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Torts -- Last Clear Chance -- Contributory Negligence as a Matter of Law

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damages, rather than basing the decision on a trespass theory, which may later prove troublesome.

The court's rule, finally, seems to contemplate the pink-coated, mounted foxhunt of the English squire rather than the nocturnal and sedentary hunt of his North Carolina cousin. It appears, as many of the English decisions, to be based on the probability of the hunter being near enough to his hounds to control their trespasses during the hunt.²² *Quaere* whether this rule will in effect harness the fox, 'possum, or 'coon hunter to a strict liability for trespasses of dogs, while hunting, which in actuality are quite as beyond his control as when ranging "on their own volition."²³

HAMILTON C. HORTON, JR.

Torts—Last Clear Chance—Contributory Negligence as a Matter of Law

In a recent wrongful death action¹ plaintiff's intestate was adjudged contributorily negligent as a matter of law when he failed to notice the approach of a detached coal car which he could have seen for a quarter of a mile, had he but looked. The court nonsuited the plaintiff, refusing to submit the issue of last clear chance to the jury. On appeal Justice Parker first pointed out that the doctrine had not been pleaded, nor had any evidence been advanced in support of the doctrine. He then added that "this doctrine [of last clear chance] does not apply when the contributory negligence of the party injured, as a matter of law, bars recovery."²

This last statement has begun to make frequent appearances in the North Carolina law of negligence. What then is the legal meaning of this phrase, as used in this context?

The doctrine of last clear chance supposedly sprang from the famous "hobbled ass" case of *Davies v. Mann*.³ It was a reaction against the

²² For an excellent introduction to English fox hunting, see 11 ENCY. BRITANICA, *Hunting* (14th ed., 1932). Here the factor of control is real, being accomplished by horn and "whipper in." In North Carolina, however, in the typical foxhunt, of which the instant case is an example, (see complaint, Record on Appeal, p. 2) the hounds are released at night and generally run at will, the "huntsmen" often seating themselves beside jug and fire, enjoying with liquid conviviality the cry of the hounds. Often the hunt takes all night—until either fox or hounds are too exhausted to continue. Tar Heels still tell of an all night hunt when the first rays of dawn saw five of the hounds walking painfully down the road—with the fox, equally tired, just a few feet ahead—also walking.

²³ The actualities of the average Southern foxhunt seem to have been recognized by Virginia in VA. CODE § 29-213 (1950), which allows permits to be issued to allow foxhounds to run at large and without their master.

¹ *Wagoner v. N. C. R. R. and Southern R. R.*, 238 N. C. 162, 77 S. E. 2d 701 (1953).

² *Id.* at 174, 77 S. E. 2d at 710.

³ 152 Eng. Rep. 588 (1842).

harshness of the contributory negligence rule,⁴ and began to show up clearly in North Carolina law about 1881.⁵ Perhaps the best modern statement of the North Carolina doctrine can be found in *Ingram v. Smoky Mtn. Stages, Inc.*:

"The contributory negligence of the plaintiff does not preclude a recovery where it is made to appear that defendant, by exercising reasonable care and prudence, might have avoided the injurious consequences to plaintiff, notwithstanding plaintiff's negligence; that is, that by the exercise of reasonable care defendant might have discovered the perilous position of the party injured or killed and have avoided the injury, but failed to do so."⁶

Thus stated, the North Carolina doctrine seems as sound and understandable as that of any other jurisdiction, but in its recent tendency to rely on "contributory negligence as a matter of law" as grounds for refusing to submit the last clear chance issue to the jury, the North Carolina court's position is as unique as it is baffling.

Apparently this idea was first expressed in the case of *Redmon v. Southern R. R.*⁷ In listing certain "principles" applicable to last clear chance cases, the court (per Justice Brogden) first pointed out that contributory negligence on the plaintiff's part was a prerequisite to any consideration of the last clear chance doctrine,⁸ and then, in the same breath, said that a certain kind of contributory negligence—contributory negligence "as a matter of law"—would preclude the application of the doctrine.

However confusing and contradictory this may seem, it now appears to be the law in North Carolina. The question which immediately arises in the mind of the practicing attorney is, at what point does *mere* contributory negligence become contributory negligence *as a matter of law*, which bars the submission to the jury of the issue of last clear chance?

Justice Brogden, in the *Redmon* opinion, cited many cases in support of this surprising theory.⁹ Yet they hardly seem to be in point, for in

⁴ PROSSER, TORTS § 54 (1941).

⁵ *Gunter v. Wicker*, 85 N. C. 310 (1881).

⁶ 225 N. C. 444, 447, 35 S. E. 2d 337, 339 (1945).

⁷ 195 N. C. 764, 143 S. E. 829 (1928).

⁸ For a recent reiteration of this position see *Graham v. Atl. Coast Line R. R.*, 240 N. C. 338, 82 S. E. 2d 346 (1954), in which reference is made to the "doctrine of last clear chance, which presupposes both negligence and contributory negligence. . . ."

⁹ *Cooper v. N. C. R. R.*, 140 N. C. 209, 52 S. E. 932 (1905); *Mitchell v. Seaboard Airline Ry.*, 153 N. C. 116, 68 S. E. 1059 (1910); *Coleman v. Atl. Coast Line R. R.*, 153 N. C. 322, 69 S. E. 129 (1910); *Davidson v. Seaboard Airline Ry.*, 171 N. C. 634, 88 S. E. 759 (1916); *Holton v. Kinston-Carolina R. R.*, 188 N. C. 277, 124 S. E. 307 (1924); *McCulloch v. N. C. R. R.*, 188 N. C. 797, 125 S. E. 529 (1924); *Elder v. Plaza R. R.*, 194 N. C. 617, 140 S. E. 298 (1927); *Harrison v. N. C. R. R.*, 194 N. C. 656, 140 S. E. 598 (1927); *Pope v. Atl. Coast Line R. R.*, 195 N. C. 67, 141 S. E. 350 (1928).

only two of them was the issue of last clear chance even raised,¹⁰ and in not a single one does it appear that the court refused to allow application of last clear chance because plaintiff had been guilty of "contributory negligence as a matter of law."¹¹ But if there was no precedent for the court's decision, there certainly have been a number of cases following it with approval.¹²

The court has never offered to define "contributory negligence as a matter of law" when using it in this sense.¹³ But an examination of the cases in which last clear chance has been ruled inapplicable on those grounds may afford some clue as to the kind of conduct which the court will call "contributory negligence as a matter of law."

In all of these cases plaintiff was guilty of what the court calls continuing negligence, that is, negligence which, if it did not come after that of defendant, at least concurred with it in causing the accident. In *Rives v. Atl. Coastline R. R.* the court said: "In the daytime on a clear day he (plaintiff's intestate) was standing on a live track without looking or taking any precautions for his own safety, and he stood there until a fast passenger train snuffed out his life. Consequently he was guilty of contributory negligence which continued to the moment of the impact."¹⁴ In *Rimmer v. Southern R. R.*¹⁵ the intestate was crossing a track holding a cloak over her head for protection from the rain. Her attention was centered on the traffic in the highway, and she was struck by a train and killed. In *Sherlin v. Southern R. R.*¹⁶ plaintiff attempted to run across a railroad trestle ahead of a speeding train when he could have stood in safety on a "chat" jutting out from the trestle. In the *Redmon*

¹⁰ *Davidson v. Seaboard Airline Ry.*, 171 N. C. 634, 88 S. E. 759 (1916); *Elder v. Plaza R. R.*, 194 N. C. 617, 140 S. E. 298 (1927).

¹¹ The following fact situation is typical of those in the cases cited in the *Redmon* decision: The injured party, apparently under no disability, walks or drives directly into the path of an oncoming train. Without mentioning the doctrine of last clear chance, the court nonsuits the plaintiff on the grounds that the injured party was guilty of contributory negligence as a matter of law. It is difficult to understand how the court could cite these as involving last clear chance.

¹² *Rives v. Atl. Coast Line R. R.*, 203 N. C. 227, 165 S. E. 709 (1932); *Rimmer v. Southern R. R.*, 208 N. C. 198, 179 S. E. 753 (1935); *Sherlin v. Southern R. R.*, 214 N. C. 222, 198 S. E. 640 (1938); *Ingram v. Smoky Mtn. Stages, Inc.*, 225 N. C. 444, 35 S. E. 2d 337 (1945); *Dowdy v. Southern R. R.*, 237 N. C. 519, 75 S. E. 2d 639 (1953).

¹³ Violation of statute by the plaintiff is usually referred to by the court as contributory negligence *per se*, or as a matter of law, but obviously this is not what the court has reference to in these cases, for mere violation of statute would not preclude the application of last clear chance where the defendant could, in the exercise of due care, have avoided the accident.

¹⁴ 203 N. C. 227, 229, 165 S. E. 709, 710 (1932).

¹⁵ 208 N. C. 198, 179 S. E. 753 (1935).

¹⁶ 214 N. C. 222, 198 S. E. 640 (1938). As supporting cases the court in this decision, cites (among others) *Stover v. Southern R. R.*, 208 N. C. 495, 181 S. E. 336 (1935) and *Lemmings v. Southern R. R.*, 211 N. C. 499, 191 S. E. 39 (1937). No mention is made of "contributory negligence as a matter of law" in these cases, but in both cases the court makes it clear that it is the continuing negligence of the plaintiff, up to the moment of impact, which bars the application of last clear chance.

case itself,¹⁷ and in cases cited there,¹⁸ it appears that the injured party was guilty of negligence which continued up to the time of the accident.

It is also true that in these cases, starting with the *Redmon* case, which have relied on a doctrine of contributory negligence as a matter of law in refusing to apply the last clear chance doctrine, the injured party was never in any *apparent* peril. Defendant (usually the train engineer) had no reason to believe that plaintiff was not in full possession of all his faculties.

The court, in *Sherlin v. Southern R. R.* said: "It appears that the intestate was in the apparent possession of all his faculties, and there was nothing to put the engineer on notice of any impairment in his hearing, or that he would not step off the track to an existent place of safety before the train hit him."¹⁹ In *Ingram v. Smoky Mtn. Stages, Inc.*, it was said: "There was nothing in the conduct of the deceased to indicate to the bus driver that he was in a position of peril."²⁰ And in *Dowdy v. Southern R. R.*: "There is no evidence that the engineer knew, or by the exercise of due care, could have known, that Dowdy was helpless upon the track—if, indeed, Dowdy was helpless. The defendant had a right to assume up to the very moment of the collision that Dowdy would extricate himself from danger."²¹

Often, of course, there have been other factors in these cases which have influenced the court in nonsuiting the plaintiff.²² But the conclusion is irresistible that where the court denies plaintiff access to the doctrine of last clear chance, saying, in explanation, that the injured party has been guilty of contributory negligence as a matter of law, either the injured party was guilty of (1) active, continuing contributory

¹⁷ 195 N. C. 764, 143 S. E. 829 (1928). Here plaintiff's intestate drove a truck onto the railroad tracks, in full view of an oncoming train.

¹⁸ See note 7 for the cases cited in support of the *Redmon* decision. In one of these, *McCulloch v. N. C. R. R.*, 188 N. C. 797, 799, 125 S. E. 529, 530 (1924), it was said: "Recovery is denied . . . upon the ground that plaintiff's intestate was guilty of contributory negligence, continuing up to and necessarily proximately producing the injury."

¹⁹ 214 N. C. 222, 224, 198 S. E. 640, 641 (1938). Cited in this case was *Reep v. Southern R. R.*, 210 N. C. 285, 286, 186 S. E. 318 (1936), in which the court said: "There is no evidence that any disability of the intestate was known or was apparent to the engineer. The engineer therefore had a right to assume up to the last moment that the intestate would get off the track."

²⁰ 225 N. C. 444, 449, 35 S. E. 2d 337, 340 (1945).

²¹ 237 N. C. 519, 527, 75 S. E. 2d 639, 644 (1953). In dissenting in this decision, Johnson, J. pointed out the fallacy of the position that "contributory negligence as a matter of law" will bar application of last clear chance. He said: "It is stated in the majority opinion that the doctrine of last clear chance 'does not apply when plaintiff is guilty of contributory negligence as a matter of law.' Conversely, may it not be said with equal force that one may not be adjudged contributorily negligent as a matter of law when the doctrine of last clear chance applies?" *Id.* at 528, 75 S. E. 2d at 645.

²² As, for instance the probability that defendant was too close to stop even if he had discovered plaintiff's peril in time. See *Ingram v. Smoky Mtn. Stages, Inc.*, 225 N. C. 444, 35 S. E. 2d 337 (1945).

negligence, or (2) he was never in any "apparent peril" or (3) both.

One may or may not agree with the wisdom and ultimate justice of refusing to apply the last clear chance doctrine in these situations, but one cannot deny that these rules are clearer and more tangible than the blank statement that plaintiff has been guilty of contributory negligence as a matter of law. Why, then, does the court insist upon using this phrase, which explains nothing and succeeds only in creating an aura of mystery about the entire decision?

This note does not purport to analyze trends in the North Carolina law of negligence, but more exhaustive and general research might well reveal that the confusion in this area heralds a general reaction against the doctrine of last clear chance and a tendency on the part of the North Carolina court to apply it more sparingly.

DAVID M. CLINARD

Torts—Liability of Golf Courses to Invitees

In a recent North Carolina case, the court moved a step closer to defining the liability of a golf course for accidents which occur on its premises.¹ In affirming the non suit granted by the lower court, the court held that the defendant golf course was under no duty to guard against possible injury to patrons by reason of the maintenance of the water hole which caused the plaintiff's injury and that the plaintiff's evidence clearly indicated that he was contributorily negligent, which barred his recovery as a matter of law.²

In its discussion of the situation, the court placed the golf course in the general category of places of amusement and the golfer in the general category of invitee. As was correctly stated in the principal case, the general rule is that the owner of a place of amusement "is not an insurer of the safety of patrons, but owes them only what, under particular circumstances, is 'ordinary' or 'reasonable' care."³

¹ *Farfour v. Mimosa Golf Club et al.*, 240 N. C. 159, 81 S. E. 2d 375 (1954). Plaintiff was playing golf on a course owned by defendants. After finishing the ninth hole, he placed his caddie cart several feet away from a path leading to the tenth tee. He drove his ball from the tee and returned to get his cart. After getting the cart, he was injured when he stepped into an open terra cotta hole which was used by the defendants in connection with watering the greens. The hole was normally covered, and there was evidence to show that it had been uncovered for 30 to 50 days prior to the accident. The court granted the defendant's motion for non-suit.

² Other jurisdictions have reached a similar result in similar situations by application of the doctrine of assumption of risk. See: *Young v. Roass*, 127 N. J. L. 211, 21 A. 2d 762 (1941); *Schlenger v. Weinberg*, 107 N. J. L. 130, 150 Atl. 434 (1930); *Kavafian v. Seattle Baseball Club*, 105 Wash. 215, 181 Pac. 679 (1919); Note, 32 N. C. L. Rev. 366 (1954).

³ *Farfour v. Mimosa Golf Club et al.*, 240 N. C. 159, 163, 81 S. E. 2d 375, 378 (1954). See also: *Boucher v. Paramount-Richards Theaters*, 30 So. 2d 211 (La. Ct. App. 1947); *Modoc v. City of Eveleth*, 224 Minn. 556, 29 N. W. 2d 453 (1947); *Revis v. Orr*, 234 N. C. 158, 66 S. E. 2d 652 (1952); *Patterson v. City of Lexing-*