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THE DOCTRINE OF LAST CLEAR CHANCE IN MONTANA

The doctrine of last clear chance was first announced by an English court in *Davies v. Mann.*[1] It provides that a plaintiff may recover for personal or property damages regardless of his own negligence if the defendant negligently fails to exercise the last clear opportunity to avoid the accident. Last clear chance is the most commonly recognized exception to the defense of contributory negligence, which operates as a complete bar to any action of negligence.[2] Since last clear chance is a basis for an affirmative claim for relief, the plaintiff must sustain the burden of proof.[3]

Generally, contributory negligence bars any recovery in a neggence action. Several explanations have been given for the doctrine of last clear chance as an exception to this rule.[4] One explanation is that the later negligence of the defendant involves a higher degree of fault. However, it does not take into account cases in which the defendant negligently fails to discover the situation, is slow to react, or makes an error in judgment. Support for this explanation is found in cases where the defendant discovers the situation, and his conduct approaches intentional or reckless disregard of the plaintiff's rights. However, if the conduct—commonly characterized as "willful," "wanton," or "reckless"—approaches intent, the ordinary contributory negligence of the plaintiff will not bar recovery, and there will be no need to rely upon the doctrine of last clear chance. If the defendant's negligence is "gross," but not willful or wanton, the plaintiff's ordinary contributory negligence is usually a defense.[6] Possibly, much confusion could result in determining when conduct is sufficiently willful

[1]M. & W. 546, 152 ENG. REP. 588 (1842). The plaintiff had left his donkey fetered on the highway. The defendant, with a team of horses pulling a wagon, came down a slight descent "at a smartish pace," ran into the donkey, knocked it down, and killed it. The defendant was held liable for the consequences of his later negligence. See JAMES, *Last Clear Chance: A Transitional Doctrine*, 47 YALE L. J. 704 (1938), and MACINTYRE, *The Rationale of Last Clear Chance*, 53 HARV. L. REV. 1225 (1940).

[2]RESTATEMENT, (SECOND) OF TORTS Section 463 (1965). Contributory negligence is conduct on the part of the plaintiff which falls below the standard to which he should conform for his own protection, and which is a legally contributing cause co-operating with the negligence of the defendant in bringing about the plaintiff's harm. Section 467 provides: Except where the defendant has the last clear chance, the plaintiff's contributory negligence bars recovery against a defendant whose negligent conduct would othwise make him liable to the plaintiff for the harm sustained by him.

[3]*Id.* at Section 281 sets forth the four elements of a claim for relief for negligence. Summarized briefly, these elements are: duty, negligence, cause, damage. In Section 328(a), the plaintiff has the burden of proving these four elements.

[4]*Id.* at Section 479, Comment (a). See PROSSER, HANDBOOK OF THE LAW OF TORTS, 437-438 (3d ed. 1964).

[5]PROSSER, *supra* note 4, at 436 concludes that all courts hold that the plaintiff's ordinary negligence will not bar recovery. The basis for his conclusion is that "such conduct differs from negligence not only in degree but in kind, and in the social condemnation attached to it."

[6]*Id.* at 436. Gross negligence is defined as an extreme departure from ordinary standards. It is generally held that the plaintiff's ordinary negligence is a defense to gross negligence.

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so that contributory negligence is not a bar to recovery. To avoid the confusion, a plaintiff might prefer to rely upon the doctrine of last clear chance.

The most common explanation is that the plaintiff's negligence is not a "proximate" or "legal" cause of the injury. The later negligence of the defendant is a "superseding" cause which relieves the plaintiff of responsibility for his contributory negligence.[7] Although this theory may fix liability upon the last human wrongdoer, it does not conform to ideas of proximate cause. For instance, if a plaintiff's negligence places himself or his property in a position of peril, such negligence is a proximate cause of his own injury. Therefore, the injury from the defendant's negligence is certainly within the risk which the plaintiff has created Furthermore, in an tutomobile collision, a negligent plaintiff is liable to an injured passenger in the defendant's car even though the defendant has the last clear chance to avoid striking the plaintiff. The plaintiff's negligence is clearly a responsible cause of injuries to the passenger.[8] The real explanation apparently arises out of a dislike for the defense of contributory negligence. Courts reject the defense in cases where they can conclude that the defendant's negligence was the "worst," "final," or "decisive" factor in producing the injury.[9]

Under last clear chance, there are two distinguishable classifications: I. THE HELPLESS PLAINTIFF, and II. THE INATTENTIVE PLAINTIFF. These classifications have been further subdivided into four categories for purposes of determining recovery in the United States.[10]

This scheme of recovery may be set out as follows:

> I. HELPLESS PLAINTIFF—ACTUAL DISCOVERY BY DEFENDANT. The helpless plaintiff, by his prior negligence, has placed himself in a position from which he is powerless to extricate by the exercise of ordinary care; and the defendant discovers the plaintiff's position of peril in time to avoid injuring him, fails to exercise reasonable care to do so.
>
> e.g. A plaintiff negligently drives onto a railroad crossing without looking for approaching trains, and his truck stalls on the tracks.

[7]In Mihelich v. Butte Electric Ry., 85 Mont. 604, 281 P.540 (1929), proximate cause is defined as "that cause, which in a natural and continuous sequence, unbroken by any new independent cause, produces the injury, and without which it would not have occurred." The terms "proximate cause" and "legal cause" are often used interchangeably. Legal cause is defined in RESTATEMENT, *supra*, note 2 at Section 431: "The actor's conduct is a legal cause of harm to another if (a) his conduct is a substantial factor in bringing about the harm, and (b) there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the harm."

[8]RESTATEMENT, *supra* note 2, at Section 479, Comment (c).

[9]*Id.* see PROSSER, *supra* note 4, at 438.

[10]RESTATEMENT, *supra* note 2, at Sections 479 and 480. The helpless plaintiff is defined in Section 479. The inattentive plaintiff is defined in Section 480.

Finding his door jammed, he becomes stuck in the window in an attempt to crawl to safety as the defendant's train approaches. The defendant's engineer sees and realizes the plaintiff is in a helpless position of peril in time to avoid injuring him, but fails to uses reasonable cars to avoid the injury. The defendant is liable to the plaintiff for personal and property damages.

All courts recognizing the doctrine permit recovery under this category.[11]

II. HELPLESS PLAINTIFF—DEFENDANT DOES NOT DISCOVER. The helpless plaintiff, by his prior negligence has placed himself in a position from which he is powerless to extricate by the exercise of ordinary care; and the defendant does not discover, but is under a duty to exercise ordinary care to discover and realize the plaintiff's position of peril, and to avoid injuring him.

e.g. The same plaintiff as above negligently places himself in an inextricable position of peril. The defendant's engineer, in the exercise of proper care, could easily discover the plaintiff's presence on the crossing. However, the engineer fails to discover the plaintiff, therefore causing the injuries. The defendant is liable for personal and property damages.

Although there is a split in authority, recovery is permitted by a majority of courts.[12]

III. INATTENTIVE PLAINTIFF—ACTUAL DISCOVERY BY DEFENDANT. The inattentive plaintiff negligently fails to pay attention to his surroundings, thus placing himself in a position of peril to which he is oblivious, but from which he could escape by the exercise of reasonable care; and the defendant knows of or discovers the plainttiff's situation, and realizes or has reason to realize that the plaintiff is inattentive and therefore unlikely to discover his peril in time to avoid the harm, and thereafter is negligent in failing to utilize with reasonable care and competence his then existing opportunity to avoid the harm.

e.g. A plaintiff walks across a street between intersections, negligently failing to pay attention to approaching traffic. The defendant, in an approaching automobile, sees the plaintiff and realizes that is inattentive, but negligently fails to avoid striking him. The defendant is liable for personal and property damages.

There is a split of authority, but recovery is permitted by a majority of courts.[13]

e.g. The same plaintiff as above negligently crosses the street without paying attention to approaching traffic. The defendant also fails to pay attention to his surroundings as he drives along the street. He does not discover, but in the exercise of reasonable care, could have discovered the plaintiff; and therefore fails to avoid injuring him. The defendant is liable for personal and property damages.

[11]2 HARPER & JAMES, THE LAW OF TORTS, 1246, Section 22.13 (1956), and PROSSER, *supra* note 4, at 439. See RESTATEMENT, *supra* note 10, at Section 479 (a)(b)(i).

[12]2 HARPER & JAMES, *supra* note 11, at 1246, PROSSER, *supra* note 11, at 440, and RESTATEMENT, *supra* note 10, at Section 479 (a)(b)(ii).

There is a split of authority, but recovery is permitted by a majority of courts.[13]

IV. INATTENTIVE PLAINTIFF—INATTENTIVE DEFENDANT. The inattentive plaintiff negligently fails to pay attention to his surroundings, thus placing hemself in a position of peril to which he is oblivious, but from which he could escape by the exercise of reasonable care; and the defendant does not discover, but would have discovered and realized the plaintiff's position of peril in time to avoid injuries had he exercised the reasonable care he owed to the plaintiff.

> e.g. The same plaintiff as above negligently crosses the street without paying attention to approaching traffic. The defendant also fails to pay attention to his surroundings as he drivers along the street. He does not discover, but in the exercise of reasonable care, could have discovered the plaintiff; and therefore fails to avoid injuring him. The defendant is liable for personal and property damages.

Only one jurisdiction is recognized as clearly allowing recovery under this category.[14]

An additional situation may arise in which the defendant, after discovering either a helpless or an inattentive plaintiff's position of peril, does all within his power to avoid the injury; however, his own antecedent negligence, such as faulty equipment, prevents him from avoiding the injuries. Most courts deny recovery on the theory that there is no logical reason for distinguishing between the prior negligence of the defendant and that of the plaintiff who put himself into a position of peril.[15]

The case which established the doctrine of last clear chance in Montana was *Neary v. No. Pac. Ry. Co.*[16] In *Neary,* the deceased was standing between the rails of the track with his back toward the defendant's approaching train. He was oblivious to his perilous position and was struck and killed by the defendant's train. The court stated:

[13]2 HARPER & JAMES, *supra* note 11, at 1246, PROSSER, *supra* note 11 at 441, and RESTATEMENT, *supra* note 11 at Section 480 (a)(b)(c). The RESTATEMENT limits recovery to this category.

[14]RESTATEMENT, *supra* note 2. Recovery is not recognized under this category in the RESTATEMENT. HARPER & JAMES, *supra* note 11, at 1246, and PROSSER, *supra* note 11, at 441 conclude that only Missouri allows recovery under this category. Missouri, under its "humanitarian doctrine" allows recovery under all four categories. In Krause v. Pitcairn, 350 Mo.339, 167 S.W.2d 74, 78 (1942), the court said: "Our humanitarian doctrine is reasoned upon precepts of humanity . . . and is not now sought to be justified on theories involving proximate cause, comparative negligence, wilfulness, recklessness or wantonness." See 7 ROCKY MTN. L. REV. 161 (1935). For a collection of cases, see 171 A.L.R. 365, 413 (1947). BORER, in 18 MONT. L. REV. 231, 232 (1957) concludes that at least four other jurisdictions have applied the doctrine under this category.

[15]PROSSER, *supra* note 4, at 442-443.

[16]37 Mont. 461, 97 P.944 (1908). See TOELLE, 5 MONT. L. REV. 12, 15. TOELLE concludes that the first Montana case to suggest the doctrine is Riley v. N.R.Ry., 36 Mont. 545, 93 P.948 (1908).

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> The obligation of the defendant arises only when the plaintiff is seen to be in a perilous situation. When defendant becomes both aware of his presence and his peril, plaintiff's contributory negligence is eliminated from the case. 2 Thompson On Negligence, Section 1735.[17]

The proposition that "plaintiff's contributory negligence is eliminated from the case" is questionable since a plaintiff concedes his own negligence when relying upon the doctrine of last clear chance. Possibly, the court meant that contributory negligence is "eliminated" from the case insofar as it does not operate to bar recovery under the doctrine. Although the court seemingly recognized the requirement of actual discovery by using the language, "seen . . . and becomes aware," it went on to say:

> The general rule that one's own negligence . . . precludes recovery is subject to the qualification that, where the defendant has discovered, or should have discovered, the peril of the plaintiff's or deceased's position, and it is apparent that he cannot escape therefrom or for any reason does not make an effort to do so, the duty becomes imperative for the defendant to use all reasonable care to avoid the injury . . . notwithstanding the negligence of the injured party.[18]

The court did not distinguish between helpless and inattentive plaintiffs. However, the words, "he cannot escape" (helpless plaintiff), "or for any reason does not make an effort to do so" (inattentive plaintiff), refer to both.

In *Neary*, the deceased was an inattentive plaintiff because he was oblivious to his perilous position. The court found that the defendant's engineer saw the deceased and was therefore guilty of "gross" negligence. Possibly, the use of the word, "gross," indicates a conclusion by the court that the defendant's negligence involved a higher degree of fault.[19] However, this theory could have been avoided because the defendant's negligence was later in time, giving the defendant the last opportunity to avoid the injury. The *Neary* case was resolved under III. INATTENTIVE PLAINTIFF—ACTUAL DISCOVERY BY DEFENDANT, because the defendant's engineer saw the inattentive plaintiff. However, the words, "or should have discovered," in the quoted language above, would suggest recovery under IV. INATTENTIVE PLAINTIFF—INATTENTIVE DEFENDANT.[20]

[17]37 Mont. 461, 464, 97 P.944, 947 (1908).

[18]*Id.* at 464.

[19]Grossnegligence on the part of the defendant's engineer was failing to stop in time after actually discovering the plaintiff's position of peril. Such conduct did not approach willfulness or wantonness, so the plaintiff's ordinary negligence would have been a bar to an action against the gross negligence of the defendant's engineer.

[20]Four years after Neary, two cases were decided together, Melzner v. N.P.Ry., 46 Mont. 162, 127 P.146 (1912), and Haddox v. N.P.Ry., 46 Mont. 185, 127 P.152 (1912). The court approved a requested instruction that the duty of the engineer to make all reasonable efforts to avoid striking the intestate, who was unobservant of the defendant's approaching engine, did not arise until the engineer actually discovered the intestate in a position of peril. The cases were therefore resolved under III. INATTENTIVE PLAINTIFF—ACTUAL DISCOVERY BY DEFENDANT.

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The court sought to clarify last clear chance in *Dahmer v. No. Pac. Ry. Co.* [21] In *Dahmer*, the plaintiff, while awaiting the arrival of a train late at night, was struck unexpectedly on the head, causing him to stagger and fall partially stunned upon the rails. His foot was caught by a wire on the tracks, and the defendant's "through-train" severed both feet. At the trial level, the plaintiff recovered for personal injuries on the basis of last clear chance. On appeal, the Supreme Court stated three elements essential to recovery under this doctrine:

> (1) The exposed condition brought about by the negligence of the plaintiff or the person injured; (2) The actual discovery by the defendant of the perilous situation of the person or property in time to avert injury; (3) The failure of defendant thereafter to use ordinary care to avert the injury.[22]

The court granted a new trial holding that evidence was insufficient to justify the jury's conclusion that the defendant's engineer discovered the position of peril in time to avoid the injury. In dicta, the court said that the words, "or should have discovered," used in the *Neary* case were unfortunate, and actual discovery of the position of peril henceforth would be required.[23]

The actual discovery requirement established by the *Dahmer* case was qualified in *Doichinoff v. Chicago, M. & St. P. Ry. Co.*[24] In *Doichinoff*, the deceased was apparently unaware of the defendant's approaching train as he walked upon the railroad track. Although the defendant's engineer had an unobstructed view of him, the deceased was run over and killed. The court sustained the trial court's refusal of instructions on contributory negligence. The court held that the theory of last clear chance necessarily involves an admission of contributory negligence. Therefore, the court clarified the position taken in *Neary* that contributory negligence is "eliminated" from a last clear chance case.

The court in *Doichinoff* approved and restated the three elements of last clear chance laid down in *Dahmer*, but qualified the second element by holding that actual discovery could be established by circumstantial evidence.[25] Moreover, this circumstantial evidence could be predicated on a combination of factors possibly more convincing than direct evidence. Such factors could include testimony that the defendant's engineer was looking in the direction of the deceased, or

[21] 48 Mont. 152, 136 P.1059 (1913).

[22] *Id.* at 162.

[23] In McIntyre v. N.P.Ry., 56 Mont. 43, 180 P.971 (1919), the court affirmed the actual discovery requirement in an inattentive plaintiff case. *McIntyre* is discussed in 92 A.L.R. 95 (1934).

[24] 51 Mont. 582, 154 P.924 (1916). Discussed in 59 A.L.R. 2d 1265 (1958).

[25] PROSSER, *supra* note 4, at 441. PROSSER states that "[T]he discovery may be proved by circumstantial evidence, and there is in the decisions so much hair-splitting as to whether 'ought to have seen' is equivalent to 'saw' that the result of any particular case is likely to be unpredictable in a given jurisdiction."

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that the train whistle was blowing. The court gave no intimation that circumstantial evidence could be determined by an objective standard such as "should have discovered." Therefore, confusion was avoided since only "seen" and not "should have seen" could fulfill the actual discoverey requirement. In *Doichinoff,* the deceased apparently unaware of his perilous position, was an inattentive plaintiff. The defendant's actual discovery was proved by circumstantial evidence. Therefore, the case was resolved under III. INATTENTIVE PLAINTIFF—ACTUAL DISCOVERY BY DEFENDANT.[26]

The Montana court modified the actual discovery requirement in the case of *Pollard v. Oregon Short Line Railroad Co.*[27] In *Pollard,* the plaintiff's truck stalled on the defendant's railroad crossing. The plaintiff was kneeling between the dashboard and the seat, oblivious to the defendant's approaching train. Although the engineer had a clear view of the plaintiff's position on the crossing, the train struck and injured him. The plaintiff's recovery for personal injuries under last clear chance was affirmed. The plaintiff, oblivious to the approaching train, was inattentive. The court found that the defendant's engineer saw or discovered him. Therefore, the case was resolved under III. INATTENTIVE PLAINTIFF—ACTUAL BY DEFENDANT.

The court in *Pollard* cited the three elements of the *Dahmer* case as well as the circumstantial evidence qualification set forth in *Doichinoff*. However, the court stated the following exception to the actual discovery requirement of the *Dahmer* case: Although actual discovery is required for trespassers other than at crossings, railroads have a duty to maintain a lookout at crossings for those in a position of peril; and liability will be imposed if the plaintiff is injured, whether or not there is actual discovery. The plaintiff's alternative allegations were held sufficient to state a claim for relief. The allegations were: "that the defendant observed and saw or had the defendant exercised ordinary care would have seen the plaintiff in a position of peril in time to avoid the injury." The plaintiff in *Pollard* was inattentive and the court apparently would have allowed recovery even though the defendant failed to discover him in a position of peril. Therefore, as applied

[26]Only two cases were found which dealt specificially with helpless plaintiff situations. In Westerdale v. N.P.Ry., 84 Mont. 1, 273 P.1051 (1929), the plaintiffs had negligently driven onto the crossing and were struck by the defendant's train. They became helpless plaintiffs as the engine dragged them a great distance down the track. The court held that the duty to avoid the injuries did not arise until the engineer knew that the car was struck, and failure thereafter to avoid injury to the plaintiffs rendered the defendant liable. In Collins v. Crimp, 91 Mont. 326, 8 P.2d 796 (1931), the plaintiff's intestate became helpless on the defendant's fender after an unavoidable collision. The court held that the defendant's duty arose only when he actually discovered the intestate in his perilous position on the fender. Recovery denied because the defendant did not have sufficient time to avoid injuring the intestate.

[27]92 Mont. 119, 11 P.2d 271 (1932). Discussed in 92 A.L.R. 90, 137 (1934), and 70 A.L.R. 2d 103 (1960).

to railroad crossings, the *Pollard* case suggests the possibility of recovery under IV. INATTENTIVE PLAINTIFF—INATTENTIVE DEFENDANT.[28]

In the *Pollard* case, the court disposed of the defense of contributory negligence by saying:

> It is true that this court has recognized that, where an accident is the result of negligence of the plaintiff concurring with the primary negligence of the defendant up to and producing the injury, there is no room for the application of the last clear chance doctrine . . . but the doctrine presupposes negligence on the part of the plaintiff and attaches in spite of such negligence when there a break in the sequence of events. Here, as in the *Neary* case the plaintiff remained passive and oblivious of his danger . . . and thereafter . . . the engineer discovered his perilous situation in time to have avoided the accident . . . and 'the defendant's last act of negligence becomes the sole proximate cause of the injury, while his initial negligence and the primary negligence of the plaintiff become the remote causes thereof'. . . .[29]

The court's reference to a "break in the sequence of events" could only relate to the time element involved. In other words, the plaintiff was in a position of peril precedent to the defendant's subsequent failure to avoid the injury after actual discovery. There was no "break in the sequence of events" insofar as negligence was concerned, because the plaintiff's inattentiveness had put himself into a position of peril, and such negligence had operated to the time of the accident. The court also said that the plaintiff remained "passive" and his primary negligence was only a "remote" cause of his injury. However, if the plaintiff had not been stalled, but had inattentively driven onto the crossing, there would not have been a break in the sequence of events. His negligence would then have been active and clearly "concurring," thereby leaving "no room for the application of the last clear chance doctrine," according to the court.

In *Pollard,* it would seem unreasonable to deny recovery to the plaintiff where the defendant actually discovered him inattentively approaching the crossing. On what basis could recovery be justified? The court stated that the "defendant's last act of negligence" became "the sole proximate cause." This is an artificial distinction because the plaintiff's negligence was clearly a proximate cause of his own injury. Therefore, the defendant's negligence was not the "sole proximate cause" of the injury. However, the defendant certainly had the last clear opportunity to avoid the injury. Moreover, the defendant's failure to avoid the injury would involve a higher degree of fault. Probably, the real

[28]One year after *Pollard,* in Linney v. Chicago, M. St. P. & Ry., 94 Mont. 229, 21 P.2d 1101 (1933), the laintiff sought damages to his automobile under the doctrine. The laintiff did not allege his own negligence, but instead alleged that he had used every ordinary care and recauption for his safety. The court remanded for a new trial. In dicta, the court said that the three elements set forth in Dahmer must concur, except in crossing cases. Furthermore, if the defendant, in the exercise of ordinary care "ought to have known" that the injured person was in a position of peril, there need be no actual discovery in order to invoke the rule. *Linney* is discussed in 70 A.L.R.2d 52 (1960).

[29]92 Mont. 119, 11 P.2d 271, at 132.

explanation for recovery under the doctrine would be a dislike for the defense of contributory negligence. If the plaintiff had been unable to rely upon the doctrine, his contributory negligence (either inattentively stalled, or inattentively approaching the crossing) would have barred any recovery unless he could have established that the defendant's conduct approached intent.

The *Polled* case was expressly affirmed in *Armstrong v. Butte, A. & P. Ry. Co.*[30] In *Armstrong,* the plaintiff brought an action of negligence against the defendant railroad company. The defendant answered by setting up the plaintiff's contributory negligence as a defense. On the day of the trial, the plaintiff filed a reply based upon last clear chance in which he admitted his negligence in carelessly driving his automobile onto the railroad crossing. The court affirmed the sustaining of a motion for nonsuit on the ground that the plaintiff could not set up a cause of action in his reply. In dicta, the court said:

> [D]efendant contends that prior cases by this court have held that before defendant can be held liable under the doctrine of last clear chance, it must actually have discovered plaintiff in a perilous position in time to avert the injury, and that it is not sufficient that in the exercise of proper care it should have discovered him.[31]

The court refuted the defendant's contention by saying:

> It is true that this court has held as defendant contends. Those cases so holding, however, were in effct overruled in the *Pollard* case when applied to a crossing or other places where the defendant had reasonable grounds to anticipate the presence of persons and negligently failed to keep a lookout and to see that which should have been seen. We reaffirm the holding in the *Pollard* case. This puts Montana in harmony with the progressive and enlightened view throughout the nation as reiterated in the Restatement of The Law of Torts. Section 479 thereof states the prevailing rule throughout the nation as follows: . . .[32]

The court, in effect, stated that it would henceforth allow recovery from a defendant who did not but should have discovered a plaintiff if the place was one where the defendant should have anticipated his presence. Therefore, if the "undiscovered" plaintiff were inattentive, as in *Pollard,* the case would be resolved under IV. INATTENTIVE PLAINTIFF—INATTENTIVE DEFENDANT. This is clearly the minority view. Yet, the court stated that *Pollard* and *Armstrong* put Montana under the majority view in accord with the Restatement. Furthermore, Section 479, the helpless plaintiff section, was cited, under which the majority of courts allow recovery in both category I. (Actual Discovery), and category II. (Should Have Discovered). The court did not cite the inattentive plaintiff section, section 480, which limits recovery to category III. (Actual Discovery). Therefore, the most likely conclusion

[30]110 Mont. 133, 99 P.2d 223 (1940). Discussed in 70 A.L.R.2d 52 (1960).
[31]110 Mont. 133, 99 P.2d 223 (1940 at 137.
[32]*Id.*

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is that the cases of *Pollard* and *Armstrong* stand for the proposition that an inattentive plaintiff will be allowed to recover from an inattentive defendant at railroad crossings or places where the plaintiff's presence should be anticipated. And, the dicta in *Armstrong* may be interpreted to mean that the court would also allow a helpless plaintiff to recover under categories I. and II.[33]

There were no decisions on last clear chance from *Armstrong* in 1940 until *Sorrells v. Ryan* in 1955.[34] In *Sorrells,* the plaintiff sued for damages for personal injuries sustained when struck by the defendant's automobile. The plaintiff conceded that he was negligently oblivious to approaching traffic while crossing midway between the intersections of a well-lighted street. The plaintiff's two alternative causes of action were held sufficient within the rulings of *Pollard* and *Armstrong* to entitle him to relief. The complaint, based upon last clear chance, alleged negligence in the following alternative: "That defendant saw plaintiff crossing the street, and that she would have seen him in the exercise of reasonable care." The court permitted an amendment to the second cause of action to include an allegation that: "had the defendant kept a proper lookout, she would have discovered from plaintiff's stooped position and posture that he was unaware of the danger from the approaching automobile in time to avert the accident."

Speaking of the plaintiff's reliance on the *Pollard* case the court said:

> That case established the rule in this state that the doctrine of 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. . . . The rule was reaffirmed in *Armstrong v. Butte, A. & P. Ry. Co.* . . .[35]

The defendant contended that the plaintiff was crossing the street at a place where the defendant had no reason to anticipate his presence, as required under *Polled* and *Armstrong*. However, the court said:

> This contention cannot be sustained . . . Ordinary caution must be observed by drivers and pedestrians both at and between crossings . . . The fact that plaintiff was crossing and not at the crossing does not absolve defendant from the duty to exercise reasonable care to avoid injuring him. . . . Defendant should have known, if these allegations be true, that plaintiff would not stop walking.[36]

In *Sorrells,* the plaintiff was unaware or oblivious to approaching

[33]See TOELLE, *supra* note 16, at 27 in which the conclusion is reached that Montana cannot be said to be contra to the unconscious last chance doctrine as developed in Section 479 of the RESTATEMENT OF THE LAW OF TORTS. However, the cases TOELLE used as support are inattentive, not helpless plaintiff situations. Therefore, Section 480 would be applicable. Furthermore, Section 480 limits recovery to category III. Only a small minority of jurisdictions allows recovery under category IV.

[34]129 Mont. 29, 281 P.2d 1028 (1955).

[35]*Id.*, at 33.

[36]*Id.*

traffic, and was therefore inattentive. The court, relying upon *Pollard,* an inattentive plaintiff case, and *Armstrong,* would allow the inattentive plaintiff to recover from the defendant who actually "saw" or discovered him in a position of peril in time to avoid the injury. (category III.) The court would also allow recovery from the defendant who, "in the exercise of reasonable care . . . should or could have discovered" the inattentive plaintiff's perilous position in time to avoid the injury. (category IV.)

In *Sorrells,* the court did not restrict the defendant's duty to maintain a proper lookout to crossings or other places where the presence of persons could be anticipated. *(Pollard, Armstrong)* The duty was extended to include "jay-walkers" crossing in the middle of the street. The language indicating that "defendant should have known, if these allegations be true, that plaintiff would not stop walking," appears to imply actual discovery. Otherwise, if the defendant had failed to discover the plaintiff, he would not have been aware of the plaintiff's presence, nor of the fact that he was walking. But actual discovery of the plaintiff by the defendant is found nowhere in the record of the case. Therefore, *Sorrells* represents authority for recovery by an inattentive plaintiff under both categories III. INATTENTIVE PLAINTIFF—ACTUAL DISCOVERY BY DEFENDENT and IV. INATTENTIVE PLAINTIFF—INATTENTIVE DEFENDANT.[37]

There was a dissent in *Sorrells v. Ryan* which concluded that the plaintiff's negligence, "continuing without interruption" to the time of the accident, was not a "remote" but a "proximate cause" of his own injury thereby barring recovery. The dissent improperly referred to a helpless plaintiff who "cannot reasonably escape in the exercise of due care." However, in *Sorrells,* the inattentive plaintiff's negligence did actively, not "passively," continue without interruption to the time of his injury. Therefore, the plaintiff's negligence was not a "remote," but a "proximate cause" of his injury. If the defendent was also inattentive and failed to discover the inattentive plaintiff, neither party would have had the last clear chance to avoid the accident. The negligence of both parties continued actively to the time of the accident. Neither negligence could be considered higher in degree of fault. Certainly, the ruling of the *Sorrells* case under category IV. INATTENTIVE PLAINTIFF—INATTENTIVE DEFENDANT cannot be sustained on the basis of usual last clear chance explanations. It must be supported on some other ground.

Possibly, category IV. rests upon "precepts of humanity," as in Missouri.[38] In other words, the defendant, in charge of a more dangerous instrumentality, should be held to a higher duty of care, especially

[37]In 18 MONT. L. REV. 231 (1957), BORER concludes that insofar as the court relied upon the combinde holdings of *Pollard* and *Armstrong, Sorrells* has no support. BORER reaches the conclusion that *Sorrells* is authority for recovery under category IV.
[38]*Supra* note 14.

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in train-automobile and automobile-pedestrian collisions. Or, perhaps the defendant's financial interests, such as a railroad company, fail to outweigh the physical or property injuries sustained by a plaintiff, especially where the defendant's insurance company ultimately sustains the loss. Whatever reasons are given, such policy considerations fail to take into account an automobile collision involving two negligently inattentive drivers under category IV.

In an automobile collision under category IV., either inattentive driver could file a suit claiming that the other party had the last clear chance to avoid the accident. The party sued could counterclaim on the same set of facts. If recovery were allowed, the doctrine of last clear chance would almost become a doctrine of comparative negligence, i.e. setting-off the negligence of one party against the other party's negligence.[39] However, if both parties were found equally at fault, there could be the somewhat ridiculous possibility that each party would pay the other's damages. Yet, there would be injustice if only one party were allowed to recover for damages when both were equally at fault. Furthermore, if both parties, were denied recovery, although not equally at fault, such a situation would almost amount to a restatement of the rule that contributory negligence bars recovery. If category IV. is to be retained, it should only be for policy considerations such as insurance, especially in train-automobile and automobile-pedestrian collisions. But it would most likely result in confusion in automobile-automobile collisions.

Soon after *Sorrells,* a federal court applied Montana law to an inattentive plaintiff case in *Feeley v. N. P. Ry. Co.*[40] Feeley was killed when his jeep and the defendant's train collided at a railroad crossing. The court stated that an inattentive plaintiff could recover from a defendant if all three elements essential to recovery under the *Dahmer* case concurred. Discovery could be established by circumstantial evidence. *(Doichinoff)* Recovery for the wrongful death of Feeley was denied because the court found nothing in the record indicating that the defendant "actually discovered," or "should reasonably have discovered the perilous situation by the demeanor or conduct of Feeley in time to avert the injury. Although recovery was denied, the court would have allowed an inattentive plaintiff to recover under category III. (Actual Discovery) and category IV. (should reasonably have discovered).

In *Feeley,* the court cited section 480 "as a variation of the last clear chance doctrine . . . defining a defendant's liability to an inattentive plaintiff." However, section 480 limits recovery to situations in which

[39]PROSSER, *supra* note 4, at 446-449. PROSSER traces the development of various comparative negligence statutes. He concludes that "The tendency in the latest decisions has been to hold that the apportionment statute takes effect, notwithstanding the fact that the defendant has the last clear chance." Such statutes have increased rather than clarified the various problems in this area of negligence.

[40]230 F.2d 316 (1956).

the defendant actually discovers the inattentive plaintiff under category III. The language indicating that the defendant "should reasonably have discovered," is not a basis for recovery under section 480. The court had cited *Pollard* as a case which recognizes recovery under these words. Therefore, the most likely conclusion is that section 480 was cited as a basis for recovery under the actual discovery requirement of the *Dahmer* case. And, the words, "or should reasonably have discovered," was recognized as a possible basis for recovery under Montana law under category IV. INATTENTIVE PLAINTIFF—INATTENTIVE DEFENDANT.

The most recent decision on last clear chance in Montana was *Mally v. Asanovich.*[41] In *Mally,* the plaintiff, a pedestrian, was struck and injured by the defendant, a motorist, while crossing a highway during the evening. The defendant testified she saw the plaintiff was not paying attention to her approaching car. She also testified she made a mental judgment that she would not stop, although she could have had she wanted. The court resolved the case by saying:

> Under the facts of this case the plaintiff falls under the rules applicable under section 480 and the case law of this state which recognizes the position of an inattentive plaintiff who negligently places himself in a perilous position . . . *Sorrells v. Ryan.* . . . Recovery under this situation is much narrower than that of the helpless plaintiff for an inattentive plaintiff to recover it must be shown that the defendant knew of the plaintiff's perilous situation, or should have known, and failed to exercise care to avoid injuring the plaintiff. Clearly here under the facts before the jury they could reasonably have found that defendant, some 100 feet away from plaintiff, driving at about 20 miles per hour, who observed the plaintiff not paying any attention to her and who failed to either blow the horn or to stop her vehicle until after the accident, could be found to be the proximate cause of the accident.[42]

In *Mally,* the defendant "observed" the inattentive plaintiff "not paying any attention," failed to avoid the injury. Therefore, the case was resolved under III. INTTENTIVE PLAINTIFF—ACTUAL DISCOVERY BY DEFENDANT. The court cited section 480, which limits recovery to situations in which the defendant "knew" of the plaintiff's perilous position. The court used the words, "or should have known," which are not a recognized basis for recovery under section 480. However, the court stated that the position of an inattentive plaintiff is recognized "under section 480 and the case law of this state," and cited *Sorrells v. Ryan.* Since the words, "or should have known," have been recognized as a basis for recovery under the case law of the State, *(pollard, Sorrells),* the court may have been referring to two possible bases for recovery in Montana, section 480 (category III.) and the case law of the state, (Category IV.).[43]

[41]149 Mont. 99, 423 P.2d 294 (1967).

[42]*Id.,* at 104.

[43]The court in *Mally* used the words, "the proximate cause of the accident," in the last line quoted above. However, the negligence of the defendant was not the only proximate cause of the accident. The plaintiff's negligent inattentiveness was also

Conclusions

During the early development of the doctrine of last clear chance in Montana, the Supreme Court invariably made no distinction between helpless and inattentive plaintiff situations. With the exception of the *Neary* case, the court restricted recovery to actual discovery situations.

The *Pollard* case extended recovery to crossings, whether a plaintiff was discovered or not if he was in a perilous position. The *Armstrong* case, in dicta, extended recovery to persons at places where their presence could reasonably be anticipated.

The *Sorrells* case allowed an inattentive plaintiff to recover from an inattentive defendant even though his presence would not necessarily be anticipated at the situs of the accident. Prior cases had allowed recovery only where there was a clear duty to maintain a lookout. *(Dahmer, Pollard)* The *Sorrells* case established authority for recovery by an inattentive "jay-walker" from an inattentive driver under category IV., and would include Montana with Missouri in the minority view.

The case of *Mally v. Asanovich* was resolved on the basis of actual discovery, as found under Section 480 of the Restatement. The court, however, used language which would have supported recovery under category IV., and the *Sorrells* case.

The most probable trend in the law of last clear chance in Montana will be away from recovery under category IV. The court has repeatedly attempted to classify itself as being within the majority view, making no claim that it adheres to the Missouri doctrine. The court will likely retain its rule as applied to pedestrian-automobile and automobile-train collisions, possibly taking the view that those in charge of dangerous instrumentalities should be held to a more stringent legal duty to avoid injuring the interests of others. However, when presented with a case involving two negligently inattentive automobile drivers, the court would probably deny recovery rather than enter into the vast maze of problems which would result from such a liberal rule.

Hopefully, the court in the future will take an affirmative stand on whether or not an inattentive plaintiff will be allowed to recover in all situations from an inattentive defendent. Possibly, the court will

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a proximate cause which continued actively to the time of the accident. The proximate cause explanation does not, properly dispose of the case. Possibly, the negligence of the defendant, who observed the inattentive plaintiff, involved a higher degree of fault. But, probably the clearest basis for imposing liability is upon the theory that the defendant, upon discovering the plaintiff in a perilous position, had the last chance, and a clear chance to avoid the injury. Therefore, the defense of contributory negligence would not operate to bar the plaintiff's recovery.
Further references to the doctrine of last clear chance are:
65A C.J.S., Negligence Sections 136-139 (1966). Key Number 83.
38 Am.Jur., Negligence Sections 215-225 (1942).
5 Am.Jur., Negligence 779 (1936).
53 Am.Jur., Trial 174 (1945).

clear up its position of allowing an inattentive plaintiff to recover from a defendant who "should have discovered the perilous position . . . under Section 480 and the case law of the state." As it appears, this language allows recovery under both category III. (Actual Discovery) and category IV. (Inattentive Defendant. Also, a flat statement that the defense of contributory negligence is disfavored in a given case, could help alleviate the problems resulting from the use of terms such as "passive," "remote," "concurring," and "sole proximate cause." Such words are limited in scope and could operate to bar recovery in situations clearly warranting recovery.

As the law stands at present, a helpless plaintiff could expect to recover, whether actually discovered or not, no matter where the collision occurs, if the requirements of Section 479 are fulfilled. (dicta in *Armstrong*) An inattentive plaintiff at a railroad crossing could also expect recovery, whether actually discovered or not. *(Pollard)* Furthermore, an inattentive plaintiff, crossing in the middle of the street, could expect to recover from a defendant, whether actually discovered or not. *(Sorrells)* It is presently questionable whether an inattentive driver will be allowed to recover from another inattentive driver.

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