Playing Offense and Defense in Personal Injury Law

Key Offenses and Defenses Including Last Clear Chance, Contributory Negligence and Assumption Of Risk, And Proof And Mitigation Of Damages.

Presented by Richard Shapiro, Randy Appleton, Kevin Duffan, Edwin Booth, and James Cales, III

Speaker Information

Richard Shapiro

Rick has practiced personal injury law for over two decades. He is a Board Certified Civil Trial Advocate by the National Board of Trial Advocacy and has litigated injury cases throughout the eastern United States. He has written and lectured on evidence law to the AAJ, VTLA, Georgia TLA, as well as to Virginia lawyers. Rick was elected chair of the Railroad Law section of the American Association for Justice (AAJ) for two separate annual terms.

Rick is also a prolific U.S. inventor and designer of consumer wheeled products, in the field of folding products like baby strollers, and folding wagons and carts, holding 18 US patents and numerous foreign patents, and is an international award winning fiction thriller author, who wrote an Amazon #1 best-selling suspense novel, entitled taming the telomeres.

Randy Appleton

Randy Appleton has dedicated his life to helping the injured. He possesses over twenty years of experience practicing personal injury law and exclusively represents injured folks. His track record of success is impressive, including a $21 million structured settlement for a young child who suffered a brain injury as the result of a commercial trucking accident.

Randy resides in Kill Devil Hills, North Carolina, an area in the Outer Banks region of the state. He has practiced in North Carolina for many years and attended law school at Wake Forest University. As someone who lives in the Outer Banks area, he is in touch with issues relating to personal injury not only as an attorney, but as a resident.

Randy is recognized as a Virginia "Super Lawyer" in Law & Politics Magazine (since '11) and is listed as a "Best Lawyer" for personal injury law (since '10).

Kevin Duffan

Kevin is a native of Virginia Beach, Virginia (VA) who earned his BA in Political Science from James Madison University and his Juris Doctor from the William & Mary School of Law. Kevin has spent his entire professional career as a litigator.

Kevin has frequently appeared on television, serving as the legal analyst to the ABC network affiliate based in the Norfolk-Virginia Beach metropolitan area, and has provided his independent analysis to the public on a wide

variety of legal topics. Kevin has been tapped as a "top 40 under 40" personal injury attorney, has been named as a Virginia Super Lawyer since 2016, and has the highest legal rating available to all attorneys from the Martindale-Hubbell Legal rating service (AV).

Kevin was previously employed as a Senior Assistant Commonwealth's Attorney in Virginia Beach, and as in-house counsel for litigation at Portfolio Recovery Associates, LLC in Norfolk. Kevin's practice is now focused on plaintiff's personal injury litigation and medical malpractice.

Ed Booth

Ed attended North Carolina State University and has practiced law since 2004, when he graduated from the University of Richmond School of Law. Ed spent the early part of his career practicing criminal law, including service as a Senior Assistant Public Defender and Senior Assistant Commonwealth's Attorney in Virginia Beach.

After leaving prosecution, Ed began practicing plaintiff's personal injury and medical malpractice law. He believes that, while it is impossible to alter what happened to cause an injury, it is possible to improve a client's life by obtaining the maximum settlement or verdict. For example, Ed (along with co-counsel Erik Porcaro) represented a school teacher who suffered serious, life-altering injuries including a punctured spleen, fractured ribs, and multiple lacerations, as a result of being hit by a drunk driver in Newport News, Virginia and obtained a $3.5 million jury verdict.

Ed dedicates his practice exclusively to personal injury and medical malpractice litigation and is listed as a Virginia Super Lawyer Rising Star in the area of personal injury law.

James A. Cales, III

Jim received a Bachelor of Arts degree cum laude from James Madison University in 1994 and his Juris Doctor degree from the University of Virginia School of Law in 1997. He served as Pro Se Law Clerk to the U.S. District Court for the Eastern District of Virginia, Alexandria Division, from 1997 to 1998. He then joined Furniss, Davis, Rashkind and Saunders, P.C. where he has concentrated on defending civil lawsuits for a number of insurance companies and governmental entities. He is co-author of "John Doe Pleadings: Not Just for the Uninsured Motorist Anymore?" published in The Journal of Civil Litigation in 2011.

Jim is a member of the Virginia State Bar, the Virginia Association of Defense Attorneys, the Defense Research Institute, the Local Government Attorneys of Virginia, the American Bar Association, the Federal Bar Association, the Norfolk-Portsmouth Bar Association, the Virginia Beach Bar Association and the James Kent American Inn of Court.

Proving Damages

Two Types: Compensatory Damages and Punitive Damages

1. Compensatory
    a. "Compensatory damages are those allowed as a recompense for loss or injury actually sustained." *Dillingham v. Hall*, 235 Va. 1, 365 S.E.2d 738, 739 (1988)
    b. Compensatory damages include *tangible*, established losses such as medical bills and lost wages, and *intangible* losses, or "non-economic damages to include bodily injury, physical pain, mental anguish (past and future), and inconvenience (past and future)." *Wakole v. Barber*, 283 Va. 488, 722 S.E.2d 238 (Va., 2012)
2. What you can claim pursuant to the VMJI 9.000
        i. Any bodily injuries she sustained and their effect on her health according to their degree of probable Duration
        ii. Any physical pain and mental anguish she suffered in the past and any that she may be reasonably expected to suffer in the future;
        iii. Any disfigurement or deformity and any associated humiliation or embarrassment;
        iv. Any inconvenience caused in the past and any that probably will be caused in the future;
        v. Any medical expenses incurred in the past and any that may be reasonably expected to occur in the future;
        vi. Any earnings she lost because she was unable to work at her calling; any loss of earnings and lessening of earning capacity, or either, that she may reasonably be expected to sustain in the future
    b. How determined
        i. the plaintiff has the burden to establish his damages with reasonable certainty, but not exact mathematical precision.
        ii. VMJI 9.010: '[t]he burden is on the plaintiff to prove by the greater weight of the evidence each item of damage he claims and to prove that each item was caused by the defendant's negligence. He is not required to prove the exact amount of his damages, but he must show sufficient facts and circumstances to permit you to make a reasonable estimate of each item. If the plaintiff fails to do so, then he cannot recover for that item.

c. The plaintiff is entitled to assign and argue in favor of a fixed amount each category of non-economic damages
    i. "It has long been recognized that plaintiff is allowed to ask for a "fixed amount" for non-economic loss caused by the defendant's negligence. Today, we hold that, as long as there is evidence to support an award of non-economic damages, plaintiff is allowed to break the lump sum amount into its component parts and argue a "fixed amount" for each element of damages claimed as long as the amount is not based on a per diem or other fixed basis." *Wakole v. Barber*, 283 Va. 488, 722 S.E.2d 238 (2012).

d. Federal court: No prohibition in asking for a specific amount in the Fourth Circuit, and authority exists permitting plaintiff to make such a demand
    i. "the Court finds that there exists no Fourth Circuit prohibition against a district court permitting counsel to simply state an *ad damnum* in closing argument. The court may, in its discretion, permit an attorney to cite the amount sued for provided there is sufficient evidence submitted to the jury that could reasonably sustain the monetary request, and the court both limits the scope of argument and instructs the jury beyond simply stating that arguments of counsel are not evidence." *Bilenky v. Ryobi Ltd*. *et al,* No. 2:2013cv00345 - Document 173 (E.D. Va. 2015).

3. Punitive
    a. Two types: common-law and statutory
    b. Purpose
        i. "The purpose of punitive damages is to provide 'protection of the public ... punishment to [the] defendant, and ... a warning and example to deter him and others from committing like offenses.' " *Huffman v. Love*, 245 Va. 311, 315, 427 S.E.2d 357, 361 (1993) (quoting *Baker v. Marcus*, 201 Va. 905, 909, 114 S.E.2d 617, 620 (1960)). This Court has observed that punitive damages are meant to warn, not to compensate the plaintiff. *Doe v. Isaacs*, 265 Va. 531, 539, 579 S.E.2d 174, 179 (2003). *Coalson v. Canchola*, 287 Va. 242, 754 S.E.2d 525 (2014).

    c. When available in personal injury cases
        i. When defendant "acted under circumstances amounting to a willful and wanton disregard for the plaintiffs' rights." *Coalson v. Canchola*, 287 Va. 242, 754 S.E.2d 525 (2014) or acted with "actual malice" defined as a

sinister corrupt motive such as hatred, personal spite, ill will, or desire to injure the plaintiff according to VMJI 9.090.

ii. Typically found in drunk driving cases, but can be available in any personal injury case involving actual malice (for which insurance coverage may be problematic) or other instances of willful and wanton disregard for the plaintiff's rights.

    1. For example, in age-discrimination cases. *Smith V. Litten*, 256 Va. 573, 575 (1998).

    2. Defamation cases; "[t]o recover punitive damages for defamation, Dively was required to prove by clear and convincing evidence that Ingles either knew the statements he made were false at the time he made them, or that he made them with a reckless disregard for their truth." *Ingles v. Dively*, 246 Va. 244, 435 S.E.2d 641 (1993).

    3. Medical negligence - punitive damages available against employer, when employer failed to take action against an employee anesthesiologist for mocking and denigrating the patient while under anesthesia. Punitive damages claim was submitted to the jury, who awarded punitive damages, on a ratification of the employee's behavior theory; and the jury did award punitive damages.

        a. As the attorneys who tried that case - Scott Perry and Mikhael Chernoff - noted in a recent peer-reviewed article in *The Journal of the Virginia Trial Lawyers Association*, the deterrent effect of punitive damages is real. They've learned from anecdotes that healthcare providers are being warned not to make fun of their patients while under anesthesia.

iii. There is Virginia Supreme Court authority that states that common-law punitive damages are not favored under the law, but a recent case – discussing statutory punitive damages – found that a trial court erred in

giving a jury instruction stating that punitive damages were not favored under the law.

1. "Additionally, it is worth noting that the punitive damages discussed in *Xspedius Mgmt. Co.* were common law punitive damages; the punitive damages at issue in the present case are statutory punitive damages. Unlike common law punitive damages, statutory punitive damages have been explicitly approved by the General Assembly. As such, we cannot say, as a matter of law, that such punitive damages are "generally not favored." Indeed, logic would dictate otherwise." *Cain v. Lee*, 772 S.E.2d 894, 897 (2015).

d. Limited to $350,000 per Virginia Code section 8.01-38.1
    i. Can be reduced by the court to be proportional with the compensatory damages award.

    ii. Defendant's ability to pay can be a factor so plaintiff may need to introduce evidence of ability to pay
    iii. See attached letter brief with authority in opposition to remittitur

e. Driving under the influence
    i. statutory punitive damages
        1. available for the jury to consider under Virginia Code section 8.01 – 44.5
        2. What you need in terms of proof:
            a. when the incident causing the injury or death occurred, the defendant had a blood alcohol concentration of 0.15 percent or more by weight by volume or 0.15 grams or more per 210 liters of breath;
            <u>OR</u>
            Proof that the defendant refused a blood alcohol test as required under Virginia's implied consent laws, with some other proof that the defendant was intoxicated;
            b. at the time the defendant began drinking alcohol, or during the time he was drinking alcohol, he knew or should have known that his ability to operate a motor vehicle, engine or train would be impaired, or when he

was operating a motor vehicle he knew or should have known that his ability to operate a motor vehicle was impaired; and

c. the defendant's intoxication was a proximate cause of the injury to or death of the plaintiff.

ii. Recent legislative changes

1. Virginia Code section 8.01 – 44.5 was amended to state that any properly obtained BAC is presumed to be at least as high as at the time of the collision, provided that the plaintiff submits a copy of a certificate of analysis obtained pursuant to the Virginia criminal code governing certificates of analysis and DUI cases. Upon submission of that certificate, the plaintiff is established proof facie evidence of the facts contained within – in other words the BAC – and compliance with the procedural requirements for obtaining the sample.

iii. What happens if the BAC at the time of the test is below .15?

1. You can walk it back with a toxicologist, provided you have an adequate foundation.

2. One such case that allows plaintiff's attorneys to utilize a toxicologist to state the BAC at a particular time is *Woods v. Mendez*, 265 Va. 68, 574 S.E.2d 263 (2003); "[t]he above language [in 8.01-44.5] requires proof of a defendant's BAC at the time of the incident and does not stipulate any particular method of proving this fact."
3. Defense attorneys have argued the case of *Kessee v. Donigan*, 259 Va. 157 (2000) in an attempt to state that there is no "average" absorption or elimination rates with regard to alcohol.
4. However, toxicologists will readily state that while *absorption* rates may vary, *elimination* rates are question of physiological fact, and the only real variance (which can be accounted for by conservative application of toxicological principles) is whether the liver of the drinker is efficient at processing alcohol, as in the case of a frequent drinker, or inefficient. Either way there is a

predictable physiological range of elimination, which is unaffected by injury, age, gender, or race.

iv. Common Law

1. In a common-law drunk driving punitive damages case - based upon alcohol consumption - the law can be summarized as requiring " ... allegations of reckless driving together with some sort of notice to the defendant that his driving behavior on that particular occasion is endangering others." *Cook v. Wayside of Va., Inc.,* 62 Va. Cir. 527, 528 (2002).
2. Intoxication in and of itself is not enough to submit the issue of common law punitive damages to a jury. *Huffman V. Love*, 245 Va. 311, 314 (1993).
3. The combination of dangerous driving and alcohol has been enough to submit cases to juries, particularly where the driving involves heading the wrong way down an exit ramp or roadway. *See e.g. Booth v. Robertson*, 236 Va. 269, 374 S.E.2d 1 (1988).

SHAPIRO APPLETON & DUFFAN P.C.

All We Do Is Injury Law℠

Richard N. Shapiro (VA, WV, DC, NC)
Randall E. Appleton (VA, WV, NC, KY, SC)
Kevin M. Duffan (VA, NC)
Edwin S. Booth (VA)

E-Mail: ebooth@hsinjurylaw.com
eclark@hsinjurylaw.com

Direct Dial:
Ed Booth: 757-460-1703
Elizabeth Clark – 757-321-3751

1294 DIAMOND SPRINGS ROAD
VIRGINIA BEACH, VA 23455
757.460.7776 - Telephone
757.460.3428 – Facsimile

Satellite Offices

Outer Banks, NC
Norfolk, VA
Hampton, VA
Portsmouth, VA
Suffolk, VA

Firm Web Sites:
hsinjurylaw.com
carolina.hsinjurylaw.com

February 18, 2016

Hon. C. Peter Tench
Newport News Circuit Court
Civil Division
2500 Washington Avenue
Courthouse Building
Newport News, Virginia 23607

Re: [redacted]
Case #: [redacted]
Hearing: [redacted]

Dear Judge Tench:

Please accept this letter brief as the Plaintiff's Response to the Defendant's Motion to Reduce Punitive Damages, the only issue still pending before the Court. I will aim to keep this short, and to the point.

There are but a few factors to consider regarding punitive damages: "....[the] reasonableness between the damages sustained and the amount of the award and the measurement of punishment required, whether the award will amount to a double recovery, the proportionality between the compensatory and punitive damages, and the ability of the defendant to pay." *Condo. Serv. Inc. v. First Owners' Ass'n of Forty Six Hundred Condo. Inc.*, 281 Va. 561, 709 S.E.2d 163 (2011).

I think everyone involved in this case would agree that the damages the plaintiff sustained are horrific. The compensatory award was entirely appropriate, and it is clear that punishment is appropriate given defendant's actions – regardless of whether he was convicted of the crime.

As to proportionality and double recovery, the award will not amount to a double recovery, notwithstanding the restitution that the defendant must pay as a result of his conviction. The compensatory recovery, for which there was limited insurance, was $2.5 million. Even the statutory maximum of $350,000 is a mere 14% of the compensatory award – hardly a double recovery.

Numerous examples exist of punitive damages, upheld by courts, which are multiples of compensatory damages. [1]

The question of ability to pay concerned the Court the most at the last hearing. Ability to pay is undeniably a factor, but it is only one factor. I can find no case law stating that this factor is more important than any other, so it would appear that the Court should balance all the factors.

When viewed in that light, the balance supports an award in accordance with the jury's verdict: the damages are severe and the award is reasonable, punishment is appropriate in this case, it is not a double recovery because, 14% of the compensatory award is far less disproportional than approved awards of 250% and 600% (see footnote 1). Yes, the defendant produced evidence that he is young and earning a modest wage. But his actions brought about this case, and his financial condition, while relevant, should not shield him from a punitive damages award.

With best regards, I am

Very truly yours,

Edwin S. Booth

ESB:ec
cc: [redacted]

[1] In the instant case, the factors this Court must consider weigh in favor of affirming the circuit court's decision not to order remittitur. First, the punitive award of $275,000 was approximately two and a half times the compensatory award for conversion of $91,125, plus $11,390 in prejudgment interest. This ratio is not disproportionate. See *Poulston,* 251 Va. at 263, 467 S.E.2d at 484 (**upholding punitive damages that were 2.5 times greater than compensatory damages)**; *Philip Morris, Inc. v. Emerson*, 235 Va. 380, 414, 368 S.E.2d 268, 287 (1988) (**affirming punitive damages that were 6.6 times the compensatory award**). The amount of the damages award is not so excessive as to shock the conscience of the court, nor does it appear that the jury was influenced by passion, corruption or prejudice. Similarly, the award of punitive damages does not provide double recovery because the compensatory and punitive damages serve different purposes. The punitive damages serve as a deterrent to ensure that CSI does not wrongfully convert other associations' money in the future. Finally, although CSI contends that it was experiencing financial difficulties, CSI did not introduce evidence of their financial situation at trial. Therefore, CSI cannot prevail before this Court on its claim that the amount of punitive damages would be oppressive. Given these factors, the circuit court did not err in refusing to order remittitur of the punitive damages award. *Condo. Serv. Inc. v. First Owners' Ass'n of Forty Six Hundred Condo. Inc.,* 281 Va. 561, 709 S.E.2d 163 (Va., 2011)

Plaintiff's Mitigation of Damages

1. This is a defense, although it is helpful to think of it as an offense when a client is still treating and anticipate future problems - i.e. counsel a client that their failure to complete their course of treatment will be used against them as a defense

2. An affirmative defense, but need not be pled specifically

3. "For the reasons that follow, we agree with Obici that mitigation of damages need not be specifically pled in order for a defendant to assert it, provided the issue has otherwise been shown by the evidence." *Monahan v. Obici Medical Management Services, Inc.,* 628 S.E.2d 330, 271 Va. 621 (2006)

4. Typical Arguments
    a. Failure to Seek Medical Treatment
    b. Failure to Report Symptoms
    c. Failure to Take Medication
    d. Failure to Complete Course of Treatment/Therapy
    e. Failure to Undergo Surgery
    f. Failure to Seek Employment

5. The law
    a. Can reduce award, but not a total bar to recovery

    b. "We have held that a plaintiff has a duty to mitigate his damages. In the context of a medical negligence claim, we have stated that "a patient's neglect of his health following his physician's negligent treatment may be a reason for reducing damages, but does not bar all recovery." *Sawyer v. Comerci,* 264 Va. 68, 563 S.E.2d 748 (2002)

    c. The instruction: VMJI 9.020: "[t]he plaintiff has a duty to minimize his damages. If you find that the plaintiff did not act reasonably to minimize his damages and that, as a result, they increased, then he cannot recover the amount by which they increased."

Contributory Negligence and Assumption of the Risk

Contributory Negligence

1. Basics
    a. affirmative defense;
    b. complete bar to recovery;
    c. if there is evidence of contributory negligence the jury must receive the instruction, unless no reasonable jury could conclude that the plaintiff's conduct contributed to the injury

2. The Law
    a. Plaintiff held to a reasonable or ordinary care standard
    b. Definition VMJI 6.000: contributory negligence is the failure to act as a reasonable person would of acted for his uncertain safety under the circumstances of the case
    c. Plaintiff's negligence must be a contributing cause of the accident, so there must be a proximate cause relationship between the contributory negligence in the injury
        i. As stated in *Rascher v. Friend*, 279 Va. 370, 689 S.E.2d 661 (2010) (internal citations omitted):
        ii. "Contributory negligence consists of the independent elements of negligence and proximate causation. Accordingly, "[w]hen a defendant relies upon contributory negligence as a defense, he has the burden of proving by the greater weight of the evidence not only that the plaintiff was negligent, but also that his negligence was a proximate cause, a direct, efficient contributing cause of the accident."

    d. Ordinarily an issue to be decided by the jury
        i. The trial court should overrule a motion to strike the evidence in every case in which there is any doubt that the party with the burden to do so has failed to prove negligence, contributory negligence, and proximate cause, as the case may be. *Brown v. Koulizakis*, 229 Va. 524, 531, 331 S.E.2d 440, 445 (1985) cited in *Rascher v. Friend*, 279 Va. 370, 689 S.E.2d 661 (2010)
    e. Children
        i. children under seven, incapable of contributory negligence
        ii. children under 14, presumed incapable of negligence

iii. children 14 to 18, judged by standard applicable to minor children of the same age according to the model jury instruction, but presumed to have sufficient capacity to be capable of contributory negligence. *Carson v. LeBlanc*, 245 Va. 135 (1993).

3. Exceptions
    a. last clear chance (see below)
    b. willful or wanton conduct on the part of the defendant. *Wolfe v. Baube*, 403 S.E.2d 338, 241 Va. 462 (1991).
4. Contributory negligence as a matter of law
    i. examples: premises cases with open and obvious hazard, violation of traffic rules that contribute to the collision.
    ii. contributory negligence per se by violating a statute, such as a traffic regulation - applies in the same way that a plaintiff can use the defendant's violation of the statute to prove negligence per se

Assumption of the Risk

1. A similar concept to contributory negligence, but distinguished by the idea that the plaintiff voluntarily encounters a known danger

2. The focus is not on the plaintiff's carelessness, but on the plaintiff's knowledge of the hazard.

3. Law and Procedure
    a. affirmative defense
    b. if there is evidence of assumption of the risk the jury must receive instruction and decide the question, unless no reasonable jury could conclude that the plaintiff's conduct contribute to the injury
    c. total bar to recovery
        i. "In this Commonwealth, a person's voluntary assumption of the risk of injury from a known danger operates as a complete bar to recovery for a defendant's alleged negligence in causing that injury." *Thurmond v. Prince William, Inc.,* 574 S.E.2d 246, 265 Va. 59 (2003) (internal citations omitted)
    d. jury question
        i. "Thus, the defense of assumption of risk ordinarily presents a jury question, unless reasonable minds could not differ on the issue."

Thurmond v. Prince William, Inc., 574 S.E.2d 246, 265 Va. 59 (2003) (internal citations omitted)

e. subjective standard: "Application of the defense of assumption of risk requires use of a subjective standard, which addresses whether a particular plaintiff fully understood the nature and extent of a known danger and voluntarily exposed herself to that danger." *Thurmond v. Prince William, Inc.,* 574 S.E.2d 246, 265 Va. 59 (2003)

f. VMJI 6.100: "[if] you find by the greater weight of the evidence that the plaintiff fully understood the nature and extent of a known danger, and if you voluntarily exposed himself to it, he assumed the risk of injuring himself from that danger. The plaintiff cannot recover for injuries the proximately resulting from assuming the risk of a known danger."

Last Clear Chance-When it Applies, and When it Doesn't

Last clear chance is a defense, normally, but not always used by the plaintiff, which can overcome contributory negligence. Given that Virginia is one of the last "contributory negligence bar" states, understanding when last clear chance may be available in a case is very important. Nuances of last clear chance will be discussed at the seminar but the seminar materials below are to provide the practitioner a primer and guidance about this doctrine that arises occasionally in negligence cases. First, the two Virginia model jury instructions on LCC are set forth, along with some commentary from the VMJI, followed by some key cases on the doctrine of last clear chance, and at the end of this outline is an excerpt from a memo of law touching on the doctrine, with argument from the Plaintiff for the application of last clear chance in a disabled motor vehicle case.

I. Last Clear Chance-Virginia Model Jury Instructions

Instruction No. 7.030
Last Clear Chance: Helpless Plaintiff

Contributory negligence by the plaintiff will not bar his recovery if you find by the greater weight of the evidence that:

(1) the plaintiff negligently placed himself in a situation of peril from which he was physically unable to remove himself; and

(2) the defendant saw, or should have seen, the plaintiff and realized, or should have realized, his peril; and

(3) thereafter, the defendant could have avoided the accident by using ordinary care.

Practice Commentary

When the plaintiff concedes his negligence but asserts that the defendant had the last clear chance to avoid the accident, the jury should be given a peremptory instruction modeled on No. 2.190 and this last clear chance instruction. When the plaintiff denies his own negligence but asserts, in the alternative, that defendant had the last clear chance to avoid the accident, then the case should be submitted to the jury with both a contributory negligence instruction and a last clear chance instruction. See Smith v. Gay, 190 F.2d 719, 722 (4th Cir. 1951).

Alerts:

- It is error to give the "last clear chance" instruction for the helpless plaintiff unless there is evidence that the physical incapacity of the plaintiff results from a non-negligent, non-intentional natural cause. Voluntary intoxication is not "physical incapacity" within the last clear chance doctrine. Pack 236 Va. At 330-331, 374 S.E.2d at 25-26.
- If the opportunity to avoid the accident is as available to the plaintiff as to the defendant, then last clear chance does not supersede contributory negligence. Williams, 255 Va. at 276-277, 447 S.E.2d at 470.

Instruction No. 7.040
Last Clear Chance: Inattentive Plaintiff

Contributory negligence by the plaintiff will not bar his recovery if you find by the greater weight of the evidence that:

(1) the plaintiff negligently placed himself in a situation of peril; and

(2) he was physically able to remove himself from the situation, but he was unaware of his peril; and

(3) the defendant actually saw the plaintiff and realized, or should have realized, his peril; and

(4) therefore, the defendant could have avoided the accident by using ordinary care.

Practice Commentary

When the plaintiff concedes his negligence but asserts that the defendant had the last clear chance to avoid the accident, the jury should be given a peremptory instruction such as No. 2.190and this last clear chance instruction. When the plaintiff denies his own negligence but asserts, in the alternative, that defendant had the last clear chance to avoid the accident, then the case should be submitted to the jury with

both a contributory negligence instruction and last clear chance instruction. See Smith v. Gay, 190F.2d 719, 722 (4th Cir. 1951). In either case the issues and finding instructions will have to be tailed carefully to the case.

Alerts

- If the opportunity to avoid the accident is as available to the plaintiff as to the defendant, then last clear chance does not supersede contributory negligence. Williams, 255 Va. at 276-277, 447 S.E.2d at 470.

II. Last Clear Chance Case Law

From *Virginia Torts Case Finder*, Fifth Edition, § 2-7, by Brien A. Roche

Last Clear Chance-Definition,

1998 *Williams v. Harrison*, 255 Va. 272, 497 S.E.2d 467

Last clear chance applies in two situations: (1) injured party has negligently placed himself in position of peril from which he is physically unable to remove himself, and (2) injured party has negligently placed himself in position of peril from which he is physically able to remove himself but is unconscious of peril. In this wrongful death action where the decedent was exceeding the speed limit and driving on wrong side of the road when he was rear-ended by defendant who likewise was exceeding speed limit and on wrong side of road, last clear chance does not apply.

1988 *Pack v. Doe,* 236 Va. 323, 374 S.E.2d 22.

This doctrine applies in two instances: (1) Helpless plaintiff: Has negligently placed himself in position of peril from which he is physically unable to remove himself? (2) Inattentive plaintiff: Has negligently placed himself in position of peril from which he is physically able to remove himself but is unconscious of peril? In this case, plaintiff intoxicated, in drunken stupor, fell asleep on roadway and run over by motorist. This does not constitute physical incapacity; i.e.,

condition resulting from non-negligent, non-intentional natural causes such as seizure, heart attack.

1971 *Simmers v. DePoy,* 212 Va. 447, 184 S.E.2d 776.

Last clear chance applies in two situations: (1) helpless plaintiff and (2) inattentive plaintiff. In first situation, defendant is liable if he saw or should have seen plaintiff. In second situation, defendant is liable only if he actually saw plaintiff. In either case, defendant must have had time to avert accident.

1963 *Smith v. Spradlin,* 204 Va. 509, 132 S.E.2d 455.

Last clear chance applies: (1) where plaintiff has negligently placed himself in peril from which he is physically unable to remove himself; defendant is liable if he saw or should have seen him in time to avert accident by using reasonable care; and (2) where plaintiff has negligently placed himself in peril from which he is physically able to remove himself, but is unconscious of peril; defendant is liable only if he saw plaintiff and realized or should have realized his peril in time to avert accident by using reasonable care.

1953 *Craighead v. Sellers,* 194 Va. 920, 76 S.E.2d 212.

In order for plaintiff to recover under this doctrine, he must prove: (1) that he was in situation of peril, of which he was unaware or from which he could not by exercise of reasonable care extricate himself; and that, (2) after his peril was discovered or ought to have been discovered,

defendant had last clear chance to save him by exercise of ordinary care. Last clear chance is not applicable where negligence of plaintiff pedestrian continued up to moment of accident.

1952 *Burton v. Oldfield,* 194 Va. 43, 72 S.E.2d 357.

Burden is on plaintiff to show, by preponderance of evidence, that defendant negligent in what he did or failed to do after he discovered or should have discovered that plaintiff was in situation of helpless or unconscious peril. Last clear chance presupposes time for effective action. Doctrine of last clear chance does not supersede defense of contributory negligence.

1951 *Keatts v. Shelton,* 191 Va. 758, 63 S.E.2d 10.

Defendant's vehicle struck plaintiff while plaintiff was crossing highway. It does not save plaintiff from bar of his own negligence unless it is shown that after situation of peril created by his previous negligence was discovered, or ought to have been discovered, defendant had last clear chance to prevent accident by using ordinary care.

1949 *Anderson v. Payne,* 189 Va. 712, 54 S.E.2d 82.

Burden is on plaintiff to show, by preponderance of evidence, that he was in situation of peril, of which he was unconscious or from which he could not by exercise of reasonable care extricate himself, and that after his peril was discovered, or ought to have been discovered, defendant had last clear chance to save him by exercise of ordinary care.

1948 *Hooker v. Hancock,* 188 Va. 345, 49 S.E.2d 711.

To justify instruction on this principle, it must be shown that plaintiff was inattentive to peril into which he had placed himself, and that after defendant saw him and realized or should have realized, his inattentiveness, defendant failed to use reasonable care to avoid collision. Facts do not justify instruction in this case.

1948 *Stark v. Hubbard,* 187 Va. 820, 48 S.E.2d 216.

Doctrine presupposes time for effective action and is not applicable to sudden emergency; not applicable where negligence of plaintiff and defendant continues down to time of accident.

1947 *Stuart v. Coates,* 186 Va. 227, 42 S.E.2d 311.

When negligence of plaintiff continues as proximate cause, then this is fatal to plaintiff's case under last clear chance. If plaintiff had last clear chance to avoid accident and failed to do so, then plaintiff may not recover. For doctrine to apply, negligence of plaintiff must become remote cause prior to accident. Even though negligence of plaintiff continues to moment of injury, if defendant knew or should have known of danger to plaintiff and had last clear chance, then plaintiff may recover. Last clear chance defense presupposes negligence of plaintiff and defendant.

1946 *Harris Motor Lines v. Green,* 184 Va. 984, 37 S.E.2d 4.

Where two parties are both guilty of continuous acts of negligence down to time of accident, last clear chance not applicable; otherwise, there would be nothing left of law of contributory negligence or concurring negligence.

1945 *Herbert v. Stephenson,* 184 Va. 457, 35 S.E.2d 753.

Doctrine applies where: (1) peril of plaintiff is known or ought to have been known to defendant, and (2) defendant owes to plaintiff duty to keep reasonably careful lookout commensurate with nature of agency he is using or operating, and nature of locality, and by exercise of ordinary care ought to have seen or known of plaintiff's perilous situation in time to have avoided injury by exercise of reasonable care.

1943 *Willard Stores, Inc. v. Cornell,* 181 Va. 143, 23 S.E.2d 761.

This doctrine does not impose duty of prevision. Instead, each person has right to assume that normal person in situation requiring exercise of prudence will use his faculties in time to prevent his injury. This defense clearly does not supersede defense of contributory negligence.

Last Clear Chance-Miscellaneous

1952 *Manhattan For Hire Car Corp. v. O'Connell,* 194 Va. 398, 73 S.E.2d 410.

Last clear chance does not supersede defense of contributory negligence.

1952 *Messick v. Barham,* 194 Va. 382, 73 S.E.2d 530.

Last clear chance instruction must be premised on evidence of contributory negligence of plaintiff.

1943 *Orndorff v. Howell,* 181 Va. 383, 25 S.E.2d 327.

Pedestrian crossing street. Last clear chance instruction given.

Last Clear Chance-No Opportunity to Avoid Injury

1981 *McManama v. Wilhelm,* 222 Va. 335, 281 S.E.2d 813.

Doctrine of last clear chance was not applicable where there was no evidence that decedent pedestrian was helpless or that defendant motorist had last clear chance to avoid him.

1964 *Eisenhower v. Jeter,* 205 Va. 159, 135 S.E.2d 786.

Plaintiff alleged he was struck in crosswalk by motorist. Last clear chance not applicable. Last clear chance only applies where plaintiff has negligently placed himself in position of danger of which he is unaware and from which he is unable to extricate himself.

1963 *Smith v. Spradlin,* 204 Va. 509, 132 S.E.2d 455.

Last clear chance implies thought, appreciation, mental direction and lapse of sufficient time to effectively act on impulse to save another from injury. Defendant was 47 feet away when he saw plaintiff in his position of peril and did not have sufficient time to stop; last clear chance not applicable.

1956 *Brown v. Vinson,* 198 Va. 495, 95 S.E.2d 138.

Where plaintiffs negligence is ongoing up to time of accident in that he is driving on wrong side of road, then there is no last clear chance for defendant to avoid accident.

1955 *Hodgson v. McCall,* 197 Va. 52, 87 S.E.2d 791.

Pedestrian struck between intersections. Last clear chance should not apply when means of avoiding accident are equally available to plaintiff as to defendant.

1955 *Hopson v. Goolsby,* 196 Va. 832, 86 S.E.2d 149.

Pedestrian struck; did not maintain proper lookout. Where opportunity to avoid accident is as available to plaintiff as to defendant, then plaintiff's negligence is not remote cause but continues as proximate cause.

1955 *Marshall v. Shaw,* 196 Va. 678, 85 S.E.2d 223.

Pedestrian struck. Neither party's evidence showed plaintiff in position of peril with defendant having opportunity to avoid accident.

1951 *Keatts v. Shelton,* 191 Va. 758, 63 S.E.2d 10.

Defendant's vehicle struck plaintiff while she was crossing highway. Judgment for plaintiff reversed and remanded for new trial. Doctrine of last clear chance presupposes that there must have been time and opportunity for effective action by defendant, and burden is on plaintiff to establish this affirmatively by preponderance of evidence.

1949 *Lanier v. Johnson,* 190 Va. 1, 55 S.E.2d 442.

Plaintiff's decedent turned in front of defendant. Last clear chance will save plaintiff from bar of his own negligence if he has shown that after situation of peril of plaintiff was or ought to have been discovered, defendant had last clear chance to avoid accident by using ordinary care. If

opportunity to avoid accident was as available to plaintiff as to defendant, then defendant is not liable.

1948 *DeMuth v. Curtiss,* 188 Va. 249, 49 S.E.2d 250.

Pedestrian struck. Burden of proof on plaintiff to establish that plaintiff was in position of danger at time that defendant should have discovered him to avoid accident.

1947 *Jenkins v. Johnson,* 186 Va. 191, 42 S.E.2d 319.

Pedestrian struck. To invoke last clear chance, plaintiff must show that defendant had sufficient time and opportunity to avoid injury after he should have discovered plaintiff's danger from his own negligence. There must be appreciable difference in time between earlier negligence of plaintiff and later negligence of defendant and last clear chance to avoid accident.

Last Clear Chance-Opportunity to Avoid Injury

1964 *Turner v. Norfolk S. Ry.,* 205 Va. 691, 139 S.E.2d 68.

Decedent sitting on railroad track evidently having seizure. Last clear chance applies.

1954 *Conrad v. Thompson,* 195 Va. 714, 80 S.E.2d 561.

Plaintiff's decedent, a pedestrian, was struck and killed on three-lane highway by vehicle operated by defendant. Since evidence showed and defendant admitted that she saw deceased in position of imminent danger of which deceased was unaware and had time to avoid striking him, no error in instructing jury on doctrine of last clear chance.

1948 *Washington & O.D.R.R. v. Taylor,* 188 Va. 458, 50 S.E.2d 415.

Court seems to apply last clear chance doctrine in this case where plaintiff was lying on tracks in drunken stupor.

1948 *Crouse v. Pugh,* 188 Va. 156, 49 S.E.2d 421.

Where driver has no explanation of why he did not see pedestrian, question of last clear chance is presented.

1946 *Slate v. Saul,* 185 Va. 700, 40 S.E.2d 171.

Where defendant saw plaintiff and had opportunity to save him and failed to do so, this would be sufficient to carry question of last clear chance to jury.

1945 *Herbert v. Stephenson,* 184 Va. 457, 35 S.E.2d 753.

Pedestrian struck. Conceding continuing negligence of plaintiff in walking on wrong side of highway, still he can recover if defendant had last clear chance to avert injury and failed to avail himself of it.

III. Sample of Memo of Law on Last Clear Chance Fact Situation

PLAINTIFF'S MEMO OF LAW IN SUPPORT OF LAST CLEAR CHANCE DOCTRINE

Plaintiff offers this memo of law in this arbitration for the purposes of outlining the current state of law relating to the doctrine of "last clear chance," which under certain factual circumstances nullifies a plaintiff's contributory negligence.

To obtain an instruction on the doctrine of last clear chance, the plaintiff must show the following essential elements:

1) The plaintiff, by his own negligence put himself into a position of helpless peril;

2) Defendant discovered, or should have discovered, the position of the plaintiff;

3) Defendant had the time and ability to avoid the injury;

4) Defendant negligently failed to do so; and

5) Plaintiff was injured as a result of the defendant's failure to avoid the injury.

At the time that plaintiff's decedent Burton was struck and killed by Defendant Lambert, it is clear from the evidence that Burton's work truck was disabled and it was not capable of being moved because the brakes "locked up." Moreover, there was simply no shoulder for Mr. Burton to have moved his truck onto. The investigating officer saw the truck flashers were activated, and the photographic evidence taken when both the Burton truck and the Lambert car were not yet separated proves that the truck flashers were illuminated. The same pictures also show multiple reflective tape areas along the visible rear of the truck.

In the middle of the night, as Mr. Lambert drove on the highway, there was a straight unobstructed roadway view ahead along NC 242 for 1000 feet as he approached Mr. Burton's disabled truck. After turning off of NC 55, onto highway 242, and after accelerating to 55 mph, moving at about 80 feet per second, Mr. Lambert had more than 13 seconds to maintain a proper lookout and to see Mr. Burton and/or his immobile and disabled vehicle.

We may never know if Mr. Burton was simply helpless, or whether he was inattentive in the last moments before his demise. But under the doctrine of last clear chance it matters not whether Mr. Burton was merely helpless or was also inattentive, because the last clear chance to avoid any collision was solely Mr. Lambert's. He merely needed to turn (or veer) to the left on the otherwise deserted highway and carefully pass the Burton truck. Instead he did not maintain a proper lookout, was apparently distracted, and struck Mr. Burton and the rear of the truck at a high rate of speed. Of course, even if Mr. Burton did observe Mr. Lambert's oncoming headlights in the darkness, he was able to assume that the driver could clearly see his flashers and would be safely passing his vehicle—until the last moment when the oncoming vehicle instead skidded and plowed into the rear of his truck entrapping him. The evidence is clear that Mr. Burton had a split second to avoid disaster, only when he realized that Lambert failed to keep a proper lookout and smashed into him and his truck at a high rate of speed.

The North Carolina decision in *Exum v. Boyles* could not be more relevant under these circumstances since that 1968 case involved a defendant who rear-ended a station wagon partially occupying the highway shoulder, at least 200 yards ahead of the defendant plainly visible to him up ahead. *Id*. In *Exum* the "tail lights, headlights and the interior dome light of the station wagon were burning" compared with this case where *flashers* were illuminated along with *multiple areas of reflective tape* visible on the rear of the truck. *Exum*, 158 S.E. 2d at 850; 1968 N. C. LEXIS 701 at ***12.

Like Mr. Lambert in this case, the defendant in *Exum* claimed that he was unaware of the existence of the plaintiff who was kneeling behind the station wagon when struck by the defendant. In *Exum* the N.C. Supreme Court stated: "without reducing his speed or veering to

his left to the slightest degree, he passed so close to the parked station wagon that he struck [the plaintiff] whom he did not see until virtually the instant of impact. This is not the care which a reasonable man would use in passing a parked vehicle under like circumstances." The *Exum* court went on to state that the defendant had ample time, "by a mere flick of the wrist, to guide his car to the left so as to avoid striking [the plaintiff]." And the court went on to mention "had he maintained a lookout in the direction of his travel, the defendant could have observed the perilous position of [the plaintiff] in time so as to avoid striking him." *Exum*, 158 S.E. 2d at 850; 1968 N. C. LEXIS 701 at ***12-13. Moreover, it is hardly plausible that since Lambert admits he failed to appreciate either the flashers, the reflective tape, or even Mr. Burton, that reflective cones, or even flares, placed on the pavement would have had any effect on his absolute unexplained failure to keep a proper lookout ahead of his vehicle, as he could have easily passed around the Burton truck since there was no other traffic on the highway in the middle of the night.

Based on all of the evidence presented in this arbitration it is plain that whether or not Decedent Burton was helpless, inattentive, or whether or not he had yet placed warning cones on the highway, none of these inactions by plaintiff would defeat the last clear chance doctrine which places the proximate cause negligence solely and only upon the defendant Lambert in this case. Plaintiff has proved not only that Mr. Burton's negligence was never a proximate cause of this fatality-causing collision, but that even if Mr. Burton somehow was considered careless (highly disputable here) that the last clear chance to avoid the disaster was solely on Mr. Lambert, nullifying any possible negligence possibly attributable to decedent Burton.