The Doctrine of Last Clear Chance—Should It Survive The Adoption of Comparative Negligence in Texas?

On September 1, 1973, Texas joined a growing number of states[1] that have discarded contributory negligence in favor of comparative negligence. The Texas comparative negligence statute[2] provides:

> Contributory negligence shall not bar recovery in an action by any person or party or the legal representative of any person or party to recover damages for negligence resulting in death or injury to persons or property if such negligence is not greater than the negligence of the person or party or persons or parties against whom recovery is sought, but any damages allowed shall be diminished in proportion to the amount of negligence attributed to the person or party recovering.[3]

The subject of this comment is whether the doctrine of last clear chance, or as it is known in Texas, discovered peril, should be affected by the adoption of comparative negligence in Texas.

I. The Origin of the Doctrine of Last Clear Chance

The common law rule that the plaintiff in a negligence action is barred from recovery by his own contributory negligence was established[4] in 1809 by the case of *Butterfield v. Forrester.*[5] Butterfield and his horse collided with a pole which had been left in the highway by Forrester. A factor contributing to the accident was Butterfield's imprudent speed under the conditions. In denying relief to Butterfield, the court first announced the rule that recovery on a negligence cause of action would not be allowed if the plaintiff contributed to his own damages.[6]

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1. In 1973, for example, ten states replaced contributory negligence with comparative negligence. These states were Connecticut, Florida (by judicial decision), Nevada, New Jersey, North Dakota, Oklahoma, Texas, Utah, Washington, and Wyoming. For a complete list of states which currently use comparative negligence rules, see note 55 *infra*.

2. Tex. Rev. Civ. Stat. Ann. art. 2212a, § 1 (Supp. 1974-75).

3. *Id.*

4. James, *Last Clear Chance: A Transitional Doctrine,* 47 Yale L.J. 704 n.2 (1938) [hereinafter cited as James].

5. 103 Eng. Rep. 926 (K.B. 1809).

6. *Id.* at 927.

The *Butterfield* doctrine was a harsh rule of law. It barred recovery by a plaintiff who was guilty of negligence, no matter how slight.[7] As a result, the doctrine was gradually eroded by the courts.[8] *Davies v. Mann*,[9] decided in 1842, introduced one theory under which a contributorily negligent plaintiff could recover—the doctrine of last clear chance.[10] The plaintiff in *Davies* had hobbled his donkey and left it to graze on the side of a highway. The animal later wandered onto the roadway where it was struck and killed by the defendant's wagon and horses.[11] Davies sued the owner of the wagon for negligently causing the death of his donkey. The trial judge instructed the jury that although Davies may have committed an improper act in leaving his fettered donkey on the highway, Davies could recover if the proximate cause of the injury was attributable to the negligence of the defendant.[12] The appellate court, in affirming both the jury verdict for Davies[13] and the trial court's jury instruction, stated that " . . . the mere fact of negligence on the part of the plaintiff in leaving his donkey on the public highway, was no answer to the action, unless the donkey's being there was the *immediate* cause of the injury . . . ."[14]

Following *Davies*, the doctrine of last clear chance was developed more fully and became known by names other than last clear chance.[15] These names—the humanitarian doctrine, discovered peril, the doctrine of ultimate negligence— were due to minor variations in the elements of the doctrine from jurisdiction to jurisdiction.[16] The basic theory of last clear chance, however, has remained

7. Maki v. Frelk, 40 Ill. App. 2d 193, ____, 239 N.E.2d 445, 449 (1968) (dissenting opinion).

8. *See, e.g.*, authorities cited notes 4-8 *infra* and accompanying text.

9. 152 Eng. Rep. 588 (Ex. 1842). *Davies v. Mann* is generally accepted as having established the principle of last clear chance. *E.g.*, Hirsch v. Chapman, 109 Ga. App. 444, ____, 136 S.E.2d 409, 415 (Ct. App. 1964) (concurring opinion); Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465, 471 (1953) [hereinafter cited as Prosser].

10. The term "last clear chance" was not used by the *Davies* court, although the decision established the principle of the doctrine.

11. The evidence showed that the defendant's wagon and horses were proceeding at a "smartish pace," and that the driver was some distance behind the wagon. 152 Eng. Rep. 588 (Ex. 1842).

12. *Id.*

13. *Id.* The damages were found to be 40 shillings. *Id.*

14. *Id.* at 589 (emphasis added).

15. "[T]he doctrine has on occasion been referred to as the 'jackass doctrine,' but more often and generally as the last-clear-chance doctrine, the avoidance, discovery of peril, or the humanitarian doctrine." Hirsch v. Chapman, 109 Ga. App. 444, ____, 136 S.E.2d 409, 416 (Ct. App. 1964) (concurring opinion).

16. *E.g.*, Prosser, *supra* note 9, at 471-74.

constant: A negligent defendant will be held liable to a contributorily negligent plaintiff if the defendant had the last opportunity to avert the accident.[17] Under last clear chance, the defendant had the last opportunity to avert the accident if he was aware of the plaintiff's peril or was unaware of such peril only through carelessness.[18]

II. JUSTIFICATIONS FOR LAST CLEAR CHANCE

The use of last clear chance is justified by one of two rationales. The first is that the doctrine is a true exception to the contributory negligence rule.[19] Courts that utilize the exception rationale characteristically allow a negligent plaintiff to recover for one of several reasons. One reason is that the policy of the law is not served by denying the plaintiff a recovery.[20] Another reason is that it would be unjust to allow the defendant to escape liability for his actions.[21] A third reason is that humane considerations require the defendant to bear the damages burden rather than the plaintiff.[22] Finally, some opinions justify the plaintiff's recovery under last clear chance on the theory that because the defendant's negligence is later in time than the plaintiff's negligence, the defendant is the more culpable party.[23]

The opinion of the Ohio Supreme Court in *West v. Gillette*[24] is an example of the exception rationale. In approving a recovery by the plaintiff under last clear chance, the *West* court stated that last clear chance was a "humane modification"[25] of the contributory negligence rule and that the doctrine was used because

> . . . it would surely be unjust to hold that one should be denied the protection of the law because of acts of carelessness on his part, which were followed by subsequent acts of negligence on the part of another, which latter acts were the [cause] of injury.[26]

The second rationale for last clear chance is that the doctrine

17. Kansas City So. Ry. v. Ellzey, 275 U.S. 236, 241 (1927).
18. *Id.*
19. *See* Kinney v. Chicago Great W. R.R., 17 F.2d 708, 709 (8th Cir. 1927); Wheelock v. Clay, 13 F.2d 972, 973 (8th Cir. 1926).
20. *See, e.g.*, Texas & Pac. Ry. v. Breadow, 90 Tex. 26, 36 S.W. 410 (1896).
21. *E.g.*, West v. Gillette, 95 Ohio St. 305, ___, 116 N.E. 521, 522 (1917).
22. Pecos & N.T. Ry. v. Rosenbloom, 107 Tex. 291, 173 S.W. 215 (1915).
23. *See, e.g.*, Hirsch v. Chapman, 109 Ga. App. 444, ___, 136 S.E.2d 409, 416 (Ct. App. 1964) (concurring opinion); Cushman v. Perkins, 245 A.2d 846, 850 (Me. 1968).
24. 95 Ohio St. 305, 116 N.E. 521 (1917).
25. *Id.* at ___, 116 N.E. at 522.
26. *Id.*

is an aspect of the proximate cause question.[27] The original *Davies v. Mann*[28] opinion said that unless the negligence of the plaintiff was an *immediate* cause of the injury, a negligent defendant would not be protected from liability by the contributory negligence doctrine.[29] Early American cases involving last clear chance situations tracked the reasoning and conclusions of the *Davies* opinion.[30] For example, in *Vicksburg & Jackson Railroad Co. v. Patton*,[31] an 1856 Mississippi case, defendant's train struck the plaintiff's horses after the horses had wandered onto defendant's unfenced railroad tracks. The railroad asserted that Patton was contributorily negligent in allowing his horses to roam on the track. The Mississippi High Court of Errors and Appeals noted the general contributory negligence rule that when both plaintiff and defendant are negligent, the plaintiff cannot recover.[32] The court then stated, however, that the general rule was subject to several qualifications. One qualification was that when both parties were at fault, but the defendant was the immediate and proximate cause of the injury, the defendant would be liable.[33] The court considered it to be "settled law" that

> . . . though there be negligence or fault on the part of the plaintiff remotely connected with the injury, yet, if at the time the injury was done, it might have been avoided by the exercise of reasonable care, prudence, and skill, on the part of the defendant, the plaintiff may maintain his action for the injury.[34]

The Maine Supreme Court also classified last clear chance as an aspect of the proximate cause question. In *O'Brien v. McGlinchy*[35] the court stated:

> The [negligence of plaintiff] would not be a part of the transaction through which the injury befel [*sic*] the plaintiff, but another transaction prior thereto and distinct therefrom. It may have been the "agency" or "medium" or "opportunity" or "occasion" or "sit-

27. Kansas City S. Ry. v. Ellzey, 275 U.S. 236, 240-41 (1927); Grand Trunk Ry. v. Ives, 144 U.S. 408, 429 (1892); 57 AM. JUR. 2D *Negligence* § 40 (1971).

28. 152 Eng. Rep. 588 (1842). *See* text accompanying notes 9-14 *supra*.

29. *Id.* at 589.

30. *E.g.*, Inland & Seaboard Coasting Co. v. Tolson, 139 U.S. 551, 558 (1891); Kerwhacker v. Cleveland, Columbus, & Cin. R.R., 3 Ohio St. 172, 195-96 (1854); Trow v. Vermont Cent. R.R., 24 Vt. 487, 494-95 (1852).

31. 31 Miss. 156 (1856).

32. *Id.* at 192.

33. *Id.* at 193.

34. *Id.*

35. 68 Me. 552 (1878).

> uation" or "condition," as it is variously styled, through or by which the accident happened; but no part of its real and controlling cause. The fault of [plaintiff] would be the remote cause, while that of the defendant would be the proximate or the more proximate cause, the *proxima causa* or *causa causans;* the one a passive and the other a causal connection with the ultimate events . . . where the negligent acts of the parties are distinct and independent of each other, the act of the plaintiff preceding that of the defendant, it is considered that the plaintiff's conduct does not contribute to produce the injury, if, notwithstanding his negligence, the injury could have been avoided by the use of ordinary care at the time by the defendant.[36]

III. THE DOCTRINE OF LAST CLEAR CHANCE IN TEXAS

In 1879 the Texas Supreme Court recognized the validity of the last clear chance doctrine in *Houston & Texas Central Railway Co. v. Smith.*[37] In *Smith* the plaintiff was walking on defendant's railroad track. Defendant's train approached Smith from behind. Although the train whistled several times, Smith continued walking on the tracks and was struck by the train. In affirming a judgment for Smith the supreme court stated that under Texas law a contributorily negligent plaintiff could not recover in a negligence action.[38] The court then stated, however, that if the defendant *became aware* of the plaintiff's dangerous situation and did not use a proper degree of care in attempting to prevent injury to the plaintiff, " . . . another principle of law governs and the defendant would be liable."[39]

Texas courts have adhered to the doctrine of last clear chance as stated in *Smith.* Texas law does not allow the plaintiff to recover under the doctrine unless the defendant actually discovered the plaintiff's dangerous situation.[40] For this reason, the doctrine of last clear chance, as it presently exists in Texas, is referred to as the doctrine of "discovered peril."[41] The elements of discovered peril are

36. *Id.* at 557. The court remanded the case for a new trial in light of new evidence. *Id.* at 559.

37. 52 Tex. 178 (1879).

38. *Id.* at 183.

39. *Id.* at 184.

40. Safeway Stores, Inc. v. White, 162 Tex. 473, 348 S.W.2d 162 (1961).

41. R.T. Herrin Petrol. Transp. Co. v. Proctor, 161 Tex. 222, 338 S.W.2d 422 (1960); Schuhmacher Co. v. Posey, 147 Tex. 392, 215 S.W.2d 880 (1949); Lee v. Howard, 483 S.W.2d 922 (Tex. Civ. App.—Eastland 1972, writ ref'd n.r.e.).

The difference between "discovered peril" and "last clear chance" is that if the defendant does not actually discover the plaintiff's perilous position, the negligent plaintiff might

(1) that the plaintiff was in a position of peril,[42] (2) that the defendant actually discovered that the plaintiff was in a position of peril, (3) that the defendant realized that the plaintiff probably would not extricate himself from the perilous position, (4) that the defendant's discovery and realization were in time for the defendant to have avoided the accident by the exercise of ordinary care in using the means available to him, (5) that after his discovery and realization, the defendant failed to exercise ordinary care in the use of the means available to him to avoid the accident, and (6) that the defendant's failure was a proximate cause of the plaintiff's damages.[43]

In *Smith* the Texas Supreme Court allowed recovery under the doctrine of last clear chance because the court viewed the defendant's negligence as being the proximate cause of the damage.[44] The plaintiff's negligence was only a remote cause and, therefore, did not bar plaintiff's recovery.[45] Subsequent to *Smith* the Texas Supreme Court indicated that the doctrine is based upon principles of "humanity and public policy."[46] Recently, Texas courts have taken the position that last clear chance is actually based on a new duty that arises in certain situations.[47] When a defendant actually discovers the plaintiff in a perilous situation,[48] realizes that the plaintiff probably will not extricate himself from the perilous situation,[49] and has time to avoid the accident,[50] the defendant has a new duty. His new

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still recover under last clear chance. *See* RESTATEMENT (SECOND) OF TORTS § 479, comment b (1965). Under discovered peril, however, the defendant must have actually discovered and appreciated the plaintiff's perilous position. *See* text accompanying note 43 and authorities cited note 43 *infra*.

For a general discussion of discovered peril, see Comment, *Doctrine of Discovered Peril*, 6 BAYLOR L. REV. 61 (1953).

42. The doctrine of discovered peril presupposes contributory negligence on the part of the plaintiff. Sisti v. Thompson, 149 Tex. 189, 194, 229 S.W.2d 610, 613 (1950). *See* Gentry v. Southern Pac. Co., 457 S.W.2d 889, 890 (Tex. 1970).

43. Gentry v. Southern Pac. Co., 457 S.W.2d 889, 890 (Tex. 1970); Lee v. Howard, 483 S.W.2d 922, 925 (Tex. Civ. App.—Eastland 1972, writ ref'd n.r.e.).

44. 52 Tex. at 183.

45. *Id.*

46. Texas & Pac. Ry. v. Breadow, 90 Tex. 26, 31, 36 S.W. 410, 412 (1896).

47. *E.g.*, R.T. Herrin Petrol. Transp. Co. v. Proctor, 161 Tex. 222, 226, 338 S.W.2d 422, 425 (1960).

48. Gentry v. Southern Pac. Co., 457 S.W.2d 889, 890 (Tex. 1970); Safeway Stores, Inc. v. White, 162 Tex. 473, 478, 348 S.W.2d 162, 165 (1961); Lee v. Howard, 483 S.W.2d 922, 925 (Tex. Civ. App.—Eastland 1972, writ ref'd n.r.e.); Keith v. Ledbetter, 431 S.W.2d 433, 435 (Tex. Civ. App.—Amarillo 1968, writ ref'd n.r.e.).

49. Gentry v. Southern Pac. Co., 457 S.W.2d 889, 890 (Tex. 1970);Lee v. Howard, 483 S.W.2d 922, 925 (Tex. Civ. App.—Eastland 1972, writ ref'd n.r.e.).

50. Gentry v. Southern Pac. Co., 457 S.W.2d 889, 890 (Tex. 1970); Parks v. Airline Motor Coaches, Inc., 145 Tex. 44, 193 S.W.2d 967 (1946); Lee v. Howard, 483 S.W.2d 922, 925 (Tex. Civ. App.—Eastland 1972, writ ref'd n.r.e.).

duty is to use the means at his disposal to avoid injuring the plaintiff.[51] If the defendant does not use ordinary care to avoid injuring the plaintiff after discovering his perilous position, the defendant's negligence becomes the sole proximate cause of the injury.[52] The negligence of the plaintiff becomes a remote cause.[53] Once this new duty arises, the prior negligence of a plaintiff becomes immaterial and will not bar the plaintiff's recovery.[54] Texas law does not bar a plaintiff from recovering in a discovered peril situation even if his negligence continues until the time of his damage and is concurrent with the defendant's negligence.[55]

IV. THE CURRENT STATUS OF LAST CLEAR CHANCE IN JURISDICTIONS USING COMPARATIVE NEGLIGENCE

Of the jurisdictions currently utilizing a general system of comparative negligence,[56] at least five[57] do not recognize last clear

51. *E.g.*, R.T. Herrin Petrol. Transp. Co. v. Proctor, 161 Tex. 222, 338 S.W.2d 422 (1960).

52. *Id.*

53. *Id.*

54. Parks v. Airline Motor Coaches, Inc., 145 Tex. 44, 48, 193 S.W.2d 967, 969 (1946); Searcy v. Sellers, 470 S.W.2d 103, 107 (Tex. Civ. App.—Amarillo 1971, writ ref'd n.r.e.).

Submitting issues to the jury on plaintiff's contributory negligence and defendant's primary negligence is not improper, because the discovered peril issue may be decided in defendant's favor. If the jury finds for the defendant on the discovered peril issue, then the questions of primary and contributory negligence are relevant. Smith v. Galveston-Houston Elec. Ry., 277 S.W. 103, 105 (Tex. Comm'n App. 1925, holding approved); Guyger v. Hamilton Trailer Co., 304 S.W.2d 377, 380 (Tex. Civ. App.—Eastland 1957, no writ).

55. Sugarland Indus. v. Daily, 135 Tex. 532, 143 S.W.2d 931 (1940); Wilson v. Southern Traction Co., 111 Tex. 361, 234 S.W. 663 (1921); Yellow Cab Co. v. Pfeffer, 233 S.W.2d 964, 966 (Tex. Civ. App.—Austin 1950, no writ).

Most jurisdictions deny recovery under last clear chance if the plaintiff was concurrently negligent with the defendant. These jurisdictions hold that the plaintiff's concurrent negligence is a proximate cause of the accident and that it is not superseded by the defendant's negligence. *E.g.*, Gulf, M. & O. Ry. v. Sims, 69 So. 2d 449 (Ala. 1953); West v. Belle Isle Cab Co., 100 A.2d 17 (Md. Ct. App. 1953).

56. Many states have special apportionment of damages statutes. These are generally in the areas of railroad and labor legislation. Special apportionment of damages systems are not comprehended by this comment.

Twenty-six states now use comparative negligence within the meaning of the term "general system" of negligence. Twenty-five states have adopted comparative negligence by statute. Florida has done so by judicial decision. ARK. STAT. ANN. §§ 27-1763 to 27-1765 (Supp. 1973); COLO. REV. STAT. ANN. § 41-2-14 (Supp. 1971); CONN. GEN. STAT. ANN., Public Act No. 73-622 (Supp. 1974); Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973); GA. CODE ANN. § 105-603 (1968); HAWAII REV. STAT. § 663-31 (Supp. 1973); IDAHO CODE § 6-801 (Supp. 1973); ME. REV. STAT. ANN. tit. 14, § 156 (Supp. 1974); MASS. GEN. LAWS ANN. ch. 231, § 85 (Supp. 1974); MINN. STAT. ANN. § 604.01 (Supp. 1974); MISS. CODE ANN. § 11-7-15 (1972); NEB. REV. STAT. § 25-1151 (1964); N.H. REV. STAT. ANN. § 507:7a (Supp. 1973); NEV. REV. STAT. ANN. § 41.141 (1973); N.J. REV. STAT. ANN. § 2A:15-5.1 (Supp. 1974); N.D. CENT. CODE ANN. § 9-

chance as a valid doctrine. These are Arkansas,[58] Connecticut,[59] Wisconsin,[60] Florida,[61] and Maine.[62] Of the five, only Maine[63] and Florida[64] have judicially abolished last clear chance as being incompatible with a comparative negligence system. Arkansas[65] and Connecticut[66] abrogated the doctrine by the statutes which instituted comparative negligence. Wisconsin did not recognize the doctrine even before enactment of that state's comparative negligence statute.[67]

The Florida Supreme Court summarily abolished last clear chance in *Hoffman v. Jones*.[68] The court offered no reasoning for its conclusion in *Hoffman*, stating only that under comparative negligence, "[t]he doctrine of last clear chance would, of course, no longer have any application in these cases."[69] The basis for this decision rested on earlier Florida cases[70] that held last clear chance

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10-07 (Supp. 1973); OKLA. STAT. ANN. tit. 23, § 11 (Supp. 1974); ORE. REV. STAT. § 18.470 (1971); R.I. GEN. LAWS ANN. 1-9-20-4 (Supp. 1973); S.D. COMPILED LAWS ANN. § 20-9-2 (1967); TEX. REV. CIV. STAT. ANN. art. 2212a (Supp. 1974-75); UTAH CODE ANN. § 78-27-37 (Supp. 1973); VT. STAT. ANN. tit. 12, § 1036 (1973); WASH. REV. CODE ANN. § 4.22.010 (Supp. 1973); WIS. STAT. ANN. § 895.045 (Supp. 1974); WYO. STAT. ANN. § 1-7.2 (Supp. 1973).

57. The number of jurisdictions using comparative negligence is growing rapidly. For example, in 1973 ten states introduced comparative negligence as a replacement for contributory negligence. Note 1, *supra*. Therefore, the number of states which have either maintained last clear chance or abolished the doctrine after adopting comparative negligence is subject to immediate change.

58. ARK. STAT. ANN. §§ 27-1763 to 27-1765 (Supp. 1973).

59. CONN. GEN. STAT. ANN., Public Act No. 73-622 (Supp. 1974).

60. WIS. STAT. ANN. § 895.045 (Supp. 1974).

61. Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973).

62. Cushman v. Perkins, 245 A.2d 846 (Me. 1968).

63. *Id.*

64. Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973).

65. ARK. STAT. ANN. §§ 27-1763 to 27-1765 (Supp. 1973).

66. CONN. GEN. STAT. ANN., Public Act No. 73-622 (Supp. 1974).

67. The Wisconsin comparative negligence statute was enacted in 1931. Last clear chance was denied validity as a theory of recovery in Wisconsin in 1925. Switzer v. Detroit Inv. Co., 188 Wis. 330, 206 N.W. 407 (1925).

68. 280 So. 2d 431 (Fla. 1973). By its decision in *Hoffman*, the Florida Supreme Court changed Florida from a contributory negligence jurisdiction into a comparative negligence jurisdiction. The court accomplished this transformation without the benefit of a state statute providing for introduction of comparative negligence.

69. *Id.* at 438.

70. The *Hoffman* court cited Martin v. Sussman, 82 So. 2d 597 (Fla. 1955) as support for holding that last clear chance did not apply in comparative negligence cases. *Martin*, however, merely cites the case of Loftin v. Nolin, 86 So. 2d 161 (Fla. 1956) on the issue. *Loftin* is the case which overruled last clear chance as a valid theory of recovery in Florida railroad comparative negligence cases. For a discussion of *Loftin*, see text accompanying notes 72-76 *infra*.

inapplicable to suits brought under a Florida statute[71] providing for apportionment of damages in railroad accident cases. The case which held last clear chance incompatible with the railroad apportionment statute was *Loftin v. Nolin.*[72] In *Loftin* the court noted that prior Florida railroad accident cases[73] had approved the use of last clear chance in conjunction with the apportionment statute. The earlier cases had characterized last clear chance as being part of the proximate cause element of negligence actions.[74] The *Loftin* court continued by stating that numerous legal scholars opposed the use of last clear chance after the adoption of comparative negligence.[75] The court, however, did not set forth the reasoning of the scholars it cited. Based on the foregoing analysis, the court concluded that last clear chance had no applicability under an apportionment-of-damages statute.[76] The *Hoffman* court offered no basis for its decision on last clear chance other than its brief cite to the *Loftin* line of cases.

The Supreme Judicial Court of Maine also concluded that last clear chance and comparative negligence are not compatible. In *Cushman v. Perkins,*[77] the Maine court noted two possible justifications for last clear chance. The first was that the plaintiff's negligence was remote and that the defendant's negligence was the sole proximate cause of the injury.[78] The court offered two reasons for rejecting this justification. The first was that it is illogical to describe a plaintiff as contributorily negligent for failing to anticipate the danger that resulted in his injury, and then to say that the negligence of the plaintiff was not a proximate cause of his damage.[79] The inconsistency in this reasoning lies in the fact that before a plaintiff can be found contributorily negligent, his negligence must be a proximate cause of his injury.[80] Therefore, the "sole proximate cause" justification is founded on the conflicting conclusions that a plaintiff proximately caused his injury, but his actions were

71. FLA. STAT. ANN. § 768.06 (1964).
72. 86 So. 2d 161 (Fla. 1956).
73. Seaboard Airline R.R. v. Martin, 56 So. 2d 509 (Fla. 1952); Poindexter v. Seaboard Airline R.R., 56 So. 2d 905 (Fla. 1951).
74. *E.g.,* Poindexter v. Seaboard Airline R.R., 56 So. 2d 905, 910 (Fla. 1951).
75. 86 So. 2d 161, 162-63 (Fla. 1956).
76. *Id.* at 163.
77. 245 A.2d 846 (Me. 1968).
78. *Id.* at 848.
79. *Id.* at 849.
80. *Id.*

not a proximate cause of his injury.[81] The second reason for rejecting the sole proximate cause rationale was similar to the first. The *Cushman* court noted that according to the sole proximate cause justification, a plaintiff's negligent act might be classified as a remote cause of his damages in relation to the defendant's act, but if a third party was injured by the same negligent act, the negligence could be a proximate cause of the third party's injuries.[82] The court decided that these different results were not reconcilable when they were based on the same negligent act.[83]

The second justification for last clear chance that the *Cushman* court considered was that the defendant's negligence involved a greater amount of fault than did the negligence of the plaintiff.[84] The defendant's fault was supposedly greater because his negligence occurred after he knew or should have known of the plaintiff's peril. The court rejected this justification also. As the court noted, this justification was invalid when the plaintiff was grossly negligent in getting into his perilous position, and the defendant was only slightly negligent.[85]

After considering the arguments for last clear chance, the Maine court concluded that the real reason for use of the doctrine lay in the dissatisfaction of courts with the results of the contributory negligence rule.[86] The court decided that last clear chance was no more than a modification of the doctrine of contributory negligence.[87] Therefore, the court reasoned, when contributory negligence disappeared, the real reason for last clear chance also ceased to exist.[88] The court ruled that last clear chance no longer existed as a theory of recovery for the plaintiff,[89] but that

> . . . the degree of plaintiff's negligence, its remoteness in time, the

81. *Id.* at 848-49, *citing* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 437 (3d ed. 1964).

82. 245 A.2d at 849.

83. *Id.*

84. *Id.* Although the *Cushman* court rejected this justification, Texas courts have adhered to the justification. Texas courts have described the actions of a defendant in a discovered peril situation as being very nearly the acts of an intentional tortfeasor. Sugarland Indus. v. Daily, 135 Tex. 532, 536, 143 S.W.2d 931, 933 (1940); Wilson v. Southern Traction Co., 111 Tex. 361, 367, 234 S.W. 663, 665 (1921). The cause of action in Texas, however, is still pled and tried as a negligence action. Punitive damages are not awarded when discovered peril is the theory of recovery. *See* Whited v. Powell, 155 Tex. 210, 285 S.W.2d 364 (1956).

85. 245 A.2d at 849.

86. *Id.*

87. *Id.* at 850.

88. *Id.*

89. *Id.*

> efficiency of its causation, the degree of defendant's negligence, the efficiency of its causation, defendant's awareness of plaintiff's peril, defendant's opportunity to avoid doing damage and his failure to do so—remain as factors to be considered by the jury in measuring and comparing the parties' relative fault.[90]

The courts of four states have considered the compatibility of last clear chance and comparative negligence and have retained last clear chance after the adoption of comparative negligence.[91] These states are Nebraska,[92] South Dakota,[93] Mississippi,[94] and Georgia.[95] In Nebraska, the courts have assumed without discussion that last clear chance exists under that state's comparative negligence statute.[96] Representative of the Nebraska opinions on the issue is a statement by the Nebraska Supreme Court in *Carnes v. Deklotz.*[97] In *Carnes* the court simply found it " . . . [unnecessary] to discuss at length the comparative negligence of the parties, in view of the fact that the last clear chance doctrine was invoked by the plaintiff."[98]

South Dakota courts have also found it unnecessary to discuss, to any significant degree, the compatibility of comparative negligence and last clear chance. In *Vlach v. Wyman*[99] the South Dakota Supreme Court noted that South Dakota courts had always viewed last clear chance as a rule of proximate cause.[100] Because the doctrine was viewed as a rule of proximate cause, the court continued, it was not in conflict with the South Dakota statutory rule of comparative negligence.[101] The court's opinion contained no further rea-

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90. *Id.* at 850-51.

91. As discussed in note 57 *supra*, this figure may soon be out of date because of the rapidity with which comparative negligence is being adopted by different jurisdictions. Because more jurisdictions are utilizing comparative negligence, the compatibility of last clear chance and comparative negligence will be considered many times. Currently, however, only four comparative negligence states have considered the compatibility of the theories and have retained last clear chance.

92. Bezdek v. Patrick, 170 Neb. 522, 103 N.W.2d 318 (1960); Carnes v. Deklotz, 137 Neb. 787, 291 N.W. 490 (1940).

93. Vlach v. Wyman, 78 S.D. 504, 104 N.W.2d 817 (1960).

94. *See* Underwood v. Illinois Cent. R.R., 205 F.2d 61 (5th Cir. 1953); Illinois Cent. R.R. v. Underwood, 235 F.2d 868 (5th Cir. 1953); Price, *Applicability of The Last Clear Chance Doctrine in Mississippi*, 29 MISS. L.J. 247, 247-48 (1958).

95. Southland Butane Gas Co. v. Blackwell, 211 Ga. 665, 88 S.E.2d 6 (1955).

96. NEB. REV. STAT. § 25-1151 (1964).

97. 137 Neb. 787, 291 N.W. 490 (1940).

98. *Id.* at ____, 291 N.W. at 492.

99. 78 S.D. 504, 104 N.W.2d 817 (1960).

100. *Id.* at ____, 104 N.W.2d at 819.

101. S.D. COMPILED LAWS ANN. § 20-9-2 (1967).

soning relating to the validity of last clear chance under comparative negligence.[102]

The survival of last clear chance under the Mississippi comparative negligence statute[103] has been attributed to a case decided by federal courts applying Mississippi law.[104] *Underwood v. Illinois Central Railroad Co.*[105] was initially decided in the United States District Court for the Southern District of Mississippi. The trial judge directed a verdict for the defendant railroad.[106] The Court of Appeals for the Fifth Circuit reversed the decision because there was a possibility that the jury could have found against the defendants on the theory of last clear chance.[107] Upon retrial in the district court, the jury did find for plaintiffs under the theory of last clear chance.[108] The second appeal also resulted in a reversal.[109] The second reversal was justified on the ground that the plaintiffs had not proved their case under last clear chance.[110] In Mississippi cases decided after the introduction of comparative negligence, but prior to *Underwood,* the elements of last clear chance had been submitted to the jury.[111] The jury instructions in these cases did not include the term "last clear chance."[112] Following *Underwood,* however, the Mississippi Supreme Court altered that procedure. In *New Orleans & Northeastern Railrady Co. v. Dixie Highway Express,*[113] the court reversed and remanded the damages portion of the verdict. In remanding, the court stated:

> It was . . . a question for the jury, on the issue of damages, as to whether the engineer's negligence was an intervening, sole proximate cause of the collision, and whether the last clear chance doctrine applies thereto.[114]

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102. 78 S.D. at ___, 104 N.W.2d at 819.

103. MISS. CODE ANN. § 11-7-15 (1972).

104. Price, *Applicability of The Last Clear Chance Doctrine in Mississippi,* 29 MISS. L.J. 247, 247-48 (1958).

105. 205 F.2d 61 (5th Cir. 1953).

106. *Id.* at 63.

107. *Id.* at 64.

108. Illinois Cent. R.R. v. Underwood, 235 F.2d 868, 871 (5th Cir. 1956).

109. Illinois Cent. R.R. v. Underwood, 235 F.2d 868 (5th Cir. 1956).

110. *Id.* at 878.

111. *E.g.,* Mississippi Cent. R.R. v. Aultman, 173 Miss. 622, 160 So. 737 (1935); Gulf & S.I. R.R. v. Williamson, 162 Miss. 726, 139 So. 601 (1932); Yazoo & M.V. R.R. v. Daily, 157 Miss. 3, 127 So. 575 (1930).

112. *E.g.,* Mississippi Cent. R.R. v. Aultman, 173 Miss. 622, ___, 160 So. 737, 740 (1935).

113. 92 So. 2d 455 (1957).

114. *Id.* at 456.

After *Dixie Highway,* Mississippi courts have found last clear chance compatible with comparative negligence. Because Mississippi courts had been submitting the elements of last clear chance to juries prior to *Dixie Highway,* however, it is probable that the addition of the term "last clear chance" has changed little of the substance of the jury instructions.[115]

Georgia initially rejected[116] last clear chance as a separate plaintiff's doctrine[117] under that state's comparative negligence statute.[118] The Georgia Supreme Court reversed that position in *Southland Butane Gas Co. v. Blackwell.*[119] In *Blackwell* the Supreme Court of Georgia simply assumed that last clear chance was available to a plaintiff.[120] The court did not discuss the merits of last clear chance under comparative negligence. Therefore, the opinion is not instructive in that regard.

V. Comparative Negligence and Discovered Peril in Texas—The Precedent

In 1915 the Supreme Court of Texas considered the effect of an apportionment-of-damages statute on the doctrine of discovered peril.[121] The Texas statute[122] provided:

> In all actions brought against [a] common carrier or railroad . . . to recover damages for personal injuries to an employe or where such injuries have resulted in his death, the fact that the employe may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe; . . . .[123]

Pecos & Northern Railway Co. v. Rosenbloom[124] presented the ques-

115. *Compare* the jury instruction in Mississippi Cent. R.R. v. Aultman, 173 Miss. 622, ___, 160 So. 737, 740 (1935) *with* the court's instruction in New Orleans & N.E. R.R. v. Dixie Highway Express, 92 So. 2d 455, 456 (1957) in relation to the jury issues on remand.

116. Smith v. American Oil Co., 77 Ga. App. 463, 49 S.E.2d 90 (Ct. App. 1948).

117. The Georgia statute apparently provides that last clear chance is available as a defensive theory in negligence cases. Hirsch v. Chapman, 109 Ga. App. 444, ___, 136 S.E.2d 409, 417 (Ct. App. 1964) (concurring opinion).

118. Ga. Code Ann. § 105-603 (1968).

119. 211 Ga. 665, 88 S.E.2d 6 (1955).

120. *Id.* at ___, 88 S.E.2d at 9-10.

121. Pecos & N.T. Ry. v. Rosenbloom, 107 Tex. 291, 173 S.W. 215 (1915).

122. Tex. Laws, 1st Extra Sess. 1909, ch. 10, § 2 at 280; *currently codifed as* Tex. Rev. Civ. Stat. Ann. art. 6440 (1926).

123. Tex. Laws, 1st Extra Sess. 1909, ch. 10, § 2 at 280.

124. 107 Tex. 291, 173 S.W. 215 (1915).

tion of whether the doctrine of discovered peril would allow full recovery for a negligent plaintiff under the statute, regardless of his negligence.[125] The railroad's servants in *Rosenbloom* were moving an engine and ballast car on the defendant's tracks when they ran over Rosenbloom and killed him. Rosenbloom's survivors[126] alleged that the railroad was liable for his death under the doctrine of discovered peril.[127] The jury found for the plaintiffs[128] and the court of civil appeals affirmed.[129] The Texas Supreme Court held that the trial court had not erred in refusing to submit the question of Rosenbloom's negligence to the jury.[130] The court also held that under the apportionment statute, there could be no reduction of the damages recovered by the plaintiffs.[131] According to the supreme court the statute called for a reduction in the plaintiff's recovery only if the plaintiff was guilty of contributory negligence which, except for the statute, would bar his recovery.[132] The court stated that the negligence of Rosenbloom was no defense to this action in which the rights of the parties were determined by the law of discovered peril.[133] Therefore, the court concluded, the question of the negligence of Rosenbloom was immaterial and there could be no reduction of the damages recovered by the plaintiffs.[134] The *Rosenbloom* court did not base its approval of discovered peril on the theory that it was part of the proximate cause issue in negligence actions. Instead, the approval of discovered peril under the apportionment statute was based on the policy determination that " . . . the law will not permit an operative on a train to run upon a negligent party and destroy his life because [the plaintiff] is negligent."[135]

VI. ANALYSIS

Courts which have undertaken a detailed analysis of the compatibility of last clear chance and comparative negligence have

125. *Id.*
126. Plaintiffs were Rosenbloom's statutory heirs: his wife, two children, father, and mother.
127. Pecos & N.T. Ry. v. Rosenbloom, 141 S.W. 175, 177 (Tex. Civ. App.—Amarillo 1911, writ granted), *aff'd on appeal*, 107 Tex. 291, 173 S.W. 215 (1915).
128. *Id.* at 180.
129. *Id.* at 184.
130. Pecos & N.T. Ry. v. Rosenbloom, 107 Tex. 291, 296, 173 S.W. 215, 216 (1915).
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.*

come to the conclusion that there is no place for last clear chance in a comparative negligence jurisdiction.[136] In their decisions to abolish last clear chance under comparative negligence, the Maine and Florida courts joined numerous legal authors[137] who have argued that last clear chance should not survive the introduction of comparative negligence. On the other hand, the courts that have decided to retain last clear chance after the adoption of comparative negligence have apparently done so without an in-depth examination of the doctrine or its justification.[138] These courts have either assumed the validity of the doctrine or have based their decisions to retain it on generalized policy reasons.[139]

The courts that have allowed recovery under the doctrine of last clear chance have done so through the use of two different justifications. The first is that the defendant's negligence was the sole proximate cause of the damage.[140] Therefore, the plaintiff's negligence was remote.[141] The validity of this justification, however, must be evaluated in light of the fact that only a contributorily-negligent plaintiff may use last clear chance as a theory of recovery. A determination that the plaintiff was contributorily negligent is based on a finding that his negligence was a proximate cause of his damages. It is inconsistent to allow transformation of the plaintiff's negligence from proximate to remote merely because the defendant had a later chance to avoid the injury.[142] The defendant may be the more culpable party because his negligence was greater than the negligence of the plaintiff. His negligence may also be the more proximate cause of the accident because the defendant's negligence occurred after the plaintiff's negligence. The defendant's negligence, however, does not remove the plaintiff's negligence any further from his injury. It only adds another cause to the injury.[143]

Judicial acceptance of the inconsistency in the proximate cause

136. Cushman v. Perkins, 245 A.2d 846 (Me. 1968).

137. *E.g.*, James, *supra* note 4; Maloney, *From Contributory to Comparative Negligence: A Needed Law Reform*, 11 U. FLA. L. REV. 135 (1958); Prosser, *supra* note 9.

138. *E.g.*, Southland Butane Gas Co. v. Blackwell, 211 Ga. 665, 88 S.E.2d 6?(1955); Carnes v. Deklotz, 137 Neb. 787, 291 N.W. 490 (1940); Vlach v. Wyman, 78 S.D. 504, 104 N.W.2d 817 (1960).

139. *E.g.*, Carnes v. Deklotz, 137 Neb. 787, 291 N.W. 490 (1940); Pecos & N.T. Ry. v. Rosenbloom, 107 Tex. 291, 173 S.W. 215 (1915).

140. For a discussion of this point, see text accompanying notes 27-36 *supra*.

141. *E.g.*, O'Brien v. McGlinchy, 68 Me. 552, 557 (1878); R.T. Herrin Petrol. Transp. Co. v. Proctor, 161 Tex. 222, 226, 338 S.W.2d 422, 425 (1960).

142. Cushman v. Perkins, 245 A.2d 846, 849 (Me. 1968).

143. *Id.*

justification is not offensive under contributory negligence rules. Under contributory negligence one party must bear the entire burden of the injury. The plaintiff either recovers all of his damages, or he is barred from any recovery by his contributory negligence.[144] The last clear chance doctrine allows courts to shift the burden of damages to the last, the greatest, or the most culpable wrongdoer.[145]

Under comparative negligence, however, there is no need to indulge the inconsistent reasoning of the proximate cause justification for last clear chance.[146] Comparative negligence concepts recognize that there can be more than one proximate cause for an injury. If the negligence of a party is a proximate cause of the injury, it can be directly recognized as such, and damages can be apportioned accordingly.

The second justification for allowing a negligent plaintiff to recover under last clear chance is the exception theory.[147] This justification includes rationales for last clear chance that recognize the rule of contributory negligence, but allow recovery under last clear chance despite that rule. Under the exception rationale the defendant's negligence is great enough in relation to the plaintiff's negligence to render the defendant liable. The defendant's supposedly greater fault may be attributed to his later chance to avoid the injury[148] or to his apparently indifferent attitude toward the plaintiff after he discovered the plaintiff's perilous position.[149] Or it may be attributed to the fact that the plaintiff's negligence was extremely slight.[150] The exception justification for allowing the plaintiff to recover under last clear chance, therefore, results from a judicial attempt to compare the fault of the plaintiff to that of the defendant.

Last clear chance should not survive the demise of contributory negligence, on the basis of the exception justification, for two reasons. The first is that under comparative negligence there is no need for a makeshift comparative negligence device such as last clear chance. Under comparative negligence there is direct apportion-

144. *E.g.*, Butterfield v. Forrester, 103 Eng. Rep. 926 (K.B. 1809). For a discussion of *Butterfield*, see text accompanying notes 5-7 *supra*.

145. Cushman v. Perkins, 245 A.2d 846, 849 (Me. 1968). *See* Wilson v. Southern Traction Co., 111 Tex. 361, 367, 234 S.W. 663, 665 (1921).

146. *See* Cushman v. Perkins, 245 A.2d 846, 848-50 (Me. 1968); James, *supra* note 4.

147. *See* Wheelock v. Clay, 13 F.2d 972, 973 (8th Cir. 1926); Kinney v. Chicago Great W. R.R., 17 F.2d 708, 709 (8th Cir. 1927); text accompanying notes 19-26 *supra*.

148. *See* West v. Gillette, 95 Ohio St. 305, ____, 116 N.E. 521, 522 (1917).

149. *See, e.g.*, Whited v. Powell, 155 Tex. 210, 285 S.W.2d 364 (1956); Sugarland Indus. v. Daily, 135 Tex. 532, 143 S.W.2d 931 (1940).

150. *See* Cushman v. Perkins, 245 A.2d 846, 849 (Me. 1968).

ment of liability and damages between the parties.[151] The second reason is that if last clear chance is considered an exception to the rule of contributory negligence, and contributory negligence is abolished, last clear chance should not survive because there will be no basic rule for the doctrine to act upon.

Texas courts authorize recoveries under discovered peril through the use of two types of reasoning. One line of reasoning follows the exception justification for last clear chance.[152] As noted above, however, the exception justification simply does not warrant retention of last clear chance after the introduction of comparative negligence.[153]

The second line of reasoning through which Texas courts authorize discovered peril recoveries is that the defendant has a new duty once he discovers the plaintiff's perilous position.[154] According to the new duty reasoning, the defendant has violated a duty to the plaintiff that arose subsequent to the plaintiff's negligent acts.[155] The defendant's violation of his new duty changes the plaintiff's proximate negligence into remote negligence.[156] Therefore, the plaintiff's negligence is no longer contributory negligence and does not bar his recovery.[157]

This reasoning is a modication of the proximate cause justification for last clear chance. The difference is that the proximate cause justification classifies the defendant's negligence as a superseding cause[158] of the injury without the introduction of a new duty. Both rationales, however, call for the same result. The defendant is liable for plaintiff's damages despite the plaintiff's contributory negligence.

Just as the proximate cause rationale for last clear chance does

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151. *E.g.*, TEX. REV. CIV. STAT. ANN. art. 2212a (Supp. 1974-75); TEX. R. CIV. P. 277.

152. In addition to allowing recovery for "humane" and "policy" reasons, *see, e.g.*, Texas & Pac. Ry. v. Breadow, 90 Tex. 26, 36 S.W. 410 (1896), where Texas courts allow recovery under discovered peril when the plaintiff's negligence is concurrent with the negligence of the defendant. Sugarland Indus. v. Daily, 135 Tex. 532, 143 S.W.2d 931 (1940). Because the plaintiff's negligence in such a situation is not reasonably a remote cause of the injury, only the exception rationale justifies allowing the plaintiff to recover despite his negligence.

153. Text accompanying notes 147-51 *supra*.

154. R.T. Herrin Petrol. Transp. Co. v. Proctor, 161 Tex. 222, 226, 338 S.W.2d 422, 425 (1960).

155. *Id.*

156. *Id.*

157. Parks v. Airline Motor Coaches, Inc., 145 Tex. 44, 48, 193 S.W.2d 967, 969 (1946); Searcy v. Sellers, 470 S.W.2d 103, 107 (Tex. Civ. App.—Amarillo 1971, writ ref'd n.r.e.).

158. Prosser, *supra* note 9, at 472.

not justify retaining the doctrine after contributory negligence is discarded,[159] neither does the new duty rationale warrant retention of discovered peril after adoption of comparative negligence. Before a plaintiff can be found contributorily negligent, his negligence must be a proximate cause of his injury. But when the defendant violates his new duty under discovered peril, the plaintiff's negligence is changed into remote negligence.[160] Therefore, the new duty rationale yields the anomalous result that the same acts of a plaintiff are a proximate cause of his injury, but they are not a proximate cause of his injury.

With the abolition of contributory negligence the purpose for discovered peril has passed from Texas law. The doctrine of discovered peril should not be maintained when its purpose has disappeared. Despite the reasons for not allowing use of the discovered peril doctrine under comparative negligence, however, *Rosenbloom*[161] stands as the position of the Texas Supreme Court on the issue. When the future of discovered peril under Texas' general comparative negligence law is considered, *Rosenbloom* should be overruled. Discovered peril should no longer be available as a theory of recovery in Texas negligence actions.

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159. Text accompanying notes 140-46 *supra*.

160. R.T. Herrin Petrol. Transp. Co. v. Proctor, 161 Tex. 222, 226, 338 S.W.2d 422, 425 (1960).

161. Pecos & N.T. Ry. v. Rosenbloom, 107 Tex. 291, 173 S.W. 215 (1915). *Rosenbloom* is discussed in the text accompanying notes 121-35 *supra*.