C. & O. Ry. Co., plaintiff's intestate was walking on defendant's track, reading a newspaper. There was a clear view for a long distance, and the train was going about twenty miles an hour. When it was within twenty or thirty feet of him the engineer blew the whistle and did all possible to stop. Recovery was denied on the theory that the servants of defendant had a right to assume that plaintiff's decedent would step off the track "**" and if the employees omit no duty after becoming aware of his peril the company will not be responsible for a resulting injury." (i. e. after realizing his peril) **"... I know of no rule, and can find no case, making it the duty of the engineer, under such circumstances, not to approach a man walking on the track nearer than the distance within which the train can be stopped—say two hundred feet in this case."" Dent, J., dissented on the ground that the whistle was not sounded and the bell rung within a reasonable time to warn decedent.

limit, and repeatedly blew his horn. The court held that there was enough evidence to warrant submission to the jury, and that its conclusion was final; and reached the same result as to contributory negligence.

Ashley, Adm'x. v. Kanawha, etc., Traction Co., 60 W. Va. 306, 55 S. E. 1016 (1908). Plaintiff's intestate, while crossing defendant's track on a bicycle, at a street intersection, was killed. Apparently the car was 200 feet away when Ashley started across the street and it was traveling from 15 to 30 miles an hour. No alarm was given until Ashley was but 30 feet away. Held: The trial court erred in directing a verdict for defendant in excluding plaintiff's evidence; the negligence of both parties was a jury question.

Again, in Jeffries, Adm'x. v. Ashcraft, 104 W. Va. 636, 141 S. E. 14 (1927), the court held, Syl. Pt. 3:

"The mere negligent act of one person will not excuse negligent injury to him by another. If, therefore, a person negligently places himself in imminent danger and is injured by one who, in the exercise of reasonable care, could have avoided such injury, the negligence of the former will not bar recovery.""

The decedent was riding on the left running-board of a Ford which was struck near the edge of the concrete road by defendant's car which was going 35 or 40 miles an hour. There was evidence that the defendant was under the influence of liquor and driving recklessly. The court held that an instruction offered by defendant on the theory of contributory negligence was properly refused. Hence, the existence of contributory negligence being essential to the application of the doctrine of last clear chance, the remarks of the court with reference thereto, as well as the above quoted syllabus, are dicta.

See also Beyel v. Newport News, etc., R. R. Co., 34 W. Va. 538, 12 S. E. 532 (1890).

39 W. Va. 50, 19 S. E. 565 (1894).
Just what is meant by "aware"? Professor Goodrich says:"

"The early decisions conditioned the plaintiff's recovery upon negligent acts or omissions by the defendant 'after becoming aware of the injured party's negligence.' The test is somewhat ambiguous. Does it mean knowledge of the negligent thing the plaintiff has done, or knowledge of the facts which make his situation dangerous, or such knowledge plus an appreciation of the danger? . . . That knowledge which defendant must have is the knowledge of plaintiff's presence. If the latter's position is one of danger, the defendant is liable if, as an ordinary prudent man, he should have appreciated the danger, and conducted himself accordingly."

That is to say, the question is for the jury. Negligence should not be the subject of inquiry into the mental state of the actor."

The test is objective rather than subjective.

"Negligence neither is nor involves ('presupposes') either indifference, or inadvertence, or any other mental characteristic, quality, state or process. Negligence is unreasonably dangerous conduct, i. e. conduct abnormally likely to cause harm."

In Riggs, Adm'r. v. West Penn, etc., Co., an automobile was struck by defendant's electric car at a crossing where two streets intersected at right angles. The evidence showed that the whistle was blown, but this was controverted; that the motorman was seventy feet from the crossing when he first saw the auto; that the electric car was going twenty to twenty-five miles an hour, while the auto was going thirty to thirty-five miles an hour; that the car could not have been stopped within less than one hundred and fifty feet. The witnesses for plaintiff denied that warning

37 Supra, n. 2, pp. 41-42. Cf. Wendell v. Payne, 89 W. Va. 356, 109 S. E. 734 (1921). Here, the plaintiff, a pedestrian, was a trespasser or licensee, and was struck by defendant's engine after having been seen for a distance of 800 feet, and after having paid no attention (because of deafness) to warnings given within 350 feet. Defendant's trainmen did not slacken speed, until too late to avoid the injury.

38 Henry W. Edgerton, Negligence, Inadvertence, and Indifference; The Relation of Mental States to Negligence (1926) 39 Harv. L. Rev. 849. " . . . one may conceive that although the actor is required to conform to the standard of a normal man and not to any personal standard of his own, yet the respect in which he must conform is mental and not physical; that he is required, not to act as safely, but to attend as closely or feel as anxiously, as a normal man would in the same circumstances; that negligence is a mental phenomenon, or that it is conduct produced or accompanied by a particular mental phenomenon."

39 Ibid. at 852.

40 105 W. Va. 362, 142 S. E. 521 (1928).
signals had been given. The lower court directed a verdict for the defendant. This was affirmed by the Supreme Court.

Judge Litz, author of the opinion, disagreed with the majority of the court, and thought that the issue as to the giving of warning signals should have been submitted to the jury, on the theory that negligent failure so to do would have been a violation of the motorman’s duty under the last clear chance doctrine.

The court, however, held that he had done all that could be required under the circumstances. Although it is not apparent from the opinion, evidently the verdict was directed after both parties had introduced their evidence. The trial court apparently thought that the uncontradicted evidence of the plaintiff made a prima facie case. Therefore the decision seems to be based not on the lack of proof of defendant’s primary negligence, but rather on the lack of proof of its negligence after discovering the plaintiff’s perilous situation. If so, then the decision assumes that the motorman exercised all possible care to avoid the collision after such discovery. However, as Judge Litz pointed out, one mode of exercising due care was to blow the whistle, and this was made an issue of fact by conflicting evidence, which should have been submitted to the jury. If they believed that the whistle was not blown, and that a reasonably prudent motorman, under the circumstances, would have blown it, then there would be evidence to support a verdict for the plaintiff.

In Bonar v. B. & O. Ry. Co., the facts are thus stated in syllabus, point 3:

"Plaintiff approaching a railroad crossing in an automobile, when about 40 or 50 feet from the track momentarily saw an engine on the track between 300 and 400 feet from, and headed away from the crossing, but did not know in which direction it was moving, and his view thereafter was obstructed. He looked and listened, observed no danger, but did not stop. He saw the railroad watchwoman cross defendant’s tracks with a stop signal in her hand, and her conduct indicated that the engine was not dangerously near."

When a collision was imminent, plaintiff discovered the backing engine, swerved his car off the crossing into a sand pile, and it was thereby demolished. It was held that plaintiff’s contributory negligence was a question for the jury. Last clear chance was not discussed, but it perhaps could have been applied. Admitting that plaintiff was negligently in a position of danger

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29 91 W. Va. 462, 113 S. E. 766 (1922).
of which he was unconscious and from which he could have escaped (by stopping his car), nevertheless if the defendant, (through its servant, the watchwoman), perceived the situation and could thereafter have avoided the injury by giving warning, liability should be imposed.

One is rather unprepared for the surprising case of Waller v. N. & W. Ry. Co. Plaintiff’s intestate was riding in an automobile which his son was driving. The latter negligently drove the car off the planks over defendant’s public crossing and the motor stalled. Plaintiff’s evidence further showed that the car remained stalled on the tracks for eight or nine seconds while the driver attempted to start it; that defendant’s engineer could have seen the car at a distance of from 555 to 700 feet; that the train was actually stopped in 480 feet. The court, however, denied a recovery, and stated that the doctrine had no application. Thus:

"Assume that the engineer saw the automobile at a distance of 555 to 700 feet. That alone is not enough. Before there can be recovery it must be said that he knew or ought to have known of the peril. The natural presumption in the mind of an engineer upon seeing an automobile on a crossing several hundred feet away would be that it would move off the crossing either forward or backward before the train reached it."

Prior to that, the court had said:

"But this presupposes that immediately upon seeing the automobile at a distance of twelve to fifteen car lengths, the engineer would have realized that it was stalled upon the track. We cannot presume that he would have so realized, nor can we say that he should have done so under the circumstances, considering that there was nothing in the physical appearance of the machine to convey the immediate impression that it was in distress. It is analogous to a pedestrian on a track some distance in advance of an approaching train."

It is submitted that if the assumption of discovered peril is made, the decision is out of line with the weight of authority

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22 Cavendish v. C. & O. Ry. Co., 95 W. Va. 490, 121 S. E. 498 (1924) is a clear case of concurrent negligence, in which plaintiff's decedent attempted to "beat the train" across the tracks. In referring to the Casdorph and Bonar cases, the court said that in them "there were watchmen at the crossings upon whom the injured travelers had a right to rely for notice of the approaching trains, and therefore the duty on them to stop, look and listen was not so great . . . ."

and contrary to the theoretical basis of last clear chance as developed by the modern decisions. It is not at all clear that the engineer should have failed to realize the situation of peril, for the supposed analogy to a pedestrian appears unreasonable. If an automobile is seen standing on a crossing the first impression should be that it is stalled, otherwise, the driver would not permit it to remain in such a dangerous position. At least it is a question for the jury as to whether or not a reasonably prudent person in the position of the engineer should have realized the situation. Furthermore, the view of the track was clear and if, as the engineer stated, he was keeping a lookout, he should not be permitted, any more than a pedestrian, to say that he did not see what was plainly before his eyes.

A clearer case of discovered peril, coupled with unconsciousness thereof on the part of the decedent and a sufficient interval of time within which to avoid the injury, would be difficult to imagine.

Finally, the court entirely overlooks the possibility of avoiding the injury otherwise than by stopping the train. There was an issue as to whether signals were given. If they had been given, might not the occupants of the car have escaped in the twenty-two seconds elapsing between the time when their position should have been (or was) discovered, and the time of the collision?

Suppose the action had been instituted by the owner of the car to recover for damage to it? Certainly it could not have been extricated from its dangerous situation by any degree of care. The case would be on all fours with Davies v. Mann even conceding that the engineer did not actually discover the situation. Notwithstanding, the case was approved in Keller v. N. & W. Ry. Co.\textsuperscript{4} There an automobile was driven onto a private railroad crossing. The driver testified that the car stalled with the rear wheels on the second rail; that he then looked and saw no train; that he then attempted to start the car, and while doing so, one and one-half minutes later, it was struck by the defendant's train, without warning. Evidence for the plaintiff showed that there was a clear view of the crossing of from 900 to 1600 feet, available to the trainmen.

The engineer claimed that he had a clear view for 500 feet and the fireman for 900 feet. The engineer was watching the track, but the fireman testified that he saw the car approaching

\textsuperscript{4}156 S. E. 50 (1931).
when the train was 800 to 900 feet away, and rang the bell; that
when he saw the car was not stopping he blew the whistle. The
engineer did not see the car until it was right at the crossing,
then threw on the emergency brake and applied the sand. There
was testimony that the car was entirely on the track. This latter
testimony was confirmed by certain physical facts such as scraped
places on both sides of the track and indentations on the car
_corresponding to coupling knuckles on the locomotive.

Admitting this to be true, and that the car was in fact en-
tirely on the crossing, is this so important as the court intimates
when it says:

"It is incumbent on the plaintiffs to show just how and why
the entire car happened to be on the crossing when struck.
Until they show that, we have no way of determining just
what prior duty the trainmen owed them, or whether that
duty was breached."

Surely the question is not why the car was on the crossing,
nor how it got there, whether by stalling of the motor or other-
wise. The crux of the matter is, was the car on the crossing at
all, and if so, was it seen by the trainmen in time to have avoided
the injury by the exercise of care under the circumstances? There
is nothing in the opinion to indicate the speed of the train
at the time, or the distance in which the train could have been
stopped in an emergency. Point 2 of the syllabus indicates that
the cases were decided on the theory of contributory negligence,
which, of course, admits the negligence of the trainmen. The
holding is:

"When a plaintiff is negligent, and his negligence concurs
and co-operates with that of the defendant, as a proximate
cause of the injury complained of, he cannot recover."

Of course plaintiff's negligence was a proximate cause of his in-
jury, otherwise there would have been no collision. But this does
not answer the question: did the fireman discover the perilous
situation in time by the exercise of due care under the circum-
stances, to have avoided the injury? There was evidence that he
did, and that thereafter no warning signals were given. The
physical facts as to the position of the car do not in any way
contradict this evidence. Admit that those facts show that the
car was entirely on the crossing, how does that nullify the testi-
mony of the plaintiff that it remained there for one and one-
half minutes before the train struck it? Green has shown, in a
very elaborate discussion, the futility of attempting to decide last clear chance cases on the theory of proximate cause.25

"The second most usual error made by courts in dealing with proximate cause is the confusion of the negligence issue with the issue of casual relation. The accepted test of negligent conduct is the foreseeability or probability of harm, as a result of the defendant’s conduct, to the interest of plaintiff (or of some one so situated) which has been injured."26

In the Keller cases, the court approved certain cases and disapproved others.27 Judge Hatcher, speaking for himself, indicated that in his opinion the doctrine should be limited to cases of actually discovered peril. Therefore, there may have been circumstances disclosed by the record, but not revealed in the opinion, establishing that in this case the peril was not discovered, to such a degree of certainty as not to raise a question for the jury.28

25Leon Green, Contributory Negligence and Proximate Cause, (1927) 6 N. O. L. Rev. 3. "The law pertaining to negligent conduct ought not to be difficult. It is based on the simple but broad premise of reasonable conduct in view of the danger to those interests which would probably be hurt by conduct less than reasonable. Even though a plaintiff has been contributorily negligent, he is not necessarily defeated of a recovery against a defendant, if the latter had the opportunity of avoiding hurt to the plaintiff after defendant discovered, or (in some jurisdictions) should have discovered, the plaintiff’s dangerous predicament. This exception (in fact, merely a limitation on the corollary rule of contributory negligence) is based on the same sense of fair play, justice, and social well-being as underlie both negligence and contributory negligence."

26Ibid., pp. 8-9. See also: James Angell McLaughlin, Proximate Cause (1926) 35 Harv. L. Rev. 149. "Proximate cause has been used also to explain inadequately the distinct doctrine of last clear chance on the ground that the negligence of the plaintiff is not ‘the’ proximate cause of the damage. A plausible reason why many cases are needlessly based on proximate cause instead of on lack of negligence is that the law of negligence is known to be relatively simple and to raise a jury question unless reasonable men cannot differ, whereas a case can be disposed of on proximate cause as a matter of law by accumulating enough words in an opinion."

27The court further proceeded to indicate by way of dicta, its disapproval of Davies v. Mann, 10 M. & W. 546 (1842); Riedel v. Traction Co., 69 W. Va. 18, 71 S. E. 174 (1911); and Schoonover v. R. Co., 69 W. Va. 561, 73 S. E. 266 (1911), and its approval of McLeod v. Laundry Co., 106 W. Va. 361, 145 S. E. 756 (1928), and Waller v. N. & W. Ry. Co., 108 W. Va. 576, 152 S. E. 13 (1930), characterizing the latter cases as “a return to rational treatment” of the doctrine of last clear chance.

28For other examples of cases under this section of, Beyel v. Newport News, etc., R. R. Co., 34 W. Va. 538, 12 S. E. 532 (1890) and Kelley v. Railroad Co., 53 W. Va. 216, 52 S. E. 520 (1905). Plaintiff’s intestate while walking along the track, was struck by defendant’s train. The trainmen had a clear view for one-half mile and actually saw decedent a long distance away, but gave no warning signal until the instant before striking him. This was controverted. Held: On demurrer to evidence, judgment for plaintiff affirmed.
Clearly, if the fireman did not actually discover the plaintiff’s position in time to have avoided the accident, either by stopping the train, or giving a warning signal, the cases are correct. The point here made is that, judging from the facts set forth in the opinion, there was evidence upon which reasonable men might differ as to whether the fireman did actually discover the situation. A jury would have the right to disregard his testimony entirely, or believe some parts of it, or give to it such weight as they believed the same was entitled, in the event that they were of opinion that he had wilfully testified falsely as to any material matter.

Case no. 4. This is the same as Case no. 3, except that the defendant does not actually discover the plaintiff’s peril, but could have done so by exercising due care under the circumstances.

Many courts have apparently gone astray in cases of this type, but it seems beyond doubt that no recovery should be allowed. The duty of the plaintiff and defendant is the same, viz., to keep a reasonable lookout for the probability of injury. If both disregard their duties they are equally at fault, and the prevention of injury is as much within the control of one as of the other. For convenience these cases may be called those of ‘mutual unconsciousness.’

Accidents at railroad crossings, where the view is obstructed, are perhaps the most common cases of this type. Thus, in Canterbury v. Director General the plaintiff was injured while driving his horses and buggy over defendant’s grade crossing. There was a view of the track for 600 feet. But because of a curve, the engineer only had a clear view of 350 feet. Due to sleet, plaintiff raised the top of his buggy, without stopping the horses, and then drove onto the crossing. The negligence alleged was the failure to give crossing signals. The evidence on this point was conflicting. Plaintiff testified that just before entering upon the tracks he looked, but saw nothing. The engineer did not see plaintiff at any time before the collision.

It was held that plaintiff’s contributory negligence was a question for the jury and a recovery was upheld. At page 237 of the opinion the court states: “There is no room for the application of the doctrine of last clear chance, as it clearly appears that it would have been impossible to stop the rapidly-moving

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29 87 W. Va. 233, 104 S. E. 597 (1920).
train in time to prevent the accident had the engineer seen the plaintiff upon the crossing at the very earliest moment that he could have been seen from the locomotive." There was evidence here of contributory negligence on the part of the plaintiff, but the jury resolved the question in his favor. Indeed, considering the clear view that he had of the track, the propriety of submitting the case to the jury may be doubted.

Another doubtful case is Dimmey v. W. Va., etc., Electric Co. Defendant maintained a double track along the highway in front of plaintiff's residence, the nearest rail being four feet from the gate or property line. There was a clear view, apparently, of about seventy-five feet. Plaintiff prepared to cross the tracks, and observed cars coming from both directions, and waited until they had passed, then walked on and was struck by a second inbound car, following the first. She was not on the track, but was struck by the overhanging part of the car. The cars were traveling twenty-five to thirty miles an hour, and often followed each other closely, of which fact plaintiff was aware. There was a dispute as to whether a gong or warning was sounded. It was held that the issues of negligence and contributory negligence should have been submitted to the jury. It is difficult to reconcile this case with that of Berkeley v. C. & O. Ry. Co. There plaintiff was struck while attempting to cross defendant's track at a public crossing in the city of Huntington. The engine passed by plaintiff, who waited until that time, and then proceeded, and apparently the engine stopped and backed, striking plaintiff. Plaintiff did not look or listen after the engine first passed him. There is nothing in the opinion to show what lookout the defendant maintained, or whether the plaintiff was actually discovered, but it was shown that no whistle was blown nor bell rung. A recovery was denied.

In Schoonover v. B. & O. R. R. Co., plaintiff, an infant eleven or twelve years of age, was struck by defendant's train at a point used as a crossing, but which had not been established as such. The train, (an engine and two cars) was running backward at ten or fifteen miles an hour. When plaintiff halted momentarily on the tracks, unconscious of his peril, the engine was seventy feet distant. His back was toward the engine and he

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\(^a\) 83 W. Va. 755, 99 S. E. 93 (1919).
\(^b\) 43 W. Va. 11, 26 S. E. 349 (1896).
\(^c\) 89 W. Va. 560, 73 S. E. 266 (1911).
had not looked for it. A whistle was blown, but no bell was rung, and there were no lookouts maintained.

It was said to be proper in some cases, for the trial court to hold plaintiff contributorily negligent as a matter of law; that it was the duty of defendant to maintain a lookout and to discover the plaintiff. A recovery was allowed. This is an example of how bad theories and a failure to understand proximate cause leads to a wrong conclusion. Thus the court says:

"Such common law duty includes maintenance of a lookout or other adequate means of avoiding collision at crossings, and failure to do so is negligence, constituting proximate cause of injury, even though the plaintiff himself was negligent in going upon the track, if the performance of such duty would have prevented injury."

The court overlooks the duty of the pedestrian who was negligent not only in going upon the track, but also in remaining there. Clearly, this is a case of mutual unconsciousness in which recovery should be denied, if the plaintiff was contributorily negligent.

In *Riedel v. Wheeling Traction Co.*, plaintiff was struck by defendant's car at a public crossing. She testified that she looked but did not see the car approaching. There was a clear view for a "considerable" distance. Just as she had almost crossed the track, her clothing was caught. The car was running at a high rate of speed. The motorman testified that as soon as he saw her starting across the street he sounded the gong and applied the brakes. The court held that plaintiff was contributorily negligent in not observing the car, i.e., she did not maintain a proper lookout; that this was a case of concurrent negligence. It was further held, syllabus, point 8, that: "the injured party cannot recover, although the company was guilty of negligence, through its servants, in having approached the crossing at an undue rate of speed before the danger was discovered." The case was remanded for a new trial, and, on the second writ of error, a directed verdict for defendant was reversed, the court saying:

"Granting that plaintiff was negligent in the first instance, in not taking reasonable precaution to ascertain whether a car was approaching, before she attempted to cross the tracks, still it does not follow that such negligence was the proximate

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63 W. Va. 522, 61 S. E. 821 (1908).
69 W. Va. 18, 71 S. E. 174 (1911).
cause of her injury. If the defendant was guilty of a subsequent act of negligence, either in the omission of a duty, or in the commission of a wrongful act, such supervening negligence becomes, in law, the proximate cause of the injury; and plaintiff's prior negligence will not defeat her recovery."

The facts, while susceptible of two interpretations from the statements thereof in the opinions, seem to make a case of mutual unconsciousness of danger, at least up to the point where it was no longer possible for either party to have avoided the injury. Apparently, the court treated it as a case of discovered peril. If the facts justify this theory, the case could be upheld.

The Schoonover and Riedel cases have been productive of some loose phraseology and fanciful rationalization. Thus, in Bond v. B. & O. R. R. Co., the doctrine of last clear chance was mentioned in a case in which the plaintiff (rescuing a negligent third person from danger) could not himself be charged therewith. There, the plaintiff was struck by defendant's engine while rescuing one, Doris Smith, from a position of peril. She was crossing defendant's tracks, at the station, apparently unconscious of her danger. There was a clear view for 540 feet. The fireman was not keeping a lookout, and the engineer, on the right side, could not see her position. A recovery was allowed. The court made some inaccurate observations, presumably having in mind last clear chance, thus:

"Of course she (Doris Smith) was guilty of negligence. She should have seen the train and hurried across or abstained from crossing, but this fact does not absolve the defendant from liability for its subsequent negligence. Schoonover v. B. & O. Railroad Co., cited; Riedel v. Wheeling Traction Co., 63 W. Va. 522. There was evidence of its last chance to prevent injury, amply sufficient to warrant submission to the jury, of the issue as to its existence."

Again, in Cline v. McAdoo, the court thought it necessary to mention the Riedel case, drawing a distinction. There, the defendant's tracks paralleled each other, one eastbound and one westbound. Plaintiff drove his car over a public crossing, looking to the westward only, and was struck by defendant's engine then being operated backward and westward over the eastbound track. Plaintiff was rather deaf and did not see the engine until

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82 W. Va. 557, 96 S. E. 932 (1918).
85 W. Va. 524, 102 S. E. 218 (1920).
it was within 20 feet of him. There was no obstruction of the view in either direction. No signals were given. The plaintiff was held guilty of contributory negligence as a matter of law; he could not rely on defendant’s custom of operating eastbound and westbound trains on their respective tracks. Speaking of the Riedel case, the court further stated:"

"Steam railroads are regarded as having the right of way, while travelers on streets, particularly at street crossings, are regarded as having rights particularly equal to those of street railways."

The second case of Buchanan v. N. & W. Ry. Co. differed from the first, in that it was an action by the owner of the demolished automobile, who was not present at the time of the collision. The evidence varied from that in the former case in that here it was shown that both the driver and the trainmen had a clear view of each other for 1100 feet, and defendant introduced no evidence as to speed of the locomotive, the distance in which it could have been stopped, or that any effort was made to stop it before reaching the crossing. The court said:"

"... the question of last clear chance was properly submitted to the jury. The occupants of the car were guilty of contributory negligence, and granting, but not deciding, that their contributory negligence was imputable to the plaintiff, yet it was the duty of the operators of the electric motor to have used proper care to discover the danger of the occupants of the car on the public crossing, who were evidently unconscious of their peril, and after discovering their perilous situation, to have used reasonable care to avoid injuring them."

One’s first impression is that this is a consistent application of Davies v. Mann, for the reason that the owner’s personal property was damaged in his absence. However, it is submitted that in reality it is a case of mutual unconsciousness, if it be granted that the negligence of the driver of the car is imputable to the plaintiff, and that the case is incorrectly decided.

We have seen that the owner of cattle who permits them to stray upon a railroad track may recover in certain instances. But, if he permits his wife to drive them over a grade crossing,
and she does not see the approaching train, the result is just the opposite. It was so held in Jones v. Hines,\textsuperscript{44} and the result seems sound. The principle of mutual unconsciousness has been followed in other cases involving injuries to persons on the tracks of the railroad company, but in some of them it is virtually impossible to ascertain what the true facts were.\textsuperscript{45}

Suppose the plaintiff is unaware of the defendant’s approach, and does not become conscious of his peril until too late to escape? This was the situation in Attelli v. Laird.\textsuperscript{46} There plaintiff’s decedent came from behind a truck and started to walk across the highway. At this point, defendant was 200 feet away, on a straight road. When Attelli had proceeded to the middle of the

\textsuperscript{44} 85 W. Va. 496, 102 S. E. 143 (1920). Plaintiff’s cattle were being driven over defendant’s grade crossing which was so constructed that an approaching train could not be seen until one came within 40 feet thereof, and likewise the trainmen could not see approaching travelers until they came within the same distance. Plaintiff’s wife, who was preceding the cattle, did not see defendant’s train until it was within 50 feet of her, at which time she was almost on the tracks. There was evidence that no crossing signals were given. It was held, that even so, there could be no recovery unless “after the perilous position of the cows was discovered, or could have been discovered, the defendant’s agents in charge of the train could have stopped the same in time to avoid the accident.”

There was no evidence to show how far the engine was from the crossing when the cattle could first have been seen by the trainmen. The opinion is questionable in apparently limiting the duty of the trainmen to stopping. Proper phrasing would employ the word “avoided,” whether by stopping or signaling.

\textsuperscript{45} Chadister v. B. & O. R. Co., 62 W. Va. 506, 59 S. E. 523 (1907). Plaintiff’s team of 6 horses, in charge of teamsters, were struck by defendant’s train at a public crossing. The teamsters had been warned by a watchman that the passenger train was due, but they were struck by a freight train. There was a clear view of the track, from the crossing, of 610 feet. The engineer, being on the outside of the curve, did not see the team until within 250 to 300 feet from it. He then blew the whistle and attempted to stop. The train could not have been stopped in less than 600 feet. The court held there was no evidence of defendant’s negligence.

Nuzum v. Ry. Co., 30 W. Va. 228, 4 S. E. 242 (1887). In this case the plaintiff only introduced evidence. It proved that plaintiff’s intestate was struck while crossing defendant’s track, by a train of cars cut loose from the engine, and moving under their own momentum, with no employees on the front end to give warnings. The inference is that deceased was not a trespasser. There is nothing to show the distance between deceased and the moving cars at the time he stepped on the track, or in what distance they could have been stopped.

Christy’s Adm’r. v. C. & O. Ry. Co., 35 W. Va. 117, 12 S. E. 1111, (1891). Plaintiff’s intestate was an employee using the track for his own convenience. He was struck by the train which could be seen at a distance of from 600 to 900 feet, and could have been stopped in 600 feet, but he did not step on the track until the train was within 300 feet of him. Held: no recovery.


\textsuperscript{45} 106 W. Va. 717, 146 S. E. 882 (1929).
road he saw defendant's car and attempted to escape by continuing across, but was struck. Defendant testified that he did not see the deceased until within 20 feet of him. There was evidence that all possible effort to stop the car was not made; nor were warning signals given.

The court held that there was evidence justifying submission to the jury under the doctrine of last clear chance. This seems incorrect. The wrong reason was given, namely, that defendant should have anticipated decedent's appearance; that he should have reduced his speed and given a warning signal; and that had he not been exceeding the speed limit he could have stopped in time to have avoided the injury.

Attelli had as clear a chance to avoid the injury by exercising care for his own safety as did defendant by discharging his duty. If the former had not realized his position of danger, but on the contrary had been struck while unconscious thereof, the case would certainly be one of mutual unconsciousness. When the plaintiff becomes aware of the situation, but too late to escape, consciousness means nothing. In such cases, the plaintiff should be treated as if he had been unaware of his peril up to the moment of injury. Otherwise, the plaintiff could recover although he might have been ever so negligent, if, an instant before being struck, he perceives his danger. Such a result is contrary to reason and policy. The case of *Shumaker v. Thomas* is analagous, but will be discussed subsequently.

A correct result in a mutual unconsciousness case was reached in *McKinney v. The Virginia Ry. Co.* Plaintiff walked over defendant's public crossing, then started back and walked for 34 feet, when he was struck by defendant's train which had failed to give crossing signals. He was on the crossing for "about a minute," during which time there was a clear view for 600 or

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"108 W. Va. 204, 151 S. E. 178 (1929). See also: *Bitter v. Hicks*, 102 W. Va. 541, 135 S. E. 601 (1926). When plaintiff's decedent started to cross the street, defendant's car was seen by him approaching 75 yards away. Bitter did not look again, but continued, unconscious of his danger, and was struck. No warning signals were given. Defendant did not see him until within 4 feet, due to dimmed lights, darkness and rain. There was evidence of excessive speed. It was held that the question of contributory negligence was for the jury; that having once looked, and the situation appearing to be safe, the pedestrian was under no duty to look again. If the jury had found Bitter guilty of contributory negligence, the doctrine would not be applicable since it was a case of mutual unconsciousness.


"105 W. Va. 319, 142 S. E. 442 (1928)."
700 feet. Recovery was denied on the theory of concurrent negligence.

In *Casdorph v. Hines* a right of recovery was indicated notwithstanding that the court treated both parties as having been unconscious of the danger. Plaintiff, 83 year old, was struck at a public crossing in the city of Charleston, while driving his horse and buggy. When he was within 15 or 18 feet of the center of the crossing the train was 100 feet away, and then gave several sharp blasts of its whistle. Plaintiff did not look in the direction of the train, apparently relying upon defendant’s watchman, at the crossing, for warning. The watchman did nothing to warn plaintiff.

The trial court directed a verdict for defendant, at the conclusion of plaintiff’s evidence, apparently holding that he was guilty of negligence as a matter of law. The Supreme Court held this to be error; that the failure of the watchman to warn plaintiff was a circumstance which should have been submitted to the jury for determination of plaintiff’s negligence. A question not fully discussed by the court was the primary negligence of defendant. The declaration was based on the alleged breach of duty to give proper warning signals, and the omission of the watchman to warn plaintiff. Yet it was shown that signals were given by the trainmen in ample time to warn plaintiff and enable him to stop his horse within 15 feet of the crossing. Consequently there was a failure of proof on that allegation. Secondly, was it the duty of the defendant to maintain a watchman? Presumably there is no common-law or statutory duty so to do."

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*89 W. Va. 448, 109 S. E. 774 (1921).*


"Our State has not seen fit to carry into effect by enactment into law provisions requiring railway companies to erect and maintain gates, or to provide watchmen at public crossings. Neither has the municipality of Welch done so. We have said, however, that the exercise of such power essentially inheres in all legislative agencies of the State. Sutherland v. Miller, 79 W. Va. 796. Therefore, laws of this nature may be enacted by the city or state whenever the public exigencies and safety of the community demand it."

Niland v. Monongahela, etc., Co., 106 W. Va. 528, 147 S. E. 473 (1928). A case of accident at a crossing where defendant’s automobile warning bell was ringing 722 feet from the crossing; the motorman maintained a lookout and first saw car in which plaintiff was riding when within 30 or 40 feet of the crossing and immediately did all possible to stop his electric car. 

*Held:* No negligence of defendant shown. That Ch. 54, Sec. 61, Code of 1923, does not apply to "electrically equipped railroads"; and that "nevertheless the common law requirement as to signals does apply, and that is fully as exacting as the statutory duty. What the notice and warning to the public shall be depends, under the common law, upon the circumstances
But, having voluntarily undertaken to do so, and having thus induced the plaintiff to rely thereon, a duty would seem to arise, namely, that the watchman perform the service in which the public in general and the plaintiff in particular, had been induced to impose confidence. The point is that the evidence as to the watchman tended to prove primary negligence on the part of the defendant. It likewise had a pertinent bearing on plaintiff's negligence, but how could the vigilance of the watchman have accomplished more than was accomplished by the engineer in the way of warning? There was no evidence that the plaintiff was deaf, or otherwise not in full possession of his faculties. Presumably he heard the whistle when 15 or 18 feet from the crossing. He was therefore warned by the engineer instead of by the watchman, in time to have avoided the collision. Consequently, the alleged negligence of the watchman was not controlling. It was not a legal cause of the injury. It is submitted, therefore, that the trial court correctly directed a verdict for defendant, not because of plaintiff's negligence, but for the reason that no prima facie case was made against the railroad company. In brief, it had fulfilled its duty by warning the plaintiff (whether by watchman or whistle is immaterial) in ample time for him to have avoided the collision.

It is therefore difficult to reconcile the Casdorph case with Robinson v. C. & O. Ry. Co. unless the presence of the watchman in the former case can be said to relieve the plaintiff of a duty to maintain a lookout for his own safety. This is not the law. In the Robinson case plaintiff's testimony showed that he was struck at defendant's public crossing, where it maintained 3 lines of track, the first a side track, upon which at both sides of the crossing, box-cars were stationed; that as plaintiff walked over the crossing, between the ends of the box-cars, his view was obstructed; and that he stopped, looked and listened; but that no crossing signals were given. The jury in answering interrogatories, upheld his version.

However, it was shown that after plaintiff crossed the first track, he had a clear view of the next track of from 40 to 50 feet. The two tracks were about 9 feet apart. On these facts,
the court held plaintiff guilty of contributory negligence as a matter of law; that his testimony was without weight, being contrary to the physical facts, and said:

"... when, as in this case, it be clearly proven or admitted that if the person injured had looked he must have seen the approaching train, his protest that he did not see it should be disregarded. His failure to make use of his faculties of sight and hearing under such circumstances is negligence per se, where it appears as here that a reasonable and fair use thereof would have disclosed his danger."

McLeod, Adm'r. v. The Charleston Laundry Co.\(^a\) is one of the clearest and best expositions of the doctrine that our court has made. There, plaintiff's intestate, his wife, attempted to cross a street in the middle of a block, in a blinding rainstorm. She pulled her umbrella over her head, obscuring her vision of approaching vehicles. She was struck by defendant's truck, whose driver did not see her until within 8 or 10 feet. The case was disposed of on the theory that the driver had no appreciable interval of time within which to avoid the collision, and that it was not one involving last clear chance, but rather a case of concurrent negligence. Assuming that the driver was guilty of negligence in failing to reduce the speed of the truck so that he could stop in the distance covered by his lights (which is a doubtful assumption)\(^b\) and that by the exercise of such care, and keeping a lookout he could have discovered Mrs. McLeod, still the case is one of mutual unconsciousness, and no recovery could be allowed.

The writer again wishes to emphasize that the allocation of these cases rests upon a proper interpretation of the facts as revealed by the opinions. It is possible that in some of the foregoing cases, the situation was not one of mutual unconsciousness, particularly in the Keller case. However, to summarize the four types of cases presented, recovery is allowed in both cases where the plaintiff, had he been conscious of his danger, was powerless to escape, for the obvious reason that the situation was beyond his control. Vigilance would have availed him nothing, and he is not, therefore, to be charged with the omission to perform a futile

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\(^a\) 106 W. Va. 361, 145 S. E. 756 (1928).
\(^b\) Chambers v. Princeton Power Co., 93 W. Va. 598, 117 S. E. 480 (1923) holds that it is negligence per se for a street railway company to operate its cars over the streets of a municipality in the night time, at a greater rate of speed than will enable it to be stopped within the distance covered by its own lights.
act. In case no. 3, although if conscious he could have escaped, the avoidance of injury is actually in the hands of the defendant who has in fact perceived the situation. Being possessed of actual knowledge, his failure to act with care constitutes reckless disregard of human life or property, amounting to a wilful tort, to which contributory negligence has never been considered a defense.

Case no. 5. Plaintiff negligently places himself (or his property) in a position of imminent peril, of which he is conscious and from which he could have escaped. Thereafter defendant perceives the situation in time to have avoided the injury by the exercise of due care.

Needless to say, the doctrine of last clear chance has no application to this situation. The plaintiff has as much opportunity to avoid the injury as the defendant. However, if a case of this character is permitted to go to a jury, a recovery would not be unexpected. The writer submits that Harrison Engineering etc., Co. v. Director General is such a case. Defendant negligently constructed a temporary crossing, at which plaintiff’s truck became stuck in the soft earth. The train was not in sight when the truck was driven on the crossing, and did not appear for a period of from 3 to 5 minutes later, during which the driver attempted to move the truck forward. The train, consisting of 14 or 15 cars being shoved ahead of the engine, then appeared from around a curve, 260 to 275 feet away. The flagman immediately signalled for the train to stop, but it did not slow down until close to the truck, and stopped within 2 car lengths after striking it. The driver had not attempted to reverse the truck and back off the crossing. The jury could have found from the evidence, by inference, that the train could have been stopped before striking the truck, had the signals been relayed promptly. No crossing warnings were given.

It was held that defendant was negligent in its construction of the crossing, and that whether the truck driver was negligent in remaining on the track was a question for the jury.

Assuming that it was negligence for him to remain in a position of peril on the track, the important question is, could he have extricated himself therefrom? The evidence does not show, and the driver does not know, since he made no attempt to back the truck. It seems reasonable to assume that he could have

86 W. Va. 271, 103 S. E. 355 (1920).
done so; at least, he should be chargeable with the failure to use all possible means at his disposal. Again, this is, as the court said, a question for the jury.

It is not important that the negligence of the defendant, in its construction of the crossing, caused the plaintiff’s property to be placed in peril. Even so, if the driver, by the exercise of ordinary care, could have removed himself and his truck out of that position of peril, the policy of the law should be to impose the loss on the plaintiff. This is a very close case, and one that a jury would probably decide in favor of the plaintiff.

**Case no. 6.** This is the same as Case No. 5, except that the defendant does not perceive the situation, but by the exercise of due care could have done so.

*A fortiori*, there should be no application of the doctrine to this case. Yet, since plaintiff’s contributory negligence may be a question for the jury, a recovery was upheld in *Shumaker v. Thomas*.

Plaintiff, 12 years of age, perceived defendant’s truck approaching 100 feet away and started across the street. After reaching the center of the street he realized that he was in danger and attempted to turn back, but was struck. Defendant’s driver did not perceive the danger until too late to avoid injury, as he was not keeping a proper lookout. No attempt was made to try the case on the theory of last clear chance, nor was it mentioned by the Supreme Court. This was plainly right, assuming that plaintiff was guilty of negligence. Perhaps the facts bring the case within case no. 8 but only if we measure the plaintiff’s actions by a subjective test. Tested objectively it seems just to say that a reasonably prudent child of the same age should have recognized his peril at the moment he started to cross the street, within which time he could have escaped. For this reason the case is allocated to its present position.

In *Helvey v. Power Co.* defendant’s truck ran for more than a mile virtually parallel to a public highway upon which plaintiff was driving his automobile. 300 feet from a crossing the road turned sharply toward it. Both the car and automobile were in plain sight of each other for a distance, and each operator tried to pass over the crossing at the same time. The driver and the motorman each said that they did not see the other, until too late to avoid the collision. One of the passengers in plaintiff’s

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108 W. Va. 204, 151 S. E. 178 (1929).

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automobile said that he saw the car, heard the signals and asked plaintiff to stop, but the latter did not do so. This was uncontradicted. It was held that recovery was barred by contributory negligence. In view of the witness’s uncontradicted testimony this should be treated as a case where plaintiff was conscious of his peril.

Case no. 7. Plaintiff negligently places himself (or his property) in a position of imminent peril of which he is conscious, but from which he could not escape. Thereafter, defendant perceives the situation in time to have avoided the injury, by the exercise of due care.

A good example of this case is Freeman v. Monongahela, etc., Traction Co. Plaintiff’s car was struck by defendant’s interurban car at a “blind” crossing where both the highway and the tracks came through deep cuts. When plaintiff reached a point 8 feet from the crossing he had a clear view of 440 feet, but testified that he did not see the interurban car until the front wheels of his automobile were on the tracks, at which time the defendant’s car was only 50 feet away. The motorman testified that he did not see plaintiff’s car until within 75 feet of it, and immediately applied the brakes. A witness for the plaintiff denied that the brakes were applied before the collision. There was evidence that the defendant’s car was traveling at a high rate of speed.

The court held both parties guilty of negligence and reversed the case because of an erroneous instruction. It further held that the doctrine of last clear chance could have been applied on the theory that if the jury believed plaintiff’s witness, then the motorman, after perceiving plaintiff, could have slowed down, by the instant application of the brakes, thereby avoiding the collision.

But in Mollohan v. Charleston, etc., R. R. Co., the court had little faith in the jury, and, it is submitted, decided the case contra to the Freeman case. Plaintiff’s evidence showed that he drove out of an intersecting street and onto defendant’s tracks, where he then perceived its street car approaching 75 to 80 feet away. He attempted to back, but his engine stalled. One of his witnesses testified that the street car, going 12 to 15 miles an hour, could have been stopped within 20 feet.

92 W. Va. 311, 128 S. E. 129 (1924).
The court held that there was no evidence justifying the application of the doctrine of last clear chance, saying:

"Under the rule adopted in this state the doctrine of last clear chance would apply only in those cases where the motorman knew, or by the exercise of due care ought to have known, of plaintiff automobilist's probable peril in time to avoid collision...." The motorman, being sixty to eighty feet distant, would have had reason to believe that plaintiff would continue west, at the same time pulling into the clear between the track and parked cars. Under plaintiff's theory of the case, was it possible for the motorman to have sensed the fact that plaintiff had stopped on the track or 'killed' his engine for a second or more? In that length of time the street car would have been some twenty-two or more feet nearer the point of the accident.\textsuperscript{358}

It is submitted that the real question was: did the motorman after perceiving plaintiff's position exercise the care which a reasonably prudent motorman would have exercised under the same or similar circumstances? Again, the test is objective. What this particular motorman did or "sensed" is of no importance. If reasonable men might differ, the question should have been submitted to the jury. The Supreme Court thought that only one conclusion could be drawn.

Case no. 8. This is the same as case no. 7, except that the defendant does not perceive the plaintiff's position of peril, but could have done so by the exercise of due care.

The case of Sexton v. White Transportation Co.\textsuperscript{37} is not in point because the plaintiff could have escaped from his position of danger. There plaintiff was driving a truck which became stalled as he attempted to turn off the highway, leaving the rear part of the truck on the road, with a clearance of 9 feet. Defendant's bus approached on a level road, straight for 400 or 500 yards, and was observed by plaintiff. There was a conflict of evidence as to whether the lights on the truck were burning. The bus struck the truck, injuring plaintiff, who was standing with one foot on the running board. Visibility was low. The court reversed the case because of erroneous instructions. If the action had been instituted for recovery of damages to the truck, the case would, under the plaintiff's version of the evidence,

\textsuperscript{358} Italics writer's.
\textsuperscript{37} 97 W. Va. 568, 125 S. E. 574 (1924).
fall within this allocation, assuming that the stalling of the truck was a negligent act.

Recovery should be permitted in this type of case although the defendant does not actually perceive the situation because of his breach of duty in not maintaining a proper lookout. True, the duty of the plaintiff may be the same, but if he is conscious of the situation he has performed that duty; if he is unable to escape, maintenance of a lookout is a useless gesture. The avoidance of injury is out of his control.

In the instances previously noted, as Judge Hatcher said in the Keller case, "the logic of the doctrine of last clear chance calls for actual knowledge so that impending injury may be averted. Imputed knowledge affords no such clear chance. Why indeed should knowledge be imputed to the defendant without also imputing it to the plaintiff? Why mete out a measure to one litigant different from that to the other? Why should justice thus discriminate?"

Doubtless this statement was meant to include only those instances in which the plaintiff's knowledge would have been of some service to him in avoiding the danger. For we have seen, in cases nos. 3 and 8, that a liability should be imposed, even though the knowledge of the defendant is only imputed to him.

One other point is deserving of mention. That is the so-called rule of "antecedent" negligence, or "pre-existing" negligence. In Harper, Adm'r. v. Crislip,39 syllabus, point 2, holds: "The general doctrine that the driver of an automobile is not liable for injuries to a child who darts in front of the machine so suddenly that its driver cannot stop or otherwise avoid the injury implies that the operator of the machine has been guilty of no pre-existing negligence which contributed to the injury and made it impossible to avoid the accident after seeing the child."

Here the deceased child was 5 years old. The "pre-existing negligence" consisted in driving at an excessive speed. It is submitted that the application of such a principle to last clear chance cases, so as to impose liability upon the defendant notwithstanding that there is no "appreciable" interval of time, and that even after actual discovery of the plaintiff's peril at the earliest possible moment when it could have been discovered, he may have exercised every means at his command, is, as Goodrich says, "a

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contradiction in terms." Professor Bohlen states:

"Where the defendant, had he discovered the plaintiff's peril, would be powerless to avert it, even though his inability to save the plaintiff is due to some prior misconduct whereby he has put out of his power to do so, he is generally held not to be liable for the ensuing harm.

How can there be any doubt concerning the matter? Last clear chance is based upon knowledge, actual or imputed, plus an opportunity in fact to avoid harm. The effect of "pre-existing" negligence is to impute the opportunity as well as the knowledge. Thus, by piling one imputation upon the other, is the rock of contributory negligence sunk, leaving hardly a ripple to mark its place in the judicial sea."

To conclude, several corollaries drawn from the foregoing analysis may be of assistance. (1) plaintiff's consciousness of danger, when he cannot escape, is immaterial. (2) Plaintiff's unconsciousness of danger is immaterial except when the defendant is also unconscious thereof. (3) If both parties are conscious of the danger and each has an opportunity to avoid the injury, there can be no recovery.

The doctrine should not be misused as a catch-all device to relieve a plaintiff of the consequences of his own negligence. Contributory negligence should be the rule and the doctrine the exception. Sanely and carefully applied, it appears to be based on a sound policy and sufficient reason. Practitioners could assist the courts if, by careful examination of witnesses, they would

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\*\* Supra n. 2. "The overwhelming weight of authority in America is to the effect that a precedent act of negligence, whether of commission or omission, whereby the defendant has put it out of his power to avert the accident after discovering that it is impending, does not make him responsible to a plaintiff who has through his negligence, exposed himself to the peril . . . "

\*\* Bohlen, Contributory Negligence (1908) 21 HARV. L. REV. 233, at 259.

\* The case of Coleman v. N. & W. Ry. Co., 100 W. Va. 679, 131 S. E. 563 (1925), appears to be one in which the doctrine is inapplicable because there was no appreciable interval of time. On this point of Gray v. N. & W. Ry. Co., 99 W. Va. 375, 130 S. E. 139 (1925), where the facts are not very clear. See Bassford, Adm'r. v. Ry. Co., 70 W. Va. 250, 73 S. E. 226 (1912). The cases of Morris' Adm'r. v. B. & O. R. Co., 107 W. Va. 97, 147 S. E. 547 (1929), and Morris, etc., v. B. & O. R. Co., 107 W. Va. 181, 147 S. E. 759 (1929), do not come within the doctrine for the reason that apparently the plaintiffs were not guilty of negligence, and in addition, there appears to have been no appreciable interval of time. The former case presents a good summary of various railroad cases. One interested in the subject may derive assistance from the following: Lasch, The Last Clear Chance Doctrine (1929) 3 TEMP. L. QUAR. 307; Savage, "Last Clear Chance" in Virginia—Injuries by Railroads (1917) 3 VA. L. REV. (N. S.) 321; note (1923) 9 VA. L. REV. 237.
elicit all the facts as to respective distances, speeds and time, from the standpoint of both parties. The writer has found that juries do not understand what the court is talking about when it instructs them as to last clear chance. They do realize that contributory negligence bars a recovery, and hence, in cases where railroad companies are defendants, make the trial an occasion for distributing the economic surplus to plaintiffs. Thus does social injustice tend to produce its legal counterpart. The courts ought to find some corrective other than the bludgeoning of principles and precedents. It is good to reach a correct social result in each particular case, but hardly at the cost of reducing lawyers to the intellectual level of crystal-gazers. Let it be remembered that in "The Merchant of Venice", Act IV, Scene 1, there was this answer to the temptation:

"Bass. Wrest once the law to your authority
To do a great right do a little wrong . . .

Port. It must not be; . . .
'Twill be recorded for a precedent,
And many an error, by the same example,
Will rush into the state: it cannot be."