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Recent Cases

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RECENT CASES

EVIDENCE—CONFIDENTIAL COMMUNICATIONS—STATEMENT MADE CONFIDENTIALLY TO CLERGYMAN WAS INADMISSIBLE IN CRIMINAL PROSECUTION—Defendant was charged with violating Section 22-901 of the District of Columbia code under which it is a crime to torture, cruelly beat, abuse or otherwise wilfully maltreat a child. The defendant's children were found chained at home while she was absent. During the course of defendant's trial, a Lutheran minister, who had appeared as a character witness in behalf of the defendant, approached the bench and informed the judge that during his appearance on the stand he had been unable to say all that his conscience impelled him to say. On being recalled as the court's witness, the minister disclosed the content of a penitential confession made by the defendant to him while she was incarcerated in the District prison. No objection was voiced by defendant's counsel. The jury found the defendant guilty as charged, and she was sentenced accordingly by the District Court for the District of Columbia. On appeal, *held,* judgment of conviction reversed; admission of a defendant to a minister that she had chained her children after he had urged her to confess her sins was a privileged communication; testimony thereof by the minister was inadmissible. When reason and experience call for recognition of a privilege, "the dead hand of the common law will not restrain such recognition." *Mullen v. United States,* 263 F. 2d. 275 (1959).

Under existing statutory law in the District of Columbia, physicians are the only professional group specifically exempt from testifying in regard to information received in their professional capacity. D.C. CODE 1951, § 14-309. Because no statute exempting as competent evidence communications between a penitent and a minister of the gospel exists, the District of Columbia has supposedly followed the common law rule: Communications to clergymen or other church or ecclesiastical officers are not privileged. 58 AM. JUR., *Witnesses,* § 531; Note, 22 A.L.R. 2d, 1154. By the weight of authority American acceptance of the so-called common law rule is based upon the fact that the privilege was not recognized in England. 5 WIGMORE, EVIDENCE, (3d.) 1940, § 2394. Since the colonies adopted the common law as it existed in England, early American cases are based solely on English decisions which denied the existence of the privilege. *Commonwealth v. Drake,* 15 Mass. 161 (1818) and *Simon v. Gratz,* 2 Penn. Rep. 417 (1831). The English cases most frequently cited as establishing the rule that the privilege did not exist at common law are: *Anonymous, Skinner,* 402, 90 Eng. Rep. 179 (1693); *Vaillant v. Dodemead,* 2 Atk. 524, 26 Eng. Rep. 715 (1743); *DuBarre v. Livette,* Peake 108, 170 Eng. Rep. 96 (1791); and *Wilson v. Rastall,* 4 T.R. 753, 100 Eng. Rep. 1283 (1792). Although all four cases discuss the privilege, not one of them presents a case on point. Later cases on the subject—with one exception—are no more conclusive. *Butler v. Moore,* McNalley 253 (1803); *Broad v. Pitt,* 3 Car. & P. 518, 172 Eng. Rep. 528 (1828); *Regina v. Hay,* 2F. & F.4, 175 Eng. Rep. 933 (1860); and *Anderson v. Bank of British Columbia* 35 L.T. (N.S.) 76 (1876) are continually cited in American decisions as common law cases which denied the existence of the penitential privilege. Yet a study of these cases reveals that only two—*Butler v. Moore* and *Regina v. Hay*—even involve clergymen. The one case that does deny the existence of the privilege is an 1893 case, *Normanshaw*

v. Normanshaw, 69 L.T. (N.S.) 468. There, in an action for divorce on the ground of adultery, a vicar was compelled to testify to a conversation with a parishioner. Although this case is in point, the lateness of its date dulls its persuasiveness as evidence of the common law rule for American courts.

As might be expected, the common law rule has occasionally resulted in citations for contempt being imposed upon clergymen who refused to reveal the subject matter of a confession. See *Bahrey v. Poniatishin,* 95 N.J.L. 128, 112 Atl. 481 (1921). Fortunately, however, courts confronted with the issue generally have respected ecclesiastical law, and have held that because of the sacredness of the communication, no disclosure is required. Courts have frequently resolved the problem by making a determination as to whether the communication amounts to a spiritual confession from the surrounding circumstances. *In Re Swenson,* 183 Minn. 602, 237 N.W. 589 (1931).

Despite the manifest reluctance of the courts to require a clergyman to disclose the content of a penitential communication, state legislatures have deemed it necessary to enact statutes prohibiting a clergyman or other minister of religion from disclosing a confession made to him in his professional character. Today thirty-five states have such statutes. 8 WIGMORE EVIDENCE, (3d.) 1940, Supp. 1957, § 2395. The District of Columbia will soon join this list. During the 1st session of the 86th Congress, a bill to create the privilege in the District of Columbia, H.R. 4192, easily passed the House of Representatives. Adjournment, however, prevented the Senate from taking any action on it.

In view of the aforementioned history of the privilege at issue, it would seem that the Court of Appeals could have disposed of the present case by affirming the lower court on the ground that the privilege does not exist without statutory enactment to the contrary, or by reversing because a study of the case law on the subject does not substantiate the supposed common law rule. In effect, the court chose to do neither. Instead, it ruled that the recognition of the privilege in federal courts neither depends on its existence at common law, nor its approval by Act of Congress, but that it had the power to determine the admissibility of evidence under "principles of common law as they may be interpreted . . . in light of reason and experience." See Rule 26 Fed.R.Crim.P., 1948. Using this formula the court ruled that the privilege should be recognized.

This holding may start a new trend with regard to the doctrine of the privileged communication. In recent years, there has been a movement by lawmen to narrow the field of the statutory privilege which has now been extended to confidential communications received by journalists, accountants, and radio-TV newscasters and sought by the marriage counsellor and the social worker. MCCORMICK EVIDENCE, § 81. The method they propose is not new. They call for a return of the rule that grants the trial judge discretionary power to determine whether or not a particular communication should be deemed privileged. In this way, it is contended, he could prevent those disclosures which needlessly shock our feelings of delicacy, and at the same time override minor amenities when it appears necessary in order to secure the facts essential to do justice in a case before him. Indeed, such a solution seems to be the only way to prevent the doctrine of the privileged communication from being ultimately applied to all confidential communications received by professional people.

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TORTS—LAST CLEAR CHANCE—LAST CLEAR CHANCE IS SUPERSEDED UNDER COMPARATIVE NEGLIGENCE STATUTE—The plaintiff was a railroad flagman. He was struck by a train he was supposed to flag. On the night of the accident he was working with a crew on the railroad's special work train. To protect the work train crew the plaintiff was directed to flag two trains, one southbound and the other northbound. He flagged the southbound train and then walked down the track to the place where he was to wait for the other train. He carried signal equipment. His lantern was lit when he walked down the track. He placed his torpedoes, and he waited for the train. He was struck by the train and seriously injured. He sued for damages under the Federal Employers Liability Act. There was evidence for the defendant that the plaintiff was sitting on the track when he was struck by the train. The trial judge submitted the case to the jury with instructions on comparative negligence and last clear chance. The jury found a verdict for the plaintiff for $115,000. On appeal, held, judgment reversed and the case remanded; the doctrine of last clear chance should not have been submitted to the jury in this case. *Atlantic Coastline R. v. Anderson,* 267 F. 2d 329 (C.A. 5th, 1959).

The doctrine of last clear chance modifies the strict rule of contributory negligence. The doctrine is old. See *Davies v. Mann,* 10 M. & W. 546, 152 Eng. Rep. 588 (1842). In the *Davies* case the plaintiff was suing for the value of a donkey which had been grazing in the highway where it was struck and killed by the defendant's milk cart. The court held that contributory negligence was not a defense because there was evidence that the driver should have seen the plaintiff's donkey in the highway and could have avoided the accident. American courts have followed the English case but not without qualification. A generation ago some courts refused to apply the doctrine when the plaintiff's negligence was active and continuous down to the time of the accident. *Jones v. Chicago, R.I. & P. Ry.,* 162 La. 690, 111 So. 62 (1926); *Everett v. Los Angeles Consol. Ry.,* 115 Calif. 105, 43 Pac. 207, 46 Pac. 889 (1896). Most often nowadays courts recognize that the doctrine is applicable, even when the plaintiff is actively negligent, if the evidence indicates that the defendant should have discovered the plaintiff's predicament and could have avoided the accident. *Capital Transit Co. v. Garcia,* 194 F. 2d 162, 90 D.C. App. 168 (1952); *Russo v. Texas & P. Ry.,* 189 La. 1042, 181 So. 485 (1938).

Except for what they have done with last clear chance, courts have not compromised with contributory negligence. Comparative negligence is not judge-made. It rests on statute. Ark. Laws (1957—Supp.) §§ 27.1742.1, 27.1742.2; FLA. STAT. ANN. (1955) § 768.06; MISS. STAT. ANN. (1942) § 1454; NEB. REV. STAT. ANN. (1943) § 25.1151; S.D. CODE (1953) § 47.0304-1; WIS. STAT. ANN. (1958) § 331.045. *Cf.* The Federal Act (FELA) 45 U.S. CODE § 53. What does comparative negligence do to last clear chance? The legislature in Arkansas spoke positively. Last clear chance was superseded. Ark. Laws (1955) No. 191, § 1. That part of the statute was repealed by the next legislature. Ark. Laws (1957) No. 296 § 3. *Cf.* Wis. Laws (1951) c. 199 (where legislature repealed special railroad crossing comparative negligence law and opened door for last clear chance). The case law is still thin. The court in the instant case relied on *Loftin v. Nolin* [86 S. 2d 161 (Fla. 1956)] and *St. Louis Southwestern Ry. v. Simpson* [286 U.S. 346 (1932)]. The Florida court in *Loftin* overruled earlier cases and

decided that comparative negligence supersedes last clear chance. *Cf. Seaboard Airline Ry. v. Martin,* 56 S. 2d 509 (Fla. 1953); *Poindexter v. Seaboard Airline Ry.,* 56 S. 2d 905 (Fla. 1951); see *Martin v. Sussman,* 82 S. 2d 597 (1955). The *Simpson* case is not squarely in point, but in that case the United States Supreme Court agreed with the railroad that the record did not point up a case for last clear chance because the company's employees did not know of the decedent's predicament.

Some text writers have concluded that the two doctrines are incompatible. MacIntyre, *Last Clear Chance After Thirty Years Under the Apportionment Statute,* 33 CAN. BAR. REV. 257, 283 (1955); *cf.* James, *Last Clear Chance, A Transitional Doctrine,* 47 YALE L. J. 704, 721 (1938). Perhaps it should be that comparative negligence destroys the possibilities for last clear chance when the plaintiff's conduct was active and continuing down to the time of the accident. Nevertheless, it is submitted that policy choosers can distinguish between that kind of case and the restricted one recognized as within the doctrine by some courts thirty years ago. When the plaintiff is helpless before the accident occurs, and if there is evidence that the defendant's employees could have discovered the plaintiff's predicament in time to avoid the accident, there is room for last clear chance even under a comparative negligence statute. The instant one looks like that kind of case. *Cf.* Wis. Laws (1951) c. 199.

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