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FLORIDA'S LAST CLEAR CHANCE DOCTRINE

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INTRODUCTION

". . . It may be safely remarked that no science is more dependent upon the accuracy of its terms and definitions than that of the law. Looseness of language and dicta in judicial opinions either silently acquiesced in or perpetuated by inadvertent repetition often insiduously exert their influence until they result in confusing the application of the law or themselves become crystalized into a kind of authority which the Courts without reference to principal are constrained to follow." Chief Justice Shepherd in *Smith v. Norfolk S. & R. Company*, 114 N.C. 228, 19 S.E. 863, 869 (1894).

In 1933 the Florida Supreme Court first expressly enunciated that the last clear chance doctrine was a part of Florida jurisprudence,[1] and in a series of cases the doctrine was defined and its boundaries were outlined. The language of these cases when considered together with their facts seems at times confusing, and the confusion is due in no small measure to a failure to accurately define the terms peculiarly associated with the doctrine. In addition, there was a failure on the part of the court to grasp and enunciate the basic reason for the doctrine. In this the Florida court was not alone among the courts of this country. However, from the results of the cases, certain conclusions can be drawn as to what the law on last clear chance is in Florida. This is an attempt to present those conclusions.

The common law requires that one who has failed to use the care that an ordinary and prudent man would use under all the circumstances, and thereby has caused injury to another or his property, must pay the other for the injuries he has inflicted.[2] However, not all negligent conduct resulting in damage gives rise to liability for damages. The one who has been harmed may have engaged in some conduct which will bar his recovery. The most often used and most effective defense in suits against negligent defendants is that of contributory negligence, or the failure of the plaintiff to use the

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1. Merchants' Transportation Co. v. Daniel, 109 Fla. 496, 149 So. 401 (1933).
2. RESTATEMENT, TORTS § 281 (1934).

care an ordinary and prudent man would use under all the circumstances to protect himself against the injuries which have resulted.[3] When a defendant is successful in establishing the defense of contributory negligence, it serves as a complete bar to recovery.[4]

The effect of such a rule has at times seemed to place an undue hardship on the plaintiff. The application of the doctrine of contributory negligence is undeviating. No matter how small a departure the plaintiff may take from the standards of due care required of him, he must stand the cost of his injuries even if the defendant's conduct was much more flagrant than his own. Quite understandably then, the courts would tend to manufacture legal devices which would avoid the consequences of contributory negligence in certain cases.[5] The doctrine of last clear chance seems to be one result of judicial reaction against the oppressive effects of the contributory negligence doctrine.

The doctrine of last clear chance exists in Florida to modify the rule that a negligent plaintiff cannot recover.[6]

In this respect its operation may be regarded as an exception to the general rules of negligence. In the broader view however, it should be stated that contributory negligence does not necessarily bar recovery in

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3. *Ibid.*

4. RESTATEMENT, TORTS § 467 (1934).

5. One such technique is to divide negligence into degrees: wilful negligence, gross negligence, and ordinary negligence (or similar categories), and then to hold that ordinary contributory negligence is no defense to some of the more flagrant types of negligence.

The Florida Supreme Court has held that contributory negligence is no defense to "wilful negligence". Florida Southern Ry. v. Hirst, 30 Fla. 1, 11 So. 506 (1892); *see* Florida Ry. v. Dorsey, 59 Fla. 260, 52 So. 963 (1910). It is a defense to gross negligence. Florida Southern Ry. v. Hirst, *supra.*

The most satisfactory method for dealing with the harsh effects of the contributory negligence doctrine is to deduct from the plaintiff's damages that amount which his carelessness contributed to the impact as compared to the total carelessness causing the accident, *i.e.*, a sharing of the loss by both the plaintiff and the defendant according to how much each one's negligence has contributed to the plaintiff's injuries. Such apportionment of damages was unknown to the common law, but has been provided for by statute in certain cases. See FLA. STAT. §§ 768.06, 769.03 (1951).

It seems that some courts have completely overlooked that the purpose of such comparative negligence statutes is to apportion damages according to fault and have held, when the facts warrant the application of the last clear chance doctrine, the apportionment provisions of the statutes are inapplicable, and the defendant who had the last clear chance to avoid the accident has to bear the entire burden of the resultant injury. St. Louis Southwestern Ry. v. Simpson, 184 Ark. 633, 43 S.W.2d 251 (1921); Barnes v. Red River & G. Ry., 14 La. App. 188, 128 So. 724 (1940); Watts v. Pere Marquette Ry., 231 Mich. 40, 203 N.W. 859 (1925). See Owen v. Kurn, 347 Mo. 516, 148 S.W. 519 (1941); Bole v. Hines, 226 S.W. 272 (Mo. 1920).

Apparently the Florida Supreme Court does not take such a view of their statutes providing for apportionment. Atlantic Coast Line Ry. v. Britton, 109 Fla. 212, 146 So. 842 (1933); Kenan v. Withers, 137 Fla. 561, 188 So. 95 (1930); Florida Central & P. Ry. v. Foxworth, 41 Fla. 1, 25 So. 338 (1899). But see the concurring opinion of Chief Justice Davis in Atlantic Coast Line Ry. v. Britton, 109 Fla. 212, 217, 146 So. 842, 843 (1933).

6. Consumer's Lumber and Veneer Co. v. Atlantic Coast Line Ry., 117 F.2d 329 (5th Cir. 1943); Schoen v. Western Union Telegraph Co., 135 F.2d 967 (5th Cir. 1941); Davis v. Cuesta, 146 Fla. 471, 1 So.2d 475 (1941); Lindsay v. Thomas, 128 Fla. 293, 174 So. 418 (1937).

every instance and that the situations involving the doctrine of last clear chance constitutes one such instance. In this light, last clear chance is an extension of the law of contributory negligence, not an exception to it.[7]

Without attempting at this time to define the various elements of the last clear chance doctrine, the following situation has been hypothesized to which the doctrine would be almost universally applicable.

High above a wide river is a railroad trestle. Barnes negligently decides to take a stroll across this trestle, although he notes that its height would prevent him from jumping and its narrowness would prevent him from moving out of the path of an approaching train. When he is halfway across, a train enters the trestle. At the time the engineer sees Barnes he is able to stop the train. Negligently he accelerates, rather than brakes, the train so that the available opportunity to stop is lost. Barnes is injured. In his suit against the railroad company, despite the admission of his own negligence, Barnes recovers for his injuries on the theory that the railroad company failed to utilize its last clear chance to prevent impact.[8]

In this situation a negligent plaintiff recovers damages from a negligent defendant. Since this rule of liability is contrary to ordinary concepts of torts, there are evidently factors within the hypothetical siuation which take it out of the ordinary rule of contributory negligence.

It is to be noted that:

1. The plaintiff was negligent.

2. His negligence had placed him in a position from which he could not extricate himself.

3. The defendant actually saw the plaintiff.

4. He recognized that the plaintiff could not avoid an impact by escaping from the danger.

5. When the defendant first appreciated this dangerous situation he could have avoided an impact by then exercising due care.

6. He failed to exercise the necessary care at that particular moment.

In short, these factors show the existence of the superior opportunity in the defendant to have avoided the accident at the time the presence of the plaintiff was discovered.

It is this superior opportunity, as represented by some or all of the above listed elements, which characterizes the doctrine of last clear chance. As stated, the existence of this superior opportunity allows recovery by a negligent plaintiff.[9]

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7. "The last clear chance doctrine is not an exception to the general doctrine of contributory negligence. It does not permit one to recover in spite of his contributory negligence, but merely operates to relieve the negligence of a plaintiff . . . which would otherwise be regarded as contributory, from its character as such." Merchants' Transportation Co. v. Daniel, 109 Fla. 496, 502, 149 So. 401, 403 (1933).

8. *Cf.* Barnes v. Red River & G. Ry., 14 La. App. 188, 128 So. 724 (1930). See also example listed in Merchants' Transportation Co. v. Daniel, note 1 *supra*.

9. See note 6 *supra*.

The reasons broached for this modification of the rules of contributory negligence have been many. Unfortunately, no theory yet presented can be regarded as fully satisfactory. The Supreme Court of Florida, as well as courts in other jurisdictions, has attempted to lay a logical foundation for this rule.

Perhaps the most popular explanation in Florida is that, by the existence of the defendant's superior opportunity to prevent impact, the plaintiff's negligence becomes "immaterial" or "remote".

In the case of *Merchants' Transportation Co. v. Daniel*[10] it was stated:

> This result [allowing recovery by a negligent plaintiff] it [the doctrine of last clear chance] accomplishes by characterizing the negligence of the defendant if it intervenes between the negligence of the plaintiff or deceased and the accident as the sole proximate cause of the injury and the plaintiff's antecedent negligence merely as a condition or remote cause. The antecedent negligence of the plaintiff or deceased having been thus relegated to the position of a condition or remote cause of the accident, it cannot be regarded as contributory since it is well established that negligence in order to be contributory must be one of the proximate causes.[11]

The Florida court has also stated:

> The gist of the rule is that the jury ascertain whose negligent act was the immediate cause of the injury. The commission of the last or immediate negligent act renders all antecedent acts of negligence remote and immaterial.[12]

It seems apparent that what is meant by so characterizing the negligence of the plaintiff as "remote" is that it is of a quality whereby it would not create liability, or as it would normally be termed, "not proximate".

This, of course, is not true. First, the negligence of the plaintiff contributes in some measure to the impact. That is, there is no separate and distinct intervening event so that the impact would have occurred regardless of the action of the plainiff. In every case it is indisputable that had the plaintiff not been negligent there would have been no impact. Second, the negligence of the plaintiff is actionable and does cause damage within the risk created by this negligence, or is what is commonly called the proximate cause of the injury. Suppose that negligent plaintiff does recover for his injuries from a negligent driver who possessed a superior opportunity to prevent impact. This fact will not deny recovery by an injured passenger of the defendant from the plaintiff whose negligence has been so loosely termed "remote".

Thus the plaintiff's negligence is remote for some purposes, and proximate for others. This terminology, for practical purposes, is not a valid basis for the operation of the last clear chance doctrine.

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10. See note 1 *supra*.
11. Merchants' Transportation Co. v. Daniel, 109 Fla. 496, 502, 149 So. 401, 403 (1933). Bracketed material supplied.
12. Williams v. Sauls, 151 Fla. 270, 274, 9 So.2d 369, 371 (1942).

It has further been pointed out that last clear chance is used to relieve the negligent plaintiff of the bar to his recovery because the defendant has wilfully caused the impact by not utilizing his superior opportunity to prevent it.[13] Such language is unfortunate. Wilfulness or intent is not here involved. By definition the defendant's failure to prevent the impact is negligence only. The defendant does not intend to ride down a negligent but helpless victim in his path. Had he done so, an intentional tort arises to which contributory negligence is not a bar.[14] Rather the defendant is merely negligent — generally no more so than the plaintiff.

Wherein then lies the rationale of the last clear chance doctrine? What exists in the factors constituting the concept to allow recovery by a negligent plaintiff? Why must it be necessary to charge the jury to consider that even if the plaintiff were the *sine qua non* of, and contributed to, his own injury he can nevertheless recover in full for the injury he sustained after the impact? Merely stating that the defendant had a superior opportunity, or last chance, to avoid the accident is not the reason; it is the result. It is clear that advantage was not taken of this superior opportunity because of the defendant's negligence. In any event, is the negligence of the defendant so gross that the wrong of the plaintiff can be ignored? Were the law other than that a contributorily negligent plaintiff is barred, the answer to this last question might be answered affirmatively. However, the case is otherwise.

Paradoxically, it appears that simply because the negligent plaintiff is normally denied relief that the effect of the last clear chance doctrine has been so eagerly, and sometimes so irrationally, accepted.

The absence of a logical basis for the doctrine has not been disturbing in view of the ends which last clear chance serves. The dislike of the bench to deny relief to negligent plaintiffs harmed by the more serious negligence of the defendant is apparent. Where it can be shown that among the commissions and omissions caused by the defendant's negligence was the failure to utilize a conjectural opportunity to prevent impact, this negligence is immediately branded as qualitatively different from any other act of negligence. It then becomes possible to switch the entire burden of compensation from the plaintiff to the defendant. This result is readily acceptable, and logical reasons therefor are not fastidiously demanded.

In truth, a defendant's breach of duty to a negligent plaintiff by failure to utilize an opportunity to prevent an impact is no more serious than his failure to use due care in any other situation.

There is much to dislike in awarding a negligent plaintiff nothing.

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13. "The doctrine of 'last clear chance' has been recognized by this court . . . . It is founded upon reasons humane which forbid a wrongdoer from taking advantage of the perilous position of his fellow man to inflict injury and escape responsibility." Davis v. Cuesta, 146 Fla. 471, 472, 1 So.2d 475, 476 (1951).

14. Florida Southern Ry. v. Hirst, 30 Fla. 1, 11 So. 506 (1892). See Florida Ry. v. Dorsey, 59 Fla. 260, 52 So. 963 (1910).

However, awarding the same plaintiff full compensation because of the defendant's failure to utilize a superior opportunity is little better.[15]

Nevertheless, the operation of the doctrine of last clear chance is with us. Once it is appreciated that its basis for existence is a certain sympathy for the negligent plaintiff, this fact can be used as a means of drawing the many distinctions that are extant in this field of law.

The Elemental Factors of Last Clear Chance

Negligence of the Plaintiff

It is apparent that the plaintiff must be negligent.[16] The doctrine only applies when the defense of contributory negligence is raised.[17] If the plaintiff is not negligent, then the sole issue is the defendant's negligence and this negligence may be of any conceivable type of commission or omission which in itself creates a risk of harm to others. When the plaintiff himself is alleged to have been negligent, he may use as a weapon in his battle for recovery the fact that the defendant is guilty of that very specialized type of negligence known as the failure to utilize the last clear chance to avoid the injury.[18] The character and result of the plaintiff's negligence is of extreme importance in certain situations which will be more closely considered below.

Negligence of the Defendant in Failing to Avoid an Impact

In order to invite the operation of the doctrine of last clear chance the negligence of the defendant must be of the peculiar character of carrying the defendant past the point where, but for his negligence, he could

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15. Prosser on Torts 416 (1941).

16. Yousko v. Vogt, 63 So.2d 193 (Fla. 1953); Davis v. Cuesta, 146 Fla. 471, 1 So.2d 475, 476 (1941).

17. Technically, only the plaintiff should be able to avail himself of the theory of last clear chance, since the defendant has no need for such a defense. If both the defendant and the plaintiff are negligent, the plaintiff cannot prevail, unless the defendant had the last clear chance to avoid the impact. If the facts are the same, but the defendant did not have a superior opportunity to prevent impact, it is only important that the plaintiff be negligent to prevent recovery. That the negligence of the plaintiff consists partially or entirely of a failure to prevent impact merely defines the quality of the negligence that has already denied his recovery. Referring to the plaintiff's negligence as a failure to utilize a last clear chance only serves to add confusion to the doctrine. However, the case of Miami Beach Ry. v. Dohme, 131 Fla. 171, 178, 179 So. 166, 169 (1938) did not take this view, and speaks of a plaintiff having the last clear chance. The court held that failure to give the following charge as requested by the defendant was reversible error.

> A motorist who drives on to a street car track is chargeable with seeing that which he is bound, as an average person in the exercise of ordinary care, to see, had he looked. A motorist who is struck by a street car, which he had ample opportunity to see, in time to avoid a collision, and did not, is contributorily negligent.

It would appear that the court correctly reversed for failure to so instruct the jury. However, it is to be noted that the defendant claimed the acts of the plaintiff made the plaintiff contributorily negligent. There was no request that the jury be instructed on the plaintiff's last clear chance. The court, however, chose to decide the case on the basis of the plaintiff's alleged last clear chance.

18. Must the doctrine of last clear chance be raised in the pleading? It is not necessary that the doctrine be pleaded if the situation warrants instructions thereon. Miller v. Ungar, 149 Fla. 79, 5 So.2d 598 (1941); Becker v. Blum, 142 Fla. 60, 194 So. 275, (1940); Dunn Bus Service v. McKinley, 130 Fla. 778, 178 So. 865 (1937).

have prevented the impact. It is insufficient that an automobile driver was drunk, going too fast, asleep or participated in other actions unknown to the reasonable man. Indeed, such actions are not necessary or even important. Insofar as the doctrine is concerned, it is only important that the defendant be, at the time, in a position to prevent the impact and thereafter fail to use due care to do so. Since, in the course of events, it is always possible to state that at one particular point or other the accident could have been avoided, it is vital that the point at which the defendant was legally required to take steps to prevent the collision be clearly defined. For the present we will assume the existence of such an instant when the defendant realizes the plaintiff is in danger of being struck.

At the time when the law requires action by the defendant so as to prevent a subsequent impact, it must be physically possible for a reasonable man to do so.

In *Humphries v. Boersma*[19] it was held that the doctrine of last clear chance was inapplicable because when the defendant became aware, or should have become aware, of the plight of the defendant there was no time then to prevent the impact.[20]

Similarly, though the defendant would be physically able to prevent impact were he in complete control of his senses the fact that the emergency deprived him of his full faculties does not necessarily place him at fault for failure to avoid the impact.

This is merely an application of the general rule of conduct in emergencies to the last clear chance doctrine. The sudden emergency rule is to the effect that "persons placed in sudden peril by the negligence of others are not held to the same degree of presence of mind and carefulness which is justly required under ordinary circumstances . . . ."[21]

Where a sudden emergency causes a defendant to become involved in an accident which he otherwise would have had the last clear chance to avoid, it has been distinctly stated that the doctrine of last clear chance is inapplicable and the defendant is not liable.[22]

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19. 190 F.2d 843 (5th Cir. 1951).

20. Suppose the physical impossibility results from the defendant's negligence which occurred some time before the point of discovery, as for instance, where the engineer of a train sees an automobile which has been negligently stalled on the railroad track. He applies his brake in sufficient time to avert the accident, but strikes the automobile because his brakes are defective. A few courts in this country have applied the last clear chance doctrine in such a situation and have held the defendant liable despite the fact that there was no chance physically to avert the accident after the moment of discovery. In such a situation, the case should be treated as the usual one with the issues of negligence and contributory negligence raised. There is literally no last clear chance to avoid the accident and there is no reason to distinguish between the plaintiff's and the defendant's negligence. See RESTATEMET, TORTS, § 479(g).

21. Hull v. Laine, 127 Fla. 433, 440, 173 So. 159, 161 (1937); Cook v. Lewis K. Liggett Co., Inc., 127 Fla. 369, 173 So. 159 (1937).

22. ". . . if one finds himself in a position of sudden peril and acts as a person of ordinary prudence would act under the circumstances, the jury may find him free from negligence or contributoy negligence although he might have been able to avoid the accident under less pressing circumstances." Car and General Ins. Corp. v. Keal

The Point at Which the Defendant Has the Last Clear Chance

At what point does the law impose upon the defendant the duty to exercise due care to avoid impact with the negligent plaintiff? It has been briefly pointed out that the defendant's knowledge of the plaintiff's position is the important factor. This however is not the complete answer, since embodied within the legal definition of knowledge is the concept of implied knowledge. That is, in addition to what the defendant actually knows is that which he should have known under the circumstances. Further, knowledge implies more than a single concept. It consists of visual or other sensory contact, and mental appreciation of what this contact provides.

The courts have singularly failed to realize the complexity of their own meaning of knowledge and have used the word without regard to which of its particular aspects they were then concerned. Since it is the defendant's knowledge which determines whether the defendant had a last clear chance, it is here proposed for the sake of discussion to divide the concept into its various meanings.

A. The Defendant's Knowledge. *Actual sensory contact plus mental appreciation of its import*: When the defendant actually sees the plaintiff or is physically alerted to the fact of the plaintiff's presence and further realizes or should realize that the plaintiff is in danger of being struck, the defendant is under the duty to take all reasonable precautions to prevent the impact. It is at this moment of discovery that the law requires the defendant to take advantage of his opportunities, and a negligent failure to do so will result in liability, despite the plaintiff's own negligence.

The sensory contact in most cases has been visual. In *Dunn Bus Service Inc. v. McKinley*[23] the litigation arose from the collision of the defendant's bus with the plaintiff's automobile at an intersection. The plaintiff's own testimony showed that she was negligent in failing to keep a look out as she drove her car around a corner, thus cutting in front of the defendant's bus which stuck the rear of her automobile. However, there was testimony tending to show that the accident could have been avoided by the bus driver if he had swerved his bus, slowed down, or applied his brakes. The testimony further tended to show that the bus driver actually saw the plaintiff. It was held that the lower court did not commit error by charging the jury on the last clear chance doctrine.

In *Panama City Transit Co. v. DuVernoy*[24] plaintiff on a motorcycle and the defendant's bus were approaching each other on the same street near an intersection. It appears that the bus arrived at the intersection

Driveway Co., 132 F.2d 834, 836 (5th Cir. 1943); Schoen v. Western Union Telegraph Co., 135 F.2d 967 (5th Cir. 1941).

23. 130 Fla. 778, 178 So. 865 (1937).

24. 147 Fla. 320, 33 So.2d 48 (1948).

first and nearly stopped, but started again in order to make a turn, thereby hitting the plaintiff's motorcycle. The plaintiff was traveling at an excessive rate of speed. The Florida Supreme Court assumed that the bus driver saw the plaintiff on his motorcycle and held that the case was properly submitted to the jury under the last clear chance doctrine to decide whether the defendant's driver could have avoided the accident by stopping to wait until the plaintiff passed.

It is not essential that the defendant actually see the plaintiff. It is enough that he somehow be alerted to the fact of the plaintiff's dangerous position, and appreciate it. In *Seaboard Airline Ry. v. Martin*[25] plaintiff's decedent was killed at a railroad crossing when his truck was struck by the defendant's train. The engineer of the train never saw the truck but the fireman on the train "hollered to the engineer" and gave him a hand signal, thereby alerting him to the fact of the plaintiff's position and predicament. The case went to the jury on the doctrine of last clear chance, and the court affirmed on appeal. In addition to discovery, it is essential that there be a reasonable awareness of the plaintiff's situation.

> Last clear chance implies thought, appreciation, mental direction, and the lapse of sufficient time to effectually act upon the impulse to save another from injury . . . .[26]

If mental appreciation of the situation is lacking the doctrine of last clear chance does not apply despite the fact that the defendant was discovered.

It must be noted that the appreciation need not be actual, but if the circumstances are such that a reasonable man would realize the plaintiff's predicament, then there is sufficient mental appreciation to bring the case within the last clear chance doctrine if all the other requisites are present. It must also be noted that appreciation or realization of the plaintiff's situation must exist before there is any application of a last clear chance doctrine under any circumstances.

> If, however, the defendant does not realize or does not have reason to realize the plaintiff's dangerous situation or inattentiveness . . . then defendant is not chargeable with liability.[27]

In *Ward v. City Fuel Oil Co.*[28] the lower court directed a verdict under the following set of facts: The plaintiff and another boy were riding their horses in a lane adjacent to a highway at a fast pace. After the plaintiff had overtaken the defendant's truck, which was then traveling along the highway, the plaintiff suddenly turned on to the highway and ran his horse into the defendant's truck. It was contended that the defendant's employee driving the truck "could have discovered and realized plaintiff's perilous situation in sufficient time to avoid the accident by the exercise

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25. 56 So.2d 509 (Fla. 1952).
26. Merchants' Transportation Co. v. Daniel, 109 Fla. 496, 504, 149 So. 401, 404 (1933).
27. Ward v. City Fuel Oil Co., 147 Fla. 320, 323, 2 So.2d 586, 587 (1941).
28. 147 Fla. 320, 2 So.2d 586 (1941).

of reasonable diligence and care."[29] The court's answer was that there was nothing in the situation to indicate that the boys were doing anything more than staging a race, and that the defendant had no reason to anticipate that the plaintiff would turn and run into his truck. They held that it was not error to direct a verdict for the defendant in this situation. Thus, the Florida Supreme Court has established the necessity of appreciation before the last clear chance doctrine comes into operation.

In the situation where the defendant actually is aware of the plaintiff's position, appreciates it and then fails to use due care to avert an impact, the defendant's opportunity to avoid the accident might very well be termed an actual last clear chance. Under this actual last clear chance doctrine the position of the plaintiff is immaterial. He may be merely inattentive as the woman driver in the *Dunn Bus Service* case,[30] or using bad judgment as the motorcyclist in the *Panama City Transit* case,[31] or helplessly unable to extricate himself from his position.[32]

Although there is probably no logical justification for the actual last clear chance doctrine, as stated before, there is a certain amount of judicial resentment against the contributory negligence doctrine which tips the scales in favor of a negligent plaintiff who is seen and who would have escaped injury had the defendant used due care. Perhaps, too, there is an unconscious feeling that when a defendant actually sees the plaintiff and fails to avoid hitting him when he could have done so, the defendant's conduct takes on the character of wanton and wilful misconduct.[33] The effect of these perhaps intuitive feelings converts failure to utilize an actual last clear chance by the defendant into a type of negligence to which the plaintiff's contributory negligence is not a bar to recovery.

B. The Defendant's Knowledge: *Constructive sensory contact plus mental appreciation of its import:* For reasons which will now be shown or guessed at, whether the defendant's knowledge is actual or implied is an important distinction upon which depends the result of many cases in this field. It has been held that actual knowledge is not the sole basis for the applicability of the last clear chance doctrine. There are cases in which a defendant, who never conceived of the existence of the plaintiff until the impact, became liable for that negligent plaintiff's injury. The defendant does not have an actual last clear chance to avoid impact because until the impact he did not know of the plaintiff's presence. At best he has a constructive last clear chance implied by law. Whatever might

29. *Id.*, 2 So.2d at 587.
30. See note 23 *supra.*
31. See note 24 *supra.*
32. The cases in Florida involving plaintiff's position of inextricability (*infra*) do not discuss the question of whether plaintiff was actually seen by defendant. As will be shown, discovery is not significant to this group of cases. Plaintiffs, inextricably helpless, recover without their being actually discovered, so that the conclusion in the text is an *a fortiori* case.
33. See language used in Davis v. Cuesta, note 13 *supra.*

be the justification for an actual last clear chance doctrine—whether it be sympathy for the observed plaintiff or whether the quality of negligence of an observing defendant who, having seen his victim in time to prevent impact and fails to do so—it is markedly different from ordinary instances of negligence and there is no such justification to countenance the existence of a constructive last clear chance doctrine.

The superior opportunity of the defendant that hitherto marked the basis for application of last clear chance does not and cannot exist where defendant never saw or heard the plaintiff. By using the fact that the defendant, had he been aware of his surroundings, could have perceived the plaintiff and thus would have had the last clear chance, is to place on the defendant a greater burden of care than is placed on the plaintiff. For is it not the case that had the plaintiff exercised due care for his own safety he also could have avoided the impact?

There is no reason, where the defendant did not actually become aware of the plaintiff's existence, to change the general rule that a negligent plaintiff cannot recover from a negligent defendant.

The Florida court does not allow a negligent plaintiff to recover from a negligent defendant who might have had a last clear chance in every case. Before applying the constructive last clear chance doctrine the position of the plaintiff is taken into account.

The negligence of the plaintiff can leave him in two types of situations:

(1) Where he is unable to extricate himself from his position of danger by the exercise of due care.

(2) Where he has placed himself in a position of danger by his inattentiveness to his environs or by a mistake in judgment but would be able to extricate himself were he to exercise due care.

The particular situations in which a negligent plaintiff happens to find himself determines as to whether he can recover under the doctrine of last clear chance when he has not been observed.

It would appear that the court should have taken great care to distinguish between these two situations. Although it is perfectly clear that the difference in situations is recognized and that the plaintiff's recovery is determined thereby, it is just as clear that little effort has been made to use the words suggesting each of these positions.

The Florida court has had inordinate fondness for the terms "peril", "perilous situation", etc. It might be thought that these words would connote the position of plaintiff's inextricability. However, they are not used as words of art to describe either of the plaintiff's two positions. Rather, they are used in their ordinary usage to mean "danger". Such words, therefore, are meaningless unless further modified, for it is not the fact that the negligent plaintiff is in danger that is significant, but whether or not he is able to extricate himself from this danger.

At times "peril" is used in conjunction with other words to describe a situation of inextricability as in the case of *Merchants' Transportation v. Daniel*: "A situation of peril from which the exercise of ordinary care on his part would not thereafter extricate him."[34] The word "dangerous", meaningless in itself to describe either situation, is also coupled with the concept of inextricability by the use of modifications, as: "A helpless and dangerous situation" in *Miller v. Ungar*.[35]

The difficulty is greater when in such cases as *Lindsay v. Thomas*[36] the words signifying danger are used alternatively to mean both positions of extricability and inextricability. In *Ward v. City Fuel Oil Co.*[37] the court used "peril" to describe a position where plaintiff was merely inattentive.

The greatest difficulty is that, by the use of these ill-defining words, the courts have made decisions concerning the plaintiff's two positions which are not completely clear, and the results tend to become clouded by the constant repetition of words meaning one thing at one time and something else at another.

In this article the word "inextricable" is used to describe the position where the plaintiff cannot undo the result of his own negligence by the exercise of due care. Further, in this article, where the negligent plaintiff is able to extricate himself from his position, he is described as being inattentive or as having used bad judgment.

The courts have had more success in expressing the concept of the situation where the plaintiff can extricate himself before impact by his own exercise of due care. Although, as shown, this position has been referred to as a "perilous position", it has also been referred to as one where the plaintiff "had a chance to escape the injury by himself exercising ordinary diligence and did nothing to extricate himself from danger."[38] This is a perfect description and leaves nothing to be desired. Further, to describe this position the courts have stated it to be one where the plaintiff's "contributory negligence continues until the collision."[39]

These words are used consistently to describe the single situation of the plaintiff's danger and his ability to extricate himself through the use of due care. These words further provide a good contrast to the phrase "plaintiff's negligence ceased"[40] which is sometimes used to express the position of inextricability.

If this language were to be used only as a symbol to identify the two

34. 109 Fla. 496, 504, 149 So. 401, 403, 404 (1933).
35. 149 Fla. 79, 5 So.2d 598 (1941).
36. 128 Fla. 293, 174 So. 418 (1937).
37. See note 28 *supra*.
38. 109 Fla. 496, 504, 149 So. 401, 403 (1933).
39. Ward v. City Fuel Oil Co., 147 Fla. 320, 2 So.2d 586 (1941); Davis v. Cuesta, 146 Fla. 471, 1 So.2d 475 (1941); Merchants' Transportation Co. v. Daniel, 109 Fla. 496, 149 So. 401 (1933).
40. Miller v. Ungar, 149 Fla. 79, 5 So.2d 599 (1942), and other cases cited in this article.

positions, the consistent use of phraseology involving the cessation of negligence (meaning the inextricable position) or continuity of negligence (meaning the other situation) might be looked upon with favor.

However, this language is not used consistently or to the exclusion of more general and abstract terminology. More important, the literal meaning of the words makes its use untenable. In last clear chance cases the negligence of the plaintiff never "ceases" and it is always "concurrent".

Consider this situation: A driver in an automobile is negligently stalled in the path of an oncoming train. The engineer of the train negligently fails to keep a lookout, and does not see the stalled automobile, thereby depriving himself of the opportunity of avoiding the accident, which could have been avoided had the engineer used due care. In the ensuing impact the driver is injured, as well as several passengers on the train. For purposes of the suit by the driver against the railroad company, the driver's negligence in reference to the last clear chance doctrine will be said not to have "continued" up to the moment of impact but to have "ceased" because the driver was unable to extricate himself from his position by using due care. However, in a suit by the passengers against the driver, can the driver urge that his negligence had ceased when the impact occurred and therefore he is not liable to the passengers? Obviously not. A plaintiff who has negligently placed himself in an inextricable position, as well as a plaintiff who has negligently made a mistake in judgment or who has negligently failed to be attentive, has created a risk of harm to himself and others, and this negligence continues until the impact.

When the court attempts to describe the position of the plaintiff it should do so by the use of such words as inextricability or helplessness on the one hand, and possibly inattentiveness on the other, to more accurately describe the two situations into which the plaintiff's negligence has led him.

The Florida Supreme Court has, except in a few cases, held that where the plaintiff is inattentive he can recover if actually seen but cannot if not actually seen.

The first expression on this point is to be found in the leading case of *Merchants' Transportation Co. v. Daniel* in the dictum. There it was stated:

> Defendant, had it so requested would have been entitled to a charge that if simultaneously with the defendant's negligence the deceased had a chance to escape the injury by himself exercising ordinary diligence and did nothing to extricate himself from danger the doctrine of "last clear chance" would not apply. This is so because in that case deceased would have been guilty of concurrent negligence which is a form of contributory negligence that bars recovery.[41]

From this time, with few exceptions, the court has refused to allow

41. 109 Fla. 496, 505, 149 So. 401, 404 (1933).

the application of the last clear chance doctrine for the benefit of an unseen, inattentive plaintiff.

In *Davis v. Cuesta* two cars approached an intersection, one from the east (the plaintiff), and the other from the south:

> No warnings were sounded by either. Neither slackened his speed nor materially altered the course of their [*sic*] vehicle. The impact came by the defendant's car striking the middle or rear of the plaintiff's.[42]

The lower court refused to charge the jury on the doctrine of last clear chance and from an adverse judgment plaintiff appealed. The high court affirmed in a unanimous *en banc* decision. It seems apparent that the defendant never saw the plaintiff's car. It is also apparent that plaintiff was negligent and that his negligence can be regarded as "concurrent" or "as having continued until the moment of impact." For this reason, the fact that the defendant never actually saw the plaintiff negates the applicability of the doctrine of last clear chance.[43]

A case expressing the same principle was *Ward v. City Fuel Oil Co.*[44] The Florida Supreme Court, in affirming the lower court's decision, stated:

> The plaintiff must, in addition to showing the defendant was negligent in failing to avert the accident after knowledge of the situation, in sufficient time to act upon it, show that his negligence did not continue up to the moment of the injury and was not a contributing and efficient cause of it.[45]

In *Turner v. Seegar*[46] a small boy stepped into the street. He was hit by an oncoming car but "was not observed by appellee (defendant) until the moment of the impact."[47] The lower court's decision not to charge on the doctrine of last clear chance[48] was upheld. In this case the boy was not in an inextricable position. He was merely inattentive to the traffic. The plaintiff not having been seen, the defendant was not culpable and the decision in *Davis v. Cuesta* was followed.

In these cases,[49] the court refused application of the doctrine of last

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42. 146 Fla. 471, 472, 1 So.2d 475, 476 (1941).

43. "Yet in invoking the benefit of the rule the plaintiff has another hurdle to make, that is, to show that he was free from concurring negligence . . . . Therefore if his contributory negligence continued until the collision he cannot avail . . . ." Davis v. Cuesta, 146 Fla. 471, 473, 1 So.2d 475, 476 (1941).

44. 147 Fla. 320, 2 So.2d 586 (1941).

45. *Id.* at 323, 2 So.2d at 587.

46. 151 Fla. 643, 10 So.2d 320 (1942).

47. *Id.*, 10 So.2d at 321 (1942).

48. "The purpose of this rule of law is to require persons to continue the exercise of due care for his fellow man's safety after it is apparent that the latter has by his own neglect placed himself in danger. The facts of this case made no such case." Turner v. Seegar, 151 Fla. 643, 646, 10 So.2d 320, 321 (1942).

49. For other Florida cases on this principle see also Becker v. Blum, 142 Fla. 60, 194 So. 275 (1940), where the Supreme Court of Florida upheld the lower court's action in refusing to charge on last clear chance when the plaintiff was inattentive, (not in a position of helplessness) and there was no proof that the defendant saw him. In Humphries v. Boersma, 190 F.2d 843, (5th Cir. 1951), the plaintiff was inattentively crossing the street, and neither the plaintiff, nor the oncoming driver saw the other until the instant of impact. It was held that in order for last clear chance to

clear chance and followed the general rule that a negligent plaintiff cannot recover from a defendant.

However, the feelings that perhaps motivated the adoption of last clear chance were at play throughout. Consequently, in situations similar to those mentioned above, where a defendant should have discovered an inattentive plaintiff, but did not, the court has occasionally compensated the plaintiff. In these cases, more than in any others, it is extremely difficult to understand the judicial motivation as being anything more than an outright desire to aid a stricken plaintiff for, in addition to lacking a clear basis for application of last clear chance, these cases fly in the faces of closely analagous precedents.

In the case of *Petroleum Carrier Corp. v. Hall*,[50] the plaintiff's automobile collided at an intersection with the defendant's truck. It is possible that plaintiff was not negligent, but since the case is decided on a theory of last clear chance it must be assumed she was.[51] At best the plaintiff made a mistake in judgment or was inattentive. The facts clearly negate the possibility of her having been placed in a helpless position. There was no evidence to show that the defendant actually saw the plaintiff. Since both parties were negligently inattentive, neither seeing the other, the case should have followed *Davis v. Cuesta*. However, the court held:

> The doctrine of last clear chance was developed in aid of the injured party in cases like this. The defendant was 150 to 175 feet north of the intersection when the plaintiff moved into it and could have avoided the accident if he had been as cautious as the plaintiff was.[52]

In *Brandt v. Dodd*[53] the jury was charged in substance that, if the plaintiff was negligent in getting himself into a position in which he was unable to extricate himself in the exercise of due care, he might nevertheless recover if the defendant saw or should have seen the plaintiff and could have avoided the accident by using due care. Although the charge might have been correct under other circumstances, the facts of the case did not warrant any instruction on last clear chance. There was no evidence to indicate that the plaintiff was helpless. The plaintiff was struck by defendant's automobile while crossing a street and while the defendant-driver was temporarily blinded by lights of cars coming from the opposite direction. On its facts, this was a case where the plaintiff was either

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apply there would have to be a finding that "the driver of the car saw [the plaintiff] while she was crossing the street so that she could have prevented striking her."

50. 158 Fla. 549, 29 So.2d 624 (1947).

51. "The case apparently was determined by the jury upon the basis of contributory negligence of appellant [plaintiff] which his request for a charge upon the doctrine of the 'last clear chance' presupposes." Yousko v. Vogt, 63 So.2d 193, 194 (Fla. 1953).

52. 158 Fla. 549, 550, 29 So.2d 624, 625 (1947). Perhaps the decision in this case was somewhat influenced by Mr. Justice Terrell's strong feelings about the size of the death toll on our highways. The bulk of the opinion is a biting editorial on the wayward conduct of our present day motorists.

53. 150 Fla. 635, 8 So.2d 471 (1942).

inattentive or using bad judgment. Since he was not actually discovered this case belongs in the category represented by *Davis v. Cuesta*.[54]

The tendency of the Florida Supreme Court to be overgenerous in favor of negligent plaintiffs, as exhibited by the *Hall* case and the *Brandt* case, seems to have been definitively spiked by the recent case of *Yousko v.*

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54. Brandt v. Dodd also illustrates the principle that under some circumstances a driver may have to use a greater amount of care towards a pedestrian. This principle, when used in connection with the constructive last clear chance doctrine, is a further aid to recovery on the part of a negligent plaintiff.

Although by the weight of authority the standard of care required of both pedestrians and drivers of automobiles is the same—the care an ordinary and prudent person would use under the circumstances of the particular situation concerned—the amount of care required of each party toward the other may be greater as the circumstances vary. An ordinary prudent person, having in his control a potentially destructive and dangerous instrumentality, should use the amount of care commensurate with the nature of the instrument and the surrounding circumstances. Carter v. J. Ray Co., 83 Fla. 470, 91 So. 893 (1921). Since the Florida Supreme Court has characterized the automobile as a dangerous instrumentality, Southern Cotton Oil Co. v. Anderson, 80 Fla. 441, 86 So. 629 (1920), the court, to follow a line of logical consistency, should require more care to be used by a motor vehicle driver. Railway Express Agency v. Brabban, 62 So.2d 713 (Fla. 1953). The court has done so despite any such explicit pronouncement on the subject.

The court has reiterated constantly that the rights of pedestrians and motor vehicle operators are reciprocal. Robb v. Pike, 119 Fla. 823, 161 So. 732 (1935); Prior v. Pounds, 113 Fla. 308, 151 So. 890 (1934); Florida Motor Transportation v. Hillman, 87 Fla. 512, 101 So. 31 (1924). Such a statement actually embodies two concepts. The first is that neither the pedestrian nor the driver can claim the use of the highway to the exclusion of the other. More important is the second concomitant of the reciprocal rights rule: the pedestrian and the motor vehicle driver, who are on the highway, must use ordinary care to avoid harm to the other under the circumstances. Thus, the standard of care is that required of the ordinary prudent man; but the ordinary prudent man who is manipulating a dangerous agency, like an automobile along the highway, may have to use a greater quantum of care to achieve that status of prudency and caution than his equally careful brother who is walking along the same highway.

> "While both parties are charged only with the exercise of the same degree of care it is manifest that the amount of care by law exacted of the driver of the motor vehicle is far greater than the amount exacted of the foot passenger." Raymond v. Hill, 168 Cal. 473, 143 Pac. 743, 747 (1914).

This principle juxtaposed with the last clear chance doctrine is a further aid to recovery against the driver by a pedestrian who is in an inextricable position. Under the constructive last clear chance doctrine, a negligent plaintiff who is in a position of inextricability and who is never discovered by the defendant may nevertheless recover if it can be established that the defendant should have discovered the plaintiff and that the defendant could have avoided the accident by using due care had such discovery been made. It is clear that in some cases had a driver been using that amount of care that was required of him under the circumstances, such care would have enabled him to discover the plaintiff in his helpless condition. Once this is established and it is further shown that the defendant had an opportunity to avoid the accident but failed to do so, the plaintiff's recovery is assured.

In Brandt v. Dodd, the plaintiff, while crossing a busy street, was struck by the defendant's car when the defendant was temporarily blinded by lights from cars coming from the other direction. The defendant contended that the testimony offered at the trial did not justify the court in charging the jury on the last clear chance docrine, apparently urging that there was no evidence tending to show that the plaintiff was in an inextricable position (although this was not discussed at all in the opinion), and apparently also contending that there was no evidence tending to show that the defendant saw the plaintiff or could have seen the plaintiff by exercising due care. Earlier in the opinion the court had quoted with approval the following statement from Mathers v. Botsford, 86 Fla. 40, 97 So. 282 (1923):

> While it may be negligence for a driver of an automobile to permit the bright lights on his car to obscure or obstruct the vision of a driver of another

Vogt.[55] In this case there was also an intersection collision. It was specifically stated that neither of the parties saw the other until impact. The negligence of the plaintiff resulted from a mistake in judgment or inattentiveness which did not place him in a position of inextricability, or, in the language of the court, "evidence showed that negligence on each party litigant was concurrent. In such a situation the doctrine of last clear chance is not applicable. Merchants' Transportation Co. v. Daniel, supra and cases therein cited."[56]

It is noteworthy that the only two authorities cited in the *Yousko* decision are those of the *Merchants' Transportation Co. v. Daniel* and *Davis v. Cuesta*. Those two cases have clearly and explicitly laid down the rule that the doctrine of constructive last clear chance will not apply where the plaintiff was not in a position of inextricability, or in the court's words, when his negligence was "concurrent". It is to be hoped that the *Yousko* case will mark a return to a more satisfactory application of the last clear chance doctrine, and that such cases as the *Hall* and the *Brandt* cases will not be followed.

Just as it now seems apparent that where the defendant did not actually see the plaintiff and appreciate his position, he is not liable where the plaintiff is merely inattentive or has made a mistake in judgment, it is equally apparent that a defendant in the identical position will be forced to compensate a plaintiff if the latter's position can be characterized as being helpless or inextricable.

In *Miller v. Ungar*[57] the facts were these: A young plaintiff was riding

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car on a public highway, yet this does not relieve the driver of the other car of the duty to stop if that is reasonably required to avoid injury to persons who may lawfully be on the road, but whose presence is not known to the driver because of the blinding light on another vehicle then approaching.

In answer to defendant's contention that it was error to charge the jury on last clear chance the court went on to state: "The automobile is a dangerous instrumentality when in operation on public streets, and under certain circumstances under which he approached the area the driver of the car was required to exercise the proper care for pedestrians lawfully about the area and to stop his car, or reduce the speed, or wait until his vision was clear, so the safety of others lawfully in the area would not be jeopardized. The impact occurred at a time when the driver's vision was impaired. Dr. Dodd was carried several feet on the fender of the car, when the car could have been earlier brought to a stop if the proper care and caution had been exercised by the driver." 158 Fla. 635, 8 So.2d 471, (1942).

Thus, in the proper situation, a helpless plaintiff who has never been discovered has another string to his bow when urging the application of the constructive last clear chance doctrine. He may validly contend that under certain circumstances a great amount of care is required of a motor vehicle driver. If the plaintiff could have been discoveed had the requisite caution been used, the way is paved toward the application of the unconscious last clear chance doctrine.

55. 63 So.2d 193 (Fla. 1953).

56. 63 So.2d 193 (Fla. 1953). Hobson, C.J., at page 194, advances this warning to both the judge and defendant's advocate: "A trial judge when faced with a request for a charge upon the doctrine of the 'last clear chance' should be extremely cautious. Such a charge should never be given unless the evidence clearly demonstrates its applicability. If this be not true, the giving of such a charge would either work an advantage to the plaintiff to which he would not be entitled or at least would tend to confuse, rather than aid, the jury in the performance of its duty."

57. 149 Fla. 79, 5 So.2d 598 (1941).

a bicycle on a busy thoroughfare. The defendant's truck was being driven on a street at five miles per hour. Visibility was poor. The plaintiff, seeing the truck became confused and fell, and was apparently unable to get out of the way of the truck from that point on. The defendant's driver "did not see plaintiff before the injury." The case came to the high court on the plaintiff's assigned error of the lower court's refusal to charge on the doctrine of last clear chance. In a split (4-2) decision the supreme court reversed:

> In the case at bar the jury should be permitted to determine whether plaintiff's negligence ceased when he fell to the street.[58]

Interpreting this judicial language, the theory is derived that if the negligence "ceased" (that is, not that there was no negligence, but that the negligent plaintiff found himself in peril and unable to extricate himself from the consequences of his negligence), the fact that the defendant did not see the plaintiff is legally immaterial.

The facts of this case were distinguished from cases where actual visual contact on the part of a defendant was required, as in *Davis v. Cuesta*, on the ground that in those cases the plaintiff's negligence as a matter of law continued until the impact; that is, the plaintiff was not in an inextricable position but was inattentive or was acting under a mistake in judgment.

The dissenting opinion does not impose the duty of actual sight on the defendant where, as here, the plaintiff is in an inextricable and helpless position. Rather the dissent only points out that, in order for last clear chance to apply, the defendant, if he did not see the plaintiff, should have been in a position where he "in the exercise of proper care ought to have seen"[59] the plaintiff, and that the burden of proving same was on the plaintiff.[60]

In *Kenan v. Withers*[61] the plaintiff was, by her own negligence, in a position of inextricability when, in crossing a railroad track, the gate closed in front of her, preventing her from removing herself and her car from the railroad track. There was no discussion of whether she was actually seen. The court held that despite negligence of both sides, the plaintiff and her husband could recover because of the application of the last clear chance doctrine. It seems that the underlying basis of the case is that since the plaintiff was in a helpless position the court need look only to what the defendant should have seen and done were it exercising due care throughout.

The Federal Court, interpreting the Florida law in *Consumer's Lumber*

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58. *Ibid.*
59. *Ibid.*
60. If a defendant neither saw the negligent plaintiff, nor should he have seen him, he would have neither an actual nor a constructive last clear chance to prevent the impact, and is therefore not liable to the negligent plaintiff.
61. 137 Fla. 561, 188 So. 95 (1939).

and Veneer Co. v. Atlantic Coast Line R.R.,[62] further points out that where the plaintiff is in a helpless position he may recover regardless of whether he is actually seen by the defendant.

As previously indicated, to apply the doctrine of last clear chance where the plaintiff was never seen is logically unjustifiable. Logical justification, even though the unseen plaintiff is not merely inattentive but is in an inextricable position, is still lacking, and to apply the doctrine on his behalf indicates an unwarranted solicitude for him.

Further, examination of the results of the last two groups of cases shows, strangely enough, the liability of the defendant is controlled not by his own acts alone, but by the purely fortuitous fact of what the plaintiff's position happens to have been when he was struck.

However, in certain respects it is consistent to find the courts denying relief to an inattentive and unseen plaintiff but affording relief to a helpless and unseen plaintiff. The demand upon the judicial sympathy which underlies this entire field is obviously greater when the plaintiff is so enmeshed by his own negligence that he cannot aid himself. On this basis the doctrine of constructive last clear chance should be closely confined to those cases where the plaintiff is inextricably helpless.

There is, however, no reason for applying the last clear chance doctrine even to the group of unseen but helpless plaintiffs, other than the greater feeling of sympathy for these plaintiffs. Reason and logic would seem to demand that recovery be denied to unseen plaintiffs regardless of the position to which their own negligence has brought them.

SUMMARY

The introduction of a last clear chance doctrine, either "actual" or "constructive", into the law of contributory negligence had no rational basis. The conception of such a doctrine seems to have stemmed from a number of intuitive feelings favoring a negligent plaintiff who, but for this doctrine, would be denied recovery. A semi-expressed feeling that failure to utilize an actual last clear chance to avoid injury partakes somewhat of wantonness or wilfulness, as well as an unexpressed hostility to the rule that one who has been contributorily negligent is barred completely from recovery, stands behind every case in which a defendant bcomes liable under the doctrine. If the law were modified so that negligent plaintiffs and negligent defendants shared the loss according to their respective fault, the doctrine of last clear chance will have outlived any usefulness that it might have. "The doctrine has been called a transitional one, a way station on the road to apportionment of damages."[63] The Florida Supreme Court, in a series of cases, has established the doctrine and forged its basic elements.

Essential to the application of the doctrine in any situation are the

62. 117 F.2d 329 (5th Cir. 1941).
63. PROSSER ON TORTS 410 (1941).

following requirements: negligence of both the plaintiff and the defendant; appreciation of the danger of the plaintiff, either actual, or such appreciation as a reasonable man would have under the circumstances; and an opportunity to avoid the accident by the use of due care after the moment of actual discovery, or after the moment when discovery would have been made if due care had been used.

Under the actual last clear chance doctrine, when the plaintiff is actually discovered he may recover regardless of the position to which his own negligence has led him.

Under the constructive last clear chance doctrine, when the plaintiff is never discovered he may recover only if his negligence has led him to a position from which he could not extricate himself.

While the Florida Supreme Court may have exhibited some tendency in the past to extend the constructive last clear chance doctrine to the situation where the plaintiff's position was that of inattentiveness, the most recent expression of the court on the subject shows that that tendency has been summarily abandoned.

Nevertheless, the last clear chance doctrine as it exists in Florida remains a great source of comfort to plaintiffs, whose recovery, because of their negligence, would normally be denied.