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THE STATUS OF THE "LAST CLEAR CHANCE DOCTRINE" IN THE STATE OF SOUTH CAROLINA

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It would be a work of superogation to review in any detail the "Last Clear Chance Doctrine." A most exhaustive and analytical comment thereon, with reference to supporting authorities, is found in the one hundred page annotation in 92 A. L. R commencing at page 47. See also 38 Am. Jur. Sec. 215, page 900, *et seq.*

While the doctrine is considered by some of the courts as a separate doctrine, the writer of this article is of the opinion that it more properly is to be considered a phase of the doctrine of proximate cause, and, in that aspect, it may be more logically explained and understood.

Negligence, to be contributory in the sense of the rule of contributory negligence, must be *a* proximate cause of the injury or damage. It is frequently said that the Doctrine of Last Clear Chance presuppcses negligence on the part of the person injured or killed, which, apart from the doctrine itself, would constitute contributory negligence. The doctrine, viewed as a phase of the principle of proximate cause, does not allow recovery in spite of contributory negligence, but considers the original negligence of the injured person in getting into a perilous position, as merely a remote cause, or a condition of the accident, thus isolating such negligence and rendering it not a proximate cause in the legal sense.

As is commented upon in all of the treatises, the doctrine is generally regarded as having had its original in the old English case of *Davies v. Morn,*[1] but the text writers seem to be correct in claiming that there is nothing in that case to indicate that the judges who decided it felt that they were putting into effect a new doctrine, not heretofore known to the law. The comment on this case, pages 49-50 of the An-

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1. Davis v. Morn, 10 Miss. S. W. 548, 152 English Reprints 588, 17 Eng. Rul. Cas. 190.

notation in 92 A. L. R., leaves no room for doubt that the underlying principle of the decision is that the defendant's negligence was the proximate cause, and the plaintiff's negligence only a remote cause, of the damage resulting.

It is worthy of comment that while, in 38 Am. Jur. Sec. 215, it is said that the doctrine has received the approval and support of the courts of nearly all American jurisdictions, no South Carolina case is cited. It is further stated that there are courts which reject the doctrine. Among the decisions cited is our case of *Spillers v. Griffin.*[1]

Consideration of the *Spillers* case indicates that the statement might unqualifiedly have been made that the doctrine does not apply in South Carolina, for Mr. Justice Fraser, speaking for the court in that case, said, without qualification, that the charge of the presiding judge to the effect "that even though the plaintiff was negligent, yet if the defendant's servant saw the plaintiff in time to avoid the collision, the plaintiff might well recover" was the Last Clear Chance Doctrine, and that it "is not the law in this state" for which error there was a reversal.

The author of the annotation in 92 A. L. R. at page 54 undertakes to analyze what was held in *Spillers v. Griffin,* and summarizes as follows:

> "In this case, however, the plaintiff was guilty of active negligence, amounting to recklessness, which in any event would have prevented the application of the doctrine of last clear chance; and, indeed, the court in the case observed that if a plaintiff wilfully contributes as the proximate cause to his own injury, he cannot recover even though the defendant was wilful."

The principal South Carolina reference to *Spillers v. Griffin,* so far as the writer finds, is in *Blackwell v. Bank,*[3] where the court cites it with approval, and says it is definitely settled that the Last Clear Chance Doctrine does not apply in this state. It should be noted that in neither of these cases is there any discussion on the point, nor any elaboration of any kind.

Considerable interest was created recently when our Supreme Court, with Mr. Justice Fishburne as the author of

2. Spillers v. Griffin, 109 S. C. 78, 95 S. E. 133, L. R. A. 1918-D, 1193.
3. Blackwell v. Bank, 185 S. C. 427, 194 S. E. 399.

the opinion, in *Scott, Admx., v. Greenville Pharmacy, Inc.*, filed June 10, 1948, in the course of the opinion quoted with approval the Last Clear Chance Doctrine, as set forth in *2 Restatement of the Law of Torts*, pp. 1257, 1258, Sec. 480, and said, "This is a sound law", the approved quotation being as follows:

> "A plaintiff who, by the exercise of reasonable vigilance could have observed the danger created by the defendant's negligence in time to have avoided harm therefrom may recover if, but only if, the defendant (a) knew of the plaintiff's situation, and (b) realized or had reason to realize that the plaintiff was inattentive and therefore unlikely to discover his peril in time to avoid the harm, and (c) thereafter is negligent in failing to utilize with reasonable care and competence his then existing ability to avoid harming the plaintiff."

The case of *Seay v. Southern Ry.—Carolina Division*,[4] is cited as authority for the proposition that the Last Clear Chance Doctrine is sound law in this state, and there will be many who will agree that the *Seay* case substantially approves the principles underlying the application of the Last Clear Chance Doctrine. The real basis of that decision, however, is found in the approved quotation from 7 Enc. Law (2d Ed.) pp. 383-385, quoted on page 174 of the decision, as follows:

> " * * * when the negligence of the person inflicting the injury is subsequent to and independent of the carelessness of the person injured, *and ordinary care on the part of the person inflicting the injury would have discovered the carelessness of the person injured in time to avoid its effect and prevent injuring him*, there is no contributory negligence, because the fault of the injured party becomes remote in the chain of causation. In such a case the want of ordinary care on the part of the injured person is held not a judicial cause (i.e. a proximate cause) of his injury, but only a condition of its occurrence. * * * "

Other South Carolina cases, antedating the *Spillers* case

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4. Seay v. Southern Ry-Carolina Division, 205 S. C. 162, 31 S. E. (2d) 133.

where the doctrine was followed, although not so designated or referred to, should be considered. [5, 6, 7, 8]

The *Scott* case, *supra*, is unique. The application of the Last Clear Chance Doctrine therein is the reverse of its general application in that plaintiff's intestate was regarded as having had the last clear chance of avoiding the defendant's negligence rather than the contrary where it is more frequently applied. Defendant, Greenville Pharmacy, Inc., allegedly unlawfully sold plaintiff's intestate barbiturate capsules without a doctor's prescription; he became, as a result of taking the barbiturates so sold, habituated to the use of the drug, in consequence of which he deteriorated mentally and physically, and, while under the influence of the drug, committed suicide by hanging. The deceased began to buy the drug from the defendant in the latter part of 1945, and committed suicide November 2, 1946. The court calls attention to the fact that the complaint does not allege that the deceased was incapable of consenting to any one or more of the sales of the barbiturate, or that the defendant had or should have had knowledge that he was incapable of consent or lacked volition or was drugged when making the purchases. The conclusion is held inescapable that the deceased was guilty of contributory negligence because he continued to make periodic purchases knowing the nature of the drug and its effect upon him long before he became an addict; that as such contributory negligence appears on the face of the complaint, the defense by demurrer is then as perfect as the defense would be later on the facts, showing in evidence the contributory negligence.

The most recent pronouncement of the Supreme Court on this subject is found in the case of *Bishop, Admx., v. A. C. L., et al.*, filed July 8, 1948, where the Supreme Court affirmed a directed verdict in favor of the defendant because the only reasonable inference from the testimony was that the plaintiff automobile driver, in a crossing accident with a train, was guilty of gross contributory negligence as a proximate cause thereof, and, in response to the contention that the negli-

5. Bodie v. Charleston, etc. & W. C. R. Co., 61 S. C. 468, 39 S. E. 715.
6. Fletcher v. South Carolina & G. E. R. Co., 57 S. C. 205, 35 S. E. 513.
7. Disher v. South Carolina and G. R. Co., 55 S. C. 187, 33 S. E. 172.
8. Sauls v. D. W. Alderman & Sons Co., 55 S. C. 395, 33 S. E. 467.

gence of the deceased was remote in the chain of causation, said:

> " * * * It is true that the negligence of the deceased would not bar recovery if those in charge of the train discovered him in a position of obvious peril in time to have prevented the accident by the exercise of reasonable care to avoid injury to him. This humanitarian doctrine was applied in *Seay v. Southern Railway Co.*, 205 S. C. 162, 31 S. E. (2d) 133, where there was evidence showing that as plaintiff's intestate was driving a truck downgrade to a crossing, the brakes suddenly failed to work 100 yards from the crossing, whereupon the driver made a frantic effort to stop but was unable to do so, and those in charge of a backing train in the exercise of ordinary care could have discovered his perilous position in time to have avoided the accident. It has also been applied to cases where a person, due to his own negligence, is on the track in a helpless condition at a place where the railroad company is required to keep a reasonable lookout (*Leppard v. Southern Railway Co., et al.*, 174 S. C. 237, 177 S. E. 129), and where the presence of a child of tender years on the track is due to the negligence or gross negligence of his mother or custodian (*Nettles v. Southern Railway Co.*, 211 S. C. 187, 44 S. E. (2d) 321.

While *Spillers v. Griffin, supra,* is not referred to or overruled in any of the recent decisions mentioned, it seems that the charge of the Trial Judge, which in that case was held to be in error, might well be warranted by the principles laid down in the more recent cases, especially the *Leppard* and *Seay* cases. The writer understands the Last Clear Chance Doctrine, in its broadest form, to mean that plaintiff may be guilty of contributory negligence which is in law a proximate cause of the injury, but if the defendant, confronted with such contributory negligence, has the opportunity, by the observance of ordinary care, of recognizing the plaintiff's danger and an opportunity to avoid doing him injury and fails to use it, the defendant is nevertheless liable. It seems to the writer that the same result is arrived at when the principle is approved, as appears from the *Seay* case, *supra,* and when the negligence of the person inflicting injury is subsequent to and independent of the carelessness of the person

injured, and ordinary care on the part of the person inflicting the injury would have discovered the carelessness of the person injured in time to have avoided its effect and prevent injuring him, the negligence of the injured person becomes remote in the chain of causation and not a judicial cause (i. e., a proximate cause) of his injury.

It would, therefore, seem, for practical purposes, that the Last Clear Chance Doctrine, or at least its equivalent, obtains in this state, and that the statements to the contrary in the *Spillers* and *Blackwell* cases may not safely be relied upon.