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Negligence—Last Clear Chance Held Applicable Though Defendant's Driver Did Not See Decedent

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stances, probability and strength of the plaintiff's cause. See *Zoske* v. *Zoske, supra,* at 834.

In the principal case, the majority's interpretation of the statute directs the trier of facts to refuse an annulment unless he be able to recognize from sources, other than the declarations of the parties, factual material which substantially verifies the integrity of the action. The rule is converted from one of evidence to one for the guidance of the judicial conscience. See *Winston* v. *Winston,* 165 N. Y. 553, 59 N. E. 273, *aff'd,* 189 U. S. 506 (1901). Under this reading, appeals would be restricted to those cases in which appellant could show that the trial forum was unreasonable in believing or disbelieving the additional proof offered.

The opposite approach would require as a technical rule of law that each vital factor of the action be established by "other satisfactory evidence." This view indicates a formalistic approach and exhibits greater concern for the traditional interest of the state in the preservation of marriages. By this conception, a defendant-appellant would prevail by showing that the "other evidence" was insufficient to sustain the establishment of any one of the required elements of the action; an appealing plaintiff would be forced to show that the additional proof established each factor. See *Matter of Case,* 214 N. Y. 199, 108 N. E. 408 (1915); *Blum* v. *Fresh Grown Preserve Corp.,* 292 N. Y. 241, 54 N. E. 2d 809 (1944).

The instant case is indicative of a relaxed interpretation of the statute and the majority has construed § 1143 to require only that there be in the record, in addition to "declarations" or "confessions" of the parties, material from other sources, substantial and reliable enough to satisfy the conscience of the trier of the facts. The emphasis is apparently relaxed as to substantiation of the factors constituting the fraud when demonstrated proof has impugned the defendant's truthfulness. The result in this case is surely chargeable in part to the pressure of modern liberal attitude, regarding the sanctity of the marriage state, considered in light of New York's one-ground divorce law. But by highlighting the existence and force of the statute, the decision may serve rather, in a practical way, to raise the existing requirements for dissolution—at least in uncontested annulment actions. See *Caleca* v. *Caleca, supra,* and the comment of Referee Lapham in *Richardson* v. *Richardson,* 103 N. Y. S. 2d 219 (Sup. Ct. 1951): "Certainly it (the principal case) is serving the very useful purpose of stimulating the thinking of the Bench and Bar as to the exact meaning of § 1143."

Morree M. Levine

NEGLIGENCE — LAST CLEAR CHANCE HELD APPLICABLE THOUGH DEFENDANT'S DRIVER DID NOT SEE DECEDENT

Decedent and his brother hitched a ride on the side of defendant's truck

unseen by the driver. Decedent slipped from his perch, grabbed onto a handhold and, after being dragged about 300 feet, fell under the rear wheel, sustaining fatal injuries. His brother began rapping on the truck window when decedent first slipped. The driver testified that he saw the hand rapping on the window ". . . so I figure something is in danger." There was conflicting evidence as to whether he promptly stopped the truck.

The Court of Appeals, reversing the non-suit of the trial court, held that it was a question of fact for the jury whether the driver knew someone was in peril and whether he acted unreasonably after such knowledge. *Chadwick* v. *City of New York,* 301 N. Y. 176, 93 N. E. 2d 625 (1950).

The court in the instant case said that last clear chance can be invoked as long as there is knowledge that someone is in peril; the defendant need not be cognizant of both the exact nature of the danger and of the particular person threatened.

Contributory negligence is not a bar to recovery if the plaintiff's situation was known by the defendant in time to avert the consequences of plaintiff's negligence. The last clear chance doctrine may then be applied, defendant's negligence being the sole legal cause of the injury. *Storr* v. *New York Central R. R.,* 261 N. Y. 348, 185 N. E. 407 (1933). Last clear chance has sometimes been treated as a doctrine of proximate cause, *Bragg* v. *Central New England Ry.,* 228 N. Y. 54, 126 N. E. 253 (1920), and also justified on the basis that defendant's act is wilful or wanton so that plaintiff's contributory negligence is not a bar. *Wilson* v. *Southern Ttraction Co.,* 111 Tex. 361, 234 S. W. 663 (1921). Probably the real rationale behind the doctrine is a dislike for the defense of contributory negligence. See PROSSER ON TORTS, 409, 410. Some believe the doctrine to be a transitional one before the adoption of comparative negligence and damage apportionment. See 47 YALE L. J. 704 (1938).

To apply the doctrine plaintiff's negligence must be prior to, not contemporaneous with, the defendant's negligence. *Hernandez* v. *Booklyn & Queen's Transit Co.,* 284 N. Y. 535, 32 N. E. 2d 542 (1940); *Panarese* v. *Union Ry.,* 261 N. Y. 233, 185 N. E. 84 (1933); and a duty must be owed to plaintiff by defendant. *Elliott* v. *N. Y., N. H. & Hartford R. Co.,* 83 Conn. 320, 76 A. 298 (1910); *Tarter* v. *Missouri, Kansas, Texas R. Co.,* 119 Kan. 365, 239 P. 754 (1925); see 92 A. L. R. 47, 55.

In New York the defendant must have *actual* knowledge that another is in a state of present peril although such knowledge may be established by circumstantial evidence even in the face of professions of ignorance. *Woloszynowski* v. *New York Central R. R.,* 254 N. Y. 206, 172 N. E. 471 (1930); *Bragg* v. *Central New England Ry., supra; Elliott* v. *New York Rapid Transit Co.,* 293 N. Y. 145, 53 N. E. 2d 86 (1944). But this rule does not require that the exact nature of the peril be known. Generally in negligence the exact nature of the

danger need not be known by the defendant in order for there to be liability. *Hill* v. *Windsor,* 118 Mass. 251 (1875). And the knowledge which will bring a case within the doctrine may be acquired without the defendant actually having seen the peril [see *Southern Ry Co.* v. *Ingle,* 117 Ind. App. 229, 69 N. E. 2d 746 (1946)], or the particular person threatened. It is only required that the plaintiff is foreseeably within the zone of danger created by the defendant's unreasonable conduct, and that defendant is given reasonable warning of his presence. In *Woloszynowski* v. *New York Central R. R., supra,* the allegedly negligent engineer could neither see nor identify the decendent but he was informed of the victim's presence and perilous position by the shouts of warning from the fireman and brakeman; the defendant was held not liable because the engineer had no time to avert the injury after he had knowledge of the peril—not because he failed to see the decedent.

The holding in the instant case requires: 1) that defendant owe plaintiff a duty of care as in every action for negligence, *Palsgraf* v. *Long Island R. Co.,* 248 N. Y. 339, 162 N. E. 99 (1928); 2) that defendant know that someone is in peril, *Woloszynowski* v. *New York Central R. R., supra;* 3) that defendant's negligence be subsequent to the plaintiff's negligence, *Hernandez* v. *Brooklyn & Queen's Transit Co.,* and *Panarese* v. *Union Ry., supra;* 4) that defendant by the exercise of ordinary care could have avoided the accident. Some jurisdictions also require that plaintiff be unable to extricate himself. The New York decisions are unclear on this point, but in the instant case, decedent was clearly unable to extricate himself, a situation in which all courts allow recovery. See annotation 92 A. L. R. 83-101.

Here, whatever may have been the duties or obligations of the parties before the driver was made aware of the presence of the hitchhikers, after such notice a duty of care arose, and unreasonable conduct in failing to conform to the duty, with resultant injuries, would constitute actionable negligence. *Weitzman* v. *Nassau Electric R. Co.,* 33 App. Div. 585, 53 N. Y. Supp. 905 (1898). After notice of his presence, the decedent, being within the zone of foreseeable danger, was owed a duty of care. The decedent's negligence here —the single non-continuing act of mounting the truck ,completed long before the injury—was prior to, not contemporaneous with, the defendant's negligence. Thus, the decedent's negligence did not contribute right up to the point of impact as an active factor in causation. *Compare Panarese* v. *Union Ry., supra.* Whether the rapping on the window gave the defendant's driver the requisite knowledge to invoke last clear chance, and if so, whether the driver could have avoided the accident by the exercise of ordinary care, are questions of fact properly within the purview of the jury.

Chadwick v. *City of New York,* the principal case, may appear at face value to be an extension of last clear chance in New York. It is submitted,

however, that the decision does not go beyond the scope of the doctrine as it existed heretofore, but rather serves to clarify the nature of last clear chance.

Alvin M. Glick

LIMITATION OF ACTIONS — IMPLIED WARRANTY "CONTRACT" ACTION HELD BARRED BY INJURY TO PROPERTY STATUTE OF LIMITATIONS

More than three years after plaintiff's dwelling house had been levelled by an explosion of waterproofing material he had purchased from the defendant, the plaintiff brought this action for damages for injury to his property. The complaint contained two causes of action, one of which was framed in contract and predicated on a breach of warranty theory. The motion to dismiss set up the three year statute of limitations applicable to actions for damages for injury to property, New York Civ. Prac. Act § 49(7). The plaintiff in opposition to this motion, contended that the six year statute applying to contract actions should govern. N. Y. Civ. Prac. Act § 48(1). *Held:* An action for consequential damages to property, whether the action is brought in contract or in tort, is an action for injury to property within the three year statute of limitations. Motion of defendant granted. *Buyers* v. *Buffalo Paint & Specialties, Inc.*, 99 N. Y. S. 2d 713 (Sup. Ct. Erie County 1950).

By Chapter 588 of the Laws of 1936 §§ 48 and 49 were amended, subd. 7 being added to § 49, cutting down the applicable period of limitations for actions for damages for injury to property from six to three years. Section 49 in part states: "The following actions must be commenced within three years after the cause of action has accrued . . . (7) An action to recover damages for an injury to property, except in the case where a different period is expressly prescribed in this article . . ." It will be noted that this statute does not draw a distinction in terms between actions in tort and actions in contract.

Warranty actions are commonly cast in the form of an action in contract. There must be privity of contract in an action for breach of warranty. *Ryan* v. *Progressive Grocery Stores*, 255 N. Y. 388, 175 N. E. 105, 74 A. L. R. 339 (1931). The negligence of the defendant is immaterial. *Rinaldi* v. *Mohican Co.*, 171 App. Div. 814, 157 N. Y. S. 561 (3d Dept. 1916), *aff'd*, 225 N. Y. 70, 121 N. E. 471 (1918). General Construction Law § 25-a states: "Injury to property is an actionable act, whereby the estate of another is lessened, other than a personal injury or the breach of contract." Injury to property refers to actions grounded in tort, such as trespass or waste. *Confreda* v. *George H. Flinn Corp.*, 68 N. Y. S. 2d 925 (Sup. Ct. 1947). The definition of injury to property, § 25-a, is applicable to the Civil Practice Act. General Construction Law, § 110, Report of Joint Legislative Committee, 34 (1919). But cf.