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Last Clear Chance in Ohio--Derogation of Contributory Negligence

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termination of the economic desirability of fair trade legislation is a matter which addresses itself to the state legislatures and to Congress, and not to the courts.

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*Last Clear Chance in Ohio—Derogation of Contributory Negligence**

INTRODUCTION

Contributory negligence, once praised as the doctrine of reason and justice, was recently described as the harshest doctrine known to the 19th century.[1] A distastefully gross quality inheres in a rationale which denies any compensation to an injured party while exonerating an admittedly negligent defendant. The austerity of this rule, however, is commonly modified by the application of the doctrine of last clear chance. Even though a plaintiff may have violated the duty imposed upon all men to observe ordinary care for his own safety, the last clear chance doctrine allows him to recover for his injuries. The usual explanation of the doctrine is that the plaintiff may recover in spite of his own fault if the defendant had, but failed to seize, the "last clear chance" to prevent the accident.[2]

In an early Ohio case,[3] the supreme court remarked that contributory negligence rested upon no doctrinal basis, but rather upon the policy of making the personal interest of parties dependent upon their own care and prudence.[4] The doctrine of last clear chance also rests upon a hidden policy of the law — a policy which is more concerned with social effects than personal prudence.

The manner in which courts inject this policy into the law deserves attention. The typical last clear chance situation is one of multiple fault: both plaintiff and defendant negligently contribute to the impact. In such a situation, courts commonly place responsibility for the loss by finding one party's fault to be the proximate, immediate, later or responsible "cause" of the impact.

Judgments of causality, however, are intimately dependent upon value standards.[5] Causal relationships are seen through a highly selective screen

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* This note received second prize in the 1956 Sindell Tort Competition, awarded by Sindell, Sindell and Bourne.

[1] GREEN, JUDGE AND JURY 115 (1930).

[2] PROSSER, TORTS 290 (2d ed. 1955).

[3] Davis v. Guarnieri, 45 Ohio St. 470 (1887)

[4] *Id.* at 489.

[5] Cohen, F. S., *Field Theory and Judicial Logic,* 59 YALE L. J. 238, 253 (1950).

of human values which give more importance to some antecedents than to others. Thus, despite the fact that an impact has only one set of physical antecedents, different jurisdictions, and different judges in the same jurisdiction, may differ on the question of which factor was the responsible "cause." Last clear chance operates as an instrument by which courts may label some antecedents "proximate" or "responsible" factors and other antecedents "remote."

The purpose of this note is to analyze the last clear chance doctrine, to trace its development and use in Ohio law, to note relevant factors which seem to influence judgments of causality in particular cases, and to appraise the usefulness of such a doctrine in our system of law.

Doctrine and Critique

Negligence is founded, in part, upon morality. Fault is the first step to a defendant's legal liability. Contributory negligence, itself a countervailing morality, accentuates the element of causation in the determination of responsibility for loss. A distinguished English Jurist once said,

> Contributory negligence in a plaintiff only means that he himself has contributed to the accident in such a sense as to render the defendant's breach of duty no longer its proximate cause.[6]

Last clear chance extends fault to the third degree by withholding the defense of contributory negligence in situations where the defendant fails to avail himself of the last opportunity to prevent loss.

Last clear chance originated in the celebrated Exchequer case of *Davies v. Mann.*[7] Plaintiff left his ass fettered on the highway. Defendant's team of horses, coming at what witness termed a "smartish pace," knocked the ass down and drove over it. The animal died soon after. The court held that the plaintiff might recover, even though negligent, if the accident might have been avoided by the exercise of proper conduct on the part of the defendant. Baron Parke said,

> Although the ass may have been wrongfully there, still the defendant was bound to go along the road at such a pace as to avoid the injury the mere fact of negligence on the part of the plaintiff was no answer to the action unless the donkey's being there was the *immediate cause* of the injury. (Emphasis added.)[8]

This decision stressed the subsequent negligence of the defendant while the ass was in helpless peril. This emphasis upon the time factor indicates that the decision was based upon the "last human wrongdoer" theory. Thus, the foundation was laid for a doctrine which stressed the later fault.

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[6] Thomas v. Quartermaine, 18 Q.B.D. 685, 694 (1887).

[7] 10 M. & W 545 (1842).

[8] *Id.* at 548.

Last clear chance was met with bitter criticism by American text writers.[9] They foresaw a virtual nullification of the doctrine of contributory negligence. Although the criticism, often condemnation, has continued to this day, virtually every jurisdiction has adopted the doctrine in some guise.[10] To meet the facts of particular cases, courts have extended, restricted and varied its application. As a result of this varied application, last clear chance has become a label applied in different jurisdictions to different rules of law.

In order to understand how last clear chance functions, it is useful to analyze the typical last clear chance situation.[11]

Plaintiff, whose thoughts are a million miles away, wanders down a path which crosses a railroad track. A train is approaching. Plaintiff is about to enter and pass slowly through a zone of danger. Unless plaintiff realizes his danger, collision will be inevitable if the defendant fails to brake the train before a certain critical point on the track is reached. After that point is passed, even though the brakes be applied, the train would pass over the point upon which plaintiff is positioned. Even after the critical point is passed, plaintiff will have an opportunity in time and space to jump clear of the zone of danger if he realizes his peril. The engineer sees the plaintiff, but he fails to brake until after the crucial point is passed. Plaintiff fails to realize his position of peril. He is struck and seriously injured, perhaps fatally. Who had the last clear chance to avoid this accident? Specific questions of fact must first be answered. Was the plaintiff helpless or merely inattentive? Could plaintiff extricate himself from peril after defendant passed the critical point? Did the defendant have actual knowledge of plaintiff's peril, or should he have had such knowledge by the exercise of due care? When the defendant discovered plaintiff's peril, did he have the means at hand to prevent the impact? Did defendant's antecedent negligence prevent his having a last clear chance or opportunity to avoid the harm? Did the negligence of the plaintiff continue and concur with that of the defendant? Depending upon the jury, jurisdiction and time, the answers to these questions of fact will determine whether the defense of contributory negligence will be denied the defendant on the ground that he had the last clear chance of avoiding the accident.

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[9] See Schofield, *Theory of Contributory Negligence*, 3 HARV. L. REV. 263 (1890). This author thoroughly discusses the early attitude of courts and secondary writers toward last clear chance.

[10] See Black v. New York, N. H. & H. R.R., 193 Mass. 448, 79 N.E. 797 (1907) The doctrine of last clear chance is here repudiated, yet applied under the Massachusetts doctrine of cause and condition.

[11] See MORRIS, TORTS 221, 222 (1953) The author sets forth therein an excellent analysis of the typical last clear chance situation. This article should be both a guide and a starting point for understanding the problem of fact required to support a petition or jury charge on the doctrine of last clear chance.

Where the plaintiff is helpless to avoid the harm by reason of his prior negligence, and the defendant discovers his peril in time to avoid it, the majority of jurisdictions hold the defendant liable upon the doctrine of discovered peril or *conscious last clear chance.*[12]

Where the plaintiff is helpless and in a position of inextricable peril, but the defendant does not discover the danger in time to avoid it, the general rule is that the plaintiff may not recover even though the defendant could have discovered plaintiff's peril by the exercise of due care.[13] The courts hold that the defendant had *no chance* to avoid the harm.

In the leading case of *Woloszynowski v. The New York Central Railroad,*[14] a small boy went upon defendant's tracks. He stood there in the path of a train looking neither to the right nor the left. The fireman and brakeman, who saw him, shouted a warning to the engineer. He immediately applied the brakes, without avail. In the action for wrongful death, the New York Court of Appeals reversed a verdict for the plaintiff. Justice Cardozo said,

> Knowledge may be established by circumstantial evidence, in the face even of profession of ignorance, but knowledge there must be or recklessness so reckless as to betoken indifference to knowledge. The doctrine of the last clear chance, however, is never wakened into action unless and until there is brought home to the defendant to be charged with liability a knowledge that another is in a state of present peril, in which event there must be reasonable effort to counteract the peril and avert its consequences.[15]

A strong minority of jurisdictions do allow recovery in such a situation.[16] This rule is termed the doctrine of *unconscious last clear chance.* These jurisdictions submit that a plaintiff oblivious of his surroundings has no more of an opportunity to escape than a man asleep or drunk. The "no chance" jurisdictions reply with the argument that the defendant can reasonably assume, until the last moment, that plaintiff will take care of himself. These cases, however, are usually marked by a flagrant lack of reasoning. Courts state that the chance which was presented was not "clear,"

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[12] Schaaf v. Coen, 131 Ohio St. 279, 2 N.E.2d 605 (1936); Bence v. Teddy's Taxi, 112 Cal. App. 636, 297 Pac. 128 (1931).

[13] Cleveland Ry. Co. v. Masterson, 126 Ohio St. 42, 183 N.E. 873 (1932).

[14] 254 N.Y. 206, 172 N.E. 471 (1930). (This case is usually cited for the proposition that the danger must be actually discovered by the defendant. It should be noted, however, that the plaintiff's decedent was not helpless, but was in a position of extricable peril. There was a time when he could have jumped free had he realized his dangerous position. Thus the case could be, though it has not been, limited to instances of extricable peril.)

[15] *Id.* at 209, 172 N.E. at 472.

[16] Nicol v. Oregon-Washington R.R. & N. Co., 71 Wash. 409, 128 Pac. 628 (1912) (this rule is also termed the "Washington Rule"); *accord,* Casey v. Marshall, 64 Ariz. 232, 168 P.2d 240 (1946); RESTATEMENT, TORTS § 479 (1934).

or that the negligence of the party which the court feels should be absolved was remote, while that of the other was proximate.

These decisions are not so far distant in practice as they may seem in theory. Knowledge may be determined by circumstantial evidence. It is a question of fact to be determined by the jury. The defendant who had a duty to lookout may well have a difficult time convincing a jury that he did not, in fact, see the plaintiff. The defendant also faces another dilemma. If he pleads and testifies that he did not see the plaintiff, this admission of lack of due care will come hauntingly back should the jury fail to find contributory negligence. The primary negligence of the defendant will be apparent.

The majority of jurisdictions also recognize the application of last clear chance where the plaintiff is merely inattentive, and the defendant discovers his danger while he can still avoid it.[17] This is based upon the doctrine of conscious last clear chance.

If the inattentive defendant does not discover the plaintiff's inattention, both have an equal opportunity to avoid the harm. All jurisdictions deny the plaintiff recovery in this situation save Missouri.[18] That state has evolved what is termed the "humanitarian doctrine."[19] Recovery is allowed when the defendant is operating a dangerous mechanism such as a train or automobile. As the vast majority of last clear chance situations do involve such an instrumentality, the rule should apply in practice to all but the most unusual cases. Its application has created such confusion that no other jurisdiction has been tempted to follow it.[20]

If the defendant's antecedent negligence prevents his having the present opportunity to avoid the harm, the general rule is that the defendant had no chance.[21]

The leading exception to this general rule is the case of *British Columbia Ry. v. Loach*.[22] Sands, plaintiff's decedent, was a passenger in a wagon approaching defendant's railroad crossing. When the car was ap-

[17] Merrill v. Stringer, 58 N.M. 372, 271 P.2d 405 (1954); Girdner v. Union Oil Co., 216 Cal. 197, 13 P.2d 915 (1932); RESTATEMENT, TORTS § 480 (1934).

[18] Thompson v. Porter, 21 Wash.2d 449, 151 P.2d 433 (1944); Iverson v. Knorr, 68 S.D. 23, 298 N.W 28 (1941).

[19] McCall v. Thompson, 348 Mo. 795, 155 S.W.2d 161 (1941); Barrie v. St. Louis Transit Co., 102 Mo. App. 87, 76 S.W 706 (1903); Gaines, *The Humanitarian Doctrine in Missouri*, 20 ST. LOUIS L. REV. 113 (1935).

[20] *Cf.* Capital Transit Co. v. Garcia, 194 F.2d 162 (D.C. Cir. 1952). In this case the Missouri result was reached saying the plaintiff was helpless because of his inattention.

[21] Chesapeake and Ohio Ry. v. Conley's Adm'x, 261 Ky. 669, 88 S.W.2d 683 (1935); Johnson v. Director General of Railroads, 81 N.H. 289, 125 Atl. 147 (1924); Illinois Central Ry. v. Nelson, 173 Fed. 915 (8th Cir. 1909).

[22] (1916) A.C. 719 (P.C.).

proximately 400 feet away, the motorman appreciated the danger and applied the brakes. Had the brakes been in good condition, the car would have stopped in 100 feet. In fact, the brakes were defective. The train could not be stopped until well past the crossing. Sands was killed in the collision. In the trial court, a verdict was given for the plaintiff. The Privy Council of England dismissed defendant's appeal upon the ground that a last opportunity, which he would have had but for his own antecedent negligence, was equivalent to one actually had. In the instant case, plaintiff continued to act unreasonably after the defendant's servant had started to act reasonably. Surely, the later fault belonged to the plaintiff. Yet, liability was predicated upon the doctrine of *last opportunity*. When courts use causal relation judgments to support objectives, verbal legerdemain is not uncommon.

LAST CLEAR CHANCE IN OHIO

In 1854, the first case involving the elements of last clear chance reached the Ohio Supreme Court—*Kerwacker v. Cleveland, Columbus, and Cincinnati Railroad.*[23] Farmer Kerwacker's pigs wandered into the path of defendant's locomotive, were run over and killed. The issue before the court was whether defendant had exercised due care to avoid the injury. Because due care on the part of the railroad would have avoided the harm, recovery was allowed. The negligence of the defendant was termed "proximate," while that of the plaintiff was labeled "remote."

Despite the *Kerwacker* case, *Railroad Co. v. Kassen*[24] is usually cited as being the case which introduced last clear chance into Ohio jurisprudence. Defendant operated a train which ran in two sections, two hours apart. Decedent negligently stepped from the first train and fell unconscious upon defendant's tracks. Defendant's servants on the first section had actual knowledge of plaintiff's decedent's peril. The second section ran him over. The Ohio Supreme Court imputed the knowledge of the brakeman on the first section to the engineer of the second, and proceeded to allow recovery. The negligence of the defendant was pronounced to be the *more proximate* cause of the harm. Unfortunately, the opinion included language broader than the decision. Although the court had imputed actual knowledge to the engineer of the second section it went on to say that the plaintiff could recover if the defendant had been aware or *ought to have been aware* of the plaintiff's danger. Interpreted literally, this language would allow a recovery upon the doctrine of unconscious last clear chance. This dictum was later repudiated, but the holding definitely committed Ohio to the

[23] 3 Ohio St. 172 (1854).

[24] 49 Ohio St. 230, 31 N.E. 282 (1892).

theory that last clear chance is a part of the doctrine of proximate cause, rather than an extension of contributory negligence.

A distinguished authority on the subject of legal cause has submitted that the rules of legal cause are applied to produce a just result, rather than to save time or avoid uncertainty.[25] Through the years, the Ohio Supreme Court has applied the rules of legal cause through the doctrine of last clear chance. The following cases trace the development of the doctrine and illustrate some factors which affected the judicial decisions then and, perhaps, now.

In *Drown v. Northern Ohio Traction Co.*,[26] the Ohio Supreme Court held that the doctrine of last clear chance was logically irreconcilable with the doctrine of contributory negligence, and that the basis for the doctrine was the distinction between a proximate and a remote cause. Perhaps the language of the court can better describe the attitude of the judge who wrote this decision. He wrote,

> In short, there can be no recovery in such a case unless the whole doctrine of contributory negligence, a doctrine founded in reason and justice, should be abolished. It is clear that the last clear chance rule should be given with discrimination.[27]

Pennsylvania Co. v. Hart[28] established the doctrine of concurrent negligence as a corollary to the doctrine of last clear chance. The doctrine of concurrent negligence postulates that last clear chance is not an extension of the doctrine of comparative negligence; therefore, a plaintiff's negligence must cease before impact or the last clear chance will be said to be his. In situations of extricable peril occasioned by plaintiff's inadvertence to impending danger, this continuing negligence which will eventually concur with that of the defendant precludes recovery by the plaintiff.

In *West v. Gillette*,[29] the trial court inadvertently charged the jury that the plaintiff could recover if the defendant " ought to have seen" the plaintiff. A majority of the Ohio Supreme Court held the charge, even if erroneous, would not preclude recovery, for the evidence showed actual knowledge. Commenting on contributory negligence, Judge Johnson said,

> it would surely be unjust to hold that one should be denied the protection of the law, because of acts of *carelessness* on his part, which were followed by subsequent acts of *negligence* on the part of another, which latter acts were the proximate cause of the injury. (Emphasis added.)[30]

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[25] Edgerton, *Legal Cause*, 72 U. PA. L. REV. 211 (1924)

[26] 76 Ohio St. 234, 81 N.E. 326 (1907).

[27] *Id.* at 246, 249, 81 N.E. at 328, 329.

[28] 101 Ohio St. 196, 128 N.E. 142 (1920)

[29] 95 Ohio St. 305, 116 N.E. 521 (1917)

[30] *Id.* at 311, 116 N.E. at 522.

It is interesting to note that Judge Johnson compared the *carelessness* of the plaintiff to the *negligence* of the defendant in arriving at the conclusion that the negligence of the defendant was the *proximate cause* of the impact. Compare this conclusion with the dissent where Judge Jones said,

> By the charge in this case, the doctrine of contributory negligence, long recognized in this state, has been emasculated, since the charge permits recovery by a *negligent* person even though that negligence concurred in and was a *proximate cause* of the injury. (Emphasis added.)[31]

These excerpts serve to illustrate some of the factors which influenced two learned judges to differ on which of two fault factors was the proximate cause of an impact. Justice Cardozo once wrote,

> There is nothing absolute in the legal estimate of causation. Proximity and remoteness are relative and changing concepts.[32]

Indeed, valuations of proximity and remoteness are relative to judge and jurisdiction, and legal estimates of causation do change with the passage of time. The conservative views expressed by Judge Jones for the minority in *West v. Gillette*[33] were later to take root in majority opinions of the Ohio Supreme Court. This judge, who feared last clear chance would emasculate the doctrine of contributory negligence, was the author of the majority opinions in both *Cleveland Railway v. Wendt*,[34] and *Cleveland Railway v. Masterson*,[35] the leading last clear chance case in Ohio. In both cases, judgments for the plaintiff were reversed by the Ohio Supreme Court.

In the *Masterson* case, plaintiff, while jaywalking, was struck by an auto and thrown into the devils strip on defendant's track. He was struck by an oncoming street car. The plaintiff pleaded and the trial judge charged the jury that recovery could be had by the plaintiff if the defendant saw, or in the exercise of ordinary care *should have seen* the plaintiff, and could have stopped the street car in time to avoid striking him. The Ohio Supreme Court reversed a judgment for the plaintiff holding the instruction to be reversible error. Judge Jones delivered the majority opinion. The court held that a defendant is required to use due care only after knowledge of a plaintiff's peril. This decision definitely placed Ohio among the conservative "discovered peril" jurisdictions.

That so extreme a case as *Fairport, Painesville, and Eastern R.R. v. Meredith*[36] managed its way into Ohio law is astonishing. Plaintiff and her

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[31] *Id.* at 326, 116 N.E. at 526.

[32] CARDOZO, THE PARADOXES OF LEGAL SCIENCE 85 (1927).

[33] 95 Ohio St. 305, 326, 116 N.E. 521, 526 (1917).

[34] 120 Ohio St. 197, 165 N.E. 737 (1929).

[35] 126 Ohio St. 42, 183 N.E. 873 (1932). This case is universally cited as a leading case requiring discovered peril.

[36] 46 Ohio App. 457, 189 N.E. 10 (1933); *aff'd*, 292 U.S. 589 (1934). The Ohio Supreme Court refused to take up the case.

daughter negligently drove upon defendant's railroad crossing. They did not observe the approaching train, running backward, which consisted of 32 cars. Although the engine, tender, and all other cars were equipped with air brakes, the connection required by federal statute had not been made. Neither defendant nor plaintiff knew of the approach of the other until immediately prior to the impact. There was no dispute that, from the instant of collision until the auto dropped from the tender, the car had traveled 657 feet from the crossing. When the train finally stopped, the auto was beneath the wheels of the tender. The occupants of the car had received no serious injury until the car was crushed beneath the tender. Had the air brakes been connected, the train could have stopped more quickly and serious harm would have been averted. In the trial court, a jury returned a verdict of $20,000 for the plaintiff. This squarely raised the issue of whether pre-existing negligence may be considered in determining responsibility under the doctrine of last clear chance. Against the overwhelming weight of authority,[37] citing only one obscure Utah case[38] in support, the court of appeals affirmed the judgment on the verdict. The Ohio Supreme Court judiciously declined to review the action of the court of appeals.

The *Meredith* case reveals much of the judicial attitude toward last clear chance. The opinion read,

> In the instant case, at most, the plaintiff violated no rule except the natural law to use ordinary care for her own protection, and the defendant violated a federal law. [39]

Although proximate cause may be the cornerstone of the Ohio doctrine of last clear chance, the court of appeals seemed to emphasiz *greater* rather than *later* fault. In a jurisdiction which is emphatically committed to the proposition that last clear chance has nothing to do with the doctrine of comparative negligence, a jursdiction whose highest court once hailed contributory negligence as the doctrine of reason and justice, this decision stands alone. It has never been followed.

SUMMARY OF THE OHIO DOCTRINE

The battleground of last clear chance is the trial court. The fact situations to which the doctrine may be properly applied have been defined by appellate cases. Its application is dependent upon questions of fact in each particular case.

The defendant must have actual knowledge of plaintiff's peril. The

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[37] See note 19 *supra.*

[38] Thompson v. Salt Lake Rapid-Transit, 16 Utah 281, 52 Pac. 92 (1898).

[39] Meredith v. Fairport, P. & E. R.R., 46 Ohio App. 457, 468, 189 N.E. 10, 14 (1933); *aff'd,* 292 U.S. 589 (1934).

negligence of plaintiff must have ceased before the impact. If the negligence of the plaintiff continues and concurs with that of the defendant, plaintiff will be denied recovery. These questions are questions of fact to be determined by the jury, unless reasonable men could not disagree. There is slight authority that a defendant's antecedent negligence with actual knowledge of plaintiff's peril will render him liable.

Throughout the leading cases in Ohio on last clear chance runs a common thread, the proposition that last clear chance is but an application of the principles of law relating to proximate cause.

SUMMARY AND CONCLUSION

Last clear chance is more than one rule. It is a conglomeration of many different rules, each applied under the same label. Practically every possible rule has been developed, even in the same jurisdiction.[40]

The "last" in the doctrine is directly related to the "proximate" in proximate cause. Both words bear connotation of a time factor. Many times the question of later fault is the decisive factor in determining responsibility. Yet, it is submitted that courts, and certainly juries, often search for the greater blameworthiness. Although the courts of Ohio are committed to the *later,* rather than the *greater,* fault theory, comments which bespeak a recognition of greater fault have crept into the opinions.

Logically a party who is to blame for an accident ought to bear only that part of the loss for which he is responsible. But last clear chance has functioned as an instrument by which courts place sole responsibility for loss upon a single party when both parties are at fault. Thus, instead of mitigating the harshness of contributory negligence, this doctrine merely shifts the responsibility for loss. The inflexibility of both contributory negligence and last clear chance points out the inadequacies in the present Monte Carlo system of "winner take all." These inadequacies have prompted contemporary legal scholars to advance alternative solutions.

One alternative employed by some jurisdictions is a statutory rule of apportionment, which is clearly based upon the concept of fault. Under such "comparative negligence" statutes, however, the loss is still borne by the immediate parties, who very often can ill afford to incur such a loss. These considerations may lead to a future system of law based upon "social fault," rather than the current notion of personal blameworthiness.

Legal concepts, to a certain degree, reflect the mores of the contemporary societies from which they evolve. Modern society is highly mechanized,

[40] See Demuth, *Derogation of The Common Law Rule of Contributory Negligence,* 7 ROCKY MT. L. REV. 161 (1935). The author sets forth therein an excellent chart of reaction of Colorado courts to the various fact situations in which last clear chance was considered.