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## TORTS — LAST CLEAR CHANCE DOCTRINE AS HUMANITARIAN ROLE

The plaintiff, a pedestrian, was struck from the rear by defendant's automobile while walking on the right side of the hard surface of the road with her back to oncoming traffic in violation of a statute.<sup>1</sup> The accident occurred just after dawn on a winter morning while visibility was very poor. Defendant had wiped some frost from his windshield but the areas cleaned were not sufficiently large or clear to afford good vision. The plaintiff did not hear or see the defendant approach and when the defendant finally saw the plaintiff it was too late to avoid the accident. Plaintiff admitted her negligence in walking on the wrong side of the road but insisted that the defendant in the exercise of ordinary care, should have seen her in time to avoid striking her and that therefore the doctrine of last clear chance was applicable. The trial court awarded damages to the plaintiff. On appeal, *held*, reversed. The continuing negligence of the plaintiff in being in a position of unconscious peril was a proximate, not a remote, cause of the accident. *Anderson v. Payne*, 189 Va. 712, 54 S. E. 2d 82 (1949). *Hudgins, C. J. and Miller, Sprattley, JJ. concurring.*

While many of the cases in Virginia on the last clear chance doctrine appear to be irreconcilable,<sup>2</sup> the general rule in this state seems to be that the doctrine is to be applied when the plaintiff is in peril as a result of his antecedent negligence and the defendant discovers, or, with proper vigilance, *might have discovered* the plaintiff's peril in time to avoid it.<sup>3</sup> As Chief Justice Holt said in *Maryland v. Coard*,<sup>4</sup> "he is charged with what he saw and what he should have seen." The Supreme Court of Appeals has recognized several limitations to this interpretation of last clear chance in that the doctrine will not be allowed to wipe out or supercede the doctrine of contributory negligence.<sup>5</sup> Where the last clear chance is mutual, or if the plaintiff has an equal or better chance than the defendant to avoid the accident, the plaintiff cannot recover.<sup>6</sup> The plaintiff may not demand greater care for his own protection than he himself exercises. All but a few jurisdictions hold that there can be no recovery.<sup>7</sup>

It is essential to note at this point that the entire court agreed that there was no liability on the part of the defendant. It is the method of reaching that result which splits the court. The majority of the court continues to apply the "humanitarian rule," making the defendant liable for all he saw or should have seen. However it conditions its application of the rule by seizing on the fact that

at no time was the plaintiff helpless to avoid the harm resulting from her antecedent negligence. She had an equal chance to avoid the accident so her continuing negligence must be held to have been a proximate cause of the injury. At no time, however, does the court relieve the defendant of the responsibility for what he saw or should have seen.

It is on this point that the three judge concurring opinion differs from the majority, maintaining that the plaintiff should be entitled to recover only by proving by the preponderance of the evidence<sup>8</sup> that the defendant *knew* of her presence and realized or should have realized her inattentiveness and peril and then failed to use reasonable care to avoid the collision.<sup>9</sup> It is submitted that this view held by the concurring judges is the more sound, will lead to less confusion, and is in line with the weight of authority in this country.

The doctrine of last clear chance is used to modify the harshness of the law of contributory negligence but it is not to be used to supercede such defense.<sup>10</sup> Consequently in most jurisdictions, last clear chance is applied and limited to two separate classes of plaintiffs. Recovery is allowed where plaintiff is in a helpless position due to his antecedent negligence and defendant saw or should have seen him in time to avoid the accident by the use of reasonable care. Where the plaintiff through his own negligence or inattentiveness is in a position of peril but at all times can remove himself from such peril, he can recover only by proving that defendant, *after seeing him*, realized, or should have realized his peril and was then negligent in attempting to avoid the accident.<sup>11</sup> Mr. Justice Miller in a recent concurring opinion<sup>12</sup> quoted favorably from *American Jurisprudence* as follows: "The great weight of judicial authority denies the application of the last clear chance doctrine in the situation where the defendant, while under a duty to discover the danger to the injured person, did not actually discover it and the injured person was physically able to escape from the peril at any time up to the moment of impact."<sup>3</sup>

This line of demarcation was recognized in Virginia as long ago as 1890<sup>14</sup> but the court has failed to follow it and thus has brought on much confusion. By insisting that the defendant be responsible for all that he sees or should see but deciding cases on the basis of continuing mutuality of negligence, the court in effect adopts a rule of comparative negligence. Each case is necessarily decided by determining who contributed most to the accident in spite of the mandate given some years ago that the doctrine of last clear chance is not to become in fact a rule of comparative negli-

gence<sup>15</sup> — a rule almost entirely abandoned at common law because of its difficulty of application by sympathetic jurors.<sup>16</sup>

In the instant case it is true that had the defendant properly defrosted his windshield he would have seen the plaintiff in time to have avoided the accident but to do this is to draw a distinction between negligently failing to see and negligently making it impossible to see. Had the defendant seen plaintiff in ample time and been unable to stop due to negligently defective brakes, it is submitted that defendant would have been held not liable under either view of the Virginia court.<sup>17</sup> Negligent inability to have the last clear chance is not the same as having it.

By a strict application of the general rule of the majority in the instant case, one might infer that a pedestrian does not owe the same duty to look out for a car as the driver of the car owes to look out for the pedestrian. When the pedestrian is in his proper place this is good law, but when that pedestrian deliberately places himself in a position of peril from which he may remove himself at any time, then he is negligent<sup>18</sup> and owes the same duty to the driver as is owed to him. It is submitted that the "humanitarian rule" of the majority of the court requires the defendant to exercise a greater degree of care for the plaintiff than the plaintiff is required to exercise for himself.

In the closing paragraph the court submits a hypothetical problem whereby healthy but negligent plaintiff *A* is carrying helpless plaintiff *B* and both are struck by a motorist who negligently did not see them. The court infers that to allow helpless plaintiff *B* to recover because he ought to have been seen and not to allow *A* to recover because he is healthy and could have removed himself from peril, is at least an unjust, if not a ridiculous result. It is submitted that the result would not be unjust in that it is in keeping with our concept of law that a greater duty and protection is owed to some classes than others. The beating of an invalid with the fists may well constitute an intent to kill and amount to a felony,<sup>19</sup> while the same act done to a healthy man of equal size is a mere misdemeanor.

It is further submitted that the continued application of this broad last clear chance doctrine as announced by the majority of the court, coupled with its varying limiting facts, leads only to hopeless confusion, while the Restatement view as expressed by the concurring opinion establishes a much needed clarity on this entire subject.

ROBERT E. COOK

## FOOTNOTES

1. VA. CODE §46-267 (1950).
2. See *Harris Motor Lines v. Green*, 184 Va. 984, 992, 27 S. E. 2d 4 (1946). Compare *Herbert v. Stephenson*, 184 Va. 457, 35 S. E. 2d 753 (1945), with *South Hill Motor Co. v. Gordon*, 172 Va. 193, 200 S. E. 637 (1939).
3. E. g., *Barnes v. Ashworth*, 154 Va. 218, 153 S. E. 711 (1930); *Frazier v. Stout*, 165 Va. 68, 181 S. E. 377 (1935); *Crawford v. Hite*, 176 Va. 69, 10 S. E. 2d 561 (1940); *Harris Motor Lines v. Green*, 184 Va. 984, 37 S. E. 2d 4 (1946); *Jenkins v. Johnson*, 186 Va. 191, 12 S. E. 2d 319 (1947).
4. 175 Va. 571, 581, 9 S. E. 2d 454 (1940).
5. *Frazier v. Stout*, 165 Va. 68, 181 S. E. 377 (1935).
6. *Green v. Ruffin*, 141 Va. 628, 125 S. E. 742 (1924); *Dick v. Va. Electric Co.*, 158 Va. 77, 163 S. E. 75 (1932); *Harris Motor Lines v. Green*, 184 Va. 984, 37 S. E. 2d 4 (1946).
7. PROSSER, TORTS §54 (1941).
8. *Washington, etc., Ry. v. Thompson*, 136 Va. 597, 118 S. E. 76 (1923).
9. *Hooker v. Hancock*, 188 Va. 345, 49 S. E. 2d 711 (1948).
10. *Frazier v. Stout*, 165 Va. 68, 181 S. E. 337 (1935).
11. RESTATEMENT, TORTS §§479, 480; PROSSER, TORTS §54 (1941).
12. See *C. & O. Ry. Co. v. Marshall*, 189 Va. 729, 741, 54 S. E. 2d 90 (1949).
13. 38 Am. Jur., "Negligence," §224, p. 909.
14. *Richmond, etc. Ry. v. Yeamans*, 86 Va. 860, 869, 12 S. E. 946 (1890).
15. *Va. Electric Co. v. Vellines*, 162 Va. 671, 175 S. E. 35 (1934).
16. PROSSER, TORTS §53, p. 404 (1941).
17. RESTATEMENT, TORTS §479, III. 3.
18. *Crouse v. Pugh*, 188 Va. 156, 49 S. E. 2d 421 (1948).
19. Cf. *Dawkins v. Commonwealth*, 186 Va. 55, 41 S. E. 2d 500 (1947).