CONTRIBUTORY NEGLIGENCE AND APPORTIONMENT STATUTES

The Western Australian *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947* departs from the pattern of previous apportionment legislation such as the English *Maritime Conventions Act 1911,* the English *Law Reform (Contributory Negligence) Act 1945,* and the apportionment statutes of the Canadian Provinces in that it expressly abrogates the "last opportunity" rule *in the case of the plaintiff.* The Act, however, makes no reference to the "last opportunity of the defendant" situation which has arisen in Admiralty cases and under the Canadian Acts. It would therefore be possible for a plaintiff to advance the argument that since the defendant had the last opportunity of avoiding the damage, he (the plaintiff) is entitled to throw the whole loss upon the defendant, and while it is hoped that the court would reject such an argument, nevertheless the facts of a particular case might favour its adoption. Further, the decisions upon the English Act of 1945 and the periodical literature reveal the law on this topic as in a state of flux, with so many diverse hypotheses as to the true basis of the "last opportunity" rules that even under the Western Australian Act their ghosts may still arise and in a new guise trouble the law. In this context, it is significant that the Canadian Commissioners for Uniformity of Legislation for many years treated as insuperable the difficulty of drafting a provision which would satisfactorily exclude the rules. Rushing in where so many have ably trodden, this article will attempt one further survey of English and Canadian authority upon contributory negligence. In it I am greatly indebted to the periodical literature, in particular to the work of F. W. Bohlen,[1] Glanville L. Williams,[2] M. M. MacIntyre,[3] A. L. Goodhart,[4] and contributors to the *Canadian Bar Review* too numerous for acknowledgement here.

The former common law rules as to contributory negligence may be summarised as follows:—

(1) The rule that where the negligence of both parties concurs and combines in producing the damage, in the sense that neither party has the last opportunity of avoiding the consequences of the other's negligence, neither can recover from the other. Borrowing

[1] *Contributory Negligence,* 21 H.L.R. 233.

[2] *The Law Reform (Contributory Negligence) Act 1945,* 9 Mod. L.R. 105.

[3] *Rationale of Last Clear Chance,* 53 H.L.R. 1225; reprinted in 18 Can. Bar Rev. 665.

[4] *The "Last Opportunity" Rule,* 65 L.Q.R. 237.

Glanville Williams's happy phrase, this will be termed the "stalemate" rule. This rule it is the primary object of all apportionment legislation to abrogate.

(2) The proposition established in *Butterfield v. Forrester*[5] that if by the exercise of reasonable care the plaintiff might have avoided the consequences of the defendant's negligence, he is not entitled to recover. This will be termed the "last opportunity of the plaintiff" rule.

(3) The rule in *Davies v. Mann*[6] that if the defendant might, by the exercise of reasonable care, have avoided the consequences of the plaintiff's negligence, the defendant is liable and the plaintiff is entitled to recover. This proposition will be termed the "last opportunity of the defendant" rule.

It is obvious, as Asquith, L.J., points out in *Henley v. Cameron*,[7] that propositions (2) and (3) are simply applications of the one principle, *viz.*, that he who has the last opportunity is responsible for the damage. As, however, before apportionment legislation the plaintiff was barred both under proposition (1) and under proposition (2), it was usual to direct the jury that if the negligence of both parties has contributed to the accident, the plaintiff cannot recover unless the defendant could by reasonable care have avoided the consequences of the plaintiff's negligence. In considering the effect of apportionment legislation, however, the "last opportunity of the defendant" rule must be distinguished from the "stalemate" rule, because the former depends upon the same reasoning as the "last opportunity of the plaintiff" rule and stands or falls with it. Hence, it is somewhat unfortunate that the Western Australian Act does not expressly allow apportionment where the defendant had the last opportunity.

It should also be observed that the "last opportunity" rule, whether of plaintiff or defendant, has two distinct branches:—[8]

(a) where one party by carelessness has created a risk of harm, but the other party *actually knows* of the danger and fails to take reasonable care to avoid it; this will be termed the "conscious last opportunity" rule;

(b) where one party by carelessness has created a risk of harm, but the other party, if he had been taking reasonable care, would have known of the risk so created and would thus have been able to avoid it; this will be termed the "unconscious last opportunity" rule.[9]

[5] (1809) 11 East 60.
[6] (1842) 10 M. & W. 546.
[7] (1949) 65 T.L.R. 17, at 20.
[8] See Greer, L.J., in *The Eurymedon*, [1938] P. 41, and Goodhart, *op. cit.*
[9] Goodhart uses the term "constructive last opportunity" in this context, but I have preferred to use this phrase to label one version of the *Loach* doctrine (*infra*). — K.O.S.

Apart from other objections to this distinction, it is pointed out here that there is an intermediate terrain between the two types of situation with infinite possible gradations from the type of case where the party actually knows of a dangerous situation which is almost *the* actual situation, to the case where the party has sensory perceptions which ought reasonably to have acquainted him with the existence of the danger. *Davies v. Swan Motor Co. Ltd.*[10] and *Radley v. London & North Western Rly.*[11] are examples of such cases, and it should be noted that the judicial solution of the former case under apportionment legislation differs from the solution of the latter under the common law rules. The distinction drawn by Greer, L.J., between the two branches of the rule is of considerable importance in considering the effect of apportionment legislation both under the Admiralty rule and under the English Act of 1945, as on the balance of authority the second branch of the rule, the "unconscious last opportunity" rule, is dead, and arguably, independently of the Act.

Inroads into the "last opportunity" rule before apportionment legislation.

In the nineteenth century the common law, accepting the rigour of the "stalemate" rule, seems to have worked on the whole satisfactorily in the cases before the courts, and hence their legal basis is either unexpressed or the reasoning, if given, escaped attention and critical examination. Fresh combinations of facts, amongst which may be mentioned accidents involving swiftly moving and heavy vehicles, brought to light latent inadequacies in the "last opportunity" rule; and, before examining the real or supposed bases of the rule, it is necessary to take into account some of the mitigations of the rule introduced by the common law itself before apportionment was adopted. These may be grouped as follows:—

(1) The doctrine (whatever it is) established in *British Columbia Electric Rly. Co. v. Loach.*[12] The factual analysis of the case is either that the deceased had the last opportunity or that, taking "a broad, common-sense point of view," the negligences were substantially simultaneous. In neither analysis had the defendants' motorman an actual "last opportunity." This being so, under the common law rules the plaintiff's action would appear to have been barred, either under the "last opportunity of the plaintiff" rule or under the "stalemate" rule. Judgment for the plaintiff was, however, justified on two grounds not clearly separated in Lord Sumner's judgment:—

(a) The defendants' negligence was last in point of time, operating after the deceased had become helpless to avoid the accident.

[10] [1949] 1 All E.R. 620.
[11] (1876) L.R. 1 A.C. 754.
[12] [1916] 1 A.C. 719.

(b) The defendants' motorman, but for his prior negligence, would have had the last opportunity of avoiding the accident, and an opportunity which a party would have had, but for his negligence, is equivalent to an actual "last opportunity."

There are several possible explanations of the *Loach Case*.

(A) That it is bad law. Against this, however, is *Service v. Sundell*,[13] Lord Wright in *M'Lean v. Bell*,[14] the opinions of the Court of Appeal in *The Eurymedon*, of the High Court of Australia in *Wheare v. Clark*,[15] and apparently of Lord Simon in *Boy Andrew v. St. Rognvald*.[16]

(B) That the "last opportunity" rules are merely guides to the principle that if the negligence of the parties can be separated in point of time, the party whose negligence is last in point of time is in law the sole cause of the damage. Applying this rule, the defendants' negligence, which only became concrete when the deceased was in a situation of peril from which he could no longer extricate himself by his own effort, was operative last in point of time.

(C) That the decision can be incorporated into the "last opportunity" rules by treating it as laying down the principle that prior negligence which incapacitates a party from taking what otherwise would have been an opportunity to avoid a risk created by the negligence of the other party constitutes "ultimate" negligence. In other words, a "last opportunity" which a party would have had but for his own prior negligence is equivalent to an actual "last opportunity."

With the substantial justice of the decision there can be no quarrel, but neither of the supposed bases (B) and (C) can be sustained. In both of them, apart from the unreality of such an analysis, exactly the same analysis can be made of the deceased's conduct in the case, and it could equally be argued that his abstract obligation to take care only became concrete when the defendants' motorman was helpless to avoid the accident. To get any result from either test, it is necessary to limit its application to one party only, the party whom it is desirable to affix with responsibility. It is difficult not to accept MacIntyre's view that the blameworthiness of the defendants and considerations of justice and public policy demanded a verdict in favour of the plaintiff, and that the principles which were said to govern the case are not corollaries upon the "last oppor-

[13] (1929) 46 T.L.R. 12.
[14] (1932) 147 L.T. 262, at 264.
[15] (1937) 56 C.L.R. 715.
[16] [1948] A.C. 140; also reported as *Admiralty Commissioners v. North of Scotland etc. S. N. Co.*, [1947] 2 All E.R. 350.

tunity" rule, but an escape from it which was not only fallacious in the tests indicated but a negation of the rule.

(D) That the decision anticipates a position taken in recent authority, *viz.*, that the "last opportunity" rule is merely a useful guide in certain types of case only, and that this decision is one of the other types of case in which the rule is not a useful guide.

An objection to this last explanation, which applies equally to (B) and (C), is that although it provided an escape from the "last opportunity" rule, it did so in circumstances unpredictable until the final court of appeal had pronounced on the matter.

(E) That the court fixed the loss upon the party guilty of much the greater negligence. This is an application of the "comparative negligence" theory consistently rejected by British courts in the past, but is possibly the basic explanation of the "last opportunity" rule and of the *Loach Case* itself.

(2) The next inroads into the "last opportunity" rule may be conveniently grouped round *The Volute*[17] and *Swadling v. Cooper*.[18] These decisions represent the acceptance of the impossibility of ascertaining who had the actual last opportunity, conscious or unconscious, in collisions between ships or vehicles where the parties remain, to some extent at least, in control of the situation and where it is impossible either to find one actual last opportunity or, on the other hand, the situation resolves itself into an infinite number of possible last opportunities on both sides. The *Volute* solution of the difficulty is best expressed in the oft-quoted dictum of Lord Birkenhead, L.C., who said, " . . . the question of contributory negligence must be dealt with somewhat broadly and upon common-sense principles as a jury would probably deal with it. And while no doubt, where a clear line can be drawn, the subsequent negligence is the only one to look to, there are cases in which the two acts come so closely together, and the second act of negligence is so mixed up with the state of things brought about by the first act, that the party secondly negligent, while not held free from blame under the *Bywell Castle* rule, might, on the other hand, invoke the prior negligence as being part of the cause of the collision so as to make it a case of contribution." The solution suggested in *Swadling v. Cooper* is that in such cases the trial judge should instruct the jury that they should base their verdict on the "substantial" or "effective" cause.

While appreciating the practical good sense of the principles established by those cases, it should, however, be realised that in practice it is often very difficult to draw the line between a genuine "last opportunity" rule situation and a *Volute* or *Swadling v. Cooper* situation, with the attendant serious disability from the public point

[17] [1922] 1 A.C. 129.
[18] [1931] A.C. 1.

of view that a litigious-minded party can attack in an appellate court the analysis of the trial court on the ground either that the jury was insufficiently directed on the "last opportunity" rule, or alternatively that the jury was directed on the "last opportunity" rule on facts to which the doctrine could have no application. This appears to have been Canadian experience under a Prince Edward Island statute which attempts to give statutory effect to the principle in *Swadling v. Cooper*.

(3) The third device to mitigate the rigour of the "last opportunity" rule may conveniently be termed the "continuing negligence" device, used by the Court of Appeal in *The Eurymedon* to oust the "last opportunity" rule in a collision case under the Admiralty rule. In other words, the court says that where a dangerous state is created by one party then, although the other party may have the last opportunity—at least an "unconscious last opportunity"—of avoiding the accident, nevertheless the negligence of the first party continues and is thus simultaneous with the negligence of the other, and the rule does not apply. This reasoning is used also by the Court of Appeal in *Davies v. Swan Motor Co. Ltd.*[19] and *Henley v. Cameron,*[20] although in the latter case Asquith, L.J., in his dissenting judgment treated the negligence of the defendant as continuing but still held that the plaintiff had the last opportunity and was therefore barred *in toto*. The objections to the device are that it can be invoked in any set of circumstances and hence

(a) its operation is unpredictable until the final court of appeal has pronounced upon the case, and

(b) fertile material for appeal is offered to a litigious-minded party.

(4) Another device which has been used is to find that the party who has been guilty of only slight carelessness has not been guilty of negligence at all. Examples of this are to be found particularly in the field of actions brought by workers for breach of a statutory duty by the employer, where the employer sets up the defence of contributory negligence; see *Caswell v. Powell Duffryn Associated Collieries Ltd.*[21] and *Piro v. W. Foster & Co. Ltd.*[22] In these cases it is suggested that a reasonable view must be taken of the conduct of a worker in face of industrial risk; in the second case the High Court of Australia upset the trial judge's affirmative finding of contributory negligence against the plaintiff.

(5) Finally, it should be noted that the *Loach* doctrine can be invoked not only to affix a party, either helpless or alleged to be helpless to avoid the accident, with the constructive last opportunity,

19 See note 10, *supra*.
20 See note 7, *supra*.
21 [1940] A.C. 152.
22 (1943) 68 C.L.R. 313.

but also to affix him with continuing negligence so as to make the negligence of both parties contemporaneous and thus avoid the invocation of the "actual last opportunity" rule by the other party; see the judgment of Greer, L.J., in *The Eurymedon,* and the judgment of Lord Simon in *Boy Andrew v. St. Rognvald.*[23]

Introduction of "last opportunity" rule under apportionment legislation.

It is necessary to emphasise that while the common law was engaged in mitigating the rigour of the "stalemate" rule by the "last opportunity" rule, and was then further engaged in mitigating the consequences of the application of the "last opportunity" rule, the courts, in jurisdictions where apportionment was the rule, were nevertheless introducing the "last opportunity" rule and engrafting it upon apportionment statutes. Glanville Williams suggests that this was due to the allegiance to principle of common law judges when called upon to apply apportionment statutes. There is, however, the possibility that the "last opportunity" rules themselves were well-founded, apart from the "stalemate" rule, at least to the extent that they offered a satisfactory solution of certain types of cases, even under apportionment statutes. Canadian legal opinion is divided upon this question.

Thus, in the Admiralty jurisdiction, where the rule of equal apportionment applied before the *Maritime Conventions Act 1911,* it was held that the Admiralty rules and the common law rules as to causation were the same, and the doctrine of "last opportunity" applied; see *Spaight v. Tedcastle*[24] and *Cayzer, Irvine & Co. v. Carron.*[25] After the *Maritime Conventions Act,* which permitted an apportionment according to the respective degrees of fault, the same principle was re-affirmed: *Anglo-Newfoundland Development Co. Ltd. v. Pacific S. N. Co.*[26]

After the Quebec courts had (not without resistance from the common lawyers) vindicated the doctrine of *faute commune* and the principle of apportionment, the Privy Council in *Canadian Pacific Rly. Co. v. Frechette*[27] overruled all the Canadian courts below to throw the whole loss upon the plaintiff. Similarly, the Canadian Supreme Court has taken the view that the "last opportunity" doctrine is not excluded by the apportionment statutes of the various Provinces: *McLaughlin v. Long.*[28]

With the exception of *Spaight v. Tedcastle,* where the alleged negligence of the plaintiff had apparently no material connection

[23] See note 16, *supra.*
[24] (1881) L.R. 6 A.C. 217.
[25] (1883-4) L.R. 9 A.C. 873.
[26] [1924] A.C. 406.
[27] [1915] A.C. 871.
[28] [1927] 2 D.L.R. 186.

with the damage sustained, all the cases examined are illustrations of the invocation of the rule to avoid apportionment in "conscious last opportunity" situations; but they raise the question as to whether justice, convenience, and public policy are not served by the preservation of the "last opportunity" rule in this form even under apportionment legislation.

Bases of the "last opportunity" rules.

In view of the inroads on the "last opportunity" rules by the common law itself and the consequent necessity of reconciling these with the original rules, it is not surprising that uncertainty as to their true basis has increasingly appeared in the twentieth century cases. Taking into account the engrafting of the "last opportunity" rule—at least the "conscious last opportunity" rule—onto the Admiralty rule, it was quite obvious that the English courts, with the coming into force of the Act of 1945 (which does not deal expressly with the rule), would no longer be able to defer examination of the problem. The problem may be described, in terms of the cases, as that of interpreting *Davies v. Mann, Loach's Case, The Volute, Swadling v. Cooper,* and *The Eurymedon* with each other and with such cases as *Anglo-Newfoundland Development Co. Ltd. v. Pacific S. N. Co.* and *Canadian Pacific Rly. Co. v. Frechette.* In dealing with it, the resilience of earlier decisions has been and will continue to be an embarrassment because, as is shown in the case of the engrafting of the "conscious last opportunity" rule on the Admiralty rule, cases will arise in which the courts will seek to avoid apportionment and hence will have resort to the various supposed bases of the old doctrine. The number of hypotheses as to the basis of the "last opportunity" rule, whether devised by judges or writers, is already large and the likelihood is that, unless the ghost can be completely laid, these hypotheses may increase as the pressure of new combinations of fact inevitably reveals the inadequacy of existing theories.

Some attempt will now be made to distinguish bases for the rule suggested either by judicial decision or commentators thereon.

(A) The "logic of causation" theory, meaning by this that there must be a cause of the damage in actual fact which can be determined by rational analysis, and that cause, when so determined, is the legal cause of the damage. It is then assumed as rationally established that the act of the party with the last opportunity is, according to one version of the theory, the *sole* cause of the damage or, according to another variant, the *proximate* or *direct* or *effective* cause or the *causa causans* of the damage, and hence that party is fixed with the sole legal responsibility for it. Historically, there is much to be said for Bohlen's argument that the "last opportunity" rule seems to have developed as an application of the doctrine of *novus actus interveniens*—that the last actor is the sole legal cause of the damage. This general proposition appears to have been a logically fallacious re-orientation of a narrow rule—the rule in

Vicars v. Wilcocks[29]—to the effect (in its original form) that a subsequent *illegal* act by a third party which causes the damage complained of relieves the original actor from responsibility although such intervening act was a consequence of the original actor's wrongful act. For this rule there were good reasons—reasons, however, of policy and convenience—but the courts broadened it into a general rule, anchored in the supposed logic of causation, to the effect that any *novus actus interveniens,* illegal or legal, broke the chain of causation, or in other words that the last human actor is the sole legal cause of the damage. The doctrine, governing as a general rule remoteness of damage, has in the main given way to a broader view of causation, *viz.,* that the liability of the original actor may continue, notwithstanding an intervening human act, if such consequences were probable and foreseeable: *Haynes v. Harwood.*[30] The older doctrine, however, cannot be regarded as dead because of its approval by Lord Sumner in *Weld-Blundell v. Stephens,*[31] and also because its invocation occasionally produces a satisfactory solution of certain types of case.

The doctrine was applied to the field of contributory negligence partly no doubt by extension of reasoning, but almost certainly because it provided an escape from the rigour of the "stalemate" rule and hence remained alive and vigorous at a time when the general rule as to remoteness, as based upon proximity of cause, was passing into disfavour. However, several factors co-operated to reveal the inadequacy of this supposed logical basis of the rule, amongst which we need only distinguish the following:—

(i) As a supposed logical theory it can only lead to the proposition that the last act in the temporal chain is the cause of the damage, but cases before the courts revealed the inadequacy of this proposition leading, *inter alia,* to the "continuing negligence" device.

(ii) The difficulty of applying the theory to collisions between moving vehicles, and the appearance before the courts of combinations of facts such as those in the *Loach Case* and *The Eurymedon* in which the application of the "unconscious last opportunity" rule produced an unacceptable result.

(B) The "clear line of demarcation" theory which has two distinct variations—

(i) That where the negligence of one party is severable because it is clearly subsequent in point of time, that party is solely responsible for the damage: Lord Birkenhead in *The Volute,* Lord Simon and Lord MacDermott in *Boy Andrew v. St. Rognvald.*

(ii) That where one party is guilty of "active" negligence as contrasted with the "static" negligence of the other, such party is

29 (1806) 8 East 1.
30 [1935] 1 K.B. 146.
31 [1920] A.C. 956.

solely responsible for the damage: Lord Simon in *Boy Andrew v. St. Rognvald,* and A. L. Goodhart.

Within the ambit of both variations of the theory, the following situations have been held to fall:—

(a) Where one party has created a dangerous state of affairs *which he has become powerless to remedy* at a time when the other party could still, by taking reasonable care, have avoided the danger.

(b) Where one party has created a dangerous situation of which the other party has knowledge or the means of knowledge.

In both types of situation, the modern tendency is to sever the negligence of the parties only where one has actual knowledge of the dangerous situation created by the other.

Accepting this theory in either form, the "last opportunity" rules become merely useful guides in certain types of cases in determining whether the acts of negligence are severable. In particular, the courts are able to dispense with the "unconscious last opportunity" rule.

It is submitted by way of criticism of both these variants that any such severance is quite unreal except where one party is negligent in face of a known danger, and that even in this type of case the negligence of a party who has created the danger may be so blameworthy that, even though it is known to the other, the former should not escape responsibility. In particular, it is hard to see why what may be a most reprehensible factor in the situation—the fact that the party who has created a danger has himself put it out of his control to remove or minimise it—should be of advantage to such a party. *Davies v. Swan Motor Co. Ltd.* is a case where the helplessness of the party is rightly rejected as immaterial to the situation. In short, the only practical advantage to be gained in formulating the rules as to contributory negligence in this form is that it enables the court to dispense with the "last opportunity" rules in certain cases, but the price is an illusory substitute incapable of providing any concrete guidance except in the "known danger" situation, and here it is suggested that new combinations of facts may at any time prove its unsatisfactoriness.

(C) A re-appraisal of the "last opportunity" rules in which the doctrine of causation is given elasticity and flexibility by re-stating it in terms such as "legal cause," "legal responsibility," to be determined on "common-sense" lines. This, it is submitted, represents clearly the present judicial doctrine of causation, and it is unnecessary to cite authority in this context. In the light of this doctrine, the "last opportunity" rules sink from the level of rules of law to that of "useful guides in certain types of cases." There is a good deal to be said for this theory, in that it provides a constant terminology to meet ever-varying combinations of facts which will ever elude more mechanical rules. The only criticism is in the uncertainty

of the role assigned to the "last opportunity" rules, and this difficulty arises not so much from this modern version of causation as from the fact that it is difficult to avoid the conclusion that up to the second decade of this century the "last opportunity" rules were, on the balance of authority, accepted either as rules of law or, what comes to the same thing, as the legal tests of causation. The price of their survival, even in this attenuated form as useful guides, is uncertainty, the opening up of possibilities of appeal, and the chance of their revival to afford a satisfactory solution of a particular case. This in fact happened under the Admiralty rule and, it is submitted, is likely to happen under the English Act of 1945. The answer would seem to be the express exclusion of the rules in the apportionment statute; although probably not even express legislation can effectively guarantee against their intrusion in some other guise, such as in the form of the distinction between "active" and "static" negligence, or between "prior" negligence and "subsequent" negligence.

The theories so far outlined have all received judicial countenance. Two more should be added.

(1) M.M. McIntyre and Glanville Williams strenuously contend that the "last opportunity" rules were evolved by British and American courts to avoid the rigour of the "stalemate" rule where the negligence of one party has been so much more blameworthy than the negligence of the other that it is substantially just to cast the whole loss on the former. Hence, they argue, with apportionment legislation the whole basis of the rules disappears. Although any such theory of comparative negligence has never been judicially countenanced—in *Pilloni v. Doyle*[32] a direction by the District Court judge apparently in those terms was criticised by the Full Court of New South Wales—it is difficult not to accept the view of the learned writers that the "unconscious last opportunity" rule was undoubtedly used as an escape from the "stalemate" rule, and MacIntyre's further contention that the "unconscious last opportunity" rule had broken down even before the English Act of 1945 has received much support, both judicial and academic It is less easy, however, to accept the view of Glanville Williams that the survival of the "last opportunity" rules—at least of the "conscious last opportunity" rule—in the Admiralty jurisdiction, and in Canadian courts after the introduction of apportionment legislation, was due solely to the adherence of the judges to traditional common law theory It is much more likely that it survived because in the cases in which it was invoked, justice demanded, or appeared to the court to demand, that one party should bear the whole loss. Whether the price paid in the retention of the rule is too high will be discussed later. The argument of the learned writers is briefly that with apportionment legislation there is no longer any place for the "last opportunity" rules. Their theory also involves an excessive emphasis upon the moral blameworthiness of the parties. While this is in the main true, it

32 (1949) 49 S.R. (N.S.W.) 13.

must be remembered that in the imposition of liability for negligence, unexpressed and intuitive notions of social convenience and public policy also play their part.

(E) A. L. Goodhart, examining the "last opportunity" rules after the passing of the English Act, particularly in the light of *Henley v. Cameron*[33] and *Davies v. Swan Motor Co. Ltd.*,[34] comes to the conclusion that the Act "did not either expressly or by necessary implication abolish the 'last opportunity' rules." He contends, however, that the Act has enabled the courts to place the doctrine on a rational basis. He rejects for this rational basis the temporal distinction between successive acts of negligence and the distinction between active and static negligence, and finds it in foreseeability. Thus, when A creates a danger of which B is unaware, then, even though B. ought to have been aware of it, A.'s negligence does not cease because it is reasonably foreseeable that a person may incur a risk of which he is not aware. This reasoning, he suggests, accounts for what is undoubtedly borne out by the present state of authority, the disappearance of the "unconscious last opportunity" rule. Applying this reasoning to the "conscious last opportunity" situation, he argues that if A. creates a danger of which B. is actually aware, and B deliberately runs the risk of injuring himself, A.'s negligence ceases because he could not reasonably have foreseen that B. would deliberately incur the risk of injury. To this proposition he admits as exceptions—(a) cases where A. ought reasonably to have foreseen that B. *would* incur the risk of a known danger, as in *Clayards v. Dethick*[35] and in the cases of workers injured through breach of a statutory duty; (b) the cases where, owing to lack of time or some other circumstance, B. did not take all the necessary steps to avoid the danger; and (c) cases where A ought to have foreseen that B., owing to the changing character of the situation, might not have complete knowledge of the risk at the time he incurred it. The objections to this explanation are briefly:—

(i) The element of foreseeability, although an important element in determining blameworthiness, is not the only test, and in addition to the question of moral blameworthiness there are, in determining the imposition of liability for negligence, unformulated considerations of public policy to be taken into account.

(ii) Foreseeability as a test has in this context no more precision than the terms borrowed from the language of causation, and has at most the same virtue of vagueness and indefiniteness in concealing a value judgment on the facts. The very wide group of exceptions (by no means exhaustive) to the "conscious last opportunity" rule are linked together, not by a precise test uniformly applied, but by a term which conceals a series of individual value judgments. It is

[33] See note 7, *supra*.
[34] See note 10, *supra*.
[35] (1848) 12 Q.B. 439.

more than likely that the experience of litigation in this context will establish a list of exceptions which exceeds the rule.

(iii) To achieve the desired result, it is necessary to limit the application of the test to one party only, *viz.*, the party creating the danger, in respect of the other party's probable actions, and to make it virtually the sole test of his negligence. It is submitted that cases can easily arise in which, although he could not reasonably have foreseen that the other party will incur the risk, his carelessness will be so blameworthy that the courts will not allow him to escape liability. In short, the imposition of liability for contributory negligence cannot turn solely upon such a narrow consideration.

It is submitted that the price of even the "conscious last opportunity" rule, however explained and although a satisfactory solution of certain types of case even under apportionment legislation, is too high. Some combinations of fact will demand the imposition of some liability upon a party who has created a known danger, while others will require that the whole loss should be borne by the party wilfully running the risk. Typical illustrations may be found in the case of allegations of contributory negligence against workers suing for breach of a statutory duty. It is imperative, if only to limit the possibilities of appeal, that apportionment should depend on the merits of each individual case and not upon the application of any supposed rule of law, however rationalised. Again, there appears to be no good reason why "known danger" cases which demand the exclusion of apportionment should not be met by the invocation of the maxim *Volenti non fit iniuria.*

It is suggested that the true solution of the problem is implicit in the current judicial theory of causation described above, supplemented by apportionment legislation on the Western Australian pattern. This theory is couched in vague and elastic terms, and the judges have deliberately refrained from more precise analysis from a wholesome fear of laying down legal rules which will not stand the pressure of new combinations of fact; but nevertheless it pushes analysis as far as it can go in this context. The acceptance of this theory has been hindered by two fallacies: Firstly, the idea that there is a metaphysical or logical doctrine of causation which in itself affords a test for determining in what circumstances legal consequences shall be attributed to the act of an alleged wrongdoer; and secondly, by repulsion from this, the notion that causation is a cabbalistic term which covers the determination of legal responsibility by unspecified processes.

Involved in the concept of legal causation are two notions, both of which are necessary, the second giving to the first practical utility in the field of law:—

(a) The concept of necessary connection between suceeding phenomena and preceding phenomena. This notion is fundamental

to legal as to other reasoning, but, applied alone, only gives a multiplicity of causes opening up cone-like to an infinite degree.

(b) A moral judgment based upon justice, convenience, and public policy as to the cause or causes which should, for the purposes of legal responsibility, be isolated from this multiplicity.

This process of moral judgment may either be left to operate unfettered in the circumstances of each case, or become crystallised to some extent in rules of law. Although the development of such rules of law has the advantage of fettering the vagaries of individual judgment and tends to uniformity and predictability, nevertheless it is suggested that the pressure of new combinations of fact will in this context inevitably reveal the inadequacy of well-established rules hitherto regarded as well founded; and the price of such rules is complexity, uncertainty, and confusion in the law when they begin to change under the pressure of new facts.

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