If the petitioner asks for a county road, it must be fenced, and the cost of fencing is an element of damages; but if only a gateway is petitioned for, no fencing is contemplated and the only elements of damages are the value of the land taken and the loss and inconvenience caused by travel over the land, the expense of erecting and maintaining gates being the burden of the petitioner.[46] Where it appeared from a conveyance of a right of way that it was the intention of the parties that the grantee get a "road of public easement," like that described in the statute, and not merely a gateway, the grantor's successors could not thereafter construct a gate on the road.[47]

DONALD S. RICHARDSON*

REW *v.* DORN: A NOVEL USE OF THE LAST-CLEAR-CHANCE DOCTRINE—The last-clear-chance doctrine has brought forth more than its share of strange progeny but none is stranger than a decision handed down about a year ago by the Oregon Supreme Court. The facts are commonplace enough. Plaintiff was injured when two automobiles collided at a street intersection. She was riding in one of them driven by her husband. To a complaint charging various acts of negligence, defendant answered setting up contributory negligence and, as an affirmative defense, he said that he skidded on the icy street and lost control of his car just before entering the intersection, and that both plaintiff and her husband saw his predicament in time to have saved him, but negligently failed to do so. At the trial evidence was introduced which supported each allegation of the affirmative defense. Plaintiff and her husband denied seeing defendant in time to avoid him. But on the whole evidence the jury might properly have either (1) rejected the truth of this denial, or (2) accepted the denial yet found that plaintiff and her husband should, in the exercise of due care, have seen defendant's plight in time to prevent the collision. The court instructed that either of these findings would bar recovery, and the jury brought in a defendant's verdict. The trial court set the verdict aside for misdirection of the jury, and the Supreme Court upheld this action. In doing so, it found the instruction erroneous because, under Oregon decisions, *the defendant should have been accorded the last clear chance only if the jury found plaintiff (and her husband) actually saw him in time to keep from hitting him.*[1] Had this reasoning been used with reference to a claim for damages by the defendant under a counterclaim, that would have been logical and understandable. But there appears to have been no counterclaim and the only issue was whether plaintiff could maintain her action. In that state of the case, the rule announced is so shockingly out of harmony with current American rationalizations of contributory negligence and last clear chance that it invites analysis.

The prevailing rule in this country, where statute has not changed it, may be put thus: in an action based on defendant's negligence, it is a complete de-

another public road or gateway or steamboat landing or railroad station, so as to do the least damage to the land through which such road or gateway is located, and shall assess the damages sustained by the persons owning such lands." Sec. 44-1902 OREGON CODE (1930).

[46] In re Sage. Yoran v. Sage, 54 Or. 587, 104 Pac. 428 (1909).

[47] Fendall v. Miller, 99 Or. 610, 196 Pac. 381 (1921).

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[1] Rew v. Dorn, 160 Or. 368, 85 Pac. (2d) 1031 (1938).

fense to show that plaintiff's own negligence was a contributing factor in producing his injury.[2] Oregon generally has followed this rule.[3] Negligence, primary or contributory, is substandard conduct.[4] This conduct may consist in folly in the light of seen danger, but it is not confined to that. In Oregon, as elsewhere, "so far as mere negligence is concerned, either party, the one inflicting or the one receiving the injury, is bound by what he knew, or might have known by the exercise of ordinary care and diligence."[5] Many a plaintiff has lost his suit because of failure to see what a reasonably prudent person would have seen.[6]

To this general rule of contributory negligence, there is one practically universal exception. Where the plaintiff's fault has put himself or his property in helpless peril, he may recover full damages from a defendant who thereafter has, but fails to take, the "last clear chance" to avoid injury.[7] This doctrine is probably a lonely modern survivor of ancient notions of legal cause which attached liability only to the act of the last wrong-doer;[8] although some states, like Oregon, have injected into the rule requirements which cannot be traced to the principle that gave it birth, but which apply instead the principle of comparative negligence. An insistence that the plaintiff's peril be *seen* is, for example, such a requirement.[9] But that is beside the present point.

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[2] Bohlen, *Contributory Negligence* (1908) 21 HARV. L. REV. 233; BOHLEN, STUDIES IN LAW OF TORTS (1926) 500; 1 STREET, FOUNDATION OF LEGAL LIABILITY (1906) 137; HARPER, LAW OF TORTS (1933) sec. 132; RESTATEMENT, TORTS (1934) sec. 463-467.

[3] Landis v. Wick, 154 Or. 199, 230, 57 P. (2d) 759, 59 P. (2d) 403 (1936); Dorfman v. Portland El. Power Co., 132 Or. 648, 286 Pac. 991 (1930); Morser v. Southern Pac. Co., 110 Or. 9, 222 Pac. 736 (1927); Cathcart v. Oregon-Washington R. & N. Co., 86 Or. 250, 168 Pac. 308 (1917); Stewart v. Portland Ry. L. & P. Co., 53 Or. 377, 114 Pac. 936 (1911).

[4] HOLMES, THE COMMON LAW (1881) 108-110; RESTATEMENT, TORTS (1934) sec. 463-464.

[5] Cerrano v. Portland Ry. L. & P. Co., 62 Or. 421, 126 Pac. 37, 40 (1912).

[6] Examples are Morser v. Southern Pac. Co., 110 Or. 9, 222 Pac. 736 (1927); Slusher v. Great Southern R. Co., 107 Or. 587, 213 Pac. 420 (1923); Massey v. Seller, 45 Or. 267, 77 Pac. 397 (1904).

[7] SALMOND, LAW OF TORTS (8th ed. 1934) 480; 1 SHEARMAN & REDFIELD, NEGLIGENCE (6th ed. 1913) sec. 99; 1 THOMPSON, NEGLIGENCE (1901) sec. 240, 241; RESTATEMENT, TORTS (1934) sec. 479, 480; James, *Last Clear Chance, A Transitional Doctrine* (1938) 47 YALE L. J. 704.

[8] See Bohlen, *Contributory Negligence* (1908) 21 HARV. L. REV. 233; James, *supra* note 7.

[9] This, I realize, flies directly in the face of the Oregon court's own reasoning. The very decisions which limit last clear chance to discovered peril expressly repudiate the doctrine of comparative negligence; indeed they seek to identify that doctrine with the broader rendering of last clear chance which they reject. Stewart v. Portland Ry. L. & P. Co., 53 Or. 377, 114 Pac. 936 (1911); Emmons v. Southern Pac. Co., 97 Or. 263, 191 Pac. 333, 340 (1920). But such statements spring from a misunderstanding of the historical and logical bases of last clear chance. If that rule is not to be grounded frankly on a comparison of faults, it must be accounted for in terms of proximate cause. By this I do not mean that the rule would be satisfied only where the plaintiff's fault is not a proximate cause of his injury, since that would be to deny the rule any application in the only cases where it is necessary. See Green, *Contributory Negligence and Proximate Cause* (1927) 6 N. C. L. REV. 3; James, *Last Clear*

Whatever the local rule of "last clear chance," its special requirements need be met only by one who seeks to overcome the effects of contributory negligence. Because of his own neglect, such a person must do more than show that his opponent was likewise neglectful; he must also show that his opponent had a later opportunity in the premises.

The court in the present case points out that last clear chance may be invoked by as well as against a defendant. It concludes that the limitations of last clear chance should be applied in determining whether plaintiff's conduct should bar his action. The premise is right but the conclusion does not follow from it. The defendant, in an action based on his simple negligence, never *needs* to invoke last clear chance. If the circumstances are such that plaintiff may be said to have it, he will be barred, but no novel or separate doctrine is required to support such a conclusion. Having what would amount to a last clear chance is just one of several ways in which a plaintiff can be contributorily negligent. No one has ever doubted in America that a plaintiff's fault will bar him if it is concurrent in time with defendant's where both faults unite to produce the injury.[10] Indeed, where plaintiff's wrong comes first in time, it will still be fatal to him if it is a cause of his damage unless he can show that defendant had the last clear chance.[11] In neither of these situations, of course, could defendant show that plaintiff had the last opportunity to avoid injury. Nor would *any*

Chance: A Transitional Doctrine (1938) 47 YALE L. J. 704, 707, 708, and note 22.

What I do mean is this: the last-clear-chance rule came into being through testing the causal relationship between plaintiff's wrong and his injury by a medieval principle of causation or of liability which was even then becoming obsolete in most other fields. Cf. Illidge v. Goodwin, 5 C. & P. 190 (C.P. 1831); Lynch v. Nurdin, 1 A. & E. 29 (Q.B. 1841). That principle may be termed the last-wrongdoer rule. See 8 HOLDSWORTH, HISTORY OF ENGLISH LAW (1922) 459, 460; Bohlen, *Contributory Negligence* (1908) 21 HARV. L. REV. 233. Under it liability was not traced beyond the last act of wrongdoing in the chain of cause, so that, whenever the defendant was the last wrongdoer, any prior negligence on the part of plaintiff or anyone else was simply disregarded. But this test was met if defendant was guilty of any fresh wrong after the commission of the contributory negligence (*i.e.*, after plaintiff could no longer save himself by the exercise of reasonable care). The wrong might include a negligent failure to see, as well as to avoid plaintiff's danger, as indeed it did in the progenitor of all last-clear-chance cases. Davies v. Mann, 10 M. & W. 546 (Ex. 1842). Accord: Springett v. Ball, 4 F. & F. 472 (Q.B. 1865).

The faults of the respective parties were not weighed against each other but only the relative directness of their causal relationships to the injury. Any question of whether defendant was negligent in the light of seen peril or merely negligent in failing to see it, would have no place at all in this inquiry. The character or quality of a fault may determine how grave it is, but it can have no tendency whatever to show how near it is, in point of time, to the injury. History and logic are faithfully reflected in sec. 479 of the RESTATEMENT, TORTS. See also Teakle v. San Pedro L. A. & S. L. R. Co., 32 Utah 276, 90 Pac. 402 (1907); Mosso v. Stanton Co., 75 Wash. 220, 134 Pac. 941 (1913). They are ignored by that branch of the Oregon rule which insists on *discovered* peril. They are ignored also by sec. 480 of the RESTATEMENT, TORTS which extends liability where the peril is seen. But the American Law Institute can at least justify its new departure as a liberalizing of antiquated restrictions.

[10] Citation of authority seems scarcely necessary, but the Dorfman and Stewart cases, cited *supra* note 3, furnish examples.

[11] Emmons v. Southern Pac. Co., 97 Or. 263, 191 Pac. 333 (1920).

court insist that plaintiff be shown actually to have seen a readily apparent danger before he could be condemned as careless. Why then, when plaintiff's neglect is later in time than defendant's, should the defendant be held unless he can prove a full-fledged last-clear-chance case against plaintiff? Such a requirement, it is believed, has never been imposed by any other American court upon a defendant[12] (though others have said that a plaintiff's last clear chance will bar him,[13] without attempting to draw from such statement the conclusion drawn here). Surely there is nothing in current legal theories of contributory negligence and last clear chance that would afford even the flimsiest logical basis for the rule apparently adopted in the present case.[14] So manifest is this that other possible explanations of the decision should be carefully explored. There appear to be two.

(1) Perhaps there was no basis in the pleadings for the instruction as given. The affirmative defense of plaintiff's last clear chance contained no allegation of plaintiff's negligent failure to see defendant. If the plea expressly addressed to contributory negligence also omitted any such allegation, the decision is clearly sustainable on the pleading ground. But this cannot be the reasoning of the court since we are not even told what the plea of contributory negligence contained or omitted. It is more than likely that the pleading of plaintiff's last clear chance as a separate defense led the court to regard it as something distinct from contributory negligence, and to test the evidence in the light of this distinct defense without regard to the allegations of any other part of the answer. The pleadings in *Marshall* v. *Olson*[15] were cast in the same form. But the form of the pleadings should not blind the court to their essential nature. If there had been no plea of last clear chance at all, the plaintiff would be barred from recovery by negligence which came later in time than defendant's though it consisted in a mere failure to see a dangerous situation which defendant had created, provided of course there was a sufficient plea of contributory negligence.[16] If then the plea of contributory negligence in this case alleged plaintiff's negligent failure to see and avoid defendant's auto, the addition of a plea couched in terms of last clear chance ought not to deprive defendant of the benefit of a defense he otherwise would have had. If it did so here, that fact must be attributed to the same failure (noted above) to recognize "plaintiff's last clear chance" as merely one phase or aspect of the defense of contributory negligence.

(2) There is another possible explanation of the actual decision. The plaintiff after all was not the driver of either car. Her own duty of vigilance

[12] The rule in Oregon was foreshadowed by the opinion in Marshall v. Olson, 102 Or. 502, 202 Pac. 736 (1922).

[13] Frazier v. Stout, 165 Va. 68, 181 S.E. 377 (1935); cf. Palmer v. Tschudy, 191 Cal. 696, 242 Pac. 703 (1925); Vizacchero v. Rhode Island Co., 26 R. I. 392, 59 A. 105, 69 L.R.A. 188 (1904).

[14] Indeed the leading early case on contributory negligence involved facts exactly parallel to those presented by the instruction which was held erroneous here. Butterfield v. Forrester, 11 East 60 (K.B. 1809).

[15] 102 Or. 502, 202 Pac. 736 (1922).

[16] Massey v. Seller, 45 Or. 267, 77 Pac. 397 (1904). Of course if the present decision is not grounded merely on pleading, it may overturn cases such as Massey v. Seller.

and her chance to take effective precautions were necessarily very limited. The negligence of her husband could not be charged against her. In the light of all that, the challenged instruction may well be criticized as assuming the plaintiff had obligations which a jury should not have been made to impose upon her.[17] Further the charge seems from the report to suggest an identity between husband and wife that for present purposes might well be thought misleading. The Supreme Court, however, did not place its decision on any such grounds as these, and it seems quite fair to take the opinion at face value.[18]

If the rule in the instant case is to be limited to situations presenting the same pleading structure, it is a narrow, illogical, technical rule, but no monument in the law of torts. It will remain a trap for the unwary, but the moral for future pleaders is clear. If, on the other hand, the opinion announces a substantive limitation on the operation of contributory negligence, it is significant and deserves appraisal from a broader point of view than the purely logical and legalistic one elaborated above. Even if it is clear that the decision should be regarded in this light, however, it is not clear how wide is its scope. There are two possible interpretations: (1) a defendant will not be entitled to the defense of contributory negligence in any case unless he can prove plaintiff had a "last clear chance"; or (2) a defendant may have the benefit of the defense of contributory negligence as before except where plaintiff's wrongful act is later than defendant's, but in such cases he must show that plaintiff had a full-fledged last clear chance.

If the first interpretation is the true one, the case marks a very material inroad upon the defense of contributory negligence. Its ultimate evaluation, then, should depend on the broad question whether society will be best served by keeping or abandoning (in large part, at least) that defense. This is a grave question and one that will not be discussed here. It is enough to point out that much can be said, from many points of view, for a change or a rejection of the prevailing rule.[19] Perhaps, also, if that is important, there is some rather remote historical precedent for the Oregon court's position. It is likely that some of the English judges in the early nineteenth century—when the rationale of contributory negligence was still taking shape—thought the plaintiff's wrong would bar him only where it was the last wrongful act and so the direct cause of the injury.[20] Translated freely into modern terms, this theory would exclude the defense of contributory negligence save where plaintiff had a last clear chance. It is unlikely, though, that the Oregon court had so sweeping a

[17] Cf. Marshall v. Olson, 102 Or. 502, 202 Pac. 736 (1922).

[18] See Note (1939) 37 MICH. L. REV. 1147.

[19] There seems to be a growing feeling that something like comparative or proportional negligence should supplant the rule that contributory negligence bars a plaintiff completely. The Federal Employers Liability Act and many state statutes carry out the newer point of view. See Mole & Wilson, *A Study of Comparative Negligence* (1932) 17 CORN. L. Q. 333, 604. And, of course, the defense in question finds no place in systems of workmen's compensation, and would find none in any similar scheme for compensation of automobile-accident victims. Altogether it may safely be said that, for good or evil, the common-law rule of contributory negligence is on the wane.

[20] That seems to have been the notion underlying the decisions in Bridge v. Grand Junction Ry. Co., 3 M. & W. 244 (Ex. 1838), and Davies v. Mann, 10 M. & W. 546 (Ex. 1842). See James, *supra* note 7, at 706, 707.

change as this in mind.[21] In fact I have thought it so improbable that up to this point I have ignored the possibility. As can be seen, most of my criticism of the decision proceeds on the assumption that it is intended to stand side by side with the rest of the prevailing law of contributory negligence; *i.e.*, that the second interpretation set out above is the true one. In that view it is altogether illogical. Yet it may, along with the first interpretation, be justified in some small measure, as a partial abandonment of an undesirable defense. Of course, that will be a justification only in the eye of those who disfavor the defense of contributory negligence and welcome any inroads upon it. And even if the case be judged in the light of this objective, the Oregon court could with far better logic and far greater effect abandon the restrictions it has itself placed upon the operation of the last-clear-chance rule, in the face of the overwhelming weight of Anglo-American authority.

FLEMING JAMES*

[21] Nothing in the *opinion* points to the first interpretation of which the *decision* is capable. The court, for instance, cites with apparent approval the Landis, Dorfman, and Morser cases, cited *supra* note 3, which espouse the doctrine of contributory negligence as it is conventionally stated.

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