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# Negligence—Last Clear Chance

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Police lawlessness must be deterred, but the control of federal law enforcement agencies lies within the executive powers of the federal government, not within the judicial processes of the United States Supreme Court. Without directly overruling the *Wolf* and *Stefanelli* decisions, the Court effectively narrowed and limited their rulings. Pragmatically, the pronouncement of the *Rea* case imposed the federal exclusionary rule on a national basis, without regard to the viewpoint of the individual states on the question of admissibility, and represented a departure from the former policy of maintaining an equilibrium between the federal and state governments in law enforcement in criminal prosecutions.

Even if the decision is interpreted in an extremely narrow scope to mean that the federal injunction will issue against the offending federal agent only where he attempts in a state criminal prosecution to produce illegally obtained evidence which has been suppressed in a prior federal proceeding, the *Rea* decision to that extent broadens the federal exclusionary rule by encroaching on the rights of the individual states through the intervention of federal judicial legislation.

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NEGLIGENCE—LAST CLEAR CHANCE—Plaintiff brought an action for injuries suffered when he was struck by the defendant's car while crossing the street in the middle of the block in a negligently inattentive manner. The complaint, resting on the last clear chance doctrine, alleged negligence of the defendant based (1) on her failure to exercise the reasonable means available to avoid the accident after actually discovering the plaintiff in peril, and (2) on her failure to exercise reasonable vigilance to discover the plaintiff in peril due to inattention. The district court sustained a demurrer to both counts and dismissed the action. On appeal to the Supreme Court of Montana, *held,* reversed and remanded. The doctrine of the last clear chance is applicable both where the defendant did see and thereafter failed to exercise the reasonable means available to avoid injuring the plaintiff in peril, and also where the defendant negligently failed to see the plaintiff in peril due to inattention. *Sorrels v. Ryan,* 281 P.2d 1028 (Mont. 1955) (Chief Justice Adair dissenting).

The basic reasoning underlying the doctrine of the last clear chance is that the person who has the last clear opportunity to avoid an accident should bear the burden of the resulting injuries if he fails to take advantage of his opportunity.[1] There are four possible situations to which the doctrine can be applied. An overwhelming majority of the courts allow the plaintiff to recover in the first two situations: where a defendant is actually aware of the plaintiff's peril in time to avoid an accident by exercise of reasonable care and a plaintiff is either (1) in inextricable peril (physically helpless to escape injury), or (2) in peril due to inattention.[2] In the third situation, where a defendant who because of his inattention is unaware of the plaintiff's inextricable peril, a clear majority of the courts allow the plaintiff to recover.[3] This is supportable on the ground that the plaintiff's negligence

[1]PROSSER, TORTS § 52 (2d ed. 1955).
[2]Annot., 92 A.L.R. 47, 149 (1934).
[3]*Ibid.*

has culminated in his inextricable peril, but that the defendant's negligence in failing to discover him, being the last act of negligence, is the proximate cause of the accident.[4]

The fourth situation to which the last clear chance doctrine can be applied and the one with which we are here concerned, is where the plaintiff is in peril because of his inattention and the defendant fails to discover him because the defendant is also inattentive. The objection to applying the doctrine to this situation is the difficulty in saying that the defendant had the last opportunity to avoid the accident, or that he committed the last act of negligence.

Dean Prosser[5] indicates that Missouri is the only jurisdiction which applies the last clear chance doctrine to this fourth situation.[6] However, an examination of the decisions reveals that at least four other jurisdictions have applied the doctrine to this class of cases.[7] Numerous cases from additional jurisdictions appear to lay down this rule, but on the facts the cases do not support such an inclusive rule.[8]

Montana, prior to the decision in *Pollard v. Oregon Short Line Railroad Co.*[9] followed the majority rule on the last clear chance doctrine.[10] In the *Pollard* case the Supreme Court held that the evidence was sufficient for the jury to have found that the defendant actually discovered the inattentive plaintiff in time to have avoided the accident. The court then stated that the defendant would have been liable even though through negligence he had failed to discover the plaintiff. The court *did not* distinguish between helpless and inattentive plaintiffs and therefore this dictum could be interpreted as approving the minority rule, *i.e.*, allowing an inattentive plaintiff to recover from an inattentive defendant.[11]

In *Armstrong v. Butte, Anaconda and Pacific Railway Co.*,[12] decided in 1940, the court approved the *Pollard* case as bringing Montana into harmony with "the progressive and enlightened view throughout the nation on this subject as reiterated in the Restatement of the Law of Torts." The court quoted section 479 of the *Restatement* in its entirety. That section allows a plaintiff in *inextricable* peril to recover from the defendant regardless of whether the defendant's negligence consists of the failure to use available means to avoid the accident, or failure to discover the plaintiff in time to avoid the accident. It does not pertain to the plaintiff in peril due to inattention. The court did not mention section 480 of the *Restatement* which does consider the problem of the plaintiff in peril due to inattention, denying the inattentive plaintiff recovery from the inattentive defendant. Thus the court, in the *Armstrong* case, interprets the rule of the *Pollard*

[4] *Id.* at 101.
[5] PROSSER, TORTS § 52 (2d ed. 1955).
[6] Krause v. Pitcairn, 350 Mo. 339, 167 S.W.2d 74 (1942). See Annot. 171 A.L.R. 365, 413 (1947) for a discussion of the Missouri "humanitarian doctrine."
[7] Rankin v. Shayne Brothers, Inc., 234 F.2d 35 (D.C. Cir. 1956); Caplin v. Arndt, 123 Conn. 585, 196 Atl. 631, 119 A.L.R. 1037 (1938); Springer v. Morris, 74 So. 2d 781 (Fla. 1954); Jackson v. Cook, 189 La. 860, 181 So. 195 (1938).
[8] 171 A.L.R. 365, 406 (1947).
[9] 92 Mont. 119, 11 P.2d 271 (1932).
[10] See Toelle, *Last Clear Chance in Montana*, 5 MONTANA L. REV. 12 (1944), for an analysis of Montana last clear chance cases, concluding that they follow the majority rule.
[11] *Ibid.*
[12] 110 Mont. 133, 99 P.2d 223 (1940).

case as being in conformity with section 479 of the *Restatement*. Therefore, by implication at least, the court is saying that the rule of the *Pollard* case applies only to plaintiffs in inextricable peril.

With the foregoing analysis of the *Pollard* and *Armstrong* cases in mind, consider the instant case. The first count, supported by the majority rule and Montana authority,[13] clearly states a cause of action. However, the second count, predicating the plaintiff's right to recover on the defendant's negligent failure to discover the plaintiff, who was in peril due to inattention, does not state a cause of action under the majority last clear chance doctrine. In holding that the second count did state a cause of action, the court relied entirely on the *Pollard* and *Armstrong* cases. The court cited the *Pollard* case as laying down the rule that "the doctrine of the last clear chance has application to a case not only where defendant actually saw plaintiff in a position of peril in time to avoid the injury by the exercise of reasonable care but also to a case where in the exercise of reasonable care he should or could have discovered plaintiff in his perilous position in time to avoid the injury."[14] The court then cited the *Armstrong* case as approving this rule, which, as previously shown, approves the rule only so far as applied to a plaintiff in *inextricable* peril.

If the foregoing analysis of the *Pollard* and *Armstrong* cases is valid, the conclusion seems inescapable that insofar as the court in the instant case relies on the combined holdings of those cases, the instant case is without support.[15]

Logically, the rule of the instant case is untenable. If it is to endure, it must do so for policy reasons. The principal argument advanced in its favor is that since most cases involve pedestrian-automobile or automobile-train collisions, the defendant, generally being in charge of the more dangerous instrument, should have greater responsibilities. However, on the negative side, what policy considerations can possibly be served when in cases involving two cars the rule allows the party who first files his suit to recover, or if extended to a cross-claim results in each party paying the other's damages? This is the necessary result of the rule in many situations because while both parties are negligent, either party suing as plaintiff can claim that *he* was the one in peril and that the other party had the last chance to avoid the accident. Such a result does not even have the virtue of distributing the burden according to the degree of fault. Thus, even when placed on a policy basis, the rule seems to be of dubious utility.

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[13]McIntyre v. Northern Pac. Ry., 56 Mont. 43, 180 Pac. 971 (1919).
[14]Instant case at p. 1030.
[15]*Cf.* Feeley v. Northern Pacific Ry., 230 F.2d 316 (9th Cir. 1956), holding that the last clear chance doctrine in Montana is in accord with the majority rule. The instant case is not cited.