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THE RATIONALE OF LAST CLEAR CHANCE *

Although origins are obscure and although the word "negligence" did not always carry the meaning it carries today, it was settled before the advent of the nineteenth century that a defendant was liable in damages for harm caused to a plaintiff by the defendant's negligent conduct.

Shortly after the turn of the nineteenth century, this liability was subjected to the qualification that a plaintiff's negligence, if contributing to harm resulting from the defendant's negligent conduct, was a complete bar to recovery. This doctrine is well known as the principle of *Butterfield* v. *Forrester*.[1] But when the courts perceived that this led to unnecessarily harsh results in cases in which the plaintiff was only slightly negligent and the defendant's negligence was comparatively great, a rule was evolved which denied the defense if the defendant's negligence was later, in point of time, than that of the plaintiff. This came to be known as the rule in *Davies* v. *Mann*,[2] justified as an exception to the *Butterfield* case on the theory that the plaintiff's negligence was not the proximate cause of the harm. Text writers, and some courts, stressed the time element, and provided an alternative description of the exception to the contributory negligence bar under the name of the last clear chance doctrine. Thus was prevented a clear realization of the underlying reason for the escape from the harshness of the contributory negligence bar, *i.e.*, that in last clear chance cases the defendant's negligence was relatively greater than the plaintiff's.

To demonstrate that the last clear chance doctrine in all its protean forms (and a wide variety may be seen in the

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[1] 11 East 60 (1809).

[2] 10 M. & W. 546 (1842).

American state courts) is merely an escape from the contributory negligence bar, by means of comparative negligence in various disguises, it will be necessary first to trace the evolution of the rule from its birth to its modern form.

I

A number of attempts have been made to explain contributory negligence; but none of those, except the universal solvent "causation," offers to explain its compensating principle —its antidote—last clear chance. This study is therefore an exploratory excursion into the power and mystery of common-law causation as that word has been used in last clear chance cases. The books are replete with instances of a very wide use of the word "cause." It is used to embrace a host of matters which cannot be discussed in this study. The list includes forseeable risks, difficulties of proof, the type of interest secured, judicial restrictions of liability for damages resulting from acts done in violation of regulatory statutes to liability for harms within the risks which the legislature desired to reduce, and general notions as to the extent to which a wrongdoer should be made liable for harms resulting from forseeable risks which his conduct has created. Until we remove the wrappings and become conscious of the various items of jural purpose which are now hidden in the bundle labelled "causation", we cannot hope for clarity in the law of torts.

The word "cause," as used in the authoritative materials dealing with last clear chance, may be but a conclusion as to legal responsibility stated as if it were a reason leading to that conclusion, or it may connote greater blameworthiness. The former is a common factor in all the legal uses of the word, and will not be referred to again in this study. The latter, when separable from the former, is the additional element of meaning peculiar to last clear chance cases.

In understanding the perfection of "cause" to conceal, and by concealing, to facilitate and make possible the development of a doctrine which appears to be one thing and in reality is something quite different, it must not be forgotten that the human mind in dealing with matters involving moral judgment has an inveterate tendency to give the same answer to the two different questions: (a) What produced the harm? (b) Whose fault was it?

Negligence is a word used to express the value judgment that a certain activity, or in rare cases inactivity,[3] created an undue risk of harm. Negligence may then be said to be a characteristic of conduct which creates an undue risk of harm. What is an *undue* risk varies with time and place, and involves a value judgment on particular conduct after the risk has materialized in harm. The greater the risk, using "risk" to include both the probability and the magnitude of the harm, and the less the utility — without attempting to refine on "utility" for the moment — of the activity, the greater the departure from the standard of care. There are therefore infinite degrees of negligence, and the complaint that gross negligence is ordinary negligence with the addition of a "vituperative epithet" is merely a common-law refusal to refine. The refusal may have been proper when the only question to be determined was whether the defendant under all the circumstances had been negligent enough to be compelled to pay for the harm he had wrought. But such self-limitation should not persist in any case in which the determination of the degrees of negligence is functional. In making negligence a basis of liability, the law has been influenced by a purposefulness which is in part conscious and in part unconscious. Our universal tendency to mete out praise and blame expresses an unconscious didacticism directed to fostering or repressing conduct considered desirable or undesirable in the society of the time and place. When we create a liability or disability because of the existence of negligence on the part of the defendant or the plaintiff, we do so because we wish to discourage the conduct which has created the risk of the harm. Consistency with our underlying ethical motivation should therefore make us strive to allocate the loss in contributory negligence cases in proportion to the degree of the fault of each of the negligent actors.

I do not know by what accident the common law happened to start off with contributory negligence as an absolute bar. The leading decision, *Butterfield* v. *Forrester*, antedates any clear formulation of what we today mean by negligence. In his judgment, Lord Ellenborough seems to have treated the plaintiff's conduct as equivalent to wilful stubbornness.[4] He gives as his only analogy: "In the case of persons riding on the wrong side of the road, that would not authorize another to purposely ride up against them."

[3] For the sake of brevity, this article will deal with activity only and will steer clear of the borderline between negative and affirmative obligations.

[4] The defendant negligently obstructed a highway with a pole. The plaintiff riding violently at twilight failed to see it and was injured.

Obviously the plaintiff who had recklessly contributed to his misfortune would not appear entitled to full recovery, and that he should recover a portion only of his damages does not appear to have occurred to anyone who participated in the case. The admiralty courts and the courts in Scotland were at this time dividing the damages, but there is no discussion of the possibility of division in *Butterfield* v. *Forrester*, and after that case had become a precedent, that pathway appears to have been closed for over a century to the common-law courts.

The phraseology of the last clear chance doctrine, that is, its empty form, finds its first expression in *Bridge* v. *The Grand Junction Railway*,[5] and it has acquired its meaning from the many subsequent solutions on particular facts. The plaintiff's declaration alleged that the defendant's train negligently ran into a train in which the plaintiff was a passenger and injured him; the defendant pleaded that the collision was caused by the faults of both trains and that the defendant had nothing to do in the way of ownership or control with the train in which the plaintiff was riding.

The plaintiff demurred specially, assigning several defects in the defendant's plea and, as an afterthought, that the defendant's plea was bad in substance. The plaintiff's demurrer was sustained. The court, speaking through Baron Parke, gave two reasons: (a) that as a special plea which amounted to the general issue the plea was bad in form for prolixity; (b) that the plea was bad in substance also, and said, referring to *Butterfield* v. *Forrester:*

> The rule [of law] is, that, although there may have been negligence on the part of the plaintiff, yet, unless he might, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence, he is entitled to recover: if by ordinary care he might have avoided them, he is the author of his own wrong. That is the only way in which the rule as to the exercise of ordinary care is applicable to questions of this kind.

Notice the adherence to the form of words used in *Butterfield* v. *Forrester*. In that case the plaintiff fell inside the category created by the words and failed; *i.e.*, had he been riding with care, he would not have hurt himself on the pole. In this case there is nothing that the plaintiff could have done, and he falls outside the category. Although the last clear chance formula is complete, there is no thought in Baron Parke's mind which looks like what came to be known as last clear chance. The

[5] 3 M. & W. 244, 248 (1838).

plaintiff is still the hero of the formula. If he could have avoided the consequences of the defendant's negligence he cannot recover. Later cases were to make the defendant the hero of this same formula. It can be said that the whole law of contributory negligence and last clear chance was contained in an inspired sentence in *Butterfield* v. *Forrester*, only in the same manner and with about as much truth as it can be said that the whole body of American constitutional law is contained in the document known as the Constitution.

For a season, the common-law courts permitted apportionment of the damages. Unfortunately this practice received no formulated sanctification in the reports, and so failed to establish itself. In *Raisin* v. *Mitchell*[6] the defendant's brig and the plaintiff's sloop were in collision; the testimony bearing on fault was in direct conflict. Tindal C.J., charged the jury:

> You must be satisfied that the injury was occasioned by the want of care or the improper conduct of the defendants, and was not imputable in any degree to any want of care or any improper conduct on the part of the plaintiff.

The jury found for the plaintiff and divided the damages in half. When questioned by the judge, they said they had done this because there were faults on both sides. Whereupon the defendant claimed that he was entitled to a verdict. Chief Justice Tindal replied, "No. There may be faults to a certain extent."

In *Smith* v. *Dobson*,[7] decided in 1841, the jury, despite strict instructions to the effect that contributory negligence was an absolute bar, returned a verdict for one-quarter of the damages. On appeal, the court refused to disturb the verdict, stating that it could ignore the jury's reasoning which had been based upon comparative faults. The report shows no thought which looks like last clear chance, the desire to escape the full rigor of the contributory negligence bar finding a different outlet.

These cases show the courts charging the jury to the effect that contributory negligence is a complete bar. This the jury promptly ignores and divides the damages. And the judges seem unwilling to disturb the jury's disregard of the "law."

Then in 1842 came the great case of *Davies* v. *Mann*.[8] The plaintiff's declaration alleged that the plaintiff's donkey was lawfully on the highway and that the defendant's horses, in charge

[6] 9 C. & P. 613, 616, 617 (1839).
[7] 3 Man. & G. 59 (1841).
[8] 10 M. & W. 546.

of the defendant's servant, were so negligently directed and governed by the servant that by such negligence the plaintiff's donkey was run over and killed. To this, the defendant pleaded not guilty.

At the trial there was evidence that the ass, with its forefeet fettered, was grazing on the off-side of a twenty-four foot highway, that the defendant's wagon came down a slight descent at a "smartish pace" and knocked the donkey down. The report states that it was proved that the driver of the wagon was some little distance behind the horses. The trial judge, Erskine (who had about six months before participated with Tindal in the appeal of *Smith* v. *Dobson*), told the jury that though the act of the plaintiff in leaving his ass so fettered as to prevent its getting out of the way of carriages might be illegal, still, if the proximate cause of the injury was attributable to the want of proper conduct on the part of the driver of the wagon, the action was maintainable; he further directed them that if they thought the accident might have been avoided by the exercise of ordinary care on the part of the *driver*, they should find for the plaintiff. What else he told them we do not know. The jury found for the plaintiff (damages forty shillings).

This is all we know. We do not know if the donkey was on the travelled portion of the highway, or whether the jury thought that the donkey, unfettered, could have gotten out of the way. Nor do we know where the plaintiff was, whether the defendant's servant saw the donkey, whether the defendant's servant was with his team, nor whether, assuming he was not on the wagon or alongside the horses (which seems to be implied from the evidence), he was close enough to have stopped his team after he saw the donkey — if he saw it before it was hit. We know only that the jury concluded that had the defendant been exercising due care he could have avoided running over the donkey. We do not know whether the jury thought that the plaintiff was negligent at all.[9]

The case came up to the Court of Exchequer on a rule for a new trial on the ground of misdirection. The court unanimously held that there had been no misdirection and refused the rule. Baron Parke, who gave the main opinion, pointed out (during the argument) that, since the plaintiff's allegation was not denied, it must be taken that the donkey was lawfully on

[9] *Cf. Heath's Garage, Ltd.* v. *Hodges*, [1916] 2 K.B. 370 in which it was said that it was not negligent, though in violation of a statute, to let sheep run upon a highway frequented by motor vehicles; *i.e.*, not negligent to the motorist who suffered damages.

the highway, and he also pointed out in his judgment that the defendant had not pleaded that the plaintiff was negligent. He also referred to what he had said in *Bridge* v. *The Grand Junction Railway*, and approved his statement in that case. He then approved the trial judge's instruction, stating that:[10]

> . . . . although the ass may have been wrongfully there, still the defendant was bound to go along the road at such a pace as would . . . . prevent mischief. Were this not so, a man might justify the driving over goods left on a public highway, or even over a man lying asleep there, or the purposely running against a carriage going on the wrong side of the road.

This case must be viewed in the light of those just considered, and it must be remembered that the court was so close in point of time to those cases that they were its conscious or unconscious background, and those cases, to the exclusion of later developments, must be kept in our minds if we wish to understand *Davies* v. *Mann*. So regarded, *Davies* v. *Mann* fades into relative insignificance, and appears as a case in which the plaintiff's negligence, if any, is very slight in comparison with that of the defendant. The trial judge, Erskine, had participated in the appeal of *Smith* v. *Dobson*. Knowing what a jury might do, he may have been bothered by the theoretical inexactness of the earlier cases, and thus had seized upon the proximate cause wording to permit the jury to bring in the verdict which he believed they would in any case bring in, no matter what he told them, and at the same time preserve the appearance of cleaving to principle. I am not suggesting that Mr. Justice Erskine and his colleagues threw up their hands and let the jury take the case away from them. It is not improbable that they were in entire sympathy with any relaxation of the doctrine of *Butterfield* v. *Forrester* which would allow the less blameworthy party to recover from the more blameworthy.

On the appeal, Baron Parke gives as the alternative to the rule he upholds that otherwise a man may justify an intentional aggression. The posed alternative used *arguendo* indicates either the scant attention which the case received, or that the evidence either placed the driver on the team or was as inconclusive as the report we have, and that Baron Parke assumed the driver was on the wagon or in such position with reference to the horses that he had every opportunity to do something about the donkey. However, the facts of the case are indeterminate, and it can be contended that the "principle" applies to any

[10] *Id.* at 549.

state of facts in which the defendant has been negligent. The case has therefore been a convenient authority for escapes from the harshness of *Butterfield* v. *Forrester*.

There was little significant development until *Tuff* v. *Warman*,[11] a case which involved a collision in territorial waters and thus arose in the common-law courts. In this case the defendant's steam vessel saw, but nevertheless ran down, the plaintiff's ship, which had no lookout. The trial judge told the jury that despite the plaintiff's negligence, the defendant would be liable if, having seen the plaintiff's ship, the crew on the defendant's vessel persisted in a course which would inflict injury, because under such circumstances the plaintiff's negligence would not be a direct cause of the collision. This ruling was sustained on appeal on the ground that, if the defendant was responsible for persistence in a course likely to cause injury, the plaintiff would not be a cause without which the injury would not have happened.[12] It is clear that the court is making a comparison of the faults of the parties; one who *persists* in the face of known imminent danger is more at fault than one who through inattention fails to discover danger.

This type of situation furnishes the clearest instance of last clear chance. The doctrine was extended in the case of *Radley v. London & Northwestern Railway*.[13] The plaintiff colliery had negligently piled one coal truck on top of another so that the truck, riding pick-a-back, could not pass under the plaintiff's bridge. The defendant engineer, engaged in shunting the cars, felt resistance when the upper truck came in contact with the bridge. Instead of investigating, he increased his power and the bridge was seriously damaged. The plaintiff recovered.

Notice how neatly the case extends *Tuff* v. *Warman*, and yet in one sense, stays within its logical confines. The defendant was not aware of the dangerous situation created by the plaintiff, but he had received sensory impressions which would tell an ordinary prudent man that a dangerous situation existed, and yet he persisted.

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[11] 5 C. B. (N.S.) 573 (1858).

[12] The case contains hidden difficulties. Whiteman, J., may have had cause, in the sense of risk, in mind, rather than cause in the last clear chance sense of greater blameworthiness. The plaintiff's sailing vessel would have the right of way. Under the circumstances, it might have been justified in holding its course after sighting the defendant steam vessel, in the expectation that the steam vessel would avoid the collision. The collision, under such circumstances, would not have been within the risk created by the absence of the lookout.

[13] 1 App. Cas. 754 (1876).

Clearly this is a possible stopping point. And, if the doctrine is to have any real reference to the argument made by Baron Parke as a reason for his refusal to order a new trial in *Davies* v. *Mann*, we must stop at this point, if not just short of it. If the doctrine is to have any reference to the name under which it will be usually described, its extension must stop with the *Radley* case, because this is as far as it can be said with any honesty that the defendant had the last clear chance. But the cases have provided us with two formulae: (1) cause—with sole, proximate, decisive, efficient and *causa causans* for emphasis, and (2) the expanded ambidexterous *Butterfield* v. *Forrester*—*Davies* v. *Mann* formula, which acquired its classic form at the hands of Lord Penzance in *Radley* v. *London & Northwestern Railway* and reads as follows:[14]

> The first proposition is a general one, to this effect, that the plaintiff in an action for negligence cannot succeed if it is found by the jury that he has himself been guilty of any negligence or want of ordinary care which contributed to cause the accident.
>
> But there is another proposition equally well established, and it is a qualification upon the first, namely, that though the plaintiff may have been guilty of negligence, and although that negligence may, in fact, have contributed to the accident, yet if the defendant could in the result, by the exercise of ordinary care and diligence have avoided the mischief which happened, the plaintiff's negligence will not excuse him.

"Cause" and the above quoted formula are sufficiently vague in meaning to be applied when, as and how a court has been moved by its desire to make the more culpable party stand the whole loss.[15]

There are, of course, other modes of expression.[16] But all courts, no matter what formula they happen to select, will decide

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[14] *Id.* at 759.

[15] While such formulae permit action, it must not be forgotten that they likewise confine action within their various verbal limits. Words and phrases have a way of doing that sort of thing. It is significant that the last clear chance doctrine prospered and became most embracive in jurisdictions which have had the most generalized formulae; those which use words suggesting last clear *chance;* thus, most American jurisdictions will have difficulty in accepting the *Loach* case. See n. 60 *infra.*

[16] The comparative blame valuation has been covered up by various modes of expression. The following is a partial list:

1. The *Radley* v. *London & N. W. Ry.* formula.
2. *Causa proxima non remota spectatur.*
3. The plaintiff's negligence created a *condition* only. (The distinction between a condition and a cause is the most transparent form of transparent subterfuge.)
4. Description of the defendant's negligence as wilful and/or wanton.
5. Description of the defendant's negligence as gross. (This gets close to telling the truth.)

Tuff v. *Warman* for the plaintiff, and *Tuff* v. *Warman* is what gives strength and acceptability to its formal ancestor *Davies* v. *Mann*, while the obscurity of the facts of the earlier case provides an easy method for extending *Tuff* v. *Warman* to any of the possible sets of facts which might have been *Davies* v. *Mann*.

The courts have not permitted these uses of the word "cause" in last clear chance cases to interfere with the proper disposition of cases in which *A* and *B* both negligently injure *C* who is not at fault. Whether *A* or *B*, or neither of them, has the last clear chance, both of them are proximate causes of *C*'s harm and liable to him.[17]

In *Smith* v. *Canadian Pacific Railway*,[18] the defendant's train negligently failed to whistle as it approached a crossing. The plaintiff father negligently drove his car in which was the other plaintiff, his daughter, onto the crossing. The father's negligent conduct was the proximate cause of the harm suffered by him in the ensuing collision. But the failure of the train to whistle was the proximate cause of the harm suffered by the daughter.

In *Topping* v. *Oshawa Street Railway*,[19] *A* negligently drove a truck onto the *B* street railway tracks. The *B* motorman failed to avoid the truck, and, in the ensuing collision, passengers in the *B* streetcar were injured. The court found that *B* had the last clear chance, but held both *A* and *B* liable to the passengers. The court then applied the modern Tortfeasors Contribution Act,[20] and decided that *A* must indemnify *B* for a percentage of the damages.

As the preceding discussion shows, the courts can use the term "proximate cause" and reach results satisfactory to our sense of justice on other grounds. Nevertheless, the anomaly presented by allowing the party who had the last clear chance to obtain contribution from his fellow-tortfeasor who did not have the last clear chance, and, at the same time, allowing the fellow-tortfeasor who did not have the last clear chance to recover in full against the party who had the last clear chance, ought to give us grave concern. Consistency would seem to

6. Last chance :
   (1) Conscious last chance.
   (2) Unconscious last chance.
7. Ultimate negligence—"ought" to have had the last chance.

[17] For an exhaustive discussion, see Bohlen, *Contributory Negligence* (1908) 21 HARV. L. REV. 233, 237–41.

[18] 62 Can. Sup. Ct. 134 (1921).

[19] 66 Ont. L. R. 618 (App. Div. 1931).

[20] The Negligence Act, 1930, Statutes of Ontario, c. 27, § 3. See ONT. REV. STAT. (1937), c. 115, § 2(1).

compel us to go a step further, and permit the party who had the last clear chance to recover back part of what we force him to pay his fellow-tortfeasor for the physical harm sustained in the same collision. In other words, the implications of the modern Tortfeasors Contribution Acts would, in time, work a complete abrogation of the last clear chance doctrine.

II

Thus far the discussion of the last clear chance doctrine has centered upon its development as an escape from the severity of the contributory negligence bar. A parallel demonstration of the nature of the doctrine may be made by contrasting the law applicable to the contributory negligence situation in legal systems not shackled by any such absolute bar from which they must escape. These jurisdictions, as one might expect, were blissfully ignorant of last clear chance.[21] If the two basic theories advanced above — that last clear chance is comparative negligence in disguise, and that the disguise assumed in British courts is the word "cause" — are sound, a study of contributory negligence problems in some of those jurisdictions should disclose flux and confusion. And an examination of the law of Quebec, English admiralty and Scotland, where common-law judges sitting on appeal interpolated last clear chance into systems of law which had not the slightest need for it, does indeed reveal flux and confusion, thus confirming the two theories mentioned.

Quebec.—The relevant sections of the Quebec Civil Code,[22] adopted in 1866, had been patterned on the French *Code Napoléon*, and though the latter jural system had sired a doctrine of *faute commune* — apportionment of the loss proportionate to the degrees of fault of the parties —,[23] the early Quebec

[21] Such is the state of the law in all modern civil-law countries. See INSTITUT AMÉRICAIN DE DROIT ET DE LÉGISLATION COMPARÉE (Études et Documents—Série Français No.9) Art. 186 (1937). See also B. G. B. § 254 and Progetto, Art. 78. It is interesting to note that the Civil Codes, and even the draft codes, purport to divide the damages on the basis of relative cause—which can mean only relative fault. Compare comments on *Long* v. *Toronto Ry.*, 50 Can. Sup. Ct. 224 (1914) cited *infra* note 47.

[22] Section 1053 of the Quebec Civil Code embraces Sections 1382 and 1383 of the *Code Napoléon* and reads as follows: "Toute personne capable de discerner le bien du mal, est responsable du dommage causé par sa faute à autrui, soit par son fait, soit par imprudence, négligence ou inhabilité."

[23] It is well settled that French Jurisprudence Constante and the French doctrinal writings are sources upon which the courts may rely in interpreting Section 1053. But see, for refinements, Mignault *Le Code Civil de la Province de Québec et son Interprétation* (1935) 1 U. OF TORONTO L. J. 104 *et seq.* Since 1879 it has been clear that the French courts will always apportion the damages, and the French Jurisprudence Constante has neither the last clear chance doctrine nor anything remotely resembling it. Civ. 20 Août, 1879 (Sirey 1880) 1, 55; 81 BULLETIN DES ARRÊTS DE

courts still applied the common law of contributory negligence.[24] The gradual infiltration of *faute commune* into Quebec law was given impetus in the lower courts,[25] which are relatively more familiar with the French doctrinal authorities than with the common law. But the doctrine met opposition in each stratum of the judicial hierarchy where the ratio of familiarity is progressively reversed. Conscious conflict has now ceased in the Supreme Court of Canada, and *faute commune* has practically triumphed over last clear chance.[26]

But the struggle for recognition encountered an additional obstacle in the Judicial Committee of the Privy Council, a body of judges more thoroughly imbued with the common law. In *Canadian Pacific Railway* v. *Fréchette*,[27] a brakeman had been injured during shunting operations. Though the trial judge in Quebec permitted the jury to find both the plaintiff and the defendant at fault, apportioning the damages, and though two intervening Quebec courts confirmed this ruling, on appeal, the Judicial Committee advised that judgment be entered for the defendant. The court expressed the common-law attitude of indulgent disapproval of *faute commune* and offered the word "cause," as used when embracing a blame ratio previously determined in the light of the last clear chance doctrine, as the rationale of its decision. A plaintiff would, the court stated, be

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LA COUR DE CASSATION 343; Civ. 24 Juillet, 1918 (Sirey 1920) 1, 359; 120 BULLETIN DES ARRÊTS 257. There are a great many cases in the Cour de Cassation to the same effect, and none opposed. For the attitude of the French doctrinal writers decrying last clear chance, see 6 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS 778, n.1 (1930); 2 MAZEAUD ET MAZEAUD, TRAITÉ THÉORIQUE ET PRATIQUE DE LA RESPONSABILITÉ CIVILE DÉLICTUELLE ET CONTRACTUELLE § 1504 (1931).

[24] *Moffette* v. *The Grand Trunk Railway*, 16 L. C. R. 231 (1866) (before the adoption of the Code); *Periam* v. *Dompierre*, 1 L.N. 5 (1878); *Allan* v. *Mullin*, 4 L. N. 387 (1881) (after the Code). *Cf. Monk* v. *Desroches*, 5 L. N. 404 (1882) (French doctrinal writers cited in competition with common-law authorities). In *Therien* v. *Morrice*, 6 L. N. 110 (1883), there is the interesting phenomenon of impartial application of both the common law of last clear chance, thereby establishing defendant's liability, and the French jurisprudence to reduce the damages.

[25] See, *e.g.*, *Monk* v. *Desroches*, 5 L. N. 404 (1882); *Central Vermont Ry.* v. *Lareau*, 30 L. C. J. 231 (1886); *Bergeron* v. *Tooke*, 9 Que. C. S. 506 (1896); *C. P. R.* v. *Fréchette*, 23 Que. B. du R. 511 (1914).

[26] See *e.g.*, *Price* v. *Roy*, 29 Can. Sup. Ct. 494 (1899); *Shawinigan Carbide Co.* v. *St. Onge*, 37 Can. Sup. Ct. 688 (1906); *Paquet* v. *Dufour*, 39 Can. Sup Ct. 332 (1907); *Nichols Chemical Co.* v. *Lefebvre*, 42 Can. Sup. Ct. 402 (1909); *Shawinigan Carbide Co.* v. *Doucet*, 42 Can. Sup. Ct. 281 (1909). Compare *Bergeron* v. *Tooke*, 27 Can. Sup. Ct. 567 (1897), *rev'g* 9 Que. C. S. 506 (1896) with *Price* v. *Talon*, 32 Can. Sup. Ct. 123 (1902).

[27] [1915] A. C. 871 (P. C.). *Cf.* Mignault, *Le Code Civil de la Province de Québec et son Interprétation* (1935) 1 U. OF TORONTO L. J. 104 (regards this case as victory for *faute commune*, in that it *recognizes* that doctrine).

denied recovery for injury sustained "if his own negligence be the sole effective cause of that injury."[28]

Thus the court gives support to an argument the thesis of which would superimpose upon decisions and statutes expressly permissive of apportionment of damages, the vestiges of last clear chance. If that doctrine would entitle the plaintiff to recover, he recovers in full. If, however, the plaintiff's negligence is classified as "ultimate," he recovers nothing, and hence it is only in the intermediate cases, where no ultimate negligence can be attributed to either party that the decisions or statutes have any application.

The pronouncement of the Judicial Committee, may, through the prestige of that body, have a profound effect on the Supreme Court of Canada in hearing Quebec appeals, and through that body have its effect on the jurisprudence of the Quebec provincial courts. But since courts apply principles with which they are most familiar, on the assumption that these represent the natural order of things, the Quebec provincial courts have not yet embraced the common law of last clear chance, and *faute commune* stands unobtrusively triumphant.[29]

Admiralty.—The early law of the sea was unanchored by any doctrine akin to that which sprang from *Davies* v. *Mann*, and division of damages was its central theme.[30] But, augured

[28] It is interesting to note that the authorities relied on by the court to sustain the principle that contributory negligence is as much a rule of the civil law as of the common law do not support that contention. In citing three Louisiana cases, the court failed to appreciate that Louisiana knows nothing of the doctrine of *faute commune*, being an ordinary common-law state so far as contributory negligence is concerned. See, *e.g.*, *Mercier* v. *New Orleans and Carrolton Railway*, 23 La. Ann. 264 (1871); *Swartz* v. *The Crescent City Railway*, 30 La. Ann. (part 1) 15 (1878); *Wood* v. *Jones*, 34 La. Ann. 1086 (1882). Similarly, the comments of Sourdat, 1 Resp. no. 660 (6ème éd. 1911), on the case of Belva C. Warin, 5 Jurisprudence de la cour de Douai 96 (Sirey 1848) II, 542, also cited in an earlier case relied on by the court, completely misconstrue the holding of that case.

[29] As a sample of what the Quebec courts do after the *Fréchette* case, see *Lachambre* v. *Coleman*, 37 R. L. N. S. 374 (1931). In this case the defendant negligently permitted his stationary horse and buggy to obstruct the highway in the path of the plaintiff. The plaintiff negligently ran into the horse and buggy, sustaining injuries in so doing. Although a clearer case of plaintiff's last clear chance would be hard to find, the plaintiff recovered half damages. See also *Silver Granite Co.* v. *Goulet*, 50 Que. B. du R. 424 (1931).

[30] See *e.g.*, Woodrop-Sims, 2 Dods. 83, 85 (1815). "There are four possibilities under which an accident of this sort may occur. In the first place, it may happen without blame being imputable to either party; as where the loss is occasioned by a storm, or any other *vis major:* In that case, the misfortune must be borne by the party on whom it happens to light; the other not being responsible to him in any degree.—Secondly, a misfortune of this kind may arise where both parties are to blame; where there has been a want of due diligence or of skill on both sides: In such a case, the rule of law is, that the loss must be apportioned between them . . . —Thirdly, it may happen by the misconduct of the suffering party

by Lord Campbell's dictum — "apprehension" that the *Davies* case would be followed if applicable,[31] the interpolation of last clear chance into admiralty law was initiated in cases which, involving collisions between ships in territorial waters, arose in the common-law courts.[32]

The concept that the admiralty and common-law rules were in accord with respect to the *Davies* principle became more firmly entrenched when the Court of Appeal and the House of Lords, manned by common-law lawyers, were vested with jurisdiction over appeals from the Admiralty Division of the High Court of Justice.[33] It was but natural that these appellate courts, bewitched by the unanalyzed multiguity of the word "cause," should apply those common-law doctrines with which they, and the lawyers practicing before them, were most familiar. What they failed to realize was that last clear chance was fashioned to alleviate the harshness of another common-law rule unknown to admiralty.

Actual admiralty practice, having the principle of equal division to fall back upon, did not strain so hard as did the common-law courts to ascertain "sole cause."[34] And since 1911, the Maritime Conventions Act,[35] which enacts rules providing for apportionment of damages in proportion to fault, has furnished the courts hearing admiralty cases with a still more satisfactory tool. Thus we may expect more boldness in finding that both ships were at fault with an even less rigid application of the doctrine of ultimate negligence than heretofore.[36] This superimposition of comparative negligence upon a portion of the last clear chance field, while ostensibly retaining that doctrine unimpaired, may furnish the thin edge of the wedge that will split last clear chance wide open.

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only; and then the rule is, that the sufferer must bear his own burthen. —Lastly, it may have been the fault of the ship which ran the other down; and in this case the injured party would be entitled to an entire compensation from the other." For earlier cases, allowing equal division of the loss in cases of no fault and inscrutable fault, see II MARSDEN, SELECT PLEAS IN THE COURT OF ADMIRALTY, Publication of the Selden Society, vol. xi (1897) introduction lxxix; MARSDEN, COLLISIONS AT SEA (9th ed. 1934) 149–60.

[31] *The General Steam Navigation Co.* v. *Tonkin* (The Ship Friends) 4 Moore P. C. 314 (1844).

[32] See, *e.g.*, *Tuff* v. *Warman*, 5 C. B. N. S. 573 (1858); *Dowell* v. *The General Steam Navigation Co.*, 5 E. & B. 195 (Q. B. 1855).

[33] *Cf. Cayzer, Irvine & Co.* v. *Carron Co.*, 9 App. Cas. 873 (1884); *Spaight* v. *Tedcastle*, 6 App. Cas. 217 (1881).

[34] See, *e.g.*, *Hero* v. *Commissioners*, [1912] A. C. 300.

[35] Public General Statutes, 1911, 1 & 2 GEO. V, c. 57.

[36] See *e.g.*, *Admiralty Commissioners* v. *S. S. Volute*, [1922] 1 A. C. 129; The Eurymedon, [1938] 1 All. Eng. 122. In these two cases the damages were divided equally. Such apportionment may have resulted from force of habit however.

Scotland.—The injection of last clear chance into Scottish jurisprudence was administered in a manner paralleling the development of that doctrine at common law. Early Scots law had permitted the diminution of damages where contributory negligence was established,[37] but, succumbing to a House of Lords dictum,[38] later cases had elevated that defense to a position of complete bar.[39] And its appendage, last clear chance, was engrafted upon it, by a series of reversals of the Scottish Court of Session by the English House of Lords.[40]

It is interesting to note that the superimposition of common-law last clear chance upon admiralty had not wrought such sweeping changes, for the principle of equal division remained otherwise intact. The difference in effect may be attributable to the fact that the long history of division in admiralty was known to, if not fully understood by, the common-law judges, and thus, when the common law met admiralty, the latter was permitted to retain some of that peculiarity. Scots law, however, did not have as long a history, and what history it had received no recognition. The Scots law of negligence had apparently not come of age when it met the common law.

III

Underlying the preceding discussion is the suggestion that courts which do not have contributory negligence to contend with have no need of the last clear chance doctrine. The same basic assumption would lead us to expect that courts which lack the power to apportion the damages will tend to expand their last clear chance doctrine so as to subject to liability a defendant whose fault was greater than that of the plaintiff's, even though such extensions may occasionally result in doing violence to standing rigidities. Illustrative of the fact that practical wisdom sometimes triumphs over stubborn theory are a succession of

[37] *Allan* v. *McLeish*, 2 Murr. 158 (1819); *Hyslop* v. *Durham*, 4 Dunl. 1168 (1842).

[38] In *Paterson* v. *Wallace & Co.*, 1 Macq. H. L. Cas. 748, 754 (1854) Lord Cranworth delivered himself of a dictum to the effect that: "In England and Scotland, and every civilized country, a party who rashly rushes into danger himself and thereby sustains damage cannot say . . . . this is owing to your negligence."

[39] *M'Naughten* v. *The Caledonian Ry.*, 21 Dunl. 160 (1858). *But cf. Whitlaw* v. *Moffat*, 12 Dunl. 434 (1849).

[40] For an illustration of the reluctance of the Court of Session to accept the last clear chance doctrine, see *Mitchell* v. *The Caledonian Ry.*, [1909] S. C. 746, 749; *Taylor* v. *The Dumbarton Burgh & County Tramways Co.*, [1918] S. C. (H. L.) 96. See also *M'Lean* v. *Bell*, [1930] S. C. (C. S.) 954, [1932] S. C. (H. L.) 21 (Scottish counterpart of the *Loach* case).

cases crystallizing in the famous *British Columbia Electric Ry., Ltd.* v. *Loach*[41] in which the last clear chance doctrine reaches its culmination.

The theoretical analysis of the *Loach* case was foreshadowed somewhat by a lower court holding in *Brenner* v. *The Toronto Ry.*[42] There the plaintiff had negligently attempted to cross in front of the defendant's streetcar. The motorman, after the peril became imminent, conducted himself without fault, but he may, up to that time, have been travelling in excess of the speed prescribed in instructions issued by the defendant company. The trial judge's directions to the jury, with respect to these instructions, may or may not have left the jury free to consider them as an admission by the defendant company of what it considered reasonable speed when approaching a crossing. Mr. Justice Anglin, in the Divisional Court, resolved the subsidiary questions in favour of the plaintiff and ordered a new trial. This decision involved the principle that prior negligence, which incapacitated the defendant from taking advantage of what would otherwise have been an opportunity to avoid a risk created by a negligent plaintiff, would constitute what Mr. Justice Anglin described as "ultimate" negligence and render the defendant liable under the *Davies* v. *Mann* theory.

Leaning heavily on the authoritative support afforded him in the speculations of Smith on Negligence[43] and a dictum in an Irish case,[44] Mr. Justice Anglin developed an elaborate theory

[41] [1916] 1 A. C. 719 (P. C. 1915).

[42] 40 Can. Sup. Ct. 540 (1908), *aff'g* 15 Ont. L. R. 195 (Ont. C. A. 1907), *rev'g* 13 Ont. L. R. 423 (Ont. D. C. 1907). The earlier case of *Inglis* v. *The Halifax Electric Tram Co.*, 30 Can. Sup. Ct. 256 (1900), in which the Supreme Court sustained the Nova Scotia court's ruling that excessive speed alone made the defendant liable on last clear chance principles, has been generally overlooked.

[43] See SMITH, NEGLIGENCE (2d ed. 1884) 233: "Suppose the defendant, sitting in his trap, negligently tied his reins to it, and fell asleep, and his horse started off; the plaintiff negligently was playing at pitch and toss in the street; the defendant is liable; but could it be contended that he would be less liable if he had deprived himself of the power of exercising care in the first instance by letting the reins lie upon the horse's back? Clearly he would be liable, although as a matter of fact he could not avoid the plaintiff's negligence, having put it out of his power to do so." *Cf. Brown* v. *London Street Ry.*, 31 Can. Sup. Ct. 642, 652 (1901), in which Mr. Justice Davies remarked that were Mr. Smith's principle accepted it "would go very far to destroy the doctrine of contributory negligence altogether." This seems to be the almost universal reaction to the *Loach* principle when first met, and yet, to those who have accepted the *Loach* case, any other result is unthinkable, because to them the ultimate negligence has become the sole proximate cause of the harm.

[44] *Scott* v. *Dublin and Wiclow Ry.*, 11 Ir. C. L. R. 377, 394–5 (1861). Chief Baron Pigot intimated that had the driver in *Davies* v. *Mann*, or the crew in *Tuff* v. *Warman*, been wholly or partially paralyzed with drink, so as to have no muscular capacity to avoid the plaintiff in peril, the cases would nevertheless have been decided for the plaintiff.

which, briefly put, stated that the abstract duty to use care becomes operative the moment the defendant sees the plaintiff in a position of peril. If at that moment the defendant fails to take effective steps to avoid the collision, his misconduct is deemed subsequent to that of the plaintiff. Thus, the prior abstract duty to have the car under reasonable control becomes a breach of duty to a particular plaintiff only at the moment the occasion for exercising care with respect to him arises. This moment occurs after the plaintiff is in a position where he can do nothing; but the reasonably prudent man in the defendant's position would have been able to avoid the accident.

The *Brenner* case was carried to the Supreme Court of Canada[45] where the ruling of the Ontario Court of Appeal, reversing the Divisional Court,[46] was affirmed. Of the four judges in favour of dismissing the appeal, two followed the Ontario Court of Appeal, avoiding the problem by determining the case on subsidiary questions; the other two — Mr. Justice Duff, with whom Mr. Justice Girouard concurred, determined the subsidiary questions in favour of the plaintiff, but definitely disapproved Mr. Justice Anglin's reasoning.

The case of *Long* v. *The Toronto Railway*[47] affords a doctrinal bridge leading to the *Loach* case. There the plaintiff, insensible to his surroundings, approached the defendant street railway track. The defendant motorman saw the plaintiff but did not reduce his normal speed so as to bring the car under complete control in the event the plaintiff should continue on and into danger in front of the car. The plaintiff did go on into danger, and the motorman then did all that could be done, but, because he had not slackened speed earlier, he was unable to stop in time to avoid colliding with the plaintiff. Schematically, the case occupies a point somewhere between *Tuff* v. *Warman*[48] and the *Loach* case. The discovered or discoverable peril made the speed excessive, and it was because of the excessive speed that the defendant motorman was unable to stop when the danger became imminent.

The Ontario Court of Appeal considered that the case fell within the decision of the Supreme Court of Canada in the *Brenner* case. The Supreme Court of Canada, however, thought otherwise, and reversed the decision of the Ontario Court of

[45] 40 Can. Sup. Ct. 540 (1908).
[46] 15 Ont. L. R. 195 (Ont. C. A. 1907).
[47] 10 D. L. R. 300 (Ont. App. Div. 1913), *rev'd*, 50 Can. Sup. Ct. 224 (1914).
[48] See p. 672 *supra*. *Cf. Radley* v. *Northwestern Ry.*, 1 App. Cas. 754 (1876).

Appeal. Mr. Justice Duff's opinion in the Supreme Court of Canada reveals a drift towards the *Loach* principle, and, though expressed in causation language, its underlying thesis is one which compares the faults of the parties. For example:[49]

> I ought also, I suppose, to refer to my own judgment in the case of *Brenner* v. *Toronto Railway Co.* . . . In that case, I had no manner of doubt that the negligence of the unfortunate victim, who attempted to pass across the track in front of a car which she knew to be approaching, without looking at the last moment to see whether she could do so in safety and without giving any sign of intention to cross until it was too late for the motorman to stop his car, was a direct contributing cause. In this case, considering the conduct of the victim, in relation to the conduct of the motorman, and the elements of knowledge on the one hand, and ignorance on the other, above mentioned, I think the proper view is that the *causa proxima* or direct cause, or if you like, the *cause*, in the legal sense, was the failure of duty on the part of the motorman. . . .

It is evident that Mr. Justice Duff, in determining cause in the legal sense, makes a comparison of the conduct of the principal actors, treating their knowledge as determinative. Now knowledge is not an ingredient of *cause* in any normal sense of the term; but knowledge has a great deal to do with the risks of probable harm known to the ordinary prudent man, and when we are comparing conduct in the light of known risks we are comparing negligence, not cause.[50]

Negligence involves a value judgment, and the conduct of various actors may be compared to determine relative negligence. Causation, however, is merely a relational category. Cause and effect are conceptual Siamese twins born of our passion for arranging our sense impressions in cognoscible form, and causation is our name for the connective tissue. When a streetcar and a pedestrian make contact, the activity of neither can be more or less a cause of the impact. Both must act exactly as they did or they would not have met *as* they did. But we may feel that one is more, or less, to blame for what happened than the other. In the *Brenner* case Mr. Justice Duff found that the plaintiff was more negligent than the conductor, and in *Long* v. *Toronto Ry.* that the conductor was more negligent than the plaintiff; but he expressed these conclusions in terms of "cause" and "condition."

Now we come to the *Loach* case itself. The plaintiff's intestate, Sands, was a passenger in a wagon which approached the

[49] 50 Can. Sup. Ct. at 248 (1914).

[50] See Seavey, *Negligence—Subjective or Objective?* (1927) 41 HARV. L. REV. 1, 5–7, 17–26.

defendant's railway crossing. When the electric car was about four hundred feet[51] away, the motorman appreciated the danger and applied his brakes. The brakes were defective and the train did not stop before it had passed the crossing, although the evidence indicated that effective brakes would have stopped the car one hundred feet short of the crossing. Apparently Sands did not realize his danger until the train was within one hundred and fifty feet of the crossing, at which time it was too late for him to avoid the danger.[52] In the ensuing collision, Sands was killed. The trial judge submitted eleven questions to the jury[53] and entered judgment for the defendant. The British Columbia Court of Appeal, by a three to two majority, allowed the appeal. Of the three judges who favoured the plaintiff, two found him wholly blameless.

The Judicial Committee of the Privy Council, speaking through Lord Sumner, dismissed the defendant company's appeal, much of the reasoning rephrasing that of Mr. Justice Anglin in the *Brenner* case, with the addition of a less artificial gloss. It was stated that it is not a question of desert or the lack of it, but a question of responsible cause. Unless these two statements are contradictory, it is difficult to determine what was meant by desert, and/or responsible. If "responsible" means legally responsible, that would make the statement mean that the question is not whether the plaintiff *ought* to recover but whether he *will* recover. Lord Sumner stated also that the defendant ought

[51] All the figures as to distances are taken from Lord Sumner: the jury made no findings relevant thereto. Whether the figures came from agreement of counsel or independent research of Lord Sumner does not appear.

[52] So Lord Sumner interpreted the facts. The fact that by hypothesis between the 400 foot point and the 150 foot point the defendant was doing all that could be done and the plaintiff still was negligently inattentive is not adverted to in the judgment. This is mentioned because subsequent cases which limit the applicability of the *Loach* case fail to appreciate that the case did make a complete departure from anything that could be called last clear chance. An unconscious chance is still in one sense of the word a chance. The plaintiff, not the defendant, in the *Loach* case had the factual last clear chance. It is also true that the plaintiff continued to *behave* negligently after the defendant had begun to *behave* properly. The consequences of one improper act were neither more nor less continuous than were those of the other. This is true, by hypothesis, of all cases considered in this paper. The coincidence of both acts must have caused the damage or we do not have the problem of determining which act "caused" the damage.

[53] The questions submitted to the jury in the *Loach* case resulted in findings :

(1) That the company was negligent by reason of excessive speed and by reason of defective brakes.

(2) That Sands was negligent because he did not take extraordinary precautions to see that the road was clear.

(3) That the motorman could have stopped had the brakes been effective.

to have had the last clear chance, but does not state why the defendant rather than the plaintiff's intestate ought to have had the last clear chance. Unless we assume that Lord Sumner used "cause" in the sense of greater fault, the opinion is meaningless. But if we make that assumption and ask ourselves how negligent was Sands as compared with the defendant company, we find:

(1) Perhaps Sands was not negligent at all. Indeed, two judges in the British Columbia Court of Appeal so believed. Though the jury found he had not exercised extraordinary care, it must not be completely forgotten that Sands was only a passenger.[54]

(2) Assume that Sands was negligent in that he exposed himself to risks by not looking. Yet this is matched by the defendant's negligence in having defective brakes and thereby exposing the plaintiff to the same risks. To this the defendant had added further risk by travelling at excessive speed. Add to this the fact that the defendant exposed all who might be in its path, of whom the plaintiff was only one. Analytically that may be irrelevant. Psychologically it is not.

(3) Even if the actual risks created were only equal, moral condemnation is more heavily visited upon those in charge of death-dealing instrumentalities than upon those who expose themselves to them. In determining degrees of negligence, the moral standard is as important as the actual risk.

(4) The defendant had actual experience with this kind of risk. Special knowledge which one has, or because of his occupation has reason to have, is an important element in determining whether or not he is negligent[55] and in determining the degree of that negligence.

(5) Lord Sumner's statement that the defendant, rather than the plaintiff, ought to have had the last chance means merely that the defendant's negligence was great as compared with that of the plaintiff. This requires an analysis which will at the same time serve as an explanation of the last clear chance doctrine.

Suppose the plaintiff is in a position of helpless peril on the tracks and that the defendant sees him there and realizes his peril.

[54] As a passenger he was under no legal duty to interfere for the safety of the motorman, car or passengers, nor was he negligent toward them. The risks created by his conduct were to himself only.

[55] See Seavey, *Negligence—Subjective or Objective?* (1927) 41 HARV. L. REV. 1, 5–7, 17–26.

(a) The defendant has good brakes and can stop in time, but does not. The defendant is liable under all last clear chance theories. Why? Because he is the more negligent of the two. Why? Negligence is the creation of undue risks. In determining what risks are undue many factors are involved. Assuming the other factors constant, let us focus attention on the knowledge the actor has or has reason to have. Considering that one rarely sees a train when crossing a track, and bearing in mind that grade crossings total but a small proportion of any stretch of track, when the plaintiff went onto the track without looking he was only moderately negligent. The risk was, say, less than one per cent. Let us be hard on the plaintiff and say that the chance was one in ten; that is, that the plaintiff by crossing without looking created a ten per cent risk. The defendant by not applying his brakes created a ninety plus per cent risk, because there was the plaintiff, actually on the crossing and almost certain to be hit if the brakes were not applied. He is much more negligent than the plaintiff. Of such stuff is the last clear chance doctrine made.[56]

(b) Now, let us suppose that the motorman acts properly, but that the defendant's brakes are useless or defective. Lord Sumner holds this to be a distinction without a difference, by which he seems to mean that the creation of unavoidable risks is as negligent as the failure to avoid avoidable risks. Perhaps Lord Sumner is right.

There is another approach which yields a similar conclusion, although by a different analysis. When a car is operated with defective brakes, a whole series of risks is created to the class to which the plaintiff belongs. The plaintiff creates, say, a ten per cent risk of harm by not looking at a crossing. If there are ten crossings on the run, the defendant creates almost a one hundred per cent risk that he may hit someone on that run. Since at

[56] In actual cases, the plaintiff's and defendant's knowledge and capacity to avoid impact will vary infinitely within whatever scale we use for measurement. Every increase in the defendant's knowledge, or means of knowledge, that the plaintiff is not going to get out of the way makes the defendant's failure to apply the brakes more negligent. Every increase in the plaintiff's knowledge, or means of knowledge, that the defendant train is approaching the crossing makes his conduct in crossing, or lingering on the crossing, more negligent. One can imagine cases in which both are aware of and could easily avoid certain impact. Neither bothers to. The defendant approaches murder and the plaintiff suicide. Both are 90 plus per cent negligent. It will be noted that this analysis makes the creation of 100 per cent risks tantamount to intention. Compare, "I think that commonly malice, intent, and negligence mean only that the danger was manifest to a greater or less degree, under the circumstances known to the actor. . . ." Holmes, *The Path of the Law* (1897) 10 HARV. L. REV. 457, 471.

each crossing there is a ninety per cent chance of *not* hitting someone, in ten crossings the percentage of chance of hitting someone would be $100 - \cdot 9^{10}$, or about sixty-five per cent. This may seem to strike an analytical snag, but where the plaintiff is of the class imperilled by the risk, risks created to others of that class may be properly considered in determining the extent to which the defendant is negligent. If such consideration be analytically improper, it is psychologically unavoidable. Though the man who drives with defective brakes is not as negligent to the injured person as the man who fails to use effective brakes in the face of a certain harm, he is more negligent than the man who gets in his path. And that is all that is necessary for the application of the last clear chance doctrine. This is the *Loach* case.

(c) Now, let us suppose that the defendant's brakes are effective, but that he fails to look at this particular crossing. He is liable on last clear chance in England and Canada. In fact, liability in this type of case antedated *Loach* case liability.[57] This analysis would not render him liable on the element of known risk alone. Does that destroy the analysis? Not at all. Considerations 3 and 4 above (which are generalized beyond the *Loach* facts), are applicable.

If one understands that last clear chance is based on greater fault, it is easier to subject to liability one whose negligence is predicated on defective brakes than one whose negligence is predicated on improper lookout. Indeed, it is not difficult to hold both.

The five considerations, as outlined, represent the *Loach* case as it faced Lord Sumner, demanding solution. There stood the last clear chance doctrine — an addendum to it enabled him to emphasize the motorman's duty as continuing after Sands was in helpless peril. The equal helplessness of the motorman is de-emphasized by stating that his inability, through prior fault, to perform that later duty makes the prior fault the (real sole proximate) cause of the harm. Notice that Lord Sumner reaches his conclusion about cause from premises which postulate fault

[57] *Springett* v. *Ball*, 4 F. & F. 472 (Q. B. 1865); *Dowsett* v. *London, Tilbury, and Southend Ry.*, 1 T. L. R. 326 (C. A. 1885). English and Canadian cases squarely raising the problem (improper lookout by the defendant uncomplicated by defective brakes and/or excessive speed, and the plaintiff in danger by reason of inattention only) are scarce. Usually it is assumed to be clearer than the *Loach Case*. It is, for instance, so treated by Lord Sumner in the *Loach Case*. *But cf.* 2 RESTATEMENT, TORTS (1934) § 480. *Cf. Neenan* v. *Hosford*, [1920] 2 Ir. K. B. D. 258 (in accord with Restatement). The fact that some courts do not treat this situation as involving defendant's last clear chance confirms the analysis in the text.

only. Such a substitution in the conclusion involves an unconscious identification in the major premise. It is obvious, therefore, that we are not thinking of cause at all, and that "sole cause" in the last clear chance doctrine means greater fault. The word proximate carries a connotation of nearness. The expression "sole proximate cause" in last clear chance cases means greater later fault. Mr. Justice Anglin and Lord Sumner made the earlier greater fault into the later fault. But that was only for the purpose of satisfying the formula which required that the defendant's act be the proximate cause of the harm so as to bring the case within the English and Canadian concept of last clear chance. Lord Sumner's use of the proximate cause formula has its semantic parallel in the use of proximate cause to mean forseeable risk, which was universal before Mr. Justice Cardozo's analysis in the *Palsgraf* case.[58]

Granted that it took the peculiar *Loach* case facts to encourage the Judicial Committee to construct its *tour de force* of rationalization and destroy the supposed basis (last clear chance) of the whole doctrine, neither the case nor the principle it creates presents difficulty from the point of view of comparative negligence. In determining whether or not the defendant "ought to have had the last chance," the courts have a new and more flexible tool to aid them in placing franker emphasis upon the relative negligence of the parties. But even the *Loach* case refinement is too crude, and when there are finer tools available the courts will make use of them within the permissible limitations of stubborn theory.

The Canadian courts were prevented by a causation theory of contributory negligence and last clear chance from giving a sensible interpretation to the apportionment statutes. The Supreme Court of Canada has interpreted these statutes in a manner which leaves the last clear chance doctrine unimpaired.[59] Similarly, the American courts have been prevented, by a later opportunity theory of last clear chance, from adopting the

[58] *Palsgraf* v. *Long Island Railroad*, 248 N. Y. 339, 162 N. E. 99 (1928). See Seavey, *Cardozo and the Law of Torts* (1939) 52 HARV. L. REV. 372, 381–391.

[59] *Long* v. *McLaughlin*, [1927] Can. Sup. Ct. 303. The plaintiff negligently rode on the outside of the defendant's truck. The defendant negligently drove his truck into a ditch. The Supreme Court reversed the judgment below which had apportioned the damages, and allowed the plaintiff full recovery on the ground that the defendant had the last clear chance to avoid the harm, and that that doctrine was unaffected by the New Brunswick apportionment statute.

Loach case itself.[60] The English and Canadian courts buried their relative blame valuation in "cause"; the American courts buried theirs in "last clear chance"; and both have become tangled in formulary terminology. The psychological parallel is marked.

Considerable conflict has arisen with respect to the exact import of the *Loach* holding in which, it will be remembered, there were two bases upon which the defendant's negligence was predicated, *i.e.*, (1) excessive speed and (2) defective brakes. Thus it may be that *any* prior incapacitating negligence brings a party within the ambit of the *Loach* case, or, conceivably, that only distinct additional negligence, prior in point of time, which incapacitated a party from avoiding a risk created by his other negligence, will do so. Factually the conflict has revolved about the sufficiency of excessive speed[61] alone as justifying the application of the *Loach* doctrine. Adherents of the former view cling to the belief that it does,[62] while adherents of the latter interpretation declare that factor, alone, insufficient to evoke the *Loach* case.[63]

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[60] For typical American reasoning, see *Mahoney* v. *Beatman*, 110 Conn. 184, 147 Atl. 762 (1929) (*Loach* principle not applied against plaintiff who was travelling at excessive speed). For an American approach to the *Loach* principle which makes stopping short of it mere verbal squeamishness, see *Dent* v. *Bellows Falls St. Ry.*, 95 Vt. 523, 116 Atl. 83 (1922). For an intuitive application of the *Loach* principle, see *Colorado & Southern Ry.* v. *Western Light & Power Co.*, 73 Colo. 107, 214 Pac. 30 (1923). See also 2 RESTATEMENT, TORTS (1934) § 480.

[61] Of course, if the speed is such that it would constitute negligence despite good brakes, and the brakes are poor brakes, the negligence is greater. Add that it is a built-up area, that the road-bed is slippery and the visibility is poor and the creation of undue risks may be described as gross—or perhaps grossly gross. The degree of the departure from the standard of care is infinitely variable and our present techniques for determining degrees of fault are crude.

[62] *Alberta: Cf. Jeremy & Jeremy* v. *Fontaine*, [1931] 3 W. W. R. 203; *Allen* v. *The City of Edmonton*, [1930] 2 W. W. R. 25; *Critchley and Critchley* v. *C. N. R.*, [1917] 2 W. W. R. 538. The Alberta courts have gone far in extending the *Loach Case*. In *McGintie* v. *Goudreau*, 17 Alta. L. Rep. 100 (App. Div. 1921), the court treated the plaintiff's lack of ability to handle an emergency, the defendant having crowded him, as prior incapacitating negligence. *Ontario: Falsetto* v. *Brown*, [1933] Ont. L. R. 645 (Ont. C. A.). *Field* v. *Sarnia Street R. W. Co.*, 50 Ont. L. R. 260 (Ont. App. Div. 1921); *Ontario Hughes-Owens, Ltd.* v. *Ottawa Electric Ry.*, 39 D. L. R. 48 (Ont. S. C. 1917). *Manitoba: Stebbe* v. *Laird*, [1938] 1 W. W. R. 173. The facts make the case easier than the *Loach Case*. *Shust* v. *Harris*, [1936] 2 W. W. R. 54. *Lajimodiere* v. *Pritchard and Duff*, [1938] 1 W. W. R. 305. (Dictum that *Loach Case* applied to defendant because driving while sleepy). All these cases, except *Falsetto* v. *Brown*, arose prior to passage of apportionment statutes.

[63] *Saskatchewan: Smith* v. *Regina*, 10 Sask. L. Rep. 72 (1917), *aff'd* 11 Sask. L. Rep. 291 (1918). The affirming opinion emphasized the plaintiff's chance to have had the last clear chance, wholly ignoring the fact that the plaintiff had the last chance to have had the last clear chance in the *Loach Case* itself. In point of fact, once we pass *Tuff* v. *Warman*,

It is interesting to note in this connection that the former view, after gaining general acceptance, shows signs of yielding to the latter approach in cases arising in provinces wherein there are apportionment statutes on record.[64] This shift is probably attributable to a designed attempt to escape the combined effect of the former approach, which would more easily permit of a finding that the defendant had the last clear chance, and the decisions holding the apportionment statutes to be subject to a prior determination of last clear chance; the product of this compound would seriously impair the value of these enactments.

CONCLUSION

The whole last clear chance doctrine is only a disguised escape, by way of comparative fault, from contributory negligence as an absolute bar, and serves no useful purpose in jurisdictions which have enacted apportionment statutes. The decisions superimposing last clear chance upon these statutes, though understandable historical accidents resulting from the greater fault meaning which the phrase "proximate cause" had acquired during the common-law struggle to escape from the contributory negligence bar, add injustice as well as complexity to an already confused *corpus juris*. Had the statutes not been thus hamstrung, they would have provided the means of doing openly and more completely what the courts have been doing unavowedly and incompletely ever since *Davies* v. *Mann*.[65]

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it is a partial misnomer to call our doctrine last clear chance, and once we have achieved the *Loach Case*, the misnomer is no longer partial.

The Supreme Court of Canada has not been very lucid in its pronouncements. *Cf. Nixon* v. *The Ottawa Electric Ry.*, [1933] Can. Sup. Ct. 154. *Stanley* v. *National Fruit Co., Ltd.*, [1931] Can. Sup Ct. 60. *Columbia Bitulithic, Ltd.* v. *British Columbia Electric Ry.*, 55 Can. Sup. Ct. 1 (1917).

[64] *Supreme Court of Canada:* Compare *Stanley* v. *National Fruit Co., Ltd.*, [1931] Can. Sup. Ct. 60 (no apportionment statute), with *Nixon* v. *The Ottawa Electric Ry.*, [1933] Can. Sup. Ct. 154. *Nova Scotia:* Compare *Morris* v. *The Halifax Electric Tram Co., Ltd.*, 50 N. S. R. 451 (1917) (before apportionment statute), with *Hanrahan* v. *McSween*, [1935] 2 D. L. R. 670.

[65] Two recently enacted contributory negligence apportionment statutes (Statutes of Alberta 1937 c. 18; Statutes of Prince Edward Island 1938 c. 5) give legislative approval to the tendency to encroach on the last clear chance doctrine in favour of apportionment. The relevant provisions are: § 5: "Where the trial is before a Judge with a jury the Judge shall not submit to the jury any question as to whether, notwithstanding the fault of one party, the other could have avoided the consequences thereof unless in his opinion there is evidence upon which the jury could reasonably find that the act or omission of the latter was clearly subsequent to and severable from the act or omission of the former so as not to be substantially contemporaneous with it." Section 6 gives a judge, trying a case without a jury, a similar *caveat* for himself. *Cf.* (1939) 52 HARV. L. REV. 1187.

Every vestige of last clear chance must be swept away in favour of apportionment. In the meantime, though the path of doctrine be tortuous, one must welcome piecemeal encroachments on the *Loach* case and hence on decisions retaining last clear chance despite apportionment legislation, even as one welcomed encroachments on *Butterfield* v. *Forrester* by means of the last clear chance doctrine, including the straw which broke its logic's back, — the *Loach* case itself.

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