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Last Clear Chance in Pennsylvania-An Observation

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LAST CLEAR CHANCE IN PENNSYLVANIA— AN OBSERVATION

In its broad application, the doctrine known as "last clear chance" provides that a plaintiff who has negligently exposed himself to danger may nonetheless recover for his injuries if the defendant could have avoided injuring him by the exercise of reasonable care after he discovered or should have discovered plaintiff's peril. (See Restatement, Secs. 479, 480.) Though the Supreme Court of Pennsylvania has explicitly stated as recently as 1943 in *Kasanovich vs. George,* 348 Pa. 199, that "last clear chance" has never been the law in Pennsylvania, the language of the Court in rejecting the doctrine, is interesting. Mr. Justice Stern, speaking for the Court, said:

> "Nor has Pennsylvania adopted the doctrine of the 'last clear chance' that, notwithstanding negligence on the part of the injured person, the tortfeasor will be held liable if, by the exercise of reasonable care, he could have discovered the peril to which the other had exposed himself, and then, by due care, could have avoided the accident."

Was the failure to repudiate that branch of the doctrine sometimes referred to as "conscious last clear chance," i. e., an affirmative act of ordinary negligence after defendant has made actual discovery of plaintiff's peril, deliberate? What was the factual situation in the *Kasanovich* case?

Plaintiff's decedent was walking alongside a track with his back turned towards the direction from which a trolley was approaching. The motorman's view was unobstructed, and he saw the decedent when the trolley was 200 feet away. He ran into decedent and there was evidence that the brakes were not applied until after the latter had been struck. The lower court granted defendant's motion for a directed verdict, upon which judgment was entered. The Supreme Court reversed, Justice Stern saying:

> "In the present case there is no claim, nor the slightest ground for belief, that the motorman intentionally ran into the decedent. But the testimony offered by plaintiff would, if believed, have justified the jury in finding that the motorman was guilty of a wanton disregard for decedent's safety. . . .
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> "For decedent to have walked alongside the streetcar track and in close proximity to it, with his back to approaching cars, and without making the necessary observations to protect himself, was so clearly negligence on his part which contributed to the happening of the accident that the court was justified in declaring it to be such as a matter of law.
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> "The real question in the case is whether plaintiff can nevertheless recover in this action. . . .

> "Apparently all of the jurisdictions in which the question has arisen have held that contributory negligence is not a defense to an action for injury caused by reckless or wanton misconduct on the part of the defendant. . . . .
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> "Instead of giving binding instructions for defendant, the learned trial judge should have instructed the jury that, even if the motorman was grossly negligent, plaintiff, because of decedent's contributory negligence, cannot recover, but that such contributory negligence would not be a bar if the motorman was guilty of wanton misconduct. . . . ."

Though there had been dicta in prior cases to like effect, *Kasanovich* was the first Pennsylvania decision squarely ruling that contributory negligence is no defense to an action predicated on defendant's wanton misconduct. What relationship, if any, exists between this decision and the "last clear chance" principle?

It is to be noted that the motorman had made no effort to stop until after he had struck the plaintiff. This is a significant fact for it manifests a state of mind indicating a consciousness of wrongdoing and a reckless indifference as to the consequences of his acts. The definition of wantonness in the case is also of interest:

> "It must be understood, of course, that wanton misconduct is something different from negligence however gross, —different not merely in degree but in kind, and evincing a different state of mind on the part of the tortfeasor. Negligence consists of inattention or inadvertence, whereas wantonness exists where the danger to the plaintiff, though realized, is so recklessly disregarded that, even though there be no actual intent, there is at least a willingness to inflict injury, a conscious indifference to the perpetration of the wrong."

If the "conscious" phase of the doctrine is applicable where defendant fails to exercise *ordinary care* after actual discovery of the plaintiff's peril, then *Kasanovich vs. George* cannot fairly be said to represent an application of the doctrine either on its facts or in its definition of wantonness. A question that suggests itself is this: suppose the motorman, after observing the plaintiff 200 feet away, had made no attempt to stop until he was within 50 feet of him, and had then made an ineffectual attempt to stop, would the defendant be liable? *If an affirmative answer is given, then at least one aspect of "last clear chance" would be law in Pennsylvania.* Under these facts, defendant's conduct probably could not be described as wanton, at least as that word is defined in *Kasanovich vs. George,* for if an attempt was made to stop, it is doubtful whether the motorman's conduct could be said to indicate "a willingness to inflict injury."

The case of *Cover vs. Hershey,* 290 Pa. 551, is of particular interest in this connection. The facts were as follows: Minor children, age 4 and 6 respectively,

were trespassing on a railroad bridge. The evidence warranted the jury in finding that the motorman of defendant's trolley car saw the children when he was several hundred feet away from them. However, he made no effort to stop until he was twenty-five feet away, and it was then too late to avoid running them down. Recovery was allowed, and the Supreme Court said:

> ". . . . it was for the jury to say whether, after he saw the children, he could have stopped the car before striking them. If he could and neglected to do so it was a wanton act, for he knew that the children had no other possible means of escape. If on seeing their perilous position he failed to exercise *reasonable care* to avoid the accident, his conduct was wanton within the meaning of the law." (Italics supplied)

It is to be observed that the definition of wantonness in the *Cover* and *Kasanovich* cases differs substantially and materially. (1) Is the difference in language due to the factual dissimilarity of the two cases? In the opinion of the writer, the Supreme Court of Pennsylvania had no intention of modifying the principles enunciated in the *Cover* case, and the variation in definitions is due to the difference in the facts of the two cases. Thus:

Cover vs. Hershey

1. Plaintiff was a trespasser on defendant's property.
2. Plaintiff was a child.
3. Plaintiff could not be guilty of contributory negligence.

Kasanovich vs. George

1. Plaintiff was not a trespasser.
2. Plaintiff was an adult.
3. Plaintiff was guilty of contributory negligence.

Which of the three foregoing factual differences is the controlling element with respect to the difference in definition of wanton misconduct? Certainly the distinguishing feature of the two cases cannot be the fact that plaintiff was a trespasser in the one case and not in the other, for the law treats trespassers less generously than non-trespassers, and in the *Cover* case where the definition of wantonness is less severe, the plaintiff was a trespasser. In *Kasanovich* where the definition of wantonness requires a "willingness to inflict injury," the plaintiff was not a trespasser.

Is the fact that plaintiff in *Cover* was a child and in *Kasanovich* an adult, the controlling difference? It may have been a factor based on the social philosophy to protect children independently of the well-established difference in the law of contributory negligence as applied to children and to adults.

However, the third factual difference would appear to be the significant one. Where a plaintiff who is guilty of contributory negligence seeks to recover damages on the theory that defendant is guilty of wanton misconduct, in the writer's opinion the definition of "wantonness" expressed in *Kasanovich vs. George,* will be applied. When, however, an adult plaintiff is not guilty of contributory negligence, but by reason of his being a trespasser on defendant's property, de-

fendant is liable only for wanton misconduct, the definition of this phrase as contained in *Cover vs. Hershey* will be applied insofar as an activity on the land as distinguished from a condition on the land is concerned.

It would seem, therefore, that the omission of the "conscious" aspect of "last clear chance" in the language contained in the *Kasanovich* case was not motivated by any doubt in the Court's mind as to the absence in this state of the doctrine of "last clear chance" in all its phases. Why, therefore, it may be asked did Justice Stern only refer to one of the aspects of last clear chance? Well — it's one of those things.[1]

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[1]For an excellent analysis of the meaning of "wanton conduct" in the Pennsylvania decisions, see "Those Weasel Words—'Wilful and Wanton' ", 92 Univ. of Pa. Law Review 431.