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Torts--Last Clear Chance--Left Turn Doctrine

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asserted against him. To sustain *federal question* jurisdiction over a declaratory judgment action, the courts normally look for a claim arising from a federal statute or the Constitution which could be coercively asserted by defendant.[17] It is even more reasonable for the court to determine the *amount in controversy* from the coercive claim which could be asserted by defendant,[18] *i.e.*, in the instant case, defendant's claim for $14,035, liability from which plaintiff seeks to be free.

It is believed, then, that in determining the rule of law established by this case the facts that: (1) under state procedure it was a de novo action; and (2) that the position of the parties and the issues involved are the same as in a declaratory judgment action, indicate that jurisdictional amount was not established by counterclaim.

H. Jefferson Herbert, Jr.

TORTS—LAST CLEAR CHANCE—LEFT TURN DOCTRINE—Action for injuries sustained by plaintiff when her automobile was struck by defendant's oncoming vehicle as plaintiff was negotiating a left turn at an intersection. The two automobiles involved were proceeding in opposite directions on the same street. Plaintiff's car stopped for a traffic light at an intersection. When it changed to green plaintiff proceeded to turn left and into the path of defendant's car which was proceeding through the intersection. The two cars collided within the intersection. The jury found both parties negligent and denied recovery. Plaintiff appealed contending the court erred in refusing to give instructions regarding last clear chance and the defendant's duty to yield the right-of-way. *Held*: Affirmed. To merit an instruction on last clear chance the burden was upon plaintiff to prove that the collision was caused by defendant's negligent act or failure to act after plaintiff placed herself in a position of peril. Plaintiff failed to sustain this burden of proof. An instruction was denied that it was the duty of defendant to yield the right-of-way if plaintiff en-

[17] See Pub. Serv. Comm'n v. Wycoff Co., 344 U.S. 237, 242 (1952); Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667 (1950).

[18] For federal question jurisdiction a claim must arise under the Constitution, laws or treaties of the United States. 28 U.S.C. §1331 (1958). This language restricts the jurisdictional determination to plaintiff's complaint more than 28 U.S.C. §1332(a) (1958), which requires that "the matter in controversy [exceed] . . . the sum or value of $10,000. . . ." If, in a declaratory judgment action, the court will look for a federal question which could be asserted coercively by defendant, a fortiori the court may determine the amount in controversy from such prospective coercive action.

tered the intersection reasonably well ahead of the defendant. Relying upon *Walton v. Grant*,[1] and *Elliott v. Drury's Adm'x*,[2] the instruction should have been given. However, this court has changed its position by holding that priority shall be given to the vehicle proceeding in a straight course. The above-mentioned cases were overruled, therefore, failure to instruct as requested was not error. *Rankin v. Green*, 346 S.W.2d 477 (Ky. 1961).

The court reiterated its disapproval of the last clear chance doctrine[3] but once again left its applicability subject to several interpretations. In addition, the court created the concept of absolute liability for a driver making a left turn who collides with an oncoming vehicle. Did the court really intend to establish as standards the burdens it appears to have placed upon the plaintiff in this case? The two aspects of the case, last clear chance and the left turn doctrine, will be discussed separately.

Last Clear Chance

The doctrine of last clear chance is a modification of the strict rules of contributory negligence. Emphasis is placed upon the time sequence of events, and the defendant will be held liable if immediately prior to the harm, he had a last clear chance to avoid the accident. The doctrine has been recognized, to some extent, in most jurisdictions; however, there is a considerable variance in the factual situations to which it is applied. The most troublesome problem presented is the test for its application: in order to have the last clear chance to avoid the accident is it necessary that the defendant *did see* plaintiff's peril, or is it necessary only that the defendant *should have seen* plaintiff's peril.[4]

This problem has given the Kentucky court difficulties. To justify submission of the doctrine to the jury the plaintiff must sustain the burden of establishing, as a matter of law, enough facts to show that the defendant had a last clear chance to avoid the accident.[5] Must plaintiff prove that the defendant *did see* his perilous position or only that he *should have seen* it?

Previously the doctrine, in Kentucky automobile cases, has been

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[1] 302 Ky. 194, 194 S.W.2d 366 (1946).
[2] 304 Ky. 93, 200 S.W.2d 141 (1947).
[3] Saddler v. Parham, 249 S.W.2d 945, 948 (Ky. 1952):
> While it might be desirable that a tightening of the doctrine of last clear chance be accompanied by a relaxation of the rules governing contributory negligence, it is difficult to see how the latter can be accomplished, short of the adoption of a comparative negligence statute.

[4] See, 2 Harper & James, Torts §2213 (1956); Prosser, Torts §52 (1955).
[5] Johnson v. Morris' Adm'x, 282 S.W.2d 835 (Ky. 1955); Saddler v. Parham, 249 S.W.2d 945 (Ky. 1952).

applicable if the defendant in the exercise of ordinary care *should have seen* plaintiff's peril.[6] In accordance with this theory, the court has justified submission of the doctrine to the jury where the defendant's testimony, as to when he did see plaintiff's peril, would establish that he did not have a last clear chance.[7]

In *Saddler v. Parham*,[8] the court, in criticizing the doctrines of contributory negligence and last clear chance, stated by way of dictum that the *should have seen* rule only applies when the plaintiff is physically unable to escape from his peril. Subsequent opinions have made no attempt to apply this standard in automobile cases, but instead have held that the *should have seen* rule is applicable in such cases. The opinions have not made a valid attempt to distinguish between cases where the plaintiff was physically unable to escape.[9] Any question relating to the proper application of the doctrine would appear to have been resolved in *Ross v. Vasseur*:

> The last clear chance rule, as it prevails in this jurisdiction in motor vehicle cases, applies where a negligent party's peril is not only actually discovered but also where it is reasonably obvious and *should have been* discovered by an approaching motorist in the exercise of ordinary care and diligence, as by observing a proper lookout duty. (Emphasis added.)[10]

The court in the principal case did not deem it necessary to enumerate any of the factual testimony on which it rejected the last clear chance instruction. If the rule is *should have seen*, as it appears to be, the record is replete with testimony sufficient to justify the instruction. Plaintiff testified that the defendant's automobile was one-half to three-fourths of a block away when the turn was started.[11] The driver of plaintiff's car testified that defendant's automobile was 200-250 feet away when the turn was started.[12] A bystander testified that the defendant was from 150-200 feet away when the turn was started,[13] and further that the defendant did not slow down, change directions or blow his horn.[14] The driver of defendant's automobile

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[6] Louisville Taxicab & Transfer Co. v. Tungent's Adm'r, 313 Ky. 1, 229 S.W.2d 985 (1950); Ramsey v. Sharpley, 294 Ky. 286, 171 S.W.2d 427 (1943). See Swift & Co. v. Thompson's Adm'r, 308 Ky. 529, 214 S.W.2d 758 (1948), for a resume of unconscious last clear chance cases.

[7] Louisville Taxicab & Transfer Co. v. Tungent's Adm'r, 313 Ky. 1, 229 S.W.2d 985 (1950); Cumberland Grocery Co. v. Hewlett, 231 Ky. 702, 22 S.W.2d 97 (1929).

[8] 249 S.W.2d 945 (Ky. 1952).

[9] Johnson v. Morris' Adm'x, 282 S.W.2d 835 (Ky. 1955).

[10] 320 S.W.2d 608, 611 (Ky. 1959): The court referred to Saddler v. Parham, 249 S.W.2d 945 (Ky. 1952), but apparently accorded it very little significance.

[11] Record, p. 4, q. 13, Rankin v. Green, 346 S.W.2d 477 (Ky. 1961).

[12] *Id.* at 125, q. 2.

[13] *Id.* at 57, q. 20-22.

[14] *Id.* at 58, q. 25-27.

testified that he saw plaintiff's car when he was 80-90 feet away,[15] and that he saw the car start to turn when he was within 10-15 feet of the intersection.[16]

The extreme variance in the testimony of plaintiff and defendant is the reason for giving the trier of fact discretion in weighing the testimony. In such a case as this, does the court invade the province of the jury in refusing the instruction? The court would be correct in denying the instruction if it relied only upon the testimony of the defendant that he was within 10-15 feet of the intersection when the turn was started. However, is it within the court's discretion to disregard the plaintiff's collaborative testimony? This demonstrates the necessity for the *should have seen* rule. If the *did see* rule is applicable defendant's testimony would constitute an absolute defense to the last clear chance doctrine. This premise arises out of the difficulty of proving what the defendant in fact did see, his testimony notwithstanding. The court in the principal case either weighed the testimony of the parties and decided in favor of the defendant, or it applied the *did see* rule. If the latter was the basis for the decision, which is the only justifiable basis, the court should have enunciated the rule to be followed in subsequent cases instead of leaving the question open to speculation.

Left Turn Doctrine

Turning left at an intersection when an automobile is approaching from the opposite direction often necessitates a decision as to whether the turn can be made safely. If a finding of contributory negligence is to be avoided for an ensuing collision with the oncoming automobile it would appear that the decision should be based on a reasonable judgment. Prior actions in Kentucky have been decided on this credible premise; however, in the principal case the court justified its holding by making the unqualified and unexplained statement that, "priority shall be given to the vehicle proceeding in a straight course."[17]

The court should take judicial notice that making a left turn is as inherently necessary to driving as proceeding in a straight course. Left turns must be made and the primary responsibility for making them safely is upon the turning driver; however, should it be an absolute responsibility? Must the turning driver assume that the oncoming driver sees nothing? Judgment is not infallible; a driver should be able to rely upon the other's attention to the road when

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[15] *Id.* at 81, q. 80.
[16] *Id.* at 82, q. 93.
[17] Rankin v. Green, 346 S.W.2d 477, 478 (Ky. 1961).

he makes a turn and if necessary that he will take slight avoiding action. The implication from the brief opinion in the principal case is that the driver proceeding in a straight course is not liable even if he fails to look, since he can expect the right-of-way. This is the only logical conclusion that can be drawn from the court's findings (when discussing the last clear chance instruction) of ample proof of defendant's antecedent negligence.[18]

The Kentucky legislature has expressed its intention: "no person shall turn a vehicle . . . unless and until such movement can be made with *reasonable* safety."[19] The legislature has further suggested what it considers as reasonable safety: "The operator of any vehicle when upon a highway shall travel upon the right side of the highway whenever possible, and unless the left side of the highway is clear of all other traffic or obstructions and presents a clear vision for a distance of at least one hundred and fifty feet ahead."[20] These statutory dictates sholud not be construed to give absolute priority to the vehicle proceeding in a straight course.

The court overruled *Walton v. Grant*[21] and *Elliott v. Drury's Adm'x.*[22] In both of these cases the court emphasized the statutory requirement that a turn be made with reasonable safety[23] and held that if the person making the turn reached and entered the intersection reasonably well ahead of the oncoming car, the latter must yield the right-of-way. These holdings offered a practical solution to the problem. If the decision to make the turn is based upon a *reasonable* judgment the driver will not be contributorily negligent; however, if the oncoming driver fails to keep a look-out and thus, to yield the right-of-way if necessary, he will be held liable, at least where only slight avoiding action, such as slowing, would permit the left turn to be completed safely.

Authority for overruling these cases was stated to be *Louisville Transit Co. v. Gipe*[24] and *Smith v. Sizemore.*[25] There is nothing in either opinion to suggest that the vehicle proceeding in a straight

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[18] *Id.* at 478.

[19] Ky. Rev. Stat. §189.380(1) (Emphasis added.) [hereinafter cited as KRS]

[20] KRS 189.300(1).

[21] 302 Ky. 194, 194 S.W.2d 366 (1946).

[22] 304 Ky. 93, 200 S.W.2d 141 (1947).

[23] KRS 189.380(1).

[24] 277 S.W.2d 52 (Ky. 1955): Plaintiff started a left turn across an intersection because he thought the bus was going to stop. The court held as a matter of law that plaintiff's negligence was the cause of the accident and directed a verdict for the defendant.

[25] 300 S.W.2d 225, 228 (Ky. 1957): "[I]t is clear that he failed in the 'reasonable safety' duty. . . . It has been clearly and conclusively shown that the injuries suffered by reason of the collision were the direct result of the sole negligence of Sizemore."

course had absolute priority. The cases were both decided on their facts, the court finding that the plaintiffs had in fact not made the turns with reasonable safety, which is the statutory requirement.

The opinion rendered in the principal case was contrary to the legislative intent and overruled established case law. It contributes to a mechanical jurisprudence in an area of conduct singularly in need of more flexible treatment. There is a compelling need for a more ample explanation for the result reached than was provided in this case.

Lowell T. Hughes

TORTS—CHARITABLE IMMUNITY—Decedent died from injuries allegedly received in a fall from a hospital bed while he was a patient in defendant's hospital. His administratrix charged that the injuries resulted from the negligence of the hospital and its agents. The defendant answered that it operated a non-profit, non-stock corporation, for purely charitable purposes, and was not liable for negligence under the doctrine of charitable immunity. Plaintiff's motion to strike was overruled and the complaint dismissed. *Held*: Reversed. Despite its previous contrary position, the court reasoned that charitable immunity was based upon expediency rather than right, and, standing alone, it was not a sufficient defense. *Mullikin v. Jewish Hosp. Ass'n*, 348 S.W.2d 930 (Ky. 1961).

The *Mullikin* decision placed Kentucky among a number of jurisdictions which have recently denied charitable immunity.[1] The Kentucky court overruled a precedent which was established in 1894, when a purely charitable institution was held immune from an action for assault upon an inmate by an institution employee.[2] Although the Kentucky court continued to uphold charitable immunity

[1] Wheat v. Idaho Falls Latter Day Saints Hosp., 78 Idaho 60, 297 P.2d 1041 (1956); Parker v. Port Huron Hosp., 105 N.W.2d 1 (Mich. 1960); Collopy v. Newark Eye & Ear Infirmary, 27 N.J. 29, 141 A.2d 276 (1958); Bing v. Thunig, 2 N.Y.2d 656, 143 N.E.2d 3 (1957); Avellone v. St. John's Hosp., 165 Ohio St. 467, 135 N.E.2d 410 (1956); Kojis v. Doctors Hosp., 12 Wis.2d 367, 107 N.W.2d 131 (1961). See Rodkey, *Charitable Immunity—A Tale of a Law in Flux*, 48 Ill., B.J. 644 (1960), listing twenty-one jurisdictions with no immunity and twenty jurisdictions with qualified immunity in 1960, and the Hosp. L. Manual, Negligence II, charts A, A 1 & A 2 (Atty's vol. 1961), listing only seven states with total immunity. A now out-dated survey is found in Annot., 25 A.L.R.2d 29, 143-200 (1952). *Contra*, Tomlinson v. Trustees of Univ. of Pa., 164 F. Supp. 352 (E.D. Pa. 1958); Muller v. Nebraska Methodist Hosp., 160 Neb. 279, 70 N.W.2d 86 (1955); Memorial Hosp. Inc. v. Oakes, Adm'x, 200 Va. 878, 108 S.E.2d 388 (1959). See Joachim, *Questionable Status of Charitable Immunity*, 32 Conn. B.J. 330, 331 (1958) listing fifteen reasons given for the charitable immunity doctrine.

[2] Williams v. Ind. School of Reform, 93 Ky. 251, 24 S.W. 1065 (1894).