Washington Law Review

Volume 27 | Number 2

5-1-1952

# Negligence—Last Clear Chance—Emergency Rule

Gordon F. Crandall

The court suggests, as all judicial remedy cannot be denied to *D*, that the proper recourse should be to habeas corpus. See *State v. Durham,* 139 Wash. Dec. 721, 724, 238 P. 2d 1201, 1203 (1951). It is submitted, however, that the statutory remedy should be available to persons in group (b) and such persons should not be required to invoke the already overworked remedy of habeas corpus.

RAY M. DUNLAP

**Negligence—Last Clear Chance—Emergency Rule.** *P* was helping to push *F*'s car out of a ditch and while standing beside the car he failed to see the approach of *D*'s auto over the crest of a hill 250 feet behind him. *D* saw *F*'s automobile partially blocking the road and tried to stop or avoid it, but his car went out of control, slid broadside down the slippery road and struck *P*, pinning him between the two cars as they collided. The trial court gave the jury an instruction on last clear chance, apparently for the reason that although *D* was unable to stop his car, as a reasonable man he might have been able to blow his horn, which would have warned *P*. Judgment for *P*. On appeal, *Held:* Reversed; new trial granted. Last clear chance is inapplicable, because although *P*'s clear chance to get out of the way might have been imputable to *D* for his failure to blow his horn, under the "emergency rule" *D* was not negligent as a matter of law. *Bergstrom v. Ove,* 139 Wash. Dec. 73, 234 P. 2d 548 (1951).

The last clear chance doctrine, which operates to bar the defense of contributory negligence when the defendant has a superior opportunity to avoid the harm, is recognized in two forms in Washington: the "unconscious" form and the "conscious" form. *Leftridge v. City of Seattle,* 130 Wash. 541, 228 Pac. 302 (1924). Under the "unconscious" form the plaintiff's contributory negligence is not a defense if (1) the plaintiff, by his own negligence, was in a helpless and inextricable position of peril; (2) the defendant had a duty to watch out for the plaintiff; and (3) the defendant injured the plaintiff due to his failure to watch out for him. *Thompson v. Porter,* 21 Wn. 2d 449, 151 P. 2d 433 (1944); *Zettler v. City of Seattle,* 153 Wash. 179, 279 Pac. 570 (1929); PROSSER, TORTS § 54 (1941). Clearly this form of the doctrine could not apply in the instant case, because *P* was merely inattentive, and not in a helpless position of peril. *Thompson v. Porter, supra.* Under the "conscious" form of the doctrine a defendant is held liable for his negligence despite the plaintiff's contributory negligence, provided the defendant (1) actually saw the plaintiff and realized (or should have realized) his peril in time to avoid the injury, and (2) failed to exercise reasonable care to avert the harm after discovering the plaintiff's peril. Under this form the plaintiff's negligence may consist of mere inattention, and he need not be in a helpless position. *Mosso v. Stanton Co.,* 75 Wash. 220, 134 Pac. 941 (1913); *Leftridge v. City of Seattle, supra;* PROSSER, TORTS § 54 (1941); RESTATEMENT, TORTS § 280 (1934).

It is submitted that the situation presented by the instant case clearly calls for an instruction to the jury on the latter form of the doctrine. However, the court ruled it out, and began their analysis by asking the following question: "In this factual situation, is [*P*'s] clear chance to get out of the way *imputable* to [*D*]?" (Italics added.) Apparently this was the court's way of asking whether *D* was negligent for failing to blow his horn, since *P* could have jumped out of the way had he been warned.. The use of "imputable" in this context seems curious because the term is ordinarily used to ascribe liability to a person because of an agency or other close relationship. Its use in this case suggests an innovation in the doctrine of last clear chance by charging one person with another's ability to escape harm, and obscures the vital question to which the court should address itself; *viz.,* "Did *D* see *P* and realize his peril in time to avoid the injury by blowing his horn?" It is submitted that the court's analysis of the

problem not only overlooks this first element of the doctrine, but further confuses the inquiry by the use of the term "imputable."

The second element of the "conscious" form of last clear chance involves the question of whether the defendant was negligent after he discovered the plaintiff's peril. *Leftridge v. City of Seattle, supra.* The court found that *D* was not negligent as a matter of law, applying the "emergency rule," which in essence is that a person who is compelled to act instantly to avoid an injury is not negligent if he makes a choice, though not the wisest one, which any prudent person in the same situation would make. *Ruff v. Fruit Delivery Co.,* 22 Wn. 2d 708, 157 P. 2d 730 (1945); *Hook v. Kirby,* 175 Wash. 352, 27 P. 2d 567 (1933). Our court, however, said that because of this rule *D* was "not required to elect horn blowing or any other particular course of action at his peril." The compelling inference from this and other language of the opinion is that since *D* was faced with an emergency situation, he *could not* be negligent, which overlooks the possibility that despite his predicament *D* could still have failed to use reasonable care. *Reuman v. La Monica,* 58 Cal. App. 2d 303, 136 P. 2d 81 (1943); PROSSER, TORTS § 37 (1941). The "emergency rule" does not purport to preclude negligence, but is merely a reminder that the emergency is one of the circumstances to be considered in judging a defendant's conduct. *Clark v. Farmer,* 229 Ala. 596, 159 So. 47 (1935); 9 NOTRE DAME LAW. 244 (1934).

Since negligence is normally a question of fact, unless only one reasonable inference can be drawn from the evidence, it would seem that the question of *D*'s negligence under the emergency situation in the instant case was properly left to the jury, because reasonable minds could easily differ as to whether he should have blown his horn, notwithstanding the admonition of the "emergency rule." See *Carroll v. Union Pacific Ry.,* 20 Wn. 2d 191, 146 P. 2d 813 (1944); *Brucker v. Matsen,* 18 Wn. 2d 375, 139 P. 2d 276 (1943).

While the applicability of last clear chance is a question of law, the court need only determine whether the physical facts at the time of the accident were such that the jury might find the elements of the doctrine present, and the question of negligence should be for the jury, except in the clearest of cases. *Smith v. Gamp,* 178 Wash. 451, 35 P. 2d 40 (1934); *Anspach v. Saraceno,* 149 Wash. 312, 270 Pac. 811 (1928). In the instant case, the Supreme Court rejected last clear chance, not for the reason that the situation did not call for its use, but on the ground that *D* was not negligent as a matter of law. Since *D*'s negligence in failing to blow his horn was properly a jury question, it would seem the court erred in rejecting last clear chance, because the decision finding it inapplicable was based entirely on the question of *D*'s negligence under the "emergency rule." Judge Schwellenbach has pointed out that if our court continues to determine negligence as a matter of law, thus preventing last clear chance from operating in appropriate situations, the doctrine "might just as well be rolled up and permanently placed off the highway." *Sarchett v. Fidler,* 37 Wn. 2d 363, 223 P. 2d 843 (1950) (dissenting opinion). In the instant case his concurring opinion suggests that he believes his prediction has now come true.

GORDON F. CRANDALL

**Municipal Corporations—Competition Between Public Utilities.** A Public Utility District (P.U.D.), organized in 1937 and including the Town of Newport in its territory, in June 1949 purchased the properties of a public service corporation which supplied the Town of Newport and the surrounding area with electric power. The P.U.D. thereafter performed this service. In July 1949, the Newport City Council proposed that the city acquire its own power system. An election was conducted which