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Torts - Negligence - Last Cleqar Chance in North Dakota

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The law may also be criticised as delegating to private persons the power to fix prices without laying down a sufficient standard and without supervision.[56] Such a delegation of power authorizes private persons to contract in restraint of trade almost at will. The price set with a presumptively friendly retailer goes uncontrolled.[57]

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TORTS — NEGLIGENCE — LAST CLEAR CHANCE IN NORTH DAKOTA

THE STRICT rules applied to the defense of contributory negligence have been modified in nearly all jurisdictions by the doctrine of last clear chance. The doctrine is generally attributed to the celebrated English case of *Davies v. Mann*[1] in which the plaintiff negligently turned his fettered donkey onto a public highway where it was struck by the defendant. Total responsibility for the injury was placed on the defendant by the court which reasoned that "notwithstanding the previous negligence of [the] . . . plaintiff . . . at the time the injury was done, it might have been avoided by the exercise of reasonable care." The principle of last clear chance thus invoked was designed to mitigate the harsh rule of contributory negligence announced in the earlier landmark case of *Butterfield v. Forrester*.[2]

Whether the last clear chance doctrine is an exception to the common law rule of contributory negligence, or instead

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[56] *Cf.* Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936); Seattle Trust Co. v. Roberge, 278 U.S. 116, 122 (1928); Eubank v. Richmond, 226 U.S. 137, 143 (1912).

[57] The Department of Justice reported. ' . . . if its Antitrust Division had sufficient men and money to examine every resale price maintenance contract . . . and to proced in every case in which the arrangement goes beyond the authorizations of the Tydings-Miller amendment, there would be practically no resale price maintenance contracts, and that, in the absence of such wholesale law enforcement, the system of resale price legislation fosters restraints of trade such as Congress never intended to sanction." FTC, REPORT ON RESALE PRICE MAINTENANCE lxi (1945).

[1] 10 M. & W. 546, 152 Eng. Rep. 588 (1842). Analysis of the case is found in Schofield, *Davies v. Mann; Theory of Contributory Negligence*, 3 HARV. L. REV. 263 (1890). Comprehensive annotations on Last Clear Chance are found in 119 A. L. R. 1037 and 71 A.L.R. 365.

[2] 11 East 60, 103 Eng. Rep. 926 (1809). Criticism of the contributory negligence rule is sharply made in *Malone, Comparative Negligence*, 6 LA. L. REV. 125 (1945) and 82 CENT. L. J. 173 (1916).

a phase of proximate cause, has been discussed at great length without agreement. The theory most often adopted, however, is that of proximate cause[3] explained on the basis that the defendant's negligent act becomes the proximate cause of the injury and the plaintiff's negligence a mere remote cause insufficient to deny recovery, the very theory stated by Erskine, J., in *Davies v. Mann.*

The doctrine has received innumerable varying judicial intepretations in the United States with virtually every possible type of attempted application.[4] Most often, however, the doctrine has been recognized in the three following situations:

(1) where the plaintiff's negligence has placed himself or his property in a perilous position from which he is powerless to extricate himself by the exercise of ordinary care, and the defendant perceives the danger while there is still time to avoid it, nearly all courts hold that the plaintiff may recover.[5] This phase of "discovered peril" or "conscious last clear chance" is sometimes explained on the grounds that negligence after the danger is known amounts to wilful misconduct to which negligence is no defense;[6]

(2) where the plaintiff's situation is one of peril from which he is unable to extricate himself and the defendant has not become aware of the danger, but by the exercise of ordinary care could have become aware of the situation and had a duty to discover it, most courts will allow the plaintiff to recover.[7] An occasional contrary view is expressed concerning this "undiscovered peril" situation;[8]

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[3] Explanations of Last Clear Chance in terms of proximate cause are found in Zeis v. Great N. Ry., 61 N.D. 18, 236 N.W. 916 (1931); Bostwick v. Minneapolis & Pac. Ry., 2 N.D. 440, 51 N.W. 781 (1892). That it is an exception to the contributory negligence rule, see Hausken v. Coman et al., 66 N.D. 633, 268 N.W. 430 (1936); Note, 22 COL. L. REV. 745 (1935).

[4] Actions against railroads have been the most usual type of action involving Last Clear Chance. There are cases holding that a defendant cannot plead the last clear chance of a joint defendant as a defense to plaintiff's cause of action. Spear v. United Railroad of San Francisco, 16 Cal. App. 637, 117 Pac. 956 (1911); Cordiner v. Los Angeles Traction Co., 5 Cal. App. 400, 91 Pac. 436 (1907); Note, 22 COL. L. REV. 745 (1935). But a defendant who had the last clear chance may be required to indemnify his joint tortfeasor. Colorado & So. Ry. v. Western Light & Power Co., 73 Colo. 107, 214 Pac. 30 (1923); Leflar, *Contribution and Indemnity between Tortfeasors*, 81 U. OF PA. L. REV. 130, 151 (1932).

[5] HARPER, LAW OF TORTS 304, 305 (1933).

[6] See Dubs v. Northern Pac. Ry., 42 N.D. 124, 171 N.W. 888 (1919), and Cowan v. Minneapolis, St. Paul & S. Ste. M. Ry. (Soo Ry.), 42 N.D. 170, 172 N.W. 322 (1919).

[7] PROSSER, TORTS 412 (1941).

[8] Strickland Transp. Co. v. Gunter, 175 F. 2d 747 (8th Cir. 1949); Lasch v. Edgar, 46 Cal. App. 2d 726, 116 P. 2d 949 (1941); Wolosynowski v. N.Y. Cent. RR.,

(3) recovery, however, is denied the plaintiff by most courts where the plaintiff by his negligence placed himself in a position of peril from which he could by the use of ordinary care up to the last moment have extricated himself though during this period the defendant by the use of ordinary care could also have discovered and avoided the injury. This is the controversial humanitarian view adopted by a small minority of courts.[9] Such a use of the doctrine seems unwarranted since it places on the defendant an even higher degree of care for the plaintiff than the plaintiff owes himself.[10]

LAST CLEAR CHANCE IN NORTH DAKOTA

An examination of the cases in North Dakota reveals a relatively well-settled doctrine despite the lack of adequate discussion by the Court on last clear chance in most opinions. The North Dakota view represents the middle ground between the Humanitarian rule applied primarily in Missouri and the more restricted application of the rule found in such states as New York, Arkansas, California, and Alabama which restrict the application of the doctrine to situations in which the plaintiff's peril has been discovered by the defendant. It might be noted that the rule as applied in North Dakota is in accord with the position taken by the Restatement of Torts which rejects both the so-called Humanitarian doctrine and the restrictive view of the states mentioned above. The scope of this article is to present chronologically each case in which the North Dakota Supreme Court has given this doctrine consideration in the period extending slightly over a half-century that this state has accorded last clear chance recognition.

In 1892 the doctrine was introduced to North Dakota in *Bostwick v. Minneapolis & Pac. Ry.*[11] where the plaintiff's horse had escaped from the stable and had run onto a snowbound public highway in the direction of a railroad crossing where the horse was struck by the defendant's train despite

254 N.Y. 206, 172 N.E. 471 (1930); 1 SHEARMAN & REDFIELD, LAW OF NEGLIGENCE 287 (1941).

[9] Smith v. Kansas City Public Service Co., 43, S.W. 2d 548 (Mo. 1944); see Otis *The Humanitarian Doctrine*, 46 AM. L. REV. 381 (1912).

[10] See Gaines, *The Humanitarian Doctrine in Missouri*, 20 ST. LOUIS L. REV. 113 (1935); Note, 22 COL. L. REV. 745 (1935); 2 DAK. L. REV. 405 (1929).

[11] 2 N.D. 440, 51 N.W. 781 (1892). Last Clear Chance cannot be invoked where the defendant merely failed to discover the peril of a trespasser, for generally there is no duty to anticipate his presence. Atchison, T.&S.F.RR. v. Howard, 86 Okl. 446, 98 P. 2d 914 (1939); 12 COL. L. REV. 729 (1912). But where a trespasser is to be anticipated, negligence may result from failure to maintain a lookout. HARPER, LAW OF TORTS 216 (1933).

awareness by the fireman and engineer of the horse's approach. The engineer testified that he did not consider the horse in danger up to the time of the injury though it was shown he did bring the engine under control. A statutory presumption of negligence[12] arose from the injury and was not overcome by the defendant. The Court in affirming the verdict for the plaintiff, and after expressly referring to *Davies v. Mann*, found that the plaintiff was guilty of no actual negligence but that his fault was "such negligence as exists irrespective of the means by which the animal becomes a trespasser." Bartholomew, J., stated with approval the rule that, "The party who last has a clear opportunity of avoiding the accident, notwithstanding the negligence of his opponent, is clearly responsible for it." It was further held that the test of knowledge is that of the ordinary man and not one of individual belief with the jury warranted in finding that the engineer understood or should have comprehended the danger. The doctrine herein related was to receive express acceptance in subsequent cases.

One year later the case of *Hodgins v. Soo Ry.*[13] resulted from the killing by the defendant's train of the plaintiff's horse which had become entrapped between the ties of a railroad bridge. There was substantial evidence that the defendant had used reasonable care after discovering the peril of the animal. The Supreme Court reversed the lower court's verdict and held that the defendant, being guilty of no "actual negligence," had sufficiently proved the exercise of due care thereby overcoming the statutory presumption of negligence. The Court here expressly approved instructions to the jury which placed on the defendant a duty of reasonable care after discovery and further indicated that the instruction correctly stated the law in conformance with the rule laid down in *Bostwick v. Minneapolis & Pac. Ry.*, but held that it was error to send the question to the jury since the rebuttal of statutory constructive negligence is a matter of law, not a question for jury determination. As precedent this decision affirms the rule imposing on the defendant the duty to exercise reasonable care after discovering a situation of danger, *i. e.*, a position of "discovered peril" with no duty, however, to discover a trespassing animal

[12] Dak. Comp. Laws §5501 (1887).
[13] 3 N.D. 382, 56 N.W. 139 (1893).

or person not at a railroad crossing or other site of anticipated danger.

In *Johnson v. Great N. Ry.*[14] the plaintiff's coal laden wagon was placed in a position of peril when the wagon sustained a broken axle at a public crossing and not being removed in time suffered destruction by the defendant's freight train. It appeared that the planking between the rails had been removed by the defendant leaving the rails four inches higher than the ground between the rails, the breakdown resulting directly therefrom. The plaintiff had sent a person up the track to warn the train, but there was no indication that whistle or brakes were made use of until only 250 feet from the crossing. While the train could not have stopped within 1600 feet there was substantial evidence that the men in charge of the locomotive could have by the exercise of due care discovered the peril of the plaintiff a half-mile distant in time to stop. In affirming the verdict for the plaintiff, Corliss, C. J., held that there was a duty incumbent on the defendant to keep a lookout to avoid collision with a person or property upon such crossing, the fault or negligence of the plaintiff presenting no defense, and that the failure to discover the peril was the proximate cause of the injury.

A similar fact situation with the same defendant was presented in *Carr & Erickson v. Soo Ry.*[15] Cattle of the plaintiff suffered injuries raising again the statutory presumption of negligence. The plaintiff rested after proving the killing, injury, and value. The jury found for the plaintiff after being instructed, "The party who last has a clear opportunity of avoiding the accident, notwithstanding the negligence of his opponent is clearly responsible for the accident." The Supreme Court affirmed the verdict for the plaintiff and expressly approved the rule embodied in the instruction and previously stated in the *Bostwick* case.

The first significant consideration of the doctrine of last clear chance was presented in *Acton v. Fargo & M. St. Ry.*,[16] where the plaintiff had driven his wagon astride a rail for sixty or seventy feet in order to pass a parked vehicle without

[14] 7 N.D. 284, 75 N.W. 250 (1898). That the defendant must exercise due care after discovery of peril was again affirmatively decided in Wright v. Soo Ry., 12 N.D. 159, 96 N.W. 324 (1903).

[15] 16 N.D. 217, 112 N.W. 972 (1907).

[16] 20 N.D. 434, 129 N.W. 225 (1910). Where both parties are negligent, it was stated in Lathrop v. Fargo & M. St. Ry., 23 N.D. 246, 136 N.W. 88 (1912), that the one whose act is the proximate cause is responsible for the entire injury.

looking back except for having looked part way back before going upon the track. He was struck by the defendant's street car, which stopped twenty to thirty feet past the place of the accident, while the evidence showed that with reasonable care the car could stop between twenty to twenty-five feet under similar conditions. The lower court instructed the jury, ". . . even if you find from a preponderance of evidence that the plaintiff in this action was guilty of contributory negligence in going upon the defendant's track, under all the circumstances of the case, that nevertheless, if the defendant or its employees in charge of the car were aware, or *should* by the exercise of reasonable diligence and care have become aware, of the dangerous position of the plaintiff, in time to have, by the exercise of reasonable diligence and care, avoided the collision with the buggy of the plaintiff, that the prior negligence of the plaintiff would not bar his right to recover . . ." The Supreme Court declared this to be a correct statement of the law in affirming the verdict for the plaintiff, despite the jury's special finding that the plaintiff was guilty of contributory negligence "to a certain extent" in driving on the track. This case served to extend the defendant's duty to discover the perilous situation. This duty is distinguishable from that stated in prior cases which held that no duty of discovery existed since there was presented none of the foreseeable dangers that prevail in the city streets and environs, the degree of duty being commensurate with the danger to be reasonably apprehended.

The plaintiff was again allowed recovery in an analagous situation in the same city several years later in *Welch v. Fargo & M. St. Ry.*[17] The defendant's street car collided with the plaintiff's horse-drawn hack after the plaintiff had turned out into the street without looking, though he testified he had listened, and after trotting his team for a distance of almost five hundred feet close to the rail was overtaken and run down by the defendant's rapidly approaching street car which sounded no gong nor gave any warning of approach. Recovery under the doctrine was affirmed since the defendant did not bring his car under proper control after noticing the danger, or if there was no notice of the peril there was held to be a duty of discovery. It was for the first time expressly held that last clear chance can be urged under a general allegation of neg-

[17] 24 N.D. 463, 140 N.W. 680 (1913).

ligence. On rehearing it was indicated that this case comes within the rule stated in the *Acton, Carr, and Bostwick* cases.

The plaintiff in *Gast v. Northern Pac. Ry. et al.,* [18] while driving a four horse team on a double wagon box, was struck at a railroad crossing with which he was familiar. The view was obstructed to some extent by an elevator and coal sheds. The plaintiff got onto the first side track before he saw the engine bearing down fifty or sixty feet away and was struck just as he tried to pull the team back though the engineer testified that he threw on the brakes when he recognized the danger. The trial court at the conclusion of the testimony directed a verdict in the defendant's favor and on appeal it was held that the plaintiff's contributory negligence precluded recovery as a matter of law. The plaintiff's effort to invoke the doctrine of last clear chance failed since he had not alleged general acts to support the doctrine, but instead had merely pleaded specific acts of excessive speed in approaching the crossing and failure to suitably warn, nor did the plaintiff even make request for amendment. The court had found two insurmountable barriers to the plaintiff's recovery: first, he had pleaded specific acts of negligence not embracing the doctrine and was restricted in his proof accordingly, and second, the engineer employed due care, therefor even if the complaint had been broad enough there could be no recovery.

There was a narrowing of the doctrine in *State v. Great Northern Ry.*[19] where the plaintiff truck driver did not stop or look to ascertain the approach of the defendant's train at a crossing which from within six hundred feet of the crossing the plaintiff could view 2000 feet of the track, the only obstruction to the plaintiff's view being the top of his truck

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[18] 28 N.D. 118, 147 N.W. 793 (1914). Bronson, J. in Dubs v. Northern Pac. Ry., 42 N.D. 124, 171 N.W. 888 (1919) pronounced failure to exercise ordinary care to avoid injury after discovery of danger to be wilful negligence. The *Dubs* case presented an extraordinary fact situation. A nine-year-old boy dozing on the track with his dog in front of him was maimed by the defendant's train. A dissenting opinion in this case apparently misunderstood the contributory negligence rule by declaring the plaintiff was contributorily negligent though denying there was negligence on the part of the defendant. The difficulty of instructing the jury on Last Clear Chance is illustrated in Cowan v. Soo Ry., 42 N.D. 170, 172 N.W. 322 (1919), involving an intoxicated plaintiff, which was remanded for special Last Clear Chance interrogatories for the jury. The difficulty of instructions are discussed in James, *Last Clear Chance: A Transitional Doctrine,* 47 YALE L. J. 704 (1938); Munday, J., *Last Clear Chance,* 21 NEB. L. BULL 347 (1942).

[19] 54 N.D. 400, 209 N.W. 853 (1926), 1 DAK. L. REV. 51 (1927).

cab with side curtains. The engineer and fireman were aware of the truck but believing it had stopped, failed to realize the peril until it was too late to avoid the collision though the engineer testified he applied the brakes when he became aware the plaintiff had stopped. The court here reversed the judgment of the lower court with direction for dismissal declaring that the engineer was not bound to anticipate that the driver of the truck would be guilty of negligence in attempting to cross the track but could assume that their train would be conceded the right of way. It was further held that the plaintiff was not in a position of peril within the doctrine since he occupied a place where by the reasonable exercise of care for his own safety all danger might have been avoided. In a dictum the rule that once the peril is apparent a duty to exercise reasonable care by the defendant arises, received approbation of the Court.

An almost identical situation appeared in *Zeis v. Great N. Ry.*[20] where the plaintiff in the last fifty feet before the crossing had a clear view of the track for one and a half miles in the direction whence the train came but here also failed stop. The court held for the defendant, finding the plaintiff approaching the crossing situated five feet above the surrounding level prairie but alleged belief that the car would stop. The Court held for the defendant, finding the plaintiff guilty of contributory negligence as a matter of law with no grounds for the attempted application of last clear chance. The court indicated that the operators of the train discovered the peril too late and were not bound furthermore, to anticipate negligence on the part of the plaintiff in conformance with the holding in *State v. Great Northern Ry.*, nor was the plaintiff even in a position of peril within the doctrine since he could with reasonable care have avoided the injury.

An unusual application of the doctrine occurred in *Hutchinson v. Kinzley*[21] where the plaintiff had temporarily stopped his automobile on the traveled portion of the highway at night in order to change a flat tire. The defendant's overtaking car swerved to the right of the plaintiff's automobile into a ditch where the plaintiff and his companion had taken

[20] 61 N.D. 18, 236 N.W. 916 (1931). While the result here seems proper the court appears incorrect in finding the plaintiff guilty of contributory negligence while stating that the defendant was not negligent since both parties must be negligent for contributory negligence to exist. HARPER, LAW OF TORTS 296 (1933).

[21] 66 N.D. 25, 262 N.W. 251 (1935).

refuge on perceiving the defendant's rapid approach. The plaintiff suffered serious injuries and brought suit on the basis of last clear chance. The plaintiff successfully maintained this action, proving that the defendant had failed to use due care after realizing the danger, or if the danger was not actually realized it was a danger that under the circumstances the defendant had a duty to discover. In attempting to pass to the right of the plaintiff's car it was held that the plaintiff's vehicle was "proceeding" within a statutory rule that an overtaking driver pass to the left of a vehicle "proceeding in the same direction." While the plaintiff was held to be negligent in leaving his car in such a position, it was further held that such negligence became a remote cause superseded by the defendant's negligent deviation to the right, which became the proximate cause of the injury.

In *Hausken v. Coman et al.*[22] the plaintiff while walking across the main highway in the business section of a village at a point other than an intersection, was fatally injured by the defendant's car. The plaintiff was a few feet past the defendant's lane when the defendant approximately seventy feet away wrongfully honked his horn causing the startled plaintiff to jump back into the path of the car. The complaint alleged the automobile was managed in a careless, negligent, and wanton manner by wrongfully honking and thereafter failing to use reasonable care to turn and avoid the injury. Argument was made by the defendant that the plaintiff was not in a position of peril but was injured as a result of his own conduct. The issue of last clear chance was held to be raised and the jury returned a verdict for the plaintiff after finding that after discovery of the peril the defendant could have avoided the injury by the exercise of due care. The Supreme Court finding prejudicial error to the defendant in the failure of the trial court to properly instruct on contributory negligence and other grounds reversed and remanded the case for new trial. The court's holding in regard to pleading of the doctrine affirms the precedent that the doctrine may be urged under general allegations of negligence but adds that it might also be pleaded under the specific allegations of this case, *i.e.*, "that at the time and place of the accident the automobile was managed in a careless, negligent,

[22] 66 N.D. 19, 283 N.W. 471 (1938).

and wanton manner so that the same was violently propelled" against said Hausken. In any case the court indicated it is better to plead the doctrine specially.

The plaintiff unsuccessfully tried to apply the doctrine in *Ramage v. Trepanier*[23] where the plaintiff's car suddenly skidded across an iced curve in the highway to collide with the defendant's automobile. The complaint alleged that the defendant "negligently, carelessly, and recklessly drove around said curve at a high, dangerous and excessive rate of speed and without due care required by existing weather conditions and the range of vision." The answer contained allegations that the plaintiff was contributorily negligent in driving at an excessive speed. The plaintiff after alleging excessive speed by the defendant as the basis of negligence oddly averred that at some point before the cars met, the defendant should have stepped on the accelerator and increased his speed to avoid the collision, though there was other testimony that both were already going too fast. The jury found for the defendant, and the plaintiff alleged error on the ground that the trial court refused to instruct the jury on last clear chance by its name or in a way the jury could recognize and apply it. The Supreme Court in affirming the verdict for the defendant indicated that the trial court did include the doctrine in the instructions, viz, ". . . . notwithstanding the previous negligence of the plaintiff, the defendant, by the exercise of ordinary care and prudence might avoid the injury to the former but fails to do so, his negligence and not that of the plaintiff is the proximate cause of the injury." It was held that the negligence of the plaintiff was still active to the time of the collision and that the peril was not real but only a possibility in terms of the defendant's ability to avoid it. The court, after declaring the case did not warrant recovery under the doctrine nor submission of instructions to the jury thereon, said that the defendant was justified in assuming that the plaintiff would obey the law and not place himself in a position of peril, in conformance with the holding in *Zeis v. Great N. Ry.* The court expressly adopted the view of the Restatement of Torts that the plaintiff must be in peril from which he is not able to extricate himself by the exercise of reasonable care and the defendant knows of the situation and realizes or would have realized the peril by the exercise of due

[23] N. D. 19, 283 N.W. 471 (1938), 16 N. D. BAR BRIEFS 163 (1939).

care as duty had it, and thereafter the defendant was negligent in failing to utilize with reasonable care his then existing ability to avoid the injury.[24]

The most recent case decided by the North Dakota Supreme Court in which last clear chance has been considered was *Stelter v. Northern Pac. Ry.*[25] The plaintiff while driving a school bus with a loaded four wheel trailer in tow failed to observe the defendant's train approaching the crossing with which the plaintiff was familiar. During the last seventy-five feet the plaintiff had an unobstructed view of fifteen hundred feet in the direction from which the train came. The plaintiff alleged that the injuries were sustained in the last twenty-five feet of the several hundred feet she was pushed by the train and sought to invoke the rule of last clear chance declaring that had the defendant exercised reasonable care after discovering the peril, the train would have been stopped sooner and thereby avoided injury to the plaintiff. The engineer testified that the plaintiff was traveling very slowly apparently intending to stop and that the train's emergency brakes were fully applied when he first became aware of the danger fifteen or twenty feet from the crossing. The court reversed the verdict for the plaintiff, holding that the plaintiff had failed to prove the lack of due care by the engineer and that it had not been shown that the avoidance of the injury was reasonably within the defendant's means.

The most recent consideration of the doctrine in North Dakota occurred in the federal case of *State v. Northern Pac. Ry.*[26] The plaintiff in operating a slow-moving dragline machine failed to observe the defendant's approaching train and was severely injured in the collision. The federal court in holding for the defendant cited the *Acton* and *Stelter* cases as authority for the law in North Dakota that the plaintiff cannot say that he is in a position of peril within the last clear chance doctrine, when by the exercise of reasonable care for his own safety, all danger could have been avoided. Recovery was denied for failure to show any lack of due care by the engineer, nor was it shown that the defendant should have realized the plaintiff's peril and applied the

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[24] RESTATEMENT, TORTS §§479, 480 (1934). For a comparison of *Davies v. Mann* and Restatement view, see Donley, *Last Clear Chance*, 49 W. VA. L.Q. 51 (1943).

[25] 71 N.D. 214, 299 N.W. 310 (1941).

[26] 171 F. 2d 506 (8th Cir. 1948).

brakes sooner than he did. The court further held that the negligence of the plaintiff was the sole cause of the injury and that for last clear chance to apply the defendant must be aware of the peril and have the present ability to avoid the danger with due regard for his own safety.

SUMMARY

The doctrine of Last Clear Chance on the basis of these holdings is applicable in North Dakota where:

(1) the plaintiff by his own negligence has placed himself in a position of peril from which he is unable to extricate himself by the exercise of reasonable care;[27]

(2) and contends under general allegations of negligence[28] or specific allegations of negligence embracing the doctrine of Last Clear Chance—[29]

(3) that the defendant had knowledge of the perilous situation[30] or was under a duty to discover the danger,[31] and thereafter the defendant failed to reasonably utilize his then existing ability to avoid the injury.[32]

THE NEED FOR A BETTER RULE

Increasing dissatisfaction with the strict rule of contributory negligence and the makeshift doctrine of last clear chance has led much creditable authority to adopt the theory of apportionment of damages.[33] The criticisms generally lev-

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[27] State v. Northern Pac. Ry., *supra*, note 26; Ramage v. Trepanier, 69 N.D. 19, 283 N.W. (1938); State v. Great N. Ry., 54 N.D. 400, 209 N.W. 853 (1926).

[28] Gast v. Northern Pac. Ry., 28 N.D. 118, 147 N.W. 793 (1914); Welch v. Fargo & M. St. Ry., 24 N.D. 463, 140 N.W. 680 (1913); see Hausken v. Coman, 66 N.D. 633, 268 N.W. 430 (1936); CLARK, CODE PLEADING 309 (1947).

[29] Hauskin v. Coman, 66 N.D. 633, 268 N.W. 430 (1936).

[30] Welch v. Fargo & M. St. Ry., 24 N.D. 463, 140 N.W. 680 (1913); Acton v. Fargo & M. St. Ry., 20 N.D. 434, 129 N.W. 225 (1910); State v. Northern Pac. Ry., 171 F. 2d 506 (8th Cir. 1948).

[31] Hutchinson v. Kinzley, 66 N.D. 25, 262 N.W. 251 (1935); Welch v. Fargo & M. St. Ry., 24 N.D. 463, 140 N.W. 680 (1913); Acton v. Fargo & M. St. Ry., 20 N.D. 434, 129 N.W. 225 (1910); Johnson v. Great N. Ry., 7 N.D. 284, 75 N.W. 250 (1898); Bostwick v. Minneapolis & Pac. Ry., 2 N.D. 440, 51 N.W. 781 (1892); *see* Ramage v. Trepanier, 69 N.D. 19, 283 N.W. 471 (1938).

[32] Stelter v. Northern Pac. Ry., 71 N.D. 214, 299 N.W. 310 (1941); Hutchinson v. Kinzley, 66 N.D. 25, 262 N.W. 251 (1935); Welch v. Fargo & M. St. Ry., 24 N.D. 463, 140 N.W. 680 (1913) There is holding in State v. Northern Pac. Ry., 171 F. 2d 506 (8th Cir. 1948) and Stelter v. Northern Pac. Ry., 71 N.D. 214, 299 N.W. 310 (1941) that the defendant is actually expected to employ due regard for his own safety.

[33] Malone, *Comparative Negligence*, 6 LA. L. REV. 125 (1945); Mole and Wilson, *A Study of Comparative Negligence*, 17 CORN. L. Q. 333 and 604 (1931) (exhaustively documented); *Comment*, 11 TULANE L. REV. 112 (1936).

eled at such apportionment, ". . . that it is not workable, that it places too heavy a burden upon the triers of fact, and that it will lead to too many appeals . . . have not been borne out by subsequent experience."[34] Any approximate division according to relative fault is far better than a rule under which, unless Last Clear Chance can be proved, the entire loss is thrown upon the plaintiff.

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[34] PROSSER, TORTS 405 (1941); James, *Last Clear Chance: A Transitional Doctrine*, 47 YALE L. J. 704 (1938); Comment, 11 TULANE L. REV. 112 (1936).