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Last Clear Chance after Thirty Years Under the Apportionment Statutes

M. M. MACINTYRE*
Vancouver

Fifteen years ago I traced the growth of the last-clear-chance doctrine from its origin in *Davies* v. *Mann*[1] to its culmination in the *Loach* case;[2] offered an explanation of what the courts were, in a very crude way, accomplishing by means of the doctrine, and expressed the hope that, because the contributory negligence apportionment statutes provided a much more complete and refined method of accomplishing the purposes which inspired last chance, the doctrine would gradually cease to confuse and mislead the courts in contributory negligence cases.

So far this much only can be said: the courts sometimes manage to divide the damages notwithstanding the last-chance doctrine, which sometimes prevents them from doing so. There has been very little evidence of any understanding in the courts of the nature of the problems involved, and such light as has illumined the provincial courts has been extinguished in the Supreme Court of Canada and more recently in the Judicial Committee. In these courts the

*Malcolm M. MacIntyre, B.A. (Mt. A.), LL.B., LL.M., S.J.D. (Harv.); of the New Brunswick Bar; Professor of Law, University of British Columbia.

[1] (1842), 10 M. & W. 546; 152 E.R. 588 (Exch.).

[2] [1916] A.C. 719; 23 D.L.R. 4; 8 W.W.R. 1263. The article is The Rationale of Last Clear Chance (1940), 53 Harv. L. Rev. 1225; 18 Can. Bar Rev. 665.

judges sit farther removed from the realities of the actual accidents, and are subject to the tremendous pressure of the ancient formulas pressed upon them in an almost endless series of quotations taken from the cases which were decided before the apportionment statutes were enacted. The power of the quoted word being almost irresistible, this result was almost inevitable.

The whole last-chance doctrine was an escape from the harshness of the contributory negligence bar by means of comparative negligence disguised in the abracadabra phrase "proximate cause". In order to appreciate the considerations involved, let us take as an illustration the simplest, clearest case of last clear chance in which we may imagine that the facts in *Davies* v. *Mann* were that the driver was sitting on the cart, saw the donkey helplessly hobbled, and nevertheless callously or stupidly ran it down. Everyone would feel that the cart driver was more negligent than the plaintiff who put his hobbled donkey out to graze, and it is only because everyone would feel that way that everyone feels that it is proper to allow the plaintiff to recover notwithstanding the fact that he was negligent. This is the real reason before the statutes for all the decisions; but courts have sought to justify what they did by saying that the defendant's wrongful conduct is the *causa causans* or the proximate cause of the harm and that the plaintiff's misconduct created only a condition or was a mere *causa sine qua non*. These misused Latin tags and fictitious categories give an air of intellectual inevitability to a purely emotional conclusion. This confusion of *fault* and *cause* was relatively harmless in the evolution of the last-chance doctrine. It is however shocking that it should be carried over into a "reason" for failing to make a sensible application of the apportionment statutes. The most misguided of all the arguments for the preservation of last chance after apportionment is the one which says that the doctrine is part of the admiralty law and also part of the law of Quebec. In my earlier article I demonstrated that last chance is part of these systems of law only because and only to the extent that the common-law appeal courts had applied *Davies* v. *Mann* in an unconscious and misguided attempt to fasten that doctrine on these older systems of law, which, never having swallowed the poison of the contributory negligence bar, had no need for its antidote.

The last-chance doctrine embraced much more than the very clear facts postulated for *Davies* v. *Mann*, and under it, as it was finally developed in the *Loach* case, the defendant was also liable for the full damage if by some prior negligence he had incapacitated

himself from having the last chance to avoid the consequences of the plaintiff's negligence. In this case too, in terms of the formula, the courts said that they were ascertaining whose negligence was the *causa causans* or the proximate cause of the harm, although what they were really doing was determining (within the limitations of the subsequent and severable and ultimate negligence formulas) whose was the greater fault, because when you come right down to it the comparative fault of the actors is the only consideration which was relevant in determining whether the defendant ought to pay the whole loss notwithstanding the plaintiff's contributory negligence. Until the decision in the *Loach* case, the doctrine took the relatively narrow line of determining greater fault in terms of last chance or subsequent and severable negligence and was therefore a relatively crude determination of greater fault, because the considerations applicable to degrees of negligence are much wider and more variable than mere sequence in time. Although when sequence in time happened to involve discovered peril, and perhaps also discoverable peril when one is in charge of a dangerous vehicle, it did furnish a *rough* test of greater fault. The *Loach* case added a refinement characteristically applicable to high-speed vehicles stopped by mechanical brakes rather than by yelling "Whoa"!

Within four years after the *Loach* case, the Supreme Court of Canada had before it *Grand Trunk Pacific Railway* v. *Earl*.[3] The Alberta Court of Appeal had applied the *Loach* case formula to the absence of a warning watchman during shunting operations which had run down a negligent cyclist. The Supreme Court reversed the Alberta court on the ground that it was pure conjecture to infer that a watchman present could have (just before the collision) attracted the plaintiff's attention and thereby saved him. But the court expressed dissatisfaction with the existing law. Mr. Justice Anglin at page 406 said:

> . . . the present case illustrates the harshness of the rule by which, where there is common fault contributing to cause injury to a plaintiff, he is deprived of all redress and the defendant entirely relieved, although the culpability of the former may be relatively slight and that of the latter distinctly gross. The doctrine of the Civil Law that in such circumstances the damages should be divided in proportion to the degree of culpability commends itself in my judgment as much more equitable.

Mr. Justice Mignault said at page 408:

> If I may say so, the doctrine of the Civil Law, in force in the pro-

[3] [1923] S.C.R. 397.

vince of Quebec and also adopted in Admiralty matters, is much more equitable for where there is common fault the liability of each party is measured by his degree of culpability.

Mr. Justice Duff, at page 398, said:

> This is one of these cases that sometimes cause one to turn a rather wistful eye to jurisdictions in which where injury results from the combined negligence or misconduct of the plaintiff and the defendant, the burden of the loss can be equitably distributed. But where the English doctrine of contributory negligence reigns, a tribunal assessing damages in such circumstances must find the defendant responsible for the whole loss.

This was thirty-two years ago, and even at that time many members of the legal profession were weary of the choice between all or nothing at all, in contributory negligence cases, and weary of the metaphysical nonsense which was resorted to in an effort to determine whose act had been the proximate cause of harm. The Ontario legislature at the next session enacted the first contributory negligence apportionment statute.[4] This was followed promptly by New Brunswick[5] and British Columbia.[6] Other common-law provinces followed in due course. Quebec, never having had the contributory negligence bar, had no need for any such legislation. Unfortunately the thing was done quickly, nobody had made any clear analysis of the whole problem; and nobody wondered whether or not the last-chance doctrine should be abolished. The courts have spent the intervening years making an unbelievably confused and contradictory mess out of the words of the statute.

The first case to come up was *Walker* v. *Forbes*.[7] A street car stopped to discharge passengers; the defendant truck-driver stopped behind the street car. There was a conflict of evidence as to whether the plaintiff, a disembarking passenger, turned into the path of the truck as it started up, after waiting facing as if he intended to cross to the other side of the street, or whether he walked straight to the near sidewalk, but the truck and the plaintiff came together in the lane between the street-car stop and the sidewalk, and the plaintiff was hurt. The trial judge left to the jury the old conventional questions:

Question 1. Could the plaintiff, by the exercise of ordinary care, have avoided the casualty?

A. Yes.

Questions 2 and 3 (shortened). If so, how?

A. By keeping a better lookout.

[4] Stats. Ont. 1924, c. 32.
[5] Stats. N.B. 1925, c. 41.
[6] Stats. B.C. 1925, c. 8.
[7] [1925] 2 D.L.R. 725 (Ont., trial).

Question 4. Notwithstanding the negligence of the plaintiff, could the defendant, by the exercise of reasonable care, have avoided the casualty?

A. Yes.

Question 5 (shortened). If so, how?

A. He should have kept a proper watch, and he did not.

Question 6 (shortened). Damages and relative degrees of fault?

A. $1,000—50.50.

Mr. Justice Riddell directed judgment for $500. On the surface everything is clear. The jury found both parties at fault, and happened to find both parties equally at fault, and the judge *did* nothing foolish.[8] He was however worried by what he had asked and received from the jury. The jury's answer to question 4 meant, in the hallowed language of over half a century of imitative repetition, one thing and one thing only, and that was that the defendant's negligence was the proximate cause of the plaintiff's harm, or that the defendant had had, or ought to have had, the last chance to avoid the accident, and was therefore at common law liable for the whole loss.[9] Mr. Justice Riddell wanted to divide the damages but did not want to be guilty of heresy. He therefore performed the miracle of having one's cake and eating it too, by paying lip service to the eternal verities and ignoring them. All that he had to do and did to accomplish this dual purpose was to say that, though the jury had formally indicated ultimate negligence in the answers to questions 4 and 5, these answers did not mean quite that in substance. Although the actual decision in the case was correct, Mr. Justice Riddell expressed certain assumptions which have encouraged the retention of last chance.

His words in *Walker* v. *Forbes*, at page 727, were:

> It is to be remembered that, a plea of contributory negligence being established, the defendant will not necessarily escape, because ultimate

[8] But compare *James* v. *McLennan, McFeeley & Prior*, [1941] 2 D.L.R. 555, where similar answers to similar questions by a jury were ruled unintelligible because contradictory and irreconcilable. And see *Gives* v. *C.N.R.*, *infra* footnote 46, in which similar answers provoked an entirely different reaction from the court.

[9] The classic formula appears in *Radley* v. *London & North West Railway* (1876), L.R. 1 Ap. Cas. 754, at p. 759. The first proposition is a general one to this effect, that the plaintiff in an action for negligence cannot succeed if it is found by the jury that he has himself been guilty of any negligence or want of ordinary care which contributed to cause the accident. But there is another proposition equally well established, and it is a qualification upon the first, namely, that though the plaintiff may have been guilty of negligence, and although that negligence may, in fact, have contributed to the accident, yet if the defendant could in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him.

> negligence may be found upon his part; consequently it was not every case in which contributory negligence was found which required action from the Legislature, but only cases in which contributory negligence being found, was an answer to the action—that is the meaning in law of the words 'If a plea of contributory negligence shall be found to have been established'. I therefore hold that the statute does not apply where there is ultimate negligence in such a way that before the statute the plaintiff would succeed.

In *Farber* v. *T. T. C.* at page 732[10] Mr. Justice Riddell expressed his assumption in these words:

> Consequently, the plaintiff would have been entitled to recover the full amount of damages awarded before the statute; and as I held that the statute applies only to cases in which the plaintiff would have failed, my conclusion is that the statute does not apply to the present case.

In *Mondor* v. *Lachine*[11] he again expressed the same assumption at page 747:

> . . . or to put it in still other words, I think the statute was intended in ease of the plaintiff who was found guilty of contributory negligence, and not of the defendant.

And the law was destined to grow out of these casual assumptions based on incomplete analysis. The assumption that the legislature was possessed by a single-minded devotion to plaintiffs who were at common law barred, and had no concern for defendants, offered as a reason for discovering the legislative desire that the last-chance doctrine should be retained because in the last-chance cases the plaintiff's negligence can in no true sense be called contributory, really proves too much. Consider the case in which the plaintiff is (as he can be) guilty of last-chance negligence. Nobody before the statutes ever took the trouble to label this kind of negligence as not contributory and before the statutes such a plaintiff was barred by his contributory negligence. On these facts, in Mr. Justice Riddell's legislature's words, "a plea of contributory negligence shall be found to have been established" and the act in terms applies. Thus, applying Mr. Justice Riddell's analysis, the statutes would compel division in case of plaintiff's last chance—but not in the case of defendant's last chance. This result is inescapable on the reasoning, but nobody has ever carried love for barred plaintiffs quite this far yet. In assessing these assumptions and the retention of last chance after the statutes, Mr. Justice Duff's feeling, expressed in the passage quoted from the *Earl* case, that it is unjust to hold the defendant liable for the *whole* loss should not be entirely overlooked.

[10] *Farber* v. *Toronto Transportation Commission*, [1925] 2 D.L.R. 729 (Ont., trial).

[11] [1925] 2 D.L.R. 747 (Ont., trial).

The next case is *McLaughlin* v. *Long*,[12] decided in 1927, which is important because (a) it happened to reach the Supreme Court of Canada, and (b) because the court probably thought that it had the question of whether the last-chance doctrine survived the statutes before it. The infant plaintiff rode on the running board of the defendant's bread delivery truck. This, the jury found, was negligent on the part of the plaintiff, and the jury likewise found the defendant negligent in permitting him to ride there. The defendant, however (from causes unknown but perhaps involving trying to light a cigarette while driving), lost control of his car on a straight stretch of highway. This also attracted a jury finding of negligence. The truck left the road and took to the woods, and the plaintiff's shoulder was injured by being jammed between the truck and a cedar tree. The Supreme Court of Canada reversed the New Brunswick Court of Appeal, which had apportioned the damages, allowing 75% recovery in accordance with the jury finding, on the ground that "the maxim *in lege causa proxima non remota spectatur* was not sufficiently adverted to". This judgment, delivered by the same court which had assisted in inspiring the legislatures to enact the statutes, has, ironically enough, deprived them of much of their usefulness. The judgment is composed largely of a series of quotations taken from a number of cases which were decided before the statute. No effort is made to consider whether it is necessary or wise to retain the last-chance doctrine after the enactment of the apportionment statutes. There are *inter alia* quotations from *Spaight* v. *Tedcastle*,[13] in which the common-law judges in the House of Lords erroneously assumed that *Davies* v. *Mann* was part of the ancient admiralty law.[14]

One of the really interesting aspects of *McLaughlin* v. *Long* is that neither in the New Brunswick Court of Appeal nor in the Supreme Court of Canada did it ever get a proper factual analysis. When the Long truck left the highway, to be stopped by the woods into which it ran, the other juvenile passenger was by the impact thrown through the roof and landed in the woods some feet away, but was (by chance) not seriously hurt. The car was "badly injured". Nobody seemed to notice that the risk that made the plaintiff's conduct negligent was that he would fall off the running

[12] *McLaughlin* v. *Long*, [1926] 3 D.L.R. 918 (N.B.C.A.); [1927] S.C.R. 303.

[13] *Spaight* v. *Tedcastle* (1881), 6 App. Cas. 217.

[14] For a condensed history of this matter, see MacIntyre, The Rationale of Last Clear Chance (1940), 53 Harv. L. Rev. 1225, at pp. 1239-1241, 18 Can. Bar Rev. 665, at pp. 677-679.

board, not that the car would leave the road, or that, if it did leave the road, the plaintiff would be in greater danger on the running board than he would have been inside the cab. Apart from the fact that nobody, in determining whether the plaintiff was negligent, would take into account the risk that the truck would abandon the road for the woods, most people would regard the running board (with the choice of hanging on or jumping clear) as a safer place to be in such an event than the cab of a 1926 truck. The court could very easily have disposed of this case by saying that the plaintiff's negligence was irrelevant because the harm he suffered was not within the risk which made his conduct negligent. Of course if anybody had thought of this the only language in which it could have been phrased in 1927 was that the harm was too remote from or was not the proximate consequence of the plaintiff's negligent conduct. So long as we have two such very different thoughts expressed by the same phrase "proximate cause" as that the harm was not within the risk and that somebody was more negligent than somebody else, and have the phrase used as the universal solvent without any meaning attached to it, except that it sounds esoteric and learned, we may expect ambiguous decisions, although the court apparently thought in this case that it was deciding that the last-chance doctrine survived the apportionment statute.

From here on this paper will trace some of the decisions which show the pattern of the application of the apportionment statutes and the application and non-application of the last-chance doctrine. The cases selected will be arranged more or less in chronological order, but will be in that order in several provinces separately, although they are selected to illustrate a judicial process and not the law of any particular jurisdiction. The study will begin with British Columbia and will move on to Alberta, New Brunswick, Nova Scotia, Ontario and the Supreme Court of Canada.[15]

Morgan v. *B.C. Electric*[16] is an early case in which damages

[15] The notes I made while looking for illustrative cases contain nothing of significance for the other provinces. Saskatchewan fits the regular pattern by sometimes applying last chance, see *Kowolski* v. *Sharp*, (1953) 10 W.W.R. (N.S.) 604, and sometimes failing to apply last chance: see *Strelioff* v. *Cherna*, [1950] 1 D.L.R. 702, [1950] 1 W.W.R. 643. I have nothing for Manitoba except an essay by Mr. Justice Coyne in *Starr* v. *Winnipeg Electric*, [1949] 4 D.L.R. 692, which incorporates Lord Justice Evershed's unfortunate gloss in *Davies* v. *Swan Motors*, [1949] 2 K.B. 291, in the report of Lord Wright's Law Revision Committee. I have no notes concerning Prince Edward Island or Newfoundland.

[16] *Morgan* v. *B.C. Electric*, [1930] 4 D.L.R. 30; [1930] 2 W.W.R. 778 (B.C.C.A.).

were divided notwithstanding the last-chance doctrine. The plaintiff trucker, for convenience in unloading a truckload of slabwood, parked his truck at dusk on the defendant street railway's right of way. The defendant motorman, not maintaining an adequate lookout, failed to see the truck in time to stop and the ensuing collision caused considerable damage. The trial judge found both parties negligent, the plaintiff 20% negligent and the defendant street railway 80% negligent. The Court of Appeal, shocked by the "effrontery" of the plaintiff, who had acted in conscious defiance of public safety and the defendant's right of way, switched the apportionment around the other way, and found the plaintiff 80% negligent and the defendant 20% negligent. Mr. Justice Martin called attention to the fact that the facts bore a startling resemblance to *Davies* v. *Mann*, but Mr. Justice McPhillips replied that *Davies* v. *Mann* was decided before there were street cars, which had to take people to and from work, and somewhat impatiently brushed that case aside. What Mr. Justice McPhillips should have said was that the contributory negligence apportionment legislation had displaced the ancient common law and that there was no longer any need of the case of the donkey or any part thereof.

About halfway between the passing of the original legislation and the present day there arose in British Columbia one of the most significant cases in the series. The case is *Whitehead* v. *North Vancouver*.[17] The facts were that the defendant negligently failed to have in place its barrier, which was designed to prevent automobiles from running off the ferry slip into the sea while the ferry was elsewhere than at the dock. The deceased, approaching the slip, negligently failed to stop in time as the jury found that he should have done notwithstanding the absence of the barrier, and drove his car off into Burrard Inlet. The jury found the defendant 60% negligent and the deceased 40% negligent. The defendant-appellant made two arguments: (1) under *Indermaur* v. *Dames*[18] and the cases following it, a duty is owed by an occupier of premises only to such of his invitees as exercise reasonable care for their own safety; there was therefore no duty to the deceased and therefore no basis for the jury to be permitted to find the defendant negligent. The majority of the court said, and in fact decided, that the Contributory Negligence Act had changed the common law in this respect and that a negligent invitee now recovered partial damages,

[17] [1939] 3 D.L.R. 83; [1939] 1 W.W.R. 369 (B.C.C.A.).
[18] (1866), L.R. 1 C.P. 274; L.R. 2 C.P. 311.

citing *Griesman* v. *Gillingham*.[19] The defendant-appellant's second argument was that the plaintiff was barred on the last-chance doctrine. This argument split the court, but the majority dismissed the defendant's appeal on the ground that the deceased's negligence was not really ultimate, but was merely concurrent. When a court does this it says that the defendant's negligence continued up to the last. In this case the barrier was not there when the car went overside. With a little ingenuity the argument for concurrent negligence can be made in every case, because always the consequences of both negligent acts must continue up to the moment of harm and all that one has to do to make this argument is to confuse the consequences of the neglect with the neglect.

But the record in British Columbia is not as clear as these two cases would indicate. There are several decisions which go the other way. In *Alonzo* v. *Bell*[20] the Court of Appeal applied last chance against a defendant motorist in favour of a negligent cyclist who had entered an intersection from the left. The defendant motorist's negligence arose out of the fact that he placed undue reliance upon the plaintiff yielding the right of way, but Sloan J.A. dissented. In his opinion, the plaintiff's negligence continued up to the last and was therefore concurrent negligence.[21] Perhaps the most revealing British Columbia case is *James* v. *McLennan, McFeeley & Prior*.[22] The female plaintiff, an invitee in the defendant warehouse, negligently fell over some wire netting which was negligently left in her way. The then customary questions were there submitted to the jury, including:

> Question 5: Notwithstanding the negligence of the defendant, if any, would the plaintiff by the exercise of reasonable care have avoided the accident? A. Yes.
>
> Question 6: If so, in what way?
>
> A. By taking reasonable care.
>
> Question 7: Notwithstanding the negligence of the plaintiff, if any, would the defendant by the exercise of reasonable care have avoided the accident?
>
> A. Yes.
>
> Question 8: If so, in what way?
>
> A. By taking reasonable care.

[19] *Griesman* v. *Gillingham*, [1934] 3 D.L.R. 472. This case should be specially noticed. It is one of the few cases in the Supreme Court of Canada in which a plaintiff who was guilty of last-chance negligence has recovered partial damages. (In the case an invitee negligently backed into an open elevator shaft. Damages were apportioned.)

[20] [1942] 3 W.W.R. 657 (B.C.C.A.).

[21] [1943] 2 W.W.R. 337; [1943] 3 D.L.R. 572. *Towne* v. *B.C. Electric*, [1943] 2 W.W.R. 337, [1943] 3 D.L.R. 572, is another case in which the British Columbia Court of Appeal applied the last-chance doctrine.

[22] [1941] 2 D.L.R. 555; (1940), 56 B.C.R. 1.

These answers, which are the only answers sensible men could make to these questions, the court ruled unacceptable, because the court regarded them, in terms of the last-chance doctrine, as stating that each party had had the last clear chance, or that each was guilty of negligence subsequent to and severable from that of the other, which is of course absurd. The court ordered a new trial on the ground that the answers of the jury were unintelligible because contradictory and irreconcilable. The jury's answers were sensible enough; the absurdity lay in the last-chance doctrine and, particularly, in questions 5 to 8, which were the standard questions under which it was administered.

In *James* v. *McLennan, McFeeley & Prior*[23] the same court later refused leave to appeal to the Supreme Court of Canada on the ground that the case raised no question involving any matter of public interest or any important question of law. My own view is: (a) that the question of whether the last-chance doctrine survives the statute will be with us until we abrogate the doctrine, (b) that it is a matter of great public interest, and (c) that the manner in which the matter has been mishandled up to date casts a grave reflection on our whole common-law system.

Notwithstanding the last three cases mentioned and some others, the recent trend in the British Columbia Court of Appeal has been in favour of division. For instance, in *Eggins* v. *Beechey*[24] a police panel and a police motor cycle were answering a call. Both sirens were going. The defendant stopped at a stop street and remained stopped to let the panel pass. He then started up again. The police motor cycle (doing fifty-five miles an hour) saw the defendant start up in apparent disobedience of the law, but did not slacken speed because, as the motor-cycle policeman later testified, notwithstanding the fact that motorists often did this sort of thing, he was optimistic about this particular motorist and thought that he would stop. He did not, and in the ensuing collision the motor-cycle officer was badly hurt. Damages were divided at the trial. The defendant appealed, arguing that the finding that the plaintiff motor cyclist was negligent meant that the plaintiff's negligence was last-clear-chance negligence. The majority, citing *Whitehead* v. *North Vancouver* and *Griesman* v. *Gillingham*, said in effect that the contributory negligence legislation had abrogated the last-chance doctrine. Chief Justice McDonald dissented on the ground that the plaintiff's negligence was ultimate negligence.

[23] [1941] 2 D.L.R. 608.
[24] [1943] 2 D.L.R. 699 (B.C.C.A.).

In *Nance* v. *B.C. Electric*,[25] in which the damages were again divided, Chief Justice Sloan at page 67 said:

> There is nothing to be gained by a close analysis of the facts or by quotations from the voluminous case law on this subject. Those weary vocables of the Law — *negligence, contributory negligence,* and ultimate negligence — are it seems no longer fashionable.

And here we were, protected from the folly of the rest of the world by the mountains and doing quite nicely, when along came *Sigurdson* v. *B.C. Electric*.[26] The plaintiff, proceeding easterly on a through city street, desired to swing across the street in order to arrive on the opposite side. To accomplish his purpose he had to turn left and cross two sets of street-car tracks. The plaintiff saw a wide enough gap in approaching traffic to enable him to do this. Unfortunately the gap closed before the plaintiff got across, and the plaintiff, blocked by oncoming traffic from the east, had to stop in front of an approaching street car which he had passed shortly before. The defendant motorman failed to stop in time to avoid a collision, and the plaintiff sustained over $20,000 damages. The trial judge put questions to the jury and got answers as follows:

> Question 1: Was the motorman guilty of negligence which contributed to the accident?
>
> A. Yes.
>
> Question 2: If so, of what did such negligence consist?
>
> A. The brakes were not applied in sufficient time. The motorman neglected to keep a proper lookout.
>
> Question 3: Was the plaintiff guilty of negligence which contributed to the accident?
>
> A. No.

Before we go any further, notice the diabolical ambiguity in this stock question 3. The jury's answer "No" may mean either (a) that the plaintiff was not negligent at all, or (b) that, though the plaintiff was negligent, his negligence did not in the language of the last-chance doctrine contribute to the harm.

In the British Columbia Court of Appeal the jury's finding was set aside as perverse and the court itself determined the proportion of the negligence of the two parties, found them equally at fault and divided the damages. The plaintiff appealed to the Privy Council. There counsel for the defendant argued that the jury's answer to question 2 really meant that the defendant motorman failed to apply his brakes in time because he was not maintaining an ade-

[25] [1950] 3 D.L.R. 64. This case went to the Privy Council but no comment was there made on these observations. See [1951] A.C. 601.

[26] [1951] 3 D.L.R. 407 (B.C.C.A.); [1953] A.C. 291, [1952] 4 D.L.R. 1.

quate lookout, that that meant that defendant's only negligence was failure to maintain an adequate lookout and that the last-chance doctrine in that form had not survived the apportionment statutes, although it was apparently conceded by counsel for the defendant that, had the motorman seen the plaintiff helpless on the tracks and then failed to apply the brakes, the last-chance doctrine would have been properly applicable. Lord Tucker refused to accept that distinction. He described the argument as a far-reaching proposition for which no authority was cited and

> which, if correct, would seem to provide the respondent in such a case as the present, with a means of escaping its 100% liability by relying on the failure of its motorman to keep a proper lookout,[27]

which he apparently thought would be a dreadful state of affairs, although why anyone should be liable 100% and not in some lesser amount to a person who also negligently created the risk of a collision Lord Tucker makes no effort to explain. Indeed he seems to forget the negligence, if any, of the plaintiff, and his conclusion is inconsistent with the result he arrived at in *Henley* v. *Cameron*.[28]

Lord Tucker went on to say[29] that the principle of *Davies* v. *Mann*

> remains unaffected by the British Columbia Contributory Negligence Act, and other similar enactments though it may be in practice the legislation may have tended to encourage the application of those broad principles of common sense in the apportionment of blame, unless the dividing line is clearly visible. Whether or not it emerges with clarity or is so blurred as to be barely distinguishable from the surrounding mass is a question of fact in each case for the tribunal charged with the duty of determining such questions.

Lord Tucker is saying that there is no rule, there is no policy, there is no anything, there is only *Davies* v. *Mann* and the void, and it is all a question of fact whether it is *Davies* v. *Mann* or whether it is not. Returning for a moment to the ambiguity in question 3, if somebody wants to get rid of the *Sigurdson* case some day, he might quite properly argue that what the jury meant was that the plaintiff was not negligent at all. That may well be what the jury meant by its answer, but with our predilection for paying attention to what courts say rather than what they do, it would be bold counsel

[27] [1954] 4 D.L.R. at p. 9.

[28] *Henley* v. *Cameron* (1948), 65 T.L.R. 17 (C.A.). I am inclined to agree with Lord Tucker that the distinction is a distinction without too much difference, but, whereas he would apply the last-chance doctrine in both cases, I would apply it in neither, always apportioning the damages according to the respective faults.

[29] [1954] 4 D.L.R. at p. 10.

who would make that argument and a bolder court which would accept it. In the meantime British Columbia seems to have progressed back into a swamp in which no lawyer can advise his client in advance as to which way the court will rule on the question of apportionment and the last-chance doctrine.

The history in Alberta is unfortunately similar. For a period of time it looked as if the Alberta Court of Appeal would escape from the last-chance doctrine. The significant case at this time was *Foster* v. *Kerr*.[30] The plaintiff was negligently walking on the wrong side of the highway, not facing traffic as by law required. The defendant motorist saw the plaintiff but nevertheless ran him down. A clearer case of last-clear chance would be hard to find, but the court, though paying lip service to the doctrine, applied the language of *The Volute*[31] and *Swaddling* v. *Cooper*[32] and divided the damages fifty-fifty. But in *Rose & Rose* v. *Sergeant*[33] the same Court of Appeal, citing *Foster* v. *Kerr*, gave as a ground for ordering a new trial (the trial court had apportioned) the following pre-statutory reasoning:

> But damages are 'caused' by the fault of two or more persons only when the fault of each is the proximate or sufficient cause of such damage.

The same court in *Kirschman* v. *Nichols*[34] divided the damages in another clear case of last-clear chance. The deceased, a mechanic in a garage, stood in front of the defendant's car and asked him to move it forward six inches. The defendant got in and negligently stepped on the starter without taking the precaution to disengage the clutch. The car surged forward and crushed the deceased between the car and a compressor. The plaintiff widow recovered half damages. There are in Alberta a number of other cases, some in the trial courts and some in the Court of Appeal, some of which divide the damages and some of which apply last chance. And the dividing line between the cases themselves is more blurred than Lord Tucker's hypothetical dividing line.

This much, however, can be said. The more closely the facts approach the facts imagined for *Davies* v. *Mann* at the beginning of this article, the more likely the court is to apply the last-chance doctrine. For instance, in *Osbaldeston* v. *Bechthold*[35] the plaintiff, intending to stop his friend, the defendant, to talk to him, blinked

[30] [1940] 2 D.L.R. 47.
[31] [1922] 1 A.C. 129, at pp. 136 and 144.
[32] [1931] A.C. 1.
[33] [1949] 2 W.W.R. 67.
[34] [1950] 3 D.L.R. 795.
[35] [1953] 1 D.L.R. 492; affirmed [1953] S.C.R. 177.

his lights in day time, crossed the highway and parked on the wrong side. There was evidence that this was a signal among truck drivers inviting a road-side chat. The defendant, for reasons unknown, failed to stop or swerve. It is not clear whether the court was satisfied that the plaintiff was negligent. But, assuming that he was, all members of the court felt that the defendant's negligence was subsequent and severable, and that he should bear the whole damage caused by the head-on collision. Adherents of the retention of the last-chance doctrine would regard this case as the case *par excellence* to prove the necessity for retaining it. If the plaintiff was negligent, and it was felt that the defendant was very much more negligent, the apportionment statutes are flexible enough to handle this case according to the evidence in the case, and I fail to see that anything is gained by depriving ourselves of the power to refine.

New Brunswick started off with two strikes against it. In the first place it was the home of *McLaughlin* v. *Long*, which could discourage local attempts to escape from the last-chance doctrine, and ten years later it had the case of *Billings* v. *Moeurs & Maguire*.[36] In *Billings* v. *Moeurs & Maguire* the defendant was driving an unlighted horse-drawn reaping machine with the table down. The plaintiff, driving an automobile at 28-30 miles an hour, failed to see this hazard until too close to do anything about it. In the collision, the plaintiff's car was damaged and one of the defendant's horses was killed. The trial judge found the defendant negligent, the plaintiff not negligent, gave the plaintiff full recovery, and dismissed the defendant's counter claim for his horse. On appeal the finding that the defendant was negligent was not disturbed, but the court found the plaintiff also negligent and then, applying *Davies* v. *Mann* and the *Loach* case, ruled that the plaintiff's negligence was the sole effective cause of the collision. In the result, the plaintiff got nothing and the defendant recovered in full. The plaintiff's negligence consisted in not maintaining an adequate lookout and, perhaps, in driving at an excessive rate of speed. Quite obviously, if we believe in last chance, and we find the plaintiff negligent in his lookout, then on last-chance reasoning he would have been barred and liable before the statutes.

In *Bird* v. *Armstrong*[37] the essential facts, except that there was no defendant to get hurt, were identical. The defendant, a road contractor, left unspread piles of gravel three feet high and twelve

[36] (1937), 11 M.P.R. 553 (N.B.C.A.).
[37] *Bird* v. *Armstrong* (1950), 27 M.P.R. 54. Both trial and Court of Appeal judgments are here reported.

feet in diameter. In front of these he placed flares, but the flares were inadequately supplied with oil so that they had burned out some hours before daylight. This the learned trial judge found to be negligent conduct on the part of the defendant contractor. The plaintiff, returning with a party of friends from a dance at a speed of 40-45 miles an hour, failed to see this gravel, ran into it and suffered serious injury. This the trial judge also found to be negligent conduct. (Other cars had successfully passed this hazard.) The trial judge found the defendant and plaintiff equally at fault, and divided the damages fifty-fifty.

Naturally the *Billings* case was pressed on the court, which distinguished it on the ground that in that case the negligence of the defendant driver of the reaper was not functional, because there was some evidence, and some members of the court had said, that because of a declivity in the road the plaintiff would not have been able to see a light had there been one on the reaper. But that aspect of the *Billings* case was only the faintest zephyr of a side-wind,[38] and the fact that the trial judge who made that distinction was sustained on appeal means that the *Billings* case, in so far as it applied the last-chance doctrine, should be dead. By way of caveat it should be pointed out, particularly when one remembers the history of *Foster* v. *Kerr*, that it is difficult to determine how deeply *Bird* v. *Armstrong* cuts into the last-chance doctrine, because its reasoning uses the language of *The Volute* and *Swaddling* v. *Cooper*, but the tone of the case and of some other recent cases in the New Brunswick Court of Appeal offers hope.

The state of the law in Nova Scotia may be summed up by saying that, although there is a strong leaning toward the retention of last chance—see *Emberley* v. *Wambolt*[39]—there is some willingness to use *Volute* language, particularly when the last chance is the *Loach* type of prior incapacitating negligence (excessive speed).[40] The recent case of *Porter* v. *Irving Oil Ltd.*[41] demonstrates no noticeable conversion to apportionment. In this case the defendant negligently delivered gasoline instead of diesel oil to a tug's tank. The

[38] It was one of those arguments which counsel make and which a court, after having decided on one ground (*Davies* v. *Mann* in this case), adds *arguendo* to its reasons for judgment further to justify its decision. When a court is in such a mood, its critical faculties are resting. In accepting this alternative argument the court assumed that the field of visibility for observing lights was synonymous and coincident with the angle and area of illumination of the car's headlights. This is an inaccurate assumption.

[39] (1941), 15 M.P.R. 445 (N.S.S.C. en banc).

[40] *Robar & Robar* v. *MacKenzie* (1952), 29 M.P.R. 320 (N.S.S.C. en banc).

[41] [1954] 3 D.L.R. 295 (N.S.S.C. en banc).

tug had four tanks and a pumping apparatus designed to transfer fuel from one tank to another—or overside. The parties discussed this negligent mistake and decided to pump out the unwanted gasoline with the tug's transfer pump, which McLeod, the tug's engineer, believed to be tight enough for the job. It was not. Some gasoline escaped and an explosion and fire followed. The court found both parties negligent, and the plaintiff recovered nothing at all. The reasons for judgment are more or less double-barrelled. The court first indicates that the danger from the negligently delivered gasoline ceased as soon as the barge had stopped pumping gasoline into the tug. This is really saying that the whole danger in negligently delivering the gasoline in place of diesel fuel ceases as soon as it is discovered that it is gasoline. If that were the *ratio decidendi*, the case would have no bearing whatever on the problem under discussion. But the gasoline does have to be removed and there is always danger in moving gasoline. The court apparently concedes this much, and it is only on this assumption that the case is interesting in this connection. On this assumption the court nevertheless exempts the defendant from liability on the ground that McLeod's subsequent negligence (the court found his mistake negligent) in attempting to pump gasoline out with a pump he did not know to be gasoline-proof made the defendant's negligence cease to be an effective cause of the explosion. My own view is that, assuming McLeod to have been negligent, the damages should have been divided. One of the risks of wrongfully delivering gasoline to a diesel tug is that some negligent act may occur in the attempt to remove the gasoline. Assume that an independent third person, the servant of neither the plaintiff nor the defendant, had been engaged to remove the gasoline and in so doing had negligently caused the explosion. Should not the plaintiff have an action against both the defendant negligent supplier of the gasoline and the negligent remover? In *Burrows* v. *March Gas Co.*[42] the defendant negligently caused gas to leak into the plaintiff's basement. An independent gas fitter, searching for the leak, used a naked light and caused an explosion. The defendant was held liable to the plaintiff. The problem of causation is not affected by the person who does the risked negligent intervening act. In the old days before the apportionment statutes, because contributory negligence was a bar, the plaintiff would be properly barred if his negligence has assisted in causing the explosion. After the apportionment statutes the result should be apportionment.

[42] (1872), L.R. 7 Exch. 96.

Ontario too has had its vicissitudes. We have in the preliminary portion of this article already considered the early cases which came up in that province. There have been a large number of intervening cases and I can here mention only a few. One of those frequently cited is the particularly inconclusive case of *Falsetto* v. *Brown*.[43] The defendant truck-driver's tail light was burning a few miles before the plaintiff ran into him from behind. All the defendant's lights were controlled by the same switch, and the defendant's headlights were on at the time of the collision, but his tail light had burned out. Therefore the defendant's failure to have the tail light burning was, under the then Ontario legislation, not negligent. The plaintiff, driving negligently, collided with the rear of the defendant's truck. The Court of Appeal denied the plaintiff recovery. This is so far a perfectly clear decision on the ground that the defendant was not negligent. But the Court of Appeal by an unnecessary alternative argument added that if the defendant had been negligent his negligence would not have been the proximate cause of the collision because the plaintiff ought to have seen the unlighted truck in time to have stopped. The case is otherwise interesting because it contains a statement by Mr. Justice Riddell that after he had in 1931 applied the last-chance doctrine, notwithstanding the apportionment statutes, he was invited by the then Attorney-General, who was considering abrogating the doctrine, to draft a bill abolishing it, but that the bill was never presented to the house. This is how close Ontario came to doing the sensible thing. The Canadian Bar Association also nearly recommended the same thing in 1934.[44] But there were differences of opinion whether amending legislation was desirable, and a compromise was reached, which was enacted by Alberta and Prince Edward Island,[45] in these words:

> Where the trial is before a judge with a jury the judge shall not submit to the jury any question as to whether, notwithstanding the fault of one party, the other could have avoided the consequences thereof, unless in his opinion there is evidence upon which the jury would reasonably find that the act or omission of the latter was clearly subsequent to and severable from the act or omission of the former so as not to be substantially contemporaneous with it. [Section 5 of the Alberta Act]

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[43] [1933] 3 D.L.R. 545 (Ont. C.A.).

[44] See Proceedings, 1934, p. 281. Twenty years after is still not too late, and the courts appear unable to get on to firm ground without legislative assistance.

[45] Stats. Alta. 1937, c. 18; Stats. P.E.I. 1938, c. 5.

Section 6 gives a judge, trying a case without a jury, a similar caveat for himself, but these sections are just the old, old story and all they really say is: Don't forget *The Volute*.

These words, which are not too effective, were designed to reduce the incidence of last chance, and may have assisted the Alberta court in *Foster* v. *Kerr*. But notice how they have now backfired in *Branley* v. *Googens & McDonald*.[46] In this case Mr. Justice McBride said that he did not like *Foster* v. *Kerr*, which he distinguished on the ground that in the case before him the defendant's windshield was not dirty, and relied on these words as fastening last chance on the Alberta courts. If a judge is satisfied that it is more negligent to try, and fail, to pass a seen pedestrian with a clean windshield than with a dirty one, he can give effect to his conclusion of greater fault in his apportionment of damages. *Foster* v. *Kerr* divided fifty-fifty, and there was plenty of scope for a different apportionment. The technique of transmuting last chance into apportionment is applicable to every case which has applied last chance since the apportionment statutes were enacted, and I cannot see why the courts prefer to use a hoe on a job which calls for a scalpel.

In *Gives* v. *The C.N.R.*[47] the Court of Appeal in Ontario appeared to be on its way up out of the swamp. The case involved a level-crossing accident in which the driver of the automobile negligently failed to keep a proper lookout. The defendant railway company was negligent through its watchman, who had been in his shack instead of on the crossing with a red lantern, until too late to offer that additional warning. The jury was given ten questions and in answers to the first five had found both parties negligent as just described, the driver of the car 80% negligent and the railway watchman 20% negligent.

Questions 6 and 8 read as follows:

> Q. 6. Notwithstanding the negligence, if any, of the defendants, could Lorne Gives [the driver of the car] have avoided the accident by the exercise of reasonable care on his part? Answer yes or no.
>
> A. Yes.
>
> Q. 8. Notwithstanding the negligence, if any, of Lorne Gives, could the defendant have avoided the accident by the exercise of reasonable care on its part? Answer yes or no.
>
> A. Yes.

In answers to 7 and 9, the jury quite properly repeated its original findings of negligence and said that Gives could have avoided the accident by keeping a better lookout and that the watch-

[46] [1952] 4 D.L.R. 646, at p. 648 (Alberta, trial).
[47] [1941] 4 D.L.R. 625.

man should have been on the crossing earlier with his lantern. In dismissing the defendant's appeal, Mr. Justice Robertson indicated that after the new Ontario Negligence Act, R.S.O., 1937, c. 115, which was worded differently from the original Contributory Negligence Act, there was normally no useful purpose to be served by submitting questions designed to evoke answers which would lead to the application of the doctrine of ultimate negligence, and that the better practice was to explain the doctrine to the jury and let them handle the question whether the negligence of the plaintiff or defendant had contributed to the accident. Since the courts have had such difficulty with the doctrine, this is perhaps one way out, and juries will probably be less likely to apply last chance than the courts would, but if there is anything to understand in the doctrine and the courts cannot understand it after a hundred years of effort, it is difficult to expect a jury to grasp it on one explanation by a judge who may not understand it, and it would be much better to pitch the whole thing out.

Mr. Justice Henderson expressed himself in these words:

> Questions 6 and 8 appear to have been submitted upon the basis of obtaining a finding of 'ultimate negligence' or what in modern parlance is sometimes called 'the last chance'. I am unable to appreciate that the doctrine of ultimate negligence has survived the provisions of the Negligence Act, R.S.O. 1037, Chapter 115.

In the case of *Bruce & Bruce* v. *MacIntyre*,[48] the plaintiff Bruce parked with his fiancée, now the other plaintiff Bruce, and negligently failed to get his car completely off the travelled portion of the highway. The defendant negligently failed to see the Bruce car in time to stop. The trial judge found the defendant's negligence the sole cause of the harm, but the Ontario Court of Appeal applied the apportionment statutes and divided the damages. But there have been intervening cases, although mostly at the trial level, in which the courts have applied the last-chance doctrine.

There is however one case, *Broderick* v. *T.T.C.*,[49] where in the Court of Appeal the confusion is all that the most devoted adherent to last chance could wish for—and more. I say more because the case makes a complete misapplication of last-chance reasoning to facts in which the plaintiff was not negligent at all. The plaintiff was a passenger in a streetcar owned by the defendant, the Toronto Transportation Commission, and operated by the defendant motorman Taylor. The other defendant truck driver,

[48] [1954] 2 D.L.R. 800 (Ont. C.A.).
[49] [1949] 4 D.L.R. 131 (Ont. C.A.).

Rosenburg, negligently drove his truck on to the T.T.C. right of way. The T.T.C. failed to stop in time and the plaintiff passenger in the T.T.C. suffered harm in the ensuing collision. The jury found Rosenburg 30% negligent and Taylor, the T.T.C. motorman, 70% negligent. Taylor and the T.T.C. appealed and Rosenburg moved that the action against him be dismissed with costs. The court granted the Rosenburg motion, applying last-chance reasoning and reaching its conclusion on the ground that Rosenburg's negligence was not the proximate cause of the collision. This left the plaintiff with judgment against Taylor and the T.T.C. only. Notice that the plaintiff was not negligent at all and that this decision is in complete, though unintended, defiance of *Topping* v. *The Oshawa Street Railway*,[50] which was not cited. The plaintiff however, having judgment against the fully solvent T.T.C., could not have cared less about the mistake the court had made in depriving him of his judgment against the other tortfeasor, and therefore did not appeal. The defendant T.T.C. did appeal to the Supreme Court of Canada, and what happened there is sadly significant. The court restored the apportionment made at the trial, but no member of the court appreciated the error made by the Ontario Court of Appeal.

All members of the court reached the correct result, but only on the ground that the jury might have disbelieved Rosenburg's evidence, which was that he had been stopped on the crossing before the T.T.C. car came along. This involves the hypothesis, which the court specifically approved, that, if Rosenburg had been stopped before the T.T.C. car came along, the result arrived at by the Ontario Court of Appeal, to wit, that the T.T.C. only would be liable to the plaintiff, because T.T.C. negligence would have been ultimate, and Rosenburg's negligence no longer contributory, would have been correct. The court allowed the appeal on the narrow ground that the jury might have accepted the T.T.C. evidence that Rosenburg's truck turned across the tracks suddenly, giving the T.T.C. motorman barely time to stop, and therefore making the case one to which *The Volute* was properly applicable.

This ruling of the Ontario court, approved by the Supreme Court of Canada, that Rosenburg was free from liability to the plaintiff T.T.C. passenger, if as between Rosenburg and the T.T.C. the T.T.C. had the last clear chance, is not and, so far as I know, never was, the law. If the T.T.C. had not been obviously able to

[50] (1931), 66 O.L.R. 618 (C.A.).

pay this judgment, the plaintiff would have appealed, and these tangential judgments would never have been written. As long ago as *Burrows* v. *March Gas*[51] the independent gas-fitter's subsequent negligent act did not make the defendant's original negligent act cease to be the cause of the plaintiff's harm. The number of cases recognizing the fact that two sequential tortfeasors can both be liable to the injured plaintiff is legion. As Lord du Parcq said in *Grant* v. *Sun Shipping Co.*[52] (a recent House of Lords case which redecided this point) at page 563:

> . . . cases in which independent acts of negligence on the part of two drivers cause injury to a third person are heard almost daily and they are not, in my experience, decided by considering whose act of negligence was the last link in the chain of causation.

To pick for further illustration a case recently decided by the Ontario Court of Appeal itself, in *Marchand* v. *Duff*[53] the defendant municipality negligently permitted a tree to overhang a sidewalk and road. The defendant truck driver negligently ran his truck body into this overhanging obstruction, and part of the truck, dislodged by the collision, struck the plaintiff pedestrian on the hip and injured her. Both defendants were held liable to the plaintiff. The facts in this case are very strong facts for the truck driver's last chance *vis-à-vis* the city. Yet the city was properly held liable to the plaintiff. The Court of Appeal cannot hold both cases in its mind at once without having mental indigestion.

The line of cases ignored in the *Rosenburg* case demonstrates from another viewpoint the fallacy in the causation theory of the last-chance doctrine. This line of cases shows that, when *A* and *B* negligently injure *C*, *C* can recover from either or both of them (up to one full satisfaction) and is in no way affected by the question of whether either of them *vis-à-vis* the other would have had the last chance. This must mean that both of them were proximate causes of the plaintiff's harm.

Perhaps concrete facts will make this clearer. *A* is a taxi-driver and *C* is his passenger. *A* negligently attempts to cross in front of the approaching *B* street car, and stalls on the track. The *B* motorman is keeping no lookout, because he is busily studying a racing

[51] (1872), L.R. 7 Exch. 96. [52] [1948] A.C. 549.

[53] [1942] 1 D.L.R. 520, affirmed [1942] 2 D.L.R. 796 (Ont. C.A.). See also *Vanwynsberghe* v. *Knockaert*, [1954] 4 D.L.R. 510 (Man., trial). *A* negligently parked his car in gear (the court decided it was negligent to park a car in gear) and *B* a passenger left in the car negligently stepped on the starter in order to warm the car up and turn on the heater. Both *A* and *B* were held liable to *C*, who was standing in front of the car and was injured when it surged forward.

form sheet. Had the motorman been maintaining a lookout he could easily have stopped in time to avoid a collision, but he does not see *A*'s cab until after he has hit it. *A*, under the last-clear-chance doctrine, recovers in full from *B* because, as between *A* and *B*, *B*'s negligence is the proximate cause of the collision, but *C* can recover from *A* or *B* because the negligence of *A* was also a proximate cause of *C*'s harm. Now it is silly to say that *A*'s negligence is not the proximate cause of this collision when *A* sues *B*, but that *A*'s negligence is the proximate cause of the same collision when *C* sues *A*. Proximate cause is not a rational reason to offer as a justification of the last-chance doctrine.

The Supreme Court of Canada has given a disappointing performance in handling the problem of whether or not the last-chance doctrine survives the statutes. The first case in this connection is *McLaughlin* v. *Long*, already discussed, from which the court could obviously have escaped if counsel had demonstrated the desirability of escaping, and offered a proper factual analysis. In *Griesman* v. *Gillingham* the Supreme Court did divide the damages, notwithstanding the fact that the plaintiff's negligence was last-chance negligence, but it cannot be claimed that the court was aware that it was dealing with last-chance facts. In *Nixon* v. *The Ottawa Electric Railway*[54] the plaintiff negligently attempted to cross in front of the defendant street car which, because of the risk that she might attempt to do just that, was negligently travelling at excessive speed. This makes the essential facts identical with *Long* v. *The Toronto Street Railway*,[55] in which, before the apportionment statutes, the court had held the defendant railway liable because its negligence was the sole proximate cause of the harm. Nevertheless, in the *Nixon* case the Supreme Court approved a jury finding, which had apportioned the damages 90% against the defendant and 10% against the plaintiff. This decision is of course *per incuriam* in ignoring the last-chance doctrine. One might have said *de minimis non curat lex*, except that in 1932 ten per cent of $17,557.15 was not *minimus*.

Another case in the Supreme Court not likely to be run across

[54] [1933] S.C.R. 154.

[55] (1914), 50 S.C.R. 224. See *infra* (1913), 10 D.L.R. 300 (Ont. C.A.). The *Long* case came before the Supreme Court in the days when it was still unwilling to extend the last-chance doctrine to include Mr. Justice Anglin's prior incapacitating or ultimate negligence thesis, which he had advanced in *Brenner* v. *Toronto Street Railway* (for the Anglin argument, see (1907), 13 O.L.R. 423 (Ont. Div. Court) and see the rejection of it in 40 S.C.R. 540, in the judgment of Mr. Justice Duff). Mr. Justice Anglin's thesis was later made into law by Lord Sumner's adoption of it in the *Loach* case.

in a normal search is *Yachuk* v. *Oliver Blais Co. Ltd.*[56] This case ran the full gamut of all the then available courts. The facts were that two youngsters, seven and nine years old, who wanted to make torches by dipping cattails into gasoline and lighting them, approached the defendant filling station with an ingenious and plausible lie to the effect that their mother's car was stalled down the street and that she had sent them to bring her a small quantity of gasoline with which to get to a filling station. The station attendant sold them a little gasoline in a lard pail, which he covered tightly. The boys carried out their purpose, in the course of which the nine-year old was badly burned. The trial judge found the plaintiff capable of contributory negligence and in fact negligent to the extent of 75% as against the defendant station-attendant's 25%. In the Court of Appeal the conclusion that the plaintiff had been negligent was set aside, and the plaintiff recovered full damages. In the Supreme Court of Canada Mr. Justice Rinfret and Mr. Justice Kerwin would have dismissed the whole action on the ground that the deceived filling-station attendant was not negligent at all, and Mr. Justice Rand would have dismissed the appeal from the Ontario Court of Appeal, agreeing with it that the plaintiff was not negligent at all. This left only Mr. Justice Estey and Mr. Justice Hudson to deal with the last-chance problem, which was raised only if both the filling station and the plaintiff were negligent. On this assumption these two judges arrived at the right conclusion, which was that the apportionment statute should be applied. The reasoning, however, does not repudiate the last-chance doctrine, but finds the negligence of both parties "so intimately associated and wrapped up" in the production of the injury that the negligence of the infant respondent should not be described as ultimate. This is the proper result, but the reasoning is, to a really orthodox last chancer, indefensible. If the plaintiff was negligent, clearly this negligence was subsequent to and severable from the negligence of the defendant, whatever that may mean. One might therefore have hoped that the Supreme Court was about to abandon adherence to last chance. On further appeal the last-chance problem in this case was avoided by the Judicial Committee, which agreed with the Ontario Court of Appeal and Mr. Justice Rand that the plaintiff infant was wholly free from fault.

Nevertheless, the sad fact that any hope based on the *Yachuk* case would be premature may be seen from the next two cases. In

[56] [1944] 3 D.L.R. 62; [1945] 1 D.L.R. 210; [1946] S.C.R. 1; [1946] 1 D.L.R. 5; [1949] 3 D.L.R. 1; [1949] A.C. 386.

Trans-Canada Forest Products v. *Heaps, Watrous and Lipsett*[57] the plaintiff negligently maintained an engine room in a planer mill so that it was a fire-hazard by reason of oil and grease on the floor, defective battery cables and no fire extinguishers. The defendant diesel repair mechanic, who had just installed reliners in the engines, started the engine for a trial run, negligently permitting the cables to become crossed. The Supreme Court of Canada applied last-chance reasoning to hold the defendant wholly liable for the ensuing fire and destruction of the mill. In *McKee & Taylor* v. *Malenfant & Beetham*[58] the defendant parked an unlighted truck negligently on a paved highway. The defendant's conduct was negligent because someone might run into this obstruction. There was a wide shoulder on which the defendant might have driven to park. The plaintiff did run into the truck. The trial judge found the plaintiff's subsequent negligence (whether he saw or failed to see the truck in time to stop) the sole cause of the harm.

The Ontario Court of Appeal properly reversed this ruling and applied the apportionment statute, but the Supreme Court of Canada restored the ruling of the trial judge. In doing so it quoted some of the more unfortunate statements of Lord Tucker in the *Sigurdson* case, to which I have already referred. After these two cases in our highest court, the outlook for a judicial escape from last clear chance is at present dismal. This decision may however turn out to be a step forward. It is so obviously wrong that it may be the thirteenth stroke of the clock which invites attention to the whole problem of whether the last-chance doctrine should be retained.

The United Kingdom did not enact its apportionment legislation until 1945 and, before enacting it, it set up a Law Revision Committee under the chairmanship of Lord Wright. This commission reported in 1939 and, after labouring mightily, brought forth the following mouse:

> While we recommend that the principle of apportioning the loss to the fault should be adopted at common law, we do not recommend any change in the method of ascertaining whose the fault may be, nor any abrogation of what has been somewhat inaptly called the 'last opportunity rule'. In truth there is no such rule. The question as in all questions of liability for a tortious act, is not who had the last opportunity of avoiding the mischief, but whose act caused the wrong?[59]

[57] [1952] 1 D.L.R. 827 (trial); [1952] 3 D.L.R. 672 (B.C.C.A.); [1954] 2 D.L.R. 545 (S.C.C.).

[58] [1954] 4 D.L.R. 785.

[59] See Cmd. 6032, 1939, p. 16. Several cases have arisen under the English legislation which followed this report. Those most frequently

If you have followed me thus far, comment is unnecessary. If you have not, I should add that everyone who has thought about last clear chance knows that the doctrine is sometimes a partial misnomer. When, for instance, the defendant motorist fails to see the plaintiff pedestrian in peril because he, the defendant, is not keeping a proper lookout, the misnomer is only partial, because the defendant had a chance to have had a chance. When we get refined *Loach* or ultimate negligence facts, in which the defendant's negligence consisted of excessive speed or defective brakes only, the misnomer is no longer partial, because in the emergency in such a case the defendant had no chance whatever to stop. This has long been clear and the application of the doctrine to such circumstances used to be justified by saying that, if the defendant by his prior negligence has incapacitated himself from having the last chance, he will nevertheless be treated as if he had had it, and held liable. This type of negligence used to be called prior incapacitating or ultimate negligence.

But while the use of the phrase "last chance" or "last clear chance", or its more elegant variant "last opportunity", to describe this doctrine is slightly misleading and requires an explanatory gloss, the ancient alternative method rediscovered by the Law Revision Committee, purporting to place the rationale of the doc-

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cited in the Canadian courts are *The Boy Andrew*, [1948] A.C. 148, and *Davies* v. *Swan Motors*, [1949] 2 K.B. 291, [1949] 1 All E.R. 620 (C.A.).

In *The Boy Andrew* an overtaking vessel was about to pass an overtaken vessel too close on the starboard side. The overtaken vessel suddenly swerved to starboard and the overtaking vessel was then unable to avoid the collision. Each vessel sought to apply the last-chance doctrine against the other and both of them cited the *Loach* case. The court applied *The Volute* and divided the damages.

In *Davies* v. *Swan Motors* the deceased was negligently standing on the side steps of a motor lorry. The driver of the lorry negligently made a turn across the road and at the same time the driver in a following bus negligently tried to pass the lorry. In an action for wrongful death the contributory negligence of the deceased was set up as a defence and the argument made that the bus driver's negligence was last-chance negligence. The court unanimously decided that it was not. The bus driver added the driver of the lorry as a third-party defendant and a similar problem arose whether, *vis-à-vis* the deceased, the lorry driver's negligence was last-chance negligence. Again the damages were apportioned. Beyond these achievements on the facts, the case does not add much. Lord Justice Evershed and Lord Justice Denning contradict each other on whether *Davies* v. *Mann* and the rule of last opportunity are the same or different, and whether the last opportunity rule ever existed or not, Lord Justice Evershed being obviously confused by the report of the Law Revision Committee. The general trend of Lord Justice Denning's remarks are in favour of apportionment in all cases except when one of the parties was guilty of an intentional aggression, which means that he is in favour of apportionment in all cases in which both parties have been negligent.

And see the admirable analysis of the whole problem in Glanville Williams, Joint Torts and Contributory Negligence (1951).

trine on the obscurantist concept "cause", is as I hope this article has shown semantically indefensible and therefore deplorable because productive of muddled thinking.

As I explained in my earlier article, in the last-chance doctrine the search for who "caused" the harm was only a crude search for which of the two parties, the plaintiff or the defendant, was guilty of the greater negligence. Once that is clearly understood, retention of the "last chance", "ultimate negligence" or "proximate cause" doctrine in contributory negligence cases after the apportionment statutes becomes absurd.

The Objection to Codification

The objection most frequently made to codification—that it would if successful deprive the present system of its 'elasticity'—has, we have reason to believe, exercised considerable influence; but when it is carefully examined, it will we think turn out to be entitled to but little, if any, weight. The manner in which the law is at present adapted to circumstances is, first by legislation, and secondly by judicial decisions. Future legislation could of course be in no degree hampered by codification. It would on the other hand be much facilitated by it. The objection under consideration applies, therefore, exclusively to the effects of codification on the course of judicial decision. Those who consider that codification will deprive the common law of its 'elasticity' appear to think that it will hamper the judges in the exercise of a discretion which they are at present supposed to possess, in the decision of new cases as they arise.

There is some apparent force in this objection, but its importance has to say the least been largely exaggerated, and it is in our opinion certainly not sufficient to constitute (as some people regard it) a fatal objection to codification. In order to appreciate the objection, it is necessary to consider the nature of this so-called discretion which is attributed to the judges.

It seems to be assumed that when a judge is called on to deal with a new combination of circumstances, he is at liberty to decide according to his own views of justice and expediency; whereas on the contrary he is bound to decide in accordance with principles already established, which he can neither disregard nor alter, whether they are to be found in previous judicial decisions or in books of recognized authority. The consequences of this are, first, that the elasticity of the common law is much smaller than it is often supposed to be; and secondly, that so far as a Code represents the effect of decided cases and established principles, it takes from the judges nothing which they possess at present. (Report of the Royal Commission appointed to Consider the Law relating to Indictable Offences: With an Appendix containing a Draft Code embodying the Suggestions of the Commissioners (London, 1879) pp. 7-8)