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Raising the Issue of Last Clear Chance

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owners by such remainder, a power of sale should be expressly given to them.

Since the Ohio simultaneous death statute[82] does not apply to inter vivos transactions, it should be amended to include the cases of simultaneous death of co-owners under survivorship instruments which make no provision for the contingency of simultaneous death. The problem would then arise as to whether the statute should apply solely to prospective transactions, or to instruments already in existence at the time of the passage of the Act as well. *Query*, would the latter provision be constitutional?

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Raising the Issue of Last Clear Chance

In most American jurisdictions contributory negligence acts as a complete bar to recovery in a negligence suit.[1] To this rule, however, there is a well recognized exception, known throughout the United States as the doctrine of last clear chance.[2] It is commonly held that, under this doctrine, the defendant who negligently injured the inattentively negligent plaintiff is liable if the plaintiff, by his own prior negligence, has rendered himself helpless to avoid the injury and the defendant has discovered the plaintiff's peril in time to avoid the injury by using proper care, or if the plaintiff is negligently inattentive and the defendant has discovered the plaintiff's peril and inattentiveness in time to avoid the injury by using proper care. Most cases have also held that the defendant who negligently injures the inattentively negligent plaintiff is liable if the plaintiff, because of his own prior negligence, has become helpless to avoid the injury, and the defendant, by exercising proper care, could discover the danger and avoid the injury.[3]

One of the chief difficulties with the question of last clear chance is ascertaining the proper manner of placing it in issue. In some jurisdictions the courts have taken the position that last clear chance need not be specially pleaded, but that evidence supporting the application of the doctrine is admissible under a simple allegation of defendant's negligence in general terms by the plaintiff.[4] In states which take this view the

[1] PROSSER, TORTS § 52 (1941).
[2] PROSSER, TORTS § 52 (1941).
[3] PROSSER, TORTS § 52 (1941).
[4] Tindell v. Guy, 243 Ala. 535, 10 So.2d 862 (1942); Duncan v. St. Louis & S. F. Ry., 152 Ala. 118, 44 So. 418 (1907); Hooker v. Schuler, 45 Idaho 83, 260 Pac. 1027 (1927); Braden's Adm'x. v. Liston, 258 Ky. 44, 79 S.W.2d 241 (1935); Longenecker v. Zanghi, 175 Md. 307, 2 A.2d 20 (1938); Bona v. Luehrman, 243 S.W 386 (Mo. App. 1922); Albright v. Joplin Oil Co., 206 Mo. App. 412, 229 S.W 829 (1921); Los Angeles & S. L. R. R., v. Umbaugh, 61 Nev. 214, 123 P.2d 224 (1942). Professor Thompson takes the view that, in states where contributory

courts have reasoned that a general allegation of negligence[5] is a pleading of an ultimate fact and that the very generality of such a plea is the factor which permits it to support evidence of any type of negligence.[6] However, it is important to note that specific allegations of simple negligence will not admit of evidence tending to prove last clear chance because of the rule that when one pleads specific facts he is limited in his proof to evidence which tends to show only those specific facts.[7]

In other jurisdictions the courts have held that if last clear chance is to be put in issue, the elements of last clear chance must appear in the plaintiff's pleading.[8] However, as to the stage of the pleading in which they should appear the authorities of the various states are not in accord. For instance, a leading Ohio case, *Drown v. Northern Ohio Traction Co.*,[9] required that they appear in the plaintiff's petition. In that case the court stated:

> It is clear, then, that the last chance rule should not be given as a hit or miss rule in every case involving negligence. It should be given with discrimination. Since the plaintiff can recover only upon the allegations of his petition, if there is no charge in the petition that the defendant, after

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negligence is an affirmative defense to be pleaded and proved by the defendant, an averment of the elements of last clear chance is superfluous. THOMPSON, NEGLIGENCE § 7466 (1905).

[5] Birmingham Stove & Range Co. v. Vanderford, 217 Ala. 342, 343, 116 So. 334, 336 (1928) (" employee negligently operated said automobile truck "); Langford v. San Diego Electric Ry., 174 Cal. 729, 731, 164 Pac. 398, 399 (1917) (" the collision was caused by the careless, negligent and unskillful running of the car by the defendant's servants."); Nathan v. Charlotte Street Ry., 118 N.C. 1066, 24 S.E. 511 (1896) (" the injury was due to the defendant's carelessness ").

[6] Langford v. San Diego Electric Ry., 174 Cal. 729, 164 Pac. 398 (1917); Hoodenpyle v. Wells, 291 S.W 520 (Mo.App. 1927); Nathan v. Charlotte Street Ry., 118 N.C. 1066, 2 4S.E. 511 (1896).

[7] Palmer v. Tschudy, 191 Cal. 696, 218 Pac. 36 (1923); Hoodenpyle v. Wells, 291 S.W 520 (Mo. App. 1927).

[8] Markley v. Hilkey Bros., 113 Colo. 562, 160 P.2d 394 (1945); Leedom v. Pennsylvania R.R., 42 Del. 186 (Super. Ct. 1942), 29 A.2d 171; Kinderavich v. Palmer, 127 Conn. 85, 15 A.2d 83 (1940); Mast v. Illinois Cent. R. R., 79 F.Supp. 149 (D.C. Iowa 1948); Nyswander v. Gonser, 218 Iowa 136, 253 N.W 829 (1934); Gibson v. Bodley, 156 Kan. 338, 133 P.2d 112 (1943); Denman v. Johnston, 85 Mich. 387, 48 N.W 565 (1891); Johnson v. Springfield Traction Co., 176 Mo.App. 174, 161 S.W 1193 (1914); Doichinoff v. Chicago, M. & St. P. Ry., 51 Mont. 582, 154 Pac. 924 (1916); Emmons v. Southern Pac. Co., 97 Ore. 263, 191 Pac. 333 (1920); East Texas Theaters v. Swink, 142 Tex. 268, 177 S.W.2d 195 (1944); Wright v. Godin, 108 Vt. 23, 182 Atl. 189 (1936). For instance, in Kansas the elements which must be alleged are, as follows; 1. Plaintiff by his negligence placed himself in a position of danger. 2. Plaintiff's negligence ceased. 3. Defendant saw, or by the exercise of reasonable care should have seen, plaintiff's position of danger, and, by exercising due care, would have had the last clear chance to avoid the injury. 4. Defendant failed to exercise such due care. 5. As a result, plaintiff was injured. Gibson v. Bodley, *supra.*

[9] 76 Ohio St. 234, 81 N.E. 326 (1907).

> having notice of the plaintiff's peril, could have avoided injury to the plaintiff, and there is no testimony to support such charge, the giving of such a charge would be erroneous.[10]

At least three other jurisdictions require that for last clear chance to be put in issue, its elements must be set forth in the petition.[11]

On the other hand, it is frequently held that it is proper to introduce the issue of last clear chance in a reply to the defendant's answer which charges the plaintiff with contributory negligence.[12]

Normally, in a state which requires a pleading of last clear chance, the sufficiency of the allegations thereof will be governed by the substantive law of the state. For instance, in states which require that a plaintiff prove that the defendant had *actual* knowledge of the plaintiff's perilous position before he may invoke the doctrine, the plaintiff must plead facts to that effect.[13] On the other hand, in states which require only that the defendant under the circumstances should have discovered the plaintiff's helpless peril, the plaintiff need allege only facts giving rise to the defendant's duty to discover his peril.[14]

Quite often it is held that a plaintiff, in order to invoke the last clear chance doctrine, must admit his own contributory negligence.[15] United States Circuit Judge Charles E. Clark, former dean of the Yale School of Law, has severely criticized this position as requiring the plaintiff to elect whether to rest his case on the negligence of the defendant apart from any last clear chance theory or to rely on last clear chance, when in all honesty he may be in doubt as to the true nature of his ground for recovery.[16]

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[10] Drown v. Northern Ohio Traction Co., 76 Ohio St. 234, 249, 81 N.E. 326, 329 (1907).

[11] Doichinoff v. Chicago M. & St. P. Ry., 51 Mont. 582, 154 Pac. 924 (1916); Emmons v. Southern Pac. Co., 97 Ore. 263, 191 Pac. 333 (1920); Wright v. Godin, 108 Vt. 23, 182 Atl. 189 (1936).

[12] Southern Ry. v. Lime Bottling Co., 210 Ala. 336, 98 So. 1 (1923); Bragdon v. Hexter, 86 Colo. 435, 282 Pac. 568 (1929); Bassett v. Wood, 146 Va. 654, 132 S.E. 700 (1926); Spaulding v. Miller, 220 Iowa 1107, 264 N.W 8 (1935) (a reply containing the elements of last clear chance held not to set forth a new cause of action); Mosso v. Stanton Co., 75 Wash. 220, 134 Pac. 941 (1913) (a reply consisting of a denial of contributory negligence held to raise the last clear chance issue.)

[13] Button v. Pennsylvania R. R., 115 Ind.App. 210, 57 N.E.2d 444 (1944) (a plea to the effect that the defendant, in the exercise of reasonable care, should have discovered the plaintiff's peril held fatal to the complaint).

[14] Thompson v. Quincy, O. & K. C. R. R., 18 S.W 2d 401 (Mo.App. 1929); Wright v. Godin, 108 Vt. 23, 182 Atl. 189 (1936);

[15] Dwinelle v. Union Pac. R. R., 104 Colo. 545, 92 P.2d 741 (1939); Williams v. Sauls, 151 Fla. 270, 9 So.2d 369 (1942); Agranowitz v. Levine, 298 Mich. 18, 298 N.W 388 (1941); Carter v. Zdan, 151 Neb. 185, 36 N.W.2d 781 (1949).

[16] Clark, *Simplified Pleading in Connecticut*, 16 CONN. BAR J. 83 (1942). In this article Clark criticizes the decision in Kinderavich v. Palmer, 127 Conn. 85, 15 A.2d 83 (1940) which overrules the case of Mezzi v. Taylor, 99 Conn. 1, 120 Atl. 871 (1923).

It would appear that such an admission should serve to bar the plaintiff's recovery unless he proves a last clear chance case.[17] However, a number of courts have taken the view that, even though the application of the doctrine of last clear chance presupposes negligence on the part of the plaintiff there is no sound reason which prevents his recovery if it should develop at the trial that he was not actually chargeable with contributory negligence even though he has pleaded last clear chance.[18] Courts which follow this view permit the plaintiff to plead in his petition facts warranting recovery on the theory of the defendant's sole negligence, as well as facts which properly put in issue the doctrine of last clear chance.[19]

The Ohio requirements for raising the issue of last clear chance have never been clearly defined. However, one rule is clear — that a plaintiff who desires to raise the issue of last clear chance by his pleadings must specially plead that issue.[20] Furthermore, there are cases which indicate that the issue of last clear chance cannot be raised, in any instance, without a special pleading of one type or another.[21] On the other hand there are many statements in Ohio cases which could be construed to mean that the issue can be raised by the evidence where no objection is taken thereto.[22] These latter cases raise some doubt as to the proper method of placing last clear chance in issue. For instance, in the case of *The Toledo Railway & Light Co. v. Poland*[23] the court stated:

> We think the language employed was equivalent to stating the doctrine of the last chance, and, as there was nothing in the pleadings *or evidence* presenting such a situation, the giving of the instruction constituted prejudicial error. (Emphasis supplied).

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[17] Contributory negligence is a good defense to an action founded on negligence apart from any last clear chance theory. Consequently it appears that an admission of contributory negligence would defeat recovery in such case. Harrell v. Goodwin, 32 So.2d 758 (La.App. 1947).

[18] *E.g.*, Gibson v. Bodley, 156 Kan. 338, 133 P.2d 112 (1943); Dilallo v. Lynch, 340 Mo. 82, 101 S.W.2d 7 (1936); Taylor v. Metropolitan Street Ry., 256 Mo. 191, 165 S.W 327 (1914)

[19] Dilallo v. Lynch, 340 Mo. 82, 101 S.W.2d 7 (1936).

[20] Schaaf v. Coen, 131 Ohio St. 279, 2 N.E.2d 605 (1936); Toledo, Columbus & Ohio River R. R. v. Miller, 108 Ohio St. 388, 140 N.E. 617 (1923); Hayman v. Pennsylvania R. R., 77 Ohio App. 135, 62 N.E.2d 724 (1945); Cleveland Ry. v. Duralia, 30 Ohio App. 389, 165 N.E.358 (1928); McGinn v. Columbus Railway & Light Co., 4 Ohio App. 398 (1913)

[21] Palmer v. Humiston, 87 Ohio St. 401, 101 N.E. 283 (1913); Drown v. Northern Ohio Traction Co., 76 Ohio St. 234, 81 N.E. 326 (1907); Luebbering, Adm'r. v. Whitaker, 10 Ohio App. 365 (1919); Harris v. Mansfield Railway, Light & Power Co., 4 Ohio App. 108 (1915).

[22] Pennsylvania R. R. v. Hart, 101 Ohio St. 196, 128 N.E. 142 (1920); The Dayton, Covington & Piqua Traction Co. v. Boswell, 17 Ohio App. 293 (1923); Toledo Railways & Light Co. v. Poland, 7 Ohio App. 397 (1914).

[23] 7 Ohio App. 397, 401 (1914).

The above quotation is capable of two reasonable interpretations: (1) that even though the last clear chance issue be raised by the pleadings, no charge on the issue will be given unless evidence supporting those pleadings has been introduced, or, (2) that a charge on the issue is permissible where the issue is developed by the evidence, even though the issue has not been raised by the pleadings.[24]

With the possible exception of the evidentiary method referred to above, Ohio requires not only that the elements of last clear chance be pleaded, but also that they be pleaded in the petition, if the last clear chance issue is to be raised.[25]

In a few appellate cases the courts have made statements which might lead to the conclusion that the issue may be raised in the reply in Ohio.[26] In these cases the plaintiff had introduced the elements of last clear chance for the first time in his reply and sought a reversal of judgment for the defendant on the ground that the trial court had refused to instruct upon the issue. In affirming the trial court's decision the appellate court in each of these cases based its decision on the fact that the plaintiff had failed to introduce evidence to support his last clear chance pleading. Such cases may appear to recognize that the plaintiff had a right to introduce evidence pertaining to last clear chance. Consequently, it may appear that these courts also recognize the propriety of raising that issue in the reply. But even if this is the view of these courts, it cannot stand in the face of the strong language of the Supreme Court of Ohio in the *Drown* case[27] and other decisions.[28]

The express reasoning of the *Drown* case, in confining a pleading of last clear chance to the petition itself, was that a plaintiff may recover "only on the allegations of his petition."[29] Yet, it is also true that it is proper to meet an affirmative defense, consisting of new matter, by new matter in a reply.[30] Furthermore, the Ohio courts have, time and time

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[24] The latter interpretation would, of course, be in conflict with the decisions cited in note 23 *supra.*

[25] Drown v. Northern Ohio Traction Co., 76 Ohio St. 234, 81 N.E. 326 (1907); Baltimore & Ohio R. R. v. Lockwood, 72 Ohio St. 586, 74 N.E. 1071 (1905); Erie R. R. v. McCormick, 69 Ohio St. 45, 68 N.E. 571 (1903); Hayman v. Pennsylvania R. R., 77 Ohio App. 135, 63 N.E.2d 724 (1945); Steinman v. Cleveland Ry., 23 Ohio App. 448, 155 N.E. 149 (1926).

[26] Dreihs v. Taxicab's of Cincinnati, 45 Ohio App. 129, 186 N.E. 832 (1933); Cincinnati Traction Co. v. Woodmansee, 16 Ohio App. 314 (1922).

[27] Drown v. Northern Ohio Traction Co., 76 Ohio St. 234, 81 N.E. 326 (1907).

[28] Cases cited note 31 *supra.*

[29] Drown v. Northern Ohio Traction Co., 76 Ohio St. 234, 249, 81 N.E. 326, 329 (1907).

[30] OHIO GENERAL CODE § 11326; CLARK, CODE PLEADING 689 (2d ed. 1947).

again, held that contributory negligence is an affirmative defense.[31] On what logical theory then can they refuse to permit a plaintiff to meet the defense on contributory negligence with a reply consisting of the elements of last clear chance? The most plausible explanation of the Ohio position is that it views last clear chance as a new cause of action, and, therefore, a departure when set forth in the reply. However, there are no cases which actually state that it is a departure.

As is true in other states,[32] the sufficiency of a pleading relying upon last clear chance in Ohio is governed by the substantive law. Since the case of *The Cleveland Railway Co. v. Masterson*[33] there appears to be no doubt that in order to state a good case of last clear chance in his petition the plaintiff must allege that the defendant *actually* discovered the plaintiff's peril in time to prevent the injury by the exercise of reasonable care.[34] A number of Ohio cases have held that the plaintiff must allege that he was placed in the position of peril through his own negligence.[35] The basis for this rule is probably the fact that last clear chance presupposes negligence on the part of the plaintiff.[36] However, other Ohio cases have permitted a plaintiff to allege, in the same petition, facts warranting recovery on a negligence theory without reference to last clear chance, along with facts showing the elements of last clear chance.[37]

There is a great deal to be said in favor of requiring a pleading of the elements of last clear chance in order to make use of this doctrine, for the reason that it gives notice to the defendant that the doctrine may be invoked against him. However if this must be done in the petition and if such pleading is regarded as a conclusive admission of the plaintiff's contributory negligence, it requires an election by the plaintiff which may prove unfair to him. On the other hand, to permit the plaintiff to plead last clear chance in the alternative along with facts alleging negligence other than last clear chance, is to burden the defendant with preparation of numerous defenses which may never come into issue.

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[31] 2 WESTERN RESERVE L. REV. 166 (1950)

[32] See *supra* p. 89.

[33] 126 Ohio St. 42, 183 N.E. 873 (1932).

[34] Cole v. New York Central R. R., 150 Ohio St. 175, 80 N.E. 2d 854 (1948); Dreihs v. Taxicabs of Cincinnati, 45 Ohio App. 129, 186 N.E. 832 (1933).

[35] Brock v. Marlatt, 128 Ohio St. 435, 191 N.E. 703 (1934); Cleveland Railway v. Wendt, 120 Ohio St. 197, 165 N.E. 737 (1929); Toledo, Columbus & Ohio River R. R. v. Miller, 108 Ohio St. 388, 140 N.E. 617 (1923); Cincinnati Traction Co. v. Woodmansee, 16 Ohio App. 314 (1922). However, one must take care that his petition show that his own negligence had ceased prior to the accident. Brock v. Marlatt, Adm'x., *supra;* Cleveland Ry. v. Wendt, *supra.*

[36] Cleveland Ry. v. Wendt, 120 Ohio St. 197, 165 N.E. 737 (1929).

[37] Cleveland Ry. v. Masterson, 126 Ohio St. 42, 183 N.E. 873 (1932); The Cincinnati Traction Co. v. Keehan, Adm'x., 45 Ohio App. 75, 186 N.E. 812 (1932).

One very simple solution to the problem is for the Ohio courts to permit a plaintiff to raise the issue of last clear chance by way of reply, which is the normal way of meeting an affirmative defense consisting of new matter.

Perhaps the most satisfactory solution to the whole problem lies in the abolition of the substantive law doctrine of last clear chance by adoption of the doctrine of comparative negligence. Under this doctrine contributory negligence is not regarded as an absolute defense; it is considered only in diminution of damages. All elements of the negligence of either party are admissible in evidence when negligence has been pleaded generally for under the doctrine of comparative negligence the issue of relative fault is raised as a matter of proof rather than by the pleading. Damages are then awarded in accordance with the proportionate fault of each party. Consequently, those facts which under the preseent law would establish last clear chance, are under the doctrine of comparative negligence only elements to be considered in determining the relative fault of the parties.[38]

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[38] "The whole last clear chance doctrine is only a disguised escape, by way of comparative fault, from contributory negligence as an absolute bar, and serves no useful purpose in states which have enacted apportionment statues." Mac Intyre, *The Rationale of Last Clear Chance,* 53 HARV. L. REV. 1225, 1251 (1940).