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Torts—Last Clear Chance Doctrine

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STUDENT NOTES AND RECENT CASES

TORTS—LAST CLEAR CHANCE DOCTRINE.—One of the syllabus points of the recent West Virginia case, *McLeod v. Charleston Laundry Company*,¹ lays down a very broad interpretation of the last clear chance doctrine. The rule as expounded by the Supreme Court of Appeals, however, was merely dictum; but it raised an interesting question of how far our court is apparently willing to go in its application of this doctrine.

Mrs. McLeod, in a blinding rainstorm, with her umbrella pulled down over her head so as to obstruct her view, ran out into the street and was struck by the defendant's truck. Evidence tended to show that the driver was within eight or ten feet of her when he first saw her, and that he pulled on his emergency and swerved to the side but could not avoid the collision. The court very properly held that the doctrine of last chance did not apply, and that Mrs. McLeod's contributory negligence would bar a recovery.

It went further, however, and laid down the very broad rule as follows: "The doctrine of last clear chance is a qualification of the general rule that contributory negligence bars a recovery, and the principle of the doctrine is that, although the plaintiff has been negligent in exposing himself to peril, and although his negligence may have continued until the accident happened, he may nevertheless recover if the defendant, after knowing of plaintiff's danger, or by the exercise of ordinary care could have known, and having reason to suppose that he may not save himself, could have avoided the injury by the exercise of ordinary care, and failed to do so."

The courts of our different states are clearly not in accord in their interpretations of the doctrine of last chance. A few refuse to follow it at all; while others restrict it within varying limits. Some, and among them is apparently our own court, are very liberal in their applications of the rule.

The doctrine is generally stated that where the plaintiff through his own negligence has placed himself in a perilous situation, and the defendant by the exercise of ordinary care could have avoided the accident but failed to do so, the plaintiff may recover in spite of his original negligence.²

The reason for the rule is generally given to be that since the defendant had an opportunity, which the plaintiff did not have,

¹ 106 W. Va. 361, 145 S. E. 756 (1928).

² 45 C. J. 539.

to avoid the injury by the exercise of due care, his negligence is regarded as the proximate cause of the injury, being subsequent to that of the plaintiff, and he is therefore liable.

The rule would logically have no application where the negligence of both parties was concurrent. There must have been some negligent act of the defendant, subsequent to that of the plaintiff to invoke the doctrine.⁴

In considering only a few of the fact situations in which the question of last chance has arisen in West Virginia, we can see a very liberal tendency on the part of the court.

The dictum in *McLeod v. Laundry Company, supra*, gives rise to the question of whether actual knowledge of the plaintiff's peril is necessary to impose liability on the defendant. This question may arise in two different situations: first, where the plaintiff's negligence has ceased, or he can not extricate himself from his dangerous position; and second, where the plaintiff's negligence is still active at the time of the accident, or he can save himself but fails to do so. Considering these facts we find four different classes of cases:

First, where the plaintiff's negligence has terminated; the defendant is aware of the plaintiff's peril, and has an opportunity to avoid the injury by exercising due care, but fails to do so. This a clear case for the application of the doctrine, and the courts are practically unanimous in allowing a recovery here.⁵

Second, where the plaintiff's negligence has terminated; the defendant is not aware of the plaintiff's peril, but by the exercise of due care he could have discovered it in time to have averted the accident, and fails to do so.

A large number of our courts hold that there is no liability unless the defendant has actual knowledge of the plaintiff's peril.⁶ The theory of these courts is that if the defendant was never actually aware of the danger, there was never a time when he had an opportunity to avoid the accident which was not

⁴ 45 C. J. 540.

⁵ *Shanks v. Traction Co.*, 101 Mo. App. 702, 74 S. W. 396 (1903).

⁶ *Jeffries v. Ashcraft*, 104 W. Va. 636, 141 S. E. 14 (1928); *Deputy v. Kimmel*, 73 W. Va. 595, 80 S. E. 919 (1914); *Carrico v. Ry. Co.*, 39 W. Va. 86, 19 S. E. 571 (1894); *Johnson v. R. R. Co.*, 25 W. Va. 570 (1885).

⁷ *Hawkins v. Ky. Co.*, 36 Tex. Civ App. 633, 83 S. W. 52 (1904); *Shuck v. Davis*, 110 Okla. 196, 237 Pac. 95 (1925); *Malone v. Ry Corp.*, 72 Cal. App. 736, 238 Pac. 110 (1925); *So. Ry. Co. v. Wahl*, 196 Ind. 581, 149 N. E. 72 (1925); *Gahagan v. Boston & M. R. R.*, 70 N. H. 441, 50 Atl. 146 (1901); *Stricklin v. Ry. Co.*, 59 Mont. 367, 197 Pac. 839 (1921); *Emmons v. So. Pac. Co.*, 97 Ore. 263, 191 Pac. 333 (1920); *Todd v. Ry. Co.*, 135 Tenn. 92, 185 S. W. 62 (1916).

available to the plaintiff also. Some of these courts, however, make a distinction between cases where there was a duty upon the defendant to keep a look-out and where there was no duty, allowing a recovery in the former instances even where the defendant was not actually aware of the danger.⁷ "Where one owing a duty to maintain a look-out could in the exercise of ordinary care and vigilance have discovered the perilous situation of the plaintiff in time to have averted the injury, the law presumes that he saw what he ought to have seen and the actual discovery is not necessary."⁸

It hardly seems probable that any court would allow a recovery unless some duty was owing the plaintiff by the defendant to discover him which was breached. This duty need not be statutory but may also arise from the particular circumstances of the situation. But if there was no such duty violated by the failure to discover the plaintiff it would be difficult to see on what ground a court could impose a liability.

Suppose, for instance, that an adult is walking along the railroad track unaware of approaching train. There is no duty on the part of the engineer to keep a look-out. If the engineer had been looking ahead he would have seen the plaintiff in time to have avoided the injury, but he does not do so, and the plaintiff is struck. Under such circumstances it could hardly be contended that the defendant was liable, for he has violated no duty. "The doctrine of the last clear chance cannot be invoked for the purpose of creating a duty on the part of the defendant to discover the danger, if that danger was not actually discovered; but, on the other hand, in the absence of an actual discovery of the danger, the existence of the duty to discover it is a condition precedent and an indispensable pre-requisite of the doctrine of last clear chance."⁹

Although there is a conflict of authority on the question whether a person is liable in the absence of actual discovery of the plaintiff's peril, the decided tendency of our courts seems to be toward allowing a recovery in such cases where the defendant owes the plaintiff a duty to discover him, and the plaintiff's negligence has ceased.¹⁰

West Virginia does not require actual discovery in such cases.

⁷ 36 L. R. A. N. S. 957; *Pickett v. Ry. Co.*, 117 N. C. 616, 23 S. E. 204 (1895).

⁸ *Richards v. Laundry Co.*, 55 Utah 409, 186 Pac. 439 (1910).

⁹ 36 L. R. A. N. S. 957, n.

¹⁰ *Idem.*

In the case of *Reidel v. Traction Company*,¹¹ the court makes this statement: "If the motorman saw the plaintiff in her perilous situation, or if he could have seen her by the exercise of ordinary caution, and could thereafter have avoided the accident by sounding the alarm, or by checking the speed of the car, and failed to do so, then his failure to do so was a supervening independent act, or acts, of negligence which were the proximate cause of the plaintiff's injury."

In the case of *Buchanan v. Railway Company*,¹² where the evidence tended to show that the defendant's agents could have discovered the plaintiff's danger by the exercise of due care in time to have avoided the accident, the question of last chance was held to have been properly submitted to the jury.

Third. Where the plaintiff's negligence continues to the time of the accident; the defendant is aware of the danger but fails to use due care and so avoid the injury.

We might make a distinction here between cases where the plaintiff was conscious of his danger, and where he was not, although he had an opportunity to save himself. Where the plaintiff is conscious of the danger and can save himself, even though the defendant is also aware of the danger and could have avoided the injury, this would seem to be a clear case of concurrent negligence, and it is doubtful that any court would allow a recovery.

But suppose that the plaintiff is not aware of his danger; the defendant sees him in time to realize the situation and to avoid the collision but fails to do so. There is a split of authority on this point. Some courts call this concurrent negligence as in the preceding case, and refuse a recovery.¹³ Others apply the doctrine of last chance.¹⁴ In the case of *Bruggeman v. Railroad Company*,¹⁵ the court said, "It was enough to call for the application of that doctrine that the defendant's employees knew of plaintiff's danger in time to have avoided the injury to him in the exercise of reasonable care, even though he was negligent in putting himself in a place of danger, and continued to be negligent in not looking out for his own safety."

The West Virginia Court would allow a recovery in such cases. In the case of *Truman v. Wink-o Products Company*,¹⁶ the de-

¹¹ 69 W. Va. 18, 71 S. E. 174 (1911).

¹² 102 W. Va. 426, 125 S. E. 384 (1926).

¹³ *Nassua Iron & Steel Co. v. Ry. Co.*, 62 N. H. 159 (1882).

¹⁴ *Pa. Co. v. Reesor*, 183 Ind. 287, 108 N. E. 983 (1915).

¹⁵ 147 Iowa 187, 123 N. W. 1007 (1909).

¹⁶ 96 W. Va. 256, 122 S. E. 745 (1924).

defendant was driving a truck and saw the plaintiff approaching the street at some distance away. Defendant estimated that he could "get by" since she was walking slowly. Just as he reached her, however, she quickened her pace and he struck her. The court allowed a recovery under the doctrine of last chance.

Fourth. Where the plaintiff's negligence continues up to the time of the accident; defendant is not aware of the plaintiff's danger, but by the exercise of due care could have discovered it in time to have avoided the injury and fails to do so.

Missouri has probably gone further than any other state in allowing a recovery in such cases where there is a duty on the part of the defendant to discover the plaintiff. It would seem in such cases, however, that the parties at the most, have an equal opportunity of averting the accident, and the negligence is concurrent. West Virginia in the dictum laid down in *McLeod v. Laundry Company, supra*, would seem to allow a recovery. The rule, however, being dictum, may not be followed to this extent.

By way of summary, then, we find that the West Virginia court applies the doctrine of last chance; first, where defendant has knowledge of plaintiff's peril, either when the plaintiff's negligence has terminated or is still active; and second, where the defendant does not know of the plaintiff's peril but by the exercise of due care could have discovered it in time to have avoided the accident, when the plaintiff's negligence has ceased; and, according to the dictum in *McLeod v. Charleston Laundry Company*, even when the negligence is still active.

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TRUSTS—EFFECT OF THE STATUTE OF FRAUDS.—In a recent West Virginia case, *Carter v. Carter*,¹ the court held that express trusts are not subject to the statute of frauds in this state. This again raises the question as to what is the law in West Virginia in regard to the seventh section of the English statute of frauds which states that all declarations or creations of trusts or confidences in any land, tenements or hereditaments to be proved in some writing signed by the party, enabled to declare such trust, or by his last will in writing.² The eighth section of said statute states that implied trusts shall be of the like force and effect as

¹ 148 S. E. 378 (W. Va. 1929).

² 29 Charles 11, C. 3 (1676).