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# The Last Clear Chance Doctrine in Louisiana - An Analysis and Critique

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## COMMENTS

### THE LAST CLEAR CHANCE DOCTRINE IN LOUISIANA— AN ANALYSIS AND CRITIQUE

*The doctrine of last clear chance, stated broadly, is that the negligence of the plaintiff does not preclude a recovery for the negligence of the defendant where it appears that the defendant by exercising reasonable care and prudence might have avoided injurious consequences to the plaintiff notwithstanding the plaintiff's negligence.*<sup>1</sup>

The last clear chance doctrine<sup>2</sup> has grown to play a prominent role in the law of negligence since its birth in the mid-nineteenth century. It has been applied with increasing frequency, and although originally created to avoid some of the rigidity and harshness of the contributory negligence rule,<sup>3</sup> it has itself become plagued with technicalities, rigidity and misuse.<sup>4</sup> The doctrine, recognized by practically all states,<sup>5</sup> now knows almost as many variations as there are states that apply it.<sup>6</sup> This Comment traces the history of the doctrine, examines its development in Louisiana, investigates its present state and offers some criticism of the doctrine itself and its application in certain cases.

#### I. INTRODUCTORY ANALYSIS OF THE DOCTRINE

##### *Origin, Purpose, and Meaning of Last Clear Chance*

Last clear chance was created to escape the harsh effects of the strict contributory negligence rule, under which a negligent

1. 38 AM. JUR. *Last Clear Chance* § 215 (1941).

2. Also known as the 'discovered peril doctrine,' 'apparent peril doctrine,' 'humanitarian doctrine,' 'donkey doctrine,' 'last opportunity doctrine,' and even the 'jackass doctrine,' with whatever implications it may carry. PROSSER, *TORTS* § 65 n.99 (3d ed. 1964).

3. See FLEMING, *TORTS* 218-19 (2d ed. 1961) [hereinafter cited as FLEMING]; PROSSER, *TORTS* § 65, at 438 (3d ed. 1964), [hereinafter cited as PROSSER]; Green, *Contributory Negligence and Proximate Cause*, 6 N.C.L. REV. 3, 21-33 (1927); MacIntyre, *The Rationale of Last Clear Chance*, 53 HARV. L. REV. 1225, 1236 (1940).

4. See generally PROSSER § 65; Green, *Contributory Negligence and Proximate Cause*, 6 N.C.L. REV. 3, 21-33 (1927).

5. See PROSSER § 65 and Green, *Contributory Negligence and Proximate Cause*, 6 N.C.L. REV. 3, 25 (1927), where it is indicated that the few courts which do not recognize the doctrine by name enforce its spirit by employing the concepts of proximate cause and wilful and wanton conduct to circumvent the contributory negligence rule.

6. See generally PROSSER § 65.

plaintiff could never recover from a negligent defendant if plaintiffs' negligence was a cause of his own injury.<sup>7</sup> The birth of the doctrine has been attributed to the 1842 English case of *Davies v. Mann*.<sup>8</sup> A farmer's donkey fettered on a public road was struck and killed by defendant's wagon, which was being driven at a "smartish pace." The court found that defendant, by using ordinary care, could have avoided hitting the helpless donkey and allowed the farmer to recover though he too might have been negligent in leaving his donkey tied in the road.

The contributory negligence rule precludes weighing the respective fault of the parties and placing the loss on the party more at fault.<sup>9</sup> A negligent plaintiff simply could not recover from a negligent defendant. This result is open to serious criticism,<sup>10</sup> and no doubt the judiciary has been aware of the unfortunate results possible under a strict application of that defense. Still, in most jurisdictions, contributory negligence remains an absolute bar to a negligent plaintiff's recovery<sup>11</sup> unless his case can be brought under some exception to the rule. *Davies v. Mann* supplied one important exception where relief was probably needed most.<sup>12</sup>

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7. See note 3 *supra*; FLEMING 218-19: "When the contributory negligence has assumed its all-or-nothing corollary, the courts disabled themselves from allocating the loss in proportion to the degree of fault of each of the negligent parties, but the problem postulated by the frequent inequalities in the respective shares of responsibility remained. Theoretically, even a slight departure from the standard of care exacted by law totally debarred the plaintiff from recovery however gross in comparison the defendant's own fault may have been. Not surprisingly, increasing irritation with the rigour of the mechanical stalemate rule led to a search for some other formula which could offset its operation in situations where it involved too drastic a departure from current notions of justice.

"It was . . . with a view to circumventing the common law refusal to countenance a theory of comparative fault, that the last opportunity rule [*i.e.*, last clear chance] was invented. Just as contributory negligence was defendant's doctrine, so this became a plaintiff's doctrine." See also *Brown v. Louisville & Nashville R.R.*, 135 F. Supp. 28, 30 (E.D. La. 1955), *aff'd*, 234 F.2d 204 (5th Cir. 1956).

Sometimes defendant's conduct is deemed wilful, wanton, or reckless, and plaintiff recovers on the grounds that defendant has committed an intentional tort, or at least a tort lying outside the defense of contributory negligence. See PROSSER 436.

8. 10 M. & W. 546, 152 Eng. Rep. 588 (1842). See generally James, *Last Clear Chance: A Transitional Doctrine*, 47 YALE L.J. 704 (1938); MacIntyre, *The Rationale of Last Clear Chance*, 53 HARV. L. REV. 1225 (1940).

9. See generally MacIntyre, *The Rationale of Last Clear Chance*, 53 HARV. L. REV. 1225 (1940).

10. See note 7 *supra*. See also 2 HARPER & JAMES, TORTS § 22.3 (1956).

11. For a discussion of comparative negligence statutes enacted in a few states, see Prosser, *Comparative Negligence*, in SELECTED TOPICS ON THE LAW OF TORTS 1, 19-45 (1956).

12. In its own time *Davies* was not considered revolutionary. See generally James, *Last Clear Chance: A Transitional Doctrine*, 47 YALE L.J. 704 (1938); MacIntyre, *The Rationale of Last Clear Chance*, 53 HARV. L. REV. 1225 (1940).

The last clear chance doctrine, a product of judicial policy,<sup>13</sup> is but a device which enables the judge or jury in effect to weigh the respective fault of the parties where otherwise no balancing would be possible and permits an imposition of liability upon the party more to blame.<sup>14</sup> *Davies v. Mann* illustrates the essential factors considered in finding defendant more at fault:<sup>15</sup> The farmer's negligence was slight, he merely left his donkey fettered on the side of a road. Defendant alone had the ability to avoid hitting the helpless donkey, for the donkey could not move from the defendant's path. Defendant drove the wagon into the donkey although there was sufficient room for him to have safely driven around it. And, his negligent conduct was later in time than that of the plaintiff. This principle is clear and simple; but when the catch-phrase *last clear chance* was used to label it, the underlying policy soon was clouded by a

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One view of *Davies* is that it is consistent with the contributory negligence rule as iterated in *Butterfield v. Forrester*, 11 East 60 (K.B. 1809); for *Butterfield* may mean simply that the one — there *plaintiff* — having a later opportunity to avoid a mishap caused in part by another's fault cannot recover damages if he failed to utilize that later opportunity. *Davies* merely applied the rule of *Butterfield* to facts where *defendant* had the last opportunity to avoid the accident; thus he had to bear all the loss. While both cases voiced the concept that the loss be placed on the last wrongdoer, later cases construed *Butterfield* as imposing an absolute bar against plaintiff's recovery if he was partially at fault regardless of the sequence of the parties' negligent acts. Then *Davies* became known as a qualification of or exception to the contributory negligence rule of *Butterfield*. See FLEMING 218; 2 HARPER & JAMES, TORTS § 22.12 (1956); MacIntyre, *supra*, at 1225-35; Schofield, *Davies v. Mann: Theory of Contributory Negligence*, 3 HARV. L. REV. 263, 273 (1890). The principle of the two cases became further entangled in the question of causation: "[The last wrongdoer] rule apparently rests upon the theory that contributory negligence is wholly a question of proximate cause, and . . . it follows logically that a person guilty of the last negligence . . . is alone responsible; for his negligence is the sole proximate cause. It also follows logically that whenever the plaintiff's negligence precedes that of the defendant, it is not *contributory* negligence; and the rules of contributory negligence can apply only where the negligence of the plaintiff is concurrent and simultaneous with that of the defendant." Schofield, *supra* at 274 n.5. See also 1 SHEARMAN & REDFIELD, NEGLIGENCE § 118 (1941); SALMOND, TORTS § 10, ¶ 10 (6th ed. 1924). But this reasoning breaks down where there are joint tortfeasors. For criticisms see 2 HARPER & JAMES, TORTS 1244-45 (1956); PROSSER 436-37; Bohlen, *Contributory Negligence*, 21 HARV. L. REV. 233, 237-38 (1908); Green, *Contributory Negligence and Proximate Cause*, 6 N.C.L. REV. 3, 23-30 (1927); James, *supra* at 707-08; Price, *Applicability of Last Clear Chance in Mississippi*, 29 MISS. L.J. 250-51 (1958); Schofield, *supra* at 367-69.

13. Cf. FLEMING 218-21; Green, *Contributory Negligence and Proximate Cause*, 6 N.C.L. REV. 3 (1927); James, *Last Clear Chance: A Transitional Doctrine*, 47 YALE L.J. 704 (1938); MacIntyre, *The Rationale of Last Clear Chance*, 53 HARV. L. REV. 1225 (1940).

14. See FLEMING 217-19. See generally MacIntyre, *The Rationale of Last Clear Chance*, 53 HARV. L. REV. 1225 (1940).

15. See FLEMING 218; MacIntyre, *The Rationale of Last Clear Chance*, 53 HARV. L. REV. 1225, 1231 (1940).

mass of judicial verbiage.<sup>16</sup> If today's courts would not lose sight of the supporting policy, perhaps less difficulty would be encountered in the doctrine's application.

Last clear chance does not apply until it is shown that *both* plaintiff and defendant were negligent and their negligence was a cause of the ensuing injury.

The doctrine's literal terms, last clear chance, express its historic requisites. For the doctrine to be applied against him, defendant must have had sufficient means to avoid the accident after plaintiff's peril became apparent (a *chance*); his opportunity must have been one a reasonable man would have utilized (a *clear chance*); and he must have had the final opportunity to avert the harm (the *last chance*). This last requisite is the essence of *Davies v. Mann*. It presupposes that plaintiff is helpless in a peril from which he could not extricate himself, while defendant yet has the time and means to avoid him. This makes time a crucial factor in the applicability of the doctrine<sup>17</sup> and acknowledges the "medieval principle"<sup>18</sup> that the last wrongdoer is the one more at fault; thus he alone should be liable.<sup>19</sup> One may question the last wrongdoer principle;<sup>20</sup> nonetheless, when courts are confronted with the necessity of determining the rights between two parties at fault, they cannot be seriously criticized for seizing upon a circumstance such as time sequence when it generally leads to the proper solution.

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16. See Green, *Contributory Negligence and Proximate Cause*, 6 N.C.L. REV. 3, 21-30 (1927).

17. 1 SHEARMAN & REDFIELD, NEGLIGENCE 288 (1941): "The doctrine contemplates an 'after negligence,' sometimes termed wilfulness, as contrasted with that violation of an initial duty which is offset by plaintiff's contributory negligence."

18. James, *Last Clear Chance: A Transitional Doctrine*, 47 YALE L.J. 704-08 (1938).

19. *Ibid.*; FLEMING 217-20; PROSSER 438; 1 SHEARMAN & REDFIELD, NEGLIGENCE 288-90 (1941).

20. *E.g.*, where a train has negligently blocked an extra-hazardous highway crossing on a foggy night without automatic warning signals operating, or any other precaution (such as flagmen or flares), and plaintiff runs into the train while negligently driving at a speed at which he was unable to stop within the range of his headlights, it strains logic to conclude that the motorist was more to blame for the accident than the railroad company simply because the former's negligence occurred subsequent to the latter's. *Cf. Finn v. Spokane, Pac. & S. Ry.*, 189 Ore. 126, 214 P.2d 354, 218 P.2d 720 (1950). See also criticisms of the last wrongdoer concept in *Dixie Drive It Yourself System v. American Beverage Co.*, 242 La. 471, 488, 137 So.2d 298, 304 (1962); 2 HARPER & JAMES, TORTS 1156-58, 1258 (1956); PROSSER 285; James, *Last Clear Chance: A Transitional Doctrine*, 47 YALE L.J. 704, 717 (1938).

*Factors Restricting Last Clear Chance to Traffic and Transportation Cases*

Last clear chance has been applied almost exclusively to traffic and transportation cases.<sup>21</sup> Several Louisiana non-traffic cases have considered the doctrine; a few have applied it.<sup>22</sup> But, while granting that last clear chance might apply in a proper non-traffic case, such cases are rare indeed. Aside from the difficulty of meeting the requisites of the doctrine<sup>23</sup> other factors tend to restrict its application to traffic cases.

21. Last clear chance was found inapplicable in: *Dickey v. Thornburgh*, 82 Cal. App. 2d 723, 187 P.2d 132 (1947) (two motorboats collided at night); *Ramsey v. Fontaine Ferry Enterprises, Inc.*, 314 Ky. 218, 234 S.W.2d 738 (1950) (girl injured through constant bumping while in a "bumper car"); *State ex rel. Hamel v. Echo Park Co.*, 137 Md. 529, 113 Atl. 85 (1921) (girl sitting on arm of roller coaster seat was thrown from coaster); *Scott v. Greenville Pharmacy, Inc.*, 212 S.C. 485, 48 S.E.2d 324 (1948) (wife sued druggist for selling barbiturates to husband, who committed suicide).

Last clear chance was applied in: *Vignone v. Pierce & Norton Co.*, 130 Conn. 309, 33 A.2d 427 (1943) (waves from speedboat swamped rowboat); *Atkinson v. Wiard*, 153 Kan. 96, 109 P.2d 160 (1941); (plaintiff dragged by joy ride, operator not at controls); *Alles v. White Motors Co.*, 141 Neb. 78, 2 N.W.2d 597 (1942) (one pressed button to close door, plaintiff's arm in door). But in this last case plaintiff was not found negligent. Note the similarity of this case to *Frentz v. United States*, 163 F. Supp. 698 (E.D. La. 1958), discussed note 22 *infra*.

22. In the following cases last clear chance was found inapplicable: *Employers' Liab. Assur. Corp. v. Butler*, 318 F.2d 67 (5th Cir. 1963) (girl performed fire dance wearing a flammable costume; director failed to notice her costume); *Dallas v. Crescent Forwarding & Transp. Co.*, 13 So.2d 113 (La. App. Or. Cir. 1943) (plaintiff struck by bale of cotton tumbling out of control); *Howes v. Wimberly*, 15 So.2d 85 (La. App. 1st Cir. 1943) (boy hurt on manlift after being warned of danger); *cf. Kansas City So. R.R. v. Ellzey*, 275 U.S. 236 (1927) (guest passenger denied recovery for driver's recklessness).

The following cases suggest last clear chance applies, although it was unnecessary for the decision. *Frentz v. United States*, 163 F. Supp. 698 (E.D. La. 1958) (pedestrian caught on drawbridge as bridge was raised; pedestrian jumped off; not held negligent); *Litton v. Travelers Ins. Co.*, 88 F. Supp. 76 (W.D. La. 1950) (plaintiff injured by fumes; no plant warning device; plaintiff not negligent, nor could defendant prevent injury after emergency arose); *Carroll v. Louisiana Iron & Supply Co.*, 17 So.2d 650 (La. App. 2d Cir. 1944) (plaintiff struck by pipe handled by defendant workmen, plaintiff not found negligent).

See also dissent in *Lee v. Peerless Ins. Co.*, 248 La. 982, 183 So.2d 328 (1966), noted in 27 LA. L. Rev. 146 (1966). A man, rendered helpless from drink, was ejected from bar near a highway and was struck by a car. Dissent said bar owner had last clear chance. This writer feels the doctrine does not apply. The creation of a state of helplessness (even if done by defendant) is not a requisite of the doctrine. It is essential to the application of the doctrine that plaintiff be in actual peril at a time when defendant could have avoided plaintiff. Here plaintiff was not in peril until he ventured onto the highway; then, only the motorist might have had the ability to avoid inflicting the injury.

The following are cases where last clear chance was expressly applied: *Moses v. Commercial Standard Ins. Co.*, 174 So.2d 682 (La. App. 3d Cir. 1965) (plaintiff struck by tree pushed on him by bulldozer after his presence was known to operator); *Fireman's Mut. Ins. Co. v. S. S. Jacobs Co.*, 162 So.2d 816 (La. App. 4th Cir. 1964) (defendant welders negligently burned down plaintiff's store, knowing of the danger). In both these cases defendant's conduct is tantamount to recklessness or intentional misconduct.

23. The requisites of last clear chance are customarily stated as: (1) plain-

Accidents resulting from the operation of trains, trolleys, trucks, and automobiles are quite numerous. While their utility prevents them from being deemed ultrahazardous,<sup>24</sup> courts regard these vehicles as "dangerous instrumentalities" because of the great damage they can inflict.<sup>25</sup> Negligence of their operators is still determined by the standard of conduct of a reasonable man in like circumstances; but in these cases, any deviation, however slight, from that standard will generally be deemed negligence.

It is a fundamental duty, both moral and legal, for one to avoid injuring another if one may reasonably do so.<sup>26</sup> Furthermore, certain duties demand precaution against the possible negligent acts of other persons.<sup>27</sup> It should be of no avail for de-

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tiff must be in a perilous position of which he is unaware or from which he is unable to extricate himself using due care and (2) defendant saw or should have seen plaintiff's peril (1) in time to reasonably avoid him, using the means at his disposal. See, e.g., *LeBlanc v. Aetna Cas. & Sur. Co.*, 162 So.2d 153 (La. App. 3d Cir. 1964); *Smith v. New Orleans & N.E. R.R.*, 153 So.2d 533 (La. App. 1st Cir. 1963); *Emmco Ins. Co. v. Employers Mut. Ins. Co.*, 150 So.2d 338 (La. App. 1st Cir. 1963); *Guidry v. United States Cas. Co.*, 134 So.2d 319 (La. App. 3d Cir. 1961); *Ballard v. Piehler*, 98 So.2d 273 (La. App. 1st Cir. 1957).

24. See PROSSER § 77.

25. *Davis v. Lewis & Lewis*, 226 La. 1064, 78 So.2d 174 (1954); *Rottman v. Beverly*, 183 La. 947, 165 So. 153 (1935); *Mequet v. Algiers Mfg. Co.*, 147 La. 364, 84 So. 904 (1920); *Prine v. Continental So. Lines*, 71 So.2d 716 (La. App. 2d Cir. 1954); *Norwood v. Bahn*, 14 La. App. 261, 120 So. 183 (1930).

26. See *Tuttle v. Buck*, 107 Minn. 144, 119 N.W. 946, 947 (1909), where the court said there are "three main heads of duty with which the law of torts is concerned, namely, to abstain from wilful injury, to respect the property of others, and to use due diligence to avoid causing harm to others."

See also POLLOCK, *TORTS* 3 (15th ed. 1951): "All members of a civilised commonwealth are under a general duty toward their neighbours to do them no hurt without lawful cause or excuse."

27. This principle was implied in *Davies v. Mann*, 10 M. & W. 546, 152 Eng. Rep. 588 (1842) (see text accompanying note 8 *supra*). Parke, B., stated: "[A]lthough the ass may have been wrongfully there, still the defendant was bound to go along the road at such a pace as would be likely to prevent mischief. Were this not so, a man might justify the driving over goods left on a public highway, or even over a man lying asleep there, or the purposely running against a carriage going on the wrong side of the road."

*Cf. Heaven v. Pender*, 11 Q.B.D. 503, 509 (1833), where Brett, M.R., stated: "Whenever one person is placed . . . in such a position in regard to another that every one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances, he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger."

*Cf. Dixie Drive It Yourself System v. American Beverage Co.*, 242 La. 471, 137 So.2d 298 (1962).

This may also be true in cases concerning injuries to patrons of stores. The owner of a public place is required to anticipate the negligence of customers and take reasonable steps to ascertain that no injury results. See *The Work of the Louisiana Supreme Court for the 1963-1964 Term - Torts*, 25 LA. L. REV. 334 (1965). See generally PROSSER § 61.

Similar is the duty imposed upon landowners by the "attractive nuisance" doctrine to employ care in order to protect trespassing children from harming

fendant, burdened with such a duty, to plead that plaintiff was contributorily negligent. It would be illogical to say that defendant has the duty to protect plaintiff against his own negligent acts and in the same breath deny plaintiff recovery on the basis of that negligence.

This may best be exemplified by some last clear chance cases where the court finds defendant had two duties.<sup>28</sup> For example, when a motorist sees an inattentive pedestrian in time to avoid him but fails to do so, courts sometimes state that when the motorist discovered the pedestrian's peril he incurred an additional duty to use all reasonably available means to avoid him. If the motorist is found not to have employed such means, the pedestrian will recover despite his inattentiveness. In such cases, the court is recognizing that at least the second duty requires that defendant protect plaintiff against his own negligence, so that the negligence of plaintiff is no defense if defendant could have avoided the accident by using due diligence.

The earliest cases invoking last clear chance were nearly all accidents where a pedestrian was struck by a train or trolley. These cases point out an interesting circumstance which influenced the growth of the doctrine — the nature of the respective risks involved. Negligent conduct creates an undue risk of injury to someone. Crucial among the factors employed in measuring the degree of risk involved is the function between the *likelihood* of injury and the *seriousness* of that injury which is likely to arise. In these early cases it is significant that the defendant (train or trolley operator) is carrying on inherently dangerous conduct, thereby creating great risk of grievously injuring others. This phenomenon may be termed a lack of *mutuality of risks*: While not outwardly recognized by the judiciary, it explains why extreme care in the operation of

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themselves. See *Kahn v. James Burton Co.*, 5 Ill. 2d 614, 126 N.E.2d 836 (1955); *Mayer, Adm'x v. Temple Properties*, 307 N.Y. 559, 122 N.E.2d 909 (1954); *Angelier v. Red Star Yeast & Products Co.*, 215 Wis. 47, 254 N.W. 351 (1934).

28. *Rottman v. Beverly*, 183 La. 947, 165 So. 153 (1935); *Prine v. Continental So. Lines*, 71 So. 2d 716 (La. App. 2d Cir. 1954); *General Exchange Ins. Corp. v. Carp*, 176 So. 145 (La. App. 1st Cir. 1937); *Buckley v. Featherstone Garage*, 11 La. App. 564, 123 So. 446 (1929).

More properly, no second duty is imposed by the doctrine. Operators owe a constant duty to avoid injuring another regardless of whether the other is negligent or not. All last clear chance does is permit negligent plaintiffs to recover from an operator who breaks that general duty, where the rule of contributory negligence would otherwise preclude plaintiff's recovery. Cf. *Elliot v. New York, N.H. & H.R.R.*, 83 Conn., 320, 76 Atl. 298 (1910).

dangerous instrumentalities (trains, trolleys, trucks, and automobiles) is demanded. A pedestrian's inattention endangers only himself; hence he breaches a duty owed primarily to himself. Where his negligence culminates in an accident, the risk of harm to others is slight. The engineer's negligence, however, endangers everything in the train's path; and this is a breach of a duty owed to the public.<sup>29</sup>

There also probably exists an attitude on the part of the judiciary that transportation instrumentalities should pay their way. Operation of these dangerous instrumentalities creates a public risk while directly benefitting the operators. Perhaps it is not unreasonable that they should be required to compensate others for injuries resulting from their operation.<sup>30</sup> Also, railroad companies generally carry ample insurance; likewise, almost all motor vehicles are insured; much less frequently does a pedestrian have complete insurance coverage for his personal injuries. Insurance enables the costs of accidents to be distributed among all who utilize the instrumentalities. Thus, if owing to mutual fault an insured motorist strikes an uninsured pedestrian, by holding the motorist liable, the courts are requiring all drivers to share in the costs of the injury; whereas, if plaintiff is denied recovery, he alone must bear the entire cost of his injury.

Because non-traffic and transportation cases are so few and because the doctrine was designed for and best fits traffic and transportation situations, this Comment will focus on the latter.

## II. GROWTH AND DEVELOPMENT OF LAST CLEAR CHANCE IN LOUISIANA

To prevent the doctrine from crippling the contributory negligence rule, Louisiana courts, in their earlier confrontations with last clear chance, adopted a restrictive attitude. During

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29. It might be argued that the engineer need show no greater care for the pedestrian than he shows for himself. See PROSSER 442; Bohlen, *Contributory Negligence*, 21 HARV. L. REV. 233, 254-55 (1908). But this attitude is open to criticism. Why should a negligent operator be given a windfall when the pedestrian is also negligent, since it is the operator, by negligently operating the dangerous agency, who has created the great public risk of injuring others and inflicted the damage to plaintiff?

30. See 2 HARPER & JAMES 1208; PROSSER 588; Green, *Contributory Negligence and Proximate Cause*, 6 N.C.L. REV. 3, 31-32 (1940); Green, *The Duty Problem in Negligence Cases: II*, 29 COLUM. L. REV. 255, 275-76; 277-78 (1929). See also *Goss v. Williams*, 196 N.C. 213, 145 S.E. 169, 172 (1928), quoted in Green, *supra* at 277.

the depression years, however, earlier fears were forgotten, restrictions were relaxed and the doctrine was afforded wider application. Today, it enjoys a scope much broader than that readily inferable from the literal terms, last clear chance, or from the rule of *Davies v. Mann*.

The principle of *Davies* was first recognized in 1894 in *McGuire v. Vicksburg, S. & P.R.R.*<sup>31</sup> Because of steam emitted from the engine the engineer did not see deceased on the tracks until it was too late to avoid striking him. After finding the engineer negligent, the court allowed recovery notwithstanding deceased's negligence, resting its holding on various grounds<sup>32</sup> and adding:

"[T]he contributory negligence of the party injured will not defeat recovery, if he shows the defendant might, by the exercise of ordinary care and prudence, have avoided the consequences of the injured party's negligence."<sup>33</sup>

The language in *McGuire* closely resembles that of *Davies v. Mann*, but its application to the facts of the case was stunningly liberal.<sup>34</sup> As a result, the holding of *McGuire* became subject to serious limitations beginning the very next year.<sup>35</sup>

The court in *McGuire* found that the engineer *should have seen* the pedestrian's peril in time to prevent the accident and imposed liability because he failed to see him. This position has been consistently followed with one three-year period of doubt during which some courts required that defendant should actually discover plaintiff's peril before liability would attach, if

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31. 46 La. Ann. 1543, 16 So. 457 (1894), McEnery, J., dissenting.

32. The Court stated that in populous areas railroad companies must show a greater standard of care for the protection of negligent trespassers than they must in rural areas. It added that defendant could not inflict wanton injury even upon trespassers, nor was contributory negligence a license for recklessness and neglect. It found defendant grossly negligent, utilizing no care whatsoever for the protection of the helpless trespasser. Then it invoked the doctrine of last clear chance (though not by name). Finally it used its discretion in reducing the \$20,000 jury award in favor of plaintiff to \$1,000, admittedly the lowest amount usually awarded for the wrongful death, which suggests that the court would reduce the award if plaintiff was also at fault in causing his own injury.

33. *McGuire v. Vicksburg, S. & P.R.R.*, 46 La. Ann. 1543, 1544, 16 So. 457, 462 (1894).

34. Defendant did not see deceased until it was too late to avoid him, nor was it shown that defendant could have seen deceased sooner, because of the cloud of steam. Under the traditional trespasser doctrine, defendant's only duty to deceased was to refrain from inflicting intentional harm after deceased's presence was actually discovered.

35. *Blackwell v. St. Louis, I.M. & S. Ry.*, 47 La. Ann. 268, 16 So. 818 (1895).

plaintiff could at any time have removed himself from danger.<sup>36</sup> Today the rule that last clear chance applies when the defendant *saw or should have seen* the plaintiff's peril is given effect in all instances,<sup>37</sup> regardless of the nature of plaintiff's negligent conduct. Thus, defendant may be held liable for a last clear chance he never knew he had.

The earliest limitation was that plaintiff could not recover if defendant's negligence occurred *prior* to his.<sup>38</sup> A trespasser was walking along a track as defendant's train approached him from the rear at an excessive rate of speed. The engineer saw plaintiff some distance ahead, but, believing him to be a company switchman, paid little attention to him. Plaintiff stepped onto the track immediately in front of the train, and the engineer was unable to stop in time. The court found that both parties were negligent, but that the negligence of the engineer in operating the train at an excessive rate of speed occurred *prior* to the negligence of the plaintiff, rendering the defendant unable to avoid the consequences of plaintiff's subsequent negligence; so plaintiff was denied recovery.<sup>39</sup>

The *prior negligence* restriction involved the same principle as the subsequent *new breach* requirement, which was that defendant could not be held liable under last clear chance if he committed no *new breach* of duty *subsequent* to plaintiff's negligence.<sup>40</sup> Both restrictions accomplished the same end; last

36. Rottman v. Beverly, 183 La. 947, 165 So. 153 (1935); Jackson v. Cook, 176 So. 622 (La. App. 1st Cir. 1937), *reversed on granting of writs*, 189 La. 860, 181 So. 195 (1938); see Davidson v. American Drug Stores, 175 So. 157 (La. App. Or. Cir. 1937) (concurring opinion); *contra*, Davidson v. American Drug Stores (majority opinion) *supra*; Iglesias v. Campbell, 175 So. 145 (La. App. 2d Cir. 1937); McCormick & Co. v. Cauley, 168 So. 783 (La. App. Or. Cir. 1936).

37. This conclusion is reached by reasoning: "What they can see they must see and in legal contemplation they do see; that their failure to see what they could have seen by the exercise of due diligence does not absolve them from liability." Jackson v. Cook, 189 La. 860, 181 So. 195, 197 (1938). See, e.g., Burnett v. Marchand, 186 So. 2d 383 (La. App. 1st Cir. 1966); Leon v. Jackson, 122 So. 2d 102 (La. App. 2d Cir. 1960); Carlson v. Fidelity Mut. Ins. Co., 88 So. 2d 461 (La. App. 2d Cir. 1956); Prine v. Continental So. Lines, 71 So. 2d 716 (La. App. 2d Cir. 1954); Soards v. Shreveport Rys., 8 So. 2d 343 (La. App. 2d Cir. 1942); Iglesias v. Campbell, 170 So. 265 (La. App. 2d Cir. 1936).

38. Loftin v. Louisiana Ry. & Nav. Co., 135 La. 33, 64 So. 972 (1914); Harrison v. Louisiana W.R.R., 132 La. 761, 61 So. 782 (1913); Tatum v. Rock Island A. & L.R.R., 124 La. 921, 50 So. 796 (1909); May v. Texas & Pac. Ry., 123 La. 647, 49 So. 272 (1909).

39. May v. Texas & Pac. Ry., 123 La. 647, 49 So. 272 (1909).

40. Jarrow v. City of New Orleans, 168 La. 992, 123 So. 651 (1929); Harrison v. Louisiana W.R.R., 132 La. 761, 61 So. 782 (1913); Jordan v. Katz & Besthoff, 15 La. App. 500, 132 So. 380 (1931). Technically the new breach restriction may be distinguished from the prior negligence limitation in that the latter was used in cases where defendant was speeding or his engine was defec-

clear chance cannot apply unless defendant failed to utilize his later opportunity to avoid the accident.

These restrictions were superseded by the limitation that last clear chance does not apply where the negligence of both parties was *concurrent and continuous* and actually contributed to the resulting injury.<sup>41</sup> *Harrison v. Louisiana W. R.R.*<sup>42</sup> illustrates the use of both concepts.<sup>43</sup> An aged farmer, walking along a railroad track late one afternoon, was struck from the rear and killed by defendant's speeding train. Both the engineer and the farmer were negligently unobservant. When the engineer discovered the farmer's peril, it was too late to avoid the accident. The farmer's wife was denied recovery, however, because the farmer had not noticed the train, so his negligence continued to the instant of the injury. The court stated that last clear chance would only apply if "the contributory negligence of the person injured has *not continued* down to the occurring of the accident, or, in other words, been *concurrent* with that of the defendant at the very moment itself of accident." Then it added: "To warrant its application there must have been some *new breach* of duty on the part of the defendant *subsequent* to the plaintiff's negligence," (emphasis added) but it found no new breach of duty by the engineer after he saw the farmer.<sup>44</sup>

#### Courts experienced difficulty in distinguishing between what

five, in which instances he was powerless at the time the peril arose to avert it using due diligence at that moment. The new breach restriction has been applied where both parties' negligence consists of inattention continuing until it was too late to prevent the accident. In this regard the new breach restriction is more closely related to the subsequent concurrent and continuous negligence restriction.

41. See, e.g., *Jarrow v. City of New Orleans*, 168 La. 992, 123 So. 651 (1929); *Thompson v. Morgan*, 167 La. 335, 119 So. 69 (1928); *Young v. Louisiana W. Ry.*, 153 La. 129, 95 So. 511 (1923); *Collery v. Morgan's L. & T. R.R. & S.S. Co.*, 139 La. 763, 72 So. 222 (1916); *Wolf v. New Orleans Ry. & Light Co.*, 133 La. 891, 63 So. 392 (1913); *Harrison v. Louisiana W.R.R.*, 132 La. 767, 61 So. 782 (1913); *Hammers v. Colorado S., N.O. & Pac. R.R.*, 128 La. 648, 55 So. 4 (1911).

42. 132 La. 761, 61 So. 782 (1913).

43. See also *Tatum v. Rock Island A. & L.R.R.*, 124 La. 921, 50 So. 796 (1909), where the court stated that plaintiff's "negligence was the proximate cause of the accident, and bars recovery, although the defendant may have been guilty of *antecedent or concurrent negligence*." (Emphasis added.) *Id.* at 926, 50 So. at 798.

44. *Harrison v. Louisiana W.R.R.*, 132 La. 761, 766, 61 So. 782, 783 (1913). The distinction between the restrictions of prior negligence (or new breach of duty) and concurrent and continuous negligence was never recognized by the judiciary, and, in adopting the continuous negligence concept, the earlier restrictions merely fell into disuse without being rejected outright. Consequently, it is possible that prior negligence is yet a valid restriction to the applicability of last clear chance in Louisiana. See note 70 *infra*.

was and what was not concurrent and continuous negligence,<sup>45</sup> probably owing to the inaptness of the terms to express the type of negligent conduct to which they referred. Concurrent and continuous negligence as a bar to plaintiff's recovery was employed to accomplish the same end as the proposition that plaintiff's negligence must have placed him in a perilous position from which he could not reasonably extricate himself before last clear chance can apply; that is, defendant must have had the *last chance* available to either party to avoid the injury. Use of such terminology as "concurrent and continuous" merely clouded the genuine limitation instilled within the doctrine at its birth. The policy reason behind this limitation was probably a hesitancy on the part of the courts to demand of defendant a higher standard of care toward a negligent plaintiff than that plaintiff shows for his own safety.<sup>46</sup>

It is likely that the very vagueness of the expression "concurrent and continuous negligence" greatly aided courts in eliminating that restriction altogether. They obviously disliked the requirement that plaintiff lose his case if his negligence continued to the moment of injury regardless of the seriousness of defendant's negligence. And, it is not surprising that the continuous negligence limitation was circumvented by some later courts by various techniques.<sup>47</sup>

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45. State of intoxication not deemed continuous negligence. *Blackburn v. Louisiana Ry. & Nav. Co.*, 144 La. 520, 80 So. 707 (1919); see also *Grennon v. New Orleans Pub. Service Inc.*, 10 La. App. 641, 120 So. 801 (1929). In *Roder v. Legendre*, 147 La. 295, 84 So. 787 (1920), the court said failure to sound horn was "concurrent" negligence. Compare *Loftin v. Louisiana Ry. & Nav. Co.*, 135 La. 33, 64 So. 972 (1914), where the court said failure to blow whistle "preceded" plaintiff's inattention.

46. See note 29 *supra*.

47. Some courts ignored the continuous negligence restriction altogether. *Duffy v. Hickey*, 151 La. 274, 91 So. 733 (1922); *Broussard v. Louisiana W. Ry.*, 140 La. 517, 73 So. 606 (1916); *Jones v. Mackey Tel. Cable Co.*, 137 La. 121, 68 So. 379 (1915); *Guinn v. Kemp*, 18 La. App. 3, 136 So. 764 (1931); *Norwood v. Bahm*, 14 La. App. 261, 129 So. 183 (1930); *Lanphier v. D'Antoni*, 14 La. App. 441, 131 So. 682 (1930).

Some decisions enshrouded the issue in "proximate cause" language enabling the court to conclude that plaintiff's negligence was not the legal cause of the accident. *Taylor v. Shreveport Yellow Cabs*, 163 So. 737 (La. App. 2d Cir. 1935), where plaintiff was struck as he endeavored to cross a street. The court stated: "Plaintiff's negligence did continue to the moment he was injured; but . . . such negligence was not a proximate cause of the accident." Thus last clear chance applied. *Id.* at 740. *Loewenberg v. Fidelity Union Cas. Co.*, 147 So. 81 (La. App. 2d Cir. 1933). Other cases found plaintiff guilty of only "passive negligence," while defendant committed "active negligence"; and so plaintiff's negligence was not the proximate cause of his injury, and he could invoke last clear chance against defendant. *Blackburn v. Louisiana Ry. & Nav. Co.*, 144 La. 520, 80 So. 708 (1918); *Boullion v. Bonin*, 2 So. 2d 535 (La. App. 1st Cir. 1940), *on rehearing*, 2 So. 2d 539 (1941), where the court's efforts at permitting recovery resulted in near ludicrous reasoning; *Harlow v. Owners' Auto. Ins. Co.*, 160 So. 169 (La.

*Rottman and Jackson Decisions Expanding the Doctrine*

The concurrent and continuous negligence restriction was partially dissolved by *Rottman v. Beverly* in 1935.<sup>48</sup> A woman was walking inattentively across a highway. Seeing her, but thinking he could safely pass in front of her, defendant merely slowed down and blew his horn. Noticing her failure to heed his warning, he then braked and tried to guide his vehicle behind her, but failed. The court found plaintiff "guilty of the grossest kind of negligence." "But her negligence in that respect does not bar recovery because the driver of the car unquestionably had the last clear chance to avert the accident by making proper use of available and adequate means,"<sup>49</sup> since he *actually saw plaintiff's peril* in ample time to avoid hitting her. The cases upholding concurrent or continuing negligence as an exception to the application of the doctrine were distinguished.

*Rottman* presents a thorough discussion of last clear chance,<sup>50</sup> making it clear that the defense of concurrent negligence will not bar plaintiff's recovery when defendant actually discovered plaintiff's peril — an adoption of the "discovered peril doctrine."

After *Rottman*, the appellate courts split as to the application of the rule, one following *Rottman*,<sup>51</sup> while others ignored

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App. 2d Cir. 1935); *Grennon v. New Orleans Pub. Service, Inc.*, 10 La. App. 641, 120 So. 801 (1929).

In all cases, except *Boullion v. Bonin*, *supra*, there lacked mutuality of risks between the parties; almost all of them involved a train or automobile striking a pedestrian.

48. 183 La. 947, 165 So. 153 (1935).

49. *Id.* at 962, 165 So. at 158.

50. *Id.* at 954-55, 165 So. at 156: "Where the danger is brought about by plaintiff's own negligence, but is not discovered by defendant, because of a failure to exercise due care, the parties are on equal footing. Their faults are mutual, their negligence is concurrent. It arises from the same cause, *viz.*, failure to observe. The negligence of each party is a contributing cause of the accident. In such case it cannot be determined whether the negligence of the plaintiff or that of the defendant was the proximate and immediate cause of the injury, and neither party can recover. . . . The first duty of those who operate engines or motor vehicles is to keep a sharp lookout ahead to discover the presence of those who might be in danger. If they perform that duty and discover that someone is in danger, then a second duty arises, and that is to use every possible available means to avert the injury. If the defendant fails to perform that duty, . . . the last clear chance doctrine applies even though plaintiff's negligence continues up to the accident. . . ."

*Id.* at 956-57, 165 So. 156-57: "If he could have averted the accident by the exercise of due diligence and failed to do so, his negligence in that respect is considered the proximate cause and immediate cause of the injury, and plaintiff may recover although his negligence continued to the instant of the accident. *The basis of recovery in such cases is the defendant's superior knowledge of the peril and his ability to avoid the injury.* He has the last clear chance." (Emphasis added.)

51. *Jackson v. Cook*, 176 So. 622 (La. App. 1st Cir. 1937), *reversed*, 189 La. 860, 181 So. 195 (1938).

its restriction and applied the broader rule that concurrent or continuous negligence will not preclude plaintiff's recovery if defendant either *saw or should have seen* the peril in time to avert the injury.<sup>52</sup>

The conflict was soon resolved by *Jackson v. Cook*<sup>53</sup> in favor of the broader rule, thus completing the break begun by *Rottman* from the concurrent and continuing negligence restriction. In *Jackson*, an inebriate was staggering along the shoulder of a road at night. The driver of the automobile, partially blinded by the lights of oncoming cars, did not see the man until he appeared directly in front of the car. The driver acted reasonably at that instant but could not avoid the man. The court of appeal applied the *Rottman* rule and found for defendant.<sup>54</sup> The Supreme Court reversed, concluding that *Rottman* was not applicable and remarking:

"The mere fact that the driver of the car in this case did not see plaintiff does not absolve the defendant from liability, because it was the duty of the driver to look, and according to the findings of both courts, he was not looking. The *Rottman* Case is not authority for holding that, merely because the driver of the car in this case did not actually see the plaintiff, the defendant is not liable."<sup>55</sup>

*Jackson* substantively shaped the doctrine of last clear chance in Louisiana as it stands today. Whenever both plaintiff and defendant are negligent and their negligence is a cause of plaintiff's injury, plaintiff's negligence will not preclude recovery if defendant appreciated plaintiff's peril or would have done so had he used reasonable care and attention at a time when he could have prevented the injury by reasonable use of the means available to him. This is also referred to as the *apparent peril* doctrine (as distinguished from the discovered peril doctrine of

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52. *Davidson v. American Drug Stores*, 175 So. 157 (La. App. Or. Cir. 1937); *Iglesias v. Campbell*, 175 So. 145 (La. App. 2d Cir. 1937); *McCormick & Co. v. Cauley*, 168 So. 783 (La. App. Or. Cir. 1936).

A further shadow was cast upon *Rottman* in *Hicks v. Texas & New Orleans Ry.*, 186 La. 1008, 173 So. 745 (1937). A woman was struck as she stepped onto a track in front of an oncoming "motor car." Her negligence in being unaware continued to the moment of the accident. The court allowed recovery, finding that the engineer could have seen the woman earlier, and then it added that even after seeing her, the motor car (traveling 12-13 m.p.h.) went another twenty feet before the brakes were effectively applied. Thus, the engineer failed to use due care and was held liable under last clear chance by alternative reasoning.

53. 139 La. 860, 181 So. 195 (1938).

54. *Jackson v. Cook*, 176 So. 622 (La. App. 1st Cir. 1937).

55. 189 La. 860, 869, 181 So. 195, 198 (1938).

*Rottman*) because it will apply against defendant if plaintiff's peril was apparent to a reasonable man, although defendant himself did not discover it.<sup>56</sup>

However, too much reliance must not be placed on the *Jackson* formula. The full effect of *Jackson* had not consistently been recognized, and it has been made subject to certain questionable limitations. The rule itself has not been altered, only its application in certain cases, as will be discussed in the following section.<sup>57</sup>

### III. APPLICATION OF LAST CLEAR CHANCE IN LOUISIANA: PROBLEM AREAS

Only after it has been determined that the negligence of both plaintiff and defendant was a cause of plaintiff's injury does last clear chance become crucial. The application of the doctrine is a question of fact;<sup>58</sup> thus each case must rest upon its own findings.<sup>59</sup> Since plaintiff is urging application of the doctrine,

56. *Jackson* has made the Louisiana rule of last clear chance broader than most other jurisdictions. See PROSSER § 65; RESTATEMENT, TORTS 2D §§ 479, 480 (1965).

57. See text accompanying note 83 *infra*. The real significance of *Jackson* remains unclear. Both *Rottman* and *Jackson* involved injury by a motorist to a pedestrian, and courts appear more sympathetic toward pedestrians than other plaintiffs in these cases. Furthermore, plaintiff in *Jackson* was helpless, and so his state might prevent his negligence from being classed as continuous. Thus it can be argued that *Jackson* merely reiterated the earlier rule that plaintiff, helpless in peril, may recover under last clear chance even if defendant did not discover his peril, and applied it to automobile cases. See note 45 *supra*. But the court in *Jackson* chose to find plaintiff's negligence was continuous and concurrent with defendant's and resolve the question of plaintiff's continuous negligence being a bar to recovery. Some cases, however, have interpreted *Jackson* as merely stating the rule that a motorist can be liable under the doctrine to a helpless pedestrian, even if the motorist did not discover his peril. See *James v. United States*, 252 F.2d 687 (5th Cir. 1958); *Bergeron v. Department of Highways*, 221 La. 595, 60 So. 2d 4 (1952); *Dupuy v. Veazey*, 63 So. 2d 756 (La. App. Orl. Cir. 1953). See also *The Work of the Louisiana Supreme Court for the 1940-1941 Term — Torts*, 4 LA. L. REV. 211 (1942).

If the full impact of *Jackson* were accepted, that decision would dissolve the defense of contributory negligence in these cases. For this reason perhaps *Jackson* should apply only when plaintiff is helpless or when a pedestrian is struck by an automobile.

58. See *Counce v. Corley*, 162 So. 2d 405 (La. App. 2d Cir. 1964); *McCarthy v. Blair*, 122 So. 2d 837, 840 (La. App. 1st Cir. 1960), where the court stated: "No citation of authority is needed in support of the principle that under the last clear chance doctrine each case must be decided in the light of its own peculiar facts and circumstances."

59. Primarily for this reason these cases are frequently distinguished but never overruled. This is probably a factor causing the lack of clarity and harmony in these cases, as one court candidly admitted: *Short v. Boise Valley Traction Co.*, 38 Idaho 593, 599, 225 Pac. 398, 399 (1924): "[I]t is probably a hopeless task, and an unprofitable one, to undertake a discussion or an analysis of all

he must prove all the facts indicating that defendant did have the last clear chance.<sup>60</sup> This, in most cases becomes a technical question involving "various calculations of the rate of speed, of the time it takes to react to an emergency and the application of brakes as well as the distance in which a . . . [given vehicle] can be brought to a stop, traveling at a given speed."<sup>61</sup>

Whether the defendant had a *chance* to avoid the accident involves time, distance, and control, as well as the nature of the defendant's negligent conduct.<sup>62</sup> Whenever, at the instant the defendant appreciated or should have appreciated the plaintiff's peril, he could possibly do *something* to prevent the accident, he has a *chance*. Conversely, he has no chance when the peril is so sudden that a reasonable person could have done nothing to avoid the injury.<sup>63</sup>

Where defendant is incapable of discovering plaintiff's peril in time or of averting a discovered peril because his vehicle has some defect or malfunction or where he is speeding, the conclusion is compelling that he really has no chance to avoid plaintiff. Such neglects may be termed acts of *prior or antecedent* negligence rendering *defendant helpless* to act effectively.<sup>64</sup> In such instances the strongest policy considerations under-

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the cases . . . [invoking] last clear chance . . . . It would be impossible to harmonize them, and we find it impossible to appreciate the hair-splitting distinctions that some of them draw in dealing with facts disclosed in . . . [these cases]."

60. See, e.g., *Franievich v. Lirette*, 241 La. 466, 129 So.2d 740 (1961); *Coleman v. Mason*, 174 So.2d 655 (La. App. 3d Cir. 1965); *Jones v. Dozier*, 160 So.2d 395 (La. App. 1st Cir. 1964); *Angeron v. Guzzino*, 140 So.2d 669 (La. App. 1st Cir. 1962); *Fontenot v. Travelers Indem. Co.*, 134 So.2d 330 (La. App. 3d Cir. 1961); *Norwood v. Bahm*, 14 La. App. 261, 129 So. 183 (1930).

61. *Bergeron v. Department of Highways*, 221 La. 595, 605, 60 So.2d 4, 8 (1952). The court further introduced the sentiment that "the doctrine . . . is one involving nice distinctions, often of a technical nature, and courts should be wary in extending its application." *Id.* at 606, 60 So.2d at 8. This attitude has been reiterated in a number of later decisions. See, e.g., *Moore v. American Ins. Co. of Newark, N.J.*, 150 So.2d 346 (La. App. 1st Cir. 1963); *Angeron v. Guzzino*, 140 So.2d 669 (La. App. 1st Cir. 1962); *Ballard v. Piehler*, 98 So.2d 273 (La. App. 1st Cir. 1957).

62. Strictly speaking, any act of antecedent or prior negligence by defendant (e.g., speeding, defective brakes, no headlight) could preclude his having any chance at the instant of the peril.

63. E.g., *Musco v. General Guar. Ins. Co.*, 181 So.2d 881 (La. App. 4th Cir. 1966); *Maryland Cas. Co. v. Gulf, Mobile & Ohio R.R.*, 157 So.2d 302 (La. App. 4th Cir. 1963); *Knighen v. Travelers Indem. Co.*, 127 So.2d 51 (La. App. 1st Cir. 1961); *Sixkiller v. Pretchter*, 118 So.2d 698 (La. App. Orl. Cir. 1960); *Hutchinson v. Texas & N.O.Ry.*, 33 So.2d 139 (La. App. 1st Cir. 1947).

64. See 2 HARPER & JAMES, 1253-55; James, *Last Clear Chance: A Transitional Doctrine*, 47 YALE L.J. 704, 714-15 (1938).

lying last clear chance do not support the conclusion that defendant should be liable to plaintiff. Defendant's negligence is not later in time, so plaintiff will have a better, or at least equal, opportunity to avoid the accident. It is submitted that one rational basis<sup>65</sup> for holding a defendant who was guilty of prior negligence liable would be found in cases that lack mutuality of risk — that is, where defendant's negligent conduct presented a likelihood of substantially more serious consequences than that of plaintiff. Where the accident is between two automobiles, there is mutuality of risk and equal fault; for each owes the other the same duty and each one's negligence exposes the other to the same degree of risk and to equally serious injury. In this instance, courts tend to let the risk fall where it may and deny both parties recovery.<sup>66</sup>

*Rottman*<sup>67</sup> and *Jackson*<sup>68</sup> are not contrary to the position that last clear chance cannot apply when defendant was helpless to avoid the accident owing to some act of prior negligence on his part.<sup>69</sup> While no modern cases have expressly recognized prior negligence as a limitation to the application of the doc-

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65. It does not seem unlikely that acts of prior negligence will also be handled by the courts under last clear chance, even though those acts do not really fit the formula for the doctrine, because many times the one guilty of prior negligence is the worse wrongdoer. For example, society probably feels it is more reprehensible for one to knowingly drive with faulty brakes than to be momentarily inattentive. If this be done, the courts should recognize this as an appendage to last clear chance and not try to fit it under the present rule. Alternatively, the question could be solved without invoking last clear chance by the application of the principle of wilful and wanton misconduct. Thereby defendant can be held liable notwithstanding plaintiff's negligence when defendant's operation of a vehicle with some known defect would be tantamount to wilful injury or recklessness.

66. Of some thirty-five cases surveyed in which two automobiles were involved and last clear chance was put at issue, negligent plaintiffs recovered in only four cases under the doctrine. These cases indicate the hesitancy on part of the judiciary in allowing plaintiff recovery for an injury caused initially — if not primarily — by his own negligence. See, *e.g.*, *Hebert v. Travelers Ins. Co.*, 179 So. 2d 513 (La. App. 3d Cir. 1965); *Williams v. State Farm Mut. Auto. Ins. Co.*, 148 So. 2d 126 (La. App. 2d Cir. 1962); *Angeron v. Guzzino*, 140 So. 2d 669 (La. App. 1st Cir. 1962); *Gage v. Nesser*, 119 So. 2d 98 (La. App. 1st Cir. 1960); *Whitner v. Scott*, 116 So. 2d 180 (La. App. 1st Cir. 1959); *Baker v. Travelers Ins. Co.*, 13 So. 2d 65 (La. App. 1st Cir. 1943). See also *Burden v. Capitol Stores*, 200 La. 329, 8 So. 2d 45 (1942); *Zorick v. Maryland Cas. Co.*, 172 So. 2d 706 (La. App. 4th Cir. 1965); *Southern Farm Bureau Cas. Ins. Co. v. George Minor & Sons*, 171 So. 2d 703 (La. App. 4th Cir. 1965). In these cases both drivers were negligent, but last clear chance was not mentioned.

67. 183 La. 947, 165 So. 153 (1935); see text accompanying note 48 *supra*.

68. 189 La. 860, 181 So. 195 (1938); see text accompanying note 53 *supra*.

69. See note 44 *supra*.

trine,<sup>70</sup> neither have any expressly rejected that early restriction.<sup>71</sup>

The plaintiff must prove defendant's chance was not only a possible one but a clear one "that a reasonably prudent man, placed in a like position, could and would have acted with effectiveness."<sup>72</sup> Testimony arousing speculation that the chance was clear will not discharge that burden.<sup>73</sup> This point has caused the courts difficulty, and the cases are discouragingly inconsistent.<sup>74</sup>

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70. *But see* Hebert v. Travelers Ins. Co., 179 So.2d 513 (La. App. 3d Cir. 1965); Pate v. State Farm Mut. Ins. Co., 147 So.2d 766 (La. App. 1st Cir. 1962); Thomas v. Lumbermen's Mut. Cas. Co., 146 So.2d 275 (La. App. 3d Cir. 1962); Angeron v. Guzzino, 140 So.2d 669 (La. App. Or. Cir. 1958); Dupre v. Union Prod. Co., 49 So.2d 655 (La. App. 1st Cir. 1950). See also Bagala v. Kimble, 225 La. 943, 74 So.2d 172 (1954) (on rehearing); Garcia v. Anchor Cas. Co., 148 So.2d 371 (La. App. 1st Cir. 1962); Guidry v. United States Cas. Co., 134 So.2d 319 (La. App. 3d Cir. 1961); Maryland Cas. Co. v. Allstate Ins. Co., 96 So.2d 340 (La. App. 2d Cir. 1957).

71. *But see* Broussard v. Louisiana W. Ry., 140 La. 517, 73 So. 606 (1916); McGuire v. Vicksburg, S. & P.R.R., 46 La. Ann. 1543, 16 So. 457 (1894); Kelly v. Neff, 14 So.2d 657 (La. App. 2d Cir. 1943); Boullion v. Bonin, 2 So.2d 535 (La. App. 1st Cir. 1940); Davidson v. American Drug Stores, 175 So. 157 (La. App. Or. Cir. 1937); Guinn v. Kemp, 18 La. App. 3, 136 So. 764 (1931); Norwood v. Bahn, 14 La. App. 261, 129 So. 183 (1930); Abate v. Hirdes, 121 So. 775 (La. App. Or. Cir. 1928).

72. Hebert v. Meibaum, 19 So.2d 629, 637 (La. App. Or. Cir. 1944) (on rehearing), *aff'd*, 209 La. 156, 24 So.2d 297 (1945). See also Dean v. Pitts, 133 So.2d 917 (La. App. 2d Cir. 1961); Warner v. Millers Mut. Fire Ins. Co. of Texas, 110 So.2d 842 (La. App. 1st Cir. 1959); *cf.* Poncino v. Reid-Murdock & Co., 136 Cal. App. 223, 28 P.2d 932 (1934).

73. Hebert v. Travelers Ins. Co., 179 So.2d 513 (La. App. 3d Cir. 1965); Angeron v. Guzzino, 140 So.2d 669 (La. App. 1st Cir. 1962); Phares v. Biggs, 135 So.2d 507 (La. App. 2d Cir. 1961).

74. This writer makes no attempt to achieve the bold, if not impossible, task of reconciling the mass of cases considering whether or not defendant had a reasonable opportunity to avoid plaintiff.

Confusing the question of last clear chance with other issues has been one source of difficulty. See *Burvant v. Wolfe*, 126 La. 787, 52 So. 1025 (1910), where a boy, crossing a street, was struck by a motorist who never saw the boy. The court held the motorist liable because of his failure to see the boy, adding: "Possibly it would, even then, have been too late; but defendant should have been sufficiently attentive to have been in a position to make the trial." *Id.* at 791, 52 So. at 1027. Similarly, in *Broussard v. Louisiana W. Ry.*, 140 La. 517, 73 So. 606 (1916), a speeding train struck a car which carelessly tried to cross the tracks. The court held the railroad liable even though the train could not have been stopped before striking the car had it been going at the lawful speed, stating that had the train been going more slowly *perhaps* the driver of the car would have noticed its presence in time for him to avoid the danger. In both of these cases plaintiff appears to have failed to prove that defendant's negligence was a *cause in fact* of the accident. See also *Iglesias v. Campbell*, 170 So. 265 (La. App. 2d Cir. 1936). Proximate cause language has occasionally been used to impose liability on defendant when plaintiff could not recover under last clear chance. In *Boullion v. Bonin*, 2 So.2d 535 (La. App. 1st Cir. 1940), two vehicles collided in an intersection, defendant having the right of way. Neither party saw the other; in addition, defendant was speeding. The court held defendant liable upon deciding that "the negligence of . . . [plaintiff] was not active and continuous up to the moment of the accident and was not concurrent with that of . . . [defendant], but his negligence became inactive when the collision occurred,"

One problem is the case where defendant delayed momentarily before attempting to avoid plaintiff. A delay of less than one second has been found unreasonable,<sup>75</sup> but the view that a second's delay does not constitute negligence is preferable,<sup>76</sup> for a normal man requires almost one second to respond to an observed situation.<sup>77</sup> Further, to attempt to make fine calculations of time based on rough and inaccurate estimates of distances is unsound.

Failure to give special warning to someone approaching a railroad track has been found to be failure to employ a reasonable chance to avert the injury.<sup>78</sup> Similarly, the argument has usually been sustained in railroad accident cases that though defendant could not have stopped after he reasonably should have realized plaintiff's danger, he might have given plaintiff sufficient time to remove himself from danger had he applied his brakes sooner.<sup>79</sup> The analogous argument that defendant

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while "the negligence of . . . [defendant] was not only active and continuous up to the moment of the collision but it was the *direct and proximate cause* of it." (Emphasis added.) *Id.* at 540-41. Certainly plaintiff's negligence was as proximate to his injury as defendant's. Compare *Musco v. General Guar. Ins. Co.*, 181 So.2d 881 (La. App. 4th Cir. 1966); *Clark v. Shannon*, 120 So.2d 307 (La. App. 2d Cir. 1960); *Wheat v. Brandt*, 61 So.2d 238 (La. App. 2d Cir. 1952); *cf. Harlow v. Owners' Auto. Ins. Co.*, 160 So. 169 (La. App. 2d Cir. 1935).

75. *Hicks v. Texas & N.O.Ry.*, 186 La. 1008, 173 So. 745 (1937) (alternatively, by implication).

76. *Fendlason v. Allstate Ins. Co.*, 136 So.2d 814 (La. App. 1st Cir. 1961); *Solomon v. Davis Bus Line*, 1 So.2d 816 (La. App. 2d Cir. 1941).

77. Courts take judicial notice that 3/4 of a second is the time it takes one to respond to an emergency. *Biggs v. Verbois*, 151 So.2d 172 (La. App. 1st Cir. 1963); *Moore v. American Ins. Co. of Newark, N.J.*, 150 So.2d 346 (La. App. 1st Cir. 1963); *Dupre v. Union Prod. Co.*, 49 So.2d 655 (La. App. 1st Cir. 1950). See also 9B BLASHFIELD, CYCLOPEDIA OF AUTOMOBILE LAW AND PRACTICE 408 (1954); Comment, 25 U. KAN. CITY L. REV. 13, 32-34 (1956).

78. *Ross v. Sibley, L. B. & S. Ry.*, 116 La. 789, 41 So. 93 (1906); *Whendon v. Porter*, 69 So.2d 610 (La. App. 2d Cir. 1953); *Browne v. Texas & Pac. R.R.*, 193 So. 511 (La. App. 2d Cir. 1939). These cases indicate a defendant must give warning so as to *provide plaintiff with a reasonable chance* to appreciate his own danger and remove himself.

The mere sounding of a whistle, however, does not per se discharge defendant's duty to utilize all means to prevent the accident. See *Russo v. Texas & Pac. R.R.*, 189 La. 1042, 181 So. 485 (1938); *Jones v. Mackay Tel. Cable Co.*, 137 La. 121, 68 So. 379 (1915).

79. See *Jones v. Mackay Tel. Cable Co.*, 137 La. 121, 68 So. 379 (1915); *Ross v. Sibley, L. B. & S. Ry.*, 116 La. 789, 41 So. 93 (1906); *O'Connor v. Chicago, R.I. & Pac. Ry.*, 40 So.2d 663 (La. App. 1st Cir. 1949); *Browne v. Texas & Pac. R.R.*, 193 So. 511 (La. App. 2d Cir. 1939); *cf. Broussard v. Louisiana W. Ry.*, 140 La. 517, 73 So. 606 (1916), discussed in note 74 *supra*. *But see Brown v. Louisville & Nashville R.R.*, 234 F.2d 204 (5th Cir. 1956); *Eggleston v. Louisiana & Ark. Ry.*, 192 So. 774 (La. App. 2d Cir. 1939). The difficulty with this argument is that it is often mere speculation, and it requires the court to conduct technical calculations from the inaccurate testimony of witnesses. *Cf. Williams v. State Farm Mut. Auto. Ins. Co.*, 148 So.2d 126 (La. App. 2d Cir. 1962).

automobile driver should have swerved more and missed plaintiff has generally not been followed.<sup>80</sup> Other decisions involve traffic situations in which defendant is unable to ascertain which of several courses of action will effectively prevent an accident.<sup>81</sup> Without proof that defendant's reaction was imprudent, he should not be held liable because he guessed wrong or because his response to an emergency created by plaintiff's negligence was not as wise or effective as it might have been.<sup>82</sup>

Since it is plaintiff whose negligence has usually created the emergency, the mere fact that defendant fails to avoid him should create no presumption of negligence on defendant's part. Again, the question is not whether defendant might have acted so as to avoid hitting plaintiff, but rather whether defendant's

80. See, e.g., *Davis v. Lewis & Lewis*, 226 La. 1064, 78 So.2d 174 (1954); *Burnett v. Marchand*, 186 So.2d 383 (La. App. 1st Cir. 1966); *Whitfield v. Travelers Ins. Co.*, 160 So.2d 353 (La. App. 1st Cir. 1964); *Knighten v. Travelers Indem. Co.*, 127 So.2d 51 (La. App. 1st Cir. 1961); *Arlinc v. Alexander*, 2 So.2d 710 (La. App. 2d Cir. 1941). *But see* *Palmisano v. Ryan*, 136 So.2d 173 (La. App. 4th Cir. 1962); *cf. Kelly v. Neff*, 14 So.2d 657 (La. App. 2d Cir. 1943).

81. These cases involve headon collisions between two vehicles, where plaintiff has negligently crossed over into defendant's lane, leaving him with the unhappy choice of driving his car off the road and possibly injuring himself, asserting his right to that lane in hopes plaintiff will realize the danger and cut his car back onto his own side, or turning his car into plaintiff's lane, hoping plaintiff will not become aware of his negligence and turn back into that lane. See *Davis v. Lewis & Lewis*, 226 La. 1064, 78 So.2d 174 (1954); *Tanner v. Texas & Pac. Ry.*, 135 So.2d 361 (La. App. 3d Cir. 1961); *Guidry v. United States Cas. Co.*, 134 So.2d 319 (La. App. 3d Cir. 1961); *Gage v. Nesser*, 119 So.2d 98 (La. App. 1st Cir. 1960); *Litton v. Samuel*, 98 So.2d 534 (La. App. Orl. Cir. 1954); *Muse v. Gulf Refining Co.*, 8 So.2d 330 (La. App. 2d Cir. 1942); *Bazile v. J. F. Landry & Co.*, 122 So. 901 (La. App. Orl. Cir. 1929); *Kennedy v. Opendeweyer*, 121 So. 363 (La. App. 1st Cir. 1929). While the effectiveness of any action by defendant depends upon the future action of plaintiff which defendant cannot predetermine, in a suit between them the court need not suffer from indecision. The test to defendant's liability is whether he acted reasonably under the circumstances. In these cases, none of the alternatives open to defendant seem unreasonable. *But see* *Prevost v. Smith*, 197 So. 905 (La. App. 1st Cir. 1940).

82. Almost all last clear chance cases arise out of sudden emergency situations where one's actions are often spontaneous reflexes. The reasonableness of the action taken is the primary factor in determining negligence. Since time prevents full contemplation of all possible courses of action, latitude must be afforded the actor in determining the reasonableness of the course taken. The "reasonable man test" thus becomes tempered by constructively placing that ideal being in those same circumstances. If his response is not found to be unreasonable, last clear chance does not become an issue, since the actor is not negligent. See, e.g., *Bagala v. Kimble*, 225 La. 943, 74 So.2d 172 (1954); *Jones v. Sibley, L.B. & S.R.R.*, 121 La. 39, 46 So. 61 (1908); *Burnett v. Marchand*, 186 So.2d 383 (La. App. 1st Cir. 1966); *Welch v. Welch*, 169 So.2d 713 (La. App. 4th Cir. 1964); *Myers v. Maricelli*, 50 So.2d 312 (La. App. 1st Cir. 1951); *Hebert v. Meibaum*, 19 So.2d 629 (La. App. Orl. Cir. 1944) (on rehearing), *aff'd*, 209 La. 156, 24 So.2d 297 (1945); *Muse v. Gulf Refining Co.*, 8 So.2d 330 (La. App. 2d Cir. 1942); *Arlinc v. Alexander*, 2 So.2d 710 (La. App. 2d Cir. 1941); *Clark v. DeBeer*, 188 So. 517 (La. App. 2d Cir. 1939). See also *Prevost v. Smith*, 197 So. 905 (La. App. 1st Cir. 1940).

course of action was reasonable. Plaintiff must not only prove that defendant acted unreasonably, but also that any reasonable course of action would have prevented the accident. A clear chance does not mean only *a reasonable chance*, but that *every reasonable alternative* open to defendant must have been one that would have effectively averted the injury.

That defendant's chance should also be the last opportunity available to either party to avert the injury was the purpose of the earlier limitations to last clear chance, which *Rottman* and *Jackson* undertook to eliminate.<sup>83</sup> The *Jackson* rule may have clarified the law in 1938, but its liberality has also created problems. For example: Driver *A*, unobservant, collides with unobservant driver *B* in an intersection where *A* had the legal right of way. *B* sues *A*, relying on last clear chance. *Jackson* indicates that *B* might recover,<sup>84</sup> reasoning that had *A* been attentive, he probably would have noticed, in sufficient time to avoid him, that *B* was inattentive and was not going to stop. Such a decision would be a perversion of the policy considerations supporting last clear chance. *B* was certainly more at fault; he was negligent both in being inattentive and in failing to yield the legal right of way. *A* had a right to assume that *B* would stop for him, and thus his standard of care was relaxed.<sup>85</sup> *A's* conduct was no more hazardous than *B's*; nor was it later in time.<sup>86</sup>

These considerations, and the fear that continued liberalization of last clear chance might destroy the defense of contributory negligence, have caused the courts to shy away from the full import of *Jackson*. As a result, *B* above would probably not be permitted to recover.<sup>87</sup> The courts employ various language

83. See text accompanying note 48 *supra*.

84. A few cases have applied the broad *Jackson* rule and permitted recovery in this type situation. See *Galliot v. Chisholm*, 126 So.2d 62 (La. App. 4th Cir. 1960); *Boullion v. Bonin*, 2 So.2d 535 (La. App. 1st Cir. 1940).

85. See, e.g., *Kientz v. Charles Dennery*, 209 La. 144, 22 So.2d 292 (1945); *Whitner v. Scott*, 116 So.2d 180 (La. App. 1st Cir. 1959); *Moore v. Shreveport Transit Co.*, 115 So.2d 218 (La. App. 2d Cir. 1959); *Carlson v. Fidelity Mut. & Ins. Co.*, 88 So.2d 461 (La. App. 2d Cir. 1956); *Jones v. American Mut. Liab. Ins. Co.*, 189 So. 169 (La. App. Or. Cir. 1939); *Clark v. DeBeer*, 188 So. 517 (La. App. 2d Cir. 1939); *Buckley v. Featherstone Garage*, 11 La. App. 564, 123 So. 446 (1929).

86. Here also, each exposes the other to the same risks: there is mutuality of risks. There appears to be no reason for the rule of contributory negligence not to apply to bar plaintiff's recovery. See *Burden v. Capitol Stores*, 200 La. 329, 8 So.2d 45 (1942); *Zorick v. Maryland Cas. Co.*, 172 So.2d 706 (La. App. 4th Cir. 1965).

87. See, e.g., *Hebert v. Travelers Ins. Co.*, 179 So.2d 513 (La. App. 3d Cir. 1965); *Scott v. Glazer*, 164 So.2d 185 (La. App. 4th Cir. 1964); *Ageron v.*

in denying recovery in this and similar situations where it seems unable to find any policy reasons why defendant alone should bear the whole loss.<sup>88</sup> One example is when last clear chance is describe das a "two-edged sword" which defendant as well as plaintiff may wield.<sup>89</sup> As a result, there are cases holding that the plaintiff cannot recover because it was he who had the last clear chance.<sup>90</sup> At other times courts find plaintiff had a chance "equal to"<sup>91</sup> or "better than"<sup>92</sup> that of defendant to avoid the accident and conclude that last clear chance cannot apply in plaintiff's favor.

Probably the most authoritative concept to deny recovery is the "superior knowledge test."<sup>93</sup> This criterion of last chance

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Guzzino, 140 So.2d 669 (La. App. 1st Cir. 1962); Clark v. Shannon, 120 So.2d 307 (La. App. 2d Cir. 1960); Harrell v. Goodwin, 32 So.2d 758 (La. App. 2d Cir. 1947). In many more cases the courts refused to specifically hold defendant negligent in failing to appreciate plaintiff's impending peril timely. See, e.g., Musco v. General Guar. Ins. Co., 181 So.2d 881 (La. App. 4th Cir. 1966); Whitfield v. Travelers Ins. Co., 160 So.2d 353 (La. App. 1st Cir. 1964); Williams v. State Farm Mut. Auto. Ins. Co., 148 So.2d 126 (La. App. 2d Cir. 1962); Whitner v. Scott, 116 So.2d 180 (La. App. 1st Cir. 1959).

88. Cf. Scott v. Glazer, 164 So.2d 185 (La. App. 4th Cir. 1964), involving a two-car collision. The court concluded: "There is no more justification for holding that the defendant driver had the last clear chance than there is for holding that the plaintiff had the last clear chance." *Id.* at 187. See also Young v. Thompson, 189 So. 487, 492 (La. App. 1st Cir. 1939).

89. This language was introduced in Bergeron v. Department of Highways, 221 La. 595, 607, 60 So.2d 4, 8 (1952), and reiterated in a number of subsequent cases. See, e.g., Tauzier v. Bondio, 237 La. 516, 111 So.2d 756 (1959); Kraft v. U. Koen & Co., 188 So.2d 203 (La. App. 4th Cir. 1966); LeBlanc v. Aetna Cas. & Sur. Co., 162 So.2d 153 (La. App. 3d Cir. 1964); Emmco Ins. Co. v. Employers Mut. Co., 150 So.2d 338 (La. App. 1st Cir. 1963); Dean v. Pitts, 133 So.2d 917 (La. App. 2d Cir. 1961); Wheat v. Brandt, 61 So.2d 238 (La. App. 2d Cir. 1952). While this approach offers the advantages of clarity and simplicity, it is doubtful last clear chance was intended as a weapon in the hands of defendant, if one accepts the premise that the doctrine is only intended to be an escape from the effects of contributory negligence on part of plaintiff. See note 124 *infra*, and preceding text.

90. See Brown v. Louisville & Nashville R.R., 135 F. Supp. 28 (E.D. La. 1955), *aff'd*, 234 F.2d 204 (5th Cir. 1956); Tauzier v. Bondio, 237 La. 516, 111 So.2d 756 (1959); Bergeron v. Department of Highways, 221 La. 595, 60 So.2d 4 (1952); Barnhill v. Texas & Pac. Ry., 109 La. 43, 33 So. 63 (1902); Short v. City of Baton Rouge, 110 So.2d 825 (La. App. 1st Cir. 1959); Matthews v. New Orleans Terminal Co., 45 So.2d 547 (La. App. Orl. Cir. 1950); Levy v. New Orleans & N.E.R.R., 20 So.2d 559 (La. App. Orl. Cir. 1945); Murphy v. City of Alexandria, 2 So.2d 103 (La. App. 2d Cir. 1941).

91. See Harrison v. Louisiana W.R.R., 132 La. 761, 61 So. 782 (1913); Blackwell v. St. Louis, I.M. & S. Ry., 47 La. Ann. 268, 16 So. 818 (1895); LeBlanc v. Aetna Cas. & Sur. Co., 162 So.2d 153 (La. App. 3d Cir. 1964); Solomon v. Davis Bus Line, 1 So.2d 816 (La. App. 2d Cir. 1941); Eggleston v. Louisiana & Ark. Ry., 192 So. 774 (La. App. 2d Cir. 1939).

92. See, e.g., Tauzier v. Bondio, 237 La. 516, 111 So.2d 756 (1959); Dean v. Pitts, 133 So.2d 917 (La. App. 2d Cir. 1961); Matthews v. New Orleans Terminal Co., 45 So.2d 547 (La. App. Orl. Cir. 1950); Levy v. New Orleans & N.E.R.R., 20 So.2d 559 (La. App. Orl. Cir. 1945). See also cases listed in note 90 *supra*.

93. See, e.g., Employers' Liab. Assur. Corp. v. Butler, 318 F.2d 67 (5th Cir.

traces its ancestry to *Rottman*, where the court stated: "The basis of recovery in such cases is the defendant's *superior knowledge* of the peril and his ability to avoid the injury."<sup>94</sup> (Emphasis added.) Akin to the superior knowledge concept are statements that defendant must have a *later opportunity* or a *later chance*<sup>95</sup> to avoid the accident before last clear chance can apply against him. Such language evidences modern judicial efforts at confining the doctrine to the scope pronounced in *Rottman*. It is noteworthy that this language is generally employed in cases not involving pedestrians or trains. It is usually resorted to where mutuality of risk can be found from the conduct of the parties; unsurprisingly, the requisite of last opportunity has largely been ignored in cases involving pedestrians.<sup>96</sup> This indicates that courts tend to treat pedestrian cases differently from those involving two motor vehicles.

As one can see, the decisions regarding the element of last chance remain confused. It seems that the requisite that defendant's chance be the last one available to either party was founded upon the principle that the last wrongdoer is the one more at fault.<sup>97</sup> Since in almost every case in which last clear chance has been applied it was defendant who struck plaintiff,<sup>98</sup> this notion may yet have substantial effect. But the basis of the last wrongdoer notion was primarily that defendant's later

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1963); *Tanner v. Texas & Pac. Ry.*, 135 So.2d 361 (La. App. 3d Cir. 1961); *Service Fire Ins. Co. of N.Y. v. Houston Fire & Cas. Ins. Co.*, 97 So.2d 854 (La. App. Or. Cir. 1957); *Carlson v. Fidelity Mut. Ins. Co.*, 88 So.2d 461 (La. App. 2d Cir. 1956); *Hanks v. Arkansas & La. Mo. Ry.*, 62 So.2d 139 (La. App. 2d Cir. 1952); *Boullion v. Bonin*, 2 So.2d 535 (La. App. 1st Cir. 1940).

94. *Rottman v. Beverly*, 183 La. 947, 956, 165 So. 153, 156 (1935).

95. See *Kansas City So. R.R. v. Ellzey*, 275 U.S. 236 (1927); *Employers Liab. Assur. Corp. v. Butler*, 318 F.2d 67 (5th Cir. 1963); *Lapuyade v. Pacific Employers Ins. Co.*, 202 F.2d 494 (5th Cir. 1953); *Service Fire Ins. Co. of N.Y. v. Houston Fire & Cas. Ins. Co.*, 97 So.2d 854 (La. App. Or. Cir. 1957).

96. See *Belshe v. Gant*, 235 La. 17, 102 So.2d 477 (1958); *Taylor v. Kendall*, 162 So.2d 156 (La. App. 3d Cir. 1964); *Ingram v. McCorkle*, 121 So.2d 303 (La. App. 1st Cir. 1960); *Dick v. Page*, 77 So.2d 209 (La. App. Or. Cir. 1955); *Prine v. Continental So. Lines*, 71 So.2d 716 (La. App. 2d Cir. 1954); *Moore v. Nola Cabs, Inc.*, 70 So.2d 404 (La. App. 3d Cir. 1954); *Breaux v. Barichnich*, 49 So.2d 651 (La. App. 1st Cir. 1950); *Neyrey v. Maillet*, 21 So.2d 158 (La. App. Or. Cir. 1945).

97. See notes 18 and 19 *supra*, and accompanying text.

98. The only exception to this is some cases involving an accident between a left turning vehicle and an overtaking vehicle (plaintiff) which was in the process of passing the other at the moment the left turn was attempted. See *Cassar v. Mansfield Lbr. Co.*, 215 La. 533, 41 So.2d 209 (1949); *Hollabaugh-Seale Funeral Home v. Standard Acc. Ins. Co.*, 215 La. 545, 41 So.2d 212 (1949); *Burns v. Evans Cooperage Co.*, 208 La. 406, 23 So.2d 165 (1945); *McCallum v. Adkerson*, 126 So.2d 835 (La. App. 2d Cir. 1961); *Parker v. Home Indem. Co. of N.Y.*, 41 So.2d 783 (La. App. 2d Cir. 1949). See note 111 *infra*, and accompanying text for discussion of these cases.

negligence was more to blame in those situations where plaintiff was helpless.<sup>99</sup> Where plaintiff is not helpless, defendant is not the last wrongdoer; plaintiff's wrongdoing continues to the instant of injury. Thus, defendant never has the last chance in a strict sense so long as plaintiff might extricate himself, and his negligence cannot be deemed more wrongful than plaintiff's on the ground that it is the last wrongful conduct. If the rule of last clear chance is to sustain its meaning, the concept of *last chance* must be retained, at least where there can be said to exist mutuality of risks created by both parties' conduct; the judicial efforts to this end are worthy even though the judicial reasoning might be clearer.

### *Negligence and Last Clear Chance*

*Types and Seriousness of Negligence.* In a number of instances the jurisprudence has distinguished between active and passive negligence. Passive negligence is conduct by one who has lost capacity to remedy the perilous situation; for example, one drunk and asleep in a dangerous place.<sup>100</sup> Active negligence is unreasonable action by one who has normal control of his faculties. Under the present rule, however, there appears no need to retain this distinction, for the plaintiff may recover whether his negligence is passive or active,<sup>101</sup> and so the distinction should be discontinued. Notwithstanding, some recent cases still speak in those terms.<sup>102</sup> As a practical matter a plaintiff has a much stronger case under last clear chance if he was helpless rather than inattentive.<sup>103</sup>

99. See FLEMING 218-21; James, *Last Clear Chance: A Transitional Doctrine*, 47 YALE L.J. 704-08, 709-12 (1938); cf. Poncino v. Reid-Murdock & Co., 136 Cal. App. 223, 227, 28 P.2d 932, 934 (1934).

100. Blackburn v. Louisiana Ry. & Nav. Co., 144 La. 520, 80 So. 708 (1919); Rector v. Allied Van Lines, 198 So. 516 (La. App. 2d Cir. 1940); Shipp v. St. Louis S.W. Ry., 188 So. 526 (La. App. 2d Cir. 1939). But see Shaw v. Missouri Pac. R.R., 39 F. Supp. 651 (W.D. La. 1941), where the court found that the pedestrian may have been intoxicated but not so helpless to render his negligence passive. Negligence of mother in allowing four-year-old child to go into street held passive, Abate v. Hirdes, 121 So. 775 (La. App. Cir. 1928). Negligent placing or leaving of an inanimate object held passive negligence, Morris v. Clark, 199 So. 437 (La. App. 2d Cir. 1940); Canal Steel Works v. City of New Orleans, 121 So. 773 (La. App. Cir. 1928). See also Boullion v. Bonin, 2 So. 2d 535 (La. App. 1st Cir. 1940); Harlow v. Owners' Auto. Ins. Co., 160 So. 169 (La. App. 2d Cir. 1935). These two cases broadened the concept of passive negligence to include mere inattentiveness.

101. See Jackson v. Cook, 189 La. 860, 181 So. 195 (1938); Rottman v. Beverly, 183 La. 947, 165 So. 153 (1935).

102. See, e.g., Gregoire v. Ohio Cas. Ins. Co., 158 So. 2d 379 (La. App. 1st Cir. 1963); Dupuy v. Veazey, 63 So. 2d 756 (La. App. Cir. 1953); Boullion v. Bonin, 2 So. 2d 535 (La. App. 1st Cir. 1940) (on rehearing).

103. The writer has found but one type circumstance when plaintiff, guilty

There are kinds of negligent conduct that are more reprehensible to society than others. For example, it is more repugnant to society's standards for one to drive 25 mph over the speed limit than to exceed it by five mph, even though the driver may be negligent in both instances. Louisiana courts recognize this sentiment by characterizing conduct which falls far below the reasonable standard of care as "gross negligence."<sup>104</sup> One might expect that the seriousness of the negligent conduct involved would especially affect the outcome of last clear chance cases, since the doctrine is in one sense only a balancing of fault. But a finding that plaintiff was grossly negligent will not preclude his recovery under last clear chance,<sup>105</sup> and so such labeling appears to have no legal effect.

*Appreciating Plaintiff's Peril.* The basis for plaintiff's recovery under last clear chance is simply that defendant failed to avoid him under circumstances in which a reasonable man would have done so. It is only necessary for the defendant to be proved negligent in one general sense—he failed to avail himself of the reasonable chance he had.<sup>106</sup> The reasons for this failure are varied; especially troublesome are cases where defendant did not appreciate plaintiff's peril in time. Failure to appreciate a peril when a reasonable man would have done so will constitute negligence, which will render defendant liable if it prevented him from utilizing the last clear chance he had.

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of passive negligence, has not been permitted to recover. This is when the accident has occurred in a rural area where defendant could not be held to anticipate the presence of someone helpless in his path. See *Tyler v. Gulf, C. & S.F. Ry.*, 143 La. 177, 78 So. 438 (1918); *Rogers v. Louisiana Ry. & Nav. Co.*, 143 La. 58, 78 So. 237 (1918); *Courtney v. Louisiana Ry. & Nav. Co.*, 133 La. 360, 63 So. 48 (1913); *Gregoire v. Ohio Cas. Ins. Co.*, 158 So.2d 379 (La. App. 1st Cir. 1963).

104. See, e.g., *Blackburn v. Louisiana Ry. & Nav. Co.*, 144 La. 520, 80 So. 708 (1919); *Lavigne v. Southern Farm Bureau Cas. Ins. Co.*, 125 So.2d 430 (La. App. 3d Cir. 1960); *Service Fire Ins. Co. of N.Y. v. Houston Fire & Cas. Ins. Co.*, 97 So.2d 854 (La. App. 4th Cir. 1957); *Montault v. Bradford*, 79 So.2d 601 (La. App. Or. Cir. 1955); *Myers v. Maricelli*, 59 So.2d 312 (La. App. 1st Cir. 1951); *Williams v. Missouri Pac. R.R.*, 11 So.2d 658 (La. App. 2d Cir. 1942).

105. See *Blackburn v. Louisiana Ry. & Nav. Co.*, 144 La. 520, 80 So. 708 (1919); *Williams v. Missouri Pac. R.R.*, 11 So.2d 658 (La. App. 2d Cir. 1942); *Law v. Osterland*, 3 So.2d 674 (La. App. 2d Cir. 1941); *Browne v. Texas & Pac. R.R.*, 193 So. 511 (La. App. 2d Cir. 1939); *Shipp v. St. Louis S.W. Ry.*, 188 So. 526 (La. App. 2d Cir. 1939). In each of these cases the plaintiff guilty of "gross" negligence was a pedestrian, and all but *Law v. Osterland* involved trains.

106. Occasionally a court will (1) determine that plaintiff was negligent, (2) see if defendant could have reasonably avoided plaintiff, and if so, (3) then hold defendant negligent in failing to avail himself of the last clear chance. Cf. *Musco v. General Guar. Ins. Co.*, 181 So.2d 881 (La. App. 4th Cir. 1966); *Wells v. Meshall*, 115 So.2d 648 (La. App. 2d Cir. 1959).

In this area operators are aided by certain legal "presumptions" which have emanated from the body of traffic regulations. One may generally assume that others will obey traffic laws and signals,<sup>107</sup> and that one in a place of safety will not suddenly cast himself into an apparent danger.<sup>108</sup> There may even be circumstances permitting one to assume that another will remove him from peril.<sup>109</sup> But these presumptions fall when one has actual or constructive notice that the other may place himself in or fail to remove himself from danger."<sup>110</sup>

### *Related Miscellaneous Problems*

A overtakes B proceeding in the same direction at a slower rate of speed and attempts to pass B at the same moment B begins to make a left turn; an accident results. Assume both parties were negligent. Most cases deny A recovery under last clear chance.<sup>111</sup> Oddly enough, it is usually plaintiff, the passing motorist, who has struck defendant; but it might be ques-

107. See, e.g., *Sule v. Missouri Pac. R.R.*, 181 So.2d 280 (La. App. 4th Cir. 1965); *Welch v. Welch*, 169 So.2d 713 (La. App. 4th Cir. 1964); *Lavigne v. Southern Farm Bureau Cas. Ins. Co.*, 125 So.2d 430 (La. App. 3d Cir. 1960); *Whitner v. Scott*, 116 So.2d 180 (La. App. 1st Cir. 1959); *Lawrence v. Sansone*, 48 So.2d 281 (La. App. Or. Cir. 1950); *Daly v. Employers Liab. Assur. Corp.*, 15 So.2d 396 (La. App. Cir. 1943); *Kelly v. Neff*, 14 So.2d 657 (La. App. 2d Cir. 1943).

108. See, e.g., *Shipley v. Schittone*, 148 So.2d 918 (La. App. 1st Cir. 1963); *Newton v. Pacillo*, 111 So.2d 895 (La. App. 2d Cir. 1959); *Ballard v. Piehler*, 98 So.2d 273 (La. App. 1st Cir. 1957); *Hebert v. Meibaum*, 19 So.2d 629 (La. App. Or. Cir. 1944) (on rehearing), *aff'd*, 209 La. 156, 24 So.2d 297 (1945); *Coleman v. Terrebonne Ice Co.*, 8 So.2d 313 (La. App. 1st Cir. 1942).

109. See *Dean v. Allied Underwriters*, 11 So.2d 93 (La. App. 1st Cir. 1942); *Young v. Thompson*, 189 So. 487 (La. App. 1st Cir. 1939); *Patterson v. Yazoo & M.V. R.R.*, 187 So. 305 (La. App. 1st Cir. 1939).

110. Notice is that knowledge a reasonable man would have acquired of (1) the incapacity of another (*Gray v. Great Am. Indem. Co.*, 121 So.2d 381 (La. App. 1st Cir. 1960)), (2) the helplessness of another (see *Dupuy v. Veazey*, 63 So.2d 756 (La. App. Or. Cir. 1953); *Coleman v. Terrebonne Ice Co.*, 8 So.2d 313 (La. App. 1st Cir. 1942)), (3) the likelihood that another presently in place of safety, will initiate a dangerous course of action (*Sorrell v. Allstate Ins. Co.*, 179 So.2d 499 (La. App. 3d Cir. 1965); *Bailey v. Reggie*, 22 So.2d 698 (La. App. 1st Cir. 1945)), or (4) the likelihood that another will continue a course of action that will soon place him in peril (*Granata v. Simpson*, 181 So.2d 791 (La. App. 1st Cir. 1965); *Levy v. New Orleans & N.E.R.R.*, 20 So.2d 559 (La. App. Or. Cir. 1945); *Barnes v. Texas N.O.R.R.*, 16 So.2d 600 (La. App. 2d Cir. 1943)). The moment defendant had notice of plaintiff's probable dangerous conduct marks the time when defendant should have appreciated the imminent peril and should have tried to avert the injury.

111. See *Hollabaugh-Seal Funeral Home v. Standard Acc. Ins. Co.*, 215 La. 545, 41 So.2d 212 (1949); *Burns v. Evans Cooperage Co.*, 208 La. 406, 23 So.2d 165 (1945); *Peninger v. New Amsterdam Cas. Co.*, 187 So.2d 128 (La. App. 2d Cir. 1966); *Sonnier v. Great Am. Ins. Co.*, 134 So.2d 363 (La. App. 3d Cir. 1961) (plaintiff was driver of car turning left); *McCallum v. Adkerson*, 126 So.2d 835 (La. App. 2d Cir. 1961); *contra*, *Cassar v. Mansfield Lbr. Co.*, 215 La. 533, 41 So.2d 209 (1949); *Parker v. Home Indem. Co. of N.Y.*, 41 So.2d 783 (La. App. 2d Cir. 1949).

tioned which driver is the one in peril. When their acts are simultaneous, it would seem that both are equally in peril and neither occupies a better position to avoid the imminent collision. In such instances last clear chance should not be used, for its application would place a premium on being plaintiff.<sup>112</sup> Only when the evidence establishes that *B* should have noticed *A* once he had already committed himself to passing, in time for *B* to refrain from any attempt to make his left turn, can it be said that *B* had the last clear chance.<sup>113</sup>

An interesting problem is presented when a train operator observes an object ahead but cannot identify it as a helpless person until it is too late. The cases have held that when the train operator has knowledge of the likelihood of pedestrians being at that place and sees an object which might reasonably be someone asleep on the tracks, he will be liable under last clear chance if he fails to take immediate measures to avoid it.<sup>114</sup> But where pedestrians are not to be anticipated, the result is opposite.<sup>115</sup>

#### IV. LAST CLEAR CHANCE IN COURT

##### *Pleading Last Clear Chance*

Since the negligence of the parties is almost always a primary issue in last clear chance cases, plaintiff will seldom base his case solely on that doctrine, for once he pleads it he admits

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112. Last clear chance is a weapon intended for use by plaintiff to circumvent the contributory negligence bar. Even were defendant to invoke the doctrine, it can act for him only as a shield. Thus, there could result a race to the courthouse, or, alternatively, reconventional demands, in order to have the advantage of the doctrine as a weapon, oftentimes in cases where neither party should recover.

113. See *Johnson v. Wilson*, 239 La. 390, 118 So.2d 450 (1960); *Peninger v. New Amsterdam Cas. Co.*, 187 So.2d 128 (La. App. 2d Cir. 1966). In *Johnson v. Wilson* the court said: "[T]he doctrine has no relevance to the case, as the testimony indicates that both cars began to pull into the left lane at approximately the same time, when they were too close together for either driver to act effectively to avoid the accident." *Id.* at 401, 118 So.2d at 454.

114. *Jones v. Chicago, R.I. & P. Ry.*, 162 La. 690, 111 So. 62 (1926); *McClanahan v. Vicksburg, S. & P. Ry.*, 111 La. 781, 35 So. 902 (1902); *Williams v. Missouri Pac. R.R.*, 11 So.2d 658 (La. App. 2d Cir. 1942); *Shipp v. St. Louis S.W. Ry.*, 188 So. 526 (La. App. 2d Cir. 1939).

115. *Cheek v. Thompson*, 28 F. Supp. 391 (W.D. La. 1939); *Tyler v. Gulf, C. & S.F. Ry.*, 143 La. 177, 78 So. 438 (1918); *Rogers v. Louisiana Ry. & Nav. Co.*, 143 La. 58, 78 So. 237 (1918); *Courtney v. Louisiana Ry. & Nav. Co.*, 133 La. 360, 63 So. 48 (1913); *cf. Smith v. New Orleans & N.E.R.R.*, 153 So.2d 533 (La. App. 1st Cir. 1963). Apparently the same rule applies to automobiles striking objects which turn out to be persons asleep in the road. See *Gregoire v. Ohio Cas. Ins. Co.*, 158 So.2d 379 (La. App. 1st Cir. 1963).

his own negligence.<sup>116</sup> As a result, last clear chance is often pleaded in the alternative. Even that is unnecessary. The Louisiana Code of Civil Procedure requires that plaintiff plead only the facts and the judgment sought.<sup>117</sup> He is not permitted to make any replicatory pleadings;<sup>118</sup> any new matter defendant raises in his answer — such as the defense of contributory negligence — is “considered denied or avoided” as a matter of law.<sup>119</sup> Since last clear chance is but a means by which the plaintiff may *avoid* the consequences of the defense of contributory negligence, it is unnecessary that it be specially pleaded.<sup>120</sup> Further, an appellate court may invoke the doctrine though it was not pleaded or argued at the trial.<sup>121</sup>

Occasionally it is the answer of defendant, and not plaintiff's petition which invokes last clear chance.<sup>122</sup> The courts have consistently recognized this as proper, reasoning that since the last clear chance may have been with either plaintiff or defendant, the doctrine may apply against either party.<sup>123</sup> What defendant does by pleading last clear chance is assert by negative reasoning that the last clear chance was *not* with him because *plaintiff* had it. As, however, the function of last clear chance is to avoid the effect of contributory negligence as a defense, it is meaningless for defendant to allege it,<sup>124</sup> and con-

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116. See, e.g., *Scott v. Glazer*, 164 So.2d 185 (La. App. 4th Cir. 1964); *Gregoire v. Ohio Cas. Ins. Co.*, 158 So.2d 379 (La. App. 1st Cir. 1963); *Dean v. Pitts*, 133 So.2d 917 (La. App. 2d Cir. 1961); *Gray v. Great Am. Indem. Co.*, 121 So.2d 381 (La. App. 1st Cir. 1960).

117. LA. CODE OF CIVIL PROCEDURE art. 891 (1960).

118. *Id.* art. 852.

119. *Ibid.*

120. See McMahon, *Pleading and Judicial Forms*, comment 2, at 252, found in 10 LA. STAT. ANN.—CODE CIV. PROC. Form 391 (1963).

121. *Iglesias v. Campbell*, 175 So. 145 (La. App. 2d Cir. 1937). See also *Lambert v. United States Fire Ins. Co.*, 148 So.2d 406 (La. App. 1st Cir. 1962); *Galloto v. Chisholm*, 126 So.2d 63 (La. App. 4th Cir. 1960); *Lee v. Kastner*, 69 So.2d 137 (La. App. Or. Cir. 1954) (defendant urged the doctrine against plaintiff); *Daw v. Matthews*, 34 So.2d 666 (La. App. 2d Cir. 1948).

122. See, e.g., *Davis v. Lewis & Lewis*, 226 La. 1064, 78 So.2d 174 (1955); *Davidson v. Morrison*, 153 So.2d 94 (La. App. 1st Cir. 1933); *Muse v. Cambly*, 16 So.2d 276 (La. App. 2d Cir. 1944); *Crow v. State Farm Mut. Auto. Ins. Co.*, 10 So.2d 105 (La. App. 1st Cir. 1942); *New Amsterdam Cas. Co. v. Dambly*, 8 So.2d 345 (La. App. 2d Cir. 1942); *Muse v. Gulf Refining Co.*, 8 So.2d 330 (La. App. 2d Cir. 1942); *Chitwood v. King*, 155 So. 466 (La. App. 1st Cir. 1934).

123. This reasoning was introduced into the jurisprudence in *Bergeron v. Department of Highways*, 221 La. 595, 60 So.2d 4 (1952). See also, e.g., *Kraft v. U. Koen & Co.*, 188 So.2d 203 (La. App. 4th Cir. 1966); *LeBlanc v. Aetna Cas. & Sur. Co.*, 162 So.2d 153 (La. App. 3d Cir. 1964); *Emmco Ins. Co. v. Employers Mut. Co.*, 150 So.2d 338 (La. App. 1st Cir. 1963); *Dean v. Pitts*, 133 So.2d 917 (La. App. 2d Cir. 1961).

124. See McMahon, *Pleading and Judicial Forms*, comments to Form 392, found in 10 LA. STAT. ANN.—CODE CIV. PROC. (1963).

fusion could be eliminated by judicial recognition that the doctrine is inappropriate when invoked by defendant.

#### *Proximate Cause and Last Clear Chance*

The permeation of proximate cause throughout the law of negligence has had its effects on last clear chance. While most of the cases speak of proximate cause, it is generally not discussed; rather it is employed as an additional method of concluding which party's negligence was legally responsible for the injury. Thus, if the court finds defendant had the last clear chance it often adds that his negligence was the proximate cause of the accident.<sup>125</sup> Proximate cause, however, should not be employed to determine ultimate liability between two negligent parties when the negligence of both contributed to the accident.<sup>126</sup>

#### *Third-Party Plaintiff: Joint Tortfeasor Cases*

The application of last clear chance becomes somewhat more complex when there are joint tortfeasors and an innocent third party. The jurisprudence is uniform that last clear chance cannot be invoked to the prejudice of an innocent third person.<sup>127</sup> Thus, both tortfeasors are liable *in solido* to the non-negligent third party. The reasoning and result of these cases appears quite sound. Last clear chance is only employed between two negligent parties to avoid the defense of contributory negligence; it certainly should not be used to the prejudice of a non-negligent party. This, however, does not prevent the court from applying the doctrine to determine the rights of the two defendants between themselves.<sup>128</sup>

### V. CONCLUDING REMARKS

The situation which last clear chance best fits is one where plaintiff is helpless or where defendant's negligent conduct cre-

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125. See, e.g., *Rottman v. Beverly*, 183 La. 947, 165 So. 153 (1935); *Browne v. Texas & Pac. R.R.*, 193 So. 511 (La. App. 2d Cir. 1939). There appears to be much less mention of proximate cause in more recent decisions.

126. This is the function of last clear chance. Also, unsound reasoning can result from overemphasis of proximate cause. See *Harlow v. Owners' Auto. Ins. Co.*, 160 So. 169 (La. App. 2d Cir. 1935). See also *Boullion v. Bonin*, 2 So. 2d 535 (La. App. 1st Cir. 1940) (on rehearing); *Taylor v. Shreveport Yellow Cabs*, 163 So. 737 (La. App. 2d Cir. 1935).

127. *Shield v. F. Johnson & Son*, 132 La. 773, 61 So. 787 (1913); *Hebert v. Travelers Ins. Co.*, 179 So. 2d 513 (La. App. 3d Cir. 1965); *Abrego v. Tri-State Transit Co.*, 22 So. 2d 681 (La. App. 1st Cir. 1945); *Killian v. Modern Iron Works*, 15 So. 2d 532 (La. App. 2d Cir. 1943); *Tarilton-Gaspard v. Malochee*, 16 La. App. 527, 133 So. 409 (1931).

128. See *Howard v. Fidelity & Cas. Co. of N.Y.*, 179 So. 2d 522 (La. App. 3d Cir. 1965).

ates a disproportionately greater risk of serious injury than does plaintiff's negligent conduct; that is, where mutuality of risk is lacking.<sup>129</sup> But where two instrumentalities are involved and there is no appreciable difference in the risks created by their operation, it is submitted that last clear chance should only be applied when plaintiff is helpless or when plaintiff's inattention is discovered by defendant (that is, where defendant can be said to be substantially more at fault in causing the accident). If mutuality of risks is present, it is improper to ground liability upon the principle that defendant's duty extends to protecting a plaintiff from his own negligence, or that defendant should have anticipated plaintiff's negligence; for plaintiff's duty is of the same scope, and he should be equally on the lookout for defendant's negligence.

In the administration of justice between two negligent parties it is impossible for a judge and jury not to consider the degree of fault of each in reaching a decision. Last clear chance is a formulation of some important factors in determining degrees of fault. Since that is what the courts are doing, it seems preferable that they should recognize the process for what it is. If this were done, comparative negligence would be adopted and last clear chance would become purposeless. Comparative negligence presents many advantages over the present method of solving cases. It is uncomplicated and easy to administer; it is more realistic and more just. While other states could not adopt comparative negligence without special legislation, Louisiana is free of that obstacle, for the principle of comparative negligence is expressly provided in article 2323 of the Civil Code.<sup>130</sup> All that is lacking is judicial recognition and application of existing legislation.<sup>131</sup> Until such time one must endure the contributory negligence rule and the problems it provokes. Likewise, last clear chance, nourished by these problems, will remain.

*Scotty G. Rozas*

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129. This explains why courts impose a high standard of care on operators of moving vehicles and a lower standard on pedestrians. This may be taken one step further by separating train operators from other types of operators and demand of railroad companies an even higher standard of care than is demanded from automobile drivers. In all cases the standard of care is commensurate with the hazards a particular type of conduct imposes upon public safety. It might be helpful for courts to recognize the distinction between last clear chance cases involving (1) a motor vehicle and a pedestrian, (2) two motor vehicles, and perhaps (3) a train and a pedestrian or motor vehicle.

130. LA. CIVIL CODE art. 2323 (1870).

131. See Malone, *Comparative Negligence, Louisiana's Forgotten Heritage*, 6 LA. L. REV. 125 (1945).