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NEGLIGENCE-LAST CLEAR CHANCE-PLAINTIFF'S IGNORANCE OF DANGER WHEN HE IS NOT IGNORANT OF THE INSTRUMENTALITY WHICH CAUSES HIS INJURY

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NEGLIGENCE—LAST CLEAR CHANCE—PLAINTIFF'S IGNORANCE OF DANGER WHEN HE IS NOT IGNORANT OF THE INSTRUMENTALITY WHICH CAUSES HIS INJURY—Plaintiff, a boy twelve years of age, was struck by a locomotive of defendant railroad and suffered severe injuries. Defendant engineer, who had noticed plaintiff walking toward the track, could have stopped the train when he first observed plaintiff but did not because he had seen plaintiff look over his shoulder at the approaching train. The train could not be stopped after plaintiff had stepped onto the track. Plaintiff admitted seeing the train when it was 400 feet distant and that he had miscalculated the time necessary to cross in front of it. On appeal from judgment against both defendants, *held,* affirmed. Application of last clear chance doctrine on ground that plaintiff was oblivious to his danger was proper. *Huggans v. Southern Pac. Co.,* (Cal. App., 1949) 207 P. (2d) 864.[1]

The doctrine of last clear chance was first applied to situations where plaintiff had negligently gotten himself into a perilous position from which he could not escape.[2] The defendant was held liable despite plaintiff's contributory negligence

[1] Petition for hearing by Supreme Court dismissed.
[2] Davies v. Mann, 10 M. & W. 546 (1842).

if he thereafter had a clear chance to avoid the injury by using due care. Some courts also apply the doctrine to situations where the plaintiff could escape but is negligently unaware of his danger, if defendant knows of plaintiff's inattention.[3] In the principal case, the plaintiff by his own admission knew of the approach of the train but had simply miscalculated the time required to cross in front of it.[4] It is doubtful whether he could be aware of a situation in fact and not have an appreciation of the danger involved. Cases frequently arise where the plaintiff looks but does not see the dangerous instrumentality approaching[5] or where the plaintiff looks but miscalculates his chances of avoiding the danger.[6] The problem generally arises in traffic accidents involving pedestrians where it is common for a pedestrian to miscalculate the speed of an approaching vehicle or, after correctly calculating its speed, to cross in front of it hoping that the driver will slow down once he sees a pedestrian in front of him. If the vehicle is far enough distant when the plaintiff steps in front of it so that the driver has a clear opportunity to avoid the accident by slowing down or turning aside, then obviously the doctrine of last clear chance applies regardless of the plaintiff's knowledge of the vehicle's approach.[7] In this type of case the plaintiff, due to his negligence in miscalculating the danger, has placed himself in a position from which, because he is on foot or in a slower vehicle, it is physically impossible for him to extricate himself, and the defendant has a last clear chance to avoid the injury. Some of the earlier California cases[8] involving miscalculations on the part of the plaintiff were necessarily decided on this basis since they arose before California permitted the doctrine to be applied when the plaintiff was merely unaware of the danger. When a case arose after this application of the doctrine was recognized where the plaintiff had miscalculated the danger and had placed himself in a physically inextricable position too late for the defendant to avoid the injury by slowing down, the court would not permit the plaintiff to say that he was ignorant of the

[3] Cavanaugh v. Boston & Me. R. R., 76 N.H. 68, 79 A. 694 (1911); Locke v. Puget Sound International Ry. & Power Co., 100 Wash. 432, 171 P. 242 (1918); Girdner v. Union Oil of Calif., 216 Cal. 197, 13 P. (2d) 915 (1932); Moore v. Kurn, 108 F. (2d) 906 (1939); Nielson v. Richman, 114 F. (2d) 343 (1940), cert. den. 311 U.S. 705, 61 S.Ct. 172 (1940); Mills v. Denver Tramway Corp., 155 F. (2d) 808 (1946). And see 11 C. J., Chance 280 (1917) and PROSSER, TORTS §54 (1941), but cf. Middletown Truss Co. v. Armour & Co., 122 Conn. 615, 191 A. 532 (1937); Butler v. Rockland T. & C. St. Ry. Co., 99 Me. 149, 58 A. 775 (1904). For a discussion of the doctrine as applied in California see HALL, LAST CLEAR CHANCE (1939).

[4] Principal case at 869.

[5] Colorado Springs & I. Ry. Co. v. Merrill, 27 Colo. App. 382, 149 P. 843 (1915); Center v. Yellow Cab Co., 216 Cal. 205, 13 P. (2d) 918 (1932); Middletown Truss Co. v. Armour & Co., supra, note 3.

[6] Commonwealth Bonding & Casualty Ins. Co. v. Pacific Electric Ry. Co., 42 Cal. App. 573, 184 P. 29 (1919); Galwey v. Pacific Auto Stages, Inc., 96 Cal. App. 169, 273 P. 866 (1929); Berguin v. Pacific Electric Ry. Co., 203 Cal. 116, 263 P. 220 (1928).

[7] Ibid. Although in Galwey v. Pacific Auto Stages, Inc. the defendant's driver testified that he did not see the plaintiff until it was too late to stop, the court thought there was sufficient evidence controverting his testimony to justify an instruction based on the doctrine of last clear chance.

[8] Ibid.

danger and that the defendant should have realized this ignorance before the plaintiff had gotten himself into a helpless position.[9] In the principal case, since the plaintiff stepped onto the track when the train was only fifteen feet distant, the defendant had no last clear chance for avoiding the injury after the plaintiff was in a physically inextricable position. Recovery was based solely upon the defendant's opportunity to avoid the injury by realizing the plaintiff's ignorance of the danger and by acting while the plaintiff was still walking toward the track. But at that time the plaintiff knew of the approach of the train and was not in a position from which it was physically impossible for him to escape. Moreover, the defendant was aware of the plaintiff's knowledge of the train's approach.[10] All the cases relied on as authority by the court, with the exception of one case,[11] involved plaintiffs who were unconscious of their peril because they were totally unaware of the approach of the instrumentalities which caused their injuries and not because they failed to analyze properly the situation in which they found themselves. The principal case is probably explainable by the youth of the plaintiff and the apparent ease with which the defendant could have stopped the train, rather than by a proper application of the doctrine of last clear chance as it has been heretofore applied. Extra caution exercised at a time when plaintiff was still walking toward the track could have prevented the injury, and the possible consequences of not using this extra caution were probably weighed against the effort required to stop the train. Inasmuch as it seems to hold that a plaintiff can be aware of the situation in fact and oblivious to the danger therein, the principal case seems to be an extension of the doctrine of last clear chance in California approaching a result of liability without fault.

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[9] Rasmussen v. Fresno Traction Co., 15 Cal. App. (2d) 356, 59 P. (2d) 617 (1936). Plaintiff, the driver of an automobile, miscalculated the speed of an approaching street car and erroneously estimated that he had time to cross in front of it. Defendant motorman did not have time to stop his street car after plaintiff's automobile was on the track and since plaintiff knew of the street car's approach, application of the doctrine of last clear chance on the ground that he was unaware of his danger before he started to cross the track was denied.

[10] Upon sounding his whistle, he had seen the plaintiff look over his shoulder toward the approaching train, hence his failure to apply the brakes initially was justifiable. Principal case at 869.

[11] Woods v. Kurn, (Mo. App. 1944) 183 S.W. (2d) 852. But there the defendant had a last clear chance to avoid the injury after the plaintiff had reached a physically inextricable position. Plaintiff had miscalculated the speed of an approaching train and erroneously estimated that she had time to drive her truck across in front of it. Nevertheless, recovery was permitted on the ground that defendant had an opportunity to avoid the injury by slowing down sufficiently after plaintiff's car was on the track to permit plaintiff to extricate herself.