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NOTES

THE LAST CLEAR CHANCE DOCTRINE

Negligence has long since been recognized as a ground of liability.¹ Contributory negligence has long since been recognized as a ground of defense.² It has been more recently held that even though there was negligence on the part of the defendant, and contributory negligence on the part of the plaintiff, nevertheless, the plaintiff may recover if the defendant had the last clear chance to avoid the injury.³ However, in each of the above cases neither negligence, nor contributory negligence, nor the last clear chance will be a ground of liability, or defense, unless it was proximate to the injury⁴

It seems that the doctrine of the last clear chance was first embodied in the common law in the case of *Davies v. Mann*.⁵ In that case the plaintiff fettered his donkey, and turned it on the public highway. The highway was about eight yards wide, and the donkey was on the off side grazing at the time of the accident. The defendant's servant was negligently driving his team to a wagon, at a smartish pace, down a slight descent, and hit the donkey causing its death. It was proved that the driver was some distance behind the horses. The judge charged the jury that though the plaintiff was negligent in leaving the donkey fettered on the highway, they should find for the plaintiff if the driver could, by the use of due care, have avoided the injury. The defendant moved for a new trial on the ground of misdirection, and insisted that the donkey would not have been injured, but for the negligence in leaving it fettered on the highway, and that this negligence should bar any recovery. Held, that though the plaintiff was negligent in leaving his donkey fettered on the highway, in a place of danger, this negligence would not excuse the defendant where he had the last clear chance to avoid the injury. The doctrine of this case seems to have first been adopted by the North Carolina Court in the case of *Gunter v. Wicker*.⁶ There the plaintiff was employed at the defendant's saw-mill, one of his duties being to oil the machinery. When the engine

¹ *Weaver v. Ward* (1616) Hobart 134.

² *Butterfield v. Forrester* (1809) 11 East 60.

³ *Davies v. Mann* (1842) 10 M. & W. 546.

⁴ *Farmer v. Railroad* (1883) 88 N. C. 564.

⁵ Note 3, *supra*.

⁶ *Gunter v. Wicker* (1881) 85 N. C. 310.

was stopped he entered the flywheel to oil it, and while there, the defendant turned on the steam causing injuries to the plaintiff. It was shown that if the plaintiff had put the engine on dead center, there would have been no injury. It was also shown that the plaintiff would have suffered no injury had the steam not been turned on until after he retired from his position. Held, that the doctrine of *Davies v. Mann* was applicable to this case. No matter how negligent the plaintiff may have been in getting into a position of danger, no harm would have come to him, but for the negligence of the defendant in turning on the steam without noticing to see if the plaintiff had retired from the flywheel. The cases are obviously correct. The defendant should not be allowed to take advantage of the plaintiff's negligence in order to do him an injury; nor should the plaintiff's negligence excuse the defendant in acting negligently when the use of due care on his part would avoid injury. The defendant is not being held liable for the plaintiff's negligence, but for his own.

This doctrine of last clear chance, originating in *Davies v. Mann* and adopted in North Carolina in the case of *Gunter v. Wicker*, has been applied by the North Carolina Court in a variety of cases, most of them involving injuries by railroads: (1) in cases where a person is lying on the railroad track in an apparently helpless condition; (2) in cases where a person is on the railroad track in apparent possession of his faculties, but is in such a situation that escape would be practically impossible; (3) in cases where a person is in apparent possession of his faculties, and not in a situation where escape would be difficult, but is apparently so absorbed that it should be apparent to the engineer that he will not escape; (4) in cases where a person is in apparent possession of his faculties, and is so absorbed in what he is doing that he will not escape, but this absorption is not apparent to the engineer.

(1) Cases where a person is on the railroad track in an apparently helpless condition. In the case of *Pickett v. Railroad*⁷ the plaintiff's intestate was lying on the defendant's railroad track apparently asleep, and was run over and killed. The facts show that the train was running about forty-five miles per hour; that the engineer could have seen the intestate from a distance of approximately five hundred yards; but there was no evidence that the engi-

⁷ *Pickett v. Railroad* (1895) 117 N. C. 616, 23 S. E. 264.

neer did see him from that distance. The defendant asked for a charge that it would not be liable unless the engineer failed to use due care after discovering the peril, where it was shown that the plaintiff's intestate deliberately went on the track and fell asleep. Held, that it was not error to refuse this charge. The rule of *Gunter v. Wicker* was approved. Though the intestate was negligent in going to sleep on the track, this does not excuse the negligence of the engineer in failing to keep a proper lookout, when the engineer by keeping a proper lookout could have avoided the injury.⁸

(2) Cases where a person is in apparent possession of his faculties, but is in such a situation that escape would be practically impossible. In the case of *McLamb v. Railroad*⁹ the plaintiff's intestate was on the defendant's railroad trestle which was about thirty feet high and four hundred feet long. The engineer gave a signal when about two hundred yards from the trestle, but didn't slacken speed. The plaintiff's intestate seemed to be in a very confused state of mind and was running across the track when hit and killed by the train. The jury found negligence on the part of the defendant, and contributory negligence on the part of the plaintiff; they also found that the defendant had the last clear chance to prevent the accident despite the defendant's claim that he thought the intestate could get to a place of safety on the siding. Defendant appealed. Held, that the engineer should have given the intestate the benefit of the doubt, and his failure to avail himself of the last clear chance, such failure causing the intestate's death, entitles the plaintiff to recover.¹⁰

(3) Cases where a person is in apparent possession of his faculties, but is apparently so absorbed that it should be apparent to the engineer that he will not escape. In the case of *Lassiter v. Railroad*¹¹ a conductor of a freight train who was standing between the main track and a side track directing men who were on a box car, stepped back on the side track in front of a shifting engine which was coming up at the rate of about four miles per hour, and was killed. The engineer of the shifting engine was unable to see the

⁸ Accord, *Brown v. Railroad* (1916) 172 N. C. 604, 90 S. E. 783. The plaintiff's intestate was killed by defendant's train while lying on the track apparently drunk. The defendant could have discovered the peril, by the use of due care, but negligently failed to do so. Held, that as the defendant had the last clear chance and could have avoided the killing despite the plaintiff's intestate's negligence, it is liable in damages to the plaintiff.

⁹ *McLamb v. Railroad* (1898) 122 N. C. 862, 29 S. E. 894.

¹⁰ Accord, *Hopkins v. Railroad* (1915) 170 N. C. 486, 87 S. E. 320.

¹¹ *Lassiter v. Railroad* (1903) 133 N. C. 244, 45 S. E. 570.

intestate, as the engine was pushing a box car in front of it, cutting off the view; but if there had been someone to keep a lookout, the injury could have been avoided. Held, that the defendant was liable in damages, for if it had been keeping a lookout, the absorption of the intestate in his business would have been discovered, and his death prevented. The fact that the defendant didn't know of its last clear chance is not a defense.¹²

(4) Cases where a person is in apparent possession of his faculties, and is absorbed in what he is doing, and he will not escape; but this absorption is not apparent. In the case of *Beach v. Railroad*¹³ the plaintiff's intestate was walking along on the defendant's track looking at a stationary engine which was making a noise so he was unable to hear the approaching train, but it appeared to the engineer that he was alert and would step off the track before the train would hit him. After it was discovered that the intestate didn't know of the peril, the engineer tried to avert the accident, but was too late to stop, or give the intestate warning. Held, that there should be no liability as it was not possible for the engineer to have discovered the intestate's true situation, and otherwise he would expect the intestate to step off the track and was not obliged to slacken the speed of the train.¹⁴

Thus, where a person is on the track in an apparently helpless condition, or where he is in apparent possession of his faculties but is in such a situation that escape is practically impossible, or where a person is in apparent possession of his faculties but is apparently so absorbed that it should be apparent that he will not escape, the defendant is held liable despite the negligence of the injured person if it is shown that it had the last clear chance to avoid the injury and negligently failed to avail itself of such chance.

Miscellaneous Cases—In the case of *Wheeler v. Gibbon*,¹⁵ the plaintiff, starting to cross a street during a storm, looked up the street from whence the storm came, and saw no one coming, pulled

¹² Accord, *Moore v. Railroad* (1923) 185 N. C. 189, 119 S. E. 357. The plaintiff's intestate, a brakeman, who was standing on the end of the cross ties checking off the cars that passed, being absorbed in his business didn't see the train and was hit and killed by the defendant's train. The engineer could have seen him, as he had a clear view, in time to stop but he didn't slacken the speed of the train. Held liable.

¹³ *Beach v. Railroad* (1908) 148 N. C. 153, 61 S. E. 664.

¹⁴ Accord, *McAdoo v. Railroad* (1890) 105 N. C. 142, 11 S. E. 316; *Davis v. Railroad* (1923) 187 N. C. 147, 120 S. E. 827.

¹⁵ *Wheeler v. Gibbon* (1900) 126 N. C. 811, 36 S. E. 277.

the umbrella over his head and went on the street, negligently failing to look any more. The defendant, coming from the same direction as the rain, in a closed buggy, negligently ran against the plaintiff causing injuries to him. It was found by the jury that the defendant had the last clear chance to avoid the injury, and failed to avail himself of it. Held, that it was proper to put the question of last clear chance to the jury, and that its finding would be sustained.

In the case of *Ingle v. Asheville Power Co.*,¹⁶ the plaintiff's intestate started across the street car track diagonally with a peck of peaches, interested in selling them to a buyer across the street, and paying no attention to the approaching street car, which hit and killed him. The motorman was looking back over his shoulder, and didn't see the intestate. It was shown that if he had been using due care in keeping a lookout, he could have discovered the intestate and prevented his death. Held, that the defendant could have prevented the death notwithstanding the intestate's negligence, and as the motorman did not avail himself of the last clear chance, it is liable.

In *Smith v. St. Railway*,¹⁷ the plaintiff's intestate was sitting on the track, bent over apparently asleep. The motorman of the street car could have easily discovered the intestate's condition in time to avoid running over him, but he testified that he didn't see the intestate until it was too late to stop before hitting him. Held, that where it is shown that the plaintiff's intestate was negligent, but that the defendant had the last clear chance to avoid the injury and failed to do so, the plaintiff may recover.

In *Farmer v. Railroad*,¹⁸ the plaintiff's mule was turned out of the lot, which was about fifty steps from the track, to go to the well across the track to get water. The engineer saw the mule in plenty of time to stop the train, but thinking the mule would get out of danger did not slacken the speed of the train so as to have it under control, and hit the mule causing its death. Held, that the engineer should have been aware that the mule would likely not get off the track, and it was negligence in his not having the train under control so as to be able to avoid the peril, and the injuries caused by such conduct entitles the plaintiff to recover.

¹⁶ *Ingle v. Asheville Power Co.* (1916) 172 N. C. 751, 90 S. E. 953.

¹⁷ *Smith v. St. Railway* (1913) 162 N. C. 29, 77 S. E. 966.

¹⁸ *Farmer v. Railroad* (1883) 88 N. C. 564.

The North Carolina Court holds a defendant liable not only where he has the last clear chance and knows of it,¹⁹ but where he has the last clear chance and doesn't know of it, but would have known of it, if he had not been negligent. In the case of *Goff v. Railroad*,²⁰ the plaintiff's intestate drove his automobile on the defendant's track, at a crossing, without looking to see if the train was coming. The engineer wasn't keeping a lookout. The train struck the automobile and carried it down the track two or three hundred yards where the automobile hit a switch-post and hurled the intestate to his death. It was shown that the train could have been stopped, after it hit the automobile, before it got to the switch-post; but, strange as it may seem, the engineer didn't know he was carrying the automobile until it had hit the switch-post, and didn't slacken speed. Held that though the engineer didn't know of the accident until after the intestate was killed, he, in fact, had the last clear chance, and his negligence in failing to use it was the cause of the intestate's death.²¹

It seems that one of the most difficult problems in the application of the last clear chance doctrine which the trial court has is its proper presentation to the jury. The doctrine of the last clear chance is primarily a secondary issue and should never be raised until it has been shown that the plaintiff has suffered injuries by the negligence of the defendant, and the defendant has shown that the plaintiff has been guilty of contributory negligence; then if it appears that the defendant had the last clear chance to avoid the injury, it should be given to the jury to determine.²² And in presenting the question to the jury the instruction as to the burden of proof is frequently given erroneously. In an action for damages, by a plaintiff, for injuries received because of the negligence of the defendant, the burden of proof is on the plaintiff to show that his injury was caused by the negligence of the defendant. After the plaintiff has shown that the negligence of the defendant was the cause of his injury, if the defendant wishes to plead contributory negligence as a defense, the burden is on him to show that the plaintiff was guilty of contributory negligence.²³ After the defendant has shown the contributory negli-

¹⁹ *Roberts v. Railroad* (1883) 88 N. C. 561; Note 9, *supra*.

²⁰ *Goff v. Railroad* (1920) 179 N. C. 216, 102 S. E. 320.

²¹ Note 16, *supra*.

²² *Curtiss v. Railroad* (1902) 130 N. C. 437. 41 S. E. 929.

²³ C. S. 523.

gence of the plaintiff, and it is a case to which the last clear chance doctrine is applicable, and the plaintiff wishes to take advantage of it, the burden is on him to show that the defendant had the last clear chance to avoid the injury to him, notwithstanding his own contributory negligence.²⁴

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EFFECT OF PARTIAL INVALIDITY OF STATUTE

The decision of the North Carolina Supreme Court in the recent case of *State v. Barkley*¹ is interesting not only to those who wish to hunt or fish, because it removes all discriminations between citizens of the State in favor of local hunters as to license fees, but the case also merits comment as to the ingenious method by which the court arrived at its decision upholding part of the Act in question.

The provisions of the statute, section 7, subsections (a) and (b), ch. 573—Public Local Laws 1925, under which the defendant was indicted, pertinent to this discussion, are as follows:

“(a) All persons who shall hunt with a gun, *and who shall have been a resident of Cabarrus county for three months*, and who shall be sixteen years of age or over, shall, before entering any field for the purposes of hunting any wild bird or animal, be required to procure a hunter’s license from the game warden or other officer or person authorized to issue said license, and, for said license the person procuring same shall pay to the person issuing such license the *sum of one dollar*, and the license so issued shall be good for one year from the first day of May of the year in which it is issued.”

“(b) All persons *living in another county*, and who shall be sixteen years of age or over, shall pay the *sum of three dollars* for a hunter’s license in Cabarrus county, which shall be good for one year from the first day of May of the year in which it is issued.”

The defendant, a resident of Mecklenburg county, was prosecuted under the Act for hunting in Cabarrus county without having paid the three dollar fee or having secured the license.

From a judgment entered upon a special verdict finding defendant not guilty the State appealed, under C. S. 4649. The Supreme Court held that subsection (b) was an arbitrary discrimination against persons living in another county and held it to be unconstitutional and

²⁴ *Hudson v. Railroad* (1926) 190 N. C. 116, 129 S. E. 146.

¹ *State v. Barkley* (1926) 192 N. C. 184, 134 S. E. 454.