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# THE LAST CLEAR CHANCE DOCTRINE IS APPLICABLE IN ADMIRALTY

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THE applicability of the doctrine of last clear chance[1] in the American law of torts committed on land is too well known to require elaboration by this writer. Its applicability in marine torts, however, presents a more clouded question. In fact, it is commonly asserted that the last clear chance rule "is not applicable in this country in admiralty,"[2] that it is "generally deemed inapplicable" to admiralty cases,[3] that it is "of sparse and uncertain application in collision law,"[4] that only "principles similar to the rule of last clear chance may be presented under that body of law,"[5] and that "the last clear chance doctrine has been rejected . . . by the United States courts."[6] Others concede that the doctrine of last clear chance has been applied in admiralty, but disparagingly state that this has been done "largely by persons . . . unfamiliar with the subject."[7]

In this paper an endeavor is made to relieve the American law of admiralty from the misconception that the last clear chance is not applicable in admiralty, and to demonstrate that "our courts have not been backward in applying the rule under whatever name it may be labeled,"[8] even though it is conceded that maritime courts are less ready than shore courts to find that a subsequent wrongful act by one party breaks the chain of causation connecting the accident with

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1 "That doctrine . . . amounts to no more than this, that a negligent defendant will be held liable to a negligent plaintiff if the defendant, aware of the plaintiff's peril or unaware of it only through carelessness, had in fact a later opportunity than the plaintiff to avert an accident." Kansas City Sou. Ry. v. Ellzey, 257 U. S. 236, 241, 48 S. Ct. 80, 81, 72 L. Ed. 259 (1927).

2 The Norman B. Ream, 252 Fed. 409, 414 (7th Cir. 1918); also The Sakito Maru, 41 F. Supp. 769 (D. C. S. D. Cal. 1941) aff'd in part and rev'd in part sub nom. Carr v. Hermosa Amusement Corporation Limited, 137 F. 2d 983 (9th Cir. 1943), cert. den. 321 U. S. 764, 64 S. Ct. 520, 88 L. Ed. 1060 (1943). ". . . The last clear chance rule is not generally considered applicable in this country in admiralty. . . ."

3 Rollman v. Morgan, 73 Ariz. 305, 240 P. 2d 1196 (1952).

4 Gilmore and Black, The Law of Admiralty 404 (1957), footnote 47.

5 Lacy v. Higgs, 314 Ky. 510, 236 S. W. 2d 272 (1951).

6 Loftin v. Nolin, 86 So. 2d 161 (1956).

7 Richmond v. The Connie C. Cenac & The La Cache, 157 F. Supp. 397, 400 (D. C. E. D. La. 1957).

8 See supra note 2, The Sakito Maru.

the prior negligence of the other party,[9] and that the doctrine when applied, is not always identified as such.

The literature on the subject is unanimous that in admiralty recovery is not wholly defeated by contributory negligence,[10] and that where fault lies on both sides and difficulty of precise measurement thereof persists, the division of damages is effected in equal halves.[11] The rule, it is said, owes its inception to the same rationale as that of the common law rejecting apportionment, to wit, juries lack devices for estimation of fault in percentiles; it has been adopted in collision causes "for the better distribution of justice between mutual wrongdoers."[12] Yet, analysis of the case law on the subject reveals that as early as the beginning of the eighties of the last century courts in the United States[13] applied the principles of the last clear chance doctrine in *The Steamboat Delaware,*[14] *The Britannia*[15] and again in *The Susquehanna.*[16] While in the first of these three cases, *The Steamboat Delaware,* the court refrained from setting forth definite rules, the court in *The Britannia* was more explicit stating that,

". . . the mere fact that a vessel is on the wrong side of the river does not make her liable, if there was ample time and space for the vessels to avoid each other by the use of ordinary care. *In such cases the cause of collision is deemed, not the simple presence of the vessel in one part of the river, rather than in another part, but the bad navigation of the vessel, that, having ample time and space, might easily have avoided collision, but did not do so.*" (Emphasis supplied.)[17]

[9] See note 4, supra.

[10] Efstratios Karanikolas v. Navegacion Maritime Pan, 157 F. Supp. 602, 605 (D. C. S. D. N. Y. 1958), and authorities there cited.

[11] ". . . the common law principle that makes even the slightest contributory negligence a bar to recovery, is not applicable in this country in admiralty, where contributory negligence effects only a division of liability." See supra note 2, The Norman B. Ream.

[12] The Alabama, 92 U. S. (2 Otto) 695, 697, 23 L. Ed. 763 (1876).

[13] In England the doctrine was applied in admiralty almost a quarter of a century earlier in Tuff v. Warman, 5 C. B. [N. S.] 573 (Ex. Ch. 1858). There a barge was run down by a steamer. It was shown that the barge was negligent in not having a lookout. The steamer, however, saw the barge, but failed to port helm, as she should have done. The steamer was held liable on the ground that she continued on a course which would inflict injury, although the plaintiff was also negligent in having no lookout.

[14] 6 Fed. 195 (D. C. S. D. N. Y. 1881).

[15] 34 Fed. 546 (D. C. S. D. N. Y. 1881), rev'd 42 F. 67 (C. C. S. D. N. Y. 1890), rev'd 153 U. S. 130, 14 S. Ct. 795, 38 L. Ed. 660 (1894). There a negligent vessel was absolved from liability because of "the bad navigation of the vessel, that, having ample time and space, might easily have avoided collision, but did not do so." (at 34 Fed. 557).

[16] 35 Fed. 320 (D. C. S. D. N. Y. 1888).

[17] 34 Fed. 557 (1881).

*The Susquehanna,* although failing to set forth the doctrine of last clear chance, was nevertheless fully decided on its four elements, to wit, (1) plaintiff tug's inability to escape from danger[18] resulting from its own negligence;[19] (2) defendant ferry-boat's awareness of the danger;[20] (3) defendant's opportunity to avert the injury;[21] and (4) defendant's failure to avert it.[22] A few years later, and without specifically referring to *The Susquehanna,* its principles were applied in *The Titan,*[23] *The Clara*[24] and in *The Portia.*[25] Although all the above cases were ostensibly based on the proximate[26] *versus* the remote[27] cause theory, as witness the following language from *The Portia*:

"*The fault* on the part of the tugs, though gross and inexcusable, *was not a proximate cause of the collision. An antecedent act of negligence is remote when,* notwithstanding, *the other vessel, by the exercise of due care, can avoid a collision;* and if, notwithstanding the fault of the tugs, the Portia could have avoided the collision . . . she alone must be condemned" (at p. 814). (Emphasis supplied),

their reasoning was clearly that of the last clear chance doctrine.

[18] See note 16 supra at 325. ". . . at the time when her pilot first had any reason to apprehend danger, he could do nothing to avert it."

[19] Id. at 324. "The tug was no doubt navigating nearer to the piers than she had any right to do. . . ."

[20] Id. at 325. "The real cause of the collision was the fact that the lookout of the ferry-boat, *though he saw the tug some time before the first signals, did not report her* . . . and because . . . *he did not at once take the necessary measures* to go astern, as his signal imported that he would do." (Emphasis supplied.)

[21] Id. at 324. "There was abundant time and space . . . for the ferry-boat, to go astern without embarrassment. . . ."

[22] See note 20, supra.

[23] 44 Fed. 510 (D. C. S. D. N. Y. 1890), aff'd 49 Fed. 479 (2d Cir. 1892). There, the tug Titan, whose course along the New York shore was contrary to statute, collided with the Francis. Held, that the Francis was alone liable, because "there was abundant time and space for the Francis to have kept away . . . after the position and course of the Titan was seen and understood . . ." (at p. 512).

[24] 55 Fed. 1021 (2d Cir. 1893).

[25] 64 Fed. 811 (2d Cir. 1894). "The fault on the part of the tugs, though gross and inexcusable, was not a proximate cause of the collision. An antecedent act of negligence is remote when, notwithstanding, the other vessel, by the exercise of due care, can avoid a collision; and if, notwithstanding the fault of the tugs, the Portia could have avoided the collision . . . she alone must be condemned." (at p. 814).

[26] Proximate cause is defined as "that cause which produces the injury or damage in continuous sequence and without which it would not have happened, and one from which any man of ordinary prudence could have foreseen that some harm, not necessarily the particular harm, would probably result." Gulf Atlantic Transp. Co. v. Becker County Sand & G. Co., 122 F. Supp. 13, 18 (D. C. E. D. N. C. 1954).

[27] "If two distinct causes are successive and unrelated in their operation, one of them must be the proximate and the other the remote cause. In such case the law regards the proximate as the efficient and consequent cause, and disregards the remote." St. Louis & S. F. Railroad Co. v. Justice, 80 Kan. 10, 101 P. 469, 473 (1909).

Although the turn of the century, the year 1903, saw the first express enunciation of the doctrine as a part of American admiralty jurisprudence in *The Steam Dredge No. 1*,[28] where it was said that its "principles . . . seem . . . to be entirely applicable to the admiralty side of the court and doctrine of the case,"[29] admiralty courts continued to apply the doctrine tacitly in, to cite but a few of the better known cases, *The Yucatan*,[30] *The Morristown*,[31] *The Socony No. 19*[32] and *The Syosset*.[33] The latter vessel, though negligent, was absolved from liability because the other one,

"The Sagamore was fully aware of her position in time to navigate with reference to her and her float so as to pass them safely. She saw the fault of the Syosset in ample time to shape her own conduct accordingly. . . . She could have kept out of danger . . . by navigating prudently . . ." (at p. 669).

It is to be noted in this connection, that although *The Syosset* does not expressly rely on the last clear chance doctrine, the case is now not only regarded as founded thereon, but also as a leading case for the "discovered peril" or "actual knowledge" theory of the doctrine.[34]

Although admiralty courts subsequently resorted time and again to the last clear chance reasoning[35] it was not until *The El Monte*[36] and *The Perseverance*[37] that express mention was again made of the doctrine as such. Judge L. Hand in *The Perseverance,* referred to it thus:

"We accept the common form of statement that the fault must be a 'cause,' and not a 'condition,' of the collision. By that as we said in

[28] 122 Fed. 679 (D. C. D. Me. 1903).

[29] Ibid., at p. 687. The doctrine was repudiated on appeal and the decision reversed; see 134 F. 161 (1904).

[30] 226 Fed. 437, 439 (9th Cir. 1915).

[31] 278 Fed. 714 (2d Cir. 1922); see also The Maine, 2 F. 2d 605 (D. C. Or. 1924); Newton Creek Towing Co. v. City of New York, 47 F. 2d 883 (2d Cir. 1931).

[32] 29 Fed. 20 (2d Cir. 1928).

[33] 71 F. 2d 666 (2d Cir. 1934).

[34] Manhattan Lighterage Corp. v. United States, 103 F. Supp. 274, 278 (D. C. S. D. N. Y. 1951).

[35] The Bellhaven, 72 F. 2d 206 (2d Cir. 1934); The S. S. Deutschland, 90 F. 2d 454 (2d Cir. 1937); Construction Aggregates Co. v. Long Island R. Co. (The Sandmaster), 105 F. 2d 1009 (2d Cir. 1939); Matton Oil Transfer Corporation v. The Greene, 129 F. 2d 618 (2d Cir. 1942); Southern Transp. Co. v. Dauntless Towing Line, 140 F. 2d 215 (2d Cir. 1944). This case, like The Syosset (see note 33, supra) is also considered representative of the "actual knowledge" theory.

[36] 252 Fed. 59 (5th Cir. 1918), cert. den. 248 U. S. 573, 39 S. Ct. 11, 63 L. Ed. 427 (1918).

[37] 63 F. 2d 788 (2d Cir. 1933), cert. den. sub nom. Cornell Steamboat Co. v. Lavender et al., 289 U. S. 744, 53 S. Ct. 692, 77 L. Ed. 1490 (Oct. Term 1932).

*The Socony No. 19,* 29 F. 2d 20, we mean that although the fault was a cause, in the sense that it was a part of those circumstances necessary to the occurrence, the tug was amply advised in advance of the ship's position, and could have avoided her by proper navigation. *The situation is similar to* that often comprised within *the* formula that a wrongdoer is solely liable if he has a *'last clear chance'* of avoiding the damage" (at p. 790). (Emphasis supplied.)

But it was left to Judge Augustus N. Hand to formally recognize the doctrine in *The Cornelius Vanderbilt*[38] and to establish it firmly in the following language:

*"The Heampstead was aware of the approach of the Watuppa and her barge in time to avoid the collision* and, if she was not, should have seen them but for her neglect to maintain a proper lookout. . . . The Watuppa, however, having a tow on a long hawser, difficult to manage in dangerous waters, could not readily swing her barge to the starboard of its position in the channel. Though each vessel neglected to blow passing signals, as required by the rules, and the Watuppa was on the wrong side of the channel, the outstanding fact is that *the Heampstead had the last clear chance to prevent a collision by the exercise of ordinary care at a time when the Watuppa* had the right of way and *was not in a position to swing her tow away* from the Heampstead's barges *in time to avert a disaster . . .*" (at p. 768). (Emphasis supplied.)

Thereafter, the doctrine of the last clear chance was firmly established in American admiralty.[39] In fact, even a state appellate court gave it recognition and applied it in the following terms:

"Where two boats are in a navigable river and one of the boats is in a position of danger and cannot well avoid a collision . . . the other boat is required to use all reasonable precautions to keep from colliding with it. . . . Under this situation it becomes proper to determine whether or not the master of The Calla [the vessel involved] had the opportunity of avoiding the collision under the last clear chance doctrine. . . ."[40]

It is remarkable in this connection, that notwithstanding its novelty and formal radical departure from the long established moiety rule,[41]

[38] 120 F. 2d 766 (2d Cir. 1941), also referred to as The Watuppa. There, the tug Watuppa was towing the barge Essex, and the tug Heampstead was towing The Cornelius Vanderbilt. The Watuppa was on the wrong side of a narrow channel. Nevertheless, it was held not liable.

[39] The Sanday, 122 F. 2d 325 (2d Cir. 1941), also referred to as The Michigan. There, the captain of the other vessel, The Michigan, failed to reduce speed in sufficient time to avoid a collision with a tug which was on the wrong side of the channel, but which was "sighted . . . in time to have avoided the collision."

[40] Ryan v. Dendinger, Inc., 2 So. 2d 263 (1941).

[41] See page 2, supra.

neither the pioneer cases of the formal doctrine[42] nor those which later applied it expressly, or considered its applicability on the merits of the cases,[43] furnished any reason for the departure, but applied it in an off-hand manner as if treading on familiar ground. This, of course, is not to say that all courts are now accepting the doctrine in admiralty without reservations, for some courts still feel apprehensive, and but for the prestige and authority of the late Judge Augustus N. Hand, the author of *The Cornelius Vanderbilt*,[44] the doctrine might still have had questionable status in admiralty. Thus, in *Kosnac* v. *The Norcuba*[45] the court said:

"We realize that the use of common law principles in admiralty are considered by many to be an anathema, but when such a respected member of our Court of Appeals as the late Judge A. N. Hand saw fit to recognize the rule in The Cornelius Vanderbilt, 2 Cir., 1941, 120 F. 2d 766, 768, and used it without apology, we feel that it is authority for us to say that the Norcuba . . . had the last clear chance. . . ."

The Court of Appeals, though reversing the lower court decision on other grounds, felt no need for apology either; on the contrary, it pronounced, in clear and unequivocal terms, that "the doctrine of last clear chance is recognized in admiralty."[46] Yet, some courts are still shying away from express reference to the doctrine but applying it, nevertheless, tacitly;[47] others are willing to apply it, but only where the

[42] See supra note 28, The Steam Dredge No. 1; see supra note 36, The El Monte; see supra note 37, The Perseverance; see supra note 38, The Cornelius Vanderbilt.

[43] Williamson v. The Carolina, 158 F. Supp. 417 (D. C. E. D. N. C. 1958); Arthur Smith Corp. v. Gulf State Marine & Mining Co., 258 F. 2d 449 (5th Cir. 1958); Crawford v. Indian Towing Co., 240 F. 2d 308 (5th Cir. 1957), cert. den. 353 U. S. 958, 77 S. Ct. 865, 1 L. Ed. 2d 909 (1957); there, the Cherokee, the vessel held to have had the last clear chance to avoid the accident, was at all times aware of the fact that another vessel was approaching head on in its path. There was ample room and deep water for the Cherokee to avoid the accident. Failure to do so was caused by the navigator's "blind insistence on a right of way." Under these circumstances the court held the Cherokee had the last clear chance; see also Kosnac v. The Norcuba, 142 F. Supp. 377 (D. C. S. D. N. Y. 1956), rev'd 243 F. 2d 890 (2d Cir. 1957); In re Adams' Petition, 125 F. Supp. 110, 113 (D. C. S. D. N. Y. 1954), aff'd 237 F. 2d 884 (2d Cir. 1956), cert. den. 352 U. S. 971, 77 S. Ct. 364, 1 L. Ed. 2d 325 (1957); Standard Oil Co. of Cal. v. Calmar Steamship Corp., 132 F. Supp. 940, 944 (D. C. W. D. Wash. 1954); P. Dougherty Co. v. United States, 207 F. 2d 626 (3rd Cir. 1953), cert. den. 347 U. S. 912, 74 S. Ct. 476, 98 L. Ed. 1068 (1953). See note 34, supra; see supra note 2, The Sakito Maru.

[44] See note 38, supra.

[45] See note 43, supra.

[46] 243 F. 2d 891 (2d Cir. 1957).

[47] The Cedar Cliff, 149 F. 2d 964, 966 (2d Cir. 1945); The Mary H., 67 F. Supp. 335, 338 (D. C. E. D. N. Y. 1946).

major-minor rule[48] could apply with equal results,[49]—a fact which, incidentally, justifies to some extent the recently expressed fears of confusion between the two doctrines,[50]—while still others are not certain as to whether they achieved their desired results by way of "the doctrine of last clear chance or the rule of causation"[51] and, finally, some are as yet not clear in what form the doctrine is to be applied to admiralty causes,[52] *i.e.*, whether in applying the doctrine, admiralty courts adopt the "actual knowledge" or the "imputed knowledge" theory, because some admiralty courts seem to require that the defendant must actually have been aware of the danger (actual knowledge) and, thus, have had a "conscious last clear chance" to avoid the ensuing collision, whereas, other courts hold it sufficient that the defendant, although not actually aware of the danger, should in the exercise of reasonable care have discovered it (imputed knowledge). Like in shore torts,[53] it is not clear in which form the doctrine is applied to marine tort causes. *The Cedar Cliff*[54] and *The Cornelius Vanderbilt*[55] tend to indicate that it suffices that the defendant should have known of the danger, although he was not actually aware of it, whereas *Southern Transp. Co.* v. *Dauntless Towing Lines*,[56] *The Sanday*,[57] *The Syosset*,[58] *The Perseverance*[59] and *Manhattan Lighterage Corp.* v. *United States*[60] require the defendant to have had actual knowledge of the danger. In *Williamson* v. *The Carolina*,[61] the most recent case on the subject, the court ruled out the imputed knowledge theory.

In conclusion, it is now well settled that the last clear chance doctrine, whether considered as a limitation upon or an exception to the admiralty rule of division of damages, is applicable in admiralty.

[48] This rule provides that in a collision between two vessels, both being in fault contributing to the collision, the fault of the one which bears little proportion to the flagrant fault of the other, and contributed little to the disaster, is not entitled to consideration. See, The Lord O'Neill, 66 F. 77 (4th Cir. 1895).

[49] See supra note 43, Williamson v. The Carolina.

[50] Witsaman, Last Clear Chance in Admiralty, 10 Western Res. L. Rev. 286 (1959).

[51] See supra note 43, Crawford v. Indian Towing Co.

[52] See note 34, supra.

[53] Prosser on Torts, 411-412 (1941).

[54] See note 47, supra.

[55] See note 38, supra.

[56] See note 35, supra.

[57] See note 39, supra.

[58] See note 33, supra.

[59] See note 37, supra.

[60] See note 34, supra.

[61] See note 43, supra.

It is, indeed, strange that any doubt should have prevailed in this regard for so long, for there appears to be no valid reason why principles of law should vary according to whether recovery is sought for damage caused on land or at sea. The theory[62] behind the last clear chance doctrine itself affords no basis for such differentiation because the reasons[63] which led the courts in shore torts to impose the burden of liability upon the subsequent wrongdoer seemingly apply with equal force to marine torts.

As regards the expressed doubts[64] in the practicability of the doctrine's co-existence with the fundamental admiralty rule of *The Pennsylvania,*[65] the rule of division of damages[66] and the rule of major and minor fault,[67] no real fears need be harbored on that score. Thus, the rule of *The Pennsylvania,* if properly understood, proves to be no more than a rule of evidence.[68] All it does is to shift the burden of proof with regard to the casual relation of default to injury. It is not a rule of absolute liability, whereas the last clear chance doctrine is a rule of substantive law in which the burden of proof is an element of plaintiff's cause of action. Consequently, there cannot possibly be a conflict between the two rules.

Focusing one's attention to the major and minor fault rule, it becomes apparent that it prevents contributory negligence from barring recovery where such negligence is but a minor or negligible factor of proximate cause. While this rule indulges in fault comparisons, the last clear chance doctrine makes no *pro rata* apportionment of fault.

[62] This theory is, that the ordinary prudent man *should* and generally would exercise a higher quantum of care toward those unable to help themselves. See supra note 43, Williamson v. The Carolina, at p. 422.

[63] These reasons are said to have originated in the dissatisfaction with the common law rule of contributory negligence (see note 53, supra at 416) which was considered too harsh. In addition, it was felt that the defendant's fault was of greater magnitude where his negligence and its remitting damage occurred subsequent to the discovery and awareness of plaintiff's negligently caused but helpless position. The doctrine, originally applied only to those cases in which the defendant was negligent subsequent to his actual discovery and awareness of plaintiff's negligently caused helpless condition, was later extended to those cases in which the defendant's negligence presented his discovery and awareness of the plaintiff's plight. See supra note 43, Williamson v. The Carolina, at p. 422.

[64] See note 50, supra.

[65] 86 U. S. (19 Wall.) 125, 22 L. Ed. 148 (1874). That case declares it to be incumbent upon a vessel show to have been guilty of violating a statutory rule of navigation to prove that the violation could not have contributed to the ensuing collision.

[66] See note 11, supra; see note 12, supra.

[67] The Umbria, 166 U. S. 404, 409, 17 S. Ct. 610, 41 L. Ed. 1053 (1897).

[68] The Aakre, 122 F. 2d 469 (2d Cir. 1941), cert. den. 314 U. S. 690, 62 S. Ct. 360, 86 L. Ed. 522 (1941).

In other words, the major-minor fault rule is based on a theory of comparative negligence which allows recovery to a negligent plaintiff when the defendant's negligence is "gross" and his own but "slight." The last clear chance doctrine, on the other hand, *a limine* considers the subsequent wrongdoer's negligence as so gross as to require him to bear the entire loss. Hence, no possible conflict can be discovered here.

An equally different matter is presented in the comparison of the last clear chance doctrine with the rule of divided damages. The latter avoids the unjust common law result of placing on one party a loss occasioned by the non-apportionable degree of concurrent negligence of both, with the equally unjust result that the loss is not borne *pro rata* according to fault. There the injury is occasioned by the negligence of both parties and neither party's negligence has been so gross as to justify his bearing the entire loss. In the doctrine of last clear chance, however, the injury, though equally occasioned through the negligence of both parties, the negligence of the defendant occurs subsequent in time, and the last opportunity to avoid the damage lies with him. Hence, no fear of confusion between the two rules need be had.

It follows, that careful analysis of the pertinent facts in each case must result in the proper application of the pertinent doctrine without confusion with any of the other fundamental admiralty doctrines relating to collision.