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LAST CLEAR CHANCE—
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IN THE DEVELOPMENT of the doctrine of last clear chance in California, there has been a conflict of opinion on the propriety of giving the instruction to the jury. In view of the evidence presented, is it proper for the court to hold, as a matter of law, that a defendant did not have a last clear chance to avoid an accident, or should the determination be made by the jury? Because the cases under the doctrine usually present close questions of fact and because the evidence is usually conflicting, the question is highly debatable. Prior to 1957, a liberal view, which favored determination by the jury, prevailed. In the past few years, the application of the doctrine has been restricted. Before an instruction will be given, the plaintiff must affirmatively prove the existence of every element of the doctrine to the satisfaction of the court.[1] The reasoning behind this conservative trend and its effect on the law can best be discovered by a review of the doctrine itself, and by an examination of some recent decisions.

Underlying Policies

The doctrine of last clear chance is generally regarded as an exception to the rule that contributory negligence is a defense to an action for negligence. It is said to be based on the humanitarian concept that the fault of the injured party should not relieve an erring defendant of liability if the defendant was afforded a last clear chance to avoid the accident after actually discovering that it was too late for the injured party to avail himself of any similar chance.[2]

The doctrine has also been supported in the light of the proximate cause element of the ordinary law on contributory negligence by pointing out that, where the elements of the doctrine are present, the defendant's failure to make use of a last clear chance to avoid an accident is considered the sole proximate cause of the accident. Referring to this theory, it has been said that the main factor that may make the plaintiff's negligence a remote rather than a proximate cause in the eyes of the law is the existence of some such appreciable interval of time after the plaintiff reaches a state of helplessness as to

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1 Rodabaugh v. Tekus, 39 Cal. 2d 290, 246 P.2d 663 (1952).

2 35 CAL. JUR. 2d, *Negligence*, § 252 (1957).

enable the defendant to gain actual knowledge thereof and have a last clear chance to avoid the accident.[3]

Elements of the Doctrine

The necessary elements which must be found to warrant the application of the doctrine are stated in the leading case of *Brandelius v. City and County of San Francisco*[4] which requires that the evidence must show that:

1. The plaintiff was in a position of danger and, by his own negligence, became unable to escape from such position by the use of ordinary care, either because it became physically impossible for him to escape or because he was totally unaware of the danger.

2. The defendant knew that plaintiff was in a position of danger and further knew, or in the exercise of ordinary care should have known, that plaintiff was unable to escape therefrom.

3. Thereafter defendant had the last clear chance to avoid the accident by the exercise of ordinary care but failed to exercise such last clear chance, and the accident occurred as a proximate result of such failure.[5]

The elements of the doctrine are well understood. As stated previously, the basic conflict is whether determination of the existence or non-existence of any last clear chance is a proper function of the judge or the jury.

A Liberal Trend

In 1951, the Supreme Court of California decided the cases of *Peterson v. Burkhalter*[6] and *Selinsky v. Olsen.*[7] It was then stated that a turning point in the application of the doctrine had been reached, and that a liberal trend was on the march.[8] In the *Peterson* case, the court held that it cannot be said, as a matter of law, that a defendant with two seconds to act does not have a last clear chance to avoid the accident. Such a defendant may have sufficient time in which to do something, either by turning his automobile or by sounding his horn. In the *Selinsky* case, the defendant testified that he did not see the plaintiff's automobile, but other evidence showed that the defendant was looking straight ahead and that his view was unobstructed. The court held that the jury could infer that the defendant had actually seen the plaintiff and left the determination of the exist-

[3] *Ibid.*

[4] 47 Cal. 2d 729, 306 P.2d 432 (1957).

[5] Formula reiterated in Hildebrand v. Los Angeles Junction Ry., 53 Cal. 2d 826, 3 Cal. Rptr. 313 (1960).

[6] 38 Cal. 2d 107, 237 P.2d 977 (1951).

[7] 38 Cal. 2d 102, 237 P.2d 645 (1951).

[8] For a full discussion of the doctrine prior to 1951 and the impact of the Peterson and Selinsky cases, see Garon, *Recent Developments in California's Last Clear Chance Doctrine,* 40 CALIF. L. REV. 404 (1952).

ence of the remaining elements of the doctrine to the jury.[9] Following these decisions, the doctrine was applied with regularity[10] notwithstanding opposition by conservative forces.[11]

Conservative Trend

In 1957, the Supreme Court of California, in the *Brandelius* case, laid a basis for a tightening of the application of the doctrine when it clarified the instruction of last clear chance. The main purpose of the restatement of the formula was to make it clear that the time element is the all-important factor in deciding whether the doctrine is to be applied, that is, the existence of any last clear opportunity to avoid an accident depends mainly upon the amount of time available to the defendant to act. The court emphasized that the exercise by defendant of any last clear chance commences only at such time as defendant has both actual knowledge of the injured person's position of danger *and* actual or constructive knowledge that the injured person cannot escape from such situation.[12]

The emphasis on the time element gave to the strict constructionists new ammunition. As can be seen from an examination of recent decisions in the California appellate courts, the liberal view is being restricted from further expansion.

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[9] Sills v. Los Angeles Transit Lines, 40 Cal. 2d 630, 255 P.2d 795 (1953), where the court said: "As held in a number of cases, where a person sees another in a position which is in fact dangerous, he may not rely upon dullness to excuse him from not realizing the danger of the position; and if he sees the dangerous situation he must use reasonable diligence in analyzing the same, knowledge of danger being imputed where the circumstances are such as to convey to the mind of a reasonable man that the plaintiff is in a position of peril."

[10] Sills v. Los Angeles Transit Lines, *supra* note 9; Daniels v. City and County of San Francisco, 40 Cal. 2d 614, 255 P.2d 785 (1953); Ferner v. Casalegno, 141 Cal. App. 2d 467, 297 P.2d 91 (1956); Mason v. Hart, 140 Cal. App. 2d 349, 295 P.2d 28 (1956); Ingram v. Bob Jaffe Co., 139 Cal. App. 2d 193, 293 P.2d 132 (1956); Jones v. Gilland, 137 Cal. App. 2d 486, 290 P.2d 329 (1955); Hardin v. Key System Transit Lines, 134 Cal. App. 2d 677, 286 P.2d 373 (1955); Lebkicher v. Crosby, 123 Cal. App. 2d 631, 267 P.2d 361 (1954); Summers v. Randall, 123 Cal. App. 2d 113, 266 P.2d 217 (1954); Buck v. Hill, 121 Cal. App. 2d 352, 263 P.2d 643 (1953); Perin v. Nelson & Sloan, 119 Cal. App. 2d 560, 259 P.2d 959 (1953); Simmer v. City and County of San Francisco, 116 Cal. App. 2d 724, 254 P.2d 185 (1953); Hopkins v. Carter, 109 Cal. App. 2d 912, 241 P.2d 1063 (1952); Galbraith v. Thompson, 108 Cal. App. 2d 617, 239 P.2d 468 (1952).

[11] Cases which held that facts did not justify application of the doctrine are: Doran v. City and County of San Francisco, 44 Cal. 2d 477, 283 P.2d 1 (1955); Sparks v. Redinger, 44 Cal. 2d 121, 279 P.2d 971 (1955); Rodabaugh v. Tekus, 39 Cal. 2d 290, 246 P.2d 663 (1952); Nippold v. Romero, 145 Cal. App. 2d 235, 302 P.2d 367 (1956); Nesje v. Metropolitan Coach Lines, 140 Cal. App. 2d 807, 295 P.2d 979 (1956); Fleharty v. Boltzen, 137 Cal. App. 2d 187, 290 P.2d 311 (1955); Mehling v. Zigman, 116 Cal. App. 2d 729, 254 P.2d 141 (1953); Jobe v. Harold Livestock Commission Co., 113 Cal. App. 2d 269, 247 P.2d 951 (1952).

[12] Kowalski v. Shell Chemical Corp., 177 Cal. App. 2d 528, 2 Cal. Rptr. 319 (1960).

Peterson *Case Restricted*

One example of this change in attitude may best be shown by a comparison of *Guyton v. City of Los Angeles*,[13] which follows the *Peterson* case, and *Fambrini v. Stikkers*,[14] which restricts further extension.

In the *Guyton* case, the plaintiff drove his bicycle from a driveway into the street and was struck by a police car owned by defendant city. The car was traveling approximately seventeen miles per hour. The driver, at the instant he saw plaintiff, hit his brakes and skidded to a stop. The driver made no attempt to swerve the car. The court, citing the *Peterson* case, held that where it could be argued that the driver had approximately four seconds and from sixty-nine to ninety feet within which to alter his course, there was validity to plaintiff's theory that the accident could have been avoided if the driver had turned into another lane, and that the jury should have been instructed on last clear chance.

In the *Fambrini* case, the plaintiff was traveling down a hill on his bicycle at a rapid rate of speed and hit the side of the defendant's car, which was crossing the intersection. The bicycle and car were ninety feet apart when defendant first saw plaintiff, and several seconds elapsed before the collision. The car was traveling from fifteen to twenty miles per hour. Defendant immediately applied her brakes and brought the car to a full stop, although she made no attempt to swerve. Plaintiff advanced the theory of the *Peterson* case, pointing out that the defendant could have avoided the collision by swerving[15] the car or by blowing the horn.[16] The court held, as a matter of law, that these courses of action were not available to defendant saying:[17]

> . . . [I]t must be noted that the parties in the swerving cases all failed to bring their vehicles to a halt, which is an important distinction, but even more crucial is the fact that they hit victims who at the time were standing still and hence, swerving would have avoided the accident, while such is mere speculation here.

It may be open to serious doubt whether any distinction exists between the facts of the two cases. Can it be said, as a matter of law, that a swerve of even two or three feet was not available to defendant?[18] Nevertheless, the distinction drawn does show that the attitude

[13] 174 Cal. App. 2d 354, 344 P.2d 910 (1959).

[14] 183 Cal. App. 2d 235, 6 Cal. Rptr. 833 (1960).

[15] Center v. Yellow Cab Co., 216 Cal. 205, 13 P.2d 918 (1932); Girdner v. Union Oil Co., 216 Cal. 197, 13 P.2d 915 (1932); Parrott v. Furesz, 153 Cal. App. 2d 26, 314 P.2d 47 (1957).

[16] Jones v. Gillard, 137 Cal. App. 2d 486, 290 P.2d 329 (1955); Lebkicher v. Crosby, 123 Cal. App. 2d 631, 267 P.2d 361 (1954).

[17] 183 Cal. App. 2d 235, 241-42, 6 Cal. Rptr. 833, 837 (1960).

[18] Fambrini v. Stikkers, *supra* note 14. In a dissenting opinion, Justice Good contended that it is not mere speculation to assume that if vehicles have even three or four feet of space between them they do not ordinarily collide.

of the court has changed. Emphasis is being placed upon the time element; the existence of a sufficient time within which to act, where both vehicles are in motion, is to be determined by the judge.

Selinsky *Case Restricted*

Kowalski v. Shell Chemical Corp.[19] offers another example of the present attitude. In that case, plaintiff's motorcycle and defendant's automobile, driven by its employee, collided at an intersection. The driver testified that he did not see the plaintiff until just before the collision. The driver's view of the intersection was obstructed by a truck which was double-parked. By calculations of braking distance, the plaintiff contended that the driver saw the plaintiff before his view was obstructed. The trial court gave the requested instruction on last clear chance and defendant appealed. The appellate court reversed the decision holding, as a matter of law, that the evidence was not sufficient to enable the jury to infer that the defendant had actual knowledge that the plaintiff was in a position of danger.

The court approved of the proposition of the *Selinsky* case that actual knowledge may be inferred where it is a reasonable inference to be drawn from the evidence. The court then pointed out that, although the *Selinsky* opinion stated that the defendant could have seen the plaintiff's car, the evidence showed that the defendant "must have seen" the plaintiff, not that the defendant could have seen the plaintiff at an earlier time. Even if, the driver did see the plaintiff, the court stated that the fact that a defendant actually sees the plaintiff some considerable time before the accident does not necessarily make the doctrine applicable.[20] There must also be evidence to indicate that plaintiff was in a position of peril from which he could not escape, and that the defendant knew this, because the evidence of a sufficient time within which to avoid an accident commences to run only after this fact is known to the defendant.

In the *Selinsky* case, after finding that actual knowledge could reasonably be inferred, the court held that it was for the jury to determine whether or not defendant had a last clear chance. On the other hand the decision in the *Kowalski* case seems to infer that the existence of sufficient evidence to support each element, especially the time element, is to be determined by the judge.[21]

Present and Future

As the law now stands, the cases show a definite trend toward a tightening of the application of the doctrine.[22] Emphasis on the rule

[19] 177 Cal. App. 2d 528, 2 Cal. Rptr. 319 (1960).

[20] Miller v. Atchison, T. & S.F. Ry., 166 Cal. App. 2d 160, 332 P.2d 746 (1958); Dalley v. Williams, 73 Cal. App. 2d 435, 166 P.2d 599 (1946).

[21] Hickambottom v. Cooper Transp. Co., 186 Cal. App. 2d —, 9 Cal. Rptr. 276 (1960).

[22] Cases which held that the facts justified the application of the doctrine are:

that the existence of substantial evidence to support each element is a question of law lessens the plaintiff's chances of obtaining an instruction to the jury. Furthermore, if the plaintiff does obtain an instruction, he places himself in danger of reversal on the finding by the appellate court that such evidence is lacking.[23]

The present attitude of the courts may best be summarized in the words of Justice Schauer: "But until . . . we no longer have to call the basic principle the doctrine of last *clear* chance I think that we should refrain from applying it to facts which on any reasonable view of the evidence give the party charged no more than a slight or possible chance."[24]

Although both parties are at fault, the doctrine of last clear chance allows the contributorily negligent party to collect full damages for his injuries.[25] Perhaps dissatisfaction with the doctrine itself is the underlying reason for the court's reluctance to extend its coverage. Whatever the reasons, the volume of litigation on the subject and the need for certainty point to the urgency of legislative study. The doctrine of last clear chance is said to be a transitional one, a stepping-stone to apportionment of damages.[26] The step is well worn.

McAllister v. Kyles, 186 Cal. App. 2d —, 8 Cal Rptr. 909 (1960); Ransdell v. Los Angeles Metropolitan Transit Auth., 185 Cal. App. 2d —, 8 Cal. Rptr. 302 (1960); Guyton v. City of Los Angeles, 174 Cal. App. 2d 354, 344 P.2d 910 (1959); Nahhas v. Pacific Greyhound Lines, 153 Cal. App. 2d 91, 313 P.2d 886 (1957); Parrott v. Furesz, 153 Cal. App. 2d 26, 314 P.2d 47 (1957); Heffington v. Paul, 152 Cal. App. 2d 235, 313 P.2d 157 (1957).

Cases which held that facts did not justify the application of the doctrine are: Hildebrand v. Los Angeles Junction Ry., 53 Cal. 2d 826, 3 Cal. Rptr. 313 (1960); Welch v. Gardner, 187 Cal. App. 2d —, 9 Cal. Rptr. 453 (1960); Hickambottom v. Cooper Transp. Co., 186 Cal. App. 2d —, 9 Cal. Rptr. 276 (1960); Dyer v. Knue, 186 Cal. App. 2d —, 8 Cal. Rptr. 753 (1960); Kavner v. Holzmark, 185 Cal. App. 2d —, 8 Cal Rptr. 145 (1960); Todd v. Southern Pac. Co., 184 Cal. App. 2d —, 7 Cal. Rptr. 448 (1960); Fambrini v. Stikkers, 183 Cal. App. 2d 235, 6 Cal. Rptr. 833 (1960); Bell v. Huson, 180 Cal. App. 2d 820, 4 Cal. Rptr. 716 (1960); Warren v. Ubungen, 177 Cal. App. 2d 605, 2 Cal. Rptr. 411 (1960); Kowalski v. Shell Chemical Corp., 177 Cal. App. 2d 528, 2 Cal. Rptr. 319 (1960); Miller v. Atchison, T. & S.F. Ry., 166 Cal. App. 2d 160, 332 P.2d 746 (1958); Holman v. Viko, 161 Cal. App. 2d 87, 326 P.2d 551 (1958); Barcelone v. Melani, 156 Cal. App. 2d 631, 320 P.2d 203 (1958); Clarida v. Aquirre, 156 Cal. App. 2d 112, 319 P. 2d 20 (1958); Hall v. Atchison, T. & S.F. Ry., 152 Cal. App. 2d 80, 312 P.2d 739 (1957).

[23] Hickambottom v. Cooper Transp. Co., 186 Cal. App. 2d —, 9 Cal. Rptr. 276 (1960); Kowalski v. Shell Chemical Corp., 177 Cal. App. 2d 528, 2 Cal. Rptr. 319 (1960); Miller v. Atchison, T. & S.F. Ry., 166 Cal. App. 2d 160, 332 P.2d 746 (1958).

[24] Sills v. Los Angeles Transit Lines, 40 Cal. 2d 630, 641, 255 P.2d 795, 802 (1953) (Schauer, J., dissenting).

[25] PROSSER, TORTS 292 (2d ed. 1955).

[26] James, *Last Clear Chance: A Transitional Doctrine*, 47 YALE L.J. 704 (1938).