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Torts—Last Clear Chance

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holds out another, or allows him to appear, as the owner of, or as having full power of disposition over the property, and innocent third parties are thus led into dealing with such apparent owner, they will be protected."³⁵ For more than a month defendant acquiesced in the public display of the ring. Defendant's officer also made no effort to inform possible purchasers of the nature of the agreement. And although such regular dealings were "on memorandum," the owner did not insist on compliance with the provisions he himself laid down. The owner was therefore responsible for the appearance of a general, unrestricted authority in the dealer to sell such items received on such memorandum and cannot be heard later to assert his title against the innocent purchaser.

The Supreme Court of New Jersey in the recent case of *Nelson v. Wolf*,³⁶ considered the statute for the first time. There too the defendant had consigned a diamond ring to the dealer under a memorandum similar to the one employed in this case. The dealer had used the ring as collateral for a \$4,000 loan from the plaintiff and later the debt was canceled as consideration for the plaintiff's purchase of the ring, although no bill of sale was ever given. Subsequently, the plaintiff redelivered the ring to the dealer upon another memorandum and the dealer returned the ring to the defendant upon his demand. Observing that the plaintiff was not a bona fide purchaser in the ordinary and regular course of business, because he never received a bill of sale or other written evidence of the purchase, and previous unsatisfactory dealings with the dealer put him on notice that the title might be questionable, the New Jersey court held that the defendant was not precluded from denying the dealer's authority to sell. The Court of Appeals in the instant case easily distinguished the New Jersey decision on the facts in reversing the Appellate Division³⁷ and holding for the plaintiff.

XII. TORTS

Last Clear Chance

While the doctrine of last clear chance has been severely criticized, it is generally justified as a modification of the strict rule of contributory negligence.¹ Defendant's negligence is said to be

35. *McNeil v. Tenth Nat. Bank*, *supra* at 329.

36. 4 N. J. 76, 71 A. 2d 630 (1950).

37. 279 App. Div. 28, 107 N. Y. S. 2d 618 (1st Dep't 1951).

1. See PROSSER, TORTS 416 (1941); *Lee v. Pennsylvania R. R. Co.*, 269 N. Y. 53, 55, 198 N. E. 629, 630 (1935), requiring that an issue of contributory negligence be present before last clear chance can be invoked. For a complete survey of the last clear chance doctrine, see 92 A. L. R. 48, supplemented by 119 A. L. R. 1041.

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the sole cause of the injury and the doctrine is applied when plaintiff's situation is known to defendant in time to avert the consequences of plaintiff's negligence.² Under this reasoning, plaintiff's negligence is not the proximate cause of his injury where defendant had a last clear chance to avoid the accident.³ To apply the doctrine, plaintiff's negligence must be prior to, not contemporaneous with the defendant's negligence.⁴

In New York, it was early established that the defendant must have *actual* knowledge that another is in a state of present peril although such knowledge may be established by circumstantial evidence.⁵ However, in a recent case,⁶ the court applied the doctrine where a truck driver was attracted by a hand rapping at his window, an attempt, by one of two boys who had hitched a ride, to stop the truck because the other was falling off. The court in the *Chadwick* case reasoned that the doctrine can be invoked as long as there is knowledge that someone is in peril; even though the exact nature of the danger or the identity of the particular person threatened is unknown to the defendant.⁷

In *Kumkumian v. City of New York*,⁸ plaintiff was struck in a subway tunnel midway between stations by defendant's train. The train was coasting between stations when it came to an emergency stop caused by the automatic braking equipment. This device can be actuated in any of three ways: 1) by the blowing of an electric pneumatic valve; 2) by a passenger pulling the emergency strap; 3) by the operation of a tripping device under each car indicating that some object had come in contact therewith.

After the train stopped, the motorman immediately reset the brakes and proceeded. This tended to show that the valves were in order. However, after traveling about a car's length the train again went into "emergency." Once more the brakes were reset

2. *Storr v. New York Central R. R.*, 261 N. Y. 348, 185 N. E. 407 (1933).

3. *Bragg v. Central New England Ry. Co.*, 228 N. Y. 54, 126 N. E. 253 (1920).

4. *Hernandez v. Brooklyn and 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).

5. *Woloszynowski v. New York Central R. R.*, 254 N. Y. 206, 208, 172 N. E. 471, 472 (1930), "knowledge may be established by circumstantial evidence, even in the face of professions of ignorance . . . but knowledge there must be, or negligence so reckless as to betoken indifference to knowledge."

6. *Chadwick v. City of New York*, 301 N. Y. 176, 93 N. E. 2d 625 (1950); see 1 BRLO. L. REV. 56 (1950).

7. The doctrine is not limited to "situations where the defendant has precise knowledge of both the exact nature of the danger and of the particular individual threatened so long as there is proof to support an *inference* that someone is in peril . . . that when defendant first became conscious of the impending danger and whether he then did all a reasonable man would under the circumstances to prevent disaster were questions of fact for the jury." *Chadwick v. City of New York*, *supra* at 181, 93 N. E. 2d at 628.

8. 305 N. Y. 167, 111 N. E. 2d 865 (1953).

and the train started. After a third emergency halt, the motorman and conductor finally investigated and thereupon found decedent's body wedged under the train. Until this time, no steps had been taken to ascertain what was causing the emergency stops.

The court, after holding that a jury could reasonably infer that the fatal injuries did not occur until after the second stop, found that the invocation of the last clear chance doctrine was not forbidden as a matter of law. While the court fails to enunciate clearly the exact basis for its application, it indicates that the result is probably based on either of two grounds. First, Judge Froessel states that it is a question of fact whether defendant's conduct was "negligence so reckless as to betoken indifference to knowledge."⁹ However, when the court in the *Woloszynowski* case indicated that last clear chance can be employed where defendant's negligence is merely "reckless" it was only stating dictum.¹⁰ Furthermore, the presence of an element of wantonness obviates the necessity of invoking last clear chance since contributory negligence is not a bar to recovery when this element is present.¹¹ Secondly, it is pointed out that the defendant may have received "the requisite knowledge upon which a reasonably prudent man would act"¹² through the operation of the automatic braking equipment. The court indicates that the doctrine could be applied if defendant's lack of knowledge as to decedent's position came about through its own "wilful indifference to the emergency" or because of its "belatedly carrying out of its plain duty to investigate."

The court may be reasoning that the defendant had actual knowledge of the peril. Or, the decision may be based upon the rationale that the defendant should have known of the danger. This would allow for an application of the last clear chance doctrine upon an inference of knowledge. In view of the language of the court as applied to the peculiar facts of the case, the defendant's mere failure to act reasonably under the circumstances may be the underlying theory for applying the doctrine. At any rate, the decision in the instant case does little to clarify the Court of Appeals' position in regard to the last clear chance doctrine in New York.

Charitable Immunities

While various reasons have been forwarded in an attempt to justify the immunity which has been conferred upon charitable

9. *Id.* at 176, 111 N. E. 2d at 869.

10. See note 5 *supra*.

11. RESTATEMENT, TORTS § 482 (1938).

12. *Chadwick v. City of New York*, *supra* note 6 at 181, 93 N. E. 2d at 628.