

AVOIDING LAST CLEAR CHANCE

Donald G. Casswell*

Victoria

At common law contributory negligence on the part of a plaintiff was a complete bar to recovery. Courts attempted to mitigate the potential harshness of this rule by creating the so-called last clear chance rule. The rule however was "capricious, unpredictable and often unfair in operation". In comparison, Quebec law authoritatively accepted faute commune in 1899 and since then Quebec has remained happily untroubled by either of the common law's difficult progeny—the contributory negligence bar or last clear chance.

All common law provinces and both territories have abrogated the contributory negligence bar to recovery by enacting apportionment legislation. However, only two provinces have similarly abrogated last clear chance. In some provinces and both territories, there is legislation specifically retaining last clear chance. In other provinces, whether last clear chance survived the enactment of apportionment legislation must be answered entirely at common law. Given that abrogating legislation does not appear forthcoming in most provinces and territories, the author argues that judicial avoidance of the last clear chance rule, even in those jurisdictions with legislation specifically retaining it, is required.

En "common law" si le plaignant était en quelque mesure négligent, tout recours lui était refusé automatiquement. Les tribunaux ont essayé d'atténuer la cruauté possible de cette règle en inventant la règle de "last clear chance". L'application de la règle s'avéra cependant capricieuse, imprévisible et souvent injuste. Au Québec, par contre, la loi a reconnu la faute commune dès 1899 et, depuis, le Québec n'a jamais connu les difficultés données par les deux enfants terribles de la "common law", à savoir le refus automatique de recours en cas de négligence du plaignant et la règle de "last clear chance".

Les provinces de "common law" et les deux territoires ont aboli le refus de tout recours en cas de négligence du plaignant en passant une loi qui permet la faute commune. Deux provinces seulement ont aussi aboli la règle de "last clear chance". Dans certaines provinces et dans les deux territoires, la législation spécifie que la règle reste en vigueur. Dans les autres provinces seule la "common law" peut décider si la règle est encore en vigueur après l'adoption de la législation sur la faute commune. Étant donné que la plupart des provinces et les territoires ne semblent pas considérer le passage d'une loi abolissant la règle de "last clear chance", l'auteur de l'article soutient que les tribunaux devraient l'éviter, même dans les provinces où la législation spécifie qu'elle reste en vigueur.

* Donald G. Casswell, of the Faculty of Law, University of Victoria, Victoria, British Columbia.

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Introduction

Surprisingly, last clear chance continues to plague Canadian law. Almost fifty years ago, Malcolm MacIntyre persuasively called for "sweeping away"¹ the rule, arguing that it was inconsistent with apportionment legislation² and characterizing its retention as "absurd".³ Academic opinion has been uniform in this direction⁴ and, while judicial opinion has been divided, the most recent comment from the Supreme Court of Canada supports the view that the rule did not survive the enactment of apportionment legislation.⁵ Further, the Uniform Law Conference of Canada has provided the statutory model for abrogation of the rule.⁶

However, only British Columbia and Prince Edward Island have by statute expressly abrogated last clear chance. Manitoba, New Brunswick, Nova Scotia and Ontario have no legislation specifically dealing with the rule. In these provinces there is conflicting judicial opinion as to whether

¹ M.M. MacIntyre, *The Rationale of Last Clear Chance* (1940), 53 Harv. L. Rev. 1225, at p. 1252, (1940), 18 Can. Bar Rev. 665, at p. 690. The exact statement was: "Every vestige of last clear chance must be *swept away* in favour of apportionment." (Emphasis added).

² I use the expression "apportionment legislation" to refer specifically to legislation apportioning liability between a negligent defendant and a contributorily negligent plaintiff: such legislation is referred to, *infra*, text accompanying footnotes 47-49. In particular, I am not concerned with contribution between tortfeasors. While by no means terms of art, the expressions "apportionment legislation" and "comparative negligence legislation" are each commonly used to refer to both apportionment between a defendant and a contributorily negligent plaintiff and contribution between tortfeasors: D. Cheifetz, *Apportionment of Fault in Tort* (1981), pp. 97, 138, 139-143; J. Fleming, *The Law of Torts* (7th ed., 1987), pp. 246, 249; A.M. Linden, *Canadian Tort Law* (4th ed., 1988), pp. 433, 437, 438. One writer preferred the expressions "negligence acts" and "tortfeasor's acts": P.B. Kutner, *Contribution Among Tortfeasors: Liability Issues in Contribution Law* (1985), 63 Can. Bar Rev. 1, at pp. 2, 4.

³ M.M. MacIntyre, *Last Clear Chance After Thirty Years Under the Apportionment Statutes* (1955), 33 Can. Bar Rev. 257, at p. 283 (with *Corrigendum* (1955), 33 Can. Bar Rev. 504).

⁴ McIntyre, *loc. cit.*, footnote 1, at pp. 689-690 (Can. Bar Rev.); Glanville Williams, *Joint Torts and Contributory Negligence* (1951), p. 265; W. Bowker, *Ten More Years Under the Contributory Negligence Acts* (1964-66), 2 U.B.C. Law Rev. 198, at pp. 214-215; L.N. Klar, *Contributory Negligence and Contribution Between Tortfeasors*, in L.N. Klar (ed.), *Studies in Canadian Tort Law* (1977), p. 158; L.N. Klar, Annotation to *MacKay v. MacLellan and Gamble* (1976), 1 C.C.L.T. 310, at p. 313; L.N. Klar, Annotation to *Keough v. Henderson Highway Branch No. 215 of the Royal Canadian Legion* (1978), 7 C.C.L.T. 147, at p. 149; Fleming, *op. cit.*, footnote 2, pp. 251-252; Linden, *op. cit.*, footnote 2, pp. 432-433.

⁵ *Infra*, text accompanying footnotes 62-66. The court was not considering an appeal from a jurisdiction with legislation retaining the rule.

⁶ Section 3 of the Uniform Law Conference's Uniform Contributory Fault Act provides: "This Act applies where damage is caused or contributed to by the act or omission of a person notwithstanding that another person had the opportunity of avoiding the consequences of that act or omission and failed to do so." Uniform Law Conference of Canada, *Consolidation of Uniform Acts* (Loose-Leaf Edition 1978), p. 7A-2.

last clear chance survived the enactment of apportionment legislation. Alberta, Newfoundland, the Northwest Territories, Saskatchewan and the Yukon Territory all have legislation which specifically retains the rule. But in these jurisdictions there is again conflicting authority: some judges apply the legislation whereas others appear to ignore it. Quebec remains happily untroubled by this common law rule.

This confused situation is not merely one of academic interest. The number of recent decisions which have considered last clear chance indicates that the rule lingers on as a potential pitfall for the unwary in any fact situation involving successive acts of negligence of the plaintiff and defendant and that it may still subvert the purpose served by apportionment legislation, namely fixing liability according to degrees of fault.

In this article I will first outline the common law on contributory negligence and last clear chance as it existed prior to the enactment of apportionment legislation. Second, I will review the current confused status of last clear chance. Finally, I will suggest that last clear chance can and should be avoided by judges, even in those provinces and territories which have legislation specifically retaining it. While statutory abrogation would be the better solution, judicial avoidance of the rule is necessary in view of the prolonged failure of most legislatures to enact such legislation.

I. *Contributory Negligence and Last Clear Chance Prior to the Enactment of Apportionment Legislation*

A. *The Rules*

The facts in *Butterfield v. Forrester*⁷ were that the plaintiff was riding his horse "violently"⁸ through the streets of Derby when he ran into a pole left across part of the roadway by the defendant, who was making repairs to his house. The plaintiff and his horse fell and he was injured. The plaintiff's action in negligence⁹ was dismissed at a jury trial. On appeal to the Court of King's Bench, the judgment for the defendant was affirmed. The court held that if the plaintiff had not been riding violently he would have been able to avoid the obstruction which, on the evidence, was visible at a distance of 100 yards.¹⁰ Lord Ellenborough C.J. stated:¹¹

One person being in fault will not dispense with another's using ordinary care for himself. Two things must concur to support this action, an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff.

⁷ (1809), 11 East 60, 103 E.R. 926 (K.B.).

⁸ *Ibid.*, at pp. 60 (East), 927 (E.R.).

⁹ Actually an action on the case: *ibid.*, at pp. 60 (East), 926 (E.R.).

¹⁰ *Ibid.*, at pp. 60 (East), 927 (E.R.).

¹¹ *Ibid.*, at pp. 61 (East), 927 (E.R.).

It is interesting to note that Bayley J., who had also been the trial judge, stated:¹²

If he [the plaintiff] had used ordinary care he must have seen the obstruction; so that the accident appeared to happen *entirely* from his own fault.

However, the entirety of the plaintiff's fault was lost in subsequent cases, which held that a plaintiff's contributory negligence was a complete defence even if the defendant was found negligent in a degree considerably in excess of that of the plaintiff.¹³

*Davies v. Mann*¹⁴ qualified the contributory negligence defence. The plaintiff had fettered the fore feet of his donkey and turned it into a public road. The donkey was grazing at the side of the road when the defendant's driver came along the road, driving a wagon and team of three horses at "a smartish pace",¹⁵ alternatively described as "driving too fast".¹⁶ The wagon knocked the donkey down and ran over it. The donkey died soon after. From the evidence it would appear that the donkey could have got out of the way if it had not been fettered.¹⁷ The plaintiff claimed in negligence¹⁸ and obtained judgment in a jury trial. The defendant appealed and specifically relied on *Butterfield v. Forrester*,¹⁹ submitting that the loss of the donkey was due to the plaintiff having left it fettered in the road. The court held that the donkey was legally on the road, that is, that there had been no negligence on the part of the plaintiff. This was not due to the court's acceptance of the plaintiff's conduct, but rather due to the failure of the defendant in his pleadings to deny the plaintiff's allegation that the donkey was legally on the road.²⁰ However, in *obiter dicta*, the court stated that even if it had found that the plaintiff had been contributorily negligent in leaving the donkey fettered on the road, it still would have held the defendant entirely liable since, in the words of Lord Abinger C.B., "[he] might, by proper care, have *avoided* injuring the animal".²¹ This holding came to be known as, alternatively, the rule, principle or doctrine "of last clear chance", "of last opportunity", "of ultimate negligence", or "in *Davies v. Mann*".²²

¹² *Ibid.* (Emphasis added).

¹³ *Cayzer, Irvine & Co. v. Carron Company* (1884), 9 App. Cas. 873, at pp. 881 (H.L.), per Lord Blackburn.

¹⁴ (1842), 10 M. & W. 546, 152 E.R. 588 (Ex.).

¹⁵ *Ibid.*, at pp. 547 (M. & W.), 588 (E.R.).

¹⁶ *Ibid.*, at pp. 549 (M. & W.), 589 (E.R.), per Parke B.

¹⁷ For a clarifying review of what we do not know about the fact situation in the case, see MacIntyre, *loc. cit.*, footnote 1, at p. 670 (Can. Bar Rev.).

¹⁸ The action was described as a "[c]ase for negligence", *supra*, footnote 14, at pp. 546 (M. & W.), 588 (E.R.).

¹⁹ *Ibid.*, at pp. 547-548 (M. & W.), 589 (E.R.).

²⁰ *Ibid.*, at pp. 548 (M. & W.), 589 (E.R.).

²¹ *Ibid.* (Emphasis added).

²² It would appear that the first person to use the word "last" in the formulation

While last clear chance was "explained in the abracadabra of causation",²³ which thereby obscured its rationale, it is probable that the original motivation for its creation was the desire of judges to have a means for mitigating the potential harshness of the contributory negligence bar to a plaintiff's recovery.²⁴ The rule permitted judges to hold the defendant entirely liable, even if the plaintiff had been contributorily negligent, in situations in which they were of the opinion that the defendant had been negligent to a significantly greater degree than the plaintiff. However, last clear chance was later applied against plaintiffs as well as in favour of them: if either the defendant or plaintiff had the last opportunity to avoid the consequences of the other's negligence and failed to take that opportunity, he or she would be entirely liable.²⁵ Interestingly, while *Davies v. Mann*²⁶ had applied last clear chance against a defendant, one of the judgments in that case had clearly contemplated that the rule was equally applicable against a plaintiff. The rule was held not to be applicable as between two defendants.²⁷ In summary, the effect of the last clear chance rule became that "when both parties are careless, the party which has the last opportunity of avoiding the results of the other's carelessness is alone liable".²⁸

The rule came to be applied not only in situations in which a party had an actual opportunity to avoid the consequences of the other's negligence, but also where there would have been such an opportunity if he or she

of the rule was Salmond: *Alford v. Magee* (1952), 85 C.L.R. 437, at pp. 455-456 (Aust. H.C.), *per curiam*; R.F.V. Heuston and R.A. Buckley, Salmond and Heuston on the Law of Torts (19th ed., 1987), p. 574. However, the doctrine or rule of "last clear chance" or "last opportunity" has not always been equated with "the principle or rule in *Davies v. Mann*": *infra*, text accompanying footnotes 184-186.

²³ Fleming, *op. cit.*, footnote 2, p. 244. For a valuable judicial exposé of this magic and an outline of the historical interplay between cause and fault as bases for liability, see *Alford v. Magee*, *ibid.*, at pp. 452-455.

²⁴ For example, *Davies v. Swan Motor Co. (Swansea) Ltd.*, [1949] 2 K.B. 291, at pp. 321-322 (C.A.), *per* Denning L.J.; *Caines v. Bank of Nova Scotia* (1978), 90 D.L.R. (3d) 271, at p. 281, 22 N.B.R. (2d) 631, at p. 645 (N.B. App. Div.), *per* Bugold J.A., dissenting.

²⁵ Before the enactment of apportionment legislation, there was no need to make last clear chance applicable as against a plaintiff, since contributory negligence was a complete bar to recovery without resort to last clear chance. However, after abrogation of that bar to recovery, it was held that last clear chance was applicable against a plaintiff as well as a defendant: *McKee v. Malenfant*, [1954] S.C.R. 651, [1954] 4 D.L.R. 785.

²⁶ *Supra*, footnote 14, at pp. 549 (M. & W.), 589 (E.R.), *per* Parke B.; but see *Alford v. Magee*, *supra*, footnote 22, at p. 454.

²⁷ *Winnipeg Electric Railway Co. v. Canadian Northern Railway Co.* (1919), 59 S.C.R. 352, at p. 368, 50 D.L.R. 194, at p. 206; MacIntyre, *loc. cit.*, footnote 1, at p. 674 (Can. Bar Rev.).

²⁸ *The Boy Andrew*, [1948] A.C. 140, at p. 149 (H.L.), *per* Viscount Simon. (On the facts, it was held that this was not a case for the application of last clear chance). For the classic formulation of the contributory negligence bar and last clear chance, see *Radley v. London & North Western Railway* (1876), 1 App. Cas. 754, at p. 759, *per* Lord Penzance.

had exercised proper care as, for example, by keeping a proper outlook,²⁹ or had not committed some prior negligent act which prevented the opportunity arising.³⁰

The common law's "all-or-nothing solution"³¹ has been characterized as "capricious, unpredictable and often unfair in operation".³²

B. *Qualifications On Last Clear Chance*

(1) *Clear, not momentary, chance required*

The chance to avoid the consequences of another's negligence had to be a clear chance, not merely some momentary chance. It was not sufficient that the negligent acts merely be successive. Both *Butterfield v. Forrester*³³ and *Davies v. Mann*³⁴ were characterized as fact situations in which there had been "a substantial interval of time between the initial negligence of the defendant or of the plaintiff respectively and the negligence which was the proximate cause of the injury".³⁵ In *Admiralty Commissioners v. S.S. Volute ("The Volute")*,³⁶ Viscount Birkenhead L.C., delivering the lead speech for an unanimous House, stated that "where a *clear line* can be drawn, the subsequent negligence is the only one to look to", but that

²⁹ *Brown v. B and F Theatres Ltd.*, [1947] S.C.R. 486, at p. 489, [1947] 3 D.L.R. 593, at p. 595; *McKee v. Malenfant*, *supra*, footnote 25, at pp. 659-660 (S.C.R.), 793 (D.L.R.); *Great Eastern Oil and Import Co. Ltd. v. Frederick E. Best Motor Accessories Co. Ltd.*, [1962] S.C.R. 118, at p. 124, (1961), 31 D.L.R. (2d) 153, at p. 158.

³⁰ *British Columbia Electric Railway Co. Ltd. v. Loach*, [1916] A.C. 719, (1915), 23 D.L.R. 4 (P.C.), which has been called a "strange case" (Heuston and Buckley, *op. cit.*, footnote 22, p. 574), and "very odd" (*Compania Mexicana de Petroleo "El Aquila" v. Essex Transport and Trading Co. Ltd.* (1929), 141 L.T. 106, at p. 112 (C.A.), per Scrutton L.J.). Williams, *op. cit.*, footnote 4, p. 234, asserts that "[t]he truth is that no one knows precisely what it settled". However, *Loach* was usually taken as standing for the proposition stated here: see, for example, *Columbia Bithulitic Ltd. v. British Columbia Electric Railway Co.* (1917), 55 S.C.R. 1, 37 D.L.R. 64. Fleming, *op. cit.*, footnote 2, p. 245, refers to this as "constructive last opportunity". In any event, after *Sigurdson v. British Columbia Electric Railway Co. Ltd.*, [1953] A.C. 291, at p. 302, [1952] 4 D.L.R. 1, at p. 9 (P.C.), per Lord Tucker, it was questionable whether *Loach* was persuasive for any proposition. For a detailed analysis of *Loach*, see MacIntyre, *loc. cit.*, footnote 1, at pp. 682-687 (Can. Bar Rev.).

³¹ Fleming, *ibid.*, p. 244. Similarly, see MacIntyre, *loc. cit.*, footnote 3, at p. 260.

³² Fleming, *ibid.*, p. 245.

³³ *Supra*, footnote 7.

³⁴ *Supra*, footnote 14.

³⁵ *Swadling v. Cooper*, [1931] A.C. 1, at p. 10 (H.L.), per Viscount Hailsham, for the House.

³⁶ [1922] 1 A.C. 129, at p. 144 (H.L.). (Emphasis added). As the style of cause clearly suggests, this case arose in admiralty, not at common law, and damages were apportionable under the Maritime Conventions Act, 1911, 1 & 2 Geo. 5, c. 57, s. 1, which provided for apportionment "in proportion to the degree in which each vessel was in fault" or, if the different degrees of fault could not be established, equal apportionment. For a succinct comparison of admiralty and common law, see *Cayzer, Irvine & Co. v. Carron Company*,

if "the two acts of negligence come so closely together, and the second act of negligence is so mixed up with the state of things brought about by the first act", then both acts of negligence must be considered to have been a cause of the accident.³⁷ Such cases were alternatively described as ones "in which the negligence of the parties is contemporaneous or so nearly contemporaneous as to make it impossible to say that either could have avoided the consequences of the other's negligence, and in which both have contributed to the accident".³⁸ The frequent failure of the courts to limit the application of the last clear chance rule to situations in which there had been a clear, as opposed to momentary, chance to avoid the consequences of another's negligence was the basis of considerable criticism.³⁹

(2) *Emergency or agony of the moment*

Last clear chance was inapplicable against a party who had been put in danger of personal injury by an emergency situation created by the other party.⁴⁰ This qualification on the rule was a particular manifestation of the general approach taken in assessing the standard of care required of a person suddenly faced with an emergency situation.⁴¹ It originated in admiralty in the context of collisions at sea,⁴² was later applied to collisions on land,⁴³ and would probably extend to all actions in negligence whether involving collisions or not.⁴⁴

supra, footnote 13, at pp. 880-882, per Lord Blackburn, and *McLaughlin v. Long*, [1927] S.C.R. 303, at pp. 312-313, [1927] 2 D.L.R. 186, at pp. 192-193, per Newcombe J., concurring. The essential difference was that while apportionment was not available at common law, it was available in admiralty, although, prior to enactment of the legislation referred to, such apportionment was always equal, as opposed to according to degrees of fault.

³⁷ In *The Volute*, *ibid.*, at p. 144, Viscount Birkenhead L.C., after making the distinction referred to in the text, went on to say that a situation in which two or more causes were closely mixed up with each other would be "a case of contribution". This was because *The Volute* was a case in admiralty: see footnote 36. With respect to the "clear line" qualification, see also *Toronto Transportation Commission and Taylor v. Rosenberg*, [1950] 4 D.L.R. 449, at pp. 451-452 (S.C.C.).

³⁸ *Swadling v. Cooper*, *supra*, footnote 35, at p. 10, per Viscount Hailsham, for the House.

³⁹ 1934 Proceedings of the Commissioners on Uniformity of Legislation in Canada, in Proceedings of the Canadian Bar Association Annual Meeting (1934), pp. 286-288.

⁴⁰ For example, *Mercer v. Mercer*, [1949] 2 W.W.R. 294, at pp. 296-297 (Man. C.A.); *Oickle v. Wentzell* (1978), 26 N.S.R. (2d) 322, at p. 330 (N.S. App. Div.).

⁴¹ For example, *Armand v. Carr*, [1926] S.C.R. 575, at p. 581, [1926] 3 D.L.R. 592, at p. 597; *Corothers v. Slobodian*, [1975] 2 S.C.R. 633, at p. 648, (1974), 51 D.L.R. (3d) 1, at p. 10.

⁴² *London Steamboat Company v. Bywell Castle*, "The Bywell Castle" (1878), 4 P.D. 219, at pp. 226-227 (C.A.).

⁴³ For example, *Armand v. Carr*, *supra*, footnote 41; *Swadling v. Cooper*, *supra*, footnote 35.

⁴⁴ *Walls v. Mussens Ltd.* (1969), 2 N.B.R. (2d) 131, at p. 135 (N.B. App. Div.),

II. *Current Status of Last Clear Chance*

A. *Introduction*

Dissatisfaction with the common law on contributory negligence and awareness on the part of common law lawyers of admiralty law⁴⁵ and Quebec law⁴⁶ led to the enactment of legislation under which liability is apportioned between the plaintiff and defendant according to their respective degrees of fault. Ontario enacted apportionment legislation in 1924⁴⁷ and all common law provinces and both territories now have such legislation.⁴⁸ Australia, New Zealand and the United Kingdom have also enacted apportionment legislation.⁴⁹ However, the statutory response to last clear chance, if any, varies significantly among the provinces and territories.

per Hughes J.A., for the court, considering a claim for damages arising out of a fire. I stress that Hughes J.A. did not consider last clear chance.

⁴⁵ See *supra*, footnote 36.

⁴⁶ For example, *Grand Trunk Pacific Ry. v. Earl*, [1923] S.C.R. 397, [1923] 2 D.L.R. 741. Indeed, A. and R. Nadeau, *Traité pratique de la responsabilité civile délictuelle* (1971), p. 510, characterize the enactment of apportionment legislation by the common law provinces and the territories as follows: "Il convient de signaler que certaines provinces anglaises du Canada ont adopté . . . des lois régissant la faute commune, qui sanctionnent les solutions de la jurisprudence française. . . . C'est un bel hommage rendu aux institutions juridiques françaises."

⁴⁷ S.O. 1924, c. 32. This was the first apportionment legislation in the Commonwealth, at least as applicable in non-admiralty cases: Fleming, *op. cit.*, footnote 2, pp. 245-246.

⁴⁸ Alberta: The Contributory Negligence Act, R.S.A. 1980, c. C-23, s. 1; British Columbia: The Negligence Act, R.S.B.C. 1979, c. 298, s. 1; Manitoba: The Tortfeasors and Contributory Negligence Act, R.S.M. 1987, c. T-90, s. 4(1); New Brunswick: The Contributory Negligence Act, R.S.N.B. 1973, c. C-19, s. 1; Newfoundland: The Contributory Negligence Act, R.S.N. 1970, c. 61, s. 2; Northwest Territories: The Contributory Negligence Act, R.S.N.W.T. 1974, c. C-13, s. 2; Nova Scotia: The Contributory Negligence Act, R.S.N.S. 1967, c. 54, s. 1; Ontario: The Negligence Act, R.S.O. 1980, c. 315, s. 4; Prince Edward Island: The Contributory Negligence Act, R.S.P.E.I. 1974, c. C-19.1, s. 1 (enacted by S.P.E.I. 1978, c. 3, s. 1); Saskatchewan: The Contributory Negligence Act, R.S.S. 1978, c. C-31, s. 2; Yukon Territory: The Contributory Negligence Act, R.S.Y.T. 1971, c. C-14, s. 2.

⁴⁹ Australia: Australian Capital Territory: The Law Reform (Miscellaneous Provisions) Ordinance, 1955, No. 3 (as amended), s. 15(1); New South Wales: The Law Reform (Miscellaneous Provisions) Act, 1965, No. 32, s. 10(1); Northern Territory: The Law Reform (Miscellaneous Provisions) Ordinance, 1956, No. 31, s. 16(1); Queensland: The Law Reform (Tortfeasors' Contribution, Contributory Negligence and Division of Chattels) Act, 1952, No. 42, s. 10(1); Southern Australia: The Wrongs Act, 1936-1975, s. 17a(3); Tasmania: The Tortfeasors and Contributory Negligence Act, 1954, No. 14, s. 4(1); Victoria: The Wrongs Act, 1958, No. 6420, s. 26(1); Western Australia: The Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act, 1947, No. 23, s. 4(1).

New Zealand: The Contributory Negligence Act, 1947, No. 3, s. 3(1).

United Kingdom: The Law Reform (Contributory Negligence) Act, 1945, 8 & 9 Geo. 6, c. 28, s. 1(1) (applicable in England, Wales, and Scotland, but not Northern Ireland); The Law Reform (Miscellaneous Provisions) Act (Northern Ireland), 1948, 11, 12 & 13 Geo. 6, c. 23, s. 2(1).

B. Quebec

After some flirtation with the common law's bar to recovery by a contributorily negligent plaintiff,⁵⁰ it was authoritatively decided in 1899⁵¹ that under Quebec civil law if both the plaintiff and defendant through their fault cause injury to the plaintiff, liability is apportioned between them according to their respective degrees of fault.⁵² This is referred to as the doctrine of *faute commune*.⁵³ It follows that there was no need for any principle similar to the last clear chance rule. However, the Privy Council in a 1915 decision arguably came close to introducing last clear chance into Quebec law.⁵⁴ Fortunately, Quebec courts and the Supreme Court of Canada have not interpreted that decision as impinging upon *faute commune*.⁵⁵ Rather, it was taken at its face value as holding that if the only fault which caused the plaintiff's loss was that of the plaintiff, no liability will be imposed upon the defendant.⁵⁶ This is completely consistent with Quebec law on causation generally and *faute commune* in particular.⁵⁷

C. British Columbia and Prince Edward Island

In 1970 British Columbia and in 1978 Prince Edward Island enacted legislation specifically abrogating last clear chance.⁵⁸ However, as recently

⁵⁰ MacIntyre, *loc. cit.*, footnote 1, at pp. 675-676 (Can. Bar Rev.).

⁵¹ *Price v. Roy* (1899), 29 S.C.R. 494, at p. 497.

⁵² Article 1053 of the Civil Code of Lower Canada; J.-L. Baudouin, *La responsabilité civile délictuelle* (1985), pp. 192-193, 196; Nadeau, *op. cit.*, footnote 46, pp. 499-510; C. Masse, *Cours de responsabilité civile délictuelle* (2e éd., 1976), p. 126.

⁵³ The expression "*faute commune*", while commonly used to refer to apportionment of liability between the plaintiff and the defendant, is somewhat of a misnomer and should be limited more properly to situations involving a single negligent act or omission committed or contributed to by more than one person: Beaudouin, *ibid.*, p. 193; Nadeau *ibid.*, p. 499.

⁵⁴ *Canadian Pacific Railway Company v. Fréchette*, [1915] A.C. 871, (1915), 22 D.L.R. 356 (P.C.); Williams, *op. cit.*, footnote 4, p. 263.

⁵⁵ MacIntyre, *loc. cit.*, footnote 1, at pp. 676-677 (Can. Bar Rev.); Williams, *ibid.*, p. 263; *Larocque v. Côté*, [1961] Que. Q.B. 583 (App. Side), affirmed, [1962] S.C.R. 632, (1962), 36 D.L.R. (2d) 228; *Trottier v. Lefebvre Ltée*, [1973] S.C.R. 609, (1972), 31 D.L.R. (2d) 707.

⁵⁶ For example, Nadeau, *op. cit.*, footnote 46, p. 503.

⁵⁷ Quebec civil law requires, as does common law, both factual connection and proximity between a negligent act or omission and the loss suffered for there to be liability: *George Matthews Co. v. Bouchard* (1898), 28 S.C.R. 580, at p. 584; Baudouin, *op. cit.*, footnote 52, pp. 182-183; Nadeau, *op. cit.*, footnote 46, pp. 504-507, 607-611.

⁵⁸ The Negligence Act, s. 8 (as enacted by S.B.C. 1970, c. 9, s. 2); The Contributory Negligence Act, R.S.P.E.I. 1974, c. C-19.1, s. 4 (as enacted by S.P.E.I. 1978, c. 3, and as amended by S.P.E.I. 1980, c. 17, s. 1). Law reformers in Alberta and Ontario have recommended enactment of provisions specifically abrogating last clear chance: Alberta Institute of Law Research and Reform: Report No. 31: Contributory Negligence and Concurrent Wrongdoers (1979), p. 10; Ontario Law Reform Commission: Report on Contribution Among Wrongdoers and Contributory Negligence (1988), p. 259.

as 1986, some in British Columbia were still unaware that the rule had been abolished.⁵⁹ The only other Commonwealth jurisdiction which has abrogated last clear chance statutorily is Western Australia, but only as against the plaintiff.⁶⁰

*D. Manitoba, New Brunswick, Nova Scotia and Ontario*⁶¹

(1) *Introduction*

Manitoba, New Brunswick, Nova Scotia and Ontario have no legislation either abrogating or specifically retaining last clear chance.

(2) *Supreme Court of Canada and Privy Council Authority*

The most recent mention of last clear chance in the Supreme Court of Canada was in 1976 in *Hartman v. Fiset*.⁶² While the only issue before the court concerned the paucity of evidence led at trial, counsel argued *Davies v. Mann*.⁶³ Dickson J., for the majority, stated:⁶⁴

If the so-called last opportunity or last-clear chance doctrine, said to derive from *Davies v. Mann*, can be said to have survived the passage of the *Contributory Negligence Acts*, as to which I harbour gravest doubt, having regard to the apparent intent of provisions such as contained in s. 4(1) of the *Manitoba Act*, I do not think the doctrine can have the remotest application on the facts of this case.

While this comment was almost certainly *obiter*,⁶⁵ it would be ignored

⁵⁹ *Morgan v. Airwest Airlines Ltd.*, [1974] 4 W.W.R. 472 (B.C.S.C.); *Philbin v. Rutley* (1977), 4 B.C.L.R. 325 (B.C.S.C.). In *Laframboise v. Pickell*, [1987] B.C.D. Civ. 2849-05, [1987] B.C.W.L.D. 1588 (B.C.S.C.), Perry L.J.S.C. stated that: "... counsel for both of the parties take the position that the common law rule of 'last clear chance' remains intact in British Columbia and has survived the apportionment legislation as enacted in the Negligence Act ... where a clear line can be drawn between the negligence of one of the parties and that of the other". (Unreported reasons for judgment at p. 29). His Honour then referred to section 8 of The Negligence Act, which abrogates last clear chance, and explicitly stated that "[t]his section was not mentioned or considered by counsel during argument in this case". (Unreported reasons for judgment at p. 30).

⁶⁰ The Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act, 1947, No. 23, s. 4(1). South Africa and Eire have also abrogated the rule statutorily: 1967 Proceedings of the Commissioners on Uniformity of Legislation in Canada, p. 73.

⁶¹ Earlier decisions are considered in depth in MacIntyre, *loc. cit.*, footnote 1 (Can. Bar Rev.); MacIntyre, *loc. cit.*, footnote 3; Bowker, *loc. cit.*, footnote 4.

⁶² [1977] 1 S.C.R. 248, (1976), 66 D.L.R. (3d) 516, affirming the Manitoba Court of Appeal, but varying the award of damages to the plaintiff.

⁶³ *Supra*, footnote 14.

⁶⁴ *Supra*, footnote 62, at pp. 258 (S.C.R.), 523 (D.L.R.). (Emphasis added).

⁶⁵ The plaintiff, while attempting to cross a street, was struck by the defendant's motorcycle. The plaintiff was examined on discovery but died before the trial. The defendant testified at the trial but had no recollection of the accident. Neither of the other two people who likely would have been able to give evidence concerning the accident was called as a witness. Given this situation, Dickson J. was probably simply saying that whether the plaintiff or defendant had had an opportunity to avoid the consequences of the other's negligence did not arise for consideration since there was no evidence which could assist such a determination.

only at one's peril.⁶⁶ Martland J., dissenting, expressed no opinion on this point.

However, perhaps as recently as 1968, last clear chance was alive and well in the Supreme Court of Canada. While some courts of appeal occasionally made valiant attempts to kill the rule judicially,⁶⁷ the Supreme Court intervened from time to time to breathe new life into it, stating that it survived the enactment of apportionment legislation.

The court's 1927 decision in *McLaughlin v. Long*⁶⁸ was subsequently relied upon by it as having held that last clear chance survived the enactment of apportionment legislation. The plaintiff was a young boy who had been riding on the running board of the defendant's bakery delivery truck. The truck went off the road and the plaintiff was seriously injured when he was pinned between the truck and a tree. At trial, the jury found that the defendant had been negligent in tacitly allowing the plaintiff to stay on the running board and in failing to drive carefully. They also found the plaintiff contributorily negligent in standing on the running board while the truck was moving and not getting off when asked.⁶⁹ Applying the New Brunswick Contributory Negligence Act,⁷⁰ the jury apportioned twenty-five per cent fault to the plaintiff and seventy-five per cent to the defendant.⁷¹

In the New Brunswick Appeal Division, Hazen C.J., for the court, stated that the jury had found three "causes" of the damage, namely the plaintiff staying on the running board of the moving truck after being asked to get off, the defendant allowing the plaintiff to stay on the running board and the defendant's lack of attention to his driving,⁷² but later stated that "there is no evidence to show that the ... plaintiff ... in any way

⁶⁶ *Sellars v. The Queen*, [1980] 1 S.C.R. 527, at pp. 529-530, (1980), 110 D.L.R. (3d) 629, at pp. 631-632, per Chouinard J., for an unanimous court; see *infra*, at footnote 196.

⁶⁷ For example, *Whitehead v. North Vancouver*, [1939] 3 D.L.R. 83, at p. 88, [1939] 1 W.W.R. 369, at p. 375 (B.C.C.A.); *Eggs v. Beechey*, [1943] 2 D.L.R. 699, at pp. 700, 709, [1943] 1 W.W.R. 682, at pp. 685, 695 (B.C.C.A.); *Gives v. CNR*, [1941] 4 D.L.R. 625, at p. 630, [1941] O.R. 341, at p. 347 (Ont. C.A.); *Bruce v. McIntyre*, [1954] 2 D.L.R. 799, at pp. 803-804, [1954] O.R. 265, at pp. 273-274 (Ont. C.A.).

⁶⁸ *Supra*, footnote 36 (varying, [1926] 3 D.L.R. 918 (N.B. App. Div.)).

⁶⁹ There is no report of the trial, probably because it was a jury trial. The jury's findings are set out by the New Brunswick Appellate Division, *ibid.*, at p. 919, and the Supreme Court of Canada, *ibid.*, at p. 305 (S.C.R.); the Dominion Law Report of the Supreme Court decision does not restate the jury's findings.

⁷⁰ S.N.B. 1925, c. 41.

⁷¹ See New Brunswick Appellate Division, *supra*, footnote 68, at pp. 919, 927; Supreme Court of Canada, *supra*, footnote 36, at pp. 305, 312 (S.C.R.), 192 (D.L.R.) for clarification with respect to the quantum of the verdict for the plaintiff.

⁷² *Ibid.*, at p. 919.

was the cause of [the truck's] plunging off the road".⁷³ Despite the latter statement, he affirmed the trial judgment.⁷⁴

On further appeal to the Supreme Court of Canada, it was held that the plaintiff had not been contributorily negligent and judgment was entered for him in the full amount of his damages. Anglin C.J.C., for the majority, concluded that the conduct of the plaintiff was not a proximate cause of his injuries at common law and that, therefore, "no question of apportioning the damages" arose.⁷⁵ It followed that the Contributory Negligence Act had "no application to the case . . .".⁷⁶ In analyzing Anglin C.J.C.'s reasons, it is necessary to take into account how the words "proximate cause" were used in 1927 as opposed merely to considering current conceptions of their meaning. In 1927 "proximate cause" was used in at least two different senses, one in the context of a defendant's negligence and the other in the context of a plaintiff's contributory negligence.⁷⁷ The former conception was analogous to our current conception of proximate causation⁸⁰ whereas the latter could incorporate not only that conception but also the last clear chance rule. This was because last clear chance was confusingly explained in causation language: in particular, a party who did not take an opportunity to avoid the consequences of the other's negligence rendered that other's conduct mere "*causa sine qua non*" as opposed to "*causa causans*".⁷⁹

It is uncertain, therefore, in which sense Anglin C.J.C. used "proximate cause". Certainly it is possible that he intended the meaning which automatically incorporated last clear chance. This interpretation of his reasons is bolstered by his reference⁸⁰ to *The Volute*.⁸¹ However, it is more

⁷³ *Ibid.*, at p. 924.

⁷⁴ More precisely, the parts of the judgment relevant to the analysis here. The verdict for the plaintiff's father was varied; *ibid.*, at p. 927.

⁷⁵ *Supra*, footnote 36, at pp. 309 (S.C.R.), 189 (D.L.R.).

⁷⁶ *Ibid.*, at pp. 311 (S.C.R.), 191 (D.L.R.).

⁷⁷ Williams, *op. cit.*, footnote 4, pp. 236-239, 244-248, 255; MacIntyre, *loc. cit.*, footnote 3, at p. 264.

⁷⁸ I use "analogous to" rather than "the same as" since, while proximate causation in the sense of requiring some causal connection beyond mere cause-in-fact is the same today as in 1927, the test for determining proximate causation has changed. In 1927, the test was directness (*In Re Polemis and Furness, Withy & Co. Ltd.*, [1921] 3 K.B. 560 (C.A.)) whereas now it is foreseeability (*Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co. Ltd. (The Wagon Mound)*, [1961] A.C. 388, [1961] 1 All E.R. 404 (P.C.)).

⁷⁹ MacIntyre, *loc. cit.*, footnote 3, at p. 258, observed that: "[t]hese misused Latin tags and fictitious categories give an air of intellectual inevitability to a purely emotional conclusion". Today's move towards use of plain English in legal reasoning would buttress these observations.

⁸⁰ *Supra*, footnote 36, at pp. 310 (S.C.R.), 190 (D.L.R.).

⁸¹ *Supra*, footnote 36.

likely that he was using "proximate cause" in its general negligence law sense rather than its contributory negligence sense, since he stated:⁸²

In order to constitute contributory negligence it does not suffice that there should be some fault on the part of the plaintiff without which the injury that he complains of would not have been suffered; a cause which is merely a *sine qua non* is not adequate. As in the case of primary negligence charged against the defendant, there must be proof, or at least evidence from which it can reasonably be inferred, that the negligence charged was a proximate, in the sense of an effective, cause of such injury.

This general proximate causation consideration would not involve last clear chance since that rule only became relevant if the plaintiff had been contributorily negligent.

This interpretation of Anglin C.J.C.'s reasons is supported by reference to the second statement by Hazen C.J. in the Appeal Division referred to above and the concurring reasons of Newcombe J. in the Supreme Court. While Newcombe J. also referred⁸³ to *The Volute*, he specifically limited his reasons by stating that he did not find it necessary "to assent to more" than that the plaintiff's negligence was not a cause of his injury and that, therefore, the Contributory Negligence Act had "nothing to do with the case".⁸⁴ Questions concerning the interpretation of the Act were left to be decided when they arose.⁸⁵ Admittedly, referring back to the two meanings of "proximate cause", this leaves the possibility that he was relying upon last clear chance. However, he indicated that the court had heard no argument concerning the interpretation of the apportionment legislation⁸⁶ and, in particular, it would seem from the juxtaposition of this comment and his mention of *The Volute* that the court had not heard argument on whether last clear chance survived the enactment of apportionment legislation.⁸⁷

Obviously, consideration of *McLaughlin v. Long* provides a good exercise in dealing with the "abracadabra of causation".⁸⁸ However, I suggest that it did not determine whether last clear chance survived the enactment of apportionment legislation. Rather, it merely held that on the facts the plaintiff's conduct had not been a proximate

⁸² *Supra*, footnote 36, at pp. 310 (S.C.R.), 190 (D.L.R.). (Emphasis added).

⁸³ *Ibid.*, at pp. 313 (S.C.R.), 193 (D.L.R.).

⁸⁴ *Ibid.*, at pp. 313-314 (S.C.R.), 193 (D.L.R.).

⁸⁵ *Ibid.*, at pp. 313 (S.C.R.), 193 (D.L.R.).

⁸⁶ *Ibid.*

⁸⁷ The difficulty in determining precisely what was in issue before the court is indicated in MacIntyre, *loc. cit.*, footnote 3, at p. 263, where the opinion that "the court probably thought that it had the question of whether the last-chance doctrine survived the statutes before it" is followed by the recognition that the court made "[n]o effort . . . to consider whether it . . . [was] necessary or wise to retain the last-chance doctrine after the enactment of the apportionment statutes".

⁸⁸ *Supra*, text accompanying footnote 23.

cause of his injuries, in the usual non-"last clear chance loaded" meaning of those words.

Cecil Wright explained *McLaughlin v. Long* as follows:⁸⁹

The accident would have happened in exactly the same way if the plaintiff had been properly on the running board of the car. Therefor [sic] his wrongful act was not a contributing cause in fact.

While focusing on cause-in-fact instead of proximate causation, it is clear that Wright did not interpret the case as having held that last clear chance survived apportionment legislation. Unfortunately, his interpretation was ignored not only in subsequent cases but also in academic writing.⁹⁰ For example, only two years later, Malcolm MacIntyre wrote that the "Supreme Court of Canada has interpreted [apportionment] statutes in a manner which leaves the last clear chance doctrine unimpaired"⁹¹ and did not mention Wright's opinion. Subsequently, MacIntyre appears to have at least approached Wright's position, and he wrote:⁹²

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. . . . The . . . [Supreme Court] could very easily have disposed of [the] 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.

In 1952, the Privy Council considered the relationship between last clear chance and apportionment legislation. Lord Tucker, delivering the Board's reasons in *Sigurdson v. British Columbia Electric Railway Co. Ltd.*,⁹³ stated that "the so-called principle of *Davies v. Mann* . . . remains unaffected by the . . . [apportionment] enactments, though it may well be that in practice this 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".

Between its decision in *McLaughlin v. Long*⁹⁴ and that in *Hartman v. Fisette*,⁹⁵ the Supreme Court of Canada did no more than occa-

⁸⁹ C. Wright, Case and Comment (1938), 16 Can. Bar Rev. 137, at p. 142, note 23. Similarly, see C. Wright, The Law of Torts: 1923-1947 (1948), 26 Can. Bar Rev. 46, at p. 72.

⁹⁰ An exception is Williams, *op. cit.*, footnote 4, p. 264, note 9.

⁹¹ MacIntyre, *loc. cit.*, footnote 1, at p. 687 (Can. Bar Rev.). For similar statements as to the holding in the case, see Bowker, *loc. cit.*, footnote 4, at p. 203; Klar, in Klar, *op. cit.*, footnote 4, p. 158.

⁹² MacIntyre, *loc. cit.*, footnote 3, at pp. 263-264. He did not, however, specifically refer to Wright's comments.

⁹³ *Supra*, footnote 30, at pp. 303-304 (A.C.), 10 (D.L.R.). The legislation under consideration was The Contributory Negligence Act, R.S.B.C. 1948, c. 68, which was silent on last clear chance.

⁹⁴ *Supra*, footnote 30.

⁹⁵ *Supra*, footnote 62.

sionally reaffirm the former.⁹⁶ In one such case,⁹⁷ Rand J. specifically stated that counsel's submission that last clear chance had been superseded by the enactment of apportionment legislation was contrary to the court's decision in *McLaughlin v. Long*. There is some indication that as late as the early 1960s,⁹⁸ and perhaps as late as 1968,⁹⁹ the court was still proceeding on the view that last clear chance survived apportionment legislation and would be applied if the facts warranted.

Given the Supreme Court's own interpretation of *McLaughlin v. Long* as having held that last clear chance survived the enactment of apportionment legislation and Dickson J.'s recent comment in *Hartman v. Fisette* to the contrary, what is the law? This question is considered below.¹⁰⁰

(3) *Manitoba authority*

The Manitoba Court of Appeal has given conflicting signals as to whether last clear chance survived the enactment of apportionment legislation. Monnin J.A. has stated that he was "satisfied that the doctrine is no longer applicable",¹⁰¹ but in the same case, Freedman C.J.M. was of the opinion that such a declaration "would have to come ... from the Legislature or the Supreme Court of Canada".¹⁰² Most recently, the court again left open the question whether last clear chance survives.¹⁰³ In these circumstances, trial judges may conclude, not unreasonably, that last clear chance remains part of the law of Manitoba.¹⁰⁴

(4) *New Brunswick authority*

Some New Brunswick decisions suggest that last clear chance is no longer likely to be applied and that courts instead will apportion

⁹⁶ *Bruce v. McIntyre*, [1955] S.C.R. 251, [1955] 1 D.L.R. 785; *Brooks v. Ward*, [1956] S.C.R. 683, (1956), 4 D.L.R. (2d) 597.

⁹⁷ *Bruce v. McIntyre*, *ibid.*, at pp. 253 (S.C.R.), 787 (D.L.R.). The other judges implicitly agreed with this conclusion.

⁹⁸ *Hobbs Manufacturing Co. v. Shields*, [1962] S.C.R. 716, (1962), 34 D.L.R. (2d) 307.

⁹⁹ *Petijevich v. Law*, [1969] S.C.R. 257, (1968), 1 D.L.R. (3d) 690. British Columbia had not yet abrogated statutorily last clear chance.

¹⁰⁰ *Infra*, text accompanying footnotes 187-197.

¹⁰¹ *Keough v. Henderson Highway Branch No. 215 of The Royal Canadian Legion* (1978), 91 D.L.R. (3d) 507, at p. 520, [1978] 6 W.W.R. 335, at pp. 348-349 (Man. C.A.).

¹⁰² *Ibid.*, at pp. 516 (D.L.R.), 344 (W.W.R.).

¹⁰³ *Poiras v. Goulet* (1987), 46 Man. R. (2d) 87, at p. 90 (C.A.), per Huband J.A. for the majority. Monnin C.J.M., dissenting, did not mention last clear chance.

¹⁰⁴ *Holian v. United Grain Growers Limited*, [1980] 3 W.W.R. 632, at p. 638, (1980), 2 Man. R. (2d) 374, at p. 383, 11 C.C.L.T. 184, at p. 192 (Man. Q.B.); *Hunter v. Briere*, [1989] 3 W.W.R. 528, at p. 536 (Man. Q.B.).

liability between a negligent plaintiff and defendant.¹⁰⁵ Others simply ignore arguments raising last clear chance.¹⁰⁶ In at least two judgments in the New Brunswick Court of Appeal, Dickson J.'s comment in *Hartman v. Fisette*¹⁰⁷ was relied upon as having determined that last clear chance did not survive the enactment of apportionment legislation.¹⁰⁸ In one of these judgments it was stated that "[the rule] was meant to obviate the harshness of the common law contributory negligence bar and has no 'raison d'être' after apportionment legislation".¹⁰⁹ Very recently, the New Brunswick Court of Appeal has indicated that last clear chance is probably dead, but shied away from clearly saying so.¹¹⁰ Nevertheless, last clear chance can still charm an unsuspecting judge into its confusion.¹¹¹

(5) *Nova Scotia authority*

Decisions in Nova Scotia form a winding and uncertain path to the conclusion that, perhaps, last clear chance has not yet been abandoned there. In *Victoria County v. Powers Bros. Ltd.*,¹¹² MacKeigan C.J.N.S., for the court, appeared critical of the trial judge's use of "last clear chance terms" in his reasons but concluded that his holding one of the parties totally liable was "quite proper . . . on the facts". Unfortunately, he followed in the trial judge's footsteps and himself used last clear chance language. He stated that a "clear line" could be drawn between the negligence of the parties, held that there was "ultimate negligence" on the part of one of them and relied upon leading last clear chance case authority.¹¹³ Since he was apparently

¹⁰⁵ For example, *Dugas v. LeClair* (1962), 47 M.P.R. 299 (N.B. App. Div.); *Knox v. Troussaint* (1969), 1 N.B.R. (2d) 817 (N.B. App. Div.).

¹⁰⁶ In *Patterson v. MacKenzie* (1972), 5 N.B.R. (2d) 176, at p. 189 (N.B. App. Div.), last clear chance was raised as a ground of appeal. However, there was no specific consideration of the rule in any of the three judgments and, in the result, fault was apportioned between the plaintiff and the defendant.

¹⁰⁷ *Supra*, footnote 62.

¹⁰⁸ *Caines v. Bank of Nova Scotia*, *supra*, footnote 24, at pp. 645-646, per Bugold J.A., dissenting, in *obiter*; *Valais v. Long* (1985), 65 N.B.R. (2d) 434, at p. 437 (N.B.C.A.), per Angers J.A., concurring.

¹⁰⁹ *Caines v. Bank of Nova Scotia*, *ibid.*, at p. 645, per Bugold J.A., dissenting, in *obiter*.

¹¹⁰ *Di Domenicantonio v. Canadian National Railway Co.*, New Brunswick Court of Appeal, February 26, 1988, unreported, per Stevenson J. (New Brunswick judgment, [1988] N.B.J. No. 133, Action Nos 244/86/CA, 245/86/CA, 246/86/CA). The trial judgment is reported *sub nom. Stamper v. Finnigan* (1986), 74 N.B.R. (2d) 271 (N.B.Q.B.).

¹¹¹ *Boulay v. Rousselle* (1984), 57 N.B.R. (2d) 235, at pp. 250-258, 30 C.C.L.T. 149, at pp. 160-165 (N.B.Q.B.).

¹¹² (1973), 10 N.S.R. (2d) 54, at pp. 57, 58 (N.S. App. Div.).

¹¹³ *Ibid.*, at p. 58. The cases relied upon were: *Admiralty Commissioners v. S.S. Volute*, *supra*, footnote 36; *Sigurdson v. British Columbia Electric Railway Company*, *supra*, footnote

of the view that the case was not to be determined by the application of last clear chance, use of general negligence causation analysis would have sufficed.¹¹⁴ This would have avoided unnecessary and potentially confusing reference to last clear chance language and case authority.

There then follows a trio of cases in the Nova Scotia Court of Appeal dealing with last clear chance, all decided by the same *coram*—Coffin, Cooper and Macdonald J.J.A. In *Lord Nelson Hotel Limited v. Cambrian Construction Limited*,¹¹⁵ Coffin J.A., for the court, quoted Dickson J.'s comment in *Hartman v. Fisette*¹¹⁶ but did not indicate explicitly whether he agreed or disagreed with it.

In *MacLellan v. MacKay*,¹¹⁷ decided three months after *Cambrian Construction*, Cooper J.A., citing that case, noted that "[his] brother Coffin referred to *Hartman v. Fisette*". He commented:¹¹⁸

I do not find it necessary to express any positive view on the survival or death of the doctrine here because in my opinion the negligence of both parties continued up to the time of the collision with no clear line of demarcation to bring into play the doctrine of last-clear-chance.

Coffin J.A., concurring, specifically agreed with Cooper J.A. on this point.¹¹⁹ Macdonald J.A., dissenting, did not specifically use either the expression "last clear chance" or "ultimate negligence". However, he was of the opinion that "a clear line . . . [could] be drawn between the negligence of the [parties]", with the result that previous Supreme Court of Canada authority on point was "conclusive of the issue".¹²⁰

30; *Great Eastern Oil and Import Company Ltd. v. Frederick E. Best Motor Accessories Company Ltd.*, *supra*, footnote 29.

¹¹⁴ For example, since both Maritime and Billard had been negligent but the subsequent negligence of Billard was considered to be so extreme, liability could have been apportioned according to fault with a finding that Billard was entirely at fault. Alternatively, Billard could have been held to have been *novus actus interveniens*. Indeed, this analysis is suggested by MacKeigan C.J.N.S.' reference, *ibid.*, at p. 58, to the trial judge's finding "that Billard's extreme recklessness blocked or isolated the undoubted causal contribution of Maritime in creating the conditions which made Billard's fire uncontrollable". (Emphasis added). Either possibility would achieve the same result, that is, judgment holding Billard entirely liable for the damage caused by the fire.

¹¹⁵ (1976), 17 N.S.R. (2d) 336, at pp. 351-352, *sub nom.*, *Cambrian Construction Ltd. v. Lord Nelson Hotel Ltd.* (1976), 1 C.C.L.T. 345, at pp. 356-357 (N.S. App. Div.).

¹¹⁶ *Supra*, footnote 62. Dickson J.'s comment is set out in the text, *supra*, footnote 64.

¹¹⁷ (1976), 18 N.S.R. (2d) 639, at p. 650, *sub nom.*, *MacKay v. MacLellan*, (1976), 1 C.C.L.T. 310, at pp. 321-322 (N.S. App. Div.). (Emphasis added).

¹¹⁸ *Ibid.*, at pp. 650 (N.S.R.), 322 (C.C.L.T.).

¹¹⁹ *Ibid.*, at pp. 642 (N.S.R.), 315 (C.C.L.T.).

¹²⁰ *Ibid.*, at pp. 659 (N.S.R.), 329 (C.C.L.T.). The reference to the Supreme Court of Canada is Taschereau J.'s reasons in *Brooks v. Ward*, *supra*, footnote 96. While MacDonald J.A.'s use of last clear chance language and reference to *Brooks v. Ward* strongly suggest that the rule was the basis for his decision, he had earlier stated, at pp. 659 (N.S.R.), 329 (C.C.L.T.), that he was "of the opinion that . . . [the appellant's negligence] was not

In *Smith v. Pinch*,¹²¹ the only issue before the court was whether last clear chance should have been applied at trial. Cooper J.A., for the court, referred to *Cambrian Construction, MacLellan v. MacKay*, and *Hartman v. Fisette*, and then stated:¹²²

I approach the issue here in the light of the ... cases to which I have referred. Did the negligence of each of the parties continue up to the moment of the collision or can it be said that the effect of the appellant's negligence was then *spent* insofar as the respondent was concerned leaving his negligence as the *sole effective cause* of the accident?

Notably, although Macdonald J.A. was again a member of the *coram*, no reference was made to his dissenting reasons in *MacLellan v. MacKay*. In the result, Cooper J.A. held that the negligence of both parties continued up to the time of the collision "as was the situation in the *MacKay* case".¹²³ Once again, there is no specific conclusion whether last clear chance survives in Nova Scotia. However, last clear chance appears to taint the reasoning of the court. For example, what does "spent" mean? Does this refer simply to the factual determination of whether a cause is connected to the loss or does it refer to a prior act of negligence not being actionable because of the application of last clear chance? In short, is general negligence analysis or last clear chance being applied?

The uncertain position taken by the Nova Scotia Court of Appeal permits trial judges to proceed as though last clear chance is still good law in the province.¹²⁴

(6) *Ontario authority*

Since at least 1941, there had been attempts in the Ontario Court of Appeal to kill judicially last clear chance.¹²⁵ The *coup de grâce* was struck by Laskin J.A. when, speaking for an unanimous court, he stated that enactment of apportionment legislation had "dispense[d] with any need to look hard over one's shoulder for the doctrine of ultimate negligence or the 'last opportunity' rule".¹²⁶ No recent Ontario

an effective factor causing or contributing to the accident". The explanation of last clear chance in causation language makes the precise basis for his decision unclear: Klar, Annotation to *MacKay v. MacLellan and Gamble*, *loc. cit.*, at pp. 311-314.

¹²¹ (1978), 26 N.S.R. (2d) 91, at p. 96 (N.S. App. Div.).

¹²² *Ibid.*, at p. 94. (Emphasis added).

¹²³ *Ibid.*, at p. 96.

¹²⁴ *McKay v. Toole* (1984), 65 N.S.R. (2d) 426, at pp. 429-431 (N.S.T.D.), per Richard J.

¹²⁵ *Gives v. C.N.R.*, *supra*, footnote 67, at pp. 630 (D.L.R.), 347 (O.R.), per Henderson J.A., concurring.

¹²⁶ *R.A. Beamish Stores Co. Ltd. v. F.W. Argue Ltd.* (1966), 57 D.L.R. (2d) 691, at p. 700, [1966] 2 O.R. 615, at p. 623 (Ont. C.A.), varied *sub nom.*, *F.W. Argue Limited v. Howe*, [1969] S.C.R. 354, (1968), 3 D.L.R. (3d) 290.

decision appears to have even mentioned last clear chance, suggesting that Ontario counsel and judges consider the rule obsolete.¹²⁷

(7) *Commonwealth authority*

Like Manitoba, New Brunswick, Nova Scotia and Ontario, other Commonwealth jurisdictions have, with one exception,¹²⁸ no legislation either specifically abrogating or retaining last clear chance. Although not without some initial hesitation and divergence of opinion,¹²⁹ Commonwealth courts have now concluded that last clear chance did not survive the enactment of apportionment legislation.¹³⁰ In the view of Denning L.J., this was because the rule was no longer required to mitigate the potential harshness of the contributory negligence bar to a plaintiff's recovery.¹³¹ Most recently, Edmund Davies L.J. has stated:¹³²

After suffering for some years from progressive anaemia, [the so-called "last opportunity" doctrine] was killed off by the Law Reform (Contributory Negligence) Act of 1945, and I personally now decline to play any part in administering the kiss of life to the mummy.

The existence of such reasoning makes the treatment of last clear chance in the Supreme Court of Canada prior to *Hartman v. Fisette*¹³³ even more disappointing; not only did the court never consider the policies underlying the judicial creation of last clear chance and the subsequent enactment of apportionment legislation, it consistently ignored the relative wealth of comment on the matter in other Commonwealth courts.

¹²⁷ *Seniunas v. Lou's Transport* (1971), 25 D.L.R. (3d) 277, [1972] 2 O.R. 241 (Ont. H.C.) is the last reported Ontario decision to apply last clear chance and *Austin Airways Ltd. v. Stewart* (1973), 54 D.L.R. (3d) 501, 7 O.R. (2d) 137 (Ont. H.C.) is the last to mention it in *obiter*. Neither referred to *Beamish*.

¹²⁸ *Supra*, text accompanying footnote 60.

¹²⁹ For example, *Davies v. Swan Motor Co. (Swansea) Ltd.*, *supra*, footnote 24; *Helson v. McKenzies (Cuba Street) Ltd.*, [1950] N.Z.L.R. 878 (C.A.); *Alford v. Magee*, *supra*, footnote 22.

¹³⁰ *Chisman v. Electromation (Export) Ltd.* (1969), 6 K.I.R. 456 (C.A.); *Evans v. Parberry* (1969), 92 W.N. (N.S.W.) 146 (S.C.). No recent New Zealand case appears even to have mentioned last clear chance. Perhaps this indicates that judges there have accepted the academic opinion that last clear chance did not survive the enactment of apportionment legislation; see Negligence: The End of the Doctrine of Last Opportunity (1949), 25 N.Z.L.J. 209 and 225.

¹³¹ *Davies v. Swan Motor Co. (Swansea) Ltd.*, *supra*, footnote 24, at pp. 321, 322.

¹³² *Chisman v. Electromation (Export) Ltd.*, *supra*, footnote 130, at p. 459. Lord Denning M.R. specifically agreed (*ibid.*, at pp. 458-459) and Phillimore L.J. said that he did "not think ... that this case [had] got anything to do with the doctrine of last opportunity" (*ibid.*, at p. 461). Interestingly, in *Rouse v. Squires*, [1973] 1 Q.B. 889 (C.A.), *Chisman* was neither cited in argument nor referred to in any of the reasons. However, none of the three Lord Justices accepted counsel's invitation to revive last clear chance.

¹³³ *Supra*, footnote 62.

E. *Alberta, Newfoundland, Northwest Territories, Saskatchewan and Yukon Territory*

(1) *Statutes retaining last clear chance*

Alberta, Newfoundland, the Northwest Territories, Saskatchewan and the Yukon Territory have legislation specifically retaining last clear chance.¹³⁴ It does not appear that any other Commonwealth jurisdiction has similar legislation. As a typical example, the relevant Yukon provision states:¹³⁵

At the trial of an action, a judge shall *not* take into consideration *nor* shall he submit it to the jury, as the case may be, any question as to whether, notwithstanding the fault of one party, the other could have avoided the consequences thereof, *unless* in the opinion of the judge, there is evidence 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.

In characteristically blunt style, MacIntyre wrote that "these sections are just the old, old story and all they really say is: Don't forget *The Volute*".¹³⁶ A decade later, Bowker similarly referred to these provisions as having "had no practical effect. In the provinces that have enacted ... [them] the courts give as little (or as great) effect to ... [them] as the courts of the other provinces give to *The Volute*".¹³⁷

Only two cases appear to have specifically commented on the effect of these provisions. In one, they were said to "have gone a long way in legislating against [the rule]", with the result that to be absolved from liability, a party's negligence "would have to be so remote in causation as ... [to have] become a matter of narrative only".¹³⁸ The other, paraphrasing the legislation, stated that such a provision "forbids the submission of ... [a last clear chance] question to the jury unless in the opinion of the trial judge there was evidence upon which the jury could find that the one act was clearly subsequent to and severable from the other", and then added that that deter-

¹³⁴ Alberta: The Contributory Negligence Act, R.S.A. 1980, c. C-23, ss. 6, 7; Newfoundland: The Contributory Negligence Act, R.S.N. 1970, c. 61, ss. 5, 6; Northwest Territories: The Contributory Negligence Act, R.S.N.W.T. 1974, c. C-13, s. 6; Saskatchewan: The Contributory Negligence Act, R.S.S. 1978, c. C-31, ss. 5, 6; Yukon Territory: The Contributory Negligence Act, R.S.Y.T. 1971, c. C-14, s. 6. All of these provisions are substantially the same. The provincial statutes have one section which deals with trial by judge alone and another which deals with trial by judge and jury whereas the two territorial statutes have one section dealing with both forms of trial.

¹³⁵ *Ibid.* (Emphasis added).

¹³⁶ MacIntyre, *loc. cit.*, footnote 3, at p. 275.

¹³⁷ Bowker, *loc. cit.*, footnote 4, at p. 204.

¹³⁸ *Caplan v. Ramsay* (1955), 14 W.W.R. 607, at p. 614 (Sask. C.A.), per Gordon J.A., dissenting. Martin C.J.S., for the majority, did not comment on the effect of such provisions.

mination "is one for the trial judge's discretion".¹³⁹ While "discretion" must refer to whatever discretion the trial judge may in practice have in making a preliminary factual assessment and not to a discretion whether to instruct on last clear chance once the factual criteria of the second branch of the typical provision retaining last clear chance have been satisfied,¹⁴⁰ the tenor of these comments suggests that trial judges should err on the side of not instructing juries or themselves on last clear chance.

(2) *Statutes retaining last clear chance avoided by judges*

Unsurprisingly, there are decisions which state that provisions retaining last clear chance are to be given effect in fact situations which they encompass. Although some of these decisions proceeded to apply the legislation retaining the rule,¹⁴¹ such statements were often made in the safety of *obiter*. For example, a statutory provision retaining last clear chance may be inapplicable either because it is held that the plaintiff was not contributorily negligent¹⁴² or the negligent acts of the plaintiff and defendant were contemporaneous.¹⁴³

However, some judges avoid statutory provisions retaining last clear chance in cases involving classic last clear chance fact situations. Since all jurisdictions which have such provisions enacted them at the same time as they enacted their apportionment legislation,¹⁴⁴ it is impossible to employ standard legislative interpretation techniques to avoid their application. In particular, implicit repeal and inconsistency with the principal provisions of apportionment legislation are not available.¹⁴⁵ Instead, the legislation retaining last clear chance is either referred to and then ignored or simply ignored altogether.

¹³⁹ *Ficko v. Thibault* (1967), 59 W.W.R. 500, at p. 502 (Sask. C.A.), per Woods J.A., for the court.

¹⁴⁰ Namely, that the conduct of one party is "clearly subsequent" to, "severable" from and "not . . . substantially contemporaneous" with the conduct of the other. See the Yukon provision, reproduced, *supra*, text accompanying footnote 135.

¹⁴¹ For example, *Healey's Estate v. Brown* (1977), 18 Nfld. & P.E.I.R. 492, at pp. 501-502 (Nfld. T.D.).

¹⁴² For example, *Great Eastern Oil and Import Co. v. Frederick E. Best Motor Accessories Co. Ltd.*, *supra*, footnote 29; *Mitchell v. U-Haul Co. of Canada Ltd.* (1986), 47 Alta. L.R. (2d) 193 (Alta. Q.B.); *Blundon v. Osmond* (1986), 58 Nfld. & P.E.I.R. 295 (Nfld. Dist. Ct.).

¹⁴³ For example, *Gutka v. Ruszkowski* (1982), 16 Sask. R. 117 (Sask. Q.B.), affirmed (1984), 33 Sask. R. 161 (Sask. C.A.).

¹⁴⁴ Alberta: The Contributory Negligence Act, S.A. 1937, c. 18; Newfoundland: The Contributory Negligence Act, 1951, S.N. 1951, c. 48; Northwest Territories: The Contributory Negligence Act, S.N.W.T. 1950, c. 17; Saskatchewan: The Contributory Negligence Act, 1944, S.S. 1944, c. 23; Yukon Territory: The Contributory Negligence Act, S.Y.T. 1955 (1st Sess.), c. 8.

¹⁴⁵ See P.-A. Côté, *The Interpretation of Legislation in Canada* (1984), pp. 74-84, 274-289.

*Lengauer v. Bate*¹⁴⁶ is instructive. The plaintiff stopped his car near the median of a highway because he had tire trouble. He was stopped for approximately five minutes and had begun to work on his car. During the time that he was stopped, six to twelve cars passed him without difficulty. The defendant was driving through a cloud of fog on the highway, approaching the car of the plaintiff from the rear of the plaintiff's car. The defendant emerged from the cloud and noticed the plaintiff and his stationary car. He took no evasive action except to apply his brakes. He hit the plaintiff and his car.

At trial, Cullen J. held that even if the plaintiff had been at fault in stopping on the highway, that fault had become "static" or "crystallized" at that time.¹⁴⁷ He further held that the defendant had been negligent in driving too quickly through the cloud of fog and emerging from it without knowing what was beyond it. After referring to last clear chance and reproducing the section of the Alberta Contributory Negligence Act retaining the rule, he concluded that the defendant's negligence was subsequent to and severable from any negligence on the part of the plaintiff. Applying the Act, he therefore held the defendant totally liable.¹⁴⁸

In very brief reasons, both the Alberta Court of Appeal and the Supreme Court of Canada disagreed with Cullen J.'s interpretation of the facts, thereby rendering the provisions of the section retaining last clear chance inapplicable. Clement J.A. held that the plaintiff had been contributorily negligent in stopping his vehicle where he did, that that negligence "continu[ed] to the moment of collision"¹⁴⁹ and that there could be no clear separation made between his negligence and that of the defendant. In the result, he apportioned liability equally between the plaintiff and defendant. Martland J., for an unanimous nine-judge court, affirmed that judgment.¹⁵⁰ I stress that the appeal judges were fully aware of the section retaining last clear chance and the fact situation in the case, since Cullen J.'s reasons dealt with the facts in detail and reproduced the section. That is, they were not proceeding *per incuriam*.¹⁵¹

MacIntyre once referred to a similar case in which "the defendant negligently permitted his stationary horse and buggy to obstruct the highway in the path of the plaintiff. The plaintiff negligently ran into

¹⁴⁶ (1974), 2 N.R. 585 (S.C.C.), affirming (1973), 2 N.R. 586 (Alta. C.A.), reversing in part (1972), 2 N.R. 587 (Alta. Q.B.).

¹⁴⁷ *Ibid.*, at p. 590 (Alta. Q.B.).

¹⁴⁸ *Ibid.*, at pp. 593-595.

¹⁴⁹ *Ibid.*, at p. 587 (Alta. C.A.).

¹⁵⁰ *Ibid.*, at p. 586 (S.C.C.).

¹⁵¹ Concerning *per incuriam* judgments, see *infra*, footnotes 190, 195.

the horse and buggy, sustaining injuries in so doing".¹⁵² He characterized that fact situation by saying that "a clearer case of . . . last clear chance would be hard to find".¹⁵³ *Davies v. Mann*¹⁵⁴ itself involved similar facts. If provisions retaining last clear chance are to be applied in cases whose facts they encompass, it is difficult to disagree with Cullen J.'s reasoning. Perhaps, however, to achieve what they felt was a fairer result, the appeal judges chose to interpret the facts as they did in order to avoid the applicability of the legislation. The judgments on appeal may represent an example of judicial avoidance of an obsolete statutory provision.¹⁵⁵

Other cases involving classic last clear chance fact situations do not even mention legislation retaining the rule. An example is *Abbott v. Kasza*.¹⁵⁶ The defendant Kasza parked his tractor-trailer on the side of the highway in order to unload cargo. In parking, he left only eighteen feet of the twenty-eight feet of pavement of the highway available for other traffic. Sometime later, the plaintiff Abbott came along the highway, slowed down to pass the defendant's unit and then proceeded up an incline. Having slowed down, he did not have sufficient speed to make the incline. After various manoeuvres, his unit slid into a ditch and capsized, damaging his unit and cargo and injuring him.

At trial, McDonald J. held that the plaintiff had not been contributorily negligent and imposed total liability on the defendant.¹⁵⁷

On appeal, Clement J.A., for the majority, held that the defendant had been negligent in parking his unit as he had, that the plaintiff had been contributorily negligent in pressing on up the incline at low speed and that both acts were causes of the accident. Clement

¹⁵² MacIntyre, *loc. cit.*, footnote 1, at p. 677, footnote 29 (Can. Bar Rev.).

¹⁵³ *Ibid.*

¹⁵⁴ *Supra*, footnote 14.

¹⁵⁵ A plethora of American writing has considered the various techniques used by courts to avoid, overtly or covertly, applying statutes which they consider obsolete. Such judicial avoidance of legislation has been both lauded as a desirable exercise in "judicial creativity" necessary to achieve results acceptable from a policy perspective and decried as an unconstitutional intrusion by the courts into legislative jurisdiction. See, for example, G. Gilmore, On Statutory Obsolescence (1966-67), 39 Univ. Colorado L. Rev. 461; J. Davies, A Response to Statutory Obsolescence: The Nonprimacy of Statutes Act (1979), 4 Vermont L. Rev. 203; G. Gilmore, Putting Senator Davies in Context (1979), 4 Vermont L. Rev. 233; G. Calabresi, The Nonprimacy of Statutes Act: A Comment (1979), 4 Vermont L. Rev. 247; M. Socarras, Judicial Modification of Statutes: A Separation of Powers Defense of Legislative Inefficiency (1985-86), 4 Yale Law and Policy Rev. 228. It is unlikely, however, that a court would ignore legislation merely on the basis that it was obsolete: see *K Mart Corporation v. Cartier Inc.*, 100 L. Ed. 2d 313 (1988).

¹⁵⁶ [1975] 3 W.W.R. 163 (Alta. T.D.), varied, (1976), 71 D.L.R. (3d) 581, [1976] 4 W.W.R. 20 (Alta. App. Div.).

¹⁵⁷ *Ibid.*, at p. 173 (Alta. T.D.).

J.A. did not refer to the section of the Alberta Contributory Negligence Act retaining last clear chance. But if both the plaintiff and the defendant were negligent, was the fact situation not the classic type which would attract the application of last clear chance? Clement J.A. indicated why last clear chance should be ignored. He quoted with approval Lord Tucker in *Sigurdson v. British Columbia Electric Railway Co. Ltd.*, who had stated:¹⁵⁸

Thirty years ago Viscount Birkenhead in *The Volute* had occasion to observe: "Upon the whole I think that the question of contributory negligence must be dealt with somewhat broadly and upon common-sense principles as a jury would probably deal with it. . .".

... this language ... is much to be preferred to attempts to classify acts in relation to one another with reference to time or with regard to the knowledge of one party at a particular moment of the negligence of the other party and his appreciation of the resulting danger, and by such tests to create categories in some of which one party is solely liable and others in which both parties are liable.

He stressed that "[t]hese observations are equally applicable to a Judge sitting alone as the tribunal of fact as well as law".¹⁵⁹ In other words, general negligence law should be applied, without resort to an artificial rule like last clear chance. Prowse J.A. dissented since in his opinion the defendant had not been negligent. Neither mentioned *Lengauer v. Bate*,¹⁶⁰ even though, interestingly, both had been members of the court which had decided that case only three years earlier. However, this fact indicates that there can be no doubt that they were aware of the existence of the legislation retaining last clear chance.

Abbott v. Kasza represents an evolution beyond *Lengauer v. Bate*. In both cases, legislation retaining last clear chance was avoided, and reasonably so. The cases differ markedly, however, in how this was achieved. In *Lengauer v. Bate* both the Alberta Court of Appeal and the Supreme Court of Canada tersely and rather unconvincingly disagreed with the trial judge's assessment of the facts, with the result that their substituted findings rendered the legislation inapplicable. While their reasons are superficially orthodox, they cannot disguise that the fact situation was of the classic last clear chance type. The difficulty which ensues is that, although the case clearly indicates that a court may choose to avoid legislation retaining last clear chance, doubt remains as to whether it will do so necessarily in a similar case. In *Abbott v. Kasza*, on the other hand, the Alberta Court of Appeal boldly ignored the legislation and in effect stated that it was right to do so.¹⁶¹ While this case might be criticized or praised

¹⁵⁸ *Ibid.*, at pp. 592 (D.L.R.), 33 (W.W.R.) (Alta. App. Div.). See *Sigurdson v. British Columbia Electric Railway Co. Ltd.*, *supra*, footnote 30, at pp. 299 (A.C.), 6 (D.L.R.).

¹⁵⁹ *Ibid.*

¹⁶⁰ *Supra*, footnote 146.

¹⁶¹ One case unequivocally stated that *Abbott v. Kasza* represents a "different approach" to fact situations which previously would have attracted the application of the last clear

as an example of covert judicial ignoring of an obsolete statutory provision,¹⁶² its reasoning is preferable to that in *Lengauer v. Bate* since it clearly indicates that courts will, not simply may, avoid legislation retaining last clear chance.

In short, two principal approaches are currently taken to legislation retaining last clear chance. First, such legislation may be applied in a classic last clear chance fact situation. Of course, some judicial flexibility may be possible in initially characterizing a fact situation so as not to attract the application of the legislation. Second, such legislation may not be applied even in a classic last clear chance situation. The legislation may be referred to and then ignored or simply avoided altogether. Further, the legislation may be avoided by an unconvincing characterization of the facts or by reasoning that last clear chance should be avoided. In an attempt to determine which approach is most commonly taken to legislation retaining last clear chance, I searched 185 recent volumes of reports from series which focus on jurisdictions with such legislation.¹⁶³ I examined every case in which negligence was alleged, looking for classic last clear chance fact situations. I located only two such cases.

In one,¹⁶⁴ the defendant parked his car with part of it on the travelled section of the highway. He then walked to the nearest town, went to the beverage room and stayed there until closing time. Meanwhile, back on the highway, the plaintiff collided his truck into the parked car. It was held that the defendant was negligent in leaving his car as he had but that there was no negligence on the part of the plaintiff. In the second case,¹⁶⁵ the plaintiff coasted his stalled car to the side of the road, leaving it partially blocking the roadway. The defendant's truck hit the car, injuring the plaintiff. It was held that both the plaintiff and the defendant had been negligent and liability was apportioned equally. In both cases the parties' conduct was assessed according to general negligence analysis and there was no reference either to last clear chance or the legislation retaining it. While no statistically significant conclusions may be drawn, the results

chance rule, that it is a manifestation "of the evolution of contributory negligence that has been going on constantly in our courts since the passing of [apportionment legislation]" and that "on a number of occasions" judges "have been really loath to follow" decisions of the Supreme Court of Canada stating that last clear chance was not affected by the enactment of apportionment legislation: *Marchuk v. Scott* (1978), 8 Alta. L.R. (2d) 237, at pp. 240-242 (Alta. Dist. Ct.), per Crossley D.C.J.

¹⁶² *Supra*, footnote 155.

¹⁶³ The reports examined were (1977), 1 Alta. L.R. (2d)—(1987), 54 Alta. L.R. (2d); (1983), 39 A.R.—(1987), 78 A.R.; (1983), 40 Nfld. & P.E.I.R.—(1987), 65 Nfld. & P.E.I.R.; [1983] N.W.T.R.—[1987] N.W.T.R.; (1980), 1 Sask. R.—(1987), 57 Sask. R.; and (1986), 1 Y.R.—(1987), 2 Y.R.

¹⁶⁴ *Wood v. Butler* (1981), 12 Sask. R. 163 (Sask. Q.B.). The fact situation was somewhat more complex than outlined in the text. However, only the subrogated claim of the Public Insurance Corporation with respect to the loss of the Salmond truck is directly relevant to an enquiry whether last clear chance might have been considered.

¹⁶⁵ *Stettner v. Todd* (1981), 16 Sask. R. 207 (Sask. Q.B.).

of the review may suggest that trial judges avoid legislation retaining last clear chance more often than they apply it.

*Oman v. Harnett*¹⁶⁶ serves as a vehicle for speculation why statutory provisions retaining last clear chance may be avoided. The case involved claims for damages arising out of a three vehicle accident. One vehicle, driven by Harnett, had been stopped by him in such a way that part of it protruded onto the travelled portion of the highway. Two other vehicles, driven by two other parties to the action, approached the stopped vehicle from opposite directions. In the result, there was a collision among all three vehicles. The driver of one of the two approaching vehicles testified that she had noticed "a mere shadow",¹⁶⁷ alternatively described as "a puzzling shadow",¹⁶⁸ on the highway. Her passenger testified that when she, the passenger, saw the shadow, she remarked "What the hell!",¹⁶⁹ following which the driver proceeded along the highway and into the collision.

Cormack J. held that there had been no negligence on the part of the second driver despite her own admission that she had seen a "shadow" on the road. In the result, he held that Harnett had been negligent in parking his vehicle so that it partly obstructed the travelled portion of the highway and held him totally responsible for the damages caused by the collision.

Given the evidence as considered by Cormack J., would not a more reasonable conclusion have been that both Harnett and the second driver had been negligent and that both negligent acts caused or contributed to the accident? Was Cormack J. really of the view that a driver who shares a passenger's "What the hell" attitude to what was obviously something on the road should not be found negligent? However, if he had made such findings, then, given that the case involved a classic last clear chance fact situation (a clear line could be drawn between Harnett's having parked his vehicle and the second driver having continued along the highway despite having seen the shadow), the section of the Alberta Contributory Negligence Act¹⁷⁰ retaining last clear chance would have been applicable and he would have had to apply the rule and hold the second driver totally liable for the damage caused by the collision. He may have been of the view that Harnett's negligence was of a significantly greater degree than that of the second driver, and may have concluded that, while it would be unjust to saddle either with total liability, it would be a lesser evil so to saddle Harnett. In the alternative, given that he did not mention the provision retaining last clear chance, he may simply have been unaware

¹⁶⁶ (1980), 26 A.R. 378 (Alta. Q.B.).

¹⁶⁷ *Ibid.*, at p. 385.

¹⁶⁸ *Ibid.*, at p. 387.

¹⁶⁹ *Ibid.*, at p. 385.

¹⁷⁰ R.S.A. 1980, c. C-23; formerly R.S.A. 1970, c. 65, s. 8. See, *infra*, footnote 186.

of it¹⁷¹ and may have determined for other reasons that the second driver was not liable.

III. *Avoiding Last Clear Chance*

A. *Last Clear Chance Obsolete*

Last clear chance is obsolete. The rule was created to mitigate the harshness of the contributory negligence bar to recovery by a plaintiff and, once this bar was abrogated by the enactment of apportionment legislation, it became superfluous. This has been the universal academic opinion,¹⁷² in some courts of appeal,¹⁷³ in other Commonwealth courts¹⁷⁴ and the most recent opinion in the Supreme Court of Canada.¹⁷⁵ Furthermore, application of last clear chance may result in holdings which are inconsistent with the purpose of apportionment legislation, namely apportioning liability according to degrees of fault; that is, application of the rule may result in unfairness to litigants.¹⁷⁶

It appears that some judges continue to rely upon last clear chance in the mistaken belief that it is the only means to fix total liability on one party in a situation involving successive acts of negligence by the plaintiff and defendant. However, general negligence analysis provides several means for fixing total liability on one party without any resort to last clear chance.¹⁷⁷

First, it may be held that there is no cause-in-fact connection between the negligence of one of the parties and the loss. Second, it may be held that, while there is a cause-in-fact connection between each party's act of negligence and the loss, there is no proximate causation connection between one party's act and the loss; that is, it may be held that the loss was not a foreseeable result of that party's act. Third, even if it is held that there is both cause-in-fact and proximate causation connection between the first party's negligent act and the loss, it may be held that the second party was *novus actus interveniens*. Fourth, even if it is held

¹⁷¹ See, *supra*, at text accompanying footnote 59.

¹⁷² Wright, *loc. cit.*, footnote 89, at p. 139; MacIntyre, *loc. cit.*, footnote 1, at p. 690 (Can. Bar Rev.); MacIntyre, *loc. cit.*, footnote 3, at p. 283; Williams, *op. cit.*, footnote 4, p. 265; Bowker, *loc. cit.*, footnote 4, at pp. 213, 215; Klar, in Klar, *op. cit.*, footnote 4, p. 158; Fleming, *op. cit.*, footnote 2, pp. 251-252; Linden, *op. cit.*, footnote 2, p. 434.

¹⁷³ *Supra*, text accompanying footnotes 101, 108, 125-126.

¹⁷⁴ *Supra*, text accompanying footnotes 130-132.

¹⁷⁵ *Supra*, text accompanying footnotes 62-66.

¹⁷⁶ See, *supra*, footnote 32.

¹⁷⁷ I will consider only the situation in which the judge has held that both parties were negligent, since that is the situation contemplated by the last clear chance rule. However, for completeness, I mention that it is also possible for a judge to fix total liability on one party by finding either that the defendant did not owe a duty of care to the plaintiff or that either the plaintiff or the defendant's conduct was not negligent in the sense of being below the standard of care required.

that there are cause-in-fact and proximate causation connections between each party's act of negligence and the loss and that the second party was not *novus actus interveniens*, it may nevertheless be held that one party's negligence was in a degree so significantly in excess of the other's that the latter's negligence may be ignored for the purposes of fixing liability.¹⁷⁸

The third and fourth possibilities require further comment. To constitute *novus actus interveniens*, the second (usually referred to as the "intervening") party's negligent act must have been utterly or completely unforeseeable.¹⁷⁹ This is a different criterion from those required for the application of last clear chance, namely that the second party failed to take an opportunity to avoid the consequences of the other's negligence, that his or her negligent act was clearly severable from that of the first party and that the second party had not been put into an emergency situation by the negligence of the first. In short, *novus actus interveniens* is not synonymous with last clear chance.¹⁸⁰

The fourth possibility referred to is somewhat problematic. Some judges and writers attempt to distinguish the last clear chance rule from what they refer to as "the principle in *Davies v. Mann*".¹⁸¹ Their position is while the inflexible last clear chance rule is obsolete, *Davies v. Mann* remains good authority for the proposition that "sole liability may be imputed to one party even though the misdoings of both are relevant to the cause of the accident".¹⁸² Other judges and writers prefer to rely upon apportionment legislation as their authority for fixing total liability on one of the two negligent parties.¹⁸³ Reference either to last clear chance or the

¹⁷⁸ I use "latter" only to refer to the party whose negligence was in a degree significantly less than the other. No temporal connotation is intended. This "latter party" may be either the plaintiff or the defendant and the "latter party" may have committed either the first (preceding) or second (succeeding) act of negligence.

¹⁷⁹ *Bradford v. Kanellos*, [1974] S.C.R. 409, (1973), 40 D.L.R. (3d) 578, affirming (1970), 18 D.L.R. (3d) 60, [1971] 2 O.R. 393 (Ont. C.A.).

¹⁸⁰ For a clear statement of the difference between last clear chance and *novus actus interveniens*, see Williams, *op. cit.*, footnote 4, p. 245.

¹⁸¹ For example, *Davies v. Swan Motor Co. (Swansea) Ltd.*, *supra*, footnote 24, at pp. 310 (Bucknill L.J.), 315 (Evershed L.J.), 321 (Denning L.J. dissenting); *Alford v. Magee* (1952), *supra*, footnote 22, at pp. 459-460; *Stapley v. Gypsum Mines Ltd.*, [1953] A.C. 663, at p. 687, [1953] 2 All E.R. 478, at pp. 489-490, per Lord Asquith; Heuston and Buckley, *op. cit.*, footnote 22, pp. 575-576, 589; W.V.H. Rogers, Winfield and Jolowicz on Tort (12th ed., 1984), p. 152.

¹⁸² Heuston and Buckley, *ibid.*, p. 589.

¹⁸³ For example, *Davies v. Swan Motor Co. (Swansea) Ltd.*, *supra*, footnote 24, at p. 323, per Denning L.J.; *Chisman v. Electromotion (Export) Ltd.*, *supra*, footnote 130, at pp. 461-462, per Phillimore L.J.; *Laframboise v. Pickell*, *supra*, footnote 59, at p. 32 of unreported reasons; Williams, *op. cit.*, footnote 4, p. 265; Fleming, *op. cit.*, footnote 2, p. 253; Linden, *op. cit.*, footnote 2, pp. 246, 251. I caution that Fleming relies upon the statutory discretion to do what is "just and equitable" provided for in the English, Australian and New Zealand apportionment legislation. Typical Canadian apportionment legislation does not contain these terms but it has been held that this legislation directs

so-called principle in *Davies v. Mann* is unnecessary. In my opinion, the latter is the preferable route since any mention of *Davies v. Mann*, which remains inextricably associated with the last clear chance rule, is fraught with potential confusion.

I emphasize that, regardless of the means employed to fix total liability on one party, the factual basis for so doing may be that that party did not take an opportunity to avoid the accident.¹⁸⁴

For decades there have been calls for legislation abrogating last clear chance. A clear model for such legislation exists. However, only British Columbia and Prince Edward Island have heeded those calls. Undoubtedly such legislation is the better solution but, since it does not appear to be forthcoming in most provinces and territories, judicial avoidance of the rule is required. As Laskin J. once put it:¹⁸⁵

No doubt, legislative action may be the better way to lay down policies.... But the better way is not the only way....

B. Judicial Avoidance of Last Clear Chance

(1) *British Columbia, Prince Edward Island and Quebec*

Last clear chance should present no problem in these provinces. Given the civil doctrine of *faute commune*, last clear chance has had no place whatsoever in Quebec law for almost a hundred years. In British Columbia and Prince Edward Island, the rule has been abrogated by statute. The only potential difficulty is ensuring that counsel and judges are aware of the legislation.¹⁸⁶

judges to do what is just and equitable: *Itterman v. Saris*, [1974] 6 W.W.R. 153, at p. 161 (B.C.S.C.); *Clelland v. Berryman* (1974), 56 D.L.R. (3d) 395, at p. 407, [1975] 1 W.W.R. 147, at p. 160 (B.C.S.C.).

¹⁸⁴ For example, *Kuharski v. Inder*, [1986] B.C.D. Civil—2883-01, [1986] B.C.J. No. 2762 (B.C.S.C.); *Clelland v. Berryman*, *ibid.*; *Horsman v. McGarvey*, [1983] 3 W.W.R. 564, (1983), 43 B.C.L.R. 192 (B.C.C.A.); *Sieben v. Kohlman* (1988), 65 Sask. R. 166 (Sask. Q.B.) (notably, despite the finding that one of the parties "made no reasonable attempt to avoid the accident", no reference was made to the provisions of the Saskatchewan Contributory Negligence Act retaining last clear chance); Cheifetz, *op. cit.*, footnote 2, p. 103, as referred to in *Bergen v. Sturgeon General Hospital District No. 100* (1984), 63 A.R. 62, at p. 62 (Alta. Q.B.).

¹⁸⁵ Dissenting in *Murdoch v. Murdoch*, [1975] 1 S.C.R. 423, at pp. 450-451, (1973), 41 D.L.R. (3d) 367, at p. 385.

¹⁸⁶ See, *supra*, text accompanying footnote 59. In this section, I fully agree with counsel and judges applying specific legislation, namely that abrogating last clear chance. In a subsequent section, I suggest that counsel and judges are right to avoid legislation specifically retaining last clear chance: *infra*, text accompanying footnotes 198-200. I submit that these positions are not inconsistent. In both cases, expanding the analysis, the first step is to determine whether there is legislation on point. In some provinces this enquiry will disclose legislation abrogating last clear chance whereas in other provinces and both territories it will disclose legislation specifically retaining the rule. The second step is to determine whether the legislation applies. This involves not only the usual enquiry whether the fact

(2) *Manitoba, New Brunswick, Nova Scotia and Ontario*

Since these provinces have no legislation specifically dealing with last clear chance, whether the rule survived the enactment of apportionment legislation must be determined entirely at common law. As already indicated,¹⁸⁷ this determination confronts a conflict in Supreme Court of Canada authority. While earlier decisions stated that the rule survived the enactment of apportionment legislation, they were based on what may be an erroneous interpretation of the seminal case and are inconsistent with Dickson J.'s comment in *Hartman v. Fiset*.¹⁸⁸

The Supreme Court has stated that it is not bound by its own previous decisions.¹⁸⁹ It will overrule even a clear line of authority if it concludes either that that authority was decided incorrectly or *per incuriam*¹⁹⁰ or that it is inconsistent with changed social policy and conditions.¹⁹¹ For example, the court may conclude that the rationale underlying a rule established in previous decisions has ceased to exist, rendering the rule obsolete, or that the policy purposes underlying current law would be frustrated by continued recognition and application of the rule.¹⁹²

The Supreme Court should no longer adhere to its previous decisions which held that last clear chance survived the enactment of apportionment legislation. The court should consider the vintage of those decisions, the

situation of the case is encompassed by the statutory provision but also an enquiry whether the provision should be applied from a policy perspective and whether it can be avoided from a doctrinal perspective.

¹⁸⁷ *Supra*, text accompanying footnote 100.

¹⁸⁸ *Supra*, footnote 62.

¹⁸⁹ *Reference Re The Farm Products Marketing Act*, [1957] S.C.R. 198, at pp. 212-213 (1957), 7 D.L.R. (2d) 257, at pp. 271-272; *Hill v. The Queen*, [1977] 1 S.C.R. 827, at p. 850, (1975), 62 D.L.R. (3d) 193, at p. 209; *Paquette v. The Queen*, [1977] 2 S.C.R. 189, at p. 197, (1976), 70 D.L.R. (3d) 129, at p. 135; *McNamara Construction (Western) Ltd. v. The Queen*, [1977] 2 S.C.R. 654, at p. 661, (1977), 75 D.L.R. (3d) 273, at p. 279; *A.V.G. Management Science Ltd. v. Barwell Developments Ltd.*, [1979] 2 S.C.R. 43, at p. 57, (1978), 92 D.L.R. (3d) 289, at p. 298; *Vetrovec v. The Queen*, [1982] 1 S.C.R. 811, at p. 830, (1982), 136 D.L.R. (3d) 89, at p. 105; *Minister of Indian Affairs and Northern Development v. Ranville*, [1982] 2 S.C.R. 518, at pp. 527-528, (1982), 139 D.L.R. (3d) 1, at pp. 8-9.

¹⁹⁰ For example, *R. v. Chabot*, [1980] 2 S.C.R. 985, (1980), 117 D.L.R. (3d) 527. A decision given *per incuriam*, as through ignorance of an inconsistent statutory provision or inadequate consideration of an issue, is not binding authority: *Cassell & Co. Ltd. v. Broome*, [1972] A.C. 1027, at p. 1107, [1972] 1 All E.R. 801, at p. 854 (H.L.), per Viscount Dilhorne (but see, at pp. 1054 (A.C.), 809 (All E.R.) per Lord Hailsham); *Bell v. Cessna Aircraft Co.* (1983), 46 B.C.L.R. 145, at p. 148 (B.C.C.A.).

¹⁹¹ For example, *Harrison v. Carswell*, [1976] 2 S.C.R. 200, (1975), 62 D.L.R. (3d) 68; *R. v. Zelensky*, [1978] 2 S.C.R. 940, (1978), 86 D.L.R. (3d) 179; *Asamera Oil Corporation Ltd. v. Sea Oil & General Corporation*, [1979] 1 S.C.R. 633, (1978), 89 D.L.R. (3d) 1; *A.V.G. Management Science Ltd. v. Barwell Developments Ltd.*, *supra*, footnote 189.

¹⁹² For example, *A.V.G. Management Science Ltd.*, *ibid.*, and, *semble*, *Asamera Oil Corporation Ltd. v. Sea Oil & General Corporation*, *ibid.*

universally held academic opinion to the contrary and the similarly contrary opinion in other Commonwealth courts. From a doctrinal perspective, the court should place significance on the apparent lack of argument in *McLaughlin v. Long*¹⁹³ as to whether last clear chance survived apportionment legislation. Further, subsequent decisions may have interpreted that case erroneously as having held that the rule survived and certainly none of them considered the matter afresh. Thus, the court should conclude that its previous decisions holding that last clear chance survived the enactment of apportionment legislation were decided incorrectly or, at least, *per incuriam*. From a broader policy perspective, the court might conclude that application of the rule would be inconsistent with the purpose served by apportionment legislation. Dickson J.'s comment in *Hartman v. Fisette*¹⁹⁴ is a strong indication of this possibility and arguably overrules the court's previous decisions.

Lower courts, including courts of appeal, are in a different situation since they are bound by decisions of the Supreme Court. However, they too can and should not follow those decisions of the Supreme Court which stated that last clear chance survived the enactment of apportionment legislation.

A lower court may consider whether a decision of the Supreme Court is good law by enquiring whether the court rendered the decision *per incuriam* as, for example, without adequate consideration of the matter, or has since rendered an inconsistent decision. The former proposition is contentious and there is conflicting opinion on the matter.¹⁹⁵ However, if a lower court is not bound by a *per incuriam* decision of the Supreme Court, then it is not bound by *McLaughlin v. Long*, if it is accepted that that decision was given *per incuriam*, or by the decisions which followed it. But this contentious route to avoiding *McLaughlin v. Long* is unnecessary since the latter proposition is not contentious. A lower court is bound to follow the most recent opinion of the Supreme Court, even if *obiter*, provided it constitutes the court's considered opinion.¹⁹⁶ Lower courts should consider themselves prudently bound by Dickson J.'s comment in *Hartman v. Fisette*, since that comment is the most recent statement of the court

¹⁹³ *Supra*, footnote 68.

¹⁹⁴ *Supra*, footnote 62.

¹⁹⁵ There is no doubt that the Supreme Court of Canada may find previous authority to have been decided *per incuriam*: see footnote 190. The approach which a lower court, even a court of appeal, may take to a previous decision of the Supreme Court of Canada which is argued to be *per incuriam* is more problematic: *Cassell & Co. Ltd. v. Broome*, *supra*, footnote 190, at pp. 1054, 1107 (A.C.), 809, 854 (All E.R.).

¹⁹⁶ *Sellars v. The Queen*, *supra*, footnote 66, at pp. 529-530 (S.C.R.), 631-632 (D.L.R.), per Chouinard J., for the court. *Sed quaere* precisely what "considered" means in the nebulous world of *stare decisis*. For comments providing conflicting points of view on *Sellars*, see G.S. Gilbert, Comment (1982), 60 Can. Bar Rev. 373, and A. Peltomaa, Comment (1982), 60 Can. Bar Rev. 823.

on the question of whether last clear chance survived the enactment of apportionment legislation and, further, is the only statement in the court which has adverted to the purpose for which such legislation was enacted. Indeed, the courts of appeal in all four provinces presently under consideration appear either to have reached this conclusion or to be receptive to it.¹⁹⁷

(3) *Alberta, Newfoundland, Northwest Territories, Saskatchewan and Yukon Territory*

Courts in these jurisdictions must confront legislation specifically retaining last clear chance. At first impression it might appear impossible for a court considering a classic last clear chance fact situation to avoid applying the rule, since avoiding the rule requires avoiding constitutionally unimpeachable legislation. But in fact this is easily justified. While different approaches have been taken to legislation retaining last clear chance,¹⁹⁸ the Supreme Court of Canada in *Lengauer v. Bate*¹⁹⁹ in effect gave its *imprimatur* to avoiding such legislation. Courts might consider themselves bound to follow the lead of the Supreme Court in this regard. At the very least, *Lengauer v. Bate* certainly affords justification for avoiding legislation retaining last clear chance.

As indicated,²⁰⁰ the Alberta Court of Appeal moved beyond *Lengauer v. Bate* and stated that general negligence law is to be preferred to classifying and categorizing rules such as last clear chance. This approach is preferable to that in *Lengauer v. Bate* since not only is legislation retaining last clear chance thereby avoided but also it is avoided for explicitly stated reasons. This provides guidance to other courts that they not only may, but should, avoid applying such legislation.

While not all courts may dare to be so bold as to adopt this second approach, it would appear that they are more likely to avoid completely legislation retaining last clear chance than to apply it or ignore it after referring to it.²⁰¹ They are right to avoid it completely. Further, in avoiding such legislation, it would be preferable to state clearly that the reason for avoiding the archaic last clear chance rule is to apply the general law of negligence. To refer to such legislation but then simply to ignore it is merely to pay lip service to it. To apply it and work an exception to the general policy of apportionment is unfair to the litigants. However, as suggested, a lower court unwilling to take this bolder approach nevertheless may achieve securely the same result in a particular case by imitating the Supreme Court's action in *Lengauer v. Bate*.

¹⁹⁷ *Supra*, text accompanying footnotes 101-127.

¹⁹⁸ *Supra*, text accompanying footnotes 141-171.

¹⁹⁹ *Supra*, footnote 146.

²⁰⁰ *Supra*, text accompanying footnotes 156-162.

²⁰¹ *Supra*, text accompanying footnotes 163-165.

Conclusion

Last clear chance is obsolete and courts in all provinces and territories should and can avoid its application. They should do so because to do otherwise would work injustice to litigants, since the effect of the rule is inconsistent with the purpose served by apportionment legislation. From a practical perspective, they can do so.

In Quebec, last clear chance is simply irrelevant.

In British Columbia and Prince Edward Island, the rule has been abrogated statutorily.

In Manitoba, New Brunswick, Nova Scotia and Ontario, courts should adopt the Supreme Court's indication in *Hartman v. Fisette*²⁰² that last clear chance did not survive the enactment of apportionment legislation and should expressly declare the rule dead rather than allowing it to linger on. This would ensure fairness to the litigants in the particular cases and also contribute well to the development of negligence law by establishing precedent clearly stating that last clear chance is no longer law.

In Alberta, Newfoundland, the Northwest Territories, Saskatchewan and the Yukon Territory, courts should avoid legislation retaining last clear chance. Preferably, courts should follow the example of the Alberta Court of Appeal in *Abbott v. Kasza*²⁰³ and indicate that general negligence analysis is to be applied rather than last clear chance. This would again achieve fairness for particular litigants and establish precedent indicating that legislation retaining last clear chance is to be avoided. Alternatively, courts could refer to the example of the Supreme Court in *Lengauer v. Bate*²⁰⁴ or simply ignore the legislation, without reference either to *Abbott v. Kasza* or *Lengauer v. Bate*. While these alternatives would avoid unfairness to particular litigants, they are less desirable since they would not establish precedent indicating that legislation retaining the rule is to be avoided. This would leave open the possibility of its unfair application in future cases. Ignoring legislation retaining last clear chance after paying lip service to it, while permitting fairness to particular litigants, would leave the impression that the legislation is still to be applied in classic last clear chance fact situations and is, therefore, not desirable.

In this way courts can finally eliminate last clear chance—an archaic, confusing and unfair rule—from Canadian law.

²⁰² *Supra*, footnote 62.

²⁰³ *Supra*, footnote 156.

²⁰⁴ *Supra*, footnote 146.