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Recent Cases

NEGLIGENCE—LIABILITY TO CHILD TRESPASSER—ATTRACTIVE NUISANCE

*Hull v. Gillioz*¹

Plaintiff, an eight year old child, sued to recover damages for personal injuries sustained from the falling of a heavy iron beam upon her. The beams were piled in layers on end, on an unfenced lot near the sidewalk. The lot had been

1. 130 S. W. (2d) 623 (Mo. 1939).

habitually used as a playground by children. The beam which fell had become loose, and the children would "rock" it on its base, making a great deal of noise. Plaintiff's evidence showed that defendant's employees had been notified of the dangerous condition. In affirming a judgment for the plaintiff, the court found the evidence sufficient under the attractive nuisance doctrine to sustain the plaintiff's case.

It has been generally recognized that the law imposes no duty upon the owner of land towards those who come there solely for their own convenience or pleasure, and who are not expressly invited or induced to come there by the purpose for which the premises are appropriated and occupied, or by some preparation or adaptation of the place for use by customers or passengers which might naturally and reasonably lead them to believe they may properly and safely enter.² One of the more outstanding exceptions to this rule has been the doctrine of attractive nuisance which prevails in some jurisdictions.

The doctrine, as set forth by the *Restatement*³ and cited by the court in the principle case, is that "a possessor of land is subject to liability for bodily harm to young children trespassing thereon caused by a structure or other artificial condition which he maintains upon the land, if (a) the place where the condition is maintained is one upon which the possessor knows or should know that such children are likely to trespass, and (b) the condition is one of which the possessor knows or should know and which he realizes or should realize as involving an unreasonable risk of death or serious bodily harm to such children, and (c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling in it or in coming within the area made dangerous by it, and (d) the utility to the possessor of maintaining the condition is slight as compared to the risk to young children involved therein."

The doctrine had its origin in the English case of *Lynch v. Nurdin*,⁴ although that case is not strictly in point in the usual situation where the exception is urged, as it involved meddling with an unattended horse and wagon in a street, rather than a trespass to land. The leading case in this country in support of the doctrine is *Sioux City & P. R. R. v. Stout*,⁵ which recognized that a railroad turntable was such an attractive nuisance as to allow recovery for injuries sustained by a child thereon.

The courts have encountered some logical difficulty in finding a reason for the rule. It cannot be based upon the maxim "*Sic utere tuo ut non alienum*

2. *Straub v. Soderer*, 53 Mo. 38 (1873); *Peters v. Bowman*, 115 Cal. 345, 47 Pac. 113, 598 (1896); *Pastorello v. Stone*, 89 Conn. 286, 93 Atl. 529 (1915); *Sweeny v. Old Colony & N. R. R.*, 10 Allen 368 (Mass. 1865); *Dobbins v. Missouri, K. & T. Ry.*, 91 Tex. 60, 41 S. W. 62 (1897).

3. *RESTATEMENT, TORTS* (1934) § 339.

4. 1 Q. B. 30 (1841). There has been some controversy as to whether this case is authority for the doctrine. The court has discussed the matter in *Friedman v. Snare & Triest Co.*, 71 N. J. L. 605, 61 Atl. 401 (1905); *Walsh v. Fitchburg R. R.*, 145 N. Y. 301, 39 N. E. 1068 (1895); *Bottum's Adm'r v. Hawks*, 84 Vt. 370, 79 Atl. 858 (1911); *Conrad v. Baltimore & Ohio R. R.*, 64 W. Va. 176, 61 S. E. 44 (1908); *Cooke v. Midland G. W. Ry.* [1909] A. C. 229. See cases collected in Note (1925) 36 A. L. R. 34, 46.

5. 17 Wall. 657 (U. S. 1874).

laedus,"—that is, that everyone must so use his own property as not to injure the property of others, for the injury occurs on the owner's property and does not flow off onto another person's land. It is not, therefore, a nuisance. The rule cannot be grounded on "implied invitation," for in most cases the owner has made efforts which clearly negative any implied invitation that might have been set up. Moreover, such a reason, carried to its logical conclusion, would make the owner liable for natural conditions on the land. It is clear, then, that the doctrine is based on the sound policy of trying to preserve human life and limb by restricting the owner's use of his property.⁶

Missouri courts have held the doctrine applicable in the cases of railroad turntables and small push cars,⁷ but have refused to extend the doctrine to other fact situations.⁸ The one seemingly discordant supreme court decision⁹ was later overruled.¹⁰

6. See opinion of Faris, J. in *Buddy v. Union Terminal Ry.*, 276 Mo. 276, 207 S. W. 821 (1918); *Kelly v. Benas*, 217 Mo. 1, 116 S. W. 557 (1909). Despite the logical difficulties of their views, however, several Missouri cases base their decisions on the theory of "implied invitation." *Witte v. Stifel*, 126 Mo. 295, 28 S. W. 891 (1895); *Berry v. St. Louis, M. & S. E. R. R.*, 214 Mo. 593, 114 S. W. 27 (1908); *Kelly v. Benas*, *supra*; *Compton v. Missouri Pac. Ry.*, 147 Mo. App. 414, 126 S. W. 821 (1910); *Houck v. Chicago & A. Ry.*, 116 Mo. App. 559, 92 S. W. 738 (1906). In *Hight v. American Bakery Co.*, 168 Mo. App. 431, 151 S. W. 776 (1912), the court stated that the rule was to be invoked to meet the defense of contributory negligence, rather than as a foundation for liability, but there seems to be no other support for the statement in this jurisdiction. For a general discussion of the reasoning substantiating the rule see Smith, *Liability of Landowners to Children Entering Without Permission* (1898) 11 HARV. L. REV. 349, 434; *McCleary, Liability of a Possessor of Land in Missouri to Persons Injured While on the Land* (1936) 1 Mo. L. REV. 45, 49; Note (1923) 26 U. OF MO. BULL. L. SER. 32.

7. *Koons v. St. Louis & I. M. R. R.*, 65 Mo. 592 (1877) (turntable); *Nagel v. Missouri Pac. Ry.*, 75 Mo. 653 (1882) (turntable); *Berry v. St. Louis M. & S. E. R. R.*, 214 Mo. 593, 114 S. W. 27 (1908) (turntable); *Morrison v. Phelps Stone Co.*, 203 Mo. App. 142, 219 S. W. 393 (1920) (push cars).

8. *Overholt v. Vieths*, 93 Mo. 422, 6 S. W. 74 (1887) (rock quarry); *Barney v. Hannibal & St. J. Ry.*, 126 Mo. 372, 28 S. W. 1069 (1894) (ladder on train); *Witte v. Stifel*, 126 Mo. 295, 28 S. W. 891 (1895) (stone on cellar window frame); *Moran v. Pullman Palace Car Co.*, 134 Mo. 641, 36 S. W. 659 (1896) (pond); *Butz v. Cavanaugh*, 137 Mo. 503, 38 S. W. 1104 (1897) (burning debris in quarry); *Arnold v. City of St. Louis*, 152 Mo. 173, 53 S. W. 900 (1899) (ice on pond); *Kelly v. Benas*, 217 Mo. 1, 116 S. W. 557 (1909) (lumber negligently piled); *O'Hara v. Laclede Gas Light Co.*, 244 Mo. 395, 148 S. W. 884 (1912) (iron pipes in city street); *Buddy v. Union Terminal Ry.*, 276 Mo. 276, 207 S. W. 821 (1918) (railroad cars on sidetrack); *State ex rel. Kansas City v. Ellison*, 281 Mo. 667, 220 S. W. 498 (1920) (retaining wall around reservoir); *Rallo v. Heman Constr. Co.*, 291 Mo. 221, 236 S. W. 632 (1921) (pond in quarry); *Howard v. St. Joseph Transmission Co.*, 316 Mo. 317, 289 S. W. 597 (1926) (high voltage wire); *Smith v. Dold Packing Co.*, 82 Mo. App. 9 (1899) (burning ash pile); *Marcheck v. Klute*, 133 Mo. App. 280, 113 S. W. 654 (1908) (hay chutes in a loft); *Compton v. Missouri Pac. Ry.*, 147 Mo. App. 414, 126 S. W. 821 (1910) (railroad cars near public crossing); *Houck v. Chicago & A. Ry.*, 116 Mo. App. 559, 92 S. W. 738 (1906) (machinery in railroad pumphouse); *Williams v. Kansas City, Clay County & St. J. Ry.*, 222 Mo. App. 865, 6 S. W. (2d) 48 (1928) (pond), (1929) 15 VA. L. REV. 175; *Kemp v. Doe Run Lead Co.*, 34 S. W. (2d) 1002 (Mo. App. 1931) (pond); see, *Harakas v. Dickie*, 224 Mo. App. 171, 23 S. W. (2d) 651 (1929) (defective porch railing).

9. *Schmidt v. Kansas City Distilling Co.*, 90 Mo. 284, 1 S. W. 865 (1886) (pool formed by discharge of escape pipe from boiler).

10. *Barney v. Hannibal & St. J. Ry.*, 126 Mo. 372, 28 S. W. 1069 (1895).

The court in the instant case cited four decisions of the Missouri Courts of Appeals¹¹ to sustain its departure from the settled law. Three of these cases would clearly seem to be disapproved by later decisions, while the fourth was the latest existing decision on the doctrine until the action of the supreme court in the principle case.

The court suggests a possible reconciliation of the previous Missouri limitations of the doctrine with the view of the *Restatement*¹² on the ground that the utility of the objects in question to the owners was of such importance that it precluded the imposition of a duty upon him to change the situation. The court, however, lays down two limitations which conflict with the position taken by the *Restatement*. First, the doctrine applies in Missouri only where the trespasses are due to the attraction of a dangerous instrumentality or condition, rather than applying to conditions and instrumentalities that the children could not see or know of without first trespassing. Second, the doctrine is limited to conditions and instrumentalities which are inherently dangerous rather than those in which danger has been created by mere casual negligence under particular circumstances. The first limitation is in accord with the former limitation of the federal courts set forth in *United Zinc & Chemical Co. v. Britt*.¹³

A number of jurisdictions have refused to sanction this exception to the liability of a landowner to trespassers,¹⁴ but a larger number have accepted it, subject to a great number and types of limitations.¹⁵ The Missouri courts have

11. *Fink v. Missouri Furnace Co.*, 10 Mo. App. 61 (1881) (excavated land); *Dwyer v. Missouri Pac. Ry.*, 12 Mo. App. 597 (1882) (memorandum case not reported, irons placed on railway trestle); *Leeright v. Ahrens*, 60 Mo. App. 118 (1894) (unfenced cistern); *Anderson v. Chicago G. W. R. R.*, 71 S. W. (2d) 508 (Mo. App. 1934) (iron wheels on railroad track). The court in applying the doctrine said that it did so "without extending the doctrine of the turntable cases."

12. *RESTATEMENT, TORTS* (1934) § 339.

13. 258 U. S. 268 (1922) (poisoned water in an empty basement), discussed at length in Hudson, *The Turntable Cases in the Federal Courts* (1923) 36 HARV. L. REV. 326; Note (1923) 26 U. OF MO. BULL. L. SER. 32.

14. *Wilmot v. McPadden*, 79 Conn. 367, 65 Atl. 157 (1906); *McMinn v. New England Tel. & Tel. Co.*, 113 Me. 519, 95 Atl. 210 (1915); *Ryan v. Towar*, 128 Mich. 463, 87 N. W. 644 (1901); *Frost v. Eastern R. R.*, 64 N. H. 220, 9 Atl. 790 (1887); *Turess v. New York, S. & W. R. R.*, 61 N. J. L. 314, 40 Atl. 614 (1898); *Walsh v. Fitchburg R. R.*, 145 N. Y. 301, 39 N. E. 1068 (1895); *Wheeling & L. E. R. R. v. Harvey*, 77 Ohio St. 235, 83 N. E. 66 (1907); *Thompson v. Baltimore & O. R. R.*, 218 Pa. St. 444, 67 Atl. 768 (1907); *Paolino v. McKendall*, 24 R. I. 432, 53 Atl. 268 (1902); *Walker's Adm'r v. Potomac, F. & P. R. R.*, 105 Va. 226, 53 S. E. 113 (1906); *Ritz v. City of Wheeling*, 45 W. Va. 262, 31 S. E. 993 (1898).

15. *Alabama G. S. R. R. v. Crocker*, 131 Ala. 584, 31 So. 561 (1901) (evidence insufficient); *Nashville Lumber Co. v. Busbee*, 100 Ark. 76, 139 S. W. 301 (1911); *Barrett v. Southern Pac. Co.*, 91 Cal. 296, 27 Pac. 666 (1891); *Denver City Tramway Co. v. Nicholas*, 35 Colo. 462, 84 Pac. 813 (1906); *Stark v. Holtzclaw*, 90 Fla. 207, 105 So. 330 (1925); *Ferguson v. Columbus & Rome Ry.*, 75 Ga. 637 (1885); *York v. Pacific & N. Ry.*, 8 Idaho 574, 69 Pac. 1042 (1902); *City of Pekin v. McMahon*, 154 Ill. 141, 39 N. E. 484 (1895); *Chicago & Erie R. R. v. Fox*, 38 Ind. App. 268, 70 N. E. 81 (1904); *Edgington v. Burlington C. R. & N. Ry.*, 116 Ia. 410, 90 N. W. 95 (1902); *Kansas Cent. Ry. v. Fitzsimmons*, 22 Kan. 477 (1879); *Bransom's Adm'r v. Labrot*, 81 Ky. 638 (1884); *Keffe v. Milwaukee & St. Paul Ry.*, 21 Minn. 207 (1875); *A. & N. R. v. Bailey*, 11 Neb. 332, 9 N. W. 50 (1881); *Kramer v. Southern Ry.*, 127 N. C. 323, 37 S. E. 468 (1900); *City of Shawnee v. Cheek*, 41 Okla. 227, 137 Pac. 724 (1913); *Hayes v. Southern Power Co.*, 95 S. C. 230, 78 S. E. 956 (1913); *Baxter v. Park*, 44 S. D. 360, 184 N. W.

always been hesitant in their advancement of the doctrine. The instant case allows an application of the doctrine in many situations where its use would formerly have been barred, while at the same time it preserves a check against too loose an extension. Such restrictions are desirable, for the doctrine is an exception to an accepted rule, and it should not be carried so far as to impose too much responsibility on the possessor. Furthermore, the restrictions, while *dicta* in the principal case, operate as a guide in future situations in determining the scope of the doctrine. The Missouri view does allow an encroachment upon the property rights of the possessor, but there has been a steady development in this direction in the law, and the possessor can no longer use his land exactly as he pleases.¹⁶

JOHN H. GUNN

NEGLIGENCE—LIABILITY OF A POSSESSOR OF LAND TO A SOCIAL GUEST

*Mann v. Pulliam*¹

The plaintiff, on the express invitation of the defendant, spent the entire afternoon and evening of the day her accident occurred making a purely social visit at the home of the defendant. As she was leaving, about 10:30 in the evening, she came upon the steps of the porch, the last of which, being made of concrete and having the same color as the walk below, reflected the light from the street and porch in such a manner so as to give the illusion that the walk

198 (1921); *East Tennessee & W. N. C. R. R. v. Cargille*, 105 Tenn. 628, 59 S. W. 141 (1900); *San Antonio & A. P. Ry. v. Morgan*, 92 Tex. 98, 46 S. W. 28 (1898); *Brown v. Salt Lake City*, 33 Utah 222, 93 Pac. 570 (1908); *Bjork v. City of Tacoma*, 76 Wash. 225, 135 Pac. 1005 (1913); *Herrem v. Konz*, 165 Wis. 575, 162 N. W. 654 (1917).

16. For Missouri cases which are distinguishable on their facts from instances in which the courts will allow the application of the doctrine, or where the courts have attempted to make such a distinction, see *Rushenbergh v. St. Louis, I. M. & S. Ry.*, 109 Mo. 112, 19 S. W. 216 (1891) (no negligence); *Carey v. Kansas City*, 187 Mo. 715, 86 S. W. 438 (1905) (no negligence); *Capp v. City of St. Louis*, 251 Mo. 345, 158 S. W. 616 (1913) (child held not to be a trespasser, but two judges dissented); *Shaw v. Chicago & A. R. R.*, 184 S. W. 1151 (Mo. 1916); *Davoren v. Kansas City*, 308 Mo. 513, 273 S. W. 401 (1925) (child held to be a licensee, although a vigorous dissent held he was a trespasser); *Kelley v. Parker-Washington Co.*, 107 Mo. App. 490, 81 S. W. 631 (1904) (child not trespasser); *Hillerbrand v. May Mercantile Co.*, 141 Mo. App. 122, 121 S. W. 326 (1909) (child not trespasser); *Hall v. Missouri & Kansas Tel. Co.*, 141 Mo. App. 183, 124 S. W. 557 (1910) (pulley held not to be dangerous contrivance); *Hight v. American Bakery Co.*, 168 Mo. App. 431, 151 S. W. 776 (1912) (no negligence); *Nation v. City of St. Joseph*, 5 S. W. (2d) 1106 (Mo. App. 1928) (child was invitee); *Dutton v. City of Independence*, 227 Mo. App. 275, 50 S. W. (2d) 161 (1932); *Blavatt v. Union Elec. L. & P. Co.*, 335 Mo. 151, 71 S. W. (2d) 736 (1934) (lack of duty or lack of breach?) noted in *N. (1936)* 1 Mo. L. Rev. 366. For an exhaustive survey of the doctrine, see Note (1925) 36 A. L. R. 34, supplemented in (1926) 45 A. L. R. 982, (1928) 53 A. L. R. 1344, (1929) 60 A. L. R. 1444; Note (1914) 2 U. OF MO. BULL. L. SER. 41; Note (1938) 36 Mich. L. Rev. 1024. On the earlier Missouri cases, see Clark, *Tort Liability for Negligence in Missouri* (1915) 7 U. OF MO. BULL. L. SER. 3, 14.

1. 127 S. W. (2d) 426 (Mo. 1939).

had been reached, so that as she stepped forward the unexpected drop caused her to lose her balance and fall, receiving the injuries for which she sues. There was no showing of knowledge of the condition on the part of the defendant. The court, reasoning that the risk of injury was not foreseeable, held that the defendant was not guilty of actionable negligence, disposing of the case on that basis.

What authority there is in the cases has consistently held that a social guest who comes on the premises by the possessor's invitation or permission comes for his own benefit, thus not according him the status of a business visitor or invitee as he is called in Missouri. To be considered of benefit to the possessor of the premises, the object of the visit must be commercial, and not the mere intangible benefit of social intercourse. The English case of *Southcote v. Stanley*² is the leading authority on the problem, and holds that the social guest becomes nothing more than a gratuitous licensee and as such is owed only the degree of care usually accorded them. The English precedent has been closely followed in the two leading cases decided in this country.³

The Missouri court, in the leading case of *Glaser v. Rothschild*,⁴ held that "A bare licensee (barring wantonness, or some form of intentional wrong or active negligence by the owner or occupier) takes the premises as he finds them." As a licensor, the host owes his social guest a duty to use care in his affirmative conduct, but is not responsible for the condition of the premises.⁵ The host is not required to achieve a greater safety and security for his guest than that which he maintains for himself or his family. A social guest must, therefore, take the premises as he finds them.

Contrary to these authorities, the *Restatement of the Law of Torts*⁶ takes the position that a possessor of land is liable to a licensee for a dangerous condition if he knows of it and if he invites or permits the licensee to enter or remain, unless he warns of the danger or makes the condition reasonably safe. This does not seem to be an unreasonable burden.

2. 1 H. & N. 246 (1857).

3. *Comeau v. Comeau*, 285 Mass. 578, 189 N. E. 588 (1933); *Greenfield v. Miller*, 173 Wis. 184, 180 N. W. 834 (1920); (1921) 19 MICH. L. REV. 572. These cases have been followed in *Pearson v. Mallory S. S. Co.*, 278 Fed. 175 (C. C. A. 5th, 1922); *Plummer v. Dill*, 156 Mass. 426, 427, 31 N. E. 128, 129 (1892); *West v. Poor*, 196 Mass. 183, 81 N. E. 960 (1907); *Cleary v. Eckart*, 191 Wis. 114, 210 N. W. 267 (1926); see *O'Shea v. Lavoy*, 175 Wis. 456, 185 N. W. 525 (1921) (automobile guest).

4. 221 Mo. 180, 120 S. W. 1 (1909).

5. *Glaser v. Rothschild*, 221 Mo. 180, 120 S. W. 1 (1909). In *Carr v. Missouri Pac. Ry.*, 195 Mo. 214, 227, 92 S. W. 874, 878 (1906), the court says, "Indeed, the doctrine that a naked license or permission to enter or pass over premises will not create a duty or impose an obligation on the part of the owner towards the licensee to provide against danger or accident, is so elementary that it cannot be questioned." *Straub v. Soderer*, 53 Mo. 38 (1873); *Moore v. Wabash, St. L. & Pac. Ry.*, 84 Mo. 481 (1884); *Barney v. Hannibal & St. J. Ry.*, 126 Mo. 372, 28 S. W. 1069 (1894); *Wencker v. Missouri K. & T. Ry.*, 169 Mo. 592, 70 S. W. 145 (1902); *Eisenberg v. Missouri Pac. Ry.*, 33 Mo. App. 85 (1888); *Shaw v. Goldman*, 116 Mo. App. 332, 92 S. W. 165 (1906); *Behre v. Hemp & Co.*, 191 S. W. 1038 (Mo. App. 1917); *Statkunas v. Promboim & Son Inc.*, 274 Mass. 515, 174 N. E. 919 (1930); *Greenfield v. Miller*, 173 Wis. 184, 180 N. W. 834 (1920).

6. RESTATEMENT, TORTS (1934) § 342.

The holding in the principal case is subject to two interpretations. The court may be attempting to follow the position of the Restatement, thus holding that a licensor owes a duty to warn or make safe if there was a known dangerous condition, a fact of which no mention was made. However, the more likely interpretation is that, even if a risk of injury could have been foreseen by the plaintiff, no duty would have been owed the defendant.

EDWARD E. MANSUR, JR.

NEGLIGENCE—HUMANITARIAN DOCTRINE—RESTRICTED TO PUBLIC PLACES

*State ex rel. Brosnahan v. Shain*¹

Plaintiff's husband, a trashman, was employed to remove the rubbish from defendant's premises, which he did by means of a pushcart, operated over defendant's private driveway. While so engaged, the deceased was run over and killed by defendant's car, as defendant backed it from the garage. Plaintiff recovered under the humanitarian doctrine as applied to discoverable peril. This was upheld by the Kansas City Court of Appeals.² On *certiorari*, the supreme court denied a recovery on the ground that the humanitarian doctrine as to discoverable obliviousness was limited to places which were either public places, or in the nature of public places because they are frequented and used by many people.³

The early cases of this type, to which the humanitarian doctrine was applied, involved railroads.⁴ The court felt that as a matter of public policy this insurer's liability should be imposed upon the operators of such dangerous instrumentalities.⁵ However, the court soon extended the doctrine to cases involving street railways,⁶ and from street railways the doctrine was extended to automobile accidents on public streets and highways.⁷ In 1930, a pedestrian re-

1. 126 S. W. (2d) 1193 (Mo. 1939).

2. *Powell v. Brosnahan*, 115 S. W. (2d) 140 (Mo. App. 1938).

3. *State ex rel. Brosnahan v. Shain*, 126 S. W. (2d) 1193, 1196 (Mo. 1939).

4. *Kellny v. Missouri Pac. Ry.*, 101 Mo. 67, 13 S. W. 806 (1890); *Hanlon v. Missouri Pac. Ry.*, 104 Mo. 381, 16 S. W. 233 (1891); *Guenther v. St. Louis, I. M. & S. Ry.*, 108 Mo. 18, 18 S. W. 846 (1891); *Tobin v. Missouri Pac. Ry.*, 18 S. W. 996 (Mo. 1891); *Schlereth v. Missouri Pac. Ry.*, 19 S. W. 1134 (Mo. 1892); *Sullivan v. Missouri Pac. Ry.*, 117 Mo. 214, 23 S. W. 149 (1893); *Lloyd v. St. Louis, I. M. & S. Ry.*, 128 Mo. 595, 29 S. W. 153 (1895); *Gaines, The Humanitarian Doctrine in Missouri* (1935) 20 *St. Louis L. Rev.* 113, 118.

5. *Czezewzka v. Benton-Bellefontaine Ry.*, 121 Mo. 201, 25 S. W. 911 (1893).

6. *Linder v. St. Louis Transit Co.*, 103 Mo. App. 574, 77 S. W. 997 (1903); *Klockenbrink v. St. Louis & M. R. R.*, 172 Mo. 678, 72 S. W. 900 (1903); *Werner v. Citizens' Ry.*, 81 Mo. 368 (1884); *Borders v. Metropolitan St. Ry.*, 168 Mo. App. 172, 153 S. W. 72 (1912).

7. *Hornbuckle v. McCarty*, 295 Mo. 162, 243 S. W. 327 (1922); *Karte v. J. R. Brockman Mfg. Co.*, 247 S. W. 417 (Mo. 1922); *Burke v. Pappas*, 316 Mo. 1235, 293 S. W. 142 (1927); *Reith v. Tober*, 8 S. W. (2d) 607 (Mo. 1928); *Disano v. Hall*, 14 S. W. (2d) 483 (Mo. App. 1929).

covered under the doctrine for damages sustained when she was hit by a bicycle.⁸

Although the Missouri courts have greatly widened the application of the doctrine, the cases have included only instances where the operator of the instrumentality was under a legal duty to keep a continuous lookout.⁹ There is a continuing obligation on those in charge of locomotives and street cars to keep a lookout at all places where they come upon, or cross over, public streets or highways. Likewise, there is a duty to keep a lookout at places where the public has been permitted such a use of the tracks that the presence of persons there should be reasonably anticipated.¹⁰ The driver of an automobile is required by statute¹¹ to use the highest degree of care in looking out for all persons at all times.¹²

In the case of *Dale v. Hill-O'Meara Construction Co.*,¹³ defendants were contractors for the erection of a building on the grounds of the Louisiana Purchase Exposition. Plaintiff was employed to do certain grading around the building, and while engaged in such task was struck by a rafter dropped by a carpenter working above him. Plaintiff's negligence in failing to notice that a carpenter was working above him, sawing off rafters that might fall and cause him injury, did not prevent his recovery for such injury, where the carpenter knew, or by the exercise of ordinary care could have known, of the workman's peril so as to avoid it. Although the place of the accident was not a public place in the sense of a railroad crossing or a public intersection, the case can be distinguished from, and reconciled with, the principal case in that there were numerous workmen present, giving to the scene of the accident the nature of a public place because it was frequented and used by many people.

The limitation of the application of the humanitarian doctrine to public places, or places in the nature of public places, is a desirable limitation.¹⁴ Yet, why should it be so restricted if it is intended to operate as a form of social insurance where the defendant can pay? In the early history of the doctrine, when it was applied to railroad and street car companies, the burden of the judgment could be passed on to the public in the form of increased rates and

8. *Gordan v. Postal Telegraph-Cable Co.*, 24 S. W. (2d) 644 (Mo. App. 1929).

9. *Mayfield v. Kansas City So. Ry.*, 337 Mo. 79, 91, 85 S. W. (2d) 116, 123 (1935); *Otis, The Humanitarian Doctrine* (1912) 46 AMER. L. REV. 381, 394.

10. *Murphy v. Wabash R. R.*, 228 Mo. 56, 128 S. W. 481 (1910); *Dalton v. Missouri, K. & T. Ry.*, 276 Mo. 663, 208 S. W. 828 (1919); *Hubbard v. Wabash R. R.*, 193 S. W. 579 (Mo. 1917); *Rice v. Jefferson City Bridge & Transit Co.*, 216 S. W. 46 (Mo. 1919); *Eppstein v. Missouri Pac. Ry.*, 197 Mo. 720, 94 S. W. 967 (1906).

11. MO. REV. STAT. (1929) § 7775.

12. *Gude v. Weick Bros. Undertaking Co.*, 322 Mo. 778, 16 S. W. (2d) 59 (1929); *Hart v. Weber*, 53 S. W. (2d) 914 (Mo. 1932).

13. 108 Mo. App. 90, 82 S. W. 1092 (1904).

14. See last chance limitations which exclude cases of the type of the instant case where both parties are inattentive: RESTATEMENT, TORTS (1934) §§ 479-480; Notes 1934) 92 A. L. R. 47, (1939) 119 A. L. R. 1041; 20 R. C. L. 138-144; 45 C. J. 984 (doctrine limited to actually discovered peril, or discoverable helplessness—not extended to discoverable obliviousness.)

fares. In the automobile cases, however, this was never possible. So why should it make any difference where the automobile did the striking, so long as there was a duty to keep a lookout for persons of the class to which the plaintiff belonged? But the entire doctrine is full of anomalies.

J. LYNDON STURGIS