Missouri Law Review

Volume 66
Issue 2 *Spring 2001*

Article 6

Spring 2001

Deadly Trap or Reasonable Danger: What Standard of Care Applies to Non-Electrical Injuries from Power Lines

Brett A. Emison

Deadly Trap or Reasonable Danger: What Standard of Care Applies to Non-Electrical Injuries from Power Lines?

Lopez v. Three Rivers Electric Cooperative, Inc.[1]

I. INTRODUCTION

Missouri demands "the highest degree of care regarding dangerous instrumentalities because of the great risk of injury or death."[2] However, Missouri also has held that only ordinary care is required when, in a suit against an electric utility, the injury was not caused by "the inherently dangerous properties of electricity."[3] This Note examines the struggles faced by a divided court in determining which standard to apply when these holdings conflict.

II. FACTS AND HOLDING

On July 29, 1994, United States Army Reserve pilot Kenney Jones, flight engineer George Lopez, and two other crew members departed in a CH-47D Chinook helicopter on a training mission.[4] Two days later, the helicopter was training in the vicinity of the Osage River.[5] As the aircraft was flying at a low altitude tracking the middle of the river, it "came into contact with power lines owned by Three Rivers Electric Cooperative (Three Rivers)," resulting in a crash and killing all on board.[6] Evidence at trial indicated that the lines were carrying 7200 volts of electricity at the time of the accident, however, "it [was] undisputed that electrical voltage was not a cause of the crash or the deaths."[7]

---

1. 26 S.W.3d 151 (Mo. 2000).

2. *Id.* at 162 (4-3 decision) (Price, C.J., dissenting).

3. *Id.* at 158.

4. *Id.* at 154. Jones "had command and control responsibilities" for the helicopter. *Id.* at 154-55. Lopez was in charge of monitoring "various aircraft systems and helped clear the aircraft on turns, but had no direct control of the aircraft." *Id.* at 155. Crew member Bruce Nanninga's widow and children filed a separate suit in federal court against Three Rivers. *See* Nanninga v. Three Rivers Elec. Coop., Inc., 203 F.3d 529, 531 (8th Cir. 2000). The CH-47D Chinook helicopter is a twin-turbine, dual rotor, cargo helicopter manufactured by the Boeing Company. The Chinook's primary military mission is the "movement of troops, artillery, ammunition" and other heavy lifting and troop transportation duties. Boeing, *CH-47D Chinook*, *at* http://www.boeing.com/rotorcraft/military/ch47d/ (last visited Apr. 2, 2001).

5. *See Lopez*, 26 S.W.3d at 155.

6. *Id.* "[W]itnesses reported seeing the helicopter in flight over the middle of the . . . [r]iver at an altitude of approximately 100 feet." *Id.*

7. *Id.*

There was no indication that the helicopter performed any evasive maneuvers to avoid the power lines.[8] At the accident site, the three-eighths (3/8) inch lines traversed a 939-foot span over the Osage River.[9] These lines were installed in 1975 and had since turned a greenish-brown color, which effectively camouflaged the lines against the wooded background landscape.[10] Furthermore, "[t]rees and other vegetation obstructed the view of the supporting structures."[11] There were no markings or other warning devices to aid pilots in detecting the lines.[12] As the power lines were fewer than five-hundred feet above the ground, they were not regarded as overly dangerous to air navigation to require marking under Federal Aviation Administration ("FAA") regulations.[13] The FAA prohibits fixed-wing aircraft from flying below five-hundred feet in non-congested areas, however, there is no such minium for helicopters, which are required only to fly "without hazard to persons or property on the surface."[14]

Elizabeth Lopez and Penny Jones brought suit against Three Rivers for the wrongful death of their husbands George Lopez and Kenney Jones.[15] Lopez and Jones alleged that Three Rivers was negligent in failing to warn aircraft pilots of the potential danger of flying into power lines spanning the Osage River at the accident location.[16] Following a two-week trial, the jury found for the plaintiffs and awarded them each $2.5 million in compensatory damages and $500,000 in punitive damages.[17] The net awards were reduced to $2.75 million for Lopez and $2.5 million for Jones because the jury assessed ten percent fault to George Lopez and twenty percent fault to Kenney Jones in their respective causes of action.[18]

Three Rivers appealed to the Missouri Court of Appeals for the Eastern District of Missouri.[19] Three Rivers presented five arguments on appeal.[20] First,

---

8. *Id.*

9. *Id.* The lines were suspended at an angle across the river between two "H" structures. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* (citing 14 C.F.R. § 77.23 (2000)).

14. *Id.* (quoting 14 C.F.R. § 91.119(d) (2000)).

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* The trial court also ordered prejudgment interest to be paid on the compensatory damage award. *Id.*

19. *See* Lopez v. Three Rivers Elec. Coop., Inc., Nos. ED 75011, ED 75072, ED 75073, 1999 WL 1054771, at *1-2 (Mo. Ct. App. Nov. 23, 1999), *transferred*, 26 S.W.3d 151 (Mo. 2000).

20. *See* Lopez v. Three Rivers Elec. Coop., Inc., 26 S.W.3d 151, 161 (Mo. 2000). Three Rivers also raised a number of other issues that were not addressed because they were not properly preserved. *Id.* Lopez also raised issues on cross appeal, but failed to

Three Rivers argued that it owed no duty to Lopez and Jones because the accident was not foreseeable.[21] Second, even if it owed a duty to Lopez and Jones, it should have been held only to "ordinary care," not the "highest degree of care," which was the instruction submitted to the jury.[22] Third, evidence of a similar accident involving an airplane crashing into lines at the same location in 1975 should not have been admitted because that accident was too remote in time.[23] Fourth, there was insufficient evidence to warrant the submission of instructions regarding an award for aggravating circumstances.[24] Finally, Three Rivers argued that Missouri Revised Statutes Section 537.675(2)[25] was unconstitutional because it allowed the attorney general to collect half of any punitive damage award on behalf of the state.[26] Because Three Rivers challenged the constitutionality of a Missouri statute, the Eastern District transferred the appeal to the Missouri Supreme Court.[27]

Judge Covington delivered the majority opinion.[28] The court found that Three Rivers owed a duty to Lopez and Jones because there was ample evidence to support the conclusion that Three Rivers either knew or should have known of a risk of harm to pilots.[29] However, the majority held that ordinary care, not the highest degree of care, was the proper standard and found that Three Rivers was unfairly prejudiced by the "highest degree of care" jury instruction.[30] The court determined that the trial court did not abuse its discretion in admitting evidence of a similar accident involving a fixed wing airplane in 1975.[31] Finally, the court held that the "evidence did not show that Three Rivers knowingly violated a duty or that it was completely indifferent to or consciously disregarded

---

preserve her claims. *Id.*

21. *Id.* at 155. "Specifically, Three Rivers claims that it did not owe any duty to Lopez and Jones because [it] could not foresee that the power lines would cause injury to pilots." *Id.*

22. *Id.* at 157.

23. *Id.* at 159.

24. *Id.* at 160.

25. MO. REV. STAT. § 537.675(2) (2000).

26. *See* Lopez v. Three Rivers Elec. Coop., Inc., Nos. ED 75011, ED 75072, ED 75073, 1999 WL 1054771, at *1-2 (Mo. Ct. App. Nov. 23, 1999), *transferred*, 26 S.W.3d 151 (Mo. 2000).

27. *Id.* The Missouri Constitution "vests the Missouri Supreme Court with the exclusive jurisdiction to decide cases in which the validity of a state statute is challenged." *Id.* at *1 (citing MO. CONST. art. V, § 3).

28. *See* Lopez v. Three Rivers Elec. Coop., Inc., 26 S.W.3d 151, 154 (Mo. 2000). The court was split in the decision 4-3, with Chief Justice Price authoring the dissent. *Id.* at 162.

29. *Id.* at 156. However, whether Three Rivers breached its duty to Lopez and Jones is a question of fact for the jury. *Id.* at 157.

30. *Id.* at 158.

31. *Id.* at 159-60. The court indicated that remoteness in time is "but one factor," and goes to the weight of the evidence in most circumstances. *Id.* at 160.

the safety of others," and as such, the evidence did not "clearly and convincingly support an instruction for aggravating circumstances."[32] Because the court decided that punitive damages were not available, it did not render a decision on the constitutionality of Missouri Revised Statutes Section 537.675(2).[33]

III. LEGAL BACKGROUND

To recover in tort, a plaintiff must first show that the defendant owes him a duty.[34] The existence of a duty is a question of law.[35] The Missouri Supreme Court in *Hoover's Dairy, Inc. v. Mid-America Dairymen, Inc.*[36] announced that when the duty itself does not arise from a relationship between the parties, "foreseeability that some injury might result from the act complained of normally serves as the paramount factor in determining the existence of a duty."[37] In determining whether a defendant's conduct creates a duty to a plaintiff, foreseeability is forward looking; thus, a defendant owes a duty if it should have foreseen a risk to a plaintiff under the given circumstances.[38] However, when determining proximate causation, foreseeability is judged in hindsight; thus, a defendant's act is the proximate cause of a plaintiff's injury if, after the accident has occurred, it is determined that the defendant "knew or ought to have known that there was an appreciable chance some injury would result."[39]

In *Zuber v. Clarkson Construction Co.*,[40] the court held that for a duty to exist, there must be some probability of harm against which an ordinary person would guard.[41] That court defined foreseeability as follows:

> [S]ome probability or likelihood, not a mere possibility, of harm sufficiently serious that ordinary men would take precautions to avoid it . . . . [T]his does not mean the chances in favor of the happening

---

32. *Id.* at 161 (citations omitted).

33. *See id.*; MO. REV. STAT. § 537.675(2) (2000).

34. *See* Hoover's Dairy, Inc. v. Mid-Am. Dairymen, Inc., 700 S.W.2d 426, 431 (Mo. 1985).

35. *See* Aaron v. Havens, 758 S.W.2d 446, 447 (Mo. 1988).

36. 700 S.W.2d 426 (Mo. 1985).

37. *Id.* at 431-32 (citing Lowrey v. Horvath, 689 S.W.2d 625, 627 (Mo. 1985); Joyce v. Nash, 630 S.W.2d 219, 222-23 (Mo. Ct. App. 1982)).

38. *See* Taylor v. Dale-Freeman Corp., 389 S.W.2d 57, 60-61 (Mo. 1965); Zuber v. Clarkson Constr. Co., 251 S.W.2d 52, 55 (Mo. 1952); Poelstra v. Basin Elec. Power Coop., 545 N.W.2d 823, 827 (S.D. 1996).

39. Callahan v. Cardinal Glennon Hosp., 863 S.W.2d 852, 865 (Mo. 1993) (quoting Tharp v. Monsees, 327 S.W.2d 889, 894 (Mo. 1959)); *see also Poelstra*, 545 N.W.2d at 827 (For proximate cause, foreseeability relies on hindsight.).

40. 251 S.W.2d 52 (Mo. 1952).

41. *Id.* at 55.

> must exceed those against it. The test is not the balance of probabilities, but of the existence of some probability of sufficient moment to induce the reasonable mind to take the precautions which would avoid it.[42]

Once a duty of care is found to exist, the court must determine the appropriate standard of care—a question of law.[43] Since the beginning of American jurisprudence, courts have defined negligence as conduct in which a reasonable man would not engage.[44] The *First Restatement of Torts* "sets up the reasonable person as the template for determining negligence."[45] The *Restatement* adopts a balancing approach that closely resembles a risk utility test: "[T]he risk is unreasonable and the act is negligent if the risk is of such magnitude as to outweigh what the law regards as the utility of the act or of the particular manner in which it is done."[46] Furthermore, the "*Restatement* expects these risk-utility judgments to be . . . based on the values public opinion assigns to different interests."[47] Francis Bohlen, the Reporter of the *First Restatement of Torts* stated:

> [T]he "reasonable man" is not the average man. He is an ideal creature, expressing public opinion declared by its accredited spokesman, whether court or jury, as to what ought to be done under the circumstances by a man, who is not so engrossed in his own affairs as to disregard the effect of his conduct upon the interests of others. He may be called a personification of the court or jury's social judgment. The factor controlling the judgment of the defendant's conduct is not what *is*, but *what ought to be.*[48]

---

42. *Id.*

43. *See* Harris v. Niehaus, 857 S.W.2d 222, 226 (Mo. 1993) (A premises liability case in which the court held as a matter of law that the condition in dispute was "open and obvious" and thus determined the appropriate standard of care to apply.).

44. *See* Stephen G. Gilles, On Determining Negligence: Hand Formula Balancing, The Reasonable Person Standard, and The Jury 7 (Sept. 14, 2000) (unpublished manuscript) (on file with author).

45. *Id.* "Because the *Second Restatement* made only minor changes to the relevant provisions, the *First Restatement*'s conception of negligence has effectively been the ALI's official position for almost seventy years." *Id.* at 6 (footnote omitted).

46. *Id.* at 8 (citing RESTATEMENT (SECOND) OF TORTS § 291 (1965)).

47. *Id.* at 14. Thus, the reasonable person is "endowed with the 'standard morality,' that is the standard ability to evaluate interests, and therefore 'evaluates interests in accordance with the valuation placed upon them by the community sentiment crystalized into law.'" *Id.* at 15 (citation omitted). The reasonable person is guided by morals that track the comparative values of the community. *Id.* at 16.

48. *Id.* at 17-18 (citing Francis Bohlen, *Mixed Questions of Law and Fact*, 24 U. PA. L. REV. 111, 113 (1924)).

Thus, the standard of negligence cannot be applied using unchanging principles of law, but must be based on a standard of conduct that is able to change with the social values of the time.[49]

The amount of care in a given situation must be commensurate with the risk involved—as the danger increases, the individual is required to exercise a greater degree of care.[50] Some courts seem to imply that a special standard is required depending on the level of risk.[51] However, legal scholars note that, regardless of the emergence of these "special standards," it appears that none of these "cases should logically call for any departure from the usual formula. What is required is merely the conduct of the reasonable person of ordinary prudence under the circumstances, and the greater the danger, or the greater responsibility, is merely one of the circumstances, demanding only an increased amount of care."[52]

Indeed, a substantial number of jurisdictions, including Missouri, "recognize a higher or lower basic standard of conduct for different defendants, or different situations."[53] However, Professor Keeton indicates that "[t]here is seldom reason to think that [courts] mean to say anything more than that greater or less care will be required under the circumstances" and "the 'high degree'

---

49. *Id.* at 20.

50. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 34, at 208 (5th ed. 1984). In *Bronson v. Kansas City*, 323 S.W.2d 526 (Mo. Ct. App. 1959), the court stated:

> While the duty owed is that of exercising ordinary care it is well recognized that where children are concerned the exercise of ordinary care requires the exercise of more vigilance and caution than might be sufficient with respect to an adult . . . . Conduct which might reach the standard of ordinary care with respect to an adult might in the case of a child amount to negligence, or even gross negligence.

Id. at 531; *see also* 65 C.J.S. *Negligence* § 11(4) (1966) ("The care to be exercised in a particular case must always be proportionate to the seriousness of the consequences which are reasonably to be anticipated as a result of the conduct in question.").

51. *See* KEETON, *supra* note 50, § 34, at 209 (describing language that indicates differing standards or "degrees" of care).

52. KEETON, *supra* note 50, § 34, at 209; *see also* 3 FOWLER V. HARPER ET AL., THE LAW OF TORTS § 16.13, at 500-01 (2d ed. 1986) (citations omitted) ("According to prevailing modern doctrine this proportioning of care to danger does not mean that different degrees of care (or of negligence) are being applied, because the legal standard remains constant—namely, what a reasonably prudent person would do in all the circumstances.").

53. KEETON, *supra* note 50, § 34, at 209; *see also* Pierce v. Platte-Clay Elec. Coop., 769 S.W.2d 769, 771 & n.1 (Mo. 1989) (citations omitted) ("Since the circumstances of this accident did not involve the inherently dangerous properties of electricity, the 'highest degree of care' standard which is utilized when electricity is the agent of injury is not applicable. The appropriate standard is ordinary care.").

instruction is unlikely ever really to mislead the jury."[54] Courts have found that when negligence leads to serious injury, "and where the means of avoiding the infliction of injury upon others [were] completely within the party's power, ordinary care require[d] almost the utmost degree of human vigilance and foresight."[55] Furthermore, "[w]here the danger may extend to taking of human life, reasonable care is very great care."[56]

With regard to electricity, the general rule is that an electric utility must exercise reasonable care or care in proportion to the danger.[57] Just as with general negligence, many courts recognize that when electricity or electric wires are involved, even ordinary care may require a high degree of care.[58] Depending upon the specific circumstances, the proper care required is the highest degree of care.[59]

In *Pierce v. Platte-Clay Electric Cooperative, Inc.*,[60] the Missouri Supreme Court declared that an electric company must indeed use a "high degree of care" to protect persons from injury resulting from the inherently dangerous

---

54. KEETON, *supra* note 50, § 34, at 209.

55. 65 C.J.S. *Negligence* § 11(4) (1966).

56. 65 C.J.S. *Negligence* § 11(4) (1966); *see also* Hall v. Dexter Gas Co., 170 So. 2d 796, 800 (Ala. 1965) (citations omitted) ("In matters involving the safety of human life, such care and vigilance must be exercised as a due regard for the sacredness of human life demands."); Commonwealth Trust Co. of Pittsburgh v. Carnegie-Ill. Steel Co., 44 A.2d 594, 596 (Pa. 1945) (citations omitted) ("When human life is at stake the rule of due care and diligence requires everything that gives reasonable promise of its preservation to be done regardless of difficulties or expense.").

57. *See* Gladden v. Mo. Pub. Serv. Co., 277 S.W.2d 510, 515 (Mo. 1955) (The Rule in Missouri is that the owner of electrical lines must exercise the highest degree of care to prevent injury to those who may lawfully be in close proximity to them.); Foote v. Scott-New Madrid-Mississippi Elec. Coop., 359 S.W.2d 40, 43 (Mo. Ct. App. 1962) ("[A]n electric company is obligated to employ the highest degree of care" to protect from injury those that may lawfully "come into close proximity to such lines and thereby may be subjected to a reasonable likelihood of injury."); 29 C.J.S. *Electricity* § 39 (1965).

58. *See* Simpson v. Jersey Cent. Power & Light Co., 138 A. 114, 116 (N.J. Sup. Ct. 1927); 29 C.J.S. *Electricity* § 39 (1965) ("[T]he degree of care is properly defined as ordinary or reasonable care, but the degree of care varies with the circumstances and what constitutes ordinary care increases as the danger increases.").

59. *See* Rice v. Ky. Util. Co., 155 S.W.2d 760, 762 (Ky. Ct. App. 1941); *Simpson*, 138 A. at 116; 29 C.J.S. *Electricity* § 39 (1965) ("Those engaged in the business of conducting electricity over high-voltage wires are bound to exercise greater precaution in its use than if the property were of a less dangerous character, and are, therefore, bound to anticipate more remote possibilities of danger. . . . [T]he degree of care required has been variously stated to be great care; high degree of foresight; high degree of diligence and foresight; high degree of watchfulness; all that human care, vigilance, and foresight can reasonably do; . . . [etc.]").

60. 769 S.W.2d 769 (Mo. 1989).

propensities of electricity.[61] *Pierce* involved an injury that occurred when a farmer, while driving a tractor, ran into an unmarked guy wire that was supporting a utility pole.[62] An automobile then struck the cable, which tightened suddenly and caught Pierce's right leg.[63] The *Pierce* court refused to apply the "highest degree of care" standard because the guy wire was not charged with current, and as such it did not "pose the special type of danger that would justify the higher standard of care."[64] *Pierce* held that only ordinary care was required when the injury was not caused by the inherently dangerous propensities of electricity.[65]

IV. INSTANT DECISION

A. The Majority

In *Lopez v. Three Rivers Electric Cooperative, Inc.*,[66] the Missouri Supreme Court considered whether Three Rivers owed a duty of care to George Lopez and Kenney Jones, and if so, what standard of care Three Rivers was required to use in protecting them.[67] To recover in an action for negligence, a plaintiff must first establish that she was owed a duty of care by the defendant.[68] The majority followed the analysis of *Hoover's Dairy* in determining whether Three Rivers owed a duty to Lopez and Jones.[69] *Hoover's Dairy* declared that in the absence of a duty created by a relationship between the defendant and the plaintiff, under the principles of general negligence law, "foreseeability that some injury might result from the act complained of normally serves as the paramount factor in determining the existence of a duty."[70]

In determining whether Three Rivers should have foreseen a probability of injury to the plaintiffs, the majority relied on *Zuber*.[71] The *Zuber* court defined foreseeability, in determining duty, as the presence of "some probability or

---

61. *Id.* at 771 & n.1.

62. *Id.* at 770.

63. *Id.* at 771.

64. Lopez v. Three Rivers Elec. Coop., Inc., 26 S.W.3d 151, 162 (Mo. 2000) (Price, C.J., dissenting) (discussing *Pierce*).

65. *Pierce*, 769 S.W.2d at 771 n.1.

66. 26 S.W.3d 151 (Mo. 2000).

67. *Id.* at 154-58.

68. *See* Krause v. U.S. Truck Co., 787 S.W.2d 708, 710 (Mo. 1990) ("In any action for negligence, the plaintiff must establish an existence of a duty on the part of the defendant to protect plaintiff from injury, failure of the defendant to perform that duty and, that plaintiff's injury was proximately caused by defendant's failure.").

69. *See Lopez*, 26 S.W.3d at 156.

70. *Id.* (quoting Hoover's Dairy, Inc. v. Mid-Am. Dairymen, Inc., 700 S.W.2d 426, 431 (Mo. 1985)).

71. *Id.* (citing Zuber v. Clarkson Const. Co., 251 S.W.2d 52 (Mo. 1952)).

likelihood . . . of harm sufficiently serious that ordinary men would take precautions to avoid it . . . ."[72] *Zuber* further defined the test as "not the balance of probabilities, but of the existence of some probability of sufficient moment to induce the reasonable mind to take the precautions which would avoid it."[73] In the case at bar, the majority determined that there was sufficient evidence to show that "Three Rivers should have foreseen that there existed some probability of sufficient moment that an injury could occur."[74] Thus, the majority concluded that because Three Rivers knew of the risk of harm that power lines pose to low flying aircraft, it owed a duty in tort to the plaintiffs.[75]

The court next turned to the standard of care Three Rivers owed to Lopez and Jones.[76] The court looked to *Pierce*[77] for guidance and determined that, as

---

72. *Zuber*, 251 S.W.2d at 55; *see also supra* text accompanying note 42.

73. *Zuber*, 251 S.W.2d at 55; *see also* Lopez v. Three Rivers Elec. Coop., Inc., 26 S.W.3d 151, 156 (Mo. 2000).

74. *Lopez*, 26 S.W.3d at 156. The plaintiffs "presented evidence that Three Rivers was aware of a similar incident that had occurred in 1975, resulting in three fatalities." *Id.* That aircraft "had been tracking . . . bald eagles along the Osage River [and] struck Three Rivers' power lines at the same location as the accident in this case." *Id.* (citing Allnutt v. United States, 498 F. Supp. 832 (W.D. Mo. 1980)). There also was a near miss at the same location in 1974, which Three Rivers was made aware of through a "copy of deposition testimony regarding the incident." *Id.* Further, Michael Harp, the former president and chief executive officer of Three Rivers' insurance company, testified that "he and his employees informed Three Rivers, at least generally, about the dangers of having unmarked power lines over the Osage River. . . . Mr. Harp also testified that he discussed with Three Rivers the presence of military and civilian aircraft flying at low altitudes over the Osage River." *Id.* at 156-57 (footnote omitted). There was also testimony from other witnesses who "had seen aircraft nearly miss, and even fly under, the power lines." *Id.* at 157.

75. *Id.*

76. *Id.* The trial court instructed the jury using a "highest standard of care" instruction. *Id.* The applicable instructions were as follows:

> On the claim of plaintiff . . . for compensatory damages for wrongful death against [Three Rivers], you must assess a percentage of fault to [Three Rivers] if you believe:
>
> First, [Three Rivers] maintained power lines across the Osage River without marker balls thereon to warn pilots of their existence and as a result, the power lines were not reasonably safe for persons flying in aircraft over the Osage River; and
>
> Second, [Three Rivers] knew of this condition and knew that such condition was not reasonably safe; and
>
> Third, [Three Rivers] knew or had information from which [Three Rivers], in the exercise of the *highest degree of care*, should have known that persons such as the pilots would not discover such condition or realize the risk of harm; and
>
> Fourth, [Three Rivers] failed to use the *highest degree of care* to adequately warn of it; and

a matter of law, the proper standard of care was ordinary care, not the highest degree of care as was required by the trial court.[78] The court then noted that, under *Root v. Mudd*,[79] "[p]rejudice is ordinarily presumed when a jury instruction imposes upon a party a standard of care greater than that required by law."[80] Thus, because Three Rivers was subject to a higher standard of care than was required under the law, the court determined that Three Rivers was prejudiced in that the instructions "deprived the jury of the ability to find that an ordinarily careful person, considering all of the circumstances, would not have placed warnings on the power lines."[81]

The court next turned to the issue of evidence of a similar accident.[82] Three Rivers argued that the trial court erred when it determined that the evidence of the similar accident involving an airplane crash at the same accident site in 1975 was admissible.[83] The court held that this evidence was admissible and explained that "[r]emoteness in time goes to the weight of the evidence in most circumstances, not to its admissibility."[84]

Finally, the court addressed the issue of punitive damages.[85] The court relied on *Rodriguez v. Suzuki Motor Corp.*[86] for the proposition that "there must be clear and convincing evidence in support of" a claim for damages for aggravating circumstances.[87] The court indicated that a plaintiff can recover punitive damages by showing that the defendant knew or had reason to know that it was very likely that the defendant's conduct would lead to injury, and if

---

> Fifth, such failure directly caused or directly contributed to cause [George Lopez's/Kenney Jones'] death.
>
> The phrase "*highest degree of care*" as used in this instruction means *that degree of care that a very careful person would use under the same or similar circumstance.*

Id. at 157-58. Three Rivers subsequently objected to these instructions. *Id.* at 158.

77. The *Pierce* court noted in a footnote that where an "accident did not involve the inherently dangerous properties of electricity, the 'highest degree of care' standard which is utilized when electricity is the agent of injury is not applicable." Pierce v. Platte-Clay Elec. Coop., Inc., 769 S.W.2d 769, 771 n.1 (Mo. 1989) (citing Poumeroule v. Postal Tel. & Cable Co., 152 S.W. 114 (Mo. Ct. App. 1912)).

78. *See Lopez*, 26 S.W.3d at 158.

79. 981 S.W.2d 651 (Mo. Ct. App. 1998).

80. *Id.* at 656.

81. Lopez v. Three Rivers Elec. Coop., Inc., 26 S.W.3d 151, 158 (Mo. 2000).

82. *Id.* at 159.

83. *Id.*

84. *Id.* at 160; *see also* State v. Bernard, 849 S.W.2d 10, 19-20 (Mo. 1993) (stating that remoteness in time goes to the weight of the evidence).

85. *See Lopez*, 26 S.W.3d at 160.

86. 936 S.W.2d 104 (Mo. 1996).

87. Lopez v. Three Rivers Elec. Coop., Inc., 26 S.W.3d 151, 160 (Mo. 2000) (citing *Rodriguez*, 936 S.W.2d at 110).

the defendant's conduct was equivalent to intentional misconduct.[88] The majority concluded that the evidence presented at trial did not "rise to the level required for submitting an instruction based upon aggravating circumstances."[89] Because the majority found that punitive damages were unavailable, it did not have to reach a decision regarding the constitutionality of Missouri Revised Statutes Section 537.675(2).[90]

B. The Dissent

The dissent[91] agreed with the majority that Three Rivers owed a duty of care to Lopez and Jones, but disagreed as to the degree of care required.[92] Chief Justice Price began with the proposition that "Missouri . . . has always demanded the highest degree of care regarding dangerous instrumentalities because of the great risk of injury or death," and he questioned why the majority declared that standard inapplicable simply because the harm in this case "did not result from the electricity carried by the lines, but instead merely from colliding with the line [sic] itself."[93] *Pierce*, principally relied on by the majority,[94] involved an injury that occurred when a farmer, while driving a tractor, ran into an unmarked guy wire that was supporting a utility pole.[95] The court in *Pierce* held that because the guy wire was not charged with current, it did not involve the inherently dangerous propensities of electricity, and as such, "was held not to pose the special type of danger that would justify the higher standard of care."[96] The dissent distinguished the facts under which *Lopez* arose from those in *Pierce*.[97] In *Pierce*, the guy wire posed no independent threat of grave danger.[98] *Lopez* is distinct because even though the danger was not from electrocution, an equally dangerous condition arose from the wires' "ability to cause almost certain death to the passengers of any aircraft that might strike them."[99] Further, the "danger

---

88. *Id.* (citing Hoover's Dairy, Inc. v. Mid-Am. Dairymen, Inc., 700 S.W.2d 426, 436 (Mo. 1952)); *see also* Alack v. Vic Tanny Int'l, 923 S.W.2d 330, 338-39 (Mo. 1996).

89. *Lopez*, 26 S.W.3d at 160.

90. *Id.* at 161. The Missouri aggravating circumstances instruction can be found at Missouri Revised Statutes Section 537.675(2) (2000).

91. Chief Justice Price authored the dissent, with which Judge White and Judge Wolfe concurred. *See Lopez*, 26 S.W.3d at 162.

92. *Id.* at 162-64.

93. *Id.* at 162 (citations omitted).

94. *See supra* text accompanying notes 61, 78.

95. *See* Pierce v. Platte-Clay Elec. Coop., Inc., 769 S.W.2d 769, 770 (Mo. 1989).

96. Lopez v. Three Rivers Elec. Coop., Inc., 26 S.W.3d 151, 162 (Mo. 2000) (Price, C.J., dissenting) (discussing *Pierce*).

97. *Id.*

98. *See Pierce*, 769 S.W.2d at 770-71 & n.1.

99. *Lopez*, 26 S.W.3d at 162 (Price, C.J., dissenting) (discussing *Pierce*).

was compounded because the electrical wires were practically invisible to approaching aircraft, constituting a deadly trap."[100]

Chief Justice Price noted two cases from Pennsylvania that were cited by the plaintiffs, but not discussed by the majority.[101] Both *Yoffee v. Pennsylvania Power & Light Co.*[102] and *Bailey v. Pennsylvania Electric Co.*[103] involved aircraft collisions with unmarked power lines.[104] The *Yoffee* court held the power company to the highest degree of care because an air collision, like an electrocution, carries "a high probability of death or serious injury."[105] The *Bailey* court cited heavily from *Yoffee* in its opinion and concluded the electric company "had a duty to take all practicable precautions necessary to preserve life,"[106] and it held that it was "evident that [the utility] was properly held to a high, not ordinary duty of care . . . ."[107] The dissent agreed with the premises of the *Yoffee* and *Baily* decisions and argued that "the highest degree of care [was] applicable where, as here, a prior fatal air strike occurred at the same location alerting the utility to the life threatening potential of its power lines to aircraft because of their particular location, construction, and lack of warning."[108]

Chief Justice Price, conceding for the purpose of argument that the highest standard of care instruction was inappropriate, then turned to the issue of prejudice.[109] The dissent did not believe prejudice resulted under the facts of this case, thus rebutting the usual presumption of prejudice when a jury has been instructed regarding a higher standard of care than required by law.[110] Citing *Fowler v. Park Corp.*,[111] the dissent distinguished *Root*,[112] and asserted that "[w]hether prejudice actually exists . . . is not to be taken for granted, but has to be determined by the court."[113] Chief Justice Price argued that in this case the

---

100. *Id.*

101. *Id.*

102. 123 A.2d 636 (Pa. 1956).

103. 598 A.2d 41 (Pa. Super. 1991).

104. *See* Lopez v. Three Rivers Elec. Coop., Inc., 26 S.W.3d 151, 162 (Mo. 2000).

105. *Id.* (citing *Bailey*, 598 A.2d at 47).

106. *Bailey*, 598 A.2d at 45.

107. *Id.* at 47.

108. *Id.* It is interesting to note that, prior to the ruling in *Lopez*, the Eighth Circuit Court of Appeals, applying Missouri law to the identical facts in this case, agreed with the dissent's analysis. *See* Nanninga v. Three Rivers Elec. Coop., Inc., 203 F.3d 529, 532 (8th Cir. 2000). *Nanninga* arose out of the same facts as *Lopez* and was brought in federal court by one of the two other crew members on board the helicopter. *See id.* at 531; *see also supra* notes 4-7 and accompanying text; *infra* Part V.

109. *See Lopez*, 26 S.W.3d at 162-63.

110. *Id.*

111. 673 S.W.2d 749, 755 (Mo. 1984).

112. The majority relied on *Root* in determining that Three Rivers was prejudiced by the highest standard of care instruction. *See supra* text accompanying notes 79-80.

113. Lopez v. Three Rivers Elec. Coop., Inc., 26 S.W.3d 151, 163 (Mo. 2000).

instructions differed only in that one instruction called for the care "that a very careful person" would use, while the other required "that degree of care that an ordinarily careful and prudent person would use."[114] The exercise of ordinary care in Missouri "must be 'commensurate with the dangers to be apprehended.' Thus, the conduct necessary to fulfill the duty of ordinary care depends upon the circumstances."[115] The dissent found that, even under the standard of an ordinarily prudent person, Three Rivers was required to be very careful; thus, Three Rivers was not prejudiced by the highest degree of care instruction.[116]

Lastly, the dissent addressed the comparative fault assigned to the flight engineer, George Lopez.[117] Chief Justice Price noted that Lopez was merely a passenger and utilized an analogy to automobile tort liability.[118] In automobile cases, a "driver's negligence is not imputed to a passenger, absent a showing of joint enterprise, because the passenger has no control over the automobile's operation."[119] Because there was no evidence that "Lopez had legal or actual ability regarding the flight plan or piloting of the helicopter,"[120] the dissent concluded that "[a]ny negligence attributed to [the] pilot Jones cannot be imputed to Lopez."[121]

V. COMMENT

The court in *Lopez* concluded that Three Rivers did not owe Lopez and Jones more than ordinary care in warning them of the danger of flying into power lines crossing the Osage River.[122] The court further held that, because the jury was instructed as to the highest degree of care, Three Rivers was unduly

---

Chief Justice Price agreed that normally prejudice will be presumed when the jury is instructed as to a higher degree of care than required by law. *Id.* However, he would not take this prejudice for granted, but would have it determined by the court by "considering the actual language of the instructions as used, opposed to the language of the instructions as they should have been given, to the evidence received in the case." *Id.*

114. *Id.* (citations omitted).

115. *Id.* (citing Cameron v. Small, 182 S.W.2d 565, 569 (Mo. 1944)).

116. *See id.* "I simply do not believe in the circumstances of this case that it would have made a difference that the jury was asked to determine the issue of Three Rivers' negligence in terms of an 'ordinarily careful' person being very careful, as opposed to that of 'a very careful person.'" *Id.* (citing *Fowler*, 673 S.W.2d at 755). Further, the dissent noted that "the trend in modern tort law is to disclaim varying degrees of care in describing the duty element of negligence." *Id.* (citations omitted).

117. *See id.* at 163-64.

118. *Id.* at 164. Lopez was "not the pilot . . . and had no control of the flight." *Id.*

119. *Id.* (citing Will v. Gillian, 439 S.W.2d 498 (Mo. 1969)).

120. *Id.*

121. *Id.*

122. *See id.* at 158; *see supra* text accompanying note 78.

prejudiced and should receive a new trial.[123] This decision is at odds with legal commentators and current trends across the country.[124] In his treatise, Professor Keeton clearly indicates his preference for a single standard of care to be applied in all negligence cases.[125] Moreover, Professor Keeton argues that there is no real difference if a jurisdiction elects to instruct on varying degrees of care.[126] Even though courts purport to recognize varying degrees of care for different situations and different defendants, rarely do such courts mean "anything more than that greater or lesser care will be required under the circumstances."[127]

The majority utilized only five sentences to determine the standard of care owed by Three Rivers.[128] The court cited a footnote from *Pierce* without discussion of any similarities or differences between it and the case at hand, and simply concluded that any time "electricity is not the agent of injury" the utility is held only to ordinary care.[129] The majority offered no discussion regarding the inherently dangerous propensities of practically invisible power lines at a location Three Rivers knew was dangerous based on previous deaths that occurred in the same manner at the same location. A logical extension of such a blind application of the *Pierce* rule could conceivably shield all electric utilities from liability in "non-electrical" situations that would normally require the highest degree of care. This rule, in determining the degree of care only after an accident occurs, diminishes "the law's ability to promote safe behavior and . . . at least partially circumvent[s] the purposes of Missouri's law of negligence."[130]

The conclusion and analysis of the dissent seems to fall more within the framework established by Missouri courts as well as other courts nationally.[131] While Missouri continues to recognize varying degrees of care, Missouri courts

---

123. *See* Lopez v. Three Rivers Elec. Coop., Inc., 26 S.W.3d 151, 158 (Mo. 2000).

124. *See* KEETON, *supra* note 50, § 34, at 210.

> Although the idea of 'degrees of negligence' has not been without its advocates, it has been condemned by most writers, . . . it adds only difficulty and confusion to the already nebulous and uncertain standards which must be given to the jury. The prevailing rule in most situations is that there are no 'degrees' of care or negligence, as a matter of law; there are only different amounts of care, as a matter of fact.

KEETON, *supra* note 50, § 34, at 210-11; *see also* HARPER, *supra* note 52, § 16.13, at 503 & n.13 (citations omitted) ("For the most part . . . modern accident law has repudiated the notion that different degrees of care are exacted of people standing in different relationships to an injured party."); Gilles, *supra* note 44, at 18-20; *supra* note 50.

125. *See* KEETON, *supra* note 50, § 34, at 210. For other commentators with a similar point of view, see HARPER, *supra* note 52, § 16.13, at 503 & n.13.

126. *See* KEETON, *supra* note 50, § 34, at 209.

127. KEETON, *supra* note 50, § 34, at 209.

128. *See Lopez*, 26 S.W.3d at 158.

129. *Id.*; *see supra* text accompanying notes 92-93.

130. Nanninga v. Three Rivers Elec. Coop., Inc., 203 F.3d 529, 532 (8th Cir. 2000).

131. *See supra* notes 50, 124.

also have held that "[t]he care to be exercised in a particular case must always be proportionate to the seriousness of the consequences which are reasonably to be anticipated as a result of the conduct in question."[132] While the majority did not assess the "seriousness of the consequences" of flying into unmarked power lines, the dissent did perform such an analysis.[133] Chief Justice Price noted that the wires "were uniquely dangerous because of their ability to cause almost certain death to the passengers of any aircraft that might strike them."[134] Because Three Rivers was required, even as an ordinary person, to be very careful, there seems little practical difference between the arguments made under either instruction.[135] As Chief Justice Price noted, this case is illustrative of the questionable utility of varying degrees of care.[136]

Adding credence to the dissent's position is the fact that the Eighth Circuit, applying Missouri law to the identical facts in this case, agreed with the dissent's analysis.[137] The Eighth Circuit concluded:

> Had electricity killed the decedent, it appears likely that Missouri courts would apply the duty of the highest degree of care, because such a duty applies even when the exact injury or manner in which it came about is unforeseeable. The mere fortuity that electricity did not in fact cause plaintiffs' decedent any injury is a slim basis on which to distinguish the case law imposing the highest degree of care on suppliers of electricity.[138]

That court also concluded that a rule "leaving the applicable standard of care to be sorted out after an accident occurs . . . would diminish the law's ability to promote safe behavior and . . . at least partially circumvent the purposes of Missouri's law of negligence."[139]

Even conceding multiple degrees of care and that the "highest degree of care" instruction was error, it does not necessarily follow that Three Rivers was prejudiced by this error. The majority offered a more thorough analysis on the issue of prejudice than it did regarding the standard of care, but its logic seems

---

132. Bronson v. Kansas City, 323 S.W.2d 526, 531 (Mo. Ct. App. 1959) (citing Stumpf v. Panhandle E. Pipeline Co., 189 S.W.2d 223, 227 (Mo. 1945)).

133. *See* Lopez v. Three Rivers Elec. Coop., Inc., 26 S.W.3d 151, 162 (Mo. 2000).

134. *Id.*

135. *Id.* at 163.

136. *See id.* Chief Justice Price indicated a willingness to consider a single standard of care and acknowledged that "the trend in modern tort law is to disclaim varying degrees of care in describing the duty element of negligence." *Id.* (citations omitted).

137. *See* Nanninga v. Three Rivers Elec. Coop., 203 F.3d 529, 532 (8th Cir. 2000); *see also* text accompanying note 110.

138. *Nanninga*, 203 F.3d at 532 (citations omitted).

139. *Id.*

at odds with that of legal scholars and precedent.[140] In determining whether prejudice actually existed in this case, the court should have examined the practical difference between the "highest degree of care" instruction and the "ordinary care" instruction.[141] Because anyone flying into the power lines crossing the river would probably be killed or seriously injured, even under ordinary care, Three Rivers should be required to use a very high standard of care.[142] Any error imparted to the jury must have been slight.[143]

VI. CONCLUSION

The Missouri Supreme Court established in *Lopez* that ordinary care is all that is required by the owner of a utility in warning aircraft of dangerous power lines.[144] The court reaffirmed that Missouri will continue to recognize varying standards of care depending upon the circumstances of injury.[145] Further, with regard to electric utilities, the court indicated that power companies will be held to "the highest standard of care" only when the injury is caused by the inherently dangerous properties of electricity.[146] Because instructing the jury regarding a higher degree of care than required by law will be held to be reversible error, attorneys must carefully evaluate whether the dangers involved in a particular situation will require such a higher degree of care. With respect to electricity, it seems that only injury from electrocution will meet such a requirement. However, *Lopez*'s 4-3 decision indicates a firm disagreement within the court. While the majority decision indicates adherence to the traditional rule in Missouri regarding the standard of care, Chief Justice Price's dissent favors at least the application of the "highest standard of care" to any injury resulting from a dangerous instrumentality and at most a move toward the single standard of care endorsed by legal scholars. Such a controversy suggests that this is a decision that could be revisited should the composition of the court change.

BRETT A. EMISON

---

140. *See supra* notes 50-59 and accompanying text.

141. This is the argument urged by Chief Justice Price in his dissent. *See* Lopez v. Three Rivers Elec. Coop., Inc., 26 S.W.3d 151, 163 (Mo. 2000).

142. *See* Cameron v. Small, 182 S.W.2d 565, 569 (Mo. 1944) ("The exercise of ordinary care as defined by our instructions must be 'commensurate with the dangers to be apprehended.'"); Bronson v. Kansas City, 323 S.W.2d 526, 531 (Mo. Ct. App. 1959) ("[T]he care to be exercised in a particular case must always be proportionate to the seriousness of the consequences which are reasonably to be anticipated as a result of the conduct in question.").

143. *See supra* note 116 and accompanying text.

144. *Lopez*, 26 S.W.3d at 158.

145. *See id.*

146. *See id.*