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LAST CLEAR CHANCE RULE

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ALBERTA LAW REFORM INSTITUTE

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PART I — SUMMARY OF REPORT

A. Recommendation

This report recommends that the *Contributory Negligence Act* be amended to abolish the common-law rule known as the "last clear chance" rule.

B. "Last clear chance" rule

The common-law "last clear chance" rule applied where both the contributory negligence of a plaintiff and the fault of a defendant caused loss to the plaintiff and where one of them had a "last clear chance" to avoid the effect of the other's fault and failed to do so. If the defendant was the one who had had the "last clear chance", the plaintiff could recover damages for the whole of their loss despite their contributory negligence. If the plaintiff was the one who had had the "last clear chance", the plaintiff could not recover any damages despite the defendant's fault.

Secs. 6 and 7 of the *Contributory Negligence Act* imply that the "last clear chance" rule still applies if the act or omission of the party who had the "last clear chance" was not substantially contemporaneous with the act or omission of the other party.

C. Reasons for abolishing the "last clear chance" rule

The reasons for the abolition of the "last clear chance" rule are:

(1) Insofar as the rule determines how responsibility is allocated between two persons whose respective faults have contributed to the plaintiff's loss, it is inconsistent with the much fairer apportionment rule established by the *Contributory Negligence Act*.

(2) Insofar as the rule determines whether or not a party's fault will be treated as an effective cause of a plaintiff's loss, it is unnecessary and misleading, because the common-law rule that only a "proximate" cause leads to legal responsibility deals exhaustively and adequately with questions of causation.

(3) The continued existence of the "last clear chance" rule under secs. 6 and 7 of the *Contributory Negligence Act* confuses the law with no countervailing benefit.

We made the same recommendation for abolition of the "last clear chance" rule in our Report 31, Contributory Negligence and Concurrent Wrongdoers, 1979. That recommendation was never implemented. We repeat the recommendation now because the Court of Appeal, in the Wickberg case referred to below, has demonstrated the need for abolition and has recommended that our previous recommendation be implemented.

PART II — REPORT

A. Introduction

In 1979, ALRI recommended that the "last clear chance" rule be abolished, and we proposed legislation which, if enacted, would abolish it.[1] That recommendation was not implemented. We repeat the recommendation and the proposed legislative solution in this report.

Our reason for repeating these recommendations now is that the judgment of Court of Appeal in the recent case of Wickberg v Patterson[2]

(a) shows that the law is confused and uncertain as to whether or not the "last clear chance" rule exists,

(b) said that the rule applies only where the usual common-law rules of causation would lead to the same result, and

(c) recommended that the law should be amended to make it clear that the rule does not exist.

B. The "last clear chance" rule at common law

The common law developed rules which may be summarized as follows:

(1) **Rule 1: A plaintiff can recover damages for loss suffered because of the defendant's negligence or other fault.**

One person (the defendant) who is under a duty to a second person (the plaintiff) and fails to carry out that duty is guilty of fault and is liable to the plaintiff for all of the loss or damage suffered by the plaintiff as a result of that fault.

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[1] See ALRI Report 31, Contributory Negligence and Concurrent Wrongdoers, 1979.

[2] [1997] 4 W.W.R. 591; (1997) 145 D.L.R. (4th) 263 (Alta. C.A.). The Court consisted of Kerans, Bracco and Picard JJA. Picard JA delivered the Court's judgment. Page references hereafter are to the W.W.R. report.

(2) **Rule 2: But a plaintiff whose loss is caused by their own contributory negligence cannot recover any part of their loss from a defendant who is at fault.**

Rule 1 sometimes worked unjustly where a plaintiff was in part responsible for their own loss or damage. The courts therefore devised Rule 2 to relieve against that injustice.

(3) **Rule 3: But a contributorily negligent plaintiff could recover if the defendant had the "last clear chance" to avoid the consequences of the plaintiff's contributory negligence.**

Rule 2, the contributory negligence exception, itself sometimes worked unjustly where there was some negligence on both sides. The courts therefore devised Rule 3 to relieve against that injustice. If the defendant had the "last clear chance" to avoid the consequences of the plaintiff's contributory negligence, the plaintiff could recover damages for 100% of their loss or injury despite the plaintiff's contributory negligence.

The rule came to apply both ways, at least in theory, so that if a plaintiff had the "last clear chance" to avoid the consequences of the defendant's fault, the plaintiff could not recover any damages at all (though this result was implicit in Rule 2).[3]

C. The "last clear chance" rule under apportionment legislation

The common law rules led to all-or-nothing results: a plaintiff could recover damages for all of their loss or for none of it. There was no middle ground. But it is frequently the case that both the fault of a defendant and the contributory negligence of the plaintiff have contributed to the plaintiff's loss, that is, each is what the law characterizes as a "proximate" cause of the loss. In such a case, an all-or-nothing rule was unfair. The common law, however, could not apportion the loss between the plaintiff and the defendant.

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[3] This point is discussed in Bowker, W.F., Ten More Years under the Contributory Negligence Acts, (1965) 2 University of British Columbia Law Review 198.

The *Contributory Negligence Act* substituted an "apportionment" rule for the common law's all-or-nothing rules. Essentially, the "apportionment" rule allocates the loss between a plaintiff and defendant in proportion to "the degree in which each person was at fault".[4] If, for example, a court holds that the degree in which the plaintiff was at fault is 40% and the degree in which the defendant was at fault is 60%, the plaintiff will be entitled to recover from the defendant, and recover only, damages for 60% of the plaintiff's loss.

But the Contributory Negligence Act did not go the whole way. Secs. 6 and 7 of the Act strongly imply that the "last clear chance" rule is still in force, though with restricted application. Sec. 7 of the Act is as follows:

> 7 ... If the trial is before a judge without a jury the judge shall not take into consideration any question as to whether, notwithstanding the fault of one party, the other could have avoided the consequences thereof, unless he is satisfied by the evidence that the act or omission of the latter was so clearly subsequent to and severable from the act or omission of the former as not to be substantially contemporaneous therewith.

Sec. 6 applies the same rule to jury trials, with necessary changes.

Secs. 6 and 7 say that the judge or jury <u>should not</u> consider whether Party 2 had the last clear chance of avoiding the consequences of Party 1's fault unless Party 2's fault "was so clearly subsequent to and severable from" Party 1's fault "as not to be substantially contemporaneous therewith". But prohibiting something unless specified circumstances exist implies that it is permissible to do it if those specified circumstances do exist. Secs. 6 and 7 can therefore be read as implying that the judge or jury <u>should</u> consider whether Party 2 had the "last clear chance" of avoiding the consequences of Party 1's fault if Party 2's fault <u>was</u> clearly subsequent to and severable from Party 1's fault. It would follow that, if the defendant had the "last clear chance" to avoid the consequences of the plaintiff's contributory negligence, the court should award the plaintiff 100% of the loss or damage, and it would also follow that if the plaintiff had the "last clear chance" to avoid the consequences of the defendant's fault, the court should dismiss the plaintiff's claim.

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[4] Note that the *Contributory Negligence Act* talks about "fault". Negligence is one form of fault, but there are others, e.g., intentional and strict liability torts. Although the "last clear chance" rule customarily arises only in negligence cases, we will use the word "fault" to describe a defendant's wrongful conduct. A plaintiff's fault will invariably be contributory negligence.

D. What effect, if any, does the "last clear chance" rule now have?

The "last clear chance" rule, as the Court of Appeal said in the Wickberg case, "is the dandelion of causation analysis"; that is, the rule has so far resisted all efforts to choke it out of the legal garden. The rule is, in the Court's view, an anachronism which is no longer helpful or necessary in causation analysis. However, as the Court of Appeal pointed out, the Supreme Court of Canada "has not given clear guidance" as to whether the rule continues in existence:

> There are cases in which the court said that the last clear chance doctrine survived the enactment of apportionment legislation and yet there is an *obiter* comment in the 1976 case, *Hartman v. Fisette* [1977] 1 S.C.R. 248 that it did not.[5]

In the Wickberg case, the Court:

(a) recognized that Alberta legislation "retains the concept of last clear chance"[6] and went on to say

> "Its continued existence in ss. 6 and 7 of the *Contributory Negligence Act* is a trap",[7]

but

(b) held, in effect, that the only cases in which the "last clear chance" rule applies are cases in which the common-law "remoteness" rule would produce the same result as the "last clear chance" rule.

This appears from the following statement:[8]

> I cannot read ss. 6 or 7 as attempts by the Legislature to undermine the purpose of the statute, which manifestly is to divide fault among all tort-feasors. The sections should only be invoked in those cases where the distance between accident and alleged fault is so great in time and circumstance that it could be said that the fault is too remote from the injury for liability. But that is a test to be applied in all cases of negligence, so the sections add nothing to the general law. Meanwhile, the duty of a judge is, in every case

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5 *Wickberg v. Patterson*, *supra* note 2, 596.

6 *Id.*, 596.

7 *Id.*, 598.

8 *Id.*

> where the tort-feasor's negligence is not too remote but where another tort-feasor has contributed to the injury, to divide liability.[9]

E. Discussion

As has been seen, the "last clear chance" rule, if it exists and has any effect

(a) allows a contributorily negligent plaintiff to recover 100% of the plaintiff's loss if they can show that the defendant had the "last clear chance" to avoid the consequences of the plaintiff's contributory negligence, and

(b) allows a defendant to avoid 100% of liability if they can show that the plaintiff had the "last clear chance" to avoid the consequences of the defendant's negligence.

In each case, this result will follow only if secs. 6 and 7 of the *Contributory Negligence Act* are satisfied, that is, only if "the act or omission of" the one party "was so clearly subsequent to an severable from the act or omission of" the other party "as not to be substantially contemporaneous therewith".

The "last clear chance" rule, in our view and in the view of those who have thought and written about the subject,[10]

(a) is inconsistent with the apportionment principle, because it is an all-or-nothing rule, and

(b) is overlapped by the common-law causation rules,

and, whether it is considered as a rule for the allocation of responsibility or as a rule of causation, is of no value and should be abolished.

By holding that the "last clear chance" rule applies only where the "remoteness" rule would apply to the same effect, the Court of Appeal gone as

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[9] The Court's comments refer in terms only to a situation in which two or more "tort-feasors" are in contest. They must in context be taken to refer also to a case in which the defendant is a tort-feasor and the plaintiff, who is not strictly speaking a "tort-feasor" in relation to themself, is guilty of contributory negligence.

[10] See, e.g., Klar, *supra* note 4, 371-373.

far as it can go to deprive the "last clear chance" rule of all practical effect and thus to read the rule out of the law of Alberta. But :

(1) The rule continues to have a shadowy existence, if only through secs. 6 and 7 of the *Contributory Negligence Act*.

(2) A question about the existence or effect of the rule could come before the Supreme Court of Canada. Given the somewhat conflicting statements in the Supreme Court, the result of such an appeal cannot be forecast with an appropriate degree of certainty. This situation is an invitation to litigants to bring or defend actions in the hope of getting a favourable result in the Supreme Court.

(3) Sec. 6 and 7 of the *Contributory Negligence Act*, as the Court of Appeal said in the Wickberg case, constitute a trap, because they will lead the reader who is unfamiliar with the finer points of case law to conclude that there is a rule under which, if the fault of one party is "so clearly subsequent to and severable from the act or omission of the former as not to be substantially contemporaneous therewith", the other party can escape liability entirely (if a defendant guilty of "fault") or recover 100% of their loss (if a contributorily negligent plaintiff).

This uncertain state of the law is unsatisfactory. It should be clarified.

That is the Court of Appeal's view. The judgment says this:

> I urge the government to act on the recommendations of the Alberta Law Reform Institute and repeal s. 6 and s. 7 of the *Contributory Negligence Act*.[11]

It is also our view. We repeat below the recommendation which we made in Report 31, that the "last clear chance" rule be abolished, and we propose a form of legislation which, in our opinion, would effect the abolition of the rule.

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[11] *Wickberg v. Patterson*, *supra* note 2, 599.

F. The legal situation if the "last clear chance" rule is abolished

In the absence of a "last clear chance" rule, the common-law rules of causation will apply. The law will treat fault, including a plaintiff's contributory negligence and a defendant's fault, as a cause of a loss if the loss would not have occurred but for the fault, or alternatively, it will treat fault as a cause of the loss if the fault "materially contributed" to the loss.[12] However, in order to attract liability, the fault must have been the "proximate cause", or a "proximate cause" of the loss.[13]

It is not easy to forecast when a court will decide that a defendant's fault or plaintiff's contributory negligence was a "proximate" cause, and when it will decide that a defendant's fault or a plaintiff's contributory negligence was too "remote" to be a "proximate" cause. However, it is not possible to legislate for all of the myriads of different circumstances that may obtain, and it has to be left to the courts to determine "proximity" and "remoteness" in each individual case. The proximity/remoteness rule covers the ground and enables the courts to do what is fair and just in the circumstances. There is no need for another rule which covers some of the same ground in an inconsistent way, and the "proximity" rule is more flexible and less arbitrary than the "last clear chance" rule.

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[12] In the recent case of *Athey v. Leonati* [1996] 3 S.C.R. 458, the Supreme Court of Canada used the but for language, which has been commonly used. But the Court also said that causation is established where the defendant's negligence "materially contributed" to the occurrence of the injury, a contributing factor being "material" "if it falls outside the *de minimis* range". See also Klar, *supra* note 4, 321-324. It is not necessary for the purposes of this report to analyse the difference, if any, between the "but for" and the "materially contributed" tests. It is enough that there is a test to determine whether not D's fault or P's contributory negligence was a cause of P's loss or damage which will attract responsibility.

[13] As a matter of English, it seems that there can be only one "proximate cause". However, the usage in the authorities suggests that as a matter of law there can be more than one.

G. Recommendations

RECOMMENDATION 1

That legislation be enacted to abolish the "last clear chance" rule.

RECOMMENDATION 2

That the legislation:

(a) repeal secs. 6 and 7 of the *Contributory Negligence Act*; and

(b) negative the "last clear chance" rule.

H. Draft Amendment

A provision which we think would, together with the repeal of secs. 6 and 7, negative the "last clear chance" rule is as follows:

> §. This Act applies if damage is caused or contributed to by the act or omission of a person notwithstanding that another person had the opportunity of avoiding the consequences of that act or omission and failed to do so.

The draft provision set out above is the section recommended in the Institute's Report 31. It was originally proposed by the Conference of Commissioners on Uniformity of Provincial Laws (now the Uniform Law Conference).

We think that, if the abolition of the "last clear chance rule" is found desirable, the legislation abolishing it could be enacted as part of a *Statute Law Amendment Act* for the following reasons:

1. The abolition of the "last clear chance" rule should not be controversial as it would give effect to the weight of academic, practitioner and court opinion.

2. The purpose of the legislation would be to eliminate uncertainty and iron out a confusing wrinkle in the law which serves no useful purpose.

PART III — LIST OF RECOMMENDATIONS

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RECOMMENDATION 2

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