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COMMENTS ON LAST CLEAR CHANCE—PROCEDURE AND SUBSTANCE

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Recent Colorado decisions involving the doctrine of "last clear chance" in accident cases have posed problems which suggest the need for renewed scholarship and precision of expression in this everyday field of tort law. For example, is an instruction and an affirmative defense of last clear chance available to a *defendant* as was attempted in the very recent case of *Rein v. Jarvis?*[1] Is a plea of last clear chance tatamount to a *confession* of contributory negligence on the part of the plaintiff?[2] How should last clear chance be pleaded under Rules 7 and 8, R.C.P., Colorado? At what stage in a trial can you amend a complaint under Rule 15 to invoke the doctrine? Must you allege or prove that plaintiff was in a position of inextricable peril? From the standpoint of substantive law, has the Supreme Court of Colorado over-ruled its earlier decisions approving the doctrine of "unconscious last clear chance"[3] by holding that "the burden is upon plaintiff to prove that he was in a place of danger; that defendant *discovered* the perilous situation, and that after discovery of plaintiff's danger, defendant could then have prevented the injury by the use of reasonable care"?[4]

In this article we shall consider our state decisions involving last clear chance from the approximate advent of the Rules of Civil Procedure in Colorado in an effort to analyze and clarify the present status of selected procedural and substantive problems.[5]

Perhaps the explanation of the last clear chance doctrine in *Grand Trunk Railway Co. of Canada v. Ives*[6] by the Supreme Court of the United States is typical:

> . . . Although the defendant's negligence may have been the primary cause of the injury complained of, yet an action for such injury cannot be maintained if the proximate and immediate cause of the injury can be traced to the want of ordinary care and caution in the person injured; subject to this qualification which has grown up in recent years (having been first enunciated in Davis v. Mann, 10 Mees. & W 546), that the contribu-

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[1] 1954-55 C. B. A. Adv. Sh. No. 9, p. 306, 282 P. 2d .... (1955).

[2] Barnes v. Wright, 123 Colo. 463, 468, 231 P. 2d 794 (1951).

[3] Independent Lumber Co. v. Leatherwood, 102 Colo. 460, 79 P. 2d 1052 (1938).

[4] Werner v. Schrader, 127 Colo .523, 528, 258 P. 2d 766 (1953); quoted in Anchor Casualty Co. v. Denver & Rio Grande R. Co., 154-55 C. B. A. Adv. Sht. No. 4, 277 P. 2d 523, 525 (1954).

[5] For an extensive treatment of theoretical and substantive aspects of last clear chance in Colorado including a collection of all the Colorado cases to 1929, see *Derogation of the Common Law Rule of Contributory Negligence*, by Laurence W. DeMuth, in 7 ROCKY MT. LAW REV. 161.

[6] 144 U. S. 408, 12 S. Ct. 679, 687, 36 L. Ed. 485, 493.

> tory negligence of the party injured will not defeat the action if it be shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the injured party's negligence.

Our state Supreme Court considers last clear chance to be a tool for the analysis of an extended fact situation into two separate parts in the search for the elusive "proximate" cause of an accident.[7] Since Colorado cases from the very beginning have included the language of proximate cause, it is of academic interest only to mention theories of degrees of fault, comparative negligence, or apportionment of damages which have been acknowledged in other jurisdictions.

DEFINITION OF TERMS

At first blush it might seem that the liberal philosophy of rules pleading which allows freedom of amendment under Rule 15b, R.C.P., Colo., should make precision of expression and procedure unimportant in pleading last clear chance. However, in the 1951 case of *Barnes v. Wright*,[8] our Supreme Court, on the strength of a timely objection by defendant's counsel in the trial court, reversed the trial court which had allowed amendment by interlineation *after* the evidence was substantially before the jury.

Perhaps the very heart of the problem as to confusion of language and procedure lies in the failure to distinguish between the burden of *pleading* last clear chance on the one hand and the separable burdens of *proof* and *going forward with evidence* on the other. Certainly a failure to distinguish these terms is the primary reason for confusion in statements such as "a plea of last clear chance is an *admission* of contributory negligence." Failure to reach a precise understanding of burden of *proof* is the obvious explanation of an attempted plea of last clear chance by a *defendant*.

The burden of *pleading* refers only to the burden of stating a claim for relief that will be invulnerable to a pleading or motion under Rule 12b (5) (for failure to state a claim upon which relief may be granted) or to a motion for summary judgment under Rule 56, sections "b" and "c", R.C.P., Colo.

The burden of *proof*, in its narrow meaning, refers to the risk of non-persuasion of the jury.[9] This burden will normally follow the burden of pleading and is a duty to the jury or the trier of fact alone. The penalty for failure to sustain the burden of proof is simply an adverse verdict upon the facts. It is this burden which may be said never to shift, but each party may have his own separate burden dependent upon his pleading.[10]

The burden of *going forward with evidence* is often confused

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[7] Note 3, *supra*.
[8] Note 2, *supra*.
[9] 9 WIGMORE, EVIDENCE, §2485 (3rd. ed., 1940).
[10] Wigmore, *op. cit.* §2489.

with the burden of proof. Wigmore, however, distinguishes the burden of *going forward with evidence* by referring to it as the duty of producing evidence owed to the judge.[11] The penalty for failure to sustain this burden is a directed verdict under Rule 50. The burden of *going forward with evidence* will shift to and fro during the trial as the parties alternately produce enough evidence as to controversies of fact to avoid a directed verdict for the opposite party.[12]

PLEADING LAST CLEAR CHANCE

Let us now utilize this precise terminology in an examination of the burden of *pleading* last clear chance. Initially, Rule 8e, R.C.P., Colo., requires the plaintiff in an accident case to make a short plain statement of the claim of negligence showing that the pleader is entitled to relief. Rule 8c then forces the defendant to set forth affirmatively the defense of contributory negligence on the part of the plaintiff.

While it seems probable in Colorado that the plaintiff need not undertake the burden of specifically negating contributory negligence in his complaint, there are probably two exceptions to the general rule that contributory negligence is an affirmative defense that must be specially pleaded by the defendant or it will be waived. The exceptions occur when contributory negligence appears as a matter of law, either by an allegation in a complaint or by a disclosure of contributory negligence as a matter of law from the plaintiff's own evidence.[13]

Although Colorado reports do not indicate that our Supreme Court has decided the problem of a faulty complaint, an interesting example involves an Oregon case wherein the plaintiff alleged that the proximate cause of an aircraft accident was the negligence of the defendant in allowing the plaintiff's intestate to rent and fly a light plane when "visibly intoxicated and considerably under the influence of intoxicating liquor" at the time of the rental.[14] The trial court dismissed the complaint with prejudice.

If it were not for a history of judicial expression, the burden of pleading last clear chance could be a bit confusing in Colorado. Rule 7a, R.C.P., Colo., provides for a "complaint and an answer; and there shall be a reply to a counterclaim denominated as such . . . no other pleading shall be allowed except that the court may order a reply to an answer." Rule 15b provides that "such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time . . ." Rule 8c also provides that

[11] Wigmore, *op. cit.* §2486.

[12] For a description of the two aspects of burden—proof and going forward with evidence—see 9 WIGMORE, EVIDENCE, §2487 (3rd ed. 1940).

[13] 65 C. J. S. Negligence, §198c, p. 926.

[14] Adair v. Valley Flying Service, 196 Ore. 479, 250 P. 2d 104 (1952). The decedent took the plane off the ground, flew up a canyon about 30 feet above the trees, and made a steep turn into the canyon wall.

"in pleading to a preceding pleading, a party shall set forth affirmatively . . . contributory negligence . . . and any other matter constituting an avoidance or affirmative defense."

Apparently the die was cast prior to the advent of rules pleading in the case of *Bragdon v. Hexter* [15] when the court said, "the last clear chance doctrine, upon which plaintiff relies, is new matter constituting an affirmative defense to the new matter of contributory negligence set up in the answer."

In the case of *Wendelin v. Ross,* 99 Colo. 365, an application was made by plaintiff and permission was granted to amend the replication by pleading last clear chance *after* the testimony was concluded and the witnesses excused. The majority of the Court felt that it was an application addressed to the discretion of the trial court and that the defendant was not prejudiced because all the evidence concerning the accident was admissible under the allegations of negligence and contributory negligence contained in the pleadings as they stood *prior to* the amendment.

Mr. Justice Bouck registered a sharp and enlightened dissent explaining that the problems of last clear chance were not within the scope of the prior pleadings. As authority, the dissenter quoted the *Bragdon* case which demanded an affirmative plea of last clear chance by the plaintiff if it was to be relied upon.

LAST CLEAR CHANCE UNDER RULES PLEADING

Our Supreme Court again endorsed the procedure of pleading last clear chance as an affirmative defense in the case of *Markley v. Hilkey* [16] which was the first case involving the problem of pleading under the Rules of Civil Procedure. The *Bragdon* case was cited as authority. The *Markley* case is also authority for a contention that allegations of negligence and denials of same by both parties coupled with an allegation of contributory negligence by the defendant will not be construed as a plea of last clear chance. The reason that such a suggestion could only lead to unorthodox procedure will be clarified when we examine the burden of *proof* later in this discussion. It should suffice to say that the recent case of *Rein v. Jarvis* [17] makes it very clear that our Court feels a plea of last clear chance is not available to a defendant.

The next case in point of time involving the pleading of last clear chance was the case of *Mills v. Denver Tramway Corp.*[18] which was tried in our Federal District Court. The then Circuit Court on appeal was faced with an assertion that last clear chance was not available under Colorado law unless affirmatively pleaded. The Court said that it was not necessary to decide the issue because the parties with the assent of the trial court had tried the case on the theory that last clear chance was within the general

[15] 86 Colo. 435, 439, 282 P. 568 (1929).
[16] 113 Colo. 562, 567; 160 P. 2d 394 (1945).
[17] 1954-55 C. B. A. Adv. Sht. No. 9, p. 307, 282 P. 2d .... (1955).
[18] 155 F. 2d 808 (C. A. 10th, Colo., 1946).

issues of negligence and contributory negligence and that the defendant could not be allowed to shift his position for the first time on appeal.

In the case of *Lambrecht v. Archibald,*[19] the plaintiff pleaded last clear chance by way of a reply to an affirmative defense of contributory negligence contained in defendant's answer. Our Supreme Court endorsed this as a proper method of pleading.

In the trial court the plaintiff Wright in the 1951 case of *Barnes v. Wright* [20] alleged negligence on the part of defendant. Barnes answered by a denial of negligence and an allegation of contributory negligence. Defendant also filed a counterclaim based on an allegation of negligence, and this the plaintiff denied. At the close of the evidence as to the nature of the accident, defendant moved for dismissal of the plaintiff's complaint on the ground that the evidence conclusively showed plaintiff to be contributorily negligent. The motion was denied. Thereupon, plaintiff's counsel sought leave of court to amend the complaint under Rule 15b, R.C.P., Colo., by alleging last clear chance. Defendant's counsel made a timely objection to the proposed amendment on the ground that it was not supported by the evidence and that the request had come too late. Neverthless, the amendment was allowed. Very little evidence came in after the amendment.

Our Supreme Court reversed the trial court on the twin grounds argued by defendant's counsel, stating that "she should have pleaded same (last clear chance) affirmatively which opportunity was afforded her by way of reply, or at any time upon motion to amend her complaint *prior* to trial".[21] (emphasis and insert added) "The decisions of this Court unmistakably lay down and follow the well settled rule that the doctrine of last clear chance must be affirmatively pleaded." (citing *Bragdon* and *Markley* cases)

The opinion in the *Barnes* case implies that there can be an amendment to bring in last clear chance at any stage in the trial if, but only if, there has been evidence of last clear chance actually admitted without objection. Reliance upon this method of getting last clear chance into the case would obviously be very dangerous for a timely objection to *evidence* of last clear chance would keep both the evidence and the issue out of the case entirely by making it impossible to amend the complaint after the beginning of trial.

It is of some real significance to note that counsel for defendant in error Wright (who prevailed in the trial court) sought to prove that last clear chance had actually been pleaded and that the issue had in fact been tried by consent. As precedent for their contention, counsel for Wright urged upon the Supreme Court the case of *Swift & Co. v. Young* [22] which involved a head-on col-

[19] 119 Colo. 356, 203 P. 2d 897 (1947).
[20] 123 Colo. 463, 468, 231 P. 2d 794 (1951).
[21] *Id.* at 469.
[22] 107 F. 2d 170 (C. A. 4th, N. C., 1939).

lision between an automobile and a truck. The court instructed the jury on last clear chance; plaintiff got judgment; and defendant, as in the *Barnes* case, appealed on the ground that the instruction on last clear chance was neither supported by evidence nor pleaded by the parties.

The complaint in both the *Barnes* and *Swift* cases contained very similar wording which in essence alleged negligence in failure to keep a proper lookout and in failure to keep the car under reasonable control.

In the *Swift* case, the Circuit Court *affirmed* the trial court instruction with the statement that last clear chance was but one of the rules of law to be applied in determining whose negligence was to be deemed the proximate cause of the injury, and that there would seem to be no occasion for pleading last clear chance where the negligence of the defendant relied upon for the application of the doctrine was pleaded as the proximate cause of the injury.

Even though the *Swift* case was repeatedly cited by defendant in error in the *Barnes* case,[23] our Supreme Court held that last clear chance had *not* been properly pleaded and that there had in fact been no trial of the issue by consent. The Court said that timely objection by defendant prevented any trial by consent, and that the doctrine of last clear chance had not been affirmatively pleaded in the first instance. As proof of the latter holding, the Court cited the fact that counsel for defendant in error had changed his position on appeal from a contention that last clear chance had been pleaded to a contention that late amendment had not been erroneous. The Supreme Court said further that if the trial court had been in doubt to the extent that it allowed a late amendment, then certainly the issue of last clear chance had not been clearly pleaded.

Our Supreme Court said that "the underlying theory of the well settled rule that last clear chance must be affirmatively pleaded, is that it affords timely notice to the opposing party . . ."[24] The Court further suggested that under sub-division "b (1)" of Rule 41, R.C.P., Colo., the trial court could have dismissed plaintiff's complaint with the specification that it was *not* an adjudication upon the merits rather than to have permitted the amendment.

In summary then, it seems probable that Colorado decisions dictate that a plaintiff met by an affirmative defense of contributory negligence must himself seek leave of court under Rule 7 to reply with plaintiff's affirmative claim of last clear chance. However, if the defendant allows the issue of last clear chance to be tried by express or implied consent, he may not successfully object to an amendment to conform to the evidence. On the other hand, the plaintiff will not be able to amend to bring in last clear chance

[23] See Brief of Defendant in Error in the Supreme Court of Colorado, Barnes v. Wright, Colorado case no. 16,463 (1951).

[24] Note 20, *supra*, at 470.

at the close of the evidence in the face of a timely objection by defendant. In rejecting the *Swift* case as precedent, our Supreme Court may have indicated an unwillingness to find last clear chance within the scope of general allegations of negligence and contributory negligence. It would be preferable to dismiss without prejudice under Rule 41 rather than to allow a late amendment of the complaint. The underlying theory of an affirmative defensive plea of last clear chance is to give notice to defendant that he must do more than simply prove contributory negligence to avoid an adverse verdict.

EFFECT OF PLEADING LAST CLEAR CHANCE

The importance of distinguishing between burden of *pleading* and the separable burdens of *proof* and *going forward with evidence* is demonstrated by the problem of whether a plaintiff who pleads last clear chance is bound by his pleadings in an evidential sense. Is a plea of last clear chance an *admission* of contributory negligence in the sense that the defendant is relieved of the burdns of proving and coming forward with evidence upon the issue of contributory negligence?

What is the meaning of Rule 8e (2), R.C.P., Colo., which states that "a party may set forth two or more statements of a claim or defense alternately or hypothetically . . . a party may also state as many separate claims or defenses as he has *regardless of consistency* . . ." (emphasis added)

Since the doctrine of last clear chance ordinarily presupposes that plaintiff is chargeable with negligence which, but for the defendant's subsequent negligence would bar recovery, some of the courts have taken the position that in order to invoke the doctrine, the plaintiff must confess initial contributory negligence creating his perilous situation and avoid this admission by setting up defendant's ultimate negligence.[25] However, the majority of the courts which have ruled upon the issue have held that an admission of contributory negligence is not an essential element of last clear chance pleading.[26]

In the *Bragdon case*[27] which was decided under code pleading, our Supreme Court quoted 31 Cyc. 263 as follows: "Under the code, plaintiff may, in his reply, tender as many issues as he pleases, so long as they are not inconsistent with the complaint . . . plaintiff may both traverse the defense set up in the answer and confess and avoid it." The *Bragdon* case held that a general denial of the defendant's charge of contributory negligence could be coupled, in the plaintiff's replication, with an affirmative pleading of the facts showing that the doctrine of last clear chance was applicable.

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[25] 25 A. L. R. 2d 288.

[26] *Id.* at 289.

[27] Bragdon v. Hexter, 86 Colo. 435, 439, 282 P. 568 (1929). See text for note 15, *supra.*

The case of *Dwinelle v. Union Pacific R. Co.*[28] contained language to the effect that "the doctrine of last clear chance applies only where plaintiff's negligence is *admitted,* and he has the burden of proving it (defendant's last clear chance) as any other fact." It is conceded that if plaintiff pleaded last clear chance affirmatively, he would have the burden of proving it. However, the facts of the case disclose that plaintiff approached a railroad track at right angles with a windshield so badly frosted that he could scarcely see the onrushing train which hit him. The contributory negligence of the plaintiff was found to be the primary cause of the accident, but it was established from the *facts;* it was not even urged that the plea of last clear chance was binding to the extent that it relieved defendant of putting on evidence as to plaintiff's contributory negligence.

In contrast to the blunt words of the *Dwinelle* case, consider the following quotation from the case of *Lambrecht v. Archibald*:[29]

> In order to avail oneself of the last clear chance doctrine, one *proceeds upon the assumption* of negligence on his part, and notwithstanding which he takes the position that negligence of the other party to the accident is the proximate cause of the damages sought to be recovered. In other words, the *plea* of last clear chance *is not available unless contributory negligence is present.* The *plea* of last clear chance is *comparable to confession and avoidance.* Here, *for purposes of the plea* of last clear chance, *plaintiff admits* that decendent (plaintiff's husband) was guilty of *contributory negligence* in crossing South Broadway between intersections; notwithstanding which her counsel contends that the husband's death was proximately caused by defendant's negligence. (emphasis and insert added)

Let us now compare the italicized expression "one proceeds upon the assumption" and "for the purpose of the plea . . . plaintiff admits . . . contributory negligence" with the statements that "the plea of last clear chance is not available unless contributory negligence is present" and "the plea . . . is comparable to a confession and avoidance." It is here contended that the former phrases represent the true spirit of last clear chance pleading and are in no sense binding upon the plaintiff as an admission against interest. It is submitted that the situation is a perfect example of a claim or defense stated *alternately* and *regardless of consistency* as permitted by Rule 8e (2), R.C.P., Colorado.

As precedent for these contentions, consider the Michigan case of *St. John v. Nichols* [30] which held that in order to rely on the doctrine of last clear chance, the plaintiff need not admit or

[28] 104 Colo. 545, 550, 92 P. 2d 741 (1939).
[29] 119 Colo. 356, 203 P. 2d 897 (1944).
[30] 331 Mich. 148, 49 N. W. 2d 113 (1951).

prove his own contributory negligence but is entitled to go to the jury on the alternative theories (1) that he was free from contributory negligence, (2) but if chargeable therewith, he was excused therefrom by defendant's subsequent negligence. The statement from the leading Colorado case of *Independent Lumber Co. v. Leatherwood*[31] that the rule of last clear chance is one to be applied for the analysis or resolution of an extended fact situation should be recalled.

ANALYSIS OF BURDENS

The true analysis is that plaintiff must plead negligence on the part of the defendant. The defendant would deny negligent conduct and affirmatively plead that the plaintiff was contributorily negligent. Plaintiff would deny any contributory negligence and alternately plead defendant's last clear chance.

The case would be at issue and the plaintiff must assume the burden of *proving* (at the risk of non-persuasion) that defendant's negligent conduct was the proximate cause of plaintiff's injury. Plaintiff would meet the burden of *going forward with evidence* by a simple showing, for example, that defendant was guilty of primary negligence in refusing to yield the right of way to plaintiff's car on defendant's right under a city right of way ordinance.

Can defendant now rely upon plaintiff's plea of last clear chance as an *admission* or *confession* of contributory negligence to the end that defendant need not come forward with evidence on this issue? It is submitted that defendant *must* shoulder his own burden of coming forward with evidence. The burden can be met either by a positive showing that plaintiff was speeding and inattentive, or by the negative means of relying upon plaintiff's own complaint or evidence which might show that plaintiff was slightly intoxicated. Defendant will be subject to an adverse directed verdict if he relies upon the plaintiff's last clear chance *plea* as an *admission* of contributory negligence unless the plaintiff makes the mistake of making such specific allegations as to show contributory negligence as a matter of law.

If defendant has met his burden of coming forward with evidence, we then put the clause "plea or doctrine of last clear chance is not available unless contributory negligence is present" into its proper perspective. The statement merely means that plaintiff need not worry about the burden of proving last clear chance until defendant has put on evidence of contributory negligence. If defendant put on enough evidence to avoid a directed verdict, the plaintiff must assume the burden of proving last clear chance by coming forward with evidence that, in spite of plaintiff's peril caused by his own negligence, the defendant must still respond in damages if defendant subsequently had a clear chance to avoid plaintiff's injury by the exercise of reasonable care which

[31] 102 Colo. 460, 79 P. 2d 897 (1938).

he failed to do, thereby becoming the proximate cause of plaintiff's injury.

In testing the correctness of this theory about the effect of a plea of last clear chance, let us examine the recent Colorado cases. In the 1951 case of *Barnes v. Wright*,[32] the language of the *Lambrecht* case was picked up and the case cited as follows:[33]

> The position taken by the plaintiff in seeking the application of the last clear chance was tantamount to a *confession* of this negligence which defendant alleged to be the contributing cause of the injury. Plaintiff's late plea of last clear chance was *not available* unless the negligence on her part . . . . was contributory. (emphasis added)

The above quoted language is purely *dictum* in the Supreme Court opinion for the plaintiff in error's contentions were that an amendment to the complaint and an instruction to the jury on last clear chance had come too late and that they were not supported by the evidence. The issues were the late plea and whether there was in fact a last clear chance on plaintiff in error's part—not whether plaintiff had been contributorily negligent. The judgment for Wright in the trial court was reversed and remanded for a new trial on the issues of negligence and contributory negligence and there is no indication that Wright was to be bound by her plea of last clear chance as a matter of law though obviously contributorily negligent upon the facts.

In the case of *Rosa v. Union Pacific R. Co.*[34] involving an action for damages resulting from a collision between a locomotive and an automobile, the trial court gave a summary judgment to the railroad on the basis of plaintiff's pleadings (including a plea of last clear chance) and plaintiff's own deposition. The Supreme Court reversed the trial court and remanded the case for further proceedings as the parties might desire on the basis that the pleadings presented a question of *fact* for the jury both as to contributory negligence and as to last clear chance. Counsel for plaintiff in error took the position that, "admitting for the sake of argument" plaintiff's contributory negligence, there was still a genuine fact issue involved under the plea of last clear chance which had to go the jury. The Supreme Court endorsed this view but granted the reversal upon *both* issues.

Woods v. Siegrist [35] is a case in which the plaintiff specifically pleaded last clear chance but in spite of strong evidence as to contributory negligence the problem was sent to the jury for determination of fact. The verdict was against contributory negligence and in favor of plaintiff with the Supreme Court affirming on an "as-

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[32] Barnes v. Wright, 123 Colo. 463, 468, 231 P. 2d 794 (1951).
[33] Note 29 *supra*.
[34] 127 Colo. 1, 252 P. 2d 825 (1953).
[35] 112 Colo. 257, 149 P. 2d 241 (1944).

sumption" of contributory negligence for the sake of argument and recovery on last clear chance. Though the facts are not very clear in the reported case, there seems to be no binding effect in the plea of last clear chance.

In the final analysis, last clear chance is a rule of *evidence* and not of *pleading*. It would seem that a plea of last clear chance should not be given any binding effect in the sense of an admission against interest for it is properly pleaded alternatively and without necessity of consistency under the liberal provisions of Rule 8e (2), R.C.P., Colorado. It is true that you do not reach the issue of last clear chance unless evidence as to contributory negligence has been produced by the defendant, but it does not follow that plaintiff must confess or plead his own negligence. It should be a defendant's burden to come forward with evidence as to contributory negligence when and if plaintiff has produced evidence as to defendant's primary negligence. Otherwise, the court never gets to the issue of last clear chance and the defendant's primary negligence is the only thing before the jury.

It is for this very reason that our Supreme Court in the case of *Rein v. Jarvis* [36] stated:

> If the doctrine (of last clear chance) could be invoked by *defendant,* it would be a confusing method of charging plaintiff with contributory negligence. Before the occasion arises where the doctrine could be invoked, plaintiff *already* is barred by his contributory negligence and would seek this route (last clear chance) out of the dilemma. (emphasis and inserts added)

NECESSITY FOR ALLEGING DISCOVERY OF PERIL

Most courts which have dealt with the procedural problem agree that in order to take advantage of the last clear chance doctrine, the pleader must allege something as to whether the plaintiff's peril was or should have been known to defendant had he been exercising reasonable care for the rights of plaintiff, but there seems to be no unity of expression in form.[37] The essence of the allegation will depend upon which of the substantive doctrines of last clear chance the forum observes, i.e., the doctrine of discovered peril (conscious last clear chance), the doctrine of discoverable peril (unconscious last clear chance), humanitarian doctrine, and the Missouri doctrine. Colorado seems to have endorsed the first three of these theories in one or more cases.

Werner v. Schrader [38] involved a motorcycle-automobile collision in a city street intersection with Werner as the plaintiff-cyclist in the trial court. As to discovery of peril, our Supreme Court said that "the burden is upon plaintiff to prove that he was in a place of danger; that defendant *discovered* the perilous situa-

[36] 1954-55 C. B. A. Adv. Sht. No. 9, p. 306, 282 P. 2d .... (1955).
[37] 25 A. L. R. 2d 292 ff.
[38] 127 Colo. 523, 528, 258 P. 2d 766 (1953).

tion; and that after *discovery* of plaintiff's danger, defendant could then have prevented the injury by the use of reasonable care." The same passage in the *Werner* case was quoted the following year in the case of *Anchor Casualty Co. v. Denver & Rio Grande R. Co.*[39] The writer believes that these two cases are really examples of unconscious last clear chance and that the words "or should have discovered" have been dropped inadvertently. In fact, the *Anchor* case contained these words elsewhere in the opinion, and both cases are primarily concerned with how clear the last chance was and not with the problem of discovery.

The difference between the doctrines of conscious and unconscious last clear chance lies in the fact that in the former the defendant must *actually* discover the plaintiff's peril in time to be able to avoid injury to him by the exercise of reasonable care while in the latter the defendant *would* or *could* discover plaintiff's peril if only he exercised reasonable care as he is bound to do. In both cases the plaintiff is assumed to be in a position of inextricable peril.

The leading modern case in Colorado involving the doctrine of unconscious last clear chance is probably the 1938 case of *Independent Lumber Co. v. Leatherwood*[40] in which plaintiff in error had over 450 feet on a broad and unobstructed city street to see Leatherwood move from a position of apparent peril into one of inextricable peril via a left hand turn onto the same northbound traffic lane occupied by the company truck. The Supreme Court declared that the company driver *could have* discovered plaintiff's peril in time to have avoided the resulting collision had the truck driver been exercising reasonable care. The *Independent Lumber Co.* case was specifically based upon Section 479 of the Restatement of Torts and has been cited frequently (including the *Dwinelle case*[41]).

Mills v. Denver Tramway Corp.[42] was tried in our Federal District Court and involved a negligently inattentive plaintiff who apparently never saw the street car which hit him. However, the motorman of the westbound car saw plaintiff when plaintiff was about five feet behind an east bound car and twenty to twenty-five feet from the westbound car which struck him. In giving a new trial to Mills, the Circuit Court applied the humanitarian doctrine of last clear chance as the substantive law of Colorado and gave damages to a plaintiff who was inattentive to the extent of not being aware of peril extricable in nature. Relief was apparently granted on the theory that since the motorman actually saw the plaintiff, the motorman failed to use reasonable care by his failure to sound a warning gong. It is interesting to note that in this case the Circuit Court was willing to take judicial notice for the

[39] 1954-55 C. B. A. Adv. Sht. No. 4, 277 P. 2d 523 (1954).
[40] 102 Colo. 460, 465, 79 P. 2d 1052 (1938).
[41] 104 Colo. 545, 92 P. 2d 741 (1939).
[42] 155 F. 2d 808 (C. A. 10th, 1946).

first time on appeal that all Tramway cars were equipped with gongs.

Lambrecht v. Archibald[43] involved a pedestrian plaintiff who was hit by an automobile while crossing a city street. The evidence as to speed of the car, visibility, position of pedestrian in relation to the cross-walk, and other material matters was in hopeless conflict. Our Supreme Court affirmed the judgment for plaintiff and approved the following instruction given to the jury:[44]

> A plaintiff who has negligently placed himself in a position of imminent peril, and is either *unconscious* of his peril, or unable to avoid danger, or both, may nevertheless recover . . . if defendant could have avoided injury after he discovered or by exercise of reasonable care could have discovered the plaintiff's peril.

This instruction makes the *Lambrecht* case rather difficult to classify as to type of doctrine for the humanitarian doctrine which allows recovery to a plaintiff who is unaware of a peril from which he could otherwise extricate himself normally requires *actual* discovery on the part of plaintiff. Therefore, it might be willing to equate unconsciousness on the plaintiff's part with actual inextricable peril and simply apply the doctrine of unconscious last clear chance to both situations.

In summarizing, it seems fair to say that one pleading last clear chance in Colorado must allege discovery on the part of the defendant, but no particular combination of words is required. The essence of the allegation will depend upon the type of substantive last clear chance doctrine applicable to the facts, but it is clear that Colorado courts will uphold an allegation of peril that could or should have been discovered rather than the stricter view necessitating actual discovery. Whether our courts will apply the humanitarian doctrine in its orthodox form wherein there is actual discovery by defendant of extricable peril on the part of an inattentive plaintiff, or whether the court will consider inattention as inextricable peril and apply unconscious last clear chance would seem to depend on the particular fact situation or the judge involved in the case.

Inextricable Peril and Continuing Negligence By Plaintiff

Under orthodox concepts of the substantive doctrines of last clear chance, it seems clear that the plaintiff must prove that he found himself in a position of inextricable peril and that the defendant discovered or should have discovered the perilous position in time to have avoided injury to the plaintiff. Both conscious and unconscious last clear chance doctrines require inextricable peril; however, the humanitarian doctrine is applicable in the case of a plaintiff who is unaware of an extricable peril when the defendant has actually discovered the peril and inattention.

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[43] 119 Colo. 356, 203 P. 2d 897 (1944).
[44] *Id.* at 368.

Much confusion of expression and duplication of research effort can be eliminated by a realization that inextricable peril and continuing negligence are reciprocal terms used to describe the sequence of events prior to and during the moments of peril which terminate in injury to the plaintiff. The plaintiff will seek to establish his position of inextricable peril, while the defendant will seek to show that plaintiff's own negligent conduct continued until the moment of injury. Where one party fails, the other prevails.

A succinct statement of the situation which utilizes the language of continuing negligence is as follows:[45]

> Under the last clear chance doctrine, if the plaintiff's negligence placing him in a perilous position has become static, or a mere condition upon which defendant's negligence operates to cause the injury, the fact that plaintiff is negligent in getting into that position is not considered as a proximate cause of the injury so as to deprive him of a recovery. On the other hand, if plaintiff's negligence is still active and a contributing factor in causing the injury, it is generally held that he cannot recover under the last clear chance doctrine.

The Supreme Court of Colorado in the case of *Ankeny v. Talbot* [46] used a very clear statement to show the need for proof of inextricable peril:

> One of the essential conditions to application of the doctrine of last clear chance is that the person relying upon the doctrine is unable to extricate himself from a position of peril. (Citing the *Independent Lumber Co.*[47] and *Lambrecht* [48] cases)

The facts of the *Ankeny* case involved a head-on crash between two automobiles. Plaintiff, a stranger on the particular road, came over the brow of a hill to find defendant's car angling across the road to plaintiff's side whereupon defendant's car appeared to straighten out and head toward plaintiff who was by this time on the shoulder of the road on his own side. Plaintiff testified that he was blinded by the lights of the oncoming car in the dark night and assumed that defendant must be on his own side of the road negotiating an unseen curve. In fact, defendant was driving on the wrong side of the road preparatory to stopping at a rural mailbox. After the crash, defendant became a counterclaimant and the issue was whether defendant's position (plaintiff on counterclaim) was inextricable. In reversing a trial court judgment for defendant, the Supreme Court held that counterclaimant was not in a position of inextricable peril because he had 600

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[45] 4 BLASHFIELD, Part 2, §2814 (Permanent Edition).
[46] 126 Colo. 313, 321, 250 P. 2d 1019 (1952).
[47] Note 40 *supra*.
[48] Note 43 *supra*.

feet of separation after peril became apparent in which to move back a few feet to his own side of the road while traveling at ten to fifteen miles per huor.

Often the question of inextricable peril vs. continuing negligence will be left to the jury.[49] One such case involved a left turn made by a truck-driver across the path of a streetcar driven by an inattentive motorman. Another case involved a plaintiff injured in attempting to drive through a railroad yard containing perils with which plaintiff was very familiar.

In other cases, the plaintiffs have been found guilty of continuing negligence which has disqualified them in their pleas for relief as a matter of law. In one such case, a truck driver proceeded down a highway which crossed a railroad track at right angles for a distance of half a mile with a windshield so badly frosted over as to prevent effective vision.[50] Another case involved a woman pedestrian who attempted to cross a residential street in the middle of a block, became confused as a jeep approached, and was injured when she ran into the side of the jeep.[51]

Febling v. Jones [52] is typical of a line of cases which involve a plaintiff who looked down the street and saw nothing even though the thing which subsequently injured him was obviously in plain sight as a matter of physical law. In the *Fabling* case, the plaintiff ran out from behind a moving streetcar and into the path of an automobile traveling in the opposite direction. The plaintiff testified that her visibility was unobstructed for two blocks and yet she failed to see the car almost on top of her. The Supreme Court said that "to have looked in such a manner as to fail to see what must have been plainly visible was to look without a reasonable degree of care and is of no more effect that if she had not looked at all." The Court found the plaintiff guilty of contributory negligence continuing to the time of impact and specifically endorsed the need for proof of an inextricable peril.

Mills v. Denver Tramway Corp.[53] was a case in which a negligently inattentive plaintiff walked out from behind an eastbound vehicle and across the street into the path of a wesbound vehicle all the while juggling packages and looking at the ground. The Supreme Court reversed a trial court judgment for defendant (which was based on continuing negligence) and applied the humanitarian doctrine which obviated the necessity of proving inextricable peril.

ALLEGATIONS AS TO TIME AND MEANS OF AVOIDING INJURY

Is it necessary to allege or to prove that defendant had *time*

[49] Denver Tramway Corp. v. Perisho, 105 Colo. 280, 97 P. 2d 422 (1939); Rosa v. Union Pacific R. Co., 127 Colo. 1, 252 P. 2d 825 (1953).

[50] Dwinelle v. Union Pacific R. Co., 104 Colo. 545, 92 P. 2d 741 (1939).

[51] Owens v. United States, 194 F. 2d 246 (1952).

[52] 108 Colo. 144, 114 P. 2d 1100 (1941), quoted in Werner v. Schrader, *supra*, note. 38.

[53] 155 F. 2d 808 (C. A. 10th, 1946).

to act after plaintiff's peril was or should have been discovered? Is it necessary to produce evidence showing defendant had the capability of avoiding injury with the means at hand in the time available?

Most of the cases dealing with the above questions seem to indicate that the problem is basically one of proof rather than pleading. A general allegation by plaintiff that defendant discovered or should have discovered plaintiff's peril in time to have avoided injury with the means available to him will support the necessary proof.

The *Dwinelle* case [54] involving the trucker with the frosted windshield contains a quotation as to *time* in which to act which has been quoted time after time.[55]

> . . . The evidence discloses a mere possibility that (defendant) might have avoided the collision, and that possibility rests upon split seconds. This is not enough time to meet the rule. It may present a *last* chance, but not a *clear* chance.

This case is authority for the proposition that the defendant's chance to avoid injury must be both clear and last.

The *Werner* case [56] makes clear the importance of the time element by holding that the doctrine of last clear chance presupposes a perilous situation created or existing through the negligence of both plaintiff and defendant, but it is assumed that there was a time *after* such negligence had occurred when the defendant could, and the plaintiff could not, by the use of means available, avert the accident.

Anchor Casualty Co. v. Denver & Rio Grande R. Co.[57] is a most interesting and informative case on the problem of whether defendant could have avoided the accident *after* the perilous position of the plaintiff was or should have been known by defendant. Through the procedural steps in getting to the Supreme Court were somewhat complex, the steps boil down to a situation wherein the insurance company stood in the place of the automobile owner whose car was hit by a locomotive at a grade crossing near Tolland, Colorado. The company won a verdict in the trial court but the defendant's motion for a new trial was granted upon the basis of an insufficient showing that the train engineer was aware of the perilous position of the car in time to stop. The insurance carrier elected to stand on the record and took a dismissal in order to get to the Supreme Court on error. The Supreme Court decided the case in favor of the railroad on the precise issue of whether or not

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[54] Note 50 *supra*, at 550.

[55] Barnes v. Wright, 123 Colo. 463, 231 P. 2d 794 (1951); Owen v. United States, *supra* note 51; Ankeny v. Talbot, *supra* note 46; Werner v. Schrader, 127 Colo. 523, 258 P. 2d 766 (1953); Anchor Casualty Co. v. Denver & Rio Grande R. Co., 1954-55 C. B. A. Adv. Sht. No. 4, 277 P. 2d 523 (1954).

[56] Note 55 *supra*.

[57] Note 55 *supra*.

defendant's locomotive could have been stopped short of the collision *after* the plaintiff's peril should have been known to the defendant in the exercise of reasonable care. Counsel for plaintiff in error strongly urged that the true issue was whether or not the trial judge had granted a new trial on all the evidence or only upon that produced by the plaintiff on the above point, but the Supreme Court did not agree.

The facts and method of proof in the case are a delight to anyone with a scientific bent. The automobile in question had failed to negotiate an "S" curve leading across the tracks and had come to rest across one line with one or more tires blown out. One occupant of the car proceeded up the track around a curve and toward the mountains in an effort to flag down the approaching train with a flashlight since the accident occurred after mid-night. The engineer testified that he saw a light in the bushes some 1200 feet west of the crossing but assumed that it came from one of many fishermen who frequented the road at all hours during that season. The engineer who was on the right side of the cab could not see the crossing around the curve to the left because of the 70 feet of boiler in front of him. The fireman on the left side of the cab finally became aware of the obstruction on the track and called for emergency measures when about 900 feet west of the crossing. The counsel for the railroad accepted the testimony of the would be flagman that a warning was given 1200 feet west of the crossing and then put on evidence showing that the locomotive, tender, and caboose could not be stopped by the use of brakes and reverse drive in less than 1375 feet under normal circumstances taking into account the 2% grade downhill and the one-million pound weight of the train unit. Counsel also showed that the train was actually stopped in 1180 feet and by a bit of addition and substraction (of things like locomotive length, distance of travel past crossing, and relation of car to crossing) proved that the locomotive went 67 feet beyond the point of impact in spite of the exercise of better than reasonable care.

The case really demonstrates the point that the plaintiff must bear the burden of proving that the defendant could stop in the time available. The burden in this case proved no mean one to bear becuase even with the railroad's own evidence to help, the plaintiff was never quite able to prove just where that million pound locomotive could have been stopped.

The *Barnes* case [58] is another example of the effective use of diagrams and demonstrative argument on the problem of capabilities after discovery of apparent peril, but mere cars were involved in this case.

The final problem for consideration in this paper deals with the effect of swerving, turning out, or sounding a warning device in an effort to avoid injury to plaintiff rather than the basic problem of accomplishing a complete stop. One case held that the

[58] Note 55 *supra*.

failure to sound a warning gong after peril became apparent was the proximate cause of injury even though there was no proof that the tram vehicle could actually have been stopped in time to avoid injury.[59] Another case found defendant's negligence to be the proximate cause because he failed to turn the opposite way he chose to turn in the emergency.[60] It is submitted that a better view would take into account that where a driver of an automobile suddenly realizes that he is placed in danger from the negligence of another, he should not be charged with an error in judgment where instantaneous action is required.[61]

APPENDIX I

Cases since 1938 in which last clear chance was considered. See footnote number 5 for reference to collection of all cases before 1930.

1. Independent Lumber Co. v. Leatherwood, 1938, 102 Colo. 460, 79 P. 2d 1052.
2. Dwinelle v. Union Pacific R. Corp., 1939, 104 Colo. 545, 92 P. 2d 741.
3. Gaede v. Union Pacific R. Corp., 1939, 28 F. Sup. 396 (D. Colo.) Rev. 110 F. 2d 931.
4. Denver Tramway Corp. v. Perisho, 1939, 105 Colo. 280, 97 P. 2d 422.
5. Fabling v. Jones, 1941, 108 Colo. 144, 114 P. 2d 1100.
6. Woods v. Siegrist, 1944, 112 Colo. 257, 149 P. 2d 241.
7. Welsh v. Union Pacific R. Corp., 1945, 113 Colo. 313, 156 P. 2d 844.
8. Markley v. Hilkey Bros., 1945, 113 Colo. 562, 160 P. 2d 394.
9. Mills v. Denver Tramway Corp., 1946, 155 F. 2d 808 (D. Colo.)
10. Lambrecht v. Archibald, 1949, 119 Colo. 356, 203 P. 2d 897.
11. Pueblo Transport Co. v. Moylan, 1951, 123 Colo. 207, 226 P. 2d 806.
12. Barnes v. Wright, 1951, 123 Colo. 463, 231 P. 2d 794.
13. Owens v. United States, 1952, 194 F. 2d 246 (D. Colo.).
14. Ankeny v. Talbot, 1952, 126 Colo. 313, 250 P. 2d 1019.
15. Rosa v. Union Pacific R. Corp., 1953, 127 Colo. 1, 252 P. 2d 825.
16. Comer v. Dodd, 1953, 127 Colo. 61, 253 P. 2d 600.
17. Patch v. Bowman, 1953, 127 Colo. 424, 257 P. 2d 418.
18. Werner v. Schrader, 1953, 127 Colo. 523, 258 P. 2d 766.
19. Anchor Casualty Co. v. Denver & Rio Grande R. Corp., 1954-55 C.B.A. adv. Sh. No. 4, 277 P. 2d 523 (1954).
20. Rein v. Jarvis, 1954-55 C.B.A. Adv. Sht No. 9, 281 P. 2d 1019 (1955).

[59] Note 49 *supra*.
[60] Woods v. Siegrist, 112 Colo. 257, 149 P. 2d 241 (1944).
[61] Ankeny v. Talbot, 126 Colo. 313, 250 P. 2d 1019 (1952).