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Application of the Humanitarian Doctrine by the Kentucky Court of Appeals

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by the other party for more than one year.[27] Query: If both parties are in fault in the sexual separation, and this condition continues for five years, should a divorce not be granted on the ground of living apart without cohabitation although the parties may have resided in this same house during that period?[28]

"Living apart without cohabitation for five consecutive years next before application"[29] is ground for divorce in the following situations:

1. Where either party has deserted the other and lived apart for five years, irrespective of who was at fault in the separation.[30]

2. Where the parties have lived apart for five consecutive years because one of them was confined in prison.[31]

This statute is not ground for a divorce in the following situations:

1. Where the parties have lived apart for five consecutive years but where one spouse was confined in an insane asylum for all or part of that time.[32]

2. Where the parties have lived apart for five consecutive years but where the defendant had no notice that the other spouse intended to cease cohabitation.[33]

It is not clear whether a divorce would be allowed under this statute where the parties continued to live in the same house, but where sexual intercourse was refused.[34]

Query: Would collusion prevent a divorce under this statute where the parties lived apart by agreement for five years?[35]

ELWOOD ROSENBAUM.

APPLICATION OF THE HUMANITARIAN DOCTRINE BY THE KENTUCKY COURT OF APPEALS

Since the doctrine of last clear chance is the parent and predecessor of the rule of law dealt with in this note, a preliminary analysis of the last clear chance doctrine seems necessary.

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[27] Garrison v. Garrison, 31 Ky. L. Rep. 1209, 104 S. W. 980 (1907).

[28] It is submitted that, as the fault of the parties is immaterial under this provision and abandonment is considered more serious than living apart, a divorce should be allowed in this case.

[29] Ky. Stat. (Carroll, 1936) section 2117.

[30] See note 11, *supra*.

[31] See note 18, *supra*.

[32] See note 13, *supra*.

[33] See note 17, *supra*.

[34] Compare Gates v. Gates, 192 Ky. 253, 232 S. W. 378 (1921) with Evans v. Evans, 247 Ky. 1, 56 S. W. (2d) 547 (1933).

[35] It is submitted that if the statute assumes the parties have lived apart because of their mutual purpose to do so, and if the proposition underlying the statute is that stated in the introduction to this note, collusion would not defeat an action for divorce in this instance.

From a careful study of representative cases on the subject,[1] it is found that the doctrine of last clear chance is generally applied in the following factual situations: (1) Plaintiff, by his own negligence, has placed himself in a position of helpless peril; defendant has sufficient notice of plaintiff's peril to enable him, through the use of ordinary care, to avoid injuring plaintiff.[2] (2) Plaintiff could, by the use of care, remove himself from the position of peril in which he has negligently placed himself, but negligently remains unconscious of that peril; defendant has notice of plaintiff's peril, and of plaintiff's unconsciousness thereof, in time, by the use of care on his (defendant's) part, to avoid injury to plaintiff.[3] (3) Plaintiff has negligently placed himself in a position of helpless peril; defendant is not aware of plaintiff's peril, yet by using due care defendant could have discovered it in time to enable him, by the use of care, to avoid injuring plaintiff.[4] The application of the doctrine in those circumstances necessarily presupposes an ability on defendant's part to avoid injury to plaintiff after discovering the latter's peril. However, the courts are not in accord when confronted with a situation where defendant, prior to the time of the collision, has negligently failed to provide himself with effective means of avoiding the accident.[5]

The humanitarian doctrine obviously is an extension of the above principles to a case where, though the actual injury is produced by the concurrent negligence of both plaintiff and defendant, yet "if defendant, before the injury, discovered, *or by the exercise of ordinary care could or might have discovered* the perilous situation in which the plaintiff was placed . . . and neglected to use the means at his command to prevent the injury",[6] the defendant is liable.

The humanitarian doctrine is by no means universally accepted,

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[1] Robbins v. Pennsylvania Co., 345 Fed. 435 (1917); Ala. Power Co. v. Bradley, 18 Ala. App. 533, 93 So. 73 (1922); Palmer v. Tschudy, 191 Cal. 696, 218 Pac. 36 (1923); Collom v. Black, 69 Cal. App. 789, 232 Pac. 486 (1924); Malone v. Los Angeles Ry. Corp., 72 Cal. App. 736, 238 Pac. 110 (1925); Colo. & S. Ry. Co. v. Western Light & Power Co., 73 Colo. 107, 214 Pac. 30 (1923); Bujnak v. Connecticut Co., 94 Conn. 468, 109 Atl. 244, (1920); Gibbard v. Cursan, 225 Mich. 311, 196 N. W. 398 (1923); Stricklin v. Chicago, M. & St. P. Ry. Co., 59 Mont. 367, 197 Pac. 839 (1921); Fry v. Southern Public Utilities Co., 183 N. C. 281, 111 S. E. 354 (1922); Schaff v. Verble, —— Tex. Civ. App. ——, 240 S. W. 597 (1922); see also 19 Ky. L. J. 179–240; 29 Yale L. J. 896; Harper, "The Law of Torts," Secs. 139-40.

[2] Grand Trunk R. R. v. Ives, 144 U. S. 408; 12 Sup. Ct. 679 (1892).

[3] Cavanaugh v. Boston & Me. R. R., 76 N. H. 68, 79 Atl. 694 (1911).

[4] Nichol v. The Ore.-Wash. R. R. & N. Co., 71 Wash. 409, 128 Pac. 628 (1912).

[5] Braden's Admx. v. Liston (automobile case), 258 Ky. 44, 79 S. W. (2d) 241 (1934), cases and texts cited therein; see also British Columbia Ry. v. Loach, 1 A. C. Reports 719 (1916) (defective brakes); 66 U. of Pa. L. Rev. 73.

[6] Becktenwald v. Metropolitan St. Ry., 121 Mo. App. 595, 97 S. W. 557 (1906).

having been rejected in a considerable number of jurisdictions,[7] generally by way of requiring actual knowledge of plaintiff's danger on defendant's part to subject defendant to liability. The American Law Institute[8] rejects the doctrine on principle, but does not label it with its familiar name. On the other hand, a number of respectable jurisdictions accept and apply the humanitarian doctrine.[9]

The Kentucky Court of Appeals, from an early date,[10] has repeatedly defined and applied the humanitarian doctrine,[11] although in several isolated cases there seems to be a confusion in terminology. In *Peak* v. *Arnett*,[12] the Court approved the doctrine of last clear chance, and in support thereof cited two clear cases[13] of the humanitarian doctrine. The same apparent confusion appears in the later automobile case of *Cumberland Grocery Co.* v. *Hewlett*.[14] Again, in *Mullins* v. *Cincinnati, N. & C. Ry.*,[15] the Court, in reversing a judgment for defendant, said:

> "On another trial, if one is had, the court will instruct the jury to find for the defendant, unless it believes from the evidence the motorman in charge of the defendant's street car failed to exer-

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[7] Ia. Cent. Ry. v. Walker, 203 Fed. 685 (1913); Miller v. Canadian Northern Ry., 281 Fed. 664 (1922); St. Louis S. W. Ry. v. Cochran, 77 Ark. 398, 91 S. W. 747 (1906); Waterman v. Visalia Elec. Ry., 23 Cal. App. 350, 137 Pac. 1096 (1913); Specht v. Chicago City Ry., 233 Ill. App. 384 (1924); Wolf v. Chicago Great Western Ry., 166 Iowa 506, 147 N. W. 901 (1914); Stanoshek v. Chicago, R. I. & P. Ry., 198 Iowa 62, 199 N. W. 310 (1924); Zitnik v. Union Pac. Ry., 91 Neb. 697, 136 N. W. 995 (1912); Spillers v. Griffin, 109 S. C. 65, 95 S. E. 133 (1918).

[8] Restatement of the Law of Torts, Sec. 480 (comment); 25 Ky. L. J. 386.

[9] Brown v. Kan. Elec. Utility Co., 110 Kan. 283, 203 Pac. 907 (1922); Ross v. Louisville Taxicab & Transfer Co., 202 Ky. 828, 261 S. W. 590 (1924); Bibb v. Grady, 231 S. W. (Mo.) 1020 (1921); Hornbuckle v. McCarty, 295 Mo. 162, 243 S. W. 327 (1922); Morris v. Chicago, R. I. & P. Ry., 251 S. W. (Mo.) 763 (1923); Williams v. Fleming, 218 Mo. App. 563, 267 S. W. 6 (1924); Moore v. St. Louis & S. F. Ry., 267 S. W. (Mo.) 945 (1925); Ray v. Aberdeen R. R., 141 N. C. 84, 53 S. E. 622 (1906); Kinney v. St. Louis & S. R. R., 38 Okla. 426, 133 Pac. 180 (1913); Nicol v. The Ore.-Wash. R. & N. Co., 71 Wash. 409, 128 Pac. 628 (1912), cited supra, n. 4.

[10] L. & N. R. R. v. Yandell, 17 B. Mon. 587 (1856). (This case is capable of two interpretations, but it seems reasonable to say that the Court applied, or defined, the humanitarian doctrine); see 19 Ky. L. J. 240.

[11] L. & N. R. R. v. McCoy, 81 Ky. 403 (1883); L. & N. R. R. v. Earl's Admx., 94 Ky. 368, 22 S. W. 607 (1893); L. & N. R. R. v. Lowe, 118 Ky. 260, 80 S. W. 768 (1904); Louisville Ry. v. Broaddus' Admr., 180 Ky. 298, 202 S. W. 654 (1918); Williams Motor Co. v. Howard et al., 251 Ky. 557, 65 S. W. (2d) 688 (1933) (automobile case); see also Smith v. Ferguson, 256 Ky. 545, 76 S. W. (2d) 606 (1934).

[12] 233 Ky. 756, 26 S. W. (2d) 1035 (1930).

[13] Paducah Traction Co. v. Walker's Admr., 169 Ky. 721, 185 S. W. 119 (1916); Louisville Ry. v. Broaddus' Admr. 180 Ky. 298, 202 S. W. 654 (1918), cited supra, n. 11.

[14] 231 Ky. 702, 22 S. W. (2d) 97 (1929).

[15] 253 Ky. 156, 68 S. W. (2d) 790 (1934).

cise ordinary care to avoid injuring plaintiff, after he discovered, *or by the exercise of ordinary care, could have discovered*, her peril, and that by such failure, if any, she was thereby injured, you will find for the plaintiff."

No clearer statement of the humanitarian doctrine could be desired. Yet the Court, in that case, termed it the humanitarian *or* last clear chance doctrine, and cited in support the *Cumberland Grocery Company* case *supra*, and the *Williams Motor Company* case,[16] which clearly applies the humanitarian doctrine.

In a recent case,[17] the Kentucky Court approved the humanitarian doctrine in its application to railroads, but refused to allow plaintiff to benefit thereby under that particular set of facts. The Court there restricted the doctrine to longitudinal passways sufficiently used to require operators of trains to anticipate the presence of persons on the tracks at those points. It would seem that such restriction is in keeping with the cardinal requirement of the humanitarian doctrine that defendant be under some duty, the breach of which may constitute lack of ordinary care in discovering a negligent plaintiff's peril. Again, in *Kinsella et al.* v. *Meyer's Admr.*,[18] the Court framed an instruction to be used in the second trial which, it is submitted, is a perfect enunciation of the principles of the humanitarian doctrine. Yet the Court said that the facts presented "a situation that calls for the 'last clear chance doctrine' ".

It is submitted that the real distinction to be made between the doctrine of last clear chance and the humanitarian doctrine is that under the latter plaintiff is actively negligent, not helpless, and could by waking up to his condition, remove himself from danger, while defendant is *unaware* of plaintiff's peril, yet if he had used care *he could have discovered* plaintiff's condition in time to avoid the injury. It is submitted that it is a matter of practical importance that the distinction between these two doctrines be maintained, since it is evident that a plaintiff might be denied a recovery under the doctrine of last clear chance, and yet be entitled to a judgment under the humanitarian doctrine if defendant is guilty of a breach of a duty to keep a lookout.

STEVE WHITE.

CONSTITUTIONAL LAW: SOVEREIGN WAIVING PRIVILEGE OF IMMUNITY FROM SUIT CAN LIMIT THE AMOUNT TO BE RECOVERED

A recent Kentucky case[1] upheld a statute permitting a motorist who collided with a truck operated by an employee of the State Highway Commission to sue the Commonwealth for recovery of not more than $6,000. The court held that such a statute did not violate a con-

[16] 251 Ky. 557, 65 S. W. (2d) 688 (1933), cited supra, n. 11.

[17] Cincinnati, N. O. & T. P. Ry. v. Wallace's Admr., 267 Ky. 661, 103 S. W. (2d) 91 (1937).

[18] 267 Ky. 508, 102 S. W. (2d) 974 (1937) (automobile-pedestrian case).

[1] Commonwealth v. Daniel, 266 Ky. 285, 98 S. W. (2d) 897 (1936).