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Torts: Last Clear Chance--Pedestrian Not in a Position of Danger as a Matter of Law

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operate at the earliest date the law would allow it to operate?" The court then answered this question by saying that:

> "It is dangerous for us to insert an exception by saying that if the landlord had knowledge of that tenant's intention it stands for notice. I have struggled to find a justification for adopting it (defense's line of reasoning), as the payment of the whole rent by the defendants, without any return, works a hardship, which all the members of the court appreciate; but I am compelled to say that to decide against the plaintiffs would be to fly in the face of practically a unanimity of authorities through several hundred years in all quarters where the common law rules."[22]

In a recent Montana decision,[23] the Montana court followed the common law by holding that a notice by the lessors to terminate a tenancy from month to month, served April 15 and requesting possession May 1 was insufficient, under a statute requiring 30 days notice, where the lessor after serving this notice, moved into the premises on June 25, 1949, and occupied the living room thereof for 17 days. The court found the lessor liable for intentional, wrongful and malicious invasion of right of privacy, trespass and entry. The court's conclusion, although not stated as such, impliedly was that the notice in question was not only insufficient to terminate the tenancy on May 1 as designated, but was a nullity for all purposes and therefore the tenancy was still in effect on June 25, one month and a half later, the date of lessor's trespass.

As stated above, previous California decisions do not give an answer to the question. They declare that it is necessary that proper notice be given to terminate a tenancy from month to month, but proceed no further.

Considering the growing prevalency of periodic tenancies today, and their historical background indicating the desire of the courts to further stabilize such tenancies, the California court may have established a dangerous precedent in the principal case. Perhaps the legislature can take steps to amend section 1946 of the Civil Code so as to provide a clear and concise answer to the problem, thereby preventing the reoccurrence of any further transformations of an insufficient notice into a sufficient notice.

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TORTS: LAST CLEAR CHANCE—PEDESTRIAN NOT IN A POSITION OF DANGER AS A MATTER OF LAW

In *Ferner v. Casalegno*[1] the question raised was whether as a matter of law the plaintiff had reached a position of danger; and if so whether he could have escaped from such a position by the use of ordinary care. The facts of that case were as follows: the plaintiff while intoxicated attempted to walk across a divided four lane highway in the middle of the night at a point other than at an intersection or crosswalk. Plaintiff admitted that he marched straight ahead without looking to the right or left, crossed two southbound lanes, the double white line, and continued to a point in the outside northbound lane where he was struck by defendant's automobile. Defendant testified that he first observed the plaintiff at the double white line proceeding at a rapid pace. The defendant applied his brakes and continued straight ahead to the point of impact. On appeal from a judgment for the defendant the court held:

[22] *Id.* at 585, 50 S.E. at 815.

[23] Welsh v. Pritchard, 125 Mont. 517, 241 P.2d 816 (1952).

[1] 141 Cal.App.2d....., 297 P.2d 91 (1956).

> "[T]hat a pedestrian who crossed a double white line in the center of a four lane highway 3.4 seconds before he was struck by an automobile in the outside lane toward which the plaintiff was walking was not, as a matter of law, in a position of danger within the Last Clear Chance doctrine when pedestrian crossed such double white line and therefore, pedestrian was not entitled to recover under the doctrine as a matter of law."[2]

Whether or not the doctrine of Last Clear Chance applies in a particular case depends wholly upon the existence or nonexistence of the elements necessary to bring it into play. What are these elements? The doctrine presupposes: (1) That the plaintiff has been negligent, and as a result thereof is in a *position of danger* from which he cannot escape by the exercise of ordinary care; this is not limited to situations where it is physically impossible for him to escape, but is applicable to cases where he is totally unaware of his danger and for that reason unable to escape; (2) that the defendant has knowledge that the plaintiff is in such a situation, and knows, or in the exercise of ordinary care should know that the plaintiff cannot escape from such a situation; and (3) that the defendant has the last clear chance to avoid the accident by exercising ordinary care, fails to exercise same, and the plaintiff is injured as the proximate result of such failure.[3]

If any one of these elements is absent, the doctrine does not apply and the case is governed by the ordinary rules of negligence and contributory negligence.[4]

In the *Casalegno* case the court held that the evidence failed to establish the second part of the first element, that is, the plaintiff was not, as a matter of law, in a position of danger when he crossed the double white line. Thus, while the plaintiff may be in danger or peril, *i.e.*, he may simply be exposed to injury, that may not be enough to constitute a "position of danger." To come within the doctrine of Last Clear Chance, a plaintiff must be exposed to an injury from which he cannot extricate himself by exercising ordinary care. And until he has reached this position he has the same opportunity to avoid the accident by exercise of ordinary care as has the defendant.[5] On the other hand, if the defendant observes the plaintiff in a position where, with the exercise of reasonable care upon his part, no injury will befall him, the defendant has the right, until circumstances clearly indicate the contrary, to assume that the plaintiff will not expose himself to danger.[6] In other words, the defendant is under no duty to anticipate that the plaintiff will leave a place of safety for one of danger. Even though the defendant has seen the plaintiff, he need not take measures to avert injury until it is reasonably apparent that the plaintiff is in danger because of obliviousness, inadvertance, or impossibility of self-help.[7]

To illustrate what is meant by "position of danger" under this doctrine, some of the leading cases on the subject should be noted. In *Dalley v. Williams*[8] the court said:

> "The Last Clear Chance doctrine was not applicable until the plaintiff arrived at such a point as to be in peril and this was the point where he could no longer escape injury by exercising ordinary care."[9]

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[2] *Id.* at ....., 297 P.2d at 91.

[3] Doran v. San Francisco, 44 Cal.2d 477, 283 P.2d 1 (1955).

[4] Girdner v. Union Oil Co., 216 Cal. 197, 13 P.2d 915 (1932).

[5] Brown v. McCuan, 56 Cal.App.2d 35, 132 P.2d 838 (1942).

[6] Cady v. Sanford, 57 Cal.App. 218, 207 Pac. 45 (1922); Schooley v. Fresno Traction Co., 56 Cal.App. 705, 206 Pac. 481 (1922); 19 CAL. JUR., *Negligence* § 81 (1925).

[7] See 21 CALIF. L. REV. 257 (1933).

[8] 73 Cal.App.2d 427, 166 P.2d 595 (1946).

[9] *Id.* at 435, 166 P.2d at 599.

And in *Cady v. Sanford*[10] it was said:

> "At some appreciable time prior to the crash the plaintiff was in a position of peril. He was in a position of peril at the very instant he arrived at the point where he could no longer avoid the accident by exercising ordinary care. Then and not until then was the Last Clear Chance doctrine applicable."[11]

In applying the rules of these cases to *Ferner v. Casalegno,* it seems clear that it cannot be said as a matter of law that the plaintiff uncontrovertably was shown to be in a position of danger from which he could not escape by the exercise of ordinary care. Rather, it would seem to be a factual question for the jury, as the court held.

It may be that the Last Clear Chance doctrine is limited to exceptional circumstances in its application to accidents involving automobiles or automobiles and pedestrians. In such cases the act creating the peril occurs practically simultaneously with the collision and the defendant frequently does not have the opportunity in the exercise of reasonable care to avert the accident.

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[10] 57 Cal.App. 218, 207 Pac. 45 (1922).
[11] *Id.* at 224, 207 Pac. at 48.