

1940

Bases of the Humanitarian Doctrine Reexamined

Glenn A. McCleary

Follow this and additional works at: <https://scholarship.law.missouri.edu/mlr>



Part of the [Law Commons](#)

Recommended Citation

Glenn A. McCleary, *Bases of the Humanitarian Doctrine Reexamined*, 5 *MO. L. REV.* (1940)
Available at: <https://scholarship.law.missouri.edu/mlr/vol5/iss1/8>

This Article is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Missouri Law Review by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact bassettcw@missouri.edu.

THE BASES OF THE HUMANITARIAN DOCTRINE REEXAMINED

GLENN A. MCCLEARY*

The only justification for any important doctrine of law is that it contributes toward some desired social end as determined by settled economic and social convictions prevalent at that period and place. There can be no eternal principles so long as law deals with social values, because the latter are constantly changing. For example, look at the interesting history of change in the doctrine of contributory negligence. Due to the unmitigated individualism of the common law, the law would not take better care of the plaintiff than he would take of himself. Therefore, his negligence was a complete bar to any relief from a negligent defendant. This harsh doctrine was alleviated partially by last chance exceptions which received birth in 1842. Today, by statutes, we see a further development in favor of our negligent plaintiff through notions of comparative negligence or proportional fault, by reducing the amount of the plaintiff's recovery based upon his own contribution to his injury. With these developments no one can raise very potent objections, for after all the defendant was at fault and, under any of these notions, the defendant must have been more at fault in the crisis than was the plaintiff. Hence, there can be little weight in his contention that he should escape all liability.

All important legal doctrines should be reexamined periodically to see if shifting values in their legal and social bases demand change or modification in the doctrine itself. In reexamining these social bases there should be no hesitancy to venture merely because a principle has been in the books for over fifty years. Look at the recent development in Missouri in the field of attractive nuisance, or the liability of a possessor of land to infant trespassers who are injured while on the land. On reexamining the legal and social bases of the attractive nuisance doctrine, the Missouri Supreme Court decided that it should be broadened beyond the turntable cases.¹

*Acting Dean and Professor of Law, University of Missouri. A.B., Ohio Wesleyan University, 1917; J.D., University of Michigan, 1924; S.J.D., Harvard, 1936.

1. See *Hull v. Gillioz*, 130 S. W. (2d) 623 (Mo. 1939), and the discussion of the case in (1939) 4 Mo. L. Rev. 466. While the court endeavored to show a legal basis for its decision, the considerations motivating the court were social.

This is the only way the common law can have a healthy growth. If it cannot thus adapt itself, our judge made law will more and more be replaced by legislation.

It is the purpose of this study to reexamine the legal and social bases of the principle of law which permits a contributorily negligent plaintiff to recover from a negligent defendant whose moral or social level of fault is no different from that of the plaintiff himself, and to suggest the desirability of a reexamination of the legal and social bases of the humanitarian doctrine as it is known and applied in Missouri in that situation where both parties were inattentive to the harm threatened by their inattentiveness.² Certain principles in the law of negligence have been so universally recognized and accepted as achieving desired social ends that little discussion has arisen to demand a reexamination of their usefulness or desirability. Contributory negligence fitted into the individualism of the common law so neatly that only fairly recently has this harsh doctrine been softened by the application of comparative negligence or proportional fault. Last chance principles had partially softened some of the effects of contributory negligence without ruffling to much extent professional thinking. But the extended care for a contributorily negligent plaintiff through certain aspects of the humanitarian doctrine has never been accepted by the profession to any extent outside of Missouri, nor has it been accepted by the profession in Missouri as being completely satisfactory. In this day of reexamining critically doctrines in the light of new social objectives it seems desirable to look again at the theories, legal and social, which have been employed in attempting to justify a recovery by one person from another in that situation where both have been equally inattentive to the harm threatened by their inattentiveness.

I. THEORY OF LAST CLEAR CHANCE

A. *Doctrinal Theory*

It is not insignificant that it took a donkey, in the celebrated case of *Davies v. Mann*,³ to sponsor a departure from the general proposition that

2. This discussion is directed at the legal and social bases of the humanitarian doctrine as applied to situations where both parties are inattentive to the risk of harm. It does not purport to consider the scope of the doctrine as it has been applied. Such problems as what constitutes the position of peril, whether antecedent negligence of the defendant is to be included within the doctrine, what the pleadings and instructions should show as to the obliviousness of the plaintiff, and other problems are for another treatment which will have to be premised on the acceptance of the doctrine.

3. 10 M. & W. 546 (Ex. 1842).

a contributorily negligent plaintiff may not recover from a negligent defendant. But the donkey in that case undoubtedly was less surprised that it was responsible for the introduction of a new doctrine in the law than future students of the law to see the limits to which a few courts have carried the idea. That it could have been the ancestor for the doctrine of last clear chance and such other hybrids as the doctrine of discovered peril, supervening negligence, the humanitarian doctrine, and other variations, was certainly far remote from either the beast or the judges in that case. The judges there thought, although the plaintiff was negligent in permitting the fettered donkey to be grazing unattended in the highway, that the defendant being able by the use of due care just before the collision to control his team of horses and avoid injury to the donkey, at a time when it was too late for the plaintiff to do so, it was only fair that the plaintiff's contributory negligence should not prevent a recovery—a clear case of physical helplessness on the part of the plaintiff at the moment of the crisis to rescue his property.

The rationale of a doctrine which permits a contributorily negligent plaintiff to recover from a negligent defendant took the form of a fiction in the early cases. But this has always been one of the ways law grows. The fiction was that the rule as to contributory negligence was unchanged.⁴ The last clear chance doctrine was clothed by the soothing dogma of proximate cause, to wit, that the plaintiff's negligence was a remote cause of the injury while the defendant's negligence was the proximate cause. The individualism of the common law would not take better care of the plaintiff than he took of himself, but beginning with *Davies v. Mann* this harsh attitude began to soften through the manipulations of proximate causation. Six years after *Davies v. Mann*, an American court endeavored to put up in full legal doctrine the last clear chance idea, and this Vermont decision gave sufficient satisfaction to the profession at a day when rationalization was very secondary to formulae. There the court said: "This leads our investigation to the question, whether an action can be sustained, when the negligence of the plaintiff and the defendant has mutually co-operated in producing the injury, for which the action is brought. On this question, the following rules will be found established by the authorities. When there has been mutual negligence, and the negligence of each party was the

4. For the fear that if last clear chance is recognized as a new doctrine it would invade the domain of contributory negligence, see *Nehring v. Connecticut Co.*, 86 Conn. 109, 84 Atl. 301 (1912).

proximate cause of the injury, no action whatever can be sustained. In the use of the words 'proximate cause,' is meant negligence occurring at the time the injury happened. In such case no action can be sustained by either, for the reason, 'that as there can be no apportionment of damages, there can be no recovery.' So, where the negligence of the plaintiff is proximate, and that of the defendant remote, or consisting in some other matter than what occurred at the time of the injury, in such case no action can be sustained, for the reason that the immediate cause was the act of the plaintiff himself . . . On the other hand, when the negligence of the defendants is proximate, and that of the plaintiff remote, the action can then well be sustained, although the plaintiff is not entirely without fault."⁵

This formula, which satisfied but did not explain, was (and still is) widely accepted by the courts as the theory underlying last clear chance.⁶ But the most casual analysis of the meaning of proximate cause,⁷ as used by the courts today, clearly shows that the explanation of last chance cannot be based on such a formula. It is elementary for the application of the last chance doctrine that plaintiff has been contributorily negligent. This cannot be unless the negligent act of the plaintiff is necessary to make defendant's negligently created situation effective in harm—that is, he has contributed to the situation which the defendant's negligence has made effective to do harm. By the very idea of contributory negligence the plaintiff's negligent act is one of the proximate causes of his injury.⁸ It

5. *Trow v. Vermont Cent. R. R.*, 24 Vt. 487, 494 (1852). This language is found in many of the earlier Missouri cases. In many of them there was little direct evidence of any contributory negligence at all. See *Brown v. Hannibal & St. J. R. R.*, 50 Mo. 461 (1872), where the question was whether a trespasser using a common path across a railroad track was owed a duty; *O'Flaherty v. Union Ry.*, 45 Mo. 70 (1869). In other cases the court was really dealing with a last chance situation. See extended discussion in note 57, *infra*.

6. See exhaustive comment notes in (1934) 92 A. L. R. 47, and (1939) 119 A. L. R. 1041. This was the position taken by the first writer to attempt a discussion of the humanitarian doctrine. Otis, *The Humanitarian Doctrine* (1912) 46 AM. L. REV. 381, 385.

7. *Adams v. Wiggins Ferry Co.*, 27 Mo. 95 (1858), traces the development, beginning with *Davies v. Mann*, through the *Trow* case and accepts it. That was a case of property (steamboat), and perhaps our first real last clear chance case in Missouri. Of course, last chance cases where property is injured must be treated as involving physical helplessness. The recent editorial notes in (1934) 92 A. L. R. 47, and (1939) 119 A. L. R. 1041, show that many of the best considered modern cases still take this as the explanation. One of the most complete statements in the later cases is found in *Nehring v. Connecticut Co.*, 86 Conn. 109, 84 Atl. 301 (1912). There the court was greatly bothered with the idea of the doctrine of last clear chance invading the contributory negligence domain. But it was able to convince itself that, if properly worked out on the lines of proximate cause, there was no new doctrine or independent principle at all inconsistent with the contributory negligence rule.

8. RESTATEMENT, TORTS (1934) § 463: "Contributory negligence is conduct on the part of the plaintiff which falls below the standard to which he should

is very clear that it is a cause in fact, a cause *sine qua non*; but for the plaintiff's negligence the injury would not have happened. If it would have happened anyway, the plaintiff's conduct could not be considered a cause in fact, and there would be no fault in the plaintiff. Furthermore, if plaintiff's contributory negligence is at all present in this sense—where it is necessary to make the dangerous situation negligently created by the defendant in harm—it must be one of the legal causes of his own injury. Under the most restrictive formula of legal or proximate causation, namely, that the injury must be the natural and probable consequence, in the sense of foresight, of his negligent conduct, the plaintiff's negligence will be one of the proximate causes of his own injury. Where a man's negligence has put himself or his property in a position of peril, that negligence must be a proximate cause of the injury which follows. Here the likelihood of the injury that resulted was one of the very things that made his original act negligent. Probable consequences have always been considered proximate consequences by courts and juries alike.⁹

Unless there is a different idea lurking behind the idea of legal or proximate causation where it is applicable to the plaintiff than where it is to be applied to the defendant, which would be shocking, and "hardly conducive to clear thinking,"¹⁰ the theory in the last chance cases that plaintiff's negligence was not a proximate cause of his injury completely breaks down where the negligence of both the plaintiff and the defendant combined to injure a third person.¹¹ There is no question here but that the third person may recover from either or both on the theory of proximate cause, yet as between the two defendants in a separate suit the injured defendant may recover from the other on a theory of last chance.¹²

conform for his own protection and which is a legally contributing cause, cooperating with the negligence of the defendant in bringing about the plaintiff's harm."

9. James, *Last Clear Chance: A Transitional Doctrine* (1938) 47 YALE L. J. 704, 707. This writer ably rejects the proximate cause theory of the last chance doctrine.

10. Clark, *Tort Liability for Negligence in Missouri* (1916) 12 U. OF MO. L. BULL. L. SER. 3, 29.

11. See *Bradley v. Becker*, 321 Mo. 405, 11 S. W. (2d) 8 (1928), where it was held as between concurrent or joint tort-feasors, each guilty of negligence as to a third person, that neither can say that the burden of liability shall be cast on the other, as neither can invoke the last clear chance doctrine.

12. In *Colorado & S. Ry. v. Western L. & P. Co.*, 73 Colo. 107, 214 Pac. 30 (1923), one wrongdoer, having been compelled to pay damages as to an innocent third person, was allowed to recover those damages from another wrongdoer who had, as between the two, a last clear chance. There is nothing novel in such result. An analogy exists in the cases where the negligence of one may be imputed to another and either or both be held responsible for injuries resulting to a third person; yet as between themselves the situation is as if no third person was involved. See Notes (1929) 62 A. L. R. 442; (1933) 85 A. L. R. 630.

Therefore, to attempt to explain last clear chance cases on grounds of legal (proximate) cause merely clouds the issue and clutters up an opinion with so much talk. When used as a formula for such cases, the courts are using high sounding language barren of usual meaning. Proximate cause is a convenient device for an arbitrary stopping point beyond which the investigation will not be carried (or bear scrutiny, either). Proximate cause formulae take the interpretations of natural cause, direct cause, natural and probable cause, foreseeable cause, substantial factor, efficient cause, and a host of other interpretations. Under any interpretation the plaintiff's contributory negligence is one of the proximate causes of the injury. But here is a ritual convenient for stopping the investigation of causation, not because of logic, but because of a desire to achieve an end based on social desirability. Proximate cause has not infrequently been a convenient ritual for such purpose. Yet this explanation was considered satisfactory in the early Missouri decisions and is still frequently asserted.¹³

The last chance doctrine cannot be explained by logic but only by looking at the economic, social and political ideals of the period in which it came into being. These often are inarticulate factors in the cases, to be sure, but what important doctrine of the law is based entirely upon rationalization? Not only do these factors help to formulate new principles of the law, but they give direction to old established doctrines. They are what has been called the "ideal element" in the law which gives direction to what the profession considers as the body of law.

B. *A Rational Theory*

Many modern cases expressly repudiate the proximate cause theory of last clear chance and treat the doctrine as a true exception to the notion that a contributorily negligent plaintiff cannot recover from a negligent defendant.¹⁴ No attempt is made to explain the doctrine on the logical argument of proximate cause, although the same courts may explain the result in terms of proximate cause which, in these cases, is merely a convenient term to express a conclusion in legal verbiage which has been reached from other and different considerations. The theory of these cases is not

13. *Adams v. Wiggins Ferry Co.*, 27 Mo. 95 (1858), and *Huelsenkamp v. Citizens' Ry.*, 37 Mo. 537 (1866), both based on *Trow v. Vermont Cent. R. R.*, 24 Vt. 487 (1852), cited *supra* note 5, and cases collected in Notes (1934) 92 A. L. R. 47, and (1939) 119 A. L. R. 1041. For other early Missouri cases so explaining the result, see cases cited by Otis, *supra* note 6, at 384, n. 10.

14. See Notes (1934) 92 A. L. R. 47, and (1939) 119 A. L. R. 1041; RESTATEMENT, TORTS (1934) § 467, 479, 480, taking this position.

so open to attack for their basis is not in legal doctrine but in popular notions of fairness to accident victims—perhaps more from a feeling of sympathy for an injured man, for the family or those dependent upon him, the enormity of medical bills and other human factors. The real basis of this theory of the doctrine of last clear chance is that, even where both parties have been negligent, the last responsible actor, according to the community's sense of fairness, should bear the loss. The problem then becomes one of determining the last responsible actor. This is the notion behind such explanations of last clear chance that are paraded under the name of "discovered peril," "supervening negligence," "humanitarian doctrine," and applied to accidents which have happened as a result of the combined negligence of both parties, but where it can be established that one had a later opportunity to avoid the accident. It is, in fact, the explanation of the cases which profess to find the logical proximate cause of the accident.

The real problem, then, in any case in which the doctrine of last clear chance is asserted is to determine who was the last responsible actor in the situation in which both plaintiff and defendant have been negligent. The difficulties at once become apparent. At least two factors must be present before the last responsible actor may be identified in those cases of concurring negligence. The first is that the breach of duty on the part of the defendant, performance of which would have saved the plaintiff from the effects of his own negligence, must have arisen or continued after the peril arose. The Missouri cases identify this situation by contrasting it with primary negligence, the latter meaning breach of duty prior to the time when the peril arose but not continuing subsequent to the plaintiff's negligence. Another way of expressing the same idea is to say that the doctrine is not applicable where the only negligence of the defendant was antecedent. On the other hand, the defendant's breach of duty may have commenced prior to the plaintiff's negligence in placing himself in the danger zone, yet if that duty was a continuing one, the performance of which, after the plaintiff has placed himself in the position of peril, would have enabled the defendant to avert the accident, the defendant has the last chance and is the last responsible actor. The typical example is the failure of the employees of a train to keep a lookout at highway crossings. The breach of this duty may begin prior to the time when plaintiff's position of peril could be discovered, but it continued down to the time when plaintiff had come into the position of peril, and performance of the duty would have disclosed his position in time for the defendant to avert it.

The second factor which must be present, before the defendant can be

a last responsible actor in these cases, is that the defendant could have avoided the accident by the exercise of due care under the conditions that existed when the peril of the injured person was, or should have been, discovered.

II. ANALYSIS OF VARIOUS SITUATIONS

A. *Discovered Physical Helplessness of the Injured Person*

In determining the responsibility where both plaintiff and defendant have contributed to the perils of the situation, the cases usually have been classified into four groups. This classification remains quite adequate for our purpose. The first is where the plaintiff through his negligence has placed himself or his property in a position of peril from which he cannot now, when the danger is imminent, by the exercise of due care, extricate himself. The defendant discovers the peril and realizes, or should realize from the information he possesses, the plaintiff's situation in time to prevent the injury in the exercise of due care.¹⁵ This is the simplest case and one in which any court accepting last clear chance theory of liability will apply the doctrine. Courts limiting the doctrine to "discovered peril," or to "conscious last clear chance," have no difficulty in accepting this type of case. The determination of the last responsible actor requires no philosophic niceties, for in the laymen's view, compared with the defendant's opportunity, the negligent conduct of the plaintiff has come to rest and is no longer operative, at least insofar as the idea of responsibility is concerned. It is not an important consideration which negligence began first; the vital fact is to find which party, in the performance of duty, had the last opportunity to avoid the injury. To be sure, the plaintiff's negligence has contributed to the situation which made the defendant's negligence effective to produce harm and was, therefore, one of the legal or proximate causes of his own injury; but it has been shown that legal doctrine does not explain last clear chance. In some instances the defend-

15. *Id.* at § 479: "A plaintiff who has negligently subjected himself to a risk of harm from the defendant's subsequent negligence may recover for harm caused thereby if, immediately preceding the harm, (a) the plaintiff is unable to avoid it by the exercise of reasonable vigilance and care, and (b) the defendant (1) knows of the plaintiff's situation and realizes the helpless peril involved therein; or (2) knows of the plaintiff's situation and has reason to realize the peril involved therein; or (3) would have discovered the plaintiff's situation and thus had reason to realize the plaintiff's helpless peril had he exercised the vigilance which it was his duty to the plaintiff to exercise, and (c) thereafter is negligent in failing to utilize with reasonable care and competence his then existing ability to avoid harming the plaintiff."

ant's conduct in this type of case will be sufficient to show a disregard of the probable consequences, such an indifference to a known peril to others, that not infrequently the court will call such conduct wanton and reckless, to which negligence of the plaintiff is no defense.¹⁶ The two ideas—last clear chance and wanton and reckless misconduct—may be found in the same case, the court either not recognizing the logical distinction between the two or, where the facts are not clear in this respect, resting the decision on either ground.

B. *Undiscovered Physical Helplessness of the Injured Person*

The second situation has a wider scope than the first. Here we have the same physical inability of the plaintiff by the present exercise of due care to escape from the perilous situation in which he has placed himself by his antecedent negligence, but the defendant is still able by the exercise of due care to avert the accident if he discovers the situation, and the relation of the parties is such that the defendant owes to the plaintiff the duty of reasonable vigilance. The defendant does not see, but in the exercise of his duty owed to the plaintiff he should have seen and appreciated the plaintiff's helpless peril in time to avoid injuring him. While it is true that both have been negligent, the plaintiff's negligence has culminated in a position of peril from which he cannot extricate himself even by the present performance of due care on his part. On the other hand, the defendant's wrong is later than the plaintiff's and at a time when he could control the situation, if only he had taken the precautions which it was his duty to take. In the crisis he is the last responsible actor, according to a laymen's sense of fairness, since he had the last opportunity.¹⁷ Most courts recognize this as falling within the concept of last clear chance, although it has been remarked that the last chance is not so "clear" as in the first situation.¹⁸ Typical examples of this situation are where one negligently catches his foot in a switch frog on a railroad track, or is caught on a railway trestle from which he cannot escape in the crisis and is struck by a train operated without the proper lookout on the part of the train crew which was their duty at this point to keep, and which, if kept, would have enabled them, by the use of the means within their control and under the conditions then existing, to have averted the accident.

16. This is because the plaintiff's conduct is not of the same moral or social level of fault as that of the defendant.

17. See RESTATEMENT, TORTS (1934) § 479, set forth *supra* note 15.

18. See *Leinbach v. Pickwick-Greyhound Lines*, 138 Kan. 50, 65, 23 P. (2d)

The locus of this factual set-up is necessarily greatly restricted in the railway cases since most courts find no duty on the part of the operators of trains to keep a lookout for trespassers, such lookout being required only at highway crossings and other places where numerous persons are known to cross.¹⁹ Furthermore, the situation is restricted to those cases where, assuming a duty to exercise care was owed to the plaintiff, it definitely would have been possible for the defendant in the exercise of due care to avert the accident even had he discovered the danger. The mere possibility as it appears after the accident that he could have averted the injury in the performance of his duty, had he discovered the situation and realized the danger, is not sufficient.

C. *Discovered Mental Obliviousness of the Injured Person*

The third situation is where the plaintiff's inadvertance places him in a position of peril, but he is physically able to extricate himself at any moment before the accident if he uses his senses and becomes conscious of his peril. However, as a result of his negligent inattention he remains oblivious of his danger, while the defendant sees the plaintiff and knows the facts from which he realizes, or from the facts ought to have realized, plaintiff's obliviousness to danger in time to avert the accident, but he fails to utilize with reasonable care his ability to avoid the harm. Here the negligence of the plaintiff without actual knowledge of the danger, continuing up to the moment of impact, or essentially so, stands over against the negligence of the defendant who has actual knowledge of the situation. If last clear chance is explained on proximate cause a recovery would be denied here.²⁰ But most courts regard the defendant as having the last opportunity of avoiding the harm and, therefore, he is the last responsible actor. It is true that either party could, up to the moment of the accident, have avoided the injury in the exercise of due care and, therefore, each was the proximate cause of the result. But their opportunities when compared are easily seen to differ greatly. At the crisis, the opportunity of the plaintiff is limited by his mental alertness and, because of his inattention or preoccupation, he is at the mercy of others; the defendant's opportunity is not mental but physical, not inattention but failure to act reasonably with

19. As to constant trespassers over a limited area, see the leading Missouri decision of *Ahnfeld v. Wabash R. R.*, 212 Mo. 280, 111 S. W. 95 (1908), citing many decisions.

20. See Note (1934) 92 A. L. R. 47, 86, 150.

relation to a known position of danger and, because of his information, he is in control of the situation. Failure to use care under these circumstances may be said actively to increase the danger after the plaintiff's negligence has allowed the situation to get beyond his control. The plaintiff may have the physical ability to avoid it, up to the last moment, but he does not have the mental alertness to control his physical reactions; the defendant has both the mental and physical capacities to avoid the injury. This comparison in such cases does not place the explanation of the doctrine on comparative negligence but does show who is the last responsible actor. Here, as in the first situation, those courts restricting last clear chance to "discovered peril" or to "conscious last clear chance" accept this type of case as falling under the application of the doctrine.

Of course, the defendant in many situations is entitled to assume that the plaintiff will exercise due care with reference to his position of peril, and until he has reasons to suspect the contrary, he cannot be said to know or have reasons to believe that the plaintiff is in any danger. Thus a motorman of a street car may presume that the driver of an automobile will stop before getting into a place of danger of collision with the street car. If there was nothing in the movement of the automobile or in its manner of approach as it neared the crossing, or in the actions of the driver to indicate the contrary, the motorman is entitled to assume that the plaintiff is paying or will pay reasonable attention to his surroundings.²¹ The defendant's realization of the obliviousness of the plaintiff to the peril is looked at objectively from the understanding of the ordinary reasonable man. Thus he may be liable if he fails to exercise reasonable care to avoid injury after he should have realized the plaintiff's obliviousness to the danger, regardless whether or not he actually recognized such ignorance of the peril.²² Where the facts show a dis-

21. *Jordan v. St. Joseph Ry., L., H. & P. Co.*, 38 S. W. (2d) 1042 (Mo. 1931) (automobile—street car); *Clark v. Atchison, T. & S. F. Ry.*, 319 Mo. 865, 6 S. W. (2d) 954 (1928) (automobile—railroad).

22. Undoubtedly many Missouri cases would support the objective theory of knowledge but the question need not be clearly raised because the defendant is liable if he should have seen and realized the danger in time to avoid it, under the fourth category yet to be discussed. The same idea is involved in those cases where the defendant is entitled to assume, until he has reason to suspect the contrary, that the plaintiff is paying or will pay reasonable attention to his surroundings. *Clark v. Atchison, T. & S. F. Ry.*, 319 Mo. 865, 6 S. W. (2d) 954 (1928); *Jordan v. St. Joseph Ry., L., H. & P. Co.*, 38 S. W. (2d) 1042 (Mo. 1931). For other cases, see *St. Louis, I. M. & S. Ry. v. Wilkerson*, 46 Ark. 513 (1885); *Blytheville, L. & A. S. Ry. v. Gessell*, 158 Ark. 569, 250 S. W. 881 (1923); *Nichols v. Chicago, B. & Q. R. R.*, 44 Colo. 501, 98 Pac. 808 (1908); *Director General of Railroads v. Blue*, 134 Va. 366, 114 S. E. 557 (1922).

regard for obvious consequences and an indifference to peril, the court may characterize such conduct as wanton and reckless, to which the negligence of the plaintiff is no defense, and rest the decision on that ground, the facts appearing to support either this theory or that of last clear chance.²³

D. *Undiscovered Mental Obliviousness of the Injured Person*

The fourth and last situation to be considered in completing the various factual situations which may be examined in any classification of cases in an attempt to find the last responsible actor, on whom responsibility may be sought to be placed where both parties have been negligent with reference to the injuries received, is one that should be the easiest and simplest to solve on any legal basis. Here the plaintiff is not left in a physically helpless condition by his negligence, but he can extricate himself from danger at any time before the accident if he becomes conscious of his peril. The defendant does not see the plaintiff, but if the defendant had been using due care he could have discovered the plaintiff's dangerous condition, due to the latter's inattentiveness, in time to have avoided the injury. Both parties are mentally oblivious with regard to the same peril; both are negligent with reference to the same danger; each party has an opportunity to avoid the injury if he comes out of his careless, mentally oblivious condition; neither party had a chance to avoid the accident that the other did not have. It is not a last chance situation in any respect.

For purposes of clarity, however, a digression must be made at this point and the full consideration of this type of case postponed until an opportunity is had to show what all this may have to do with the subject of the paper, namely, the humanitarian doctrine as known and applied in Missouri.

III. THE MISSOURI HUMANITARIAN DOCTRINE

The humanitarian doctrine as understood by the bench and bar of Missouri is a "variant" of the last clear chance doctrine and includes all three last chance situations discussed previously; but it includes more in that it covers the fourth situation which by no stretch of legal reason-

23. *Cavanaugh v. Boston & M. R. R.*, 76 N. H. 68, 79 Atl. 694 (1911). See Note (1909) 21 L. R. A. (N. S.) 427, on the relationship of the two principles. <https://scholarship.law.missouri.edu/mlr/vol5/iss1/8>

ing can be considered a last chance situation.²⁴ Therefore, in criticising any aspect of the humanitarian doctrine as it is known in Missouri, it must be very clearly understood that the writer does not consider the doctrine assailable in its application to the first three situations, for these are widely accepted as last chance cases; instead, all the criticism about the humanitarian doctrine pertains only to its application to the fourth situation. Here quite obviously it is not a last chance doctrine. The writer does not mean to convey any impression that it is all bad; quite to the contrary, three-fourths of it is good and fairly unassailable on legal analysis. It is the one-fourth content of the doctrine that is so questionable, and in the remainder of this discussion only this phase of the doctrine, its application to the fourth factual situation, is included within the focus of the discussion. The first three factual situations have been developed only to bring into contrast the fourth which is treated under the humanitarian doctrine as though it were of the same general type as the first three.

Returning then to the analysis of our so-called fourth situation, it is desirable to repeat the factual set-up by way of contrast to the other three types of cases. Here the plaintiff is not left in a physically helpless condition by his failure to use due care in getting into a position of peril; he can extricate himself from the danger by a vigilant use of his eyes, ears, and physical strength almost at any moment before the accident if he becomes conscious of his peril. The defendant does not discover the plaintiff's position of danger; but if the defendant had been using due care (this, of course, assumes that a duty is owed to be on the lookout for persons at this place), he could have discovered and realized the plaintiff's position of peril in time to have avoided the injury.²⁵ Both parties

24. Thus it is of no consequence what brings about or continues the situation of peril. It may be through the physical helplessness of the one imperiled to extricate himself from his environment, or it may be through the obliviousness to the dangers of the situation. The formula stated in its simplest terms contains these facts: "(1) Plaintiff was in a position of peril; (2) defendant had notice thereof (if it was the duty of defendant to have been on the lookout, constructive notice suffices); (3) defendant after receiving such notice had the present ability, with the means at hand, to have averted the impending injury without injury to himself or others; (4) he failed to exercise ordinary care to avert such impending injury; and (5) by reason thereof plaintiff was injured." *Banks v. Morris & Co.*, 302 Mo. 254, 267, 257 S. W. 482 (1924).

25. In the case of trespassers, as to whom the defendant ordinarily owes no duty of vigilance to discover their presence, actual discovery, of course, is necessary before the defendant can be found guilty of negligence at all. If the trespassers over a limited area are sufficiently numerous and the activity is sufficiently dangerous, they are given the protection of a licensee to whom a duty to keep a lookout is owed. See note 19, *supra*.

1940] *BASES OF HUMANITARIAN DOCTRINE REEXAMINED* 69

are mentally absent. Either party physically could, in the exercise of due care, have avoided the accident had he become mentally aware of the crisis. The negligence of each party in failing to discover the danger is continuous and concurrent. Each was a proximate cause of the accident. Neither had a chance to avoid the accident that the other did not have. Each had an opportunity to prevent the injury had he become aware of the surroundings.

In the early cases in which this situation was presented and in which the doctrine germinated, the defendant was in charge of some vehicle or machine which was heavy enough to withstand the force of the impact, at least to come off with slight injury compared to that of the plaintiff's. But this, by its very nature, implies that it was not only larger in bulk but more difficult to bring into control when the crisis arose. The plaintiff being equally as negligent as the defendant in not paying attention to the possibilities of peril to himself, it seems inescapable that he may be said to have been the last responsible actor as he had a later opportunity, since he was in a more mobile position either as to himself or as to the vehicle or machine which he is operating than was the defendant. Reverse these facts as to mobility and you reverse the parties plaintiff and defendant in the way the case will come up.²⁶ Putting the same idea in a slightly different way, the plaintiff was able to avoid the accident up

26. The same idea is expressed in the Comment Note (1934) 92 A. L. R. 47, 141: "In some situations, it would seem that the negligence of the injured person in failing to exercise due care to discover his own danger is greater than the negligence of the defendant in failing to discover the situation, although there may have been a duty on his (defendant's) part to discover it. For example, the negligence of a person walking or standing on a railroad track without keeping a lookout for trains which, from the very nature of the place, he has every reason to expect may approach on tracks intended for that purpose, seems greater than the negligence of the train employees in failing to keep a lookout, even assuming their duty in that regard, on the chance that some careless person may be on the tracks oblivious to his surroundings. It may be that this consideration is, in the view of some of the courts, outweighed by the fact that the train employees are in charge of an instrumentality fraught with greater potentialities of harm than those incident to the mere presence of the individual on the tracks." The latter observation is not convincing to the writer because a train crew has other and equally important duties owed to numerous persons who either are on the train or who have property in shipment on the train which, when weighed against a mobile plaintiff who has no one to look after but himself, seem considerably more important from a social point of view. If all that a train crew had to do was to keep a lookout, there might be something to the observation. But the comment adds: "Even such considerations fail in the case, for example, of a collision between two automobiles of equal potentiality for harm. In such a case, as upon the present hypothesis the parties are charged equally with the failure to discover the danger, and the negligence of the plaintiff in that regard continues at least as long as defendant's negligence, there seems to be no ground for applying the doctrine in favor of the plaintiff rather than the defendant, except that, as the event proved, it was the former rather than the latter who was injured."

until a later moment by taking the simpler precautions, either by stepping aside and thus avoiding the impact, or by moving out of the danger; whereas the defendant to avoid the injury would have had to begin to control his movement at an earlier point of time. In no sense can the defendant's opportunity be called a later one, nor can he be charged with being the last responsible actor. It seems implicit in such situations that the plaintiff is the last responsible actor in considering the possible opportunities of each.

There is another approach to a consideration of the negligences of these two parties in a situation of this type which, at first sight only, seems to make the plaintiff less culpable in failing to discover his own danger than that of the defendant who has failed to exercise due care to discover the peril of another. This arises in those cases where the defendant is in charge of a train or other instrumentality which is fraught with great potentialities for harm and his negligence is in failing to keep a lookout for some person who may be in a position of danger oblivious of his surroundings, while the plaintiff's negligence consists of approaching or remaining in a place of danger without keeping a lookout for the instrumentality he has every reason to expect to approach him. But the factors which are to be considered in determining the magnitude of the risk which the negligence of each involves brings the parties out in about equal positions again. Moreover, one should be expected to take better care of himself than should be demanded from others. Furthermore, in the ordinary carrier case, the operator of the instrumentality owes duties to many others at the same time, such as passengers, which involve his attention in handling carefully the instrumentality. If there is any inequality in the respective negligences, again it seems to favor the defendant by finding the plaintiff more at fault. Even these considerations are inapplicable in the cases where the collision is between two objects of equal potentiality for harm, as for example in the automobile cases. The only ground for permitting the plaintiff rather than the defendant to recover in such a case is that the former rather than the latter was injured. Legal reasoning would enable the defendant to use the doctrine as a defense, but the doctrine is not based on legal reasoning and it is not available to the defendant except, possibly, by counterclaim. But in no supreme court decision has the defendant's use of it stood up because of the great fog any court will get into in trying to give a set of instructions on the same theory for

1940] *BASES OF HUMANITARIAN DOCTRINE REEXAMINED* 71

each party.²⁷ It thus seems necessary, as a prerequisite, for a party to get the benefit of the doctrine to receive some injury and then beat the other in the dash to the clerk's office so as to qualify as party plaintiff. If it were available as a defense, the original theory for the humanitarian doctrine would be shifted to a theory of comparative negligence or proportional fault—a theory to be highly desired if it is frankly so considered and stripped of its fictional aspects involved by both parties pleading the doctrine.

To include this type of case under the designation of the same doctrine as applied to last chance situations clearly shows that the courts have been employing talk in the air when they have attempted to give a doctrinal basis for the whole humanitarian doctrine in the concept of proximate cause. When the approach to the four situations is made by beginning with the last, it is seen that the whole scope of the humanitarian doctrine developed from a theory of absolute liability wherever the plaintiff is in a position of peril; it matters not whether this position of peril is due to physical inability to extricate himself or from mental obliviousness; the defendant has notice thereof or, if it was the duty of the defendant to have been on the lookout, constructive notice is enough; the defendant after receiving such notice had the present ability with the means at hand to avert the impending injury without injury to himself or others; he failed to exercise ordinary care to avert the impending injury, and by reason thereof plaintiff was injured.²⁸ Thus it is of no consequence that the plaintiff was contributorily negligent in bringing about or continuing the situation of peril. Contributory negligence never has been a defense to absolute liability.²⁹

How did it happen that a doctrine developed which requires the one who happens not to be injured to take better care of the plaintiff than the plaintiff is required to take of himself, a fact which cannot be determined until after the impact and until it is discovered which one of

27. See the predicament in *State ex rel. Grisham v. Allen*, 124 S. W. (2d) 1080 (Mo. 1939); and the hesitancy in *Ashbrook v. Willis*, 338 Mo. 226, 89 S. W. (2d) 659 (1936), transferred to the *Kansas City Court of Appeals*, 231 Mo. App. 460, 100 S. W. (2d) 943 (1937). Also, see the observation by Judge Ellison in *Perkins v. Terminal R. R. Ass'n*, 340 Mo. 868, 898, 102 S. W. (2d) 915, 932 (1937).

28. See *Banks v. Morris & Co.*, 302 Mo. 254, 257 S. W. 482 (1924).

29. For example, where liability without fault is imposed against the possessor of wild animals or abnormally dangerous domestic animals for harm done. For cases, see 2 Mo. DIG. (1930) tit. ANIMALS, § 7; RESTATEMENT, TORTS (1938) § 515. Against one who carries on an ultrahazardous activity, see *Buchholz v. Standard Oil Co.*, 211 Mo. App. 397, 244 S. W. 973 (1922); RESTATEMENT, TORTS (1938) § 524.

the parties is so unfortunate as to be the one injured? Why does such a doctrine of absolute liability applied to this factual set-up continue in the face of constant attack as to its doctrinal bases? In the balancing of all the considerations is there any social justification for its retention? These are some of the questions which remain to be considered.

IV. ORIGIN OF THIS PHASE OF THE HUMANITARIAN DOCTRINE

It was quite accidental that this phase of the humanitarian doctrine was given birth. In the Missouri decisions prior to 1886 a recovery by a contributorily negligent plaintiff against a negligent defendant was limited to strictly last clear chance situations embraced within the three types of cases developed previously in this paper. The progenitor of the last chance theory which enabled a contributorily negligent plaintiff to recover, *Davies v. Mann*, was cited with approval. Likewise, the case of *Trow v. Vermont Central R. R.*,³⁰ with its contribution of the idea of proximate cause as the juristic basis for last chance theory, was accepted as a landmark. Last chance doctrine and supporting theory were moving along in the early Missouri decisions in much the same fashion as in the great bulk of the states at that time. Prior to 1886, no Missouri decision has been found permitting the plaintiff to recover which would not properly fall under the first three situations, or last chance cases. That is, they were cases in which the plaintiff's contributory negligence had placed him in such a position of physical helplessness that he could not, when the danger was imminent, by the exercise of due care, extricate himself; the defendant either discovered the peril or through the exercise of due care (that is, a duty was owed to discover) could have, and should have, discovered the plaintiff's helplessness.³¹ Or they were cases of mental obliviousness on the part of the plaintiff where the court strongly intimated that there would have been a recovery if this condition had been *dis-*

30. 24 Vt. 487 (1852).

31. Discovered or undiscovered physical helplessness, situations 1 and 2: *Adams v. Wiggins Ferry Co.*, 27 Mo. 95 (1858) (injury to moored barge, the decision closely following the first last chance case of *Davies v. Mann*, 10 M. & W. 545 (Ex. 1842)); *O'Flaherty v. Union Ry.*, 45 Mo. 70 (1869) (for death of infant child killed in street by defendant's car); *Isabel v. Hannibal & St. J. R. R.*, 60 Mo. 475 (1875), and *Donahoe v. Wabash, St. L. & P. Ry.*, 83 Mo. 543 (1884) (train struck an infant child who had wandered on the track); *McKeon v. Citizens' Ry.*, 42 Mo. 79 (1867) (*dictum*); *Burham v. St. Louis & I. M. R. R.*, 56 Mo. 338 (1874); *Meyers v. Chicago, R. I. & P. R. R.*, 59 Mo. 223 (1875); *Adams v. Hannibal & St. J. R. R.*, 74 Mo. 553 (1881) (undiscovered physical helplessness but no duty owed to be on the lookout); *Werner v. Citizens' Ry.*, 81 Mo. 368 (1884) (drunk lay helpless in street on track of defendant); *Swigert v. Hannibal & St. J. R. R.*, 75 Mo. 475 (1882) (drunk boarding train).

1940] *BASES OF HUMANITARIAN DOCTRINE REEXAMINED* 73

covered in time to avoid the injury. That the court was speaking of *discovered mental obliviousness* (situation three) in *Harlan v. St. Louis, Kansas City & Northern Ry.*,³² is shown by the italicized portion of the opinion and by the concurring opinion. In *Kelley v. Hannibal & St. Joseph R. R.*,³³ the judgment for the plaintiff was reversed on the ground that the defendant could not have stopped even had the plaintiff been discovered in his mentally oblivious condition.³⁴

In fact, in the only cases prior to 1886³⁵ which clearly involved facts of mental obliviousness on the part of the plaintiff which defendant could have discovered in time to have prevented the injury (situation four), the court reversed judgments for the plaintiff and very explicitly pointed out in one case that there could be no recovery unless the mental obliviousness was actually discovered.³⁶ There an instruction for the plaintiff had been given which was broad enough to permit a recovery even though his contributory negligence had left him mentally oblivious, but where the defendant in the exercise of due care could have discovered the peril in time to have avoided the injury:

“Even if the jury should believe, from the evidence, that the plaintiff was guilty of negligence or carelessness which contributed to the injury, yet if they further believe, from the evidence, that the agents or servants of defendant, managing the locomotive or machinery of the defendant with which the injury was inflicted, might have avoided the said injury by the use of ordinary care and caution, the jury will find for plaintiff.”³⁷

The court said that this instruction “given for the plaintiff is in direct conflict with what has been expressly declared to be the law in the following cases. . . .” (citing Missouri cases which either were not last chance cases at all, or dealt with discovered mental obliviousness,

32. 64 Mo. 480 (1877) (the facts show that the plaintiff's husband was not a casual trespasser but was using a “frequented path” across the tracks); 65 Mo. 22 (1877) (on rehearing).

33. 75 Mo. 138 (1881).

34. See *Karle v. Kansas City, St. J. & C. B. R. R.*, 55 Mo. 476 (1874); *Bell v. Hannibal & St. J. R. R.*, 86 Mo. 599 (1885).

35. *Fletcher v. Atlantic & Pac. R. R.*, 64 Mo. 484 (1877); *Zimmerman v. Hannibal & St. J. R. R.*, 71 Mo. 476 (1880); *Henze v. St. Louis, K. C. & N. Ry.*, 71 Mo. 636 (1880); and see very strong *dictum* in *Harlan v. St. Louis, K. C. & N. Ry.*, 65 Mo. 22 (1877). All of these opinions were by Judge Henry. Also, see the same idea approved in *Karle v. Kansas City, St. J. & C. B. R. R.*, 55 Mo. 476 (1874); *Price v. St. Louis, K. C. & N. Ry.*, 72 Mo. 414 (1880); *Turner v. Hannibal & St. J. R. R.*, 74 Mo. 602 (1881). *Cf. Hixson v. St. Louis, H. & K. R. R.*, 80 Mo. 335 (1883).

36. *Zimmerman v. Hannibal & St. J. R. R.*, 71 Mo. 476 (1880).

37. *Id.* at 480.

or with situations one or two, physical helplessness). The court went on to say:

“In *Isabell v. The R. R. Co.*, *supra*, the court observed (Wagner, J.): ‘In order to make a defendant liable for an injury when the plaintiff has also been negligent, or in fault, it should appear that the proximate cause of the injury was the omission of the defendant, *after becoming aware of the danger to which the plaintiff was exposed*, to use a proper degree of care to avoid injuring him.’ We have italicized that portion of the paragraph which the instruction under consideration ignores.”³⁸

However, the basis for allowing the plaintiff to recover in those cases, where both parties were mentally oblivious and both negligences continued up to the collision (situation four), was germinating in the language which the court was beginning to use quite steadily in some of these cases. This language in these early cases was purely *dictum* since a recovery was denied on the ground that the peril was not discovered, or that there was no time within which the defendant could have acted in the crisis to avoid the injury. Furthermore, the history of the *dictum* shows rather weak support for the first few years, so that it was questionable during the 50's whether it would not be entirely discarded when the facts called for its full application. Perhaps one member of the court, Judge Henry, was principally responsible for its phrasing; but he was quite opposed to its application to our problem type of case.

In tracing its history, the beginning can be seen in the case of *Harlan v. St. Louis, Kansas City & Northern Ry.*³⁹ Here the deceased, not a casual trespasser but one using a frequented path across the tracks, stepped from behind a railway car onto the defendant's track in front of an engine. The supreme court denied the plaintiff a recovery on the ground that there was no time to stop the train so as to prevent the injury even had the train crew seen the deceased.⁴⁰ On rehearing, Judge Henry, in writing the majority opinion, said:

“But if after discovering the danger in which the party had placed himself, even by his own negligence, the company could have avoided the injury by the exercise of reasonable care, the exercise of that care becomes a duty, for the neglect of which the company is liable. When it is said, in cases where plaintiff has been guilty of contributory negligence, that the company is liable, if by the exercise of ordinary care it could have prevented

38. *Id.* at 484. It may be observed, however, that the *Isabell* case, from which the court quoted, was one of physical helplessness.

39. 64 Mo. 480 (1877); 65 Mo. 22 (1877) (on rehearing).

40. 64 Mo. 480 (1877).

the accident, it is to be understood that it will be so liable, if by the exercise of reasonable care, *after a discovery by defendant of the danger in which the injured party stood*, the accident could have been prevented, or if the company failed to discover the danger through the recklessness or carelessness of its employees, when the exercise of ordinary care would have discovered the danger and averted the calamity. . . . The evidence that Harlan's negligence contributed directly to produce the injury, was clear and uncontradicted, and there was no evidence whatever tending to show that after the deceased got on the track, it was even *possible to prevent the accident.*" (Italics Judge Henry's)⁴¹

A concurring opinion in the same case further shows that the court in the mentally oblivious cases would require *discovered* peril, just as Judge Henry was emphasizing it by his italicized words:

"Now if there had been any testimony tending to show that the defendant could, by the exercise of proper care, after discovering the danger to which the deceased was exposed, have avoided injuring him, then the verdict should be permitted to stand. There was not only no such testimony, but there was testimony to the contrary, and it was therefore properly held, not that the verdict was against the weight of the evidence, but that there was no evidence whatever to support the verdict."⁴²

It seems quite clear that that portion of Judge Henry's opinion, pertaining to liability if the defendant *could have discovered* the plaintiff's mental obliviousness in the exercise of ordinary care, was not only inapplicable to the facts, but was not even considered to be anything more than *dictum* even to the judge himself by virtue of his italicized words. Judge Hough's concurring opinion perhaps points to the *dictum*, not expressly, but by agreeing only with that part of the majority opinion dealing with *discovered* mental obliviousness.

Three years later, in *Zimmerman v. Hannibal & St. Joseph R. R.*,⁴³ the first constructive notice humanitarian case dealing with mental obliviousness (situation four) was directly presented in the instructions to the jury, and in spite of the earlier broad *dictum* by Judge Henry in the *Harlan* case, the same judge held that an instruction covering this situation was "in direct conflict with what has been expressly declared to be the law" in preceding Missouri cases. The cases cited as the declared law of Missouri either did not involve last chance situations or had to do with *discovered* peril cases.⁴⁴ The writer of this opinion for the court

41. 65 Mo. 22, 25 (1877).

42. *Id.* at 26, opinion by Hough.

43. 71 Mo. 476 (1880).

44. The cases cited were: *Karle v. Kansas City, St. J. & C. B. R. R.*, 55 Mo. 476 (1874); *Nelson v. Atlantic & Pac. R. R.*, 68 Mo. 593 (1878); *Cagney v.*

then shows why an instruction on constructive notice in the mentally oblivious situation is not proper, even where the evidence would support such an instruction, by quoting from the earlier case of *Isabell v. St. Joseph R. R.*:

"In order to make a defendant liable for an injury when the plaintiff has been negligent, or in fault, it should appear that the proximate cause of the injury was the omission of the defendant, after becoming aware of the danger to which the plaintiff was exposed, to use a proper degree of care to avoid injuring him."⁴⁵

He further emphasizes his point by saying:

"We have italicized that portion of the paragraph which the instruction under consideration ignores."⁴⁶

But the next year, 1881, the same Judge Henry in *Kelley v. Hannibal & St. Joseph R. R.*,⁴⁷ in reversing a judgment for the plaintiff on the ground that the defendant could not have stopped in time to have avoided the injury even had he been discovered, reverts to his loose and inclusive language used by him in the *Harlan* case, which would make the defendant liable in the mentally oblivious cases even on constructive notice. The same careless *dictum*, however, by bobbing up again in the supreme court decisions was bound to be pressed on the court. Its very repetition, although by way of gratuitous *dictum*, would be seized upon by plaintiff's lawyers against railroads at a period when the big corporations, particularly the railroads, were considered the object of special privilege.

The first judicial application by the court of the constructive notice doctrine applied to mental obliviousness (situation four) was made in 1886 in a series of cases, the most significant of which is *Donohue v. St. Louis, Iron Mountain & Southern Ry.*⁴⁸ There the majority of the court, speaking through Judge Norton, said:

Hannibal & St. J. R. R., 69 Mo. 416 (1879); *Harlan v. St. Louis, K. C. & N. Ry.*, 64 Mo. 480 (1877). Last chance facts or contentions were not presented in any of these cases. *Isabel v. Hannibal & St. J. R. R.*, 60 Mo. 475 (1875) (discovered physical helplessness); *Harlan v. St. Louis, K. C. & N. Ry.*, 65 Mo. 22 (1877), set forth in text above in which, by *dictum*, where there is mental obliviousness on the part of the plaintiff it is necessary that the defendant have discovered the peril in time to have averted the injury.

45. 71 Mo. 476, 484 (1880).

46. *Id.*

47. 75 Mo. 138 (1881).

48. 91 Mo. 357, 2 S. W. 424 (1886). There is earlier intimation of growing judicial sentiment in this direction in *Frick v. St. Louis, K. C. & N. Ry.*, 75 Mo. 595 (1882), by way of *dictum*. In *Welsh v. Jackson County Horse R. R.*, 81 Mo. 466 (1884), decided two years earlier, it is not clear whether the facts showed physical helplessness or inattention. The basis for the opinion is the former. Another decision, decided earlier in the same year as the *Donohue* case, *Bergman v. St. Louis, I. M. & S. Ry.*, 88 Mo. 678 (1886), involved the same question with the

“The jury was substantially told by them (the instructions), that, in approaching the crossing, it was the duty of Donohue to stop, look, and listen for a train, and that if he failed to do so he was guilty of such negligence that plaintiff could not recover, unless the jury further found that defendant’s agents in charge of the train either saw, or, *by the exercise of ordinary care, could have seen, the peril that Donohue was in, in time to have avoided injuring him.*” (Italics supplied)⁴⁹

The court then observed that the instructions conformed to the law as laid down in three Missouri decisions. But the first of these, *Frick v. St. Louis, Kansas City & Northern Ry.*,⁵⁰ turned entirely upon the problem of primary negligence, the court holding specifically that there was no contributory negligence because of the tender age of the plaintiff. The second case, cited by the court to sustain its new principle of constructive notice, was the *Kelley* case set forth above which contained the steadily developed *dictum*, the case itself being one where there was no moment that the train crew could have stopped in time to avoid the injury even had they seen the plaintiff. The third case, *Werner v. Citizens’ Ry.*,⁵¹ cited by the court to sustain the instruction upheld in the *Donohue* case, had to do with the physical helplessness of an intoxicated man who “lay, or fell down, on the defendant’s track and remained there until run over by the car. . . .” Of course, such a case was a true last clear chance case (situation one or two), so that an instruction covering both discovered physical helplessness and constructive notice of the physical helplessness, where there was a duty to keep a lookout in the public streets, was proper.

It is very significant that two judges dissented, apparently because the instructions holding a defendant liable on constructive notice in the *Donohue* case went beyond any actual holding up to this time. One of the dissenters was Judge Henry, the very judge who had developed this theory in the careless *dictum* in the earlier decisions, including the *Kelley* case, and who had written the opinion in the *Werner* decision, both of which were cited as the authority by the court in the *Donohue* decision. Thus it is quite apparent that the very judge who had developed the constructive notice of liability, even though the plaintiff was contributorily

same result. But the court passes over the point so briefly that the case is not a significant one for our purpose. Also, decided in the same year, and based upon the *Donohue* case, is *Keim v. Union Ry. & Transit Co.*, 90 Mo. 314, 2 S. W. 427 (1886).

49. 91 Mo. 357, 365, 2 S. W. 424, 427 (1886).

50. 75 Mo. 595 (1882).

51. 81 Mo. 368 (1884).

negligent, in his own thinking was applying it only to the cases of physical helplessness (situation two), not to the mentally oblivious cases (situation four). This observation is reinforced further by recalling that the same judge six years earlier in the *Zimmerman* case had expressly declared that such an instruction (liability based on constructive notice in situation four) "was in direct conflict with what has been expressly declared to be the law" in the Missouri decisions up to this time.

Reviewing in summary fashion the decade ending with the *Donohue* decision in 1886, we see in the judicial language the notion of constructive notice creeping in by way of *dictum*, being applied to situation two (physical helplessness and where there is a duty on the defendant to use care to discover), and even denied as a basis for liability in situation four. But the formula that a contributorily negligent plaintiff could recover if the defendant "saw, or, by the exercise of ordinary care could have seen, the peril . . . in time to have avoided injuring him" began to be repeated in its entirety with such regularity in the cases in which a carrier was the defendant, usually where it was entirely gratuitous, that it was only a matter of time before the formula would be accepted as the law governing all situations, whether they involved a physically helpless or a mentally oblivious plaintiff. Only the judge who was so largely responsible for the development of the formula apparently realized the necessity of restricting it to the first two situations (physical helplessness) and that its constructive notice feature was not applicable to the fourth situation (mental obliviousness). Having been repeated so often as *dictum*, it now appears as a legal formula, full-fledged, the court continuing to cite the same decisions to support the formula as have been discussed above, without any attempt at further analysis of those cases.⁵²

The formula as now developed was as yet unnamed. Its christening came very soon in the case of *Kellny v. Missouri Pacific Ry.*⁵³ where the name "humanity" was first applied in connection with the formula, and out of this came the term "humanitarian doctrine".⁵⁴ It is particularly interesting to see that the "humanity" idea of the formula was first ap-

52. In 1886, a group of cases riveted the formula into the law of Missouri: *Dunkman v. Wabash, St. L. & P. Ry.*, 95 Mo. 232, 4 S. W. 670 (1888); *Kelly v. Union Ry. & Transit Co.*, 95 Mo. 279, 8 S. W. 420 (1888); *Guenther v. St. Louis, I. M. & S. Ry.*, 95 Mo. 286, 8 S. W. 371 (1888); *Eswin v. St. Louis, I. M. & S. Ry.*, 96 Mo. 290, 9 S. W. 577 (1888); and see *Williams v. Kansas City, S. & M. R. R.*, 96 Mo. 275, 9 S. W. 573 (1888).

53. 101 Mo. 67, 13 S. W. 806 (1890).

54. The rule had been called "humane" in an earlier case of *Kelly v. Union Ry. & Transit Co.*, 95 Mo. 279, 8 S. W. 420 (1888).

1940] *BASES OF HUMANITARIAN DOCTRINE REEXAMINED* 79

plied to the constructive notice portion in a case which may have been either physical helplessness or mental obliviousness. But the difference was apparently without significance to the court. The formula in words had become detached from such differentiation on the facts. Outside of Missouri, the profession still thinks of the humanitarian doctrine as limited to this one situation of constructive notice applied to mental obliviousness, the other three being considered actual last chance situations, whereas the bench and bar within the state think of the doctrine by virtue of the general formula which makes it applicable to all four situations. This is why it is so difficult for lawyers outside the State of Missouri to understand what a Missouri lawyer really means when he talks the language of the humanitarian doctrine.

Since the doctrine finds its godfather in the *Kelny* case, it is desirable to look at that case quite fully. The accident happened on the levee in St. Louis as the plaintiff, a rag peddler, was driving his one-horse wagon. The defendant's track was laid on the levee. At a certain point on the levee, the plaintiff found the space on each side of the track, for a distance of about fifty feet, occupied by wagons, leaving an open way between them occupied by defendant's track as the only way for him to pursue his journey unobstructed. In this passage the east wheels of the wagon, as he drove north, were on the inside of the west rail of the track, and his west wheels on the outside. After going a distance of forty or fifty feet, the hind wheel of his wagon was struck by the defendant's train, which was going at a negligent rate of speed in violation of the city ordinance and without warning. The evidence for the defendant tended to show that, as the train was passing, the plaintiff's horse began to back, and backed the wagon up against the train; that the plaintiff was not driving on the track as alleged by him. The judgment for the plaintiff was reversed because of error in the instructions given by the court on its own motion. The significant portion of the opinion, as it pertains to the constructive notice feature, is that it seems to base the "humanity" notion with conduct that may be designated as "wilful, reckless or wanton disregard of human life":

"We know of but one exception to the rule that where an injury is the product of the joint concurring acts of negligence of both plaintiff and defendant the plaintiff cannot recover, and that is an exception made, *on grounds of public policy and in the interest of humanity*, to prevent and restrain as far as may be a *wilful, reckless or wanton* disregard of human life or limb, or property, *under any circumstances*, and that is when the injury was produced by the concurrent negligent acts of both plaintiff and de-

defendant, yet if the defendant, before the injury, discovered or by the exercise of ordinary care might have discovered the perilous situation in which the plaintiff was placed, by the concurring negligence of both parties, and neglected to use the means at his command to prevent the injury, then his plea of plaintiff's contributory negligence shall not avail him. This exception proceeds not upon the theory that the defendant has been guilty of another and independent act of negligence which is the sole cause of the injury and which must be charged as a separate and independent cause of action, but upon the ground that the negligence he was then in the very act of perpetrating was characterized by such *recklessness, wilfulness or wantonness* as that he shall not be heard to say that the plaintiff was also guilty of contributory negligence." (Italics supplied)⁵⁵

Regardless of the fact that, in naming the doctrine, the court linked the "humanity" notion with conduct which was designated as "wilful, reckless or wanton disregard of human life", the constructive notice feature of the doctrine has not been so restricted in its subsequent development and, therefore, wilful, reckless or wanton misconduct is not a part of the doctrine, although there may be at times an overlapping of the two notions from the facts of particular cases. The same result is reached under either theory of responsibility, since contributory negligence is no defense to either. This makes it quite unnecessary then, under the Missouri decisions to refine defendant's conduct to see whether it was merely negligent or whether it was wanton and reckless, except where the degree of culpability may have a bearing on the damages assessed. But the difference between negligence and wanton misconduct is distinct and marked. Conduct designated as negligent consists of merely failing to exercise care where a risk of injury may be foreseen, whereas conduct designated as wanton and reckless is applied to situations where the defendant consciously disregards his duty to use care, knowing the chances for harming some one or property are very great, but indifferent whether injury will result or not.⁵⁶ Such misconduct falls short of being wilful in that he does not desire the injury to the plaintiff, but the courts give the same effect to such misconduct as if it had been wilful, insofar as permitting a contributorily negligent plaintiff a recovery. Realistically, it is a refusal to compare the faults where one has acted so indifferently to the consequences in

55. 101 Mo. 67, 74, 13 S. W. 806, 808 (1890).

56. For an adequate distinction between negligence and wanton misconduct, see *Archison. T. & S. F. Ry. v. Baker*, 79 Kan. 183, 98 Pac. 804 (1908), and *RESTATEMENT, TORTS* (1934) §§ 282, 500. In *Murphy v. Wabash R. R.*, 228 Mo. 56, 50. 123 S. W. 481, 485 (1910), Judge Lamm states that no longer is the humanitarian doctrine linked with willfulness.

cases where there is a conscious realization of the probability for harm. The levels of fault of the parties are not the same, and the one cannot be set off against the other. It is clearly seen that the humanitarian doctrine threw off any such limitation early, for the conduct of the plaintiff, in the fourth situation, may be of the same moral or social level as that of the defendant.

Once the doctrine was entrenched firmly into the law of Missouri its importance as a legal doctrine became one of administration—how far it was to be extended. That is, the problem now becomes one of scope. To what extent is it to be carried? What constitutes the position of peril? What must the pleadings and instructions show as to the obliviousness of the plaintiff? Is the antecedent negligence of the defendant to be included within the “humanity” notion? A discussion of the administration of the doctrine which includes these and other problems must be left for a later treatment. Our purpose here is to examine the origin of the doctrine, to see how it grew out of last chance cases, and to appraise it in an effort to see whether or not it is desirable to continue it.⁵⁷

57. There is other language in some of the earlier cases which on desultory reading might be taken as the background for the humanitarian doctrine in its application to situation 4. There was a notion developing in the cases, prior to the formulation or recognition of last chance situations, that although the plaintiff failed to use due care which contributed remotely to the injury, yet if the defendant's negligence was the immediate cause of the injury the defendant was liable. The earliest pronouncement of this notion, that contributory negligence was not always to be a defense to a negligent defendant, is found in *Huelsenkamp v. Citizens' Ry.*, 37 Mo. 537 (1866). In that case, however, the court found no contributory negligence, hence the statement was gratuitous. The same statement appears again, where the court actually found no contributory negligence, in *Morrissey v. Wiggins Ferry Co.*, 43 Mo. 380 (1869); 47 Mo. 521 (1871). Also, see *Liddy v. St. Louis R. R.*, 40 Mo. 506 (1867), where it is not clear that the plaintiff was contributorily negligent. In *Brown v. Hannibal & St. J. R. R.*, 50 Mo. 461, 465 (1872), the court approved an instruction based upon the notion developed by way of *dictum* in these earlier cases: “Even if the jury should believe from the evidence that the plaintiff was guilty of negligence by carelessness which contributed to the injury, yet if they further believe from the evidence that the agents or servants of the defendant, managing the locomotives or machinery of the defendant with which the injury was inflicted, might have avoided the said injury by the use of ordinary care and caution, the jury will find for the plaintiff.” However, it was *dictum* again, because the case turned on whether the plaintiff was owed a duty, the court deciding only that a duty was owed to this sort of a trespasser who was one of the public using this path over the property of the defendant. Also see *O'Flaherty v. Union Ry.*, 45 Mo. 70 (1869) (again grave doubt if contributory negligence existed; anyway it would be a last chance case under situation 2).

The interesting idea of this early development is that it takes proximate cause language as developed in the *Trow* case and changes its wording so that it looks like an instruction to cover situation 4. The notion was carried over also into the noncarrier cases. See *Walsh v. Mississippi Valley Trans. Co.*, 52 Mo. 434 (1873); *Schaabs v. Woodburn Sarven Wheel Co.*, 56 Mo. 173 (1874).

So soon as last chance situations began to be formulated the Missouri court began to turn this loose language into those situations and thus tie it in directly with the last chance doctrine. See this development in *Karle v. Kansas City, St. J.*

V. AN APPRAISAL OF THE CONSTRUCTIVE NOTICE ASPECT OF THE
HUMANITARIAN DOCTRINE AS APPLIED TO A MENTALLY OBLIVIOUS
PLAINTIFF

Since the constructive notice aspect of the humanitarian doctrine cannot be explained on legal analysis, there being no last responsible actor, and its early origin in Missouri law appears accidental, what is the real explanation for it? An appraisal of any well known legal doctrine will turn on its relation to a particular period. If one seeks to appraise the social value of the humanitarian doctrine in its application to situation four in the period when it came into the Missouri law, one will be less critical, perhaps, than in an attempt to appraise it under existing social values. One cannot disconnect the birth and development of the constructive notice aspect of the doctrine, as applied to cases of inattentiveness on the part of both plaintiff and defendant, from the social values of the period which saw the rapid development of the railroads in Missouri—the period following the Civil War to the close of the century. Not only were the railroads alleged to be seeking legislative favors through doubtful methods, at least to the lay mind, but along with that activity there was little effort made in that period on their part for the protection of the public from injuries. Engineering science had not developed air brakes, warning signals at crossings, warning lights, and numerous other safety devices to protect the public. Screeching, smoking monsters passing through a rural countryside, with a noise and speed unknown before that period, killing farm stock, and injuring or killing people, caused a psychological reaction most noticeable with juries and judges in the suits against the railroads.⁵⁸ It was one way to get even with special privilege. Furthermore, the railroads had in many localities mulcted the investors through watered stock and business practices which did not contribute to public relations. The very name of corporation in that period, invoking a feeling of ruthless power, aroused the sympathy of the average individual to

& C. B. R. R., 55 Mo. 476 (1874); *Matthews v. St. Louis Grain Elev. Co.*, 59 Mo. 474 (1875); *Meyers v. Chicago, R. I. & Pac. R. R.*, 59 Mo. 223 (1875); *Maher v. Atlantic & Pac. R. R.*, 64 Mo. 267 (1876); *Harlan v. St. Louis, K. C. & N. Ry.*, 65 Mo. 22 (1877) (see italicized words); *Nelson v. Atlantic & Pac. R. R.*, 68 Mo. 593 (1878); *Rains v. St. Louis, I. M. & S. Ry.*, 71 Mo. 164 (1879); *Zimmerman v. Hannibal & St. J. R. R.*, 71 Mo. 476 (1880) (such language in an instruction complained of by the court); *Price v. St. Louis, K. C. & N. Ry.*, 72 Mo. 414 (1880) (such language in an instruction called "an abstract proposition of law, erroneous it is true. . . ."); *Straus v. Kansas City, St. J. & C. B. R. R.*, 75 Mo. 185 (1881) (instruction in these words held bad).

58. See for example, *Gorman v. Pacific R. R.*, 26 Mo. 441 (1858).

protect the common citizen who may have been injured by their operation, particularly where it was thought able to pay. It was also a period in the Middle West when corporations did not exactly fit into the notion of an agricultural democracy.

These, together with a natural sympathy for an injured man and his dependants, are the important reasons for the inception of the humanitarian doctrine as applied to situation four. Throughout the early cases there is no clear notion of legal doctrine or justification given for the notion that the uninjured, mentally oblivious defendant in control of a train or street car should pay an equally mentally oblivious plaintiff, who of the two was perhaps more to blame in the crisis, when all considerations are weighed.⁵⁹ The only notion that is clear is the social one that the carrier should pay. It is a doctrine of absolute liability applied to a particular situation, and embellished by a fine sounding term. There is evidence of this in the very early cases against carriers, even before last chance ideas had developed. In fact, in one of the early decisions the analogies used were the cases based upon absolute liability.⁶⁰ Sometimes the same result was reached by the manipulations of proximate and remote causes which, as meaningless talk in the air, gave an appearance of legal respectability to a conclusion reached on social considerations.⁶¹ The criticism is directed wholly at the use of legal garb where none existed.

Even as a theory of absolute liability the humanitarian doctrine cannot be justified. All through the history of the common law, wherever absolute liability has been imposed, the defendant has introduced into the community a new danger which was greater than any social value to be

59. See the observation by Valliant, J., in *Schmidt v. St. Louis R. R.*, 149 Mo. 269, 285, 50 S. W. 921, 925 (1899); "The doctrine upon which the instruction disposed of in the foregoing paragraph is founded, that is, the liability of defendant notwithstanding plaintiff's own negligence under certain circumstances, has been so often declared by the courts of this State, and of other States, that it is thus recognized in this opinion; but the writer has never been able to understand the rationale of it. To attempt to reason it out on the principles on which the law of negligence is based leads to a self-contradiction of those principles, from which the only escape is in an effort to divide negligence into degrees; and to attempt to apply the doctrine to any given case is to attempt to ascertain to what extent the negligence of the one or the other operated to produce the result. Take the case of a man walking on a long high railroad trestle—a very careless and dangerous undertaking—a train comes and the engineer sees the man in ample time to stop before it reaches him, the engineer knows the man can not get off the track yet he runs his train on and over him. The law of negligence has nothing to do with that case."

60. *Brown v. Hannibal & St. J. R. R.*, 50 Mo. 461 (1872).

61. See instruction three for plaintiff in *Huelsenkamp v. Citizens' Ry.*, 34 Mo. 45 (1863); *Morrissey v. Wiggins Ferry Co.*, 43 Mo. 380 (1869) (a very clear case of such manipulations).

derived from his conduct, according to the social and economic values prevailing at the time and place—something unusual, extraordinary, and fraught with exceptional peril. This is the reason keepers of wild animals and keepers of domestic animals, with known vicious propensities to cause harm, are held to an insurer's liability.⁶² Today, where certain ultrahazardous activities are carried on, absolute liability is applied, unless the social gain from such activities is too important to be impeded by such strict responsibility as, for example, in the use of automobiles.⁶³ Aviation, blasting, the storage of explosives, oil drilling, and other activities are still considered as introducing a danger which is not as yet so offset by its social importance as to reduce responsibility from that of an insurer to a basis in negligence. The whole doctrine of *Rylands v. Fletcher*,⁶⁴ in which an English court applied this theory of liability to the instances where the defendant had brought into the community a substance which, if it escaped, was likely to do mischief, was pronounced only twenty years before the humanitarian doctrine crystalized. Much of the notion of absolute liability has come into the law at a time when economic activity has been thrust upon an agricultural community.⁶⁵

In the 70's and 80's the Missouri court was in effect saying that the danger which railroads and street car companies were introducing into the community was so ultrahazardous, compared with their social utility, that the defendant carrier should make good those harms which resulted from a failure to discover the peril of the plaintiff, even though the misconduct of the plaintiff was of the same sort as that of the defendant, both being

62. On the other hand, a keeper of a domestic animal, which he does not have reason to know to be abnormally dangerous, but which is likely to do harm unless controlled, is liable in negligence only. This applies to bulls, stallions, rams, and other stud animals. The rule of liability without fault is not applied here because the social utility of such animals is sufficient to justify their being kept, even though there is more risk than with other animals of the same general class. See RESTATEMENT, TORTS (1938) § 518; Note (1937) 106 A. L. R. 1418.

63. An ultrahazardous activity has been defined: "An activity is ultrahazardous if it (a) necessarily involves a risk of serious harm to the person, land or chattels of others which cannot be eliminated by the exercise of the utmost care, and (b) is not a matter of common usage." RESTATEMENT, TORTS (1938) § 520.

64. L. R. 3 H. L. 330 (1868).

65. For example, Professor Bohlen in explaining *Rylands v. Fletcher* says: "Nor should it be forgotten that, in England, the dominant class was the landed gentry, whose opinion the judges, who either sprang from this class or hoped to establish themselves and their families therein, naturally reflected. To such a class it was inevitable, that the right of exclusive dominion over land should appear paramount to its commercial utilization; to them, commerce and manufacture, in which they had little or no direct interest, appeared comparatively unimportant." Bohlen, STUDIES IN THE LAW OF TORTS (1926) 369.

mentally oblivious.⁶⁶ To be sure, this is not making the carrier absolutely liable for all harms caused by it, yet it does carry the insurers liability part way in such situations.

Furthermore, it was a convenient device to shift the loss from the group least capable of bearing it to a form of activity which could distribute the burden to those who benefited from the activity in the form of increased rates—a form of social insurance. This economic theory is undoubtedly an afterthought, a specious reason to bolster a principle really based on more earthy considerations.

VI. THE NEED FOR A NEW APPRAISAL OF SOCIAL VALUES IN THE SITUATIONS WHERE BOTH PARTIES ARE INATTENTIVE

Do the conclusions reached over fifty years ago apply under present social values? In spite of refinements in regard to safety devices, accidents still happen in which carriers are involved. Even so, do the same social considerations apply today which make it desirable to apply absolute liability to this situation? It is very certain that there is an ever increasing social interest in transportation of all sorts. No longer do the people look upon carriers with the same fear that they are ultrahazardous things. Even farm animals appear bored with their presence. There are few communities that do not feel dependent upon the social usefulness of railroads to increase the prosperity of the community by enabling their products to be marketed, and to obtain the absolute necessities for economic activity.

Furthermore, the social utility of transportation companies varies with the rates that must be charged to enable them to serve the public. No longer are the railroad corporations looked upon as embodying special privileges or mulcting the public. There has been considerable doubt in recent years whether or not they can survive in spite of present high rates.⁶⁷ The present attitude on the part of the general public is changing to one of sympathetic interest in their continued existence and service, though no such change appears on the part of juries. Yet where a principle of law requires that they be made to pay if they do not take

66. The dangerous instrumentality idea is very apparent in the earlier carrier cases. See *Kelly v. Union Ry. & Transit Co.*, 95 Mo. 279, 8 S. W. 420 (1888); *Gorman v. Pacific R. R.*, 26 Mo. 441 (1858).

67. For a picture of the changed economic picture of the railroads in the past fifty years, see statistics in opinion by the Interstate Commerce Commission, *Passenger Fares and Surcharges*, 214 I. C. C. 174 (1936). Also see the *Annual Reports (Interstate Commerce Commission)* for the past decade.

better care of the plaintiff than he may take of himself, there is a vast expense in paying judgments, settling suits, employing enlarged legal staffs to take care of this sort of claim. There is no longer the assurance that this rule forms a convenient device to shift the loss to a form of activity which can distribute the burden in the form of increased rates, a form of social insurance resulting in the larger social good.

But the greatest need for a new appraisal in the situation where both parties are inattentive and equally at fault is seen in the cases other than railroads and street car companies, particularly the automobile cases. Here it is impossible to argue that absolute responsibility should be imposed on the defendant for introducing a dangerous instrumentality into the community which has increased the risks for harm, especially where the plaintiff is also driving an automobile. Even in England where the principle of absolute liability was first introduced and perhaps carried to greater lengths, one of the exceptions engrafted on the principle was where the plaintiff was making a similar use of his property as was the defendant.⁶⁸ Even where the plaintiff is not driving a car, the idea that an automobile is to be considered a dangerous instrumentality has received little support even in the early cases. Its social usefulness more than offsets the added risk to the community. The family purpose doctrine and other forms of vicarious liability for harms done by automobiles driven by others than the owner have not been worked out on lines of absolute responsibility.

Furthermore, the economic argument (social insurance) that the humanitarian doctrine, in cases where both parties are inattentive, is a convenient device to shift the loss from him who is least capable of bearing it to the defendant who can distribute the burden to those who benefit from the activity (an argument made in favor of its application to the carrier cases, where the burden can be shifted to the public in the form of increased rates) is absurd here. The only shift in the burden here is based upon which one, equally culpable, happens to be the injured person. There is nothing humanitarian in such a case unless one is ready to subscribe to a rule of the law that an injured man regardless of his own culpability should be compensated for his injuries. Under a form of compulsory insurance, like workmen's compensation insurance, this

68. *Eastern & South African Tel. Co. v. Cape Town Tramways Co.* [1902] A. C. 381. Electricity from the defendant's tramway escaped into the plaintiff's cable in the sea.

burden could be somewhat shifted to the group. But as it stands today the automobile driver must carry the full responsibility in these cases, even where his fault is no greater than that of the plaintiff. If he seeks the cheaper method for protecting himself by liability insurance, he finds that he is compelled to pay rates which are much higher in Missouri because of this responsibility than in other states where last clear chance principles are retained.⁶⁹ But query, does the humanitarian doctrine really protect here? Only a small proportion of automobile drivers can afford to carry liability protection at the present rates, and a reading of newspaper accounts would lead one to believe that the bulk of the accidents are caused by the group of automobile drivers who are not likely to have insurance, and are at the same time execution proof. So as a device for social insurance, it does not work except in a small proportion of injuries. The Missouri courts failed to recognize the possible basis for distinction in the application of the humanitarian doctrine in the situation where the defendant was a carrier and where he was an ordinary citizen. The humanitarian doctrine where both are inattentive had been applied about forty years when the automobile cases first presented the same problem. It had become a rule, the reasons for which had been forgotten.

The whole doctrine should be reexamined and all the social implications fully considered anew, to see whether our courts are reaching a just social result, especially in their failure to distinguish between the agencies involved in producing the harm. The doctrine has become so embedded

69. The following table speaks for itself. The rates are those of a large mutual insurance company on a Chevrolet, Ford, or Plymouth car, operated for pleasure and family purposes by a resident of the "remainder of the state;" i.e., any part of the state excluding certain large cities (in Missouri, St. Louis (suburban and urban), Kansas City, St. Joseph, Springfield, and Joplin; in Iowa, Des Moines, Council Bluff, Davenport, Fort Dodge, Clinton, Ottumwa, Cedar Rapids, Burlington, Waterloo, Sioux City, and Dubuque; etc.). In general, rates for the large cities in these states are in the same relation as rates for "remainder of state," but there are obvious difficulties in selecting cities for the comparison.

	Illinois	Iowa	Kansas	Kentucky	Nebraska	Oklahoma	National Average (excluding Mo., Mass. & Texas)	Missouri
\$5,000/\$10,000 personal injury liability	\$14	\$14	\$15	\$20	\$15	\$17.55	\$19.50	\$32
\$5,000 property liability	5	6	5	8	6	5.55	6.44	\$ 7
Total liability insurance premium	\$19	\$20	\$20	\$28	\$21	\$23.10	\$25.99	\$39

in the law of Missouri that our courts accept all four situations as embraced in the scope of the doctrine without investigating the theories, legal or social, on which it rests. Occasionally, a court will question the soundness of its application to situation four, but it is content to rest its final decision on precedent. Little effort is made to compare the social attitudes at its birth with our present attitudes. Again it should be noticed that this paper does not question the types of situations covered by the humanitarian doctrine which are last chance cases, and the suggestion for a reexamination does not apply to them.

The new appraisal should be grounded solely on a reexamination of the social interests involved.⁷⁰ Law as a social institution, the cement which holds society together, deals with human relations in an effort to satisfy claims, wants, needs and desires of life. These claims, wants, needs and desires of one man usually conflict with those of many others. The adjustment of conflicting interests necessarily involves an evaluation of the interests according to some standard. While this standard has been formulated in various ways, in various periods of legal history, it has always been that which would promote the social interests affected, such as the social interest in the general security, the social interest in freedom of action, the social interest in free economic activity, the social interest in the conservation of natural resources, the social interest in general progress, the social interest in the individual life of the members of society, and various other social objectives.⁷¹ These are variables depending upon the general notions and culture of a people in any given period.⁷² A more

70. That the courts did weigh the social factors in that period though often inarticulately expressed in the opinion, see *Gorman v. Pacific R. R.*, 26 Mo. 441 (1858).

71. The various social interests have been grouped as follows: The social interest in the general security (activities that threaten the social group in its existence, such as the general safety, health, peace and order, acquisitions, transactions); the social interest in the security of institutions (domestic relations, religious, political, economic); the social interest in general morals; the social interest in the conservation of social resources (natural resources, protection and education of dependents and defectives, reformation of delinquents, protection of those economically dependent); the social interest in the general progress (economic, political, cultural, aesthetic); the social interest in the individual life (individual free self assertion, opportunity, conditions that assure at least a minimum of human life under the conditions of life of the period and place). This classification is taken from POUND, *OUTLINES OF LECTURES ON JURISPRUDENCE* (4th ed. 1928) 60ff., where an exhaustive bibliography on the subject is given.

72. For example the social interest in the general security in the earliest period of the common law was to keep the peace; in the next period in securing peace and order by means of legal remedies; then came the period of equity when an effort was made to turn moral duties into legal duties; then the general security was thought of in terms of individual rights; today it seems to be in terms of the social interest in the individual life. The usual way of stating this interest in the general security has been in terms of public policy. See Pound,

usual method used by the judges for expressing the same notion is to speak of this standard as one based on public policy. But each claim, want, desire, or interest receives protection only to the extent of the social significance implicit in it as compared with the other conflicting social interests. In other words, this standard for evaluating claims requires that, in advancing a particular interest, other interests not be invaded too far. Our detailed rules, principles, doctrines and standards of law are mere efforts to carry out in crystallized form the notions of the larger social value of certain conduct after a weighing and balancing of all the interests involved.

Involved in every case coming under the humanitarian doctrine is a conflict of social desires, each of which seeks to control the solution of the case. All cannot control. The relative worth of the different social values may very well vary with the facts of different situations to which the humanitarian doctrine has been applied, so that any attempt to apply the doctrine to all cases involving the same general fact background of the accident and injury may tend to defeat certain social objectives. It is, therefore, necessary to examine more closely the social problems in the different situations to which the doctrine has been applied in the judicial history of the state. Since the only justification for any doctrine of law is that it contributes in bringing about a desired social end, it is necessary to have those ends clearly in mind.

Then too, the evaluation of these social ends may vary with the varying social values of the period. What seemed to be a good result under such an evaluation fifty years ago may not prove to be so at the present time, due to other considerations being brought into the solution of the case which were not present earlier, perhaps because of social and economic changes. In this light, the humanitarian doctrine is not an eternal principle and, therefore, it should be critically reexamined periodically as should all important principles of the law. It is not in itself a sufficient justification for any doctrine that it has been in the books for over half a century. Its only justification is whether it helps toward a desired social end of the period and place as determined by settled economic and social convictions prevalent at the time and place.

The objectionable phase of the humanitarian doctrine in its origin

The End of Law as Developed in Legal Rules and Doctrines (1914) 27 HARV. L. REV. 195; *The End of Law as Developed in Juristic Thought* (1914) 27 *id.* 605; (1917) 30 *id.* 201.

was a reversion to the earlier notions of absolute liability, at a period when some compromise was felt necessary between conflicting social interests and prejudices brought about by a change in the economic and social life of the state, to which the railroads and street car companies were contributing. It was a means for accommodating legal doctrine to new conditions. But in the past twenty-five years the automobile has brought about a further change to which the humanitarian doctrine cannot be accommodated. In this respect, at least, it is bound to be a transitional doctrine only, and the court in the automobile cases, and perhaps in the carrier cases, may either abandon the position it has taken in situation four and return to the application of contributory negligence as barring a plaintiff from recovering from a defendant who is no more culpable, or the court will continue along the path on which it is going but will work out some new principle for the distribution of the loss which may satisfy more modern ideas of fairness and right, e. g., a principle of comparative negligence or proportional fault. If the court on a reexamination of the doctrine decides that it is a sound social doctrine and should be retained, let it so tell us the reasons why and not worry about putting it up in legal garb. Of course, compulsory insurance for carriers and drivers of automobiles might produce the fairest result, but this is outside the scope of judge made law.