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# Last Clear Chance -- Comparative Negligence

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agent,<sup>22</sup> or decided as a matter of law that the father's knowledge of the mother's negligence constituted contributory negligence on his part.

In this case of first impression the Florida Supreme Court seems needlessly to have missed the opportunity to clarify its position. Without weighing the merits of the conflicting views, it appears, none the less, that a clear alignment with one of the lines of authority would have been a positive good in and of itself.

FRANK M. DUNBAUGH III

### LAST CLEAR CHANCE—COMPARATIVE NEGLIGENCE

Plaintiff sued for the wrongful death of her husband arising out of a collision between the deceased's truck and the defendant's train. The jury gave a verdict for the plaintiff based on the judge's charge embodying the doctrine of last clear chance. On appeal, reversed. *Held*, the doctrine of last clear chance no longer applies to railroad comparative negligence cases.<sup>1</sup> *Loftin v. Nolin*, 86 So.2d 161 (Fla. 1956).

At common law, when a defendant is successful in establishing the defense of contributory negligence, it serves as a complete bar to recovery.<sup>2</sup> The hardship of the doctrine of contributory negligence upon the plaintiff has led to various efforts to avoid it. The most commonly accepted modification of the strict rule of contributory negligence is the doctrine of last clear chance,<sup>3</sup> which had its origin in 1842 in the English case of *Davies v. Mann*.<sup>4</sup> The rationale of the doctrine is that the last wrongdoer is necessarily the worst wrongdoer, or at least the decisive one, and should pay.<sup>5</sup> An entirely different approach used to avoid the complete bar of contributory negligence and last clear chance is the doctrine of comparative

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22. See *Agdeppa v. Clougie*, 71 Cal. App. 2d 463, 162 P.2d 944 (1945); *Wheat's Adm'r. v. Gray*, 309 Ky. 593, 218 S.W.2d 400 (1949); *Darbrinsky v. Pennsylvania Co.*, 248 Pa. 503, 94 Atl. 269 (1915); *Nichols v. Nashville Housing Authority*, 187 Tenn. 683, 216 S.W.2d 694 (1949). *Contra*, *Phillips v. Denver City Tramway Co.*, 53 Colo. 458, 128 Pac. 460 (1912); *Herrell v. St. Louis-San Francisco Ry.*, 324 Mo. 38, 23 S.W.2d 102 (1929); *Los Angeles & S. L. R.R. v. Umbaugh*, 61 Nev. 214, 123 P.2d 224 (1942); *Humphreys v. Ash*, 90 N.H. 223, 6 A.2d 436 (1939); *MacDonald v. O'Reilly*, 45 Ore. 589, 78 Pac. 753 (1904); *Home v. Atlantic Coast Line R.R.*, 177 S.C. 461, 181 S.E. 642 (1935).

1. By statute in Florida [FLA. STAT. § 768.06 (1953)] the doctrine of comparative negligence is applied in railroad cases.

... If the plaintiff and the agents of the [railroad] company are both at fault, the former may recover, but the amount of recovery shall be such a proportion of the entire damages sustained as the defendant's negligence bears to the combined negligence of the plaintiff and the defendant.

2. RESTATEMENT, TORTS § 467 (1934).

3. The most often stated explanation of the doctrine of last clear chance is that if the defendant has the last clear opportunity to avoid the harm, the plaintiff's negligence is not a proximate cause of the result. *Nehring v. Connecticut Co.*, 86 Conn. 109, 84 Atl. 301 (1912); *Rottman v. Beverly*, 183 La. 947, 955, 165 So. 153 (1936); *Fuller v. Illinois Central Ry.*, 100 Miss. 705, 716, 56 So. 783 (1911); *Bragg v. Central New England Ry.*, 228 N.Y. 54, 126 N.E. 253 (1920).

4. 10 M. & W. 546, 152 Eng. Rep. 588 (Ex. 1842).

5. PROSSER, TORTS at 292 (1955).

negligence. The latter doctrine is rejected by common law authorities,<sup>6</sup> except for the jurisprudence of admiralty<sup>7</sup> and as provided for by statute.<sup>8</sup>

The doctrine of last clear chance is seemingly unlimited in its application in Florida.<sup>9</sup> The problem arises when the last clear chance doctrine is applied to comparative negligence cases.<sup>10</sup> The court in the instant case had strong justification for overruling the *Poindexter v. Seaboard Airline Ry.*<sup>11</sup> case, where an automobile collided with defendant's train (stationary across the highway). Here, it was conceded that the plaintiff was negligent in failing to observe the dangers surrounding him as he approached the crossing, but the trial court felt the issue of last clear chance on the part of the railroad should be submitted to the jury. The plaintiff was awarded damages.

In the instant case, the court also overruled the *Seaboard Airline Ry. v. Martin*<sup>12</sup> case, where it was said:

In this kind of case under the statute the contributory negligence is not a complete bar to recovery. When it appears, the doctrine of comparative negligence is applied, and then the doctrine of last

6. *Kentucky & I. Bridge & R. Co. v. Sydnor*, 119 Ky. 18, 82 S.W. 989 (1904); *Belle Alliance Co. v. Texas & P.R. Co.*, 125 La. 777, 51 So. 846 (1910); *Gibbard v. Cursan*, 255 Mich. 311, 196 N.W. 398 (1923); *Bartson v. Craig*, 121 Ohio St. 371, 169 N.E. 291 (1929); *Waynick v. Walrond*, 155 Va. 400, 154 S.E. 522 (1930). While the doctrine formerly prevailed in Illinois, it is no longer recognized in any state and is expressly repudiated in most states.

7. *The Schooner Catherine*, 58 U.S. (17 How.) 170 (1854); *The Margaret*, 30 F.2d 903 (3rd Cir. 1929).

8. The Federal Employers' Liability Act, 35 STAT. 65 (1908), 45 U.S.C. §§ 51-59 (1952); FLA. STAT. §§ 768.06-769.03 (1953); GA. ANN. CODE § 2781 (1914); IOWA CODE § 8158 (1927); MINN. STAT. § 4935 (1927); VA. CODE ANN. § 3959 (1930); WIS. STAT. § 192.55 (2,3) 1927).

9. See *Consumer's Lumber and Veneer Co. v. Atlantic Coast Line Ry.*, 117 F.2d 329 (5th Cir. 1943) (collision of train and truck); *Yousko v. Vogt*, 63 So.2d 193 (Fla. 1953) (collision of scooter and automobile); *Davis v. Cuesta*, 146 Fla. 471, 1 So.2d 475 (1941) (collision of automobiles); *Lindsay v. Thomas*, 128 Fla. 293, 174 So. 418 (1937) (collision of automobile and pedestrian).

In Florida, last clear chance is an extension of the law of contributory negligence, not an exception to it. "It [last clear chance] 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." *Merchant's Transportation Co. v. Daniel*, 109 Fla. 496, 502, 149 So. 401, 403 (1933).

In several jurisdictions the last clear chance doctrine is not available to a defendant. It appears the reasoning is that since contributory negligence on the part of the plaintiff seeking recovery is essential to the application of the doctrine of last clear chance, the doctrine is not in any proper sense susceptible of being invoked by the defendant against the plaintiff because before that state can be reached, plaintiff's recovery is barred by his own contributory negligence. *Wolff v. Stenger*, 59 S.D. 231, 239 N.W. 181 (1931).

For an excellent survey see Steinhardt and Simon, *Florida's Last Clear Chance Doctrine*, 7 MIAMI L.Q. 457 (1953).

10. See *Seaboard Airline Ry. v. Martin*, 56 So.2d 509 (Fla. 1952); *Poindexter v. Seaboard Airline Ry.*, 56 So.2d 905 (Fla. 1951) (the decisions in the foregoing cases were overruled by the instant case).

11. *Supra* note 10. The comparative negligence statute was not in issue here although it would seem to control.

12. *Supra* note 10.

clear chance comes into being, if the evidence so warrants, as it does in this case.<sup>13</sup>

The trial court in the *Martin* case entered judgment for the plaintiff. The case concerned an automobile-train collision, where the automobile (proceeding parallel to the tracks) attempted a turn onto the tracks. Ostensibly, the court characterized the negligence of the train's engineer, in failing to utilize the opportunity to stop upon notice of the automobile, as the sole proximate cause of the injury. The holding seems well reasoned. The court in the instant case, however, relying on eminent text authorities<sup>14</sup> as a basis for overruling the *Martin* case, stated that last clear chance instructions in such instances are without reason or justification. The reasoning by which the court reaches this conclusion is not apparent from a reading of the case.

Viewed from a policy standpoint, the court is using the comparative negligence statute as a shield for the railroad. Interestingly enough, the same statute has been criticised as being too harsh to the railroad.<sup>15</sup> Perhaps the instant case is indicative of judicial modification of anti-railroad legislation. From the legal aspect, the doctrine of last clear chance in comparative negligence cases must be considered to determine whether or not the defendant's negligence is the sole proximate cause of the accident. If it is, there is no need to apply the comparative negligence statute, and even in situations where the negligence of both plaintiff and defendant concurred to produce the injury, the doctrine of last clear chance, used in a relative sense, is still needed to determine the *degree* of defendant's negligence, thus enabling an apportionment of damages according to the comparative negligence statute.<sup>16</sup>

SYLVAN N. HOLTZMAN

### REAL PROPERTY—BUILDING RESTRICTIONS— PROPERTY RIGHTS

In a suit by an incorporated town to enjoin the Board of Public Instruction from erecting or operating a public school, the question arose as to whether or not private building restrictions constitute "property" in the sense that compensation must be paid to their owners as part of eminent domain proceedings. *Held*, that such restrictions are not compensable.

13. *Id.* at 512.

14. James, *Last Clear Chance—A Transitional Doctrine*, 47 *YALE L.J.* 704 (1938); MacIntyre, *The Rationale of Last Clear Chance*, 53 *HARV. L. REV.* 1225 (1940); Pound, *Comparative Negligence*, 13 *NACCA L. J.* 195 (1954); Recent Statute, 52 *HARV. L. REV.* 1187 (1938). Using text authorities as the basis for a decision is considered by many to be unusual.

15. *Loftin v. Crowley*, 150 Fla. 836, 8 So.2d 909 (1942) (where the court refused to declare the statute unconstitutional merely because motor carriers were not made liable under similar circumstances).

16. In *Martin v. Sussman*, 82 So.2d 597 (Fla. 1955), the court, in citing the case under note, stated that the doctrine of last clear chance is no longer applicable in suits against a railroad company, without qualifying the doctrine and its relation to proximate cause.