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Last Cleat Chance in Admiralty

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ing into circumstances impossible to be unravelled."[56] These considerations have no less force today than when they were first announced. They have resulted in the development of a rule that, when negligence is the basis of the action, actual proof of negligence will not be required; the plaintiff makes a prima facie case by showing the carrier received the freight in good condition and delivered it to the destination in damaged condition.[57]

> The underlying reason is that the facts as to the injury or damage are peculiarly within the knowledge of the carrier.[58]

It is submitted that this simple rule effectively accomplishes all of the purposes of the common law rule which remain valid today.

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Last Clear Chance in Admiralty

INTRODUCTION

In recent years there appears to be an increasing tendency on the part of our federal courts to apply the doctrine of last clear chance in admiralty cases. Although comment has been made that there are few decisions in which the doctrine has been applied,[1] this writer has found that last clear chance has been applied either in name or in principle in at least 20 cases. It was held in the early part of this century that last clear chance had no place in admiralty law.[2] However, in a number of instances it has crept into the field and apparently has confused some of our courts on occasion. Whether or not this creation of the common law can coexist with fundamental admiralty principles is the subject of this note. The scope of the discussion is by necessity limited to the problems of maritime collision law in our federal courts. To facilitate comparison with the common law and for the convenience of those not familiar with admiralty terminology, the parties will be listed as plaintiff and defendant throughout this article rather than libellant and libellee.

56. Forward v. Pittard, 1 Term Rep. (Durnford & East) 27, 33 (1785).

57. Wilson v. Pennsylvania R.R., 135 Ohio St. 560, 21 N.E.2d 865 (1939); Sugar v. National Transit Corp., 82 Ohio App. 439, 81 N.E.2d 609 (1948).

58. Wilson v. Pennsylvania R.R., 135 Ohio St. 560, 562, 21 N.E.2d 865, 866 (1939). The clarity of the rule in this case has been clouded by a subsequent 4-3 decision of the Supreme Court, which, while expressly approving the former case, held that "The mere fact that an animal, apparently sound when delivered for shipment, arrives at its destination with a disease is not enough to charge the carrier with having negligently caused such disease." Grosjean v. Pennsylvania R.R., 146 Ohio St. 643, 650, 67 N.E.2d 623, 627 (1946).

LIABILITY IN COLLISION

It seems appropirate at this point to include a capsule outline of maritime collision law as it is applied in the United States.

Liability under admiralty collision law is based on fault;[3] *i.e.*, the failure to observe the appropriate standard of care under the circumstances of the individual case. As at the common law, fault alone is not sufficient to impose liability. The mariner's breach of duty must be the proximate cause of an injury resulting in damage.[4]

The Standard of Care

The standards imposed upon the mariner, in addition to general principles of navigation are largely statutory. The Rules of the Road[5] coupled with supplementary federal regulation, plus rules issued by state and local harbor authorities prescribe specific courses of conduct for most situations.

The Master who breaches a statutory duty prior to a collision finds a very heavy legal burden imposed upon him by the *Rule of The Pennsylvania.*[6] In that case the court ruled that a vessel guilty of statutory fault must prove not only that the fault shown probably did not, but that it could not have contributed to cause the collision. The rationale of the *Pennsylvania* rule is based upon the insistence by the courts that the Rules of Navigation are to be strictly and literally construed and that compliance is mandatory.[7] When the Rule is applied it raises an almost irrebuttable presumption of causation. However, this stringent approach has been modified by the courts and the Rules of Navigation authorize a departure from the normal prescribed course of action in certain situations.

The primary judicial modification of the *Pennsylvania* rule is found in the doctrine of *in extremis.*

The admiralty courts recognize that even the "reasonable" man may make an error in judgment, when, through no fault of his own, he is

1. Richmond v. The Connie C. Cenac and The LaCache, 157 F. Supp. 397 at 400, n. 8 (E.D. La. 1957).

2. The Norman B. Ream, 252 Fed. 409 (7th Cir. 1918).

3. The Java, 81 U.S. (14 Wall.) 189 (1872).

4. Gulf Atlantic Transf. Co. v. Becker County Sand and Gravel Co., 122 F. Supp. 13 (E.D.N.C. 1954).

5. The United States has 4 sets of Rules of Navigation applying to different waters. For the purpose of this article only the International Rules for Navigation at Sea, 65 Stat. 406 (1951), 33 U.S.C. §§ 143-47(d) (1952), will be considered, as the other regulations follow the same basic principles.

6. The Pennsylvania, 86 U.S. (19 Wall.) 125 (1874).

7. Belden v. Chase, 150 U.S. 674, 698 (1893).

placed in a position where he must take action to avoid danger. When two vessels approach each other so closely that collision is inevitable unless *both* vessels take action to prevent it, the vessels are said to be *in extremis*.[8] Thus, when a vessel, through no fault of her own, becomes involved in an *in extremis* situation, the courts, in general, exonerate the vessel for her actions as long as the navigator exercised reasonable judgment, although hindsight may show that he undertook the wrong course of conduct or violated the Rules of Navigation.[9]

The Rules of Navigation recognize that the special circumstances of a situation may require a different course of action from that prescribed by the Rules in the ordinary situation.[10] However, authorized departure from the statutory standard is severely limited to a few situations where it is readily apparent that adherence to the Rules will actually increase the risk of collision.[11]

Conversely, it should be noted that the specific rules of navigation are minimum requirements, and the mariner may still be held at fault for not exercising a greater degree of care than that laid down by these legislative standards.[12]

Recoverable Damages

Although the factual determination of negligence in admiralty is similar to the common law process, the resulting liability is a decidedly different proposition. A court may determine that although a collision occurred, neither vessel was at fault, in that the master or deck officers directing the ship's movements exercised reasonable care, or the casualty may be attributed to an Act of God. This is generally termed inevitable

8. See FARWELL, RULES OF THE NAUTICAL ROAD 326 (rev. ed. 1954).

9. The Genesee Chief, 53 U.S. (12 How.) 443 (1852); Pacific-Atlantic S.S. Co. v. United States, 175 F.2d 632, 640 (4th Cir. 1949), *cert. denied*, 338 U.S. 868 (1949).

10. Rule 27, International Rules for Navigation at Sea, 33 U.S.C. 146 (k) (1952), "In obeying and construing these Rules due regard shall be had to all dangers of navigation and collision, and to any special circumstances, including the limitations of the craft involved, which may render a departure from the above rules necessary in order to avoid immediate danger."

11. For example, when vessels are entering or leaving a slip, or when more than 2 vessels are approaching each other. For a more complete discussion see FARWELL, THE RULES OF THE NAUTICAL ROAD, ch. 8 (rev. ed. 1954).

12. This is recognized by Rule 29 of the International Rules; "Nothing in these Rules shall exonerate any vessel, or the owner or master or crew thereof, from the consequences of any neglect to carry lights or signals or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case," 33 U.S.C. § 147 (a) (1952). And see United States v. Woodbury, 175 F.2d 854 (1st Cir. 1949).

accident and each party bears his own loss.[13] In some instances the evidence may fail to show a specific breach of duty on the part of either vessel, although it is apparent from the circumstances that fault to some degree was present. The courts have classified this situation as one of inscrutable fault and apply the principle that unless fault is affirmatively shown each vessel bears it own loss.[14] When it appears that only one vessel is clearly at fault, the end result is the same as at common law; the offending vessel bears the entire loss, both its own and that of the innocent ship.[15]

When both vessels are equally at fault, or nearly so, the admiralty rule of division of damages applies. This is one of the distinguishing features of liability under admiralty law. The maritime courts early rebelled against the doctrine of contributory negligence and declared that contributory fault does not bar an action for damages arising from a collision.[16] Instead, the total damages are divided equally.[17] The divided damages rules has been criticized as being a harsh rule,[18] but actually the rule is just if applied in the proper case. The criticism should really be leveled at the improper use of the principle when the facts do not warrant the result. When both vessels are at fault, but clearly disproportionately, the rule of major and minor fault comes into play.[19] The rule is usually applied when one vessel is grossly negligent and the other vessel at fault only to a minor degree. The minor fault of the relatively innocent vessel is held not to be a contributory cause of the collision and the entire loss is borne by the vessel whose conduct was clearly the major cause of the casualty. The result obtained under this principle mitigates the

13. See The Clara, 102 U.S. 200 (1880); Stainback v. Rae, 55 U.S. (14 How.) 532 (1852).

14. The Jumna, 149 Fed. 171 (2d Cir. 1906).

15. The Clara, 102 U.S. 200 (1880); Oaksmith v. Garner, 205 F.2d 262 (9th Cir. 1953).

16. See The Max Morris, 137 U.S. 1, (1890); The Catherine, 58 U.S. (17 How.) 170 (1855).

17. The Atlas, 93 U.S. 302 (1876); The Catherine, 58 U.S. (17 How.) 170 (1855). The result is reached by adding the total damages of both vessels, and each party bears half of this total. For example, assume vessels A and B collide. A's damages = $100,000; B's damages = $50,000. Total damages equal $150,000. B would be required to contribute $25,000 to A to even the loss.

18. Tank Barge Hygrade v. Gatco New Jersey, 250 F.2d 485 (3d Cir. 1957); Oriental Trading and Transport Co. v. Gulf Oil Corp., 173 F.2d 108 (2d Cir. 1949); Socony Vacuum Transportation Co. v. Gypsum Packet Co., 153 F.2d 773 (2d Cir. 1946).

19. See The Minnie, 100 Fed. 128 (4th Cir. 1900); The Transfer No. 8, 96 Fed. 253 (2d Cir. 1899). Cf. The Delaware, 161 U.S. 459 (1896); The Oregon, 158 U.S. 186, 204 (1895); The City of New York, 147 U.S. 71, 85 (1893); Pure Oil Co. v. Neilson Inc., 135 F. Supp. 786 (E.D. La. 1955), *aff'd*, 233 F.2d 790 (5th Cir. 1956).

harsher aspects of the divided damages rule. It has been criticized as being a vague and unreliable principle,[20] but actually it appears that this form of comparative fault, while difficult in some instances, to administer, is basically a sound and just rule. Here too, it seems that the misapplication of the rule is more the basis of the criticism than the principle itself.

LAST CLEAR CHANCE AT COMMON LAW

In 1842 the English case of *Davies v. Mann*[21] gave birth to the doctrine of last clear chance. Like Jack's beanstalk this child of the common law grew out of all natural proportion, and today is accepted by most American courts in one form or another. The apparent reason for such ready acceptance by the courts seems to be the judicial distaste for the defense of contributory negligence. The basic philosophy of last clear chance presupposes that if the defendant in the exercise of reasonable care had the last opportunity to avoid the harm, the plaintiff's prior negligence is not the proximate cause of the result.[22]

The doctrine is primarily applied in the following situations: (1) where the plaintiff by reason of his prior negligence is helpless to avoid the harm and the defendant discovers his peril in time to avoid it by the exercise of due care. Most courts hold that the plaintiff can recover under the last clear chance rule either under the theory that the last wrongdoer is the proximate cause, or by classifying defendant's conduct as willful or wanton: (2) where the plaintiff is not helpless, but merely inattentive, and the defendant discovers his inattention and his danger in time to avoid it. Although the defendant cannot logically be considered the last wrong doer since the plaintiff is actively negligent up to the time of the casualty, most courts still allow recovery by the plaintiff by either classifying defendant's conduct as wanton, or in many instances simply stating the defendant's action or inaction was the "proximate cause" of the injury; (3) where the plaintiff is helpless and the defendant, though he did not discover plaintiff's peril, would in the exercise of due care have discovered it in time to avoid the harm, a substantial minority of courts again apply the doctrine and allow recovery by the plaintiff. Although the last wrongdoer philosophy may validly apply here, it is hard to say that the defendant had a last *clear* chance, but rather, it would be more correct to say that the defendant had the last possible opportunity to avoid the harm. Where both parties are merely inattentive, or where

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20. GILMORE AND BLACK, THE LAW OF ADMIRALTY 403 (1957).
21. 10 M. & W. 546 (1842).
22. Davies v. Mann, 10 M. & W. 546 (1842).

defendant's antecedent negligence prevents him from avoiding the harm, most courts refuse to apply the last wrongdoer theory.[23]

Last clear chance as a subject of criticism has provided a field day for the legal writers.[24] As a legal concept, last clear chance does leave much to be desired. Should the last wrongdoer be considered the worst wrongdoer and bear the entire loss merely because his negligence occurred subsequent to that of the plaintiff? Last clear chance does mitigate the harsh common law rule of contibutory negligence, but is the end result more just? The all or nothing rule of recovery at common law is harsh on the plaintiff in many cases, but, except where defendant's negligence is more than ordinary, last clear chance in shifting the entire loss to the defendant is equally as harsh as the rule of contributory negligence. The doctrine is based upon hindsight and usually involves difficult factual determinations such as measurement of tire marks, supposition as to distances and the end result, in many instances, is simply pure speculation. The defendant may sometimes find the entire loss shifted to him when he was not really negligent, but simply slow in reacting or guilty of an error in judgment.[25] The application of fictional analyses based upon proximate cause often stretches that nebulous doctrine to the breaking point and departs from the modern theories of negligence.[26]

Although last clear chance has been under fire for a number of years and has been described as a transitory doctrine,[27] apparently it is more than just a phase since it originated over 100 years ago and seems to have gained an even stronger foothold in the law in more recent years.

The History of the Doctrine in Admiralty

In 1918 the seventh circuit's ruling in *The Norman B. Ream*[28] seemed to have excluded last clear chance from the law of admiralty. The court briefly stated that this rule was created to mitigate the common law principle that contributory negligence is a bar to recovery, but the rule did not apply in admiralty since in that field contributory negligence effects only a division of damages. This decision could have settled the question, but, although it has been frequently cited,[29] a number of

23. For a summary of the case law see HARPER AND JAMES, THE LAW OF TORTS, (1956); PROSSER, TORTS 290-96 (2d ed. 1955).

24. Green, *Contributory Negligence and Proximate Cause,* 6 N.C.L. REV. 3 (1927); Prosser, *Comparative Negligence,* 51 MICH. L. REV. 465, 473 (1953).

25. See Smith v. Connecticut Ry. and Lighting Co., 80 Conn. 268, 67 Atl. 888 (1907).

26. Green, *supra* note 24, at 21.

27. James, *Last Clear Chance: A Transitional Doctrine,* 47 YALE L. J. 704 (1938).

28. 252 Fed. 409 (7th Cir. 1918).

29. See The Sakito Maru, 41 F. Supp. 769 (S.D. Cal. 1941); GILMORE AND BLACK, *op. cit. supra* note 20 at 404, n. 47.

courts have either overlooked or ignored the case and have proceeded to apply the doctrine in reaching their decisions.

In several decisions, the last clear chance rule has, in effect, been applied in holding that one vessel's fault was a "condition and not a cause" of collision.[30] This type of reasoning comes closer to the fictional standards of causation applied under common law last clear chance than the principle of major and minor fault, which in these cases would have been applicable and brought the same result.

A little over twenty years after the *Ream* case the second circuit found no difficulty in applying last clear chance by name in *The Watupa*[31] and *The Sanday*.[32] Neither case discussed the *Ream* case, but appear to have simply assumed the doctrine was applicable. After these two decisions the doctrine, by name or in principle, was accepted with little hesitation in more than just isolated instances,[33] but not without some confusion as to how it should be applied. One line of decisions required actual knowledge of the danger involved;[34] *i.e.*, a conscious last clear chance, while other decisions held that it was sufficient if the danger should have been discovered in the exercise of due care.[35]

There apparently has been little discussion regarding the validity of this use of the doctrine until 1957, when a district court in *Richmond v. The Connie C. Cenac and The LaCache*[36] commented that the doctrine had been used in admiralty "largely by persons who, being unfamiliar with the subject, would equate the navigation of slow responding vessels at sea to the operation of quick responding vehicles on the highways."[37]

30. The Syosset, 71 F.2d 666 (2d Cir. 1934); The Perserverence, 63 F.2d 788 (2d Cir. 1933).

31. 120 F.2d 766 (2d Cir. 1941).

32. 122 F.2d 325 (2d Cir. 1941).

33. See Kosnac v. The Norcuba 243 F.2d 890 (2d Cir. 1957); Crawford v. Indian Towing Co., 240 F.2d 308 (5th Cir. 1957); J. S. Gissel & Co. v. Dixie Carriers, Inc., 219 F.2d 233 (5th Cir. 1955); P. Daugherty Co. v. United States, 207 F.2d 626 (3d Cir. 1953); The Cedar Cliff, 149 F.2d 964 (2d Cir. 1945); Southern Transp. Co. v. Dauntless Towing Line, 140 F.2d 215 (2d Cir. 1944); Pure Oil Co. v. The F. B. Walker, 127 F. Supp. 867 (E.D. La. 1955); Chicago, B. & Q. R.R. v. The W. C. Harnes, 134 F. Supp. 636 (S.D. Tex. 1954); Hertz v. Consolidated Fisheries, Inc., 105 F. Supp. 948 (N.D. Cal. 1952); Manhattan Lighterage Corp. v. United States, 103 F. Supp. 274 (S.D.N.Y. 1951).

34. Southern Transp. Co. v. Dauntless Towing Line, 140 F.2d 215 (2d Cir. 1944).

35. The Cedar Cliff, 149 F.2d 964 (2d Cir. 1945); The Watupa, 120 F.2d 766 (2d Cir. 1941).

36. 157 F. Supp. 397 (E.D. La. 1957).

37. *Id.* at 400. The court points out a lack of comprehension that is evident in many admiralty decisions. To bring a ship to rest from full speed ahead while making full headway, engines put at full astern power will stop the vessel in 4 to 6 ship lengths. (An average freighter is about 460 feet long; the larger passenger vessels may exceed 1000 feet in length). TURPIN AND MACEWEN, MERCHANT

The court, however, did not completely rule out the use of the principle in all cases, but refused to apply it where the negligence of both of the vessels involved actively continued up to the moment of collision.

Even more recently the issue was considered again and the most cogent opinion on the entire subject was written by Justice Gilliam in *Williamson v. The Carolina.*[38] After reviewing the use of the doctrine in admiralty, the court concluded that in all the cases that he had discovered the major and minor fault rule could have been applied and the same results achieved. Justice Gilliam noted that to extend the common law doctrine to the situation in which the injury is equally occasioned through the negligence of both parties, although the negligence of one occurrs subsequent in time, would to that extent do away with the rule of divided damages. He concluded that in such circumstances the doctrine did not apply in admiralty.[39] Prior to this decision, the conflict with the principle of divided damages had not been discussed or apparently even considered by the tribunals applying the last clear chance rule. The question remains as to whether or not this well reasoned decision will start a trend away from the use of the doctrine in admiralty.

The foregoing essentially sets out the judicial status of the rule at the present time. The text writers have not clarified the issue to any extent. Several of the standard American works[40] make no mention of the doctrine. The recent treatise on admiralty law by Messrs. Gilmore and Black neatly tosses the problem back to the reader with a brief footnote treatment of the subject.[41]

The Conflict Between Last Clear Chance and Basic Admiralty Principles

If our maritime courts were to completely accept the principles of last clear chance, the rule of division of damages would be nullified in any case where a court could apply the rationale that the last wrongdoer bears the entire loss.[42] The full extension of the doctrine would also volved, than in the usual problem arising from the collision of two vehicles on land. Unlike the railroad engineer or the automobile driver,

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MARINE OFFICER'S HANDBOOK 234 (1945). This is a rule of thumb and will vary from ship to ship, but it is a good estimate.

38. 158 F. Supp. 417 (E.D.N.C. 1958).

39. *Id.* at 424.

40. BENEDICT, ADMIRALTY (6th ed. 1940 Supp. 1958); ROBINSON, ADMIRALTY (1939).

41. GILMORE AND BLACK, ADMIRALTY 404, n. 47 (1957). See, however, the discussion in GRIFFIN, AMERICAN LAW OF COLLISION §§ 214-23 (1949). For the British view see MARSDEN, COLLISIONS AT SEA 26-34 (10th ed. 1953).

42. See Williamson v. The Carolina, 158 F. Supp. 417, 424 (S.D.N.C. 1958).

negate the Rule of the *Pennsylvania.* The *Pennsylvania* standard in most cases would require at least a division of damages when a vessel breached a statutory duty. However, when the other vessel was also at fault and that fault was subsequent in time, the last clear chance doctrine would place the entire loss upon the last wrongdoer, regardless of the Rule of the *Pennsylvania.*

Unfortunately, the last wrongdoer concept in its application tends to disregard the fine line between reasonable error in judgment committed by an individual under the stress of a suddenly imposed dangerous situation, and unreasonable conduct falling under the classification of negligence. Thus, it seems entirely possible that, as a practical matter, the doctrine of *in extremis* might well be lost in the wake of last clear chance.

Possible Difficulties in Administering the Rule

There are certain aspects of the maritime field that make the application of last clear chance a great deal more difficult when vessels are in- in many instances the master of a vessel is not free to take independent action until practically the very last moment. For example, when two ships are approaching each other on courses that will intersect at right angles, the ship having the other on her port hand (left side) is termed the privileged vessel and must maintain her course and speed, while the other, called the burdened vessel, must avoid crossing the privileged vessel's bow and if necessary, slacken her speed, stop or reverse her engines.[43] In the ordinary case the burdened vessel will alter her course to starboard and pass under the stern of the privileged vessel. However, when the burdened vessel does not mind her nautical manners, the master of the privileged vessel is placed in an extremely difficult position. The Rules of the Road require him to maintain his course and speed until the actions of the other vessel force him into the jaws of collision.[44] He cannot act too soon and yet he may be held at fault if he hesitates a few seconds too long.

The factual determination is complicated by such factors as wind, current, sea effects, and the varying maneuvering characteristics of different ships. Then, too, the plotting of navigational data (positions, courses and speeds) is sketchy at best when vessels are being piloted through congested waters. There are no skid marks to measure and it is a rare case in which the testimony of disinterested bystanders is available to the court.

43. Rules 19-21, International Regulations for Navigation at Sea, 65 Stat. 418 (1951), 33 U.S.C. §§ 146 (c)-(e) (1952).

44. FARWELL, RULES OF THE NAUTICAL ROAD 328 (rev. ed. 1954).

Very few of our judges are, to any professional degree, sailors. To complicate an already difficult task by introducing the hair splitting calculations required by last clear chance would seem unwise.

CONCLUSION

After viewing the overall picture it appears that there is very little to gain through the use of last clear chance by our admiralty courts and a great deal to be lost.

Basically, there is no foundation upon which the doctrine can rest, since the contributory negligence rule of common law is not followed by our maritime courts.

Apart from its origin, the doctrine as a legal tool in admiralty is not necessary and conflicts with established maritime principles. The application of the major and minor fault rule in instances where the plaintiff's negligence is considerably less than the negligence of the defendant, reaches the same result as last clear chance. However, where the injury is occasioned by comparatively equal fault on the part of the vessels involved, to apply the last wrongdoer principle is contrary to the philosophy of divided damages. The Rule of the *Pennsylvania* and the doctrine of *in extremis* also seem to be fundamentally in opposition to this common law rule.

As a practical matter the actual administration of last clear chance would make an already difficult factual determination far too complex.

It is submitted that the established admiralty tests used in determining fault are based upon principles closer to the modern theories of negligence than are the fictional concepts of proximate cause adopted by many courts under the last clear chance doctrine. The division of damages has been described as a stepping stone, or midway point, between the common law theories of negligence liability and true apportionment of damages.[45] It would seem to be more desirable to move towards the more realistic apportionment of damages than to regress by incorporating the common law doctrine of last clear chance into the admiralty field.[46]

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45. Mole and Wilson, *A Study of Comparative Negligence,* 17 CORNELL L.Q. 333, 341 (1932).

46. Quite often admiralty courts indicate a desire to apportion damages although unable to do so under present American admiralty principles. See The Margaret, 30 F.2d 923 (3d Cir. 1929). For excellent discussions of comparative fault and the continental rule of apportionment of damages see Huger, *The Proportional Damage Rule in Collisions at Sea,* 13 CORNELL L.Q. 531 (1928); Mole and Wilson, *supra* note 45; Turk, *Comparative Negligence,* 28 CHI-KENT L. REV. 189 (1950).