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Torts - Contributory Negligence - Injuries Avoidable Notwithstanding Contributory Negligence

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commented upon so that your suggestions may be properly indexed and filed under the provision of the law which you mention in your letter. Our objective is to get a code as nearly perfect as the combined efforts of North Dakota lawyers can make it, and all your suggestions will be welcomed and will be considered.

The lawyers who are working with our law daily are the ones who can contribute most to its improvement. You must help us discover the places where improvement can be made. Give us your opinion on any phase of the prospective new Code in which you may be interested.

It is proposed to have published in each issue of the Bar Briefs hereafter something of interest to the lawyers on the Code Revision and reports will be made to the Bar from time to time as the work progresses. In the next issue of Bar Briefs, we hope to give you some of the plans for the new revised Code.

CODE COMMISSION,
By
C. L. Young,
Clyde Duffy,
A. M. Kuhfeld,
Commissioners.

AMK:A

TORTS - CONTRIBUTORY NEGLIGENCE - INJURIES AVOIDABLE NOTWITHSTANDING CONTRIBUTORY NEGLIGENCE

P, driving north, and D, driving south, collided on an icy curve. Immediately adjacent to the curve, on D's right-hand side, was an open place or road. The parties saw each other before entering the curve. The collision occurred before D reached the point where he could have driven onto the open place. He admitted that by speeding up he could have reached it before meeting P, thereby avoiding the accident. As the motorists neared each other, they applied their brakes. Skidding produced a collision, P's action for damages, in which he alleged D rounded the curve at excessive speed and without due care, was dismissed. P moved for a new trial. The motion was denied, and he appealed, predicating error on the ground, among others, that the trial court did not instruct on the last clear chance doctrine. Held, the doctrine was inapplicable. Judgment affirmed. Ramage v. Trepanier, 283 N. W. 471 (1938).

In defining the factual setup to which the doctrine applies, it is interesting to note that the court identified itself anew with the "humanitarian" viewpoint, adopting the position of the Restatement, Torts (1934) Section 479. "Last clear chance," it will be recalled, is a British-bred exception to the rule of non-liability where P has been contributorily negligent. It makes D liable where P negligently exposes himself to inextricable peril, and D discovers — or by the humanitarian rule should have discovered— the peril in performance of such duty as he owes P, but fails to

take reasonable steps to avoid the accident (if such steps would have averted it). D, the court declared in the Ramage case, supra, was not required when he saw P's car to anticipate P would place himself in a position of peril. Instead, D was justified in assuming P would obey the law of the road and place neither of them in a position of peril. Zeis v. G. N. Ry., 61 N. D. 18, 236 N. W. 916 (1931). (One is not in a position of peril when he occupies a place where by the exercise of reasonable care for his own safety all danger may be avoided. State ex rel Workmen's Comp. Bd. v. G. N. Ry., 54 N. D. 400; 209 N. W. 853 (1926); Zeis case, supra). From the speed P and D were moving, the court calculates D had only a "second or two" to avoid harming P after he became aware, or could have become aware, of P's position of peril. "Last clear chance" did not apply because the court believed D had no actual last clear chance, in his second or two, to avert the accident by exercising reasonable care and competence. The case does not establish to the writer's satisfaction that D ever was negligent. If this doubt is well-founded, the court might have refused to apply the doctrine without bothering to inquire at all whether D had a last clear chance, because by the orthodox definition, negligence and contributory negligence both must be present before there is any possibility of applying the doctrine.

The humanitarian view, which puts discovery of a perilous position on equal footing with reasonable opportunity to discover, is termed the majority view by text writers. Harper on Torts (1933) 305; Cooley on Torts (4th ed. 1932) 405. North Dakota apparently espoused it 28 years ago. Action v. Fargo and Moorhead St. Ry., 20 N. D. 434, 129 N. W. 225 (1910). Minority courts apply the doctrine only where D actually discovers P's dangerous situation and then fails to use the reasonable care any available means to avoid the accident. Among others, the minority seems to include California, South Dakota, Montana, and New York, while the Illinois court disdains "last clear chance" altogether. Isham et al v. Trimble, 5 Cal. App. (2d) 648, 43 P. (2d) 581 (1935); De Noma v. Sioux Falls Traction System, 44 S. D. 10, 162 N. W. 746 (1917) and Miller v. Sioux Falls Traction System, 44 S. D. 405, 184 N. W. 233 (1921) Dahmer v. N. P. Ry., 48 Mont. 152, 136 Pac. 1059 (1913) and Egan v. Montana Central Ry., 24 Mont. 569, 63 Pac. 831 (1901); Panarese v. Union Ry. of N. Y., 261 N. Y. 233, 185 N. E. 84 (1933) and cases cited; Specht v. Chicago City Ry., 233 Ill. App. 384 (1924). Michigan is among the courts in this Reporter Zone which recognize the humanitarian rule. Johnson v. Grand Trunk Western Ry., 246 Mich. 52 224 N. W. 448 (1929). Other North Dakota cases on the subject established that in such states as our own, where contributory negligence is an affirmative defense, "last clear chance" can be urged under a general allegation of negligence, and also under a specific allegation of careless driving. Welch v. Fargo and Moorhead St. Ry., 24 N. D. 463, 140 N. W. 680 (1913). Hausken v. Coman, 66 N. D. 633, 268 N. W. 430 (1936).

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