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HISTORICAL BACKGROUND

The student of a thousand years of Anglo-American legal history marvels at the comparatively late development of the law of Torts. Mr. Justice Holmes in 1870, reviewing an edition of Addison's work abridged for the use of Harvard Law students, observed "we are inclined to think that Torts is not a proper subject for a law book.'"[1] It is recorded that Joel Bishop, proposing in 1853 to write a text on Torts, was assured that there was no call for such a work, and that "if the book were written by the most eminent and prominent author that ever lived, not a dozen copies a year could be sold.'"[2] It was not until the year 1859 that the first general work on Torts was published, the American text by Hilliard, followed the next year, 1860, by Addison on Torts, an English work.

With recognition thus late in the substantive law, it may safely be said that no other branch of the law has in seventy-five years undergone such rapid and extensive change, expansion, and development as the law of Torts. Markedly accelerated has been the growth of the last thirty years, a period of the Restatement of the law of Torts, a vast outpouring of comment and discussion in the legal periodicals, a period of extensive development in case law.

Especially late to develop was the law of negligence, of contributory negligence, and of the last clear chance. Negligence was scarcely recognized as a separate tort before the early part of the nineteenth century. About the year 1825, negligence emerging out of the action on the case, began to be recognized as a separate basis of tort liability. Its rise coincided closely with the industrial revolution. The increased number of accidents caused by the industrial revolution, and the invention of the railroads was a stimulating influence.

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[1]Seavey, *Principles of Torts*, 56 Harv. L. Rev. 72 (1942); 22 Neb. L. Rev. 177 (1943).

[2]Prosser, Torts, Preface VII; Seavey, *Supra*, Note 1. "Torts were considered piecemeal under such titles as assault, defamation, deceit."

About the same time, the disintegration of the old forms of action and the disappearance of the distinction between direct and indirect injuries as founded in trespass and case, paved the way for a substantive law differentiation of intentional injury, direct or indirect, versus the unintended tort of negligence.[3]

One of the earliest English cases applying a doctrine of contributory fault was *Butterfield v. Forrester* decided in 1809.[4] It was not until the year 1842 that the celebrated donkey case of *Davies v. Mann*[5] enabled an English court to give expression to the doctrine which has since become known as that of the "last clear chance." Thus, within a period of less than a hundred years, our jurisdictions have found it necessary to analyze and develop a doctrine of the greatest technical nicety arising out of a branch of the law which in turn had been given an independent existence only a few years previously and which is still being dynamically formulated and moulded in the grist of actual decisions as the cases arise. It is not surprising, therefore, that jurisdictions have differed in their application of the last clear chance principles and that decisions in the same jurisdiction are frequently irreconcilable from the earliest to the latest.[6]

The formulation of the Torts Restatement has conduced to clearer thinking on the subject. With emphasis on the time sequence of events, defendant's conduct is tortious if immediately before the accident he has the superior opportunity to avoid it, under circumstances involving:

(1) The discovered helpless peril (i.e. physical helplessness) of the injured person regardless of the place of injury.[7]

[3] PROSSER, TORTS p. 171.

[4] (1809) 11 East 60. See also Cruden v. Fentham (1798) 2 Esp. (K.B.) 685, and Clay v. Wood (1803) 5 Esp. (K.B.) 44.

[5] (1842) 10 M & W. 546.

[6] Note the Colorado Survey in DEMUTH, *Derogation of the Common Law Rule of Contributory Negligence*, 7 ROCKY MTN. L. REV. 161 (1935).

[7] RESTATEMENT, TORTS, §479 applies to *the physically helpless plaintiff*, thus, "A plaintiff who has negligently subjected himself to a risk of harm from the defendant's subsequent negligence may recover for harm caused thereby, if, immediately preceding the harm;

(a) the plaintiff is unable to avoid it by the exercise of reasonable vigilance and care, and

(b) the defendant

(I) Knows of the plaintiff's situation and realizes the helpless peril involved therein; or

(II) knows of the plaintiff's situation and has reason to realize the peril involved therein: or

(2) The undiscovered helpless peril (i.e. physical helplessness) of the injured person at a place where defendant is under a duty to keep a lookout as at railroad crossings.[8]

(3) The discovered negligent inattention (i.e. mental obliviousness) of the injured person regardless of the place of injury.[9]

The defendant is not culpable, however, if the case involves the undiscovered negligent inattention (i.e. mental obliviousness) of the injured person.[10] Under the Missouri humanitarian doctrine, liability would also attach in this situation.[11] Since both parties are here mutually inattentive, the great weight of authority is that this is not properly a last chance situation. Neither party had a chance to avoid the accident that the other did not have. The Missouri humanitarian doctrine arose in the eighties, a day of privilege for the railroads, watered stock, undeveloped air brakes, undeveloped warning signals and lights, unpredictable old dobbin, sympathy for the injured man. It approaches an absolute liability principle.[11a] At the present time, $5,000 to $10,000 in insurance against personal injury liability on a car costs $14 to $18 in Illinois, Iowa, Kansas, Nebraska, and Oklahoma, and the national av-

(III) would have discovered the plaintiff's situation and thus had reason to realize the plaintiff's helpless peril had he exercised the vigilance which it was his duty to the plaintiff to exercise, and

(c) thereafter is negligent in failing to utilize with reasonable care and competence his then existing ability to avoid harming the plaintiff.

[8]RESTATEMENT, TORTS, §479.

[9]RESTATEMENT, TORTS, §480 applies to the *mentally inattentive plaintiff*, thus, "A plaintiff who, by the exercise of reasonable vigilance could have observed the danger created by the defendant's negligence in time to have avoided harm therefrom, may recover if, but only if, the defendant

(a) knew of the plaintiff's situation, and

(b) realized or had reason to realize, that the plaintiff was inattentive, and therefore unlikely to discover his peril in time to avoid the harm, and

(c) thereafter is negligent in failing to utilize with reasonable care and competence his then existing ability to avoid harming the plaintiff."

[10]PROSSER, TORTS, page 408; RESTATEMENT, TORTS, §480.

[11]Barrie v. St. Louis Transit Co. (1903) 102 Mo. App. 87, 76 S. W. 706; Murphy v. Wabash R. Co. (1910) 228 Mo. 56, 128 S. W. 481; Maginnis v. Missouri Pac. R. Co. (1916) 268 Mo. 667, 187 S. W. 1165.

[11a] See the rule of Rylands v. Fletcher (1868) L. R. 3, H. L. 330 which has not been applied in Montana. King v. Miles City Irr. Ditch Co. (1895) 16 Mont. 463, 41 P. 431; Jeffers v. Montana Power Co. (1923) 68 Mont. 114, 217 P. 652.

erage is $19.50; the cost is, however, $32 in Missouri where the humanitarian doctrine obtains.[12] Missouri citizens generally seem to be paying for the maintenance of the humanitarian doctrine in the courts at a time when the conditions responsible for its adoption have largely passed. Carriers are no longer feared as ultra-hazardous. Farm animals appear bored with the presence of means of faster transportation, there is increasing social interest in transportation of all kinds.

II.

MONTANA CASES.

One of the earliest reported Montana cases[13] involving application of last chance principles is the 1908 decision of *Neary v. Northern Pacific Railway Co.*[14] Deceased was a freight conductor who had just brought his freight train into the Billings yard; he became so absorbed in the task of checking his train that he failed to observe the coming of the Northern Pacific passenger train. He was struck and killed. Directed verdict and judgment for defendants was reversed, and the case remanded for a new trial. While the deceased was guilty of contributory negligence in not looking and listening while walking along the track, the court held that the question whether the engineer could after discovery of the peril of the

[12]See table by McCLEARY, *The Bases of the Humanitarian Doctrine Reexamined*, 5 Mo. L. REV. 56, 87 (1940).

[13]The first Montana case suggesting the last clear chance doctrine is Riley v. Northern Pac. Ry. Co. (1908) 36 Mont. 545, 93 P. 948. In this case, two men were run over and killed at a Billings street intersection at night. A switch-engine was being backed over the crossing. The widow, as administrator of one of the men, sued and recovered a verdict and judgment of $12,600 which the higher court affirmed. The complaint appeared to be one in primary negligence setting forth various grounds of fault to which defendant answered contributory negligence. There was no reply of the last clear chance, and upon appeal, defendant claimed error in that the doctrine "if such it may be termed, of the last clear chance" was relied upon in argument and no such issue was raised by the reply. To this the court observed: "There may be cases where the claim that the defendant had the last clear chance to avoid the injury, being relied upon by the plaintiff as a basis for affirmative testimony in rebuttal must be set forth in a reply in answer to defendant's plea of contributory negligence. But in this case no such necessity arose. All of the testimony relating to the last clear chance went in under the issues made by the complaint and answer without objection. Under these circumstances the plaintiff could rely upon the so-called doctrine." The complaint was long. The defendant's alleged negligence mostly primary was presented under various instructions. One cannot find that the court had any definite theory for a last chance case. Apparently, it was, in 1907, only faintly aware of the doctrine and its implications.

[14](1908) 37 Mont. 461, 97 P. 944.

conductor have stopped his train and prevented the accident should have been submitted to the jury.

On this basis, the case was correctly decided.[15] Deceased was not physically helpless; he was merely mentally inattentive. The case would, therefore, be one of contributory negligence unless defendant actually discovered the deceased in time to avoid the injury. Doubt has arisen on the basis of what the court said rather than what it decided. Thus said the court at page 474 of 37 Montana:

> "The general rule that one's own negligence in such case precludes recovery is subject to the qualification that, where the defendant has discovered, or *should have discovered,* the peril of the plaintiff's or deceased's position, and it is apparent that he cannot escape therefrom or for any reason does not make an effort to do so, the duty becomes imperative for the defendant to use all reasonable care to avoid the injury; and, if this is not done, he becomes liable, notwithstanding the negligence of the injured party."

Further, said the court:

> ". . . the rule applies to technical trespassers as well as to employees."

Now while the application of the unconscious last chance doctrine either to technical trespassers or to merely negligently inattentive employees would by the Restatement and the weight of authority rule, be indefensible, it should be noted that the court, at page 475 of 37 Montana, says:

> "The engineer evidently saw him, for the evidence tends to show that he sounded the whistle. If this was done while the train was near the caboose, he had more than twice the distance necessary to stop the train."

This, the ratio decidendi, is believed to be satisfactory.

In *Melzner v. Northern Pacific Railway Co.*[16] an administrator sued to recover damages for injury resulting in the death of a boy by being struck by a railroad train. The complaint alleged that defendant's engineer saw deceased in the path of his engine, and "did see that the said boy was in danger of being struck by the said engine, that the boy was unobservant of the approach of said engine, and that he then, after so seeing the boy in danger, negligently drove the said engine

[15] RESTATEMENT, TORTS, §480.
[16] (1912) 46 Mont. 162, 127 P. 146.

against the boy," inflicting injury from which he died. It was held that the complaint was sufficient under the last clear chance doctrine. This is the discovered peril or conscious last chance doctrine.[17] The *Melzner* case and its companion case, *Haddox v. Northern Pacific Railway Co.*[18] namely, the father's action against the railway company based on the same facts, are thought to be satisfactory applications of the mental inattention rule.

In *Dahmer v. Northern Pacific Railway Co.*[19] plaintiff had judgment. Defendants appealed. The case was reversed and remanded for new trial. Plaintiff alleged that at the Huntley station of the Northern Pacific Railway Co., he awaited his mother's arrival on No. 4, eastbound, about one o'clock in the morning, that the train was several hours late, and that No. 3, westbound, was about due, that he remained to await a friend who was to arrive on No. 3, that while he awaited No. 3, he was hit a heavy blow on the head, that he fell on the rails, and while in the act of crawling off the track, the train caught him causing the loss of both feet. The court decided that the evidence did not justify the conclusion that the engineer discovered the position of plaintiff, and since Nos. 3 and 4 were through trains, neither being scheduled to stop at Huntley, there was no duty on the part of defendant to keep a lookout at a remote station at an early hour of the morning when there was no anticipation of passengers or others being there to carry on business with the company.

The court says that the expression "or should have discovered" as used in the *Neary* case, supra, was unfortunate, and that a case calling for the application of the last clear chance doctrine must embody three elements, viz:

(1) The exposed condition brought about by the negligence of plaintiff or the injured person;
(2) The actual discovery by defendant of the perilous situation of the person or property in time to avert injury, and
(3) The failure of defendant thereafter to use ordinary care to avert the injury.

So, said the court, the rule is applied generally, citing *Davies v. Mann.*[20] The doctrine has no application here said the court because there was no antecedent negligence on the part of plain-

[17] RESTATEMENT, TORTS, §480.
[18] (1912) 46 Mont. 185, 127 P. 152.
[19] (1913) 48 Mont. 152, 136 P. 1059.
[20] *Supra*, Note 5.

tiff. The rule is limited in application to cases where plaintiff has by his own act been exposed to injury at the hands of the defendant.

Thus, was started the line of cases in which the conscious last clear chance or discovered peril rule was said to be the Montana doctrine. On the facts, it is not, however, believed that the case was incorrectly decided. Plaintiff was, we may concede, in a condition of helpless peril, but he was not injured at a place where, or time when, the defendant was under a duty to keep a lookout. Both conditions must concur in order that plaintiff recover.[21] Since the evidence failed to establish actual discovery, the court, it is believed, correctly held defendant not liable.

In *Singer v. Missoula Street Railway Co.*[22] plaintiff recovered for personal injury sustained while riding a horse based on collision with an electric car of the defendant upon the Higgins Avenue bridge over the Missoula River. The case was affirmed on the assumption, in the law of last clear chance, that given negligence by plaintiff in going over the bridge, or not retiring therefrom, when the horse became restive, the defendant motorman was under a duty when he observed plaintiff's perilous position immediately to take such precautions as he could to avoid a collision and that he had been negligent in failing to do so. Likewise, in *Anderson v. Missoula Street Railway Co.*[23] plaintiff was thrown from a buggy on the same bridge. The horse attached to the buggy became unmanageable upon the approach of defendant's street car. Plaintiff recovered judgment, and defendant appealed on the ground that certain instructions incorporating the doctrine of the last clear chance injected a principle foreign to the issue. The court reaffirmed the three essentials of the discovered peril doctrine as laid down in the *Dahmer* case.[24] All these elements must concur or the rule has no application, said the court. The court found no suggestion in the complaint that plaintiff's exposed condition was brought about by any negligence of hers, or imputable to her, and held that the instructions complained of instead of announcing the doctrine of last clear chance announce the law of primary negligence, and having done so with substantial accuracy, the judgment was affirmed.

The first of these cases is believed to be a proper applica-

[21] RESTATEMENT, TORTS, §479.
[22] (1913) 47 Mont. 218, 131 P. 630.
[23] (1917) 54 Mont. 83, 167 P. 841.
[24] *Supra*, Note 19.

tion of the conscious last chance or discovered peril doctrine.[35] As to the status of a traveller on a horse along the highway, query? One may be physically helpless to control a spirited animal, and one may be mentally inattentive on a gentle old "nag." The place is one where a municipal trolley car motorman is under a duty to keep a lookout. However, the facts here established actual discovery. The case cannot, therefore, be cited to support the unconscious last chance doctrine. In the second case, what is said on this doctrine is dehors the issue in the case; the case is properly a study in primary or simple negligence.

In *Doichinoff v. Chicago etc. Ry. Co.*[36] the Supreme Court affirmed the lower court judgment in favor of plaintiff administrator. The action was on the last chance theory under the federal employer's liability act for the death of one Koleff who was run over by a locomotive in the service of the railway. The answer alleged that the deceased stepped upon the track immediately in front of the locomotive, that his presence was not discovered and could not have been discovered by the exercise of reasonable or any care. Discovery of the peril of Koleff or duty to discover him was charged in the alternative. In this respect, the court said the pleading was indefinite, but in the absence of reasonable attack by motion or special demurrer particularly pointing out the defect, the allegations were regarded sufficient to state a cause of action. At page 589 of 51 Montana the court said:

> "It is true that there is not in this record any direct evidence that Koleff was actually discovered by the enginemen in time to avoid the accident; but the fact may be established by circumstantial evidence. If, in this instance, it has been made to appear that Koleff was walking upon the railroad track in broad daylight 200 feet or more in advance of Middleton's locomotive; that he was apparently unaware of danger; that the view from the locomotive was entirely unobstructed; that the enginemen were at their respective posts of duty on the locomotive, and were keeping a lookout ahead in the direction of Koleff; that the locomotive could have been stopped within from ten to thirty feet considering the speed at which it was moving, no one would question the right of a jury to say that Koleff's position was discovered in ample time to avoid striking him. . . ."

[35] RESTATEMENT, TORTS, §479.
[36] (1916) 51 Mont. 582, 154 P. 924.

And in *Stricklin v. Chicago, etc. Ry. Co.*[27] the court explained the alternative allegations of the *Doichinoff* case by saying that Koleff was an employee, and was actively engaged in the discharge of duty at the time of the accident, that the alternative allegations were good under the federal employers' liability act, that the company owed a duty to keep a lookout for employees, in a place of danger, that contributory negligence under the federal act does not bar recovery but may diminish the damages and that it was to avoid this contingency that the doctrine of the last clear chance was injected into the case. On the facts, however, the case is one of a negligently inattentive plaintiff, and in such case, there is no liability unless defendant actually discovered plaintiff's inattention in time to avoid the injury. It is believed the case was, therefore, correctly decided.[28]

In *McIntyre v. Northern Pacific Railway Co.*[29] a boy trespasser was killed in the company's railroad yard in Butte. The complaint against the Railway and its servants alleged that the deceased was carelessly and negligently upon the right of way but unobservant of the approach of the locomotive, that the defendants saw the deceased and that by the exercise of ordinary care they could have avoided injuring him. Defendant's answer denied discovery. It was held that the burden of proof directly or by circumstantial evidence was upon the plaintiff and that the evidence was insufficient to warrant submission to the jury of the issue framed by plaintiff's allegation and defendants' denial that the engine crew saw decedent in a position of peril in time to avoid striking him. The court affirmed that under the doctrine of the last clear chance, the duty to avoid injury arises only when the injured party is actually discovered in a position of peril, and apparently unconscious of his danger or unable to extricate himself, and the failure of the defendant to exercise reasonable care to avoid injuring him after such discovery constitutes the breach of duty. This decision is properly based on the mental inattention of the boy. No duty arose unless defendant discovered his condition of negligent inattention in time to avoid the accident.[30]

In *Stricklin v. Chicago etc. Ry. Co.*[31] it was alleged that deceased was upon a bridge or trestle of the company's road

[27](1921) 59 Mont. 367, 197 P. 839.
[28]RESTATEMENT, TORTS, §480.
[29](1919) 56 Mont. 43, 180 P. 971.
[30]RESTATEMENT, TORTS, §480.
[31]*Supra*, Note 27.

that an unobstructed view of his position could be had for more than half a mile; that he was not observant of the approach of the company locomotive, and that defendants saw, or by the exercise of ordinary care, could have seen his position of peril and his unobservant condition, but that defendants negligently failed to warn the deceased, and negligently permitted the locomotive to strike the said Stricklin inflicting injuries from which he died. At the trial, defendants objected to the introduction of evidence because of plaintiff's failure to state a cause of action. The objection was sustained, and plaintiff declining to amend, plaintiff was non-suited. The Supreme Court affirmed on the ground that where the complaint alleges in the alternative two statements of fact, one of which is sufficient to constitute a cause of action and the other not, they neutralize each other and subject the pleading to a general demurrer. It was reasoned that Stricklin was a naked trespasser, and that the only duty devolving on the defendants was to refrain from wantonly or wilfully injuring him or to exercise reasonable care to avoid injuring him after his perilous situation was actually discovered, and it was apparent that he was insensible to the impending danger. The defendants did not owe a duty to keep a lookout or give warning signals or discover the trespasser's peril, and therefore the allegation that they should have discovered the danger to which his negligence had exposed him does not charge a breach of duty, and the case comes directly within the rule that the alternative allegations neutralize each other and subject the complaint to a general demurrer or to a motion to exclude evidence.

It is believed that the *Stricklin* case was correctly decided, for while a trespasser on a trestle may be a plaintiff in helpless peril, he is at a place where the defendant is under no duty to keep a lookout for him.[23] There can, therefore, be no liability in the absence of actual discovery. The case can be criticized only in what the court said that it "is established by the repeated decisions of this court," that the conscious last clear chance rule is the Montana doctrine.

Thus, looking to what the court has said in these "repeated decisions" plaintiff must in his complaint admit by allegation his own exposed condition, i.e., his own negligence, defendant's discovery, and defendant's failure thereafter to exercise ordinary care to avoid injury to plaintiff. This rule, while objectionable in substantive law as making no allowance for unconscious last clear chance cases, is objectionable also on

[23]RESTATEMENT, TORTS, §479.

the procedural side in that plaintiff often cannot tell when he prepares his complaint whether his case is best as one in primary negligence or in last clear chance. Often he cannot make a decision on the theory of his case until defendant, by answer, pleads plaintiff's contributory negligence, or until he has had an opportunity to interview witnesses, or even during the trial based on the exigency of the evidence. Many jurisdictions, by what is regarded as the better rule, allow plaintiff to reply last clear chance after plaintiff's general allegations in the complaint of defendant's negligence and defendant's answer of contributory negligence.[33] The rule as laid down in the *Dahmer* case precludes this.

In *Mihelich v. Butte Electric Ry. Co.*[34] counsel attempted greater flexibility in the theory of the case by alleging three counts, namely, count one based on the primary negligence of defendant, count two based on the doctrine of last clear chance, i.e., actual discovery by defendant of plaintiff's position of peril, and count three, that the defendant "wilfully and wantonly" ran the car against plaintiff. Defendant, by answer, pleaded contributory negligence on the part of plaintiff and plaintiff failed to reply whereupon the lower court dismissed the action on the ground that, there being new matter in the answer, plaintiff was in default for failure to reply. The Supreme Court affirmed as to count one on the ground that a plea of contributory negligence where plaintiff's action is one in primary negligence requires a reply; but as to counts two and three, found no reply necessary since a last clear chance case is made out by the averments of the complaint in which plaintiff admits his own negligence making an answer of contributory negligence surplusage, and as to wilful and wanton conduct found no amount of contributory negligence to be a defense. The cause was remanded for trial on the issues presented by counts two and three and defendant's answer. By way of commentary, it is believed that to allow the last clear chance to be developed in the reply is more in line with the code ideal of a more simplified pleading; it would probably also lead to fewer purely procedural decisions. An allegation which sets forth that the defendant is the proximate cause of the accident should be held sufficiently general, so that under it the plaintiff could show that this was the case, either because of the defendant's sole negligence, or because of the defendant's supervening negligence.[35]

[33]CLARK, CODE PLEADING, p. 211.
[34](1929) 85 Mont. 604, 281 P. 540.
[35]CLARK, CODE PLEADING, p. 211.

In *Westerdale v. Northern Pacific Ry. Co.*[36] two seventeen year old boys were riding in a Ford automobile and were struck by defendant's locomotive at a crossing near Bozeman. Westerdale, driver of the Ford, was killed, and Schnider, his companion, was seriously injured. The actions were tried together. When the auto was struck by defendant's engine it became lodged in some manner on the step of the tender and was carried along the track for a distance of more than 400 feet without any injury or marks on the railroad ties, but during the last 100 or 150 feet the ties were badly torn and splintered. The lower court withdrew from the jury the question of negligence in failing to sound the whistle and ring the bell, and of failing to use proper care to see the approaching auto before it was struck by the engine. The cases were tried upon the last clear chance theory that the injury and death were caused after the engine had traveled farther than it should have (i.e. an entire distance of 640 feet) had the engineer used reasonable care to stop it after his discovery of the boys on the crossing at the time of or slightly before the impact. Lower court verdicts and judgments of about $3000 in each case were affirmed. While the boys were no doubt, originally in a condition of negligent inattention in this case, after their car was lodged on the step of the tender their condition changed to that of helpless peril. The unconscious last chance rule[37] might well have been applied to the case, but since the evidence established actual discovery by defendants in time to avoid injury and death, it was unnecessary for the court to consider the case other than under the doctrine of discovered peril as laid down in the *Dahmer* case.

In *Collins v. Crimp*,[38] a father sued in two capacities to recover for the death of his 12 year old boy (1) on his own behalf, and (2) as administrator of his son's estate. On appeal from judgments for plaintiff, the court reversed the case, and directed judgment for defendant. Plaintiff did not allege negligence on the part of defendant, driver of a Buick auto, resulting in the collision, but did allege that the boy was thrown on the right fender of defendant's car, that defendant saw or should have seen the boy's perilous position, and negligently continued to drive east a distance of 45 feet at a speed of 15 miles per hour until the Collins boy fell off the fender and the car passed over him. The Supreme Court held that the evidence did not warrant a finding that, during the almost infini-

[36](1929) 84 Mont. 1, 273 P. 1051.
[37]RESTATEMENT, TORTS, §479.
[38](1932) 91 Mont. 326, 8 P. (2d) 796.

tesimal period of time between the moment the boy landed on the fender and the instant he slid to the pavement, the defendant was negligent in failing sooner to apply his brakes, which negligence could be considered the proximate cause of the boy's death. In retrospect, one is inclined to agree with the court. When thrown upon the fender, the boy was in a condition of helpless peril,[39] and a motorist is under a duty to keep a lookout, but it would be difficult to say that defendant failed to exercise reasonable care to avoid the death in the short time at his command after discovery or after he should have discovered the boy's peril. The case contains no suggestion that the Montana rule is other than that of discovered peril as laid down in the *Dahmer* case.

In *Pollard v. Oregon Short Line R. R. Co.*,[40] plaintiff's complaint contained both a count in primary negligence and a last clear chance count. At the close of plaintiff's evidence, plaintiff withdrew the first count, and the case proceeded under the theory of the last clear chance. Verdict and judgment for plaintiff in the sum of $2900 was affirmed. Plaintiff, stalled on the crossing in his Ford delivery truck, went down on one knee with head under the dashboard and began checking the coils, thereafter paying no attention to anything but the work in hand. Plaintiff estimated the time he was working on the coils before the accident as about a minute. He heard an "awful roar," and the defendant's passenger train crashed his car. The court distinguished trespassers upon railroad tracks from a collision occurring at a crossing in that train operatives are under a duty to keep a vigilant lookout at crossings and therefore an allegation in the alternative that the train operatives saw or would have seen if they had exercised ordinary care was held to be sufficient in crossing cases. However, the court required actual discovery as an evidentiary matter in this case, saying that whether the engineer actually saw plaintiff in his perilous position, a matter provable by circumstantial evidence, was for the jury to determine.

It is believed that the case was properly disposed of on the record. Plaintiff was suing for personal injury; he was so absorbed in the checking of the coils that he failed to note the coming of the train; in other words, the case was one of mental inattention rather than of helpless peril. Accordingly, defendant's duty arose only based on actual discovery. Had plaintiff been suing for the demolition of his truck, it is likely that it

[39] RESTATEMENT, TORTS, §479.
[40] (1932) 92 Mont. 119, 11 P. (2d) 271.

would have been impossible to get the stalled truck off the crossing before the coming of the train. Such a case would have presented features of the unconscious last chance doctrine. The Washington decision in *Nichol v. Oregon Washington R. & Nav. Co.*[40a] presents such a case.

In *Armstrong v. Butte Ry. Co.*,[41] plaintiff sued for damages occasioned by the collision of defendant's train with plaintiff's automobile. Plaintiff's complaint was grounded in primary negligence on defendant's part in failing to ring the bell or blow the whistle at the crossing. Defendant answered by way of general denial and an affirmative plea of contributory negligence. Plaintiff's reply admitted that he carelessly drove his auto onto the crossing but alleged defendant's last clear chance. Defendant demurred to the reply on the ground of its insufficiency in law and upon its face. The higher court held that a judgment for plaintiff cannot be based upon allegations which appear in the reply only, that the shifting from primary negligence in the complaint to the last clear chance doctrine in the reply constituted an abandonment of the cause of action set out in the complaint, and that plaintiff is precluded from setting up his cause of action in the reply.

By way of dictum, the court said that "as an aid to court and counsel in case another action be instituted," defendant's contention that the case of *Pollard v. Oregon Short Line Ry. Co.*,[42] should be overruled in so far as it permits plaintiff to plead that part of the last clear chance relating to defendant's discovery of plaintiff in a perilous position in the alternative is not well taken. The court conceded that prior Montana cases had enunciated the actual discovery rule, but asserted that those cases had in effect been overruled in the *Pollard* case as applied to a crossing and other places where the defendant had reasonable grounds to anticipate the presence of persons and negligently failed to keep a lookout. Said the court: "We reaffirm the holding in the *Pollard* case. It brings this court in harmony with the progressive and enlightened view throughout the nation on this subject as reiterated in the Restatement of the Law of Torts. Section 479 thereof states the prevailing rule throughout the nation as follows" (here the court cited Section 479 verbatim.) The case is notable in that it is the first Montana case citing the last clear chance provisions of the Torts Restatement. It is also notable in that together with the *Pollard* case, it marks a definite overruling of

[40a] 71 Wash. 409, 128 P. 628, 43 L. R. A. (N. S.) 174.
[41] (1940) 110 Mont. 133, 99 P. (2d) 223.
[42] *Supra*, Note 40.

the language used in a long line of Montana cases in which the actual discovery or conscious last clear chance rule had been enunciated as the Montana doctrine. Now we are told that the unconscious last clear chance doctrine is also to be applied in proper cases. The two decisions will be hailed with satisfaction by the profession as aligning the court with the weight of authority and the "enlightened" view. However, it is to be hoped that the court will not now move to the extreme of the humanitarian doctrine. There may be excuse for some trepidation at this point owing to a statement in the *Armstrong* case at page 136 of 110 Montana referring to the last clear chance doctrine as "what is usually referred to as the humanitarian doctrine." Also by the statement in the *Pollard* case at page 133 of 92 Montana:

> "Many cases, on the fact conditions shown, indicate or declare that the continuing contributory negligence of the injured party takes the case out of the rule of the last clear chance, unless it is shown that for some reason he is in a position wherein it is physically impossible for him to extricate himself; but this is not in accord with the declarations of this court in the Neary and Doichinoff Cases . . . "

Now it is submitted that the continuing contributory negligence of the injured party does take the case out of the last clear chance rule. At any rate, this is the weight of authority and Restatement view. If the plaintiff is mentally inattentive —"continuing contributory negligence"—and defendant fails to discover plaintiff's condition of inattention, they are both in fault—both equally mentally inattentive—and neither should have a cause of action against the other. But, if plaintiff is reduced to a condition of helpless peril ("physically impossible for him to extricate himself"—non-continuing contributory negligence), and the place is one where defendant was under a duty to keep a lookout which duty was breached, then defendant's liability attaches.

These principles are not contra to the decisions in the *Neary* and *Doichinoff* cases where, as previously indicated, the court was actually dealing with negligently inattentive plaintiffs and properly on the record affirmed the judgments on the ground of actual discovery by defendant of the other's mental inattention in time to avoid the accident.

What courts say is interesting; what they do, more interesting. In summary of last clear chance cases in Montana, it appears that;

(1) The court became aware of the doctrine in 1908 in the *Neary* Case.[43] The court *said* the doctrine would apply to employees discovered or who should have been discovered by defendant, and even that the rule was applicable to technical trespassers,—an indefensible position. The case was, however, actually *decided* on the ground of actual discovery of a negligently inattentive employee, and is, therefore, in accord with Section 480 of the Restatement of the Law of Torts and the weight of authority. Likewise, the *Doichinoff* employee case [44] was *decided* on the ground of actual discovery based on circumstantial evidence. The explanation of the pleading in this case as developed in the *Stricklin* case,[45] was that the alternative allegation "discovered or should have discovered" would be good under the Federal Employer's Liability Act to avoid diminution of the damages under the federal rule on the effect of contributory negligence. But this reason is no longer valid if the language of the *Pollard*[46] and *Armstrong*[47] decisions is to be applied, those cases indicating a disposition to apply in proper case, the orthodox unconscious last chance rule. Even as to employees, as a condition to the application of the rule, the prime question is, "Was the employee in a condition of helpless peril?"

(2) Beginning with the *Dahmer* case[48] in 1913, the Montana rule was *said* to be one of discovered peril (conscious last clear chance) and this continued to be the Montana *enunciation* until the *Pollard* case[46] decided in 1932.

(3) However, the Supreme Court *decisions* during this period, 1908-1932, cannot be said to be contra to the unconscious last chance doctrine as developed in Section 479 of the Restatement of the Law of Torts. Apparently the litigious cases on appeal involved a proper application of the conscious last clear chance doctrine. What effect the *enunciation* of a sole conscious last chance or discovered peril doctrine had upon the work of trial courts, in discouraging the prosecution of unconscious last chance cases, in counsel's attempts to fit facts into the discovery rule and failing when he might have succeeded on the undiscovery rule, in getting the case to the jury, and in the instructions given to the jury, and in militating against appeals in undiscovered last chance cases, one can only surmise.

[43] *Supra*, Note 14.
[44] *Supra*, Note 26.
[45] *Supra*, Note 27.
[46] *Supra*, Note 40.
[47] *Supra*, Note 41.
[48] *Supra*, Note 19.
[46] *Supra*, Note 40.

(4) The *Pollard*[50] and *Armstrong*[51] cases now indicate a disposition to apply the unconscious last chance doctrine in proper case, but neither is a *decision* under the doctrine. The *Pollard* case on the facts involves a negligently inattentive (not a helpless peril) plaintiff, and while defendant is under a general duty to keep a lookout at crossings, this applies only to plaintiffs free from fault, or (on pleading and proof in last chance cases) to plaintiffs in a condition of helpless peril. On the facts of the *Pollard* case, therefore, plaintiff was properly allowed recovery because defendant discovered plaintiff's mental inattention in time to avoid the injury. As a decision, the *Armstrong* case involves a procedural question only.

(5) While the recent *Pollard* and *Armstrong* cases cite the early *Neary*[52] and *Doichinoff*[53] cases as giving support to the unconscious last clear chance doctrine, neither of those early cases can properly be cited as *decisions* under the doctrine. There is no Montana appellate case where, on the facts, plaintiff recovered based on application of unconscious last chance principles. The *Westerdale*[54] and *Collins*[55] cases were most promising on the facts, but were *decided* under the doctrine of discovered peril.

The result of the court's disposition of the *Dahmer, Neary, Doichinoff, Pollard,* and *Armstrong* cases is that, as a study in procedure, plaintiff must allege a last chance case in the complaint if he expects to recover on that theory. He thus alleges his exposed condition (i.e. admits his own negligence). If the complaint shows plaintiff to be a trespasser, actual discovery by defendant must be alleged. If the complaint shows the accident to have occurred at a crossing or other place where the defendant has reasonable ground to anticipate the presence of persons (i.e. at places where it owes a duty to keep a lookout), the allegation may be in the alternative, i.e. that defendant saw or would have seen plaintiff if defendant had exercised ordinary care. This applies to the testing of the complaint on demurrer for insufficient facts, and, upon objection to the introduction of evidence.

When the parties advance to the trial, the question comes to be one of the character of the plaintiff's exposed position. If the evidence develops that plaintiff was only negligently inattentive (i.e. mentally oblivious) the court will decide that

[50] *Supra*, Note 40.
[51] *Supra*, Note 41.
[52] *Supra*, Note 14.
[53] *Supra*, Note 26.
[54] *Supra*, Note 36.
[55] *Supra*, Note 38.

actual discovery by defendant of plaintiff's inattention in time to avoid the accident must be proved. And this should be the rule even though the accident occurred at a crossing or other place where the defendant is generally under a duty to keep a lookout, including actions brought by defendant's employees.

If, however, the evidence develops that plaintiff was in a condition of helpless peril (physically helpless) and the place is one where defendant was under a duty to keep a lookout, plaintiff may recover even though he was not discovered but should have been discovered if the defendant had performed the duty owed to this type of plaintiff. Two things are, therefore, necessary to the application of the unconscious last chance doctrine, (1) a helpless peril type plaintiff, and (2) an accident at a place where defendant is under a duty to keep a lookout.

The leading case best illustrating the situation is the Utah case of *Teakle v. San Pedro, L. A. & S. L. R. Co.*[56] In that case, defendant's train was being backed over a public crossing. Plaintiff's intestate was negligent in not keeping a lookout, and defendant's servants were concurrently negligent in not keeping a lookout. Plaintiff's intestate on being knocked down, was precipitated under the cars. The train was 180 feet long, and defendant was killed by the fire-box of the engine. It was held that while plaintiff's intestate could not have recovered for the injury in being knocked down, plaintiff's administrator could recover for the death. When the deceased was struck by the train and rendered helpless, the effect of his antecedent or contributory negligence was spent. His condition passed from that of negligent inattention (mental obliviousness) to that of helpless peril (physical helplessness). Had the defendant's engineer then been alert to the duty he owed to keep a lookout at crossings, he could have stopped the train in time to avoid killing the intestate.

A pedestrian whose foot is stuck in the frog of a crossing and who is struggling to extricate himself would, no doubt, be regarded in a condition of helpless peril; he is also in a place where defendant owes a duty to keep a lookout; the two essentials, therefore, concur for liability. A person caught on a railroad trestle may be physically helpless to extricate himself, but since defendant owes no duty to keep a lookout at such place, one of the two essentials for application of the unconscious last chance doctrine is lacking.

When the facts indicate discovery of a negligently inattentive plaintiff, the question may arise as to what it is nec-

[56] (1907) 32 Utah 276, 90 P. 402.

essary for defendant to discover. Some courts hold that defendant must in fact realize plaintiff's danger and his inattention, but most,[57] by what is regarded as the preferable view, require only that he discover the situation, and that the danger and lack of attention be apparent to a reasonable man.[58] This may be interpreted to the extent that defendant in many situations may reasonably assume that plaintiff will look out for himself, until he has reason to believe the contrary.

III.

THE FUTURE OF THE DOCTRINE.

Given present conceptions of the effect of contributory negligence, both the conscious and unconscious last chance doctrines are essential to an enlightened jurisprudence. The application of both theories will not, however, produce sufficient flexibility for all cases. The last chance doctrine has been labelled by some, a makeshift,[59] a transition doctrine, a way station on the road to apportionment of the damages. The case of *Mihelich v. Butte Electric Ry. Co.*[60] interprets last clear chance in terms of the law of proximate cause. Said the court at page 619 of 85 Montana:

> "Presupposing, then, that both plaintiff and defendant are guilty of negligence and thereafter the plaintiff remains passive and oblivious to his danger, and the defendant, after discovering the perilous situation of the plaintiff, could have avoided the accident by the exercise of reasonable care but did not employ the means at his

[57] PROSSER, TORTS, p. 413.

[58] See RESTATEMENT, TORTS, §480. "The defendant is liable only if he realizes or has reason to realize that the plaintiff is inattentive and consequently in peril . . . it is not necessary that the circumstances be such as to convince the defendant that the plaintiff is inattentive and, therefore, in danger. It is enough that the circumstances are such as to indicate a reasonable chance that this is the case . . . . If there is anything in the demeanor or conduct of the plaintiff which to a reasonable man in the defendant's position would indicate that the plaintiff is inattentive, and, therefore, will or may not discover the approach of the train, the engineer must take such steps, as a reasonable man would think necessary under the circumstances . . . . If the engineer sees a vehicle with the side curtains so drawn as to obstruct the driver's view approaching on a day so windy as to make it doubtful whether the whistle will be heard, he may not be entitled to assume that the driver will discover the approach of the train and may be liable if he fails to exercise reasonable care to bring his train under the necessary control."

[59] PROSSER, TORTS, p. 410; James, *Last Clear Chance, A Transitory Doctrine*, 47 YALE L. J. 704 (1938).

[60] *Supra*, Note 34.

> command to avoid it, there is a break in the sequence of events and defendant's last act of negligence becomes the sole proximate cause of the injury, while his initial negligence and the primary negligence of the plaintiff become but remote causes thereof. . . . If the plaintiff could, at the last, have avoided the injury by the exercise of reasonable care, in spite of the subsequent negligence of the defendant, he has failed to embrace 'the last clear chance'."

While this explanation of last clear chance is the one most often given, it is quite out of line with modern ideas of proximate cause. In last chance cases, plaintiff's negligence has not only been a cause, but a substantial one as well. Further, it cannot be said that injury through the defendant's negligence was not within the risk which the plaintiff has created. If the injury should be to a third person as a pedestrian near the scene of a collision or a passenger in one of the vehicles, plaintiff's negligence would clearly be recognized as a responsible cause. It is quite artificial to say that another rule should apply when plaintiff himself is injured.

Some courts say that the defendant's later negligence involves a higher degree of fault. This may be true for many cases of discovery of plaintiff's helpless peril; it does not explain cases where defendant failed to make discovery, was merely slow, clumsy, inadvertent, or erred in judgment. The last wrongdoer rule savours of the medieval notion that courts should have particular regard for the directness of the injury, early the basis for recovery in actions of trespass and later for the procedural distinction between trespass and case. The last wrongdoer is not necessarily the worst wrongdoer.

The true explanation is, no doubt, a dislike for the defense of contributory negligence in many situations which has led courts to regard the last wrongdoer as the worst wrongdoer, or, at least, the decisive one. The rationale of last clear chance is thus closely tied to the rationale of contributory negligence. It was, no doubt, unfortunate that common law courts, contrary to the rule in admiralty and in civil law countries, adopted the rule that contributory negligence on the part of plaintiff should absolutely bar recovery.

Perhaps no one theory can explain the defense of contributory negligence. Some say it has a penal basis, and that plaintiff is denied recovery to punish him for his own misconduct, some, that the plaintiff must come into court with clean hands, some, that it rests upon voluntary assumption of risk. All of these theories are subject to criticism. Again to use the illustration of the colliding of autos as a result of which a

pedestrian is injured, the negligence of one driver is not held to relieve the other of liability; as a study in proximate cause,[61] it should hardly have any different effect when one driver sues the other. Emphasis on the penal and clean hands theories might lead to denial of recovery to the careful operator of a car enroute to play golf on Sunday contrary to the statutory blue laws as against the doctor negligently operating his vehicle while enroute to see a patient. And assumption of risk requires knowledge of risk lacking in contributory negligence. It is more realistic to regard the defense as an expression of the terse individualism of the common law which makes the personal interest of parties dependent upon their own care and prudence.[62] Contributory fault might be a better label since negligence requires a duty and contributory negligence requires no duty as generally understood; and instead of its being conduct creating an undue risk of harm to others, one can only say that it is conduct involving undue risk of harm to the plaintiff himself.[63] With modern change in social viewpoints, the defense is looked upon with increasing disfavor, and various attempts have been made to modify its rigors. Of these the last clear chance theory is the most prominent.

In application, the last chance doctrine is criticized on the ground that oftentimes the greater the defendant's negligence, the less his liability. The driver who looks carefully and discovers the danger, and is thereafter slow in applying his brakes, may be liable, while the driver who does not look, or who has no effective brakes, may escape liability.[64] The rule has also been criticized as, at times, absolving plaintiff entirely from his own negligence, and placing the loss on defendant whose fault may be the lesser of the two. Some thoughtful writers have therefore recently taken the position that we may well look to the admiralty rule of divided damages and the civil law rule of comparative fault and that the future development of the law of contributory negligence may well be in

[61]Bohlen, *Contributory Negligence*, 21 HARV. L. REV. 233 (1908).

[62]Schofield, *Davies v. Mann, Theories of Contributory Negligence*, 3 HARV. L. REV. 270 (1890).

[63]Bohlen, 80 U. PA. L. REV. 781, 784.

[64]Smith v. Norfolk & S. R. Co. (1894) 114 N. C. 728, 19 S. E. 863, 923; 25 L. R. A. 287; PROSSER, TORTS, 415. "If the defendant, after discovering the plaintiff's peril, does all that can reasonably be expected of him, the fact that his efforts are defeated by antecedent lack of preparation or a previous course of negligent conduct is not sufficient to make him liable. All that is required of him is that he use carefully his then available ability." RESTATEMENT, TORTS, §479. *Contra*, British Columbia Elec. R. Co. v. Loach, [1916] 1 A. C. 719.

the direction of common law or statutory apportionment of the damages.[65]

[65]James. *Last Clear Chance, A Transitional Doctrine*, 47 YALE L. J. 704; McIntyre, *The Rationale of Last Clear Chance*, 53 HARV. L. REV. 1225; PROSSER, TORTS, 416.