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Rule # 1. *Where the injured person has negligently placed himself in a situation of peril from which he is physically unable to remove himself, the defendant is liable if he saw, or should have seen, him [and realized, or ought to have realized, his peril] in time to avert the accident by using reasonable care.*

Rule # 2. *Where the plaintiff has negligently placed himself in a situation of peril from which he is physically able to remove himself, but is unconscious of his peril, the defendant is liable only if he saw the plaintiff and realized, or ought to have realized, his peril in time to avert the accident by using reasonable care.*

These two rules state the new last clear chance doctrine in Virginia. They were announced by the Supreme Court of Appeals in a unanimous decision on September 14, 1955, in *Greear* v. *Noland Co.*, 197 Va. 233, 238. Rule # 1 has always been the law in Virginia and elsewhere. Rule # 2 is new, and it brings Virginia in line with the overwhelming weight of authority in America. Prior to this decision the Virginia law on last clear chance was in a state of hopeless confusion. The court, itself, on several occasions admitted this to be so, For example, in *Harris Motor Lines, Inc.* v. *Green,* 184 Va. 984, 992 (1946) the court said:

> We will not undertake to discuss, or attempt to reconcile, the cases in which the doctrine has been applied or withheld. This would be impossible because the cases are irreconcible.

How did the law become so confused in Virginia? This can be best answered by a brief survey of the cases. Pointing out the mistakes of the past should also serve as a warning against the continued use of the erroneous statements found in the older cases which now have been overruled. The study of the

last clear chance doctrine as developed in the Virginia cases will be made easier, it would seem, by first restating some fundamental principles.

Civil liability is based on fault. It is the general common law concept that a defendant is liable only if he is guilty of legal fault. The usual legal fault in tort law is either intentional conduct or negligent conduct. In the cases dealt with in this paper the fault of the defendant consists of his negligence. A defendant's negligence, however, is not enough to subject him to liability; his negligence must be a proximate cause of the injury or harm to the plaintiff. The concept of negligence is a separate and distinct concept from that of proximate cause. They are mutually exclusive. Proximate cause must exist whether the defendant's conduct is negligent or intentional. Even in the exceptional cases where there is absolute or strict liability (*i.e.* liability without fault) the requirement of proximate cause exists. Indeed, proximate cause is a general concept running throughout many fields of law, including criminal law and contracts. In contracts of fire insurance the fire must proximately cause the loss, or in the case of an accident policy the accident must be a proximate cause of the injury. Negligence and proximate cause have been confused in Virginia. At times the phrase "proximate cause" has been used to mean (1) negligence, or (2) proximate cause, or (3) more frequently, to mean negligence and causation wrapped up in one concept.

If the defendant is negligent and his negligence is a proximate cause of injury to the plaintiff, and nothing more is shown, the defendant is liable. However, if the plaintiff is also negligent and his negligence is also a proximate cause of the injury, recovery is barred. This is known as the doctrine of contributory negligence. The Virginia court frequently, but erroneously, employs the language of proximate cause to explain the doctrine of contributory negligence. The fallacy of doing this is obvious since the defendant's negligence subjects him to liability only if his negligence is a proximate cause of the injury and, likewise, the plaintiff's negligence bars his recovery only if his negligence proximately contributes to

the injury. The doctrine of contributory negligence presupposes that the conduct of each party is a proximate cause. The doctrine of contributory negligence cannot be explained in terms of proximate and remote cause.

The exception to the doctrine of contributory negligence, which allows the plaintiff to recover from a negligent defendant even though he, himself, has been contributorily negligent, is known as the last clear chance doctrine. The doctrine had its inception in the landmark case of *Davies* v. *Mann,* 10 M. & W. 546 (1842). What is the correct statement of the doctrine? When should it be applied? When should it not be applied? These are not merely academic questions. Substantial verdicts daily turn upon proper or improper instructions on last clear chance.

For all practical purposes there are two last clear chance doctrines, each applicable to separate and distinct factual situations. Rule # 1 above applies where the plaintiff is physically unable to save himself, *i.e.* it applies in the case of a *helpless plaintiff*. Rule # 2 above applies where the plaintiff is physically able to save himself but is unconscious of his peril due to inattention, *i.e.* it applies in the case of an *inattentive plaintiff*. The Virginia court, prior to the *Greear* case, applied Rule # 1 to both the helpless plaintiff and the inattentive plaintiff. There seem to be two reasons for this mistake. First, the court failed to understand that there were two different doctrines, each applicable to factual situations which are quite different yet bearing the same name. Second, the court failed to distinguish between "seeing" the plaintiff and "realizing" his peril. It will be observed that "seeing" in Rule # 1 is objective, *i.e.* the defendant "saw or should have seen" the plaintiff, whereas in Rule #2 "seeing" is subjective, *i.e.* the defendant "saw" (not "or should have seen") the plaintiff. On the other hand, "realizing" is objective in both rules, *i.e.* the defendant "realized or ought to have realized" that the plaintiff was in peril. Seeing the plaintiff and realizing that he is in peril are two different things. This confusion is evident from the court's blending the two in the repeated statement that the last clear chance doctrine applies if the defendant "saw or should have seen the plaintiff's *perilous*

situation.'' What does *perilous situation* mean? Does it refer to the plaintiff's peril? If so, the statement is correct. Does it refer to the plaintiff's situation which is perilous whether the defendant realizes or not that it is perilous? If, so, the statement is incorrect.

The Virginia court has described its application of the law of Rule # 1 to the factual situation of Rule # 2 as the ''humanitarian doctrine'' of last clear chance. It is rather humanitarian to the plaintiff though not to the defendant for it requires the defendant to exercise greater care for the safety of the plaintiff than the plaintiff is required to exercise for his own safety. The result is to allow the plaintiff to recover when he and the defendant are both negligently inattentive and therefore guilty of exactly the same amount and kind of negligence. Of course, the so-called humanitarian doctrine completely abrogates the doctrine of contributory negligence.

The court has always correctly applied Rule # 1 to the ''helpless plaintiff.'' In tracing the cases, only the cases involving the ''inattentive plaintiff'' will be referred to since it is in these that Rule # 1 has been applied to the factual situation existing in Rule # 2.

The first four cases to arise in Virginia, beginning with *Dun* v. *Seaboard and Roanoke R. R. Co.,* 78 Va. 645 (1884), properly applied Rule # 2. The next two cases applied Rule # 1 to an inattentive plaintiff, *i.e.* they applied the so-called humanitarian doctrine. In the first of these an instruction embodying the humanitarian doctrine was approved without comment. In the second case the court, aware that the generally accepted rule was contra, said that the humanitarian doctrine ''is *undoubtedly* the *established* doctrine of this court.'' (Emphasis added.) See *Va. Mid. R . R. Co.* v. *White,* 84 Va. 498, 504 (1888). In support of this surprising result three Virginia cases were cited. In the first of the three the point was not considered. In the second the decision was exactly contra. The third case was not in point since it involved a helpless plaintiff. The trouble began with the holding in *Va. Mid R. R. Co.* v. *White, supra.* This was the court's

"original sin." In *Richmond & Danville Ry. Co.* v. *Yeamans,* 86 Va. 860 (1890), arising two years later, the court expressly refused to follow the humanitarian doctrine and reversed the lower court for having given an instruction embodying it. The next four cases also were decided properly but, unfortunately, employed some loose language that proved to be a pitfall in subsequent cases. This caused the court in the next sixteen cases to misinterpret the loose phrase "perilous situation" used in the last few cases and apply the humanitarian doctrine. In the opinions both the humanitarian doctrine and the proper doctrine are stated side by side, apparently without realizing the inconsistency.

In an opinion by Keith, P., the court in *Southern Ry. Co.* v. *Bailey,* 110 Va. 833 (1910) expressly rejected the humanitarian doctrine and adopted Rule # 2. This would seem to have ended the vacillation of the court; however, just eight months later in another opinion by President Keith the humanitarian doctrine was again embraced. See *Chesapeake and Ohio Ry. Co.* v. *Shipp's Adm'rx.,* 111 Va. 377 (1910). The judge cited in support of this conclusion his former decision which held contra. The succeeding five cases followed the humanitarian doctrine.

The next opportunity the court had to consider the doctrine was four years later in *Chesapeake and Ohio Ry. Co.* v. *Saunder's Adm'r.,* 116 Va. 826, 831 (1914). The court reverted to Rule # 2, saying: "In the light of the settled doctrine upon the subject in this jurisdiction, it is sufficient to say that the proposition announced by this instruction [*i.e.* the humanitarian doctrine] cannot be sustained." The next case also accurately stated Rule #2 as the proper one and distinguished between *seeing* the plaintiff and *realizing* his peril. See *Norfolk Southern R. R. Co.* v. *Croker* 117 Va. 327, 333 (1915). In spite of the accuracy and clarity of the opinion in the *Croker* case, the next eleven cases quote the ambigious language of the earlier cases. The next three cases, however, again revert to the proper rule. Then the court, in the next case, again returns to the humanitarian doctrine. The next seventeen cases state both of these inconsistent views and it

is impossible to determine from the statement of the facts whether the plaintiff was helpless or inattentive.

This survey brings us to 1930 and the well-considered case of *Barnes* v. *Ashworth*, 154 Va. 218 (1930). This case settled all doubt about the Virginia law and adopted the humanitarian doctrine. In the opinion Mr. Justice Epes gave a full analysis of both last clear chance doctrines, pointed out the factual situation to which each applies, and emphasized the distinction in the rules about "seeing" and "realizing". While he did not favor the humanitarian doctrine he thought the court had gone too far with it to turn back. Certainly, anyone reading this case would have thought that the humanitarian doctrine was thereby established as the settled law of Virginia for the future.

It would seem that the court was now committed, but not so! Subsequent cases began immediately to copy the ambigious language of the older cases and seldom relied on *Barnes* v. *Ashworth*. Why? The court was not satisfied with the results in some cases. The humanitarian doctrine allowed the plaintiff to recover when he and the defendant were equally guilty of inattention. Where the court thought the result was fair it would allow the humanitarian doctrine to have its full effect. In other cases, where the court could not tolerate the result, while giving lip service to the humanitarian doctrine the court employed one of three devices to avoid what it considered to be a bad result. None of the three devices are scientific, nor has the court consistently used them. The devices are:

1. *"If the plaintiff's negligence continues down to and efficiently contributes to the injury the last clear chance doctrine does not apply."* The fallacy of this device is obvious. In all cases the effect of the plaintiff's negligence must continue down to the injury and efficiently contribute thereto in order to bar the plaintiff's recovery. If it does not do this the plaintiff's negligence is not a proximate cause. If not a proximate cause the plaintiff may recover in spite of his negligence. Therefore, the problem here is one of contributory negligence and not one of last clear chance. The court has employed this

device in some cases and ridiculed it in others, *e.g.* the *Croker* case, *supra.* When the court will apply it and when it will not do so cannot be determined from the decided cases.

2. *"The last clear chance doctrine applies to the plaintiff as well as the defendant."* This statement is obviously absurd. There can only be one "the last clear chance." If each party has a clear chance to avoid the injury, of course both of them could not be *last* clear chances. An actual case will demonstrate the absurdity of this device. In *Stephen Putney Shoe Co.*, v. *Ormsby's Adm'r.*, 129 Va. 297, 304 (1921) the defendant in making a left turn at an intersection while driving his truck was negligently inattentive to crossing pedestrian traffic. The plaintiff, a pedestrian, was inattentively crossing at the intersection when he was hit and injured by the truck. The defendant was negligent in not keeping a proper look out and this negligence was a proximate cause of the collision. The plaintiff was also negligent in not being attentive to vehicular traffic and this negligence was also a proximate cause of the collision. This was a simple case for the application of the doctrine of contributory negligence under which plaintiff's recovery would be barred. The case should have ended there. The court, however, further stated that if the defendant had a last clear chance the plaintiff had one also.

3. *"If the defendant has the last clear chance to avoid the injury then his negligence becomes the proximate cause and the plaintiff's negligence the remote cause".* The use of the technique of proximate cause to explain the doctrine of last clear chance has added to the confusion. Proximate cause and last clear chance are separate and distinct concepts. The point in a case where last clear chance becomes applicable is reached only after it has first been determined that the acts of both of the parties, plaintiff and defendent, are proximate causes of the injury. This myth was sufficiently exploded in *W. B. Bassett and Co.* v. *Wood, Adm'r.* 146 Va. 654, 669 (1926) where the court said:

> The confusion that arises in the application of the principle of law that while one is negligent, another

> negligently employs an independent force, which availing itself of the occasion afforded by the former's negligence, works a harm not its natural and probable consequence, but an independent harm, the first negligence is not contributory to the second, is due to too rigid construction of the words *last clear chance,* where the negligence of the plaintiff is antecedent or the remote cause of the harm and the defendant's negligence the subsequent and independent cause of the injury. The doctrine of last clear chance, strictly speaking, applies only to those cases where the negligence of the parties contribute or concur to cause the injury, . . .

In this state of confusion it had become almost impossible for counsel or trial judges to predict with any degree of assurance what the court would hold in any given case. The court had given effect to the humanitarian doctrine in many cases and in many other cases on similar facts neutralized its effect by use of one or more of the devices enumerated above. Under these circumstances counsel feared to submit almost any case to the jury without a last clear chance instruction, with the consequence that the doctrine was needlessly invoked in almost all negligence cases. It became urgent that the court adopt a definite rule that could be uniformly applied. It had been unwilling to uniformly apply the humanitarian doctrine.

An excellent opportunity to announce Rule # 2 as the new doctrine in Virginia was presented in *Anderson* v. *Payne,* 189 Va. 712 (1949), but the court failed to do so by one vote. The facts were simple. The plaintiff was walking on the wrong side of the road with her back to the traffic when she was struck and injured by an automobile proceeding in the same direction. The automobile was being driven by the defendant, who did not see the plaintiff in time to avoid the injury. This was an easy case of negligence and contributory negligence and should have ended in the trial court in favor of the defendant. Instead the jury found for the plaintiff on the usual instruction embodying the humanitarian doctrine of last clear

chance which the Virginia Supreme Court of Appeals had repeatedly held to be the law. The trial court gave judgment on the verdict. The sole issue on appeal was whether the plaintiff should recover under the doctrine of last clear chance. The Virginia humanitarian doctrine caused the Court of Appeals to apply last clear chance. Then, realizing that the result would be that an inattentive defendant would be held liable to an equally inattentive plaintiff, the court was compelled to find some device to avoid that result. Indeed, it employed all three of the devices discussed above. Had last clear chance not been introduced it would not have been necessary to make the second error to bring about the proper result. Here two wrongs made a right. The court, when confronted by its previous decisions where the above devices were not used, said at p. 719: "When the doctrine applies is to be determined by the facts of the particular case." Such a statement is an admission that the court does not wish to be bound by any set rule. Again, at p. 720, the court said: "The evidence in fact shows that her negligence was more responsible for the accident than was his." Thus, the language of last clear chance is being used to camouflage the appdication of the doctrine of comparative negligence which, we are told, does not obtain in Virginia.

There was a separate opinion by Justice Miller, in which he was joined by Chief Justice Hudgins and Justice Spratley, which concurred in the result but was a strong dissent from the view of the majority on its statement of the last clear chance doctrine. The concurring opinion sufficiently demonstrates the fallacies of the court's traditional method of handling problems of last clear chance. This excellent concurring opinion foreshadowed the unanimous decision of the court in the *Greear* case which overruled former cases and adopted Rule # 2, above, as the law in Virginia. The court has been converted. This is a new creed for the Virginia court though it is an old creed elsewhere. A burden is placed on the bar not to encourage or permit the new converts to

backslide. There is already some slight evidence of backsliding.

There have been three Virginia cases, and one Federal case applying Virginia law, since the *Greear* decision. In chronological order they are:

Brown v. *Vinson, Adm'r.* 198 Va. 495 (1956). This case is in accord with the *Greear* case. The court approved an instruction precisely embodying the new rule. It is unfortunate that the *Greear* case was not cited. After deciding that the defendant did not have a clear chance to avoid the injury, the court went further and copied erroneous language from cases prior to the *Greear* case which had been overruled by it. The court, at p. 499, said: "Such doctrine applies only when the negligence of the defendant becomes a proximate cause and the negligence of the plaintiff a remote cause." This is a continuation of the court's old habit of attempting to explain the concept of last clear chance by use of proximate cause language. Of course, the doctrine of last clear chance has no application whatever unless the plaintiff's negligence is a proximate cause of the injury as previously explained. Further, at the same place, the court said "the negligence of the plaintiff's decedent continued down to the time of the collision . . ." This device to neutralize the humanitarian doctrine is no longer needed since the *Greear* case abolished the humanitarian doctrine. This part of the opinion indicates that the new doctrine of the *Greear* case is not yet thoroughly understood.

Davis, Adm'r. v. *Scarborough,* 199 Va. 100 (1957). The court approved the new doctrine of the *Greear* case and correctly applied it.

Nichelson, Comm. v. *Stroup,* 249 F. 2d 874 (1957). The court quoted Rule # 2 from the *Greear* case and correctly applied it.

Cook v. *Shoulder,* 200 Va. 281 (1958). The court quoted from, cited, and correctly applied the rule of the *Greear* case. Again, unfortunately, the court carelessly employed the lan-

guage of proximate cause to explain the doctrine of last clear chance.

After seventy-one years of vacillation and confusion Virginia has adopted a precise, sound, and practicable new last clear chance doctrine. It will be a challenge to the bar, as well as to the courts, to see to it that the new rule, uncontaminated by the older cases, remains the settled law of this state. The *Greear* case furnishes a new starting point. The erroneous language of the earlier cases should not be employed either in attorney's briefs or in court opinions.