ARIZONA'S LAST CLEAR CHANCE DOCTRINE

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Introduction

"There are few, if any, legal doctrines that are more difficult of logical application to varied and ever varying situations than that known as the doctrine of last clear chance,[1] . . . the rules laid down do not apply to the ever varying situations and must be explained and modified again. This process has not yet been completed."[2] This statement from a recent Arizona case, *Odekirk v. Austin*,[3] is indicative of the struggle many courts, including Arizona's, have had with last clear chance.[4] In this case an inattentive plaintiff was running down a busy street with his back to the traffic. His negligence had not terminated nor had it culminated in a situation from which he could not extricate himself. The defendant driving down the street

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[1] The last clear chance doctrine had its origin with the case of Davies v. Mann, 10 M. & W. 546, 152 Eng. Rep. 588 (1842), in which case the plaintiff negligently left his ass fettered in the highway and the defendant negligently ran into it. It has been adopted in practically every jurisdiction, 65 C.J.S. *Negligence* § 136a (1950).

"The groans, ineffably and mournfully sad, of Davies' dying donkey, have resounded around the earth. The last lingering gaze from the soft, mild eyes of this docile animal, like the last parting sunbeams of the softest day in spring, has appealed to and touched the hearts of men. There has girdled the globe a band of sympathy for Davies' immortal 'critter.' Its ghost, like Banquo's ghost, will not down at the behests of the people who are charged with inflicting injuries, nor can its groanings be silenced by the rantings and excoriations of carping critics. The law as enunciated in that case has come to stay." Fuller v. Illinois Cent. R.R., 56 So. 783, 786 (Miss. 1911).

[2] The Arizona cases in chronological order are: Santa Fe, Prescott and Phoenix Ry. v. Ford, 10 Ariz. 201, 85 Pac. 1072 (1906); Garlington v. McLaughlin, 56 Ariz. 37, 104 P.2d 169 (1940); Barry v. Southern Pac. Co., 64 Ariz. 116, 166 P.2d 825 (1946); Casey v. Marshall, 64 Ariz. 232, 168 P.2d 240 (1946); Casey v. Marshall, 64 Ariz. 260, 169, P.2d 84 (1946); Rollman v. Morgan, 73 Ariz. 305, 240 P.2d 1196 (1952); Trauscht v. Lamb, 77 Ariz. 276, 270 P.2d 1071 (1954); Bryan v. Southern Pac. Co., 79 Ariz. 253, 286 P.2d 761 (1955); Anglin v. Nichols, 80 Ariz. 346, 297 P.2d 932 (1956); Hirsh v. Manley, 81 Ariz. 94, 300 P.2d 588 (1956); Pacific Greyhound Lines v. Uptain, 81 Ariz. 359, 306 P.2d 281 (1956); Gray v. Woods, 84 Ariz. 87, 324 P.2d 220 (1958); Layne v. Hartung, 87 Ariz. 88, 348 P.2d 291 (1960); Odekirk v. Austin, 90 Ariz. 97, 366 P.2d 80 (1961); Terzis v. Miles, 90 Ariz. 120, 366 P.2d 683 (1961); Coyner Crop Dusters v. Marsh, 367 P.2d 208 (Ariz. 1961).

[3] 90 Ariz. 97, 366 P.2d 80 (1961).

[4] This comment will deal only with the Arizona problem; no attempt will be made to examine the doctrine in other jurisdictions.

reasonably could have seen but did not actually see the plaintiff in time to avoid the collision which injured him. The court held that the last clear chance doctrine was not applicable in this situation.

The main reasons for the difficulty with last clear chance are: first, the theory upon which to base or justify the doctrine; and second, the many fact situations to which the doctrine may be applied.

Theory

In the *Odekirk* case the court states the theory to be: "for the purpose of determining the legal proximate cause of the injury."[5] This is the theory most often advanced to support the doctrine,[6] but it does not explain adequately all situations to which it is applied. For example, change one fact in the *Odekirk* case: give the defendant actual knowledge of the plaintiff's perilous position in time to avoid the accident and failure to do so. The defendant would then be liable,[7] even though the negligence of both plaintiff and defendant continues up to the time of the accident. The rationale of the court would be that the "plaintiff's negligence is remote while the defendant's conduct is the proximate cause of the accident."[8] Is the negligence of the plaintiff any more remote because the defendant actually saw him? This writer thinks not. Change the situation to result not in the injury to the plaintiff, but in the injury of an innocent bystander. Will the last clear chance doctrine be used to determine the legal proximate cause between the two concurrent tort feasors? The courts hold that it will not.[9]

In 1906 the first Arizona case on last clear chance[10] held the defendant must have actual knowledge of the plaintiff's position of danger before the doctrine would be applicable, and reasoned that if the defendant then did not exercise reasonable care the wrong verges on the willful and malicious. It would seem that the court considered that a wrong being on the verge of willful and malicious was an exception to the rule of contributory negligence. This is similar to the situation where the defendant has been reckless and wanton in

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[5] 90 Ariz. 97, 366 P.2d 80, 81 (1961).

[6] PROSSER, TORTS § 52 (2d ed. 1955), he adds that, "The real reason would seem to be a dislike for the defense of contributory negligance. . . ."

[7] Odekirk v. Austin, 90 Ariz. 97, 366 P.2d 80, 83 (1961); RESTATEMENT, TORTS § 480 (1934).

[8] Odekirk v. Austin, *supra* note 7, at 81.

[9] Kimbriel Produce Co. v. Mayo, 180 S.W.2d 504 (Texas Civ. App. 1944); Nyberg v. Wells, 14 S.W.2d 529 (Mo. 1929); Bethancourt v. Bayhi, 141 So. 111 (La. 1932).

[10] Santa Fe, Prescott and Phoenix Ry. v. Ford, 10 Ariz. 201, 85 Pac. 1072 (1906).

conduct and cannot escape liability on the basis of contributory negligence.[11]

In *Rollman v. Morgan*[12] the defendant was denied an instruction on the doctrine because last clear chance "is the plaintiff's defense to contributory negligence." If last clear chance is used to determine proximate cause the defendant could logically invoke the doctrine.[13]

If the doctrine can only be used as a defense to contributory negligence, it appears to be a method to determine *legal liability* when both parties' negligence contributed to the injury, rather than a method to determine whose negligence caused the injury.

In later cases the court talked in terms of causation, saying that if "the negligent acts of both parties concur as proximate cause. . . . Then clearly defendant cannot be guilty of having had the last clear opportunity,"[14] and if "All the elements are present and the plaintiff's negligence becomes remote in causation then the doctrine applies."[15]

Application to Facts

Broadly speaking, the last clear chance doctrine will apply where there is an injured plaintiff who has been guilty of contributory negligence which would preclude his recovery except that the defendant by the exercise of reasonable care could have avoided the accident with the means at hand.[16]

A limited application of the doctrine requires the plaintiff to be physically unable to avoid the injury[17] and the defendant to be actually aware of the situation.[18] A court giving a broad interpretation will apply the doctrine where both the plaintiff and the defendant are negligently inattentive.[19] Somewhere within these two extremes most courts establish a limit beyond which the doctrine will not apply. The following statements give some indication of the variables which cause difficulty in establishing the limit.[20]

It may be impossible for the plaintiff to escape the danger or it may be possible physically for him to escape, but he will not escape because he is inattentive and unaware of his danger. The plaintiff's

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[11] One effect of wanton negligence is to bar the defense of contributory negligence. Bryan v. Southern Pac. Co., 79 Ariz. 253, 286 P.2d 761 (1955); Butane Corp. v. Kirby, 66 Ariz. 272, 187 P.2d 325 (1947); Barry v. Southern Pac. Co., 64 Ariz. 116, 166 P.2d 825 (1946).

[12] 73 Ariz. 305, 240 P.2d 1196 (1952), Annot., 32 A.L.R.2d 540 (1953).

[13] 32 A.L.R.2d 540, 543 (1953).

[14] Hirsh v. Manley, 81 Ariz. 94, 300 P.2d 588 (1956).

[15] Trauscht v. Lamb, 77 Ariz. 276, 270 P.2d 1071 (1954).

[16] 38 AM. JUR. *Negligence* §§ 215-217 (1941); 65 C.J.S. *Negligence* § 136a (1950).

[17] 38 AM. JUR. *Negligence* § 221 (1941).

[18] Santa Fe, Prescott and Phoenix Ry. v. Ford, 10 Ariz. 201, 85 Pac. 1072 (1906); 38 AM. JUR. *Negligence* § 220 (1941).

[19] McCall v. Thompson, 348 Mo. 795, 155 S.W.2d 161 (1941); Barrie v. St. Louis Transit Co., 102 Mo. App. 87, 76 S.W. 706 (1903); PROSSER, TORTS, *supra* note 6.

[20] PROSSER, TORTS, *supra* note 6.

negligence may be continuing up to the injury or may have terminated in a situation from which he cannot escape.

To have the last clear chance the defendant must have knowledge and appreciation of the danger.[21] This knowledge may be actual or constructive. Constructive knowledge may be based on a duty to discover or on the standard of a reasonable man. Although the defendant may have knowledge of the dangerous situation, he may not know that the plaintiff cannot or will not take reasonable steps to avoid the accident.

The defendant after knowing of the danger may not have time to avoid the accident, or because of some prior negligence may not have the means at hand to avoid the injury. He may make an error in judgment or react slowly to the situation and thereby not avoid the injury.

Most courts will recognize the doctrine where the defendant actually discovers the plaintiff's inability or inattentiveness in time to avoid the accident with the means at hand. A strong minority have recognized the doctrine where the plaintiff is helpless, and the defendant with proper vigilance might have discovered his helplessness in time to avoid the harm. Most courts do not recognize the doctrine where both parties are negligently inattentive.[22]

Arizona's last clear chance has an interesting and confusing history dating back to territorial days. In 1906, the *Santa Fe, Prescott and Phoenix Ry. Co. v. Ford*[23] case said that the defendant must have actual knowledge of the plaintiff's position of danger before the doctrine is applicable. In the next case, *Garlington v. McLaughlin*,[24] thirty-four years later, the trial court gave an instruction that if the defendant "by the exercise of ordinary care might have seen the said plaintiff . . . in a position of imminent peril . . . ," and "would have seen that the plaintiff was oblivious[25] of his peril" in time to avert the accident, the doctrine would apply. This would seem to be a swing from a limited to broad application of the doctrine. In 1946 *Barry v. Southern Pac. Co.*[26] held the defendant would not be liable unless he had actual knowledge or had a duty to know of the dangerous situation. Thus the court limited the application to the situ-

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[21] 65 C.J.S. *Negligence* § 137d(1).
[22] PROSSER, TORTS, *supra* note 6; 92 A.L.R. 47, 149 (1934).
[23] 10 Ariz. 201, 85 Pac. 1072 (1906).
[24] 56 Ariz. 37, 104 P.2d 169 (1940).
[25] One who is oblivious is not helpless, but inattentive. Odekirk v. Austin, 90 Ariz. 97, 366 P.2d 80, 83 (1961).
[26] 64 Ariz. 116, 166 P.2d 825 (1946).

ation of *Restatement of Torts* § 479 which says:

> A plaintiff who has negligently subjected himself to a risk of harm from the defendant's subsequent negligence may recover for harm caused thereby if, immediately preceding the harm,
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> (a) the plaintiff is unable to avoid it by the exercise of reasonable vigilance and care, and,
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> (b) the defendant
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> (i) knows of the plaintiff's situation and realizes the helpless peril involved therein; or
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> (ii) knows of the plaintiff's situation and has reason to realize the peril involved therein; or
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> (iii) would have discovered the plaintiff's and thus had reason to realize the plaintiff's helpless peril had he exercised the vigilance which it was his duty to the plaintiff to exercise, and
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> (c) thereafter is negligent in failing to utilize with reasonable care and competence his then existing ability to avoid harming the plaintiff.

The same year as the *Barry* case the two decisions of *Casey v. Marshall*[27] were handed down. The court again quoted *Restatement of Torts* § 479 saying that it was a clear statement of the law.[28] But the court added that *Garlington* more nearly covers the last clear chance and discloses that Arizona recognizes the humanitarian last clear chance doctrine. The *Garlington* case and the humanitarian doctrine as defined in Missouri allow an inattentive plaintiff to recover from an inattentive defendant.[29] *Restatement of Torts* § 479 requires the plaintiff to be helpless before there can be any recovery. *Trauscht v. Lamb*[30] may give some reason for this seeming contradiction. It says that a plaintiff may be helpless in that he is oblivious to peril or unable to extricate himself. This case also cites § 479, but by allowing the oblivious or inattentive plaintiff to recover from the defendant who should have seen the plaintiff's peril, the scope of § 479 is exceeded. It rewards the plaintiff for his oblivion and punishes the defendant for his inattention.

The later cases[31] continued to cite the *Restatement of Torts* § 479, and the explanations were within the confines of this section. It is not called the humanitarian doctrine again. *Layne v. Hartung*[32]

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[27] 64 Ariz. 232, 168 P.2d 240 (1946); 64 Ariz. 260, 169 P.2d 84 (1946).

[28] The court also cited RESTATEMENT, TORTS § 480 (1934), but said it is not applicable in this situation.

[29] McCall v. Thompson, 348 Mo. 795, 155 S.W.2d 161 (1941); Barrie v. St. Louis Transit Co., 102 Mo. App. 87, 76 S.W. 706 (1903); PROSSER, TORTS § 52 (2d ed. 1955).

[30] 77 Ariz. 276, 270 P.2d 1071 (1954).

[31] Gray v. Woods, 84 Ariz. 87, 324 P.2d 220 (1958); Hirsh v. Manley, 81 Ariz. 94, 300 P.2d 588 (1956).

[32] 87 Ariz. 88, 348 P.2d 291 (1960).

seemed to retreat further, requiring the plaintiff to be in an inextricable position and the defendant to have actual knowledge of the danger. However this case, insofar as inconsistent with the *Odekirk* case was overruled the following year by *Odekirk.*

The *Odekirk* case held that the inattentive plaintiff could not recover from the inattentive defendant. Although the court was not required to do so, it did set out in general terms the situations where last clear chance would be applicable. It said there are two situations where the doctrine is applicable under the *Restatement of Torts,*[33] and that Arizona will follow the *Restatement.* The court then set out the two situations in its own language.[34]

> 1. (a) The plaintiff has negligently subjected himself to a danger and such negligence has terminated or culminated in a situation of peril from which he could not, by the exercise of reasonable care, extricate himself; (b) the defendant saw or ought to have seen the peril of the plaintiff, and (c) the defendant thereafter has a last clear chance to avoid injuring the plaintiff and fails to do so. 2. (a) The plaintiff has negligently subjected himself to a danger which he could have avoided by the exercise of reasonable vigilance; (b) the defendant actually saw or knew of the plaintiff's situation and realized or ought to have realized that the plaintiff was inattentive, and (c) the defendant thereafter had a last clear chance to avoid injuring the plaintiff by the exercise of reasonable care and fails to do so.

Conclusion

The *Odekirk* case is a big step in the process of defining the bounds of last clear chance. Stated simply and concisely, in Arizona last clear chance seems to be applicable in situations where the defendant is actually aware of the plaintiff's peril and should discover that the plaintiff cannot or will not extricate himself from the peril. If the plaintiff is unable to extricate himself by the use of reasonable care and the defendant by reasonable care could have discovered the plaintiff[35] he will be held to objective knowledge of the

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[33] RESTATEMENT, TORTS §§ 479-480 (1934). Section 479 is quoted in the text, § 480 is as follows: "A plaintiff who, by the exercise of reasonable vigilance could have observed the danger created by the defendant's negligence in time to have avoided harm therefrom, may recover if, but only if, the defendant (a) knew of the plaintiff's situation, and (b) realized or had reason to realize that the plaintiff was inattentive and therefore unlikely to discover his peril in time to avoid the harm, and (c) thereafter is negligent in failing to utilize with reasonable care and competence his then existing ability to avoid harming the plaintiff."

[34] 90 Ariz. 97, 366 P.2d 80, 83 (1961).

[35] RESTATEMENT, TORTS § 479 (1934), comment *d*: "This subclause (subsection iii) has no application unless there is a duty on the part of the defendant to be on the alert to observe the presence of the plaintiff."

plaintiff's peril. The defendant in either situation must have time to avoid the injury with the means at hand.[36]

This will not put a burden on the defendant. He will be held responsible where he has actual knowledge of danger and then does not exercise reasonable care to discover plaintiff's inability or inattention. Where he has a duty[37] toward the plaintiff he has a greater responsibility.

The plaintiff is relieved of the harsh results of the contributory negligence rule but cannot require that the defendant exercise more care toward the plaintiff than he exercises toward himself.

The theory by which the application is justified breaks down in the situation where the plaintiff is merely inattentive[38] because in that situation his negligence actively continues up to the time of the injury. The fact that the defendant actually knows the plaintiff is in danger and should realize that he will not avoid the injury does not make the negligence of the plaintiff any more remote, or that of the defendant any more proximate. Both parties' negligence directly and proximately causes the injury. However the one actually knowing of the danger should be legally responsible.

To avoid the tenuous reasoning involving proximate cause,[39] it could be stated that last clear chance is an exception to the rule of contributory negligence. It is a method to determine the legal liability rather than legal proximate cause.[40] *Odekirk* hints at this when it says that the rules of contributory negligence should apply where both the defendant and the plaintiff are inattentive, "rather than the *exceptional* doctrine of last clear chance."[41] (emphasis supplied) The doctrine is an exception, and should be recognized as such rather than resorting to fictitious reasoning involving proximate cause.[42]

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[36] Bryan v. Southern Pac. Co., 79 Ariz. 253, 286 P.2d 761 (1955); Trauscht v. Lamb, 77 Ariz. 276, 270 P.2d 1071 (1954).

[37] RESTATEMENT, TORTS, *supra* note 35.

[38] James, *Last Clear Chance: a Transitional Doctrine*, 47 YALE L.J. 704 (1938); 38 AM. JUR. *Negligence* § 222 (1941).

[39] PROSSER, TORTS § 47 (2d ed. 1955), "fictitious reasoning is found as to the doctrine of the 'last clear chance,'" *e.g.*, where two autos collide, the causal connection is quite clear, both parties have played an important part in bringing about the result.

[40] MacIntyre, *The Rationale of Last Clear Chance*, 53 HARV. L. REV. 1225 (1939-1940).

[41] 90 Ariz. 97, 366 P.2d 80, 83 (1961).

[42] Justice Jennings, Layton v. Rocha, 368 P.2d 444, 447 (Ariz. 1962) (dissenting opinion), says Arizona has adopted comparative negligence. If this is or should become the fact, then there will be no problem with last clear chance.

Last clear chance has no function to perform unless the injured person is chargeable with negligence which would preclude his recovery. 38 AM JUR. *Negligence* § 217 (1941); 92 A.L.R. 48 (1934); 119 A.L.R. 1041, 1046 (1939).