

A saleswoman, who was driving at an excessive speed, applied her brakes to stop at a traffic light. Due to damp, fallen leaves, her car skidded and came to a halt perpendicular to the roadway. A delivery truck driver, who was also driving at an excessive speed and was immediately behind the saleswoman, saw her car perpendicular to the roadway. Although the truck driver had sufficient distance to come to a slow, controlled stop, he decided not to slow down but, rather, to swerve to the left in an effort to go around the saleswoman's car. Due to oncoming traffic, the space was insufficient and the delivery truck collided with the car, severely injuring the saleswoman.

The saleswoman filed a personal injury action against the truck driver in a jurisdiction in which contributory negligence is a bar to recovery.

Will the saleswoman prevail?

- A. No, if the jury finds that, in speeding, the saleswoman assumed the risk.
- B. No, if the jury finds that the saleswoman's conduct was in any way a legal cause of the accident.
- C. Yes, if the jury finds that the truck driver had the last clear chance.
- D. Yes, if the jury finds that the truck driver was more than 50% at fault.

Explanation:

Contributory negligence

(traditional common law)

General rule Plaintiff's negligence completely bars recovery

Exception Recovery permitted if defendant:

(last clear chance) had last clear chance to avoid plaintiff's injury *and*
failed to use reasonable care to do so

In this jurisdiction and at common law, the plaintiff's **contributory negligence**—ie, failure to use reasonable care for his/her own safety—is a **complete bar to recovery**. This is a harsh rule for plaintiffs because it ignores any negligence by the defendant. To mitigate this harshness, courts recognize an **exception** called the **last-clear-chance rule**. This rule allows a contributorily negligent plaintiff to **recover** if the **defendant** (1) had the **last clear chance** to avoid the plaintiff's injury but (2) **failed to use reasonable care** to do so.

Here, the saleswoman's negligent, excessive speeding caused her car to skid and stop in the roadway. The truck driver saw this and had sufficient distance to come to a slow, controlled stop (last clear chance). Instead, he decided to swerve in an effort to go around her car (failure to use reasonable care). As a result, the saleswoman will likely prevail in her personal injury action against the truck driver.

(Choice A) *Assumption of the risk* is a defense to negligence when the plaintiff voluntarily exposed him/herself to a known risk of harm. Here, although the saleswoman voluntarily exposed herself to the risks of her *own* excessive speeding, she did not voluntarily expose herself to the *truck driver's* negligence.

(Choice B) The saleswoman's conduct may have been a legal (ie, *proximate*) cause of the accident if it was a foreseeable consequence of her excessive speed. But this would not preclude her recovery since the accident was also a foreseeable consequence of the truck driver's negligence and he had the last clear chance.

(Choice D) Had this been a *modified comparative negligence* jurisdiction, the saleswoman's (plaintiff's) negligence would completely bar recovery unless the truck driver (defendant) was more than 50% at fault. But comparative fault is irrelevant in this traditional *contributory* negligence jurisdiction.

Educational objective:

The last-clear-chance rule allows a plaintiff to recover despite his/her contributory negligence if the defendant (1) had the last clear chance to avoid the plaintiff's injury and (2) failed to use reasonable care to do so.

References

Restatement (Second) of Torts §§ 479–80 (Am. Law Inst. 1965) (explaining that a contributorily negligent plaintiff can still recover if the defendant had the last clear chance to avoid the plaintiff's harm).

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