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Admiralty -- Last Clear Chance in Collision

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NOTES AND COMMENTS

Admiralty—Last Clear Chance in Collision

The famous case of *Davies v. Mann*[1] gave birth to the doctrine of last clear chance by holding that if one party in the exercise of reasonable care has the last opportunity to avoid the harm, the other party's prior negligence is not a proximate cause of the result. This doctrine has in most common-law jurisdictions allowed plaintiffs to avoid the harshness of the bar of contributory negligence, and has shifted the burden of the loss to the defendant although both parties were at fault.[2]

Whether this common-law doctrine is applicable in admiralty collision cases has never been decided by the United States Supreme Court. However, two recent district court decisions serve to point out the conflict existing among the lower federal courts. In *Williamson v. The Carolina*[3] the libelant moored his vessel in an unseaworthy manner so that the displacement waves of the respondent's tug and barge caused her to be tossed about with resultant damage. Respondent was at fault in failing to maintain a proper lookout. The court rejected libelant's contention that respondent, since its negligence was subsequent in time to that of libelant's, should bear the total loss. The admiralty rule of divided damages, the court reasoned, was more equitable where there was equal fault of both parties.

In *Arundel Corp. v. The City of Calcutta*[4] the libelant's scow collided with respondent's anchored vessel and sank. The court, assuming that respondent's vessel was improperly anchored and therefore at fault, held the libelant solely responsible for the loss, on the theory that it, being cognizant of the anchored vessel's position, had the last clear chance to avoid the collision.[5]

The divergence of opinion illustrated by the two principal cases is not resolved by an examination of the history of last clear chance in admiralty. *Steam Dredge No. 1*[6] is apparently the first admiralty case in the United States dealing with last clear chance. There the First Circuit reviewed several Supreme Court decisions[7] in which the facts

[1] 10 M.& W. 546 (1842).

[2] See PROSSER, TORTS § 52 (2d ed. 1955); Annots., 92 A.L.R. 47 (1934), 119 A.L.R. 1041 (1939), and 171 A.L.R. 365 (1947). See also Note, 36 N.C.L. REV. 545 (1958).

[3] 158 F. Supp. 417 (E.D.N.C. 1958). [4] 172 F. Supp. 593 (E.D.N.Y. 1958).

[5] Note that here the respondent or defendant successfully utilized last clear chance, traditionally a plaintiff's defense to contributory negligence, to avoid liability.

[6] 134 Fed. 161 (1st Cir. 1904) (not a collision case).

[7] The New York, 175 U.S. 187 (1899); The America, 92 U.S. (2 Otto) 432 (1875); Atlee v. Packet Co., 88 U.S. (21 Wall.) 389 (1874); The John Fraser, 62 U.S. (21 How.) 184 (1858). Other early Supreme Court cases involving successive faults where both vessels were held liable are: The North Star, 106 U.S. (16 Otto) 17 (1882); The Continental, 81 U.S. (14 Wall.) 345 (1871).

would have warranted an application of the doctrine, but in which it was not mentioned, and concluded that the doctrine of *Davies v. Mann* should not be applied in maritime law. Later the Seventh Circuit in *The Norman B. Ream*[8] stated that the doctrine of last clear chance was created to mitigate the common-law principle that contributory negligence is a bar to recovery, and did not apply in this country in admiralty, since under martime law contributory negligence effects only a division of damages.

The position taken by *Steam Dredge No. 1* and *The Norman B. Ream* was weakened by The *Perseverance*.[9] There a vessel was at fault for being improperly anchored; a tug was at fault in not steering clear of the anchored vessel. The tug was held solely liable, the anchored vessel's fault being considered as a mere *condition* rather than a contributing *cause* of the collision.[10] The court stated: "The situation *is similar to* that often comprised within the formula that a wrongdoer is solely liable if he has a 'last clear chance' of avoiding the damage."[11] Eight years later the Second Circuit applied last clear chance by name in *The Cornelius Vanderbilt*[12] and *The Sanday*.[13] Neither case cited *Steam Dredge No. 1* or *The Norman B. Ream,* nor did either case discuss the doctrine's applicability to admiralty libels—the court apparently assuming that it was applicable. From an overall survey it appears that the Second,[14] Third,[15] and Fifth[16] Circuits and a district court[17] of the Ninth Circuit have adopted last clear chance, while the First[18] and Seventh Circuits[19] and a district court[20] of the Fourth Circuit have rejected it.

[8] 252 Fed. 409 (7th Cir. 1918) (dictum).

[9] 63 F.2d 788 (2d Cir. 1933).

[10] It is often held that the antecedent fault of one vessel is not a contributing cause if it merely creates a condition or situation which makes it possible for the subsequent fault of the other vessel to bring about collision. See, *e.g.,* Cornell Co. v. Phoenix Co., 233 U.S. 593 (1914); The Syosset, 71 F.2d 666 (2d Cir. 1934); The Socony No. 19, 29 F.2d 20 (2d Cir. 1928).

[11] 63 F.2d at 790 (emphasis is added to point out that the court did not consider itself as applying last clear chance except by analogy).

[12] 120 F.2d 766 (2d Cir. 1941). [13] 122 F.2d 325 (2d Cir. 1941).

[14] Kosnac v. The Norcuba, 243 F.2d 890 (2d Cir. 1957); The Cedar Cliff, 149 F.2d 964 (2d Cir. 1945); Southern Transp. Co. v. Dauntless Towing Line, 140 F.2d 215 (2d Cir. 1944); The Sanday, 122 F.2d 325 (2d Cir. 1941); The Cornelius Vanderbilt, 120 F.2d 766 (2d Cir. 1941); Arundel Corp. v. The City of Calcutta, 172 F. Supp. 593 (E.D.N.Y. 1958); *In re* Adams' Petition, 125 F. Supp. 110 (S.D.N.Y. 1954); Manhattan Lighterage Corp. v. United States, 103 F. Supp. 274 (S.D.N.Y. 1951).

[15] P. Dougherty Co. v. United States, 207 F.2d 626 (3d Cir. 1952).

[16] Crawford v. Indian Towing Co., 240 F.2d 308 (5th Cir. 1957); Richmond v. The Connie C. Cenac, 157 F. Supp. 397 (E.D. La. 1957), *aff'd sub nom.* Cenac Towing Co. v. Richmond, 265 F.2d 466 (5th Cir. 1959).

[17] Hertz v. Consolidated Fisheries, Inc., 105 F. Supp. 948 (N.D. Cal. 1952).

[18] Steam Dredge No. 1, 134 Fed. 161 (1st Cir. 1904) (not a collision case).

[19] The Norman B. Ream, 252 Fed. 409 (7th Cir. 1918) (dictum).

[20] Williamson v. The Carolina, 158 F. Supp. 417 (E.D.N.C. 1958). *But cf.* Curtis Bay Towing Co. v. Mansfield, 207 F.2d 859 (4th Cir. 1953), where, in an action under the Jones Act, 41 Stat. 1007 (1920), 46 U.S.C. § 688 (1953), the

In attempting to determine what should be the position of the admiralty courts in relation to the doctrine of last clear chance, certain basic maritime principles of liability and recoverable damages must be examined. Liability in admiralty collision law is, as at common law, based on fault.[21] The effect of dual fault in admiralty, however, is entirely different from its effect at common law. If only one vessel is at fault that vessel must bear the entire loss,[22] but if both vessels are deemed at fault the divided damages rule of American admiralty law comes into play, *i.e.*, each vessel bears half the total loss.[23] This rule is qualified by the "major-minor fault" principle: if one vessel is grossly negligent and the other at fault only to a minor degree, the minor fault is held not to be a contributing cause of the accident and the entire loss is borne by the vessel grossly at fault[24] The result is in many cases the same as would be reached under last clear chance, but the rule differs from last clear chance in that it is limited to instances where it would be unjust to divide the damages because of the gross fault of one vessel and in that it is not dependent upon one fault preceding the other.

Many of the standards imposed upon the mariner are statutory,[25] and one who violates a statutory duty before a collision is faced with the rule of *The Pennsylvania*.[26] That rule creates a legal presumption of fault that may be overcome only by showing not only that the violation *did not* but that it *could not* have been a cause of the collision. Modifying this rule slightly is the doctrine as to errors *in extremis*. This doctrine provides that when a vessel, through no fault of her own, is placed in a position where collision is seemingly imminent, she will not be held at fault for action taken in violation of the statutory rules or the standards of due care in navigation, when the fault can be explained as resulting from the extremity in which she was placed.[27]

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court allowed the issue of last clear chance to go to the jury. The court cited no authority, nor did it discuss the doctrine's applicability to a maritime cause of action.

[21] The Java, 81 U.S. (14 Wall.) 189 (1872).

[22] The Clara, 102 U.S. (12 Otto) 200 (1880); Oaksmith v. Garner, 205 F.2d 262 (9th Cir. 1953).

[23] The North Star, 106 U.S. (16 Otto) 17 (1882); The Catherine, 58 U.S. (17 How.) 170 (1855).

[24] The Victory, 168 U.S. 410 (1897); The Oregon, 158 U.S. 186 (1895); The City of New York, 147 U.S. 72 (1893); The Great Republic, 90 U.S. (23 Wall.) 20 (1874).

[25] International Rules, 33 U.S.C. §§ 144-47d (1953); Inland Rules, 33 U.S.C. §§ 151-232 (1953); Great Lakes Rules, 33 U.S.C. §§ 241-95 (1953); Western Rivers Rules, 33 U.S.C. §§ 301-56 (1953). See GILMORE & BLACK, ADMIRALTY § 7-3 (1957).

[26] 86 U.S. (19 Wall.) 125 (1874); Merritt-Chapman & Scott Corp. v. Cornell S.S. Co., 265 F.2d 537 (2d Cir. 1959). See also GILMORE & BLACK, ADMIRALTY § 7-5 (1957); GRIFFIN, COLLISION § 201 (1949).

[27] The Genesee Chief, 53 U.S. (12 How.) 443 (1852); Pacific-Atlantic S.S. Co. v. United States, 175 F.2d 632 (4th Cir. 1949); The Stifinder, 275 Fed. 271 (2d Cir. 1921). See also GILMORE & BLACK, ADMIRALTY § 7-3 (1957).

If the admiralty courts were to accept completely the principles of last clear chance in collision cases, the effect would be in many instances a nullification of these basic maritime principles. In cases where there is substantial fault on the part of both vessels, but one is subsequent in time to the other, the loss, rather than being divided, would be borne by the last wrongdoer. In this connection it is submitted that the need for last clear chance in the common law is not present in the maritime law. The doctrine of last clear chance was designed to mitigate the harshness of the bar of contributory negligence. In admiralty contributory negligence has never, as a rule,[28] barred recovery,[29] By division of damages the maritime law has evolved its own equitable adjustment between the parties.

The rule of *The Pennsylvania,* which in many instances requires at least a division of damages,[30] apparently would be made ineffective, with the result that the subsequent wrongdoer would bear the total loss regardless of any breach of a statutory duty by the other vessel. Since the doctrine of last clear chance tends to place liability on the last wrongdoer, it is possible as a practical matter that a vessel making the last error could be held liable even though her action properly should be classified under existing admiralty law as a reasonable error in judgment while *in extremis* and thus excusable.

A view of the overall picture seems to indicate that the doctrine of last clear chance has no real foundation or place in admiralty law. It would seem to conflict with some basic maritime principles, while other admiralty rules, when justice dictates, can be applied to reach the same result.[31] It is submitted that an adoption of this common-law doctrine by the American maritime courts would result in no real advance, but rather a regression from the more desirable measures of liability currently employed.[32]

RICHARD VON BIBERSTEIN, JR.

[28] See discussion of "major-minor fault" rule at text, footnote 24 *supra,* and discussion in note 10 *supra.* As was stated in Cenac Towing Co. v. Richmond, 265 F.2d 466, 471 (5th Cir. 1959): "Each case stands on its own. Call it anything: a condition, a remote cause, a non-contributing fault, the last clear chance; if, in the circumstances of the particular case, the respondent's fault is slight in comparison with the libellant's or if there was a clear cleavage between respondent's fault and the collision, an admiralty court will evaluate the respective degrees of fault and exonerate the respondent."

[29] The Max Morris, 137 U.S. 1 (1890).

[30] See Lie v. San Francisco & Portland S.S. Co., 243 U.S. 291 (1917); Merritt-Chapman & Scott Corp. v. Cornell S.S. Co., 265 F.2d 537 (2d Cir. 1959).

[31] See discussion of "major-minor fault" rule in text at note 24 *supra,* and discussion in note 10 *supra.*

[32] Presumably if a collision libel is brought in a state court, that court will be bound to apply maritime law. See Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953); Chelentis v. Luckenbach S.S. Co., 247 U.S. 372 (1918); Southern Pac. Co. v. Jensen, 244 U.S. 205 (1917); Southport Transit Co. v. Avondale Marine Ways, Inc., 234 F.2d 947 (5th Cir. 1956); Intagliata v. Shipowners & Merchants Towboat Co., 26 Cal. 2d 365, 159 P.2d 1 (1945).