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# LAST CLEAR CHANCE DOCTRINE IN FLORIDA

NATHANIEL E. GOZANSKY\*

## I. HISTORICAL DEVELOPMENT

The last clear chance doctrine originated with the landmark English decision of *Davies v. Mann*.<sup>1</sup> Simply stated, the facts were as follows: the plaintiff staked his fettered donkey in the highway, the animal being unable to move out of the path of oncoming traffic. The defendant was walking behind his horse-drawn wagon and could not see, but if he had been in the driver's seat he could have seen the animal and avoided the collision; as a result of this negligence the defendant's horses and wagon collided with and killed the donkey. The trial judge directed the jury that "if they thought that the accident might have been avoided by the exercise of ordinary care on the part of the driver, to find for the plaintiff."<sup>2</sup> The Court of the Exchequer in affirming this direction held that since the defendant could have avoided injuring the donkey by proper care and did not, he was liable for the consequences of his negligence, though the donkey may have been improperly in his path.

Firstly, the plaintiff, in placing the donkey in a position of peril, was contributorily negligent; secondly, that peril was such that the donkey could not extricate himself therefrom; thirdly, the defendant, if proceeding with reasonable care, should have become aware of, and appreciated, the donkey's peril; and finally, the defendant in the exercise of ordinary care could have avoided the injury.<sup>3</sup> This, then, is the original doctrine of last clear chance, which is a limitation on the defense of contributory negligence.<sup>4</sup>

This new doctrine was immediately accepted by the English courts.<sup>5</sup> In a later House of Lords decision,<sup>6</sup> Lord Penzance, after stating the rule of contributory negligence, made the following observation:

But there is another proposition equally well established, and it is a qualification on the first [contributory negligence]

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1. 10 M. & W. 546, 152 Eng. Rep. 588 (Ex. 1842).

2. 10 M. & W. 546, 547, 152 Eng. Rep. 588 (Ex. 1842).

3. It is important to note that the negligence of the plaintiff in the *Davies* case was such that it continued up to the point of impact, for once the donkey was placed in the road the negligence continued until such time as he might be removed therefrom.

4. "The general result . . . before *Davies v. Mann* . . . is . . . that if the plaintiff is guilty of any negligence contributing to cause the injury complained of, he could not in any circumstances recover." Schofield, *Davies v. Mann: Theory of Contributory Negligence*, 3 HARV. L. REV. 263 (1890).

5. The doctrine of last clear chance "is fully established by the recent cases." *Dimes v. Petley*, 15 Q.B. 276, 283 (1850). See also *Tuff v. Warman*, 5 C.B. (N.S.) 573 (1858).

6. *Radley v. London & No. W. Ry. Co.*, 1 App. Cas. 754 (1876).

namely, that though the plaintiff may have been guilty of negligence, and although the negligence may, in fact, have contributed to the accident, yet if the defendant could in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him.

This proposition, as one of law, cannot be questioned. It was decided in the case of *Davies v. Mann* . . . and has been universally applied in cases of this character without question.<sup>7</sup>

The doctrine met with little criticism thereafter<sup>8</sup> and had already begun to work its way across the ocean to the United States, where it was warmly, but thoughtlessly, received by our courts.<sup>9</sup> The development of the doctrine in this country is perhaps best summed up by the following comment:

But the most startling observation about the development of this exception is the quickness with which it became lost in the limbo of proximate cause. It had hardly secured a footing before the courts and writers began to demand a sounder basis for it than that afforded by the good sense apparent from the simple statement of the rule itself.<sup>10</sup>

When the last clear chance doctrine was first recognized by the Florida court it had already been "lost in the limbo of proximate cause."

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7. *Id.* at 759. Subsequently, in pointing out the lower court's error in the instruction, Lord Penzance stated, "but he [the judge] failed to add that if they [the jury] thought the engine driver might at this stage of the matter [after the plaintiff had created the encumbrance on the tracks] by ordinary care have avoided all accident, any previous negligence of the Plaintiffs would not preclude them from recovering." *Id.* at 760. Thus the House of Lords established the element of time sequence in order not to completely obviate the doctrine of contributory negligence.

8. In *The Vera Cruz* (No. 1), 9 P.D. 88 (1884) the learned judge, referring to Lord Penzance's comments in the *Radley* case, stated, "I think this passage . . . went beyond what the House of Lords intended. A decision to that effect would have put an end to the doctrine of contributory negligence altogether." *Id.* at 93.

9. "[The doctrine of last clear chance] is generally stated to be law in the United States; but a very brief examination of the cases will show that *Davies v. Mann*, although cited without criticism by our courts, is generally cited as an authority for the proposition that if the plaintiff is guilty of any negligence contributing directly, or as a proximate cause, to the injury complained of, he cannot recover. The further question, whether the defendant could by the use of due care avoid the consequences of the plaintiff's negligence, is ignored; and *Davies v. Mann* is explained as a case where the plaintiff was allowed to recover because his negligence was not contributory. . . . From American text-writers, on the other hand, the case . . . has met with great disapproval. It has been attacked upon various grounds, but principally as being a nullification of the whole doctrine of contributory negligence." Schofield, *Davies v. Mann: Theory of Contributory Negligence*, 3 HARV. L. REV. 263, 266 (1890). For subsequent early appraisals of the doctrine see generally: Shelton, *Last Clear Chance*, 10 VA. L. REG. 301 (1904); Curry, *The Last Clear Chance*, 16 VA. L. REG. 161 (1910); Smith, *The "Last Clear Chance" Doctrine*, 82 CENT. L.J. 425 (1916).

10. Green, *Contributory Negligence and Proximate Cause*, 6 N.C.L. REV. 3, 23 (1927).

## II. FLORIDA ACCEPTS THE DOCTRINE

Just as one cannot study "last clear chance" without first going to *Davies*, one cannot approach Florida's concept of the doctrine without first taking into account *Merchant Transp. Co. v. Daniel*.<sup>11</sup>

Plaintiff brought this action against Merchants' Transportation Company for her husband's wrongful death, which resulted from being struck by the defendant's truck. The decedent was working on a bridge, in clear view of oncoming traffic. Two workmen attempted to warn the driver, who was rounding a curve, of the decedent's position, but he was traveling at such an excessive speed that he could not stop in time to avoid the impact. The trial court instructed the jury on the theory of last clear chance as follows:

In this case, if you should find from the evidence that the deceased, Emmet Daniel, was careless and negligent in exposing himself to danger, but that after the said Daniel had so exposed himself to danger the driver of defendant's automobile could have avoided the injury by using ordinary care in keeping his automobile under proper control . . . and by keeping a proper lookout ahead and that said driver failed to use such ordinary care and that his failure in this respect was the *direct cause* of the injury, then you should find for the plaintiff.<sup>12</sup>

The jury returned a verdict for the plaintiff. The defendant company appealed to the Florida Supreme Court, which affirmed the lower court's decision. Chief Justice Davis, speaking for the majority,<sup>13</sup> made the following comment:

The party who last has a clear opportunity of avoiding an accident, notwithstanding the negligence of his opponent, is considered solely responsible for it. Such is a simple statement of the doctrine of "the last clear chance." 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. This result it accomplishes by characterizing the negligence of

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11. 109 Fla. 496, 149 So. 401 (1933) (subsequently cited as authority in almost every decision involving the last clear chance doctrine in Florida).

12. *Merchants' Transp. Co. v. Daniel*, 109 Fla. 496, 502, 149 So. 401, 403 (1933). The negligence of the defendant was that he was traveling at a speed which prohibited his being able to take advantage of the warning. Further comments on the application of the doctrine where one did not go prepared for an emergency situation are made in conjunction with *Edwards v. Donaldson*, 103 So.2d 257 (Fla. 2d Dist. 1958), at note 31 *infra*.

13. There were two separate concurring opinions, agreeing with the trial court's judgment but disagreeing with the majority's interpretation of the last clear chance doctrine.

the defendant, if it intervenes between the negligence of plaintiff . . . and the accident, as the sole proximate cause of the injury, and the plaintiff's antecedent negligence merely as a condition or remote cause . . . thus . . . 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.<sup>14</sup>

The above quoted language,<sup>15</sup> couched in terms of proximate cause, reflected the majority position on the doctrine throughout the United States.<sup>16</sup>

In reviewing the facts, as Justice Ellis in his concurring special opinion pointed out,<sup>17</sup> it is difficult to see why the instruction was needed on the trial level. There appears to be no evidence as to the decedent's negligence, and since negligence on the part of both parties is implicit in the last clear chance doctrine,<sup>18</sup> this was not a proper case to apply the doctrine.<sup>19</sup> The majority assumed negligence on the part of the decedent and thereby established the doctrine. The subsequent growth, modification, and entrenchment of the doctrine, can be seen by examining common fact patterns wherein the doctrine is applied or denied.

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14. *Merchants' Transp. Co. v. Daniel*, 109 Fla. 496, 502, 149 So. 401, 403 (1933).

15. These particular comments were too restrictive with respect to the doctrine's intended purpose. Such language only serves to confuse and complicate the doctrine's applicability. In his final remarks on the doctrine, the Chief Justice stated: "Neither is the doctrine of last clear chance applicable where the negligence of either party is concurrent. 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, or proof of circumstances which will put the one charged to implied notice of the situation." 109 Fla. at 504, 149 So. at 404. For further comment on this passage see Annot., 92 A.L.R. at 64 (1934).

16. Annot., 92 A.L.R. 103 n.57 (1934).

17. Justice Ellis' opinion, 109 Fla. at 512, 149 So. at 406, is in essence a dissent to the majority's interpretation of the last clear chance doctrine. His opinion, supported by a substantial amount of foreign citations, evinced some depth in his research and approached more nearly the original doctrine established in *Davies v. Mann*, note 1 *supra*. It is interesting to note that in Florida's second last clear chance case, *Lindsey v. Thomas*, 128 Fla. 293, 174 So. 418 (1937), Justice Ellis again concurred for the same reasons as in the *Merchants'* case, and yet one year later, he wrote a majority opinion, therein adopting the *Merchants'* theory. *Miami Beach Ry. Co. v. Dohme*, 131 Fla. 171, 179 So. 166 (1938).

18. *Lindsey v. Thomas*, 128 Fla. 293, 174 So. 418 (1937); *Lee County Oil Co., Inc. v. Marshall*, 98 So.2d 510 (Fla. 1st Dist. 1957).

19. In the case of *Wawner v. Sellic Stone Studio*, 74 So.2d 574 (Fla. 1954), the supreme court was again faced with a similar fact pattern as that presented in the *Merchants'* case. In this case plaintiff was in the street conducting an engineering survey for the city. Defendant's truck driver saw the plaintiff but failed to turn, stop or sound a warning. The truck struck the plaintiff while going thirty miles per hour. The trial court instructed on contributory negligence, but refused to instruct on last clear chance. The supreme court reversed on the ground that an instruction on last clear chance should have been given. It is difficult to envision justification for the contributory negligence instruction on the facts presented. Again this appears to be a case wherein negligence on the part of plaintiff is doubtful and therefore the facts possibly do not present a last clear chance situation.

### A. Pedestrian Crossing Cases

In the case of *Lindsay v. Thomas*,<sup>20</sup> the defendant's automobile was being driven by her sixteen-year-old daughter in an Orlando residential section. The plaintiff and his wife, in attempting to cross the street, were struck by the defendant's vehicle, resulting in serious injury to the plaintiff and the death of his wife. The speed of the automobile was moderate and apparently the injured couple had thought they could complete the crossing before the car could reach the intersection.

The court said that the doctrine is applicable when the defendant, by the exercise of due care, should know of the plaintiff's situation, and should realize the peril involved therein. In addition, the defendant must have reason to believe that the plaintiff is inattentive and therefore will not extricate himself from the danger.<sup>21</sup>

The effect of *Lindsay* is lasting. This is clearly pointed out in *Springer v. Morris*,<sup>22</sup> where, in affirming a judgment for the plaintiff, who had been struck by an auto while attempting to cross a street at night, the Florida Supreme Court held that the charge of last clear chance was proper if the defendant could have discovered and appreciated the plaintiff's peril.<sup>23</sup>

But this is not to say that the last clear chance doctrine is available to all negligent pedestrians. Underlying the cases in which the doctrine is applied is the fact that the plaintiff could not extricate himself from his self-imposed peril. While there are several cases denying the application of the doctrine, there are only a few factual situations presented by these decisions.

Plaintiff, an air cadet, dressed in a dark blue uniform, was walking on an asphalt street (there was an available sidewalk several feet off the road) at about midnight. The defendant was traveling the speed limit but was unable to see the plaintiff until he was within ten feet of him, at which time he could not avoid the impact.<sup>24</sup> In that case there was no evidence of negligence on the part of the defendant, but only on the part of the plaintiff and therefore, the doctrine did not apply. That

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20. 128 Fla. 293, 174 So. 418 (1937).

21. The court footnoted this discussion to RESTATEMENT, TORTS § 479, 480 (1934), and then commented that "the 'last clear chance' rule is founded upon the actual or implied knowledge of the defendant in cases where he attempts to set up alleged negligent conduct of plaintiff as a bar to the cause of action under a plea of contributory negligence." *Lindsay v. Thomas*, 128 Fla. 293, 298, 174 So. 418, 420 (1937).

22. 74 So.2d 781 (Fla. 1954).

23. *Ibid.* See also *Williams v. Sauls*, 151 Fla. 270, 9 So.2d 369 (1942); *Hodell v. Snyder*, 122 So.2d 36 (Fla. 3d Dist. 1960) wherein failure to instruct on the doctrine was held reversible error when the driver saw the pedestrian crossing the street about sixty-five feet ahead and made no effort to avoid the collision.

24. *Falnes v. Kaplan*, 101 So.2d 377 (Fla. 1958).

case, and those noted in the margin,<sup>25</sup> are readily justifiable in their refusal to apply the doctrine.

But there is another group of cases, not so clear in their reasoning, which deny application of the doctrine on the basis of "concurrent negligence."<sup>26</sup> The Court of Appeals for the Fifth Circuit recognized this bar to the use of the doctrine as part of Florida law in *Humphries v. Boersma*.<sup>27</sup> The plaintiff was crossing a street at some distance from the intersection. The impact occurred in the early evening. Both parties claimed to be looking, but neither saw the other. The court held that the plaintiff must show that he was free of "concurring negligence," or in other words, that the plaintiff prove that his negligence did not continue until the time of impact.<sup>28</sup> In a more recent case, where the plaintiff was struck while walking on a highway in the early morning, the Fifth Circuit reiterated its *Humphries*<sup>29</sup> position.

An interesting set of facts in this area appears in *Edwards v. Donaldson*.<sup>30</sup> In that case the plaintiff was walking on a dimly lit road at night and wearing dark clothing. There were no sidewalks and the evidence was in conflict as to how far in the road he was walking. There was also evidence that he had been drinking. The defendant was driving a truck at approximately forty-five miles per hour in a twenty-mile-per-hour speed zone. He saw the plaintiff about fifty feet away, applied the brakes, skidded, and struck the plaintiff. The trial judge's refusal of the plaintiff's instruction on the last clear chance doctrine was affirmed since that instruction did not include a direction for the jury to consider the plaintiff's negligence and determine at what point it ceased.<sup>31</sup>

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25. *Schoen v. Western Union Tel. Co.*, 135 F.2d 967 (5th Cir. 1943) (where the emergency is so sudden that there is no time to avert the accident, the doctrine is not applicable); *Douglas v. Hackney*, 133 So.2d 301 (Fla. 1961) (the trial court did not err by denying an instruction on the last clear chance doctrine where the defendant could not have seen the plaintiff's peril); *Turner v. Seegar*, 151 Fla. 643, 10 So.2d 320 (1942); *Green v. Loudermilk*, 146 So.2d 601 (Fla. 2d Dist. 1962) (the plaintiff created a situation where the defendant in the exercise of reasonable care could not avoid the accident); *Gordon v. Cozart*, 110 So.2d 75 (Fla. 2d Dist. 1959).

26. This concept originated in Florida in the *Merchants'* case from a portion quoted in note 15 *supra*.

27. 190 F.2d 843 (5th Cir. 1951).

28. *Ibid.* It is submitted that what the court really meant in the *Merchants'* case was that the doctrine requires that the defendant have time to appreciate the plaintiff's peril.

29. *Cavitt v. Ferris*, 269 F.2d 440 (5th Cir. 1959). The language of the Federal court in this case and *Humphries v. Boersma*, note 28 *supra*, is clearly a misapprehension of the doctrine. The plaintiff's contributory negligence must be shown by the defendant, for it is an affirmative defense. The plaintiff need only show that the defendant could have discovered him and his peril in time to prevent injury.

The decisions in both these cases may be correct inasmuch as the plaintiff was not inextricably in peril; the impropriety is in the rationale adopted.

30. 103 So.2d 257 (Fla. 2d Dist. 1958).

31. *Ibid.* The question here was not one of when the plaintiff's negligence ceased, but rather one of preparedness. That is—was the defendant in a position after discovery to do

While the idea of concurrent negligence is not difficult to perceive in light of the language in *Merchants' Transp. Co. v. Daniel*,<sup>32</sup> the fact patterns wherein the concept is applied are often confusing. One of two things may be said: either that there are several cases where the doctrine should not have been applied due to contributory negligence, or there are several cases where the court erroneously prohibited the application of last clear chance on the premise of concurrent negligence.<sup>33</sup> The confusion is really acute in those cases where this concept is applied but the facts show no negligence on the part of the defendant. In those cases the court rested a just decision on tenuous ground.<sup>34</sup> The implication would seem to be that if counsel for the defendant can characterize the plaintiff's negligence as "concurrent" he will avoid the hardship of the last clear chance doctrine.

But if confusion exists, it should be short-lived. The recent Florida Supreme Court decision of *James v. Keene*<sup>35</sup> has taken a position in the Florida courts equal to that of the *Merchants'* case. What the *Merchants'* case did in establishing the doctrine, the *James* case appears to be doing in finalizing the doctrine's form.

The facts in *James* are similar to those wherein concurrent negligence had been a bar.<sup>36</sup> The accident occurred on a clear evening with good visibility when the plaintiff had almost completed crossing the street. Each party had been negligent in not seeing the other prior to

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anything about the situation? There are numerous decisions in foreign jurisdictions which, as between the vehicle and the pedestrian, require the vehicle be under such control that the operator could take advantage of the opportunity. *E.g.*, *Jenkins v. Southern Ry. Co.*, 196 N.C. 466, 146 S.E. 83 (1929) (negligence for the railroad to operate its train in such a manner so that it could not be stopped before striking the deceased, where the company had notice that the tracks at that point were in constant public use); *Thompson v. Salt Lake Rapid-Transit Co.*, 16 Utah 281, 52 Pac. 92 (1898) (the placing of a trolley with defective brakes upon the public street was negligence); *Dent v. Bellows Falls & S.R. St. Ry. Co.*, 95 Vt. 523, 116 Atl. 83 (1922) (when a railroad knows that its bridge is used by pedestrians, the duty rests upon it to keep a lookout for them, and to operate its cars with commensurate care); *Allen v. Schultz*, 107 Wash. 393, 181 Pac. 916 (1919) (one who operates an automobile must take notice that he may be called upon to make emergency stops, and it is negligence for him not to keep the brakes in such condition that such stops are possible). See also *Becker v. Blum*, 142 Fla. 60, 194 So. 275 (1940), wherein the court speaks of concurrent negligence and yet the facts more readily lend themselves to that group of cases set out in note 25 *supra*. As to the need for an explicit instruction see *Radtke v. Loud*, 98 So.2d 891 (Fla. 3d Dist. 1957).

32. 109 Fla. 496, 149 So. 401 (1933).

33. A comparison of the pedestrian crossing cases will display cases with substantially the same facts but opposite results, based on the court's determination of concurrent negligence. *E.g.*, *Humphries v. Boersma*, 190 F.2d 843 (5th Cir. 1951); *James v. Keene*, 133 So.2d 297 (Fla. 1961). Further, in some of the cases involving concurrent negligence, the courts should have considered whether the defendant, in the exercise of reasonable care, could have avoided the accident. *E.g.*, *Yousko v. Vogt*, 63 So.2d 193 (Fla. 1953); *Williams v. Sauls*, 151 Fla. 270, 9 So.2d 369 (1942); *Davis v. Cuesta*, 146 Fla. 471, 1 So.2d 475 (1941).

34. *E.g.*, *Turner v. Seegar*, 151 Fla. 643, 10 So.2d 320 (1942); *Becker v. Blum*, 142 Fla. 60, 194 So. 275 (1940).

35. 133 So.2d 297 (Fla. 1961).

36. *Humphries v. Boersma*, 190 F.2d 843 (5th Cir. 1951).

the impact. The Florida Supreme Court held that an instruction on the doctrine of last clear chance should have been given since the defendant, in the exercise of reasonable care, could have seen the plaintiff and realized that she was either unaware of her perilous position, or unable to do anything about it. Further, the jury might have found that the defendant could have avoided the accident.<sup>37</sup>

The court quoted from *Parker v. Perfection Co-op. Dairies*,<sup>38</sup> wherein it was held that the doctrine is applicable when the evidence shows:

- (1) That the injured party has already come into a position of peril;
- (2) that the injuring party then or thereafter becomes, or in the exercise of ordinary prudence ought to have become, aware not only of that fact, but also that the party in peril either reasonably cannot escape from it, or apparently will not avail himself of opportunities open to him for doing so;
- (3) that the injuring party subsequently has the opportunity by the exercise of reasonable care to save the other from harm;
- and (4) that he fails to exercise such care.<sup>39</sup>

In conclusion the court, in *James*, pointed out that where the plaintiff is not inextricably in peril and it is not apparent that he will fail to extricate himself, the last clear chance doctrine does not apply.<sup>40</sup>

The force and effect of the *James* case already can be seen in the lower courts,<sup>41</sup> and apparently will lend stability to this area of Florida law.

### B. Vehicular Collision Cases

The following cases can be separated from the above only by factual distinction. An overview of these vehicle collision cases, coupled with the pedestrian cases, provides a picture of the current doctrine in Florida.

*Panama City Transit Co. v. Du Vernoy*<sup>42</sup> presents an excellent fact pattern for the application of the doctrine. In that case the defendant's bus was headed west and the plaintiff's motorcycle east; plaintiff was speeding; the bus entered the intersection and came to a stop; it then turned left into the path of the plaintiff and the vehicles collided.<sup>43</sup>

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37. *James v. Keene*, 133 So.2d 297 (Fla. 1961).

38. 102 So.2d 645 (Fla. 2d Dist. 1958).

39. *Id.* at 647; *James v. Keene*, 133 So.2d 297, 299 (Fla. 1961). Compare with the original doctrine set forth in *Davies v. Mann*, note 3 *supra*.

40. *James v. Keene*, note 37 *supra*.

41. *Naber v. Scott*, 149 So.2d 365 (Fla. 2d Dist. 1963) (pedestrian crossing); *Gilman v. Rupert*, 145 So.2d 746 (Fla. 2d Dist. 1962) (pedestrian struck while standing in a parking lot); *Wasserman v. Miller*, 143 So.2d 210 (Fla. 3d Dist. 1962) (struck by the bed of a passing truck while fishing from a bridge). All these cases applied the doctrine on the basis of what the supreme court set forth in *James v. Keene*, note 37 *supra*.

42. 159 Fla. 890, 33 So.2d 48 (1947).

43. *Ibid.*

The court stated that "the evidence gives rise to the application of the doctrine of 'last clear chance,' which is a phase of the law of proximate cause."<sup>44</sup>

Why the court should have introduced "the law of proximate cause" is somewhat puzzling. If the defendant had the last opportunity to avoid the collision, and failed to do so, that of itself imposes liability. There is no issue of cause.

An earlier case, with substantially the same facts, held that where the last clear chance was not raised in the pleadings it was not error for the court to give an instruction on the doctrine.<sup>45</sup>

A child upon a bicycle near the edge of a road-way, a driver who testified that he did not see the child, and sufficient evidence that the driver could have seen him, was the framework of a more recent case, which emphasized that the doctrine was applicable if the defendant in the exercise of reasonable care could have seen the plaintiff's perilous position.<sup>46</sup>

*Holdsworth v. Crews*<sup>47</sup> presented an interesting and dramatic factual pattern. The plaintiff was speeding down a state road toward the defendant. The defendant hesitated, realizing he could not make his turn in front of the oncoming car, but suddenly decided to attempt the turn. The plaintiff swerved to miss the defendant and ran head on into a tree, causing considerable damage. The appellate court affirmed the granting of a new trial on the ground that the trial court had denied the plaintiff's instruction on the last clear chance doctrine.<sup>48</sup> This case, the court said, was an example of the defendant's intervening negligence, making the plaintiff's negligence remote. Again, it is submitted that the introduction of the causation concept is uncalled for. It would be enough if the defendant had the last clear chance to avoid the plaintiff's injury.

In affirming a directed verdict for the defendant, the court in *Ward v. City Fuel Oil Co., Inc.*,<sup>49</sup> pointed out the necessity for appreciation of the plaintiff's perilous predicament before the doctrine can come into play. The facts showed that there was nothing in the situation to put the defendant on notice that the plaintiff would collide with him.<sup>50</sup> This

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44. *Id.* at 892, 33 So.2d at 50.

45. *Dunn Bus Serv., Inc. v. McKinley*, 130 Fla. 778, 178 So. 865 (1937). The language in this case was similar to that in *Panama City Transit Co. v. Du Vernoy*, 159 Fla. 890, 33 So.2d 48 (1947).

46. *Royal Kitchen Cabinet Corp. v. Palcic*, 111 So.2d 42 (Fla. 3d Dist. 1959).

47. 129 So.2d 153 (Fla. 2d Dist. 1961).

48. *Ibid.*

49. 147 Fla. 320, 2 So.2d 586 (1941).

50. The facts were: plaintiff was on a horse attempting to cross the highway upon which defendant's truck was proceeding. In an effort to avoid the truck, plaintiff's horse

case, and *Lee County Oil Co. v. Marshall*,<sup>51</sup> emphasize that the plaintiff must be guilty of negligence in order to call for the application of the doctrine. In the *Lee* case the plaintiff was a fireman who had been struck by the defendant's truck while riding on the tail gate of the fire engine. Nothing in the case indicated negligence on the part of the plaintiff or his co-workers operating the fire engine.<sup>52</sup>

There is another group of cases in this area where the last clear chance doctrine was denied on the basis of concurrent negligence.<sup>53</sup> The most important of these was *Yousko v. Vogt*.<sup>54</sup> In that case the plaintiff was operating a motor scooter and the defendant a car; each party had a clear, unobstructed view, but neither saw the other until the instant before the appulse. While the court's comments on concurrent negligence were not unique or stirring, the court did state that "such a charge [last clear chance] should never be given unless the evidence clearly demonstrates its applicability."<sup>55</sup> This cautionary note has been seriously heeded by the courts in this last decade and is frequently referred to.<sup>56</sup>

A most unusual approach to the application of the doctrine appears in *Miami Beach Ry. Co. v. Dohme*.<sup>57</sup> In that 1938 case the plaintiff, in order to avoid striking an automobile pulling out of a parking place, swerved into some trolley tracks and thereafter, was struck and injured by the defendant's trolley. The Court, after discussing the doctrine of last clear chance, held that the trial court should have given instructions to the effect that last clear chance may be applicable *against* the plaintiff. Fortunately this anomalous interpretation has never again reared its head in a Florida opinion.<sup>58</sup>

### C. Railroad Cases

It is to be noted that the doctrine of last clear chance played no great part in Florida's railroad cases. Perhaps this unusual circumstance was the result of Florida's well established comparative negligence statute for railroad cases.<sup>59</sup> In any event the last clear chance doctrine

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veered into and collided with it, resulting in injury to plaintiff. *Ward v. City Fuel Oil Co., Inc.*, note 49 *supra*.

51. 98 So.2d 510 (Fla. 1st Dist. 1957).

52. *Ibid.*

53. *Miami Transit Co. v. Goff*, 66 So.2d 487 (Fla. 1953); *Davis v. Cuesta*, 146 Fla. 471, 1 So.2d 475 (1941); *Parker v. Perfection Co-op. Dairies*, 102 So.2d 645 (Fla. 2d Dist. 1958).

54. 63 So.2d 193 (Fla. 1953).

55. *Id.* at 194 (Fla. 1953).

56. *E.g.*, *James v. Keene*, 133 So.2d 297 (Fla. 1961); *Gilman v. Rupert*, 145 So.2d 746 (Fla. 2d Dist. 1962); *Gordon v. Cozart*, 110 So.2d 75 (Fla. 2d Dist. 1959).

57. 131 Fla. 171, 179 So. 166 (1938).

58. Compare *Rollman v. Morgan*, 73 Ariz. 305, 240 P.2d 1196 (1952), and *City of Pueblo v. Ratliff*, 131 Colo. 377, 281 P.2d 1021 (1955), with *Miami Beach Ry. Co. v. Dohme*, note 57 *supra*, for foreign decisions pointing out the absurdity of the Florida decision.

59. Laws of Florida 1887, ch. 3744, § 1 at 117: "That no person shall recover

was not raised and applied to a railroad case until six years after the decision in *Merchants' Transp. Co. v. Daniel*.<sup>59a</sup> This first railroad case was *Kenan v. Withers*,<sup>60</sup> wherein the plaintiff, after entering upon a railroad crossing, was blocked and enclosed thereon by the gates. There was evidence to the effect that had the gate not blocked the plaintiff or had the train been going at the proper speed, she would have escaped injury. The Florida Supreme Court affirmed the trial court's application of the last clear chance doctrine in conjunction with Florida's comparative negligence statute.<sup>61</sup>

Thereafter three cases applied the doctrine in a manner similar to *Kenan*.<sup>62</sup> But in *Loftin v. Nolin*,<sup>63</sup> the Supreme Court of Florida brought the application of the doctrine in railroad cases to an end. This was a widow's action against a railroad company, arising out of a truck-train collision at a crossing. The train was traveling at approximately ten miles per hour. The decedent's truck was going about fifty miles per hour. When the engineer first saw the decedent, he anticipated the truck would "beat" the train; thereafter the engineer realized the truck would not make it and attempted to halt the train. A collision ensued. In reversing the trial court for giving an instruction on last clear chance, the court said:

In addition to a review of the cases from this court with reference to the last clear chance doctrine in comparative negligence cases, we have also reviewed articles by eminent text writers on the subject [citing to various law review articles]. The consensus of these eminent writers is that justification for the doctrine of last clear chance passes with the adoption of a comparative negligence statute.<sup>64</sup>

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damages from a railroad company for injury to himself or to his property when the same is done by his consent or is caused by his own negligence. If the complainant and the agents of the company are both at fault the former may recover, but the damages shall be diminished by the jury trying the case in proportion to the amount of default attributable to him." Compare with FLA. STAT. § 768.06 (1961), Florida's present comparative negligence statute, which is substantially unchanged.

It has been suggested that comparative negligence rules could replace the need for both the last clear chance and contributory negligence doctrines. But there are many problems with this concept, especially in multiple party actions.

For a comprehensive article in favor of the use of the comparative negligence doctrine see Maloney, *From Contributory to Comparative Negligence: A Needed Law Reform*, 11 U. FLA. L. REV. 135 (1958). It is submitted that Professor Maloney's opinion of Florida's last clear chance doctrine may now be more positive in the face of *James v. Keene*, 133 So.2d 297 (Fla. 1961).

59a. 109 Fla. 496, 149 So. 401 (1933).

60. 137 Fla. 561, 188 So. 95 (1939).

61. *Ibid.*

62. *Seaboard Air Line Ry. Co. v. Bailey*, 190 F.2d 812 (5th Cir. 1951); *Consumers Lumber & Veneer Co. v. Atlantic Coast Line Ry. Co.*, 117 F.2d 329 (5th Cir. 1941); *Seaboard Air Line Ry. Co. v. Martin*, 56 So.2d 509 (Fla. 1952), wherein the court held that the doctrine of last clear chance could be applied in lieu of the comparative negligence statute.

63. 86 So.2d 161 (Fla. 1956). See also Annot., 59 A.L.R.2d 1261 (1958); 10 MIAMI L. REV. 594 (1956).

64. *Loftin v. Nolin*, 86 So.2d 161, 162 (Fla. 1956).

Interestingly enough, Georgia, having a similar statute,<sup>65</sup> held that the doctrine of last clear chance was not incompatible with the statute adopting the principle of comparative negligence.<sup>66</sup>

The Florida Supreme Court's opinion in *Loftin* seems inconsistent with its explanation of the doctrine. If the doctrine of last clear chance is but a special instance of the general doctrine of proximate cause,<sup>67</sup> there appears no logical reason why its application should be affected by the comparative negligence statute, which was enacted primarily to obviate the harsh effects of the common law rule of contributory negligence.<sup>68</sup> But if the doctrine is only a question of time sequence, then clearly it should be swallowed by the adoption of a comparative negligence statute.<sup>69</sup>

#### D. Aircraft Collision Cases

Florida has only one aircraft case wherein the doctrine was involved—the case of *Shattuck v. Mullen*.<sup>70</sup> The plaintiff was landing while the defendant had “touched down” and was taking off again. When the defendant saw the plaintiff, she made an effort to avoid him, but it was too late. The planes collided fifty feet from the ground and as a result the plaintiff “nosed” in and was severely injured. Each party alleged that the other should have seen the oncoming plane in time to avoid the collision. The trial judge gave an instruction on last clear chance over the defendant's objection. The appellate court stated:

This court . . . will discuss the applicability of the last clear chance doctrine to the instant case involving an aircraft collision in the same manner as this doctrine has traditionally been applied to automobile cases in Florida.<sup>71</sup>

The court then held that this was a case of concurrent negligence and

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65. GA. CODE ANN., § 94-703 (1937):

No person shall recover damages from a railroad company for injury to himself or his property, where the same is done by his consent or is caused by his own negligence. If the complainant and the agents of the company are both at fault, the former may recover, but the damages shall be diminished by the jury in proportion to the amount of fault attributable to him.

Compare with the Florida statute, note 59 *supra*.

66. *Lovett v. Sandersville*, 72 Ga. App. 692, 34 S.E.2d 664 (1945).

67. *Merchants' Transp. Co. v. Daniel*, 109 Fla. 496, 149 So. 401 (1933).

68. Annot., 59 A.L.R.2d 1261 (1958). “There is little decisional authority in the United States for the proposition that under comparative negligence statutes or rules, the doctrine of last clear chance is no longer necessary or applicable.” *Id.* at 1267.

69. *Loftin v. Nolin*, 86 So.2d 161 (Fla. 1956), works as a complete prohibition to the application of the last clear chance doctrine in Florida railroad cases. That this is a sound view see *Maloney, From Contributory to Comparative Negligence: A Needed Law Reform*, 11 U. FLA. L. REV. 135 (1958).

70. 115 So.2d 597 (Fla. 2d Dist. 1959).

71. *Shattuck v. Mullen*, 115 So.2d 597, 601 (Fla. 2d Dist. 1959). From the facts of this case it is difficult to perceive negligence on the part of the defendant. Therefore the court's discussion of concurrent negligence may be open to criticism.

that therefore the giving of an instruction on the doctrine was reversible error.

While the *Shattuck* case was not appealed to the Florida Supreme Court, that court probably would have accepted the district court's approach to the doctrine in aircraft collision cases in light of the supreme court decisions in the automobile collision cases.

### III. SUMMARY

The doctrine of last clear chance originated in England to counter the harsh doctrine of contributory negligence.<sup>72</sup> At its inception the doctrine had four elements: (1) the plaintiff was guilty of contributory negligence; (2) this negligence had placed the plaintiff in an inextricably perilous position; (3) the defendant, in the exercise of reasonable care either did or should have seen and appreciated the plaintiff's peril; and (4) at such time the defendant by the exercise of reasonable care could have avoided the accident.<sup>73</sup> This concept was accepted in Florida as a method of determining which party, if any, was the "sole proximate cause" of the injury being sued upon.<sup>74</sup>

The doctrine of last clear chance has been developing in Florida for the past thirty years. Several concluding comments can be made in reference to that development. It has been established that the doctrine need not be raised in the pleadings in order for an instruction to be given.<sup>75</sup> It is essential that the evidence demonstrate the doctrine's applicability before an instruction may be given.<sup>76</sup> If the court does charge the jury on the doctrine, the charge should explain the doctrine of last clear chance and how the jury is to apply it to their findings.<sup>77</sup>

Finally, *James v. Keene*<sup>78</sup> has crystallized the doctrine in Florida into the following elements: (1) the plaintiff, through his own negligence, comes into a position of peril; (2) the defendant becomes, or in the exercise of reasonable care should become, aware of the plaintiff's position; (3) the plaintiff either cannot or will not extricate himself; (4) the defendant has time to appreciate the peril and an opportunity to save the plaintiff from harm by the exercise of reasonable care; and (5) the defendant fails to exercise such care.<sup>79</sup>

A comparison of this Florida formula with the original displays a

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72. Schofield, *Davies v. Mann: Theory of Contributory Negligence*, 3 HARV. L. REV. 263 (1890).

73. *Davies v. Mann*, 10 M. & W. 546, 152 Eng. Rep. 588 (Ex. 1842).

74. *Merchants' Transp. Co. v. Daniel*, 109 Fla. 496, 149 So. 401 (1933). It should be noted that this approach of the court was an unnecessary complication of the doctrine.

75. *Dunn Bus Serv., Inc. v. McKinley*, 130 Fla. 778, 178 So. 865 (1937).

76. *Yousko v. Vogt*, 63 So.2d 193 (Fla. 1953).

77. *Radtke v. Loud*, 98 So.2d 891 (Fla. 3d Dist. 1957).

78. *James v. Keene*, 133 So.2d 297 (Fla. 1961).

79. *Ibid.*

favorable resemblance, the Florida doctrine being of greater depth. Many states apply the doctrine only if the defendant actually discovers the victim's peril.<sup>80</sup> Florida has never limited itself in this fashion. Therefore, Florida has an effective and comprehensive last clear chance doctrine.

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80. 59 A.L.R.2d 1261 (1958); Maloney, *From Contributory to Comparative Negligence: A Needed Law Reform*, 11 U. FLA. L. REV. 135 (1958).