

1945

## Defense of Sole Cause in the Missouri Negligence Cases, The

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, *Defense of Sole Cause in the Missouri Negligence Cases, The*, 10 Mo. L. REV. (1945)  
Available at: <https://scholarship.law.missouri.edu/mlr/vol10/iss1/6>

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](mailto:bassettcw@missouri.edu).

# Missouri Law Review

Volume X

JANUARY, 1945

Number 1

## THE DEFENSE OF SOLE CAUSE IN THE MISSOURI NEGLIGENCE CASES

GLENN A. McCLEARY\*

Occasionally a legal doctrine emerges in decisions to give the profession considerable difficulty while its theory and application are being worked out. The humanitarian doctrine is perhaps the best known example. Its application to new situations continues to make the doctrine in theory and practice one of our most live fields in the law.<sup>1</sup> A more recent example is the theory and proper use of the defense of sole cause in the negligence cases. This has become one of the more live problems in the law during the past ten years. In the process of defining its meaning, its scope, its limitations, and the manner in which it is to be applied in the trial of cases, there is likely to be some dissatisfaction.<sup>2</sup> The concept of sole cause contains nothing new and juries have applied the defense without much assistance in various types of cases ever since the law has recognized tort liability.<sup>3</sup> The difficulties have arisen in the last few years in negligence cases when the supreme court has insisted on instructions presenting the theory of sole cause as a defense which will give the jury detailed guidance. The number of reversals clearly indicate

---

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

1. See annual review of the decisions by Becker, *The Work of the Missouri Supreme Court (The Humanitarian Doctrine)* (1938) 3 Mo. L. Rev. 392, (1939) 4 Mo. L. Rev. 406; (1940) 5 Mo. L. Rev. 446; (1941) 6 Mo. L. Rev. 447; (1942) 7 Mo. L. Rev. 395; (1943) 8 Mo. L. Rev. 261. The writer has attempted to point out some of the problems, *The Bases of the Humanitarian Doctrine Reexamined* (1940) 5 Mo. L. Rev. 56. And see comment (1944) 9 Mo. L. Rev. 264.

2. Ball, *The Vanished Sole Cause Instruction* (1942) 13 Mo. B. J. 50; Spaun, *Sole Cause Negligence Instructions* (1942) 13 Mo. B. J. 19.

3. Concepts of proximate causation, assumption of risk, consent, self defense, defense of property, defense of third persons all imply the same notion that a plaintiff should not be able to force a defendant to pay for harms caused solely by the plaintiff himself.

that the functioning of a well recognized defense has not been satisfactory. It may be questionable whether the damage to the defendant in having a verdict taken from him, the expense of a new trial and other factors involved in prolonged litigation involving his liability, may not be disproportionate to the danger which is sought to be avoided through detailed jury guidance, not to mention the weakening effect to the judicial process in requiring more than one trial to determine an issue.

For a few years sole cause instructions were not approved, not because it was a new or novel doctrine in the law but the court did not approve of the "cryptic way in which this information was conveyed to the jury."<sup>4</sup> The early attempts frowned upon were like any instructions dealing with causation in that they were abstract in nature. The court thought, and still thinks, such an instruction "was calculated, not to enlighten, but to confuse."<sup>5</sup> The first cases in which this defense was pressed involved a railroad company as defendant. The defense attempted to place the sole responsibility for the collision on the driver of the car in which the plaintiff was riding. Perhaps, as the later development shows, the court was apprehensive lest the jury get the erroneous idea that the driver's negligence could be imputed to a guest riding in the car.

Then came the cases submitted under the humanitarian rule where the plaintiff, a pedestrian, collided with the defendant's automobile as the former was crossing the street, and where the evidence would justify a finding that the plaintiff ran into the side of the car and that there was no negligence on the part of the driver of the car involved. In the first case, *Causey v. Wittig*,<sup>6</sup> the court *en banc*, apprehensive lest the jury become confused between sole negligence and contributory negligence, held a sole cause instruction faulty because "it did not require the jury to find that the negligent acts of deceased, mentioned in the instruction, were the *sole cause* of the collision and his resulting injuries and death." In so failing, the court felt that the instruction "ignored the issue of concurrent negligence" under the humanitarian rule. It pointed out that the defendant had not sufficiently shown he was free from humanitarian negligence. Without a negative finding as to all

4. *Boland v. St. Louis-San Francisco Ry.*, 284 S. W. 141, 145 (Mo. 1926); *Peppers v. St. Louis-San Francisco Ry.*, 316 Mo. 1104, 295 S. W. 757 (1927).

5. See cases cited *supra* note 4, and *Causey v. Wittig*, 321 Mo. 358, 11 S. W. (2d) 11 (1928); *Stanich v. Western Union Tel. Co.*, 348 Mo. 188, 193, 153 S. W. (2d) 54, 56, (1941); *Long v. Mild*, 347 Mo. 1002, 1013, 149 S. W. (2d) 853, 860 (1941).

6. 321 Mo. 358, 367, 11 S. W. (2d) 11, 14, (1928).

of such omissions or acts of negligence on his part the court held the instruction was too favorable to the defendant. One cannot read this struggle in a four to three decision without surmising that the majority feared that the recognition of a sole cause instruction would result in a new defensive instruction to weaken the humanitarian doctrine. The court was plainly bothered and its own reasoning was not convincing to itself, for seven years later the court *en banc*, in *Borgstede v. Walbauer*,<sup>7</sup> in what is now recognized to be the first Missouri case "which first authorized sole cause instructions based on facts shown by the defendant's evidence,"<sup>8</sup> reversed itself on both of these points: (1) that a sole cause instruction may be proper even though the words "sole cause" were not used in the instruction, where a finding by a jury of the facts as contained in the instruction was equivalent to a finding that the defendant's negligence was the sole cause of the collision; and (2) "a defendant is not obliged to include in his instructions facts relied on by the plaintiff for a recovery."

The door was now open for a development of this defense which in legal theory involved no new concept. The technique for its use was still to be worked out. The working out of the technique through the device of instructions, so as properly to pass the issue to the jury, not only presents an interesting study of the problem but it also shows the need for improvement in the operation of the judicial process at this point in jury trials.

#### I. SOLE CAUSE AS AN EXAMPLE OF THE JUDGE AND JURY PROBLEM

The part which judges have taken in assisting juries in their function as the finders of the facts in the trial of cases has had a varied history, extending from the complete supremacy of the jury, unfettered by the judge, to the opposite extremity of minute supervision of the jury in their deliberations by the trial judge through the device of instructions. So minute has this supervision become in the field of negligence that a large proportion of the grounds fought over on appeal deals with the proper limitation of the jury. Instructions intended to guard the untrained mind against error in the application of the law to the facts of a particular issue become themselves our most prolific source of error.

So long as society was primitive legal doctrines were simple and not difficult to understand. In fact, they did not require professional guidance.

7. 337 Mo. 1205, 88 S. W. (2d) 373 (1935).

8. Hyde, C., in *Shields v. Keller*, 348 Mo. 326, 335, 153 S. W. (2d) 60, 64, (1941).

At a time when people did not write, much of the law was symbolic to which there were witnesses who could testify to what they saw.<sup>9</sup> In case of dispute the members of the jury were selected because of their own knowledge of the facts based on their own perception, or on what they had been told, or on which they may trust as of their own knowledge.<sup>10</sup> Under such a system there could be no sharp boundary between the province of the judge and that of the jury. This was a period of dominance of the jury. When the jury ceased to be composed of witnesses and became a body of fact finders from evidence given before it, by necessity rules of trial had to be developed to guide laymen in their duties. As the powers of the king grew, law developed and became more detailed; the judge became more and more the dominant figure in the trial of a case. Methods for informing the jury, of guiding and restraining that body, of preventing improper influences over them, of checking them by reviewing their action, have originated and shaped our rules of law, particularly the rules of evidence and trial procedure.

A second factor in legal history affecting the judge and jury problem has been political. In periods of democratic movements against authority

9. Professor Andreas Heusler explains that "without such formalism the primitive people could not perceive their law." He mentions, besides livery of seisin, other symbols, e.g., the act of placing the clasped hands of the ward and the vassal in the opened hands of the lord as symbolizing the submission to the wardship or the suzerainty; the grasping of the altar-cloth or bell-rope, the taking possession of church and chapel; the widow's act of laying the house-key or the cloak on the bier or the tomb of the deceased husband, her surrender of the entire marriage-estate to her husband's creditors; the handing over of a lock of hair from head and beard, the transfer into household service. "Writing is the sworn enemy of symbolic representation. A people who do not write feel the need of making the law visible by external and perceivable symbols, and thereby of providing expression for acts and volitions as legal acts and legal volitions. But as soon as acts come to be put into writing, this formalism becomes first a luxury, then a burden, and finally is repudiated entirely." HEUSLER, *INSTITUTIONS OF GERMANIC PRIVATE LAW* (1885) 70, 74, cited in 5 WIGMORE, *EVIDENCE* (2d ed. 1923) § 2405. See BIGELOW, *HISTORY OF PROCEDURE IN ENGLAND* (1880); Thayer, *The Jury and its Development* (1892) 5 HARV. L. REV. 306, 316.

10. Thayer, *The Jury and its Development* (1892) 5 HARV. L. REV. 249, 295, 357. At 261 he says: "It is remarkable how free from technicality and how liberal in tone are the provisions of this ordinance of the king and the practice under it, as explained by Glanville (c.12). When once the twelve knights have assembled (cc. 17, 18), it is first ascertained by their oath whether any of them are ignorant of the fact. . . . If there be any such, they are rejected and others chosen. If the twelve differ in their verdict, others are added until there are twelve who agree, on one side or the other. The knowledge required of them is their own perception, or what their fathers have told them, or what they may trust as fully as their own knowledge. . . ." Also see *ibid.* at 315; FORSYTHE, *HISTORY OF TRIAL BY JURY* (1852); BIGELOW, *HISTORY OF PROCEDURE IN ENGLAND* (1880); POUND in *ENCYC. SOC. SCIENCES*, tit. JURY.

the people prefer to trust their own kind resulting in greater freedom for the jury and less dominance by courts. With the ascendance of power of the English kings who appointed the judges, the judges in turn began to assert more and more control over juries. Autocracy of monarch, and his appointed judges, brought on the Revolution of 1688 and resulted on the ascendancy of the jury as the bulwark of freedom and the protection of freemen against tyrannical judges.<sup>11</sup> This ascendancy of the jury continued until democratic government in England became well established and the fear of rules and judges subsided.<sup>12</sup> Outside of Fox's Libel Act of 1792, arising from political prosecutions for libel and making jurors judges of the law as well as of the facts in those cases, there has been a steady development in England toward judicial control of jury trials with power in the judges to advise on the evidence.

The grievance of the colonists in American against colonial governors extended to the arbitrary colonial judges in much the same fashion as in England a century earlier. The colonists brought with them their dislike of autocratic judges.<sup>13</sup> The jury was by history a protector and appealed to the pioneer as the bulwark of political liberty. It has been said that to the frontier Americans, many of whom came to avoid oppression, "resistance to laws was more important than enforcement of law."<sup>14</sup> This early distrust of judges explains much of the limitations of their powers in jury trials. Instructions must be in writing. The scope of the court's instructions to the jury are limited in most cases to written instructions prepared by counsel. Judges have been deprived of their power to comment on the evidence or advise with regard to its weight and application. This attitude toward judges is seen further in the substitution of election for appointment and of short periods of office instead of life tenure, all of which has identified too closely the judiciary with political parties.

As government became more firmly established and democratic institutions were found adequate to give protection against religious and political persecutions, we find the pendulum swinging back to a general attack upon

11. See HILDRETH, LIVES OF ATROCIOUS JUDGES (1856).

12. For the struggle for the control of juries by the judges through the device of attaind and fine, see the authorities cited in note 10, *supra*. This culminated in 1670 in *Bushell's* case. Vaughn, 135 (C. P. 1670). Vaughn's decision recognized that in a general verdict the jury resolved the law and facts "complicatedly."

13. See discussion of these factors by Pound, *The Judicial Office in America* (1930) 10 B. U. L. REV. 125.

14. Pound, *ENCY. SOC. SCIENCES*, tit. JURY.

the jury as a weakness in the administration of justice. While jury trial is guaranteed in all constitutions in this country, its use is being modified in many ways, with the growing tendency to discard it unless expressly demanded in a case. Administrative procedure is rapidly replacing the courts in certain fields of the law, but few have felt that the loss of jury trial has been harmful. Waiver of jury trials is becoming increasingly common as the docket of every circuit will disclose. Only in criminal cases is the jury holding its ground. Coincidental with our changed notions with respect to the jury system is the change in the method for the selection of judges and the length of their terms. People everywhere are more concerned with efficiency in the administration of justice than with their old fears of oppression. In the federal courts the trial judge may assert as much control over the consciences of the jury as at any time in history. In England the use of the jury in civil cases is almost obsolete.

The decline of the jury in civil cases in the state courts strangely has not as yet resulted in increased power of the trial judge, but it has ushered in the heyday of the appellate courts. Through various devices, one of the more important of which is through instructions, the control over the jury and the trial judge has passed to the appellate courts.<sup>15</sup> While the trial judge in most state courts cannot comment on the facts, as that would theoretically invade the province of the jury, the appellate courts are more and more controlling the jury's finding through the requirement and restriction that the facts necessary under the legal principles applicable to issues in the case be hypothesized. While this is not a charge with respect to the facts, in the sense used in the federal and English courts, much the same result is obtained only in a far less understandable way. The principle difference is that a jury in a federal court receives helpful guidance when the judge orally explains to the jury in simple language the rule of law that is to be applied to the case and what their verdict should be in the alternatives as they find

---

15. A good treatment of the development of control over juries and trial judges is found in GREEN, JUDGE AND JURY (1930) ch. 14. "Probably the strangest chapter in American legal history is how in the short period of the last fifty or seventy-five years, the same period during which trial courts were losing most of their power, the appellate courts have drawn unto themselves practically all the power of the judicial system. The early appellate court, made up as it was of a group of trial judges, neither had nor sought a dominant position in the judicial system. From the moment that the appellate courts became a separate organization from trial courts, a silent and probably unconscious struggle for supremacy began, which has resulted not only in complete subordination of trial judges but also of juries." *Ibid.* at 380.

the facts to exist. He briefly summarizes the testimony, pointing out what facts are in controversy and where there is no conflict. Contrasted with this system is the typical state practice wherein the only guidance is to be found in a lengthy instruction read to the jurors, most of whom are inexperienced in absorbing the meaning of written language which consists of an unfamiliar grouping of words, in which the facts necessary for a finding are hypothesized in a jumble of words.<sup>16</sup> Chances for error are ever present lest a certain essential fact be omitted or improperly expressed, and the control which the appellate court exercises comes long after the jury has been discharged in the form of ordering a new trial in which it is hoped that the instructions at the second trial will be corrected to conform to the appellate court's thought. A different jury on the second trial then receives a new jumble of words. While our courts could not forthrightly overturn constitutional and statutory provisions that questions of fact are for the jury, the appellate courts have transformed this requirement into a most effective control of both trial judges and juries.<sup>17</sup> This is only for a period of transition and will hasten the day when well qualified trial judges will assume the same simple dignity of the judges of the federal courts. By restoring to trial judges their common law powers, prompt and less expensive judicial administration may be established. But in this period of transition lawyers must continue to draft their instructions from the standpoint of satisfying the appellate court with scant attention to the laymen on the jury, bewildered by

---

16. In urging fact finding by the use of the special verdict, one of our judges has made the following observation: "One of the frequent and universal complaints made by lawyers in many states today is that juries pay no attention to instructions. How can laymen pay attention to instructions they cannot understand? Some instruction, given in my state today, could only be understood by the most able, astute and experienced legal scholars (if any) whose knowledge covers the entire field of legal learning and grammatical construction (if so); and then only by careful use of diagrams and complete word-by-word analysis. A layman could as readily understand Einstein's theory of relativity. Such complicated instructions are not only a waste of effort, but also, under our general exceptions practice, take a very great risk of reversal." Hyde, *Fact Finding by Special Verdict* (1941) 24 J. AM. JUD. SOC. 144.

17. See Farley, *Instructions to Juries—Their Role in the Judicial Process* (1932) 42 YALE L. J. 194, 210, *et seq.* It is pointed out that there are "other devices by which appellate courts have wrested control from trial judges and juries, but were they all abolished, it is probable that errors of misdirection, non-direction and failure to observe directions would be sufficient to assure them such control." Green in JUDGE AND JURY (1930), at 391, says: "In brief, the extravagant pains we take to preserve the integrity of jury trial in final analysis are completely counteracted in the more extravagant provisions which we make for appellate review, together with the remarkable technique appellate courts have developed for subjecting every phase of trial to their own scrutiny and judgment."



the flow of strange words and incapable of making the fine distinctions which the application of the law to the facts as hypothesized requires.

The trial judge, too, has his attention focused more on the possibility of reversal than on assistance to the jury. If he refuses an instruction the stage is set; if he gives the proffered instructions there may be so much repetition as to be lopsided; if he tries his own hand and modifies an instruction he runs the risk of committing technical or formal error.<sup>18</sup>

While it is stated generally that on appeal the court shall not weigh the evidence and that the findings of fact by the jury are final and not to be disturbed, an appellate court does supervise the findings of fact indirectly by examining the instructions and by inquiring whether or not the jury might have been misled by facts which were or were not hypothesized, and whether they might have found differently on the facts if the instruction had been worded differently. The original function of instructions to enlighten the jury has become quite secondary. The upshot is that we seem no longer to trust juries, and neither does our trial system seem to place much confidence in the guidance by the trial judge. Only the appellate court is to determine what the jury should have been told, and this on the cold transcript of the evidence. At a period when there was greater confidence in juries, instructions were not so detailed and restrictive and the jury was given a great deal of freedom in passing on the whole case. For example, the instruction today on proximate cause is a hold over from that period. In contrast, is the instruction on sole cause which has been slowly worked out in the past ten years, and which is illustrative of the control which appellate courts have wrested from juries and trial judges. The higher courts in exercising their control assume that juries pay close attention to the instructions given to them, that they are quite capable of understanding involved instructions and of making the finest discrimination, that they will make the proper application to the facts presented in evidence, and that they might have decided otherwise had a certain fact been hypothesized or excluded from the instruction. This assumes an almost professional capacity to understand and apply, yet an utter inability to arrive at a fair result should the instruction be stated more generally.

Out of the desire of our appellate courts to guide the jury so minutely in negligence cases some results are well known. (1) The instructions be-

---

18. On the functions of instructions as traps for the courts, see Farley, *Instructions to Juries—Their Role in the Judicial Process* (1932) 42 YALE L. J. 194, at 216.

come so complicated that the jury cannot understand them, the jury becoming confused and deciding the case as they see it, resulting in the defeat of the very purpose of instructions. (2) A trap is laid for the reversal of the trial judge. (3) The defendant's chance for error is enhanced in proportion to the number of instructions submitted by him in order that some will be refused which the appellate court will consider proper. (4) The plaintiff is timid in asking for instructions lest he commit error and not be permitted to keep his verdict. The third and fourth results are reversed as to the parties in sole cause instructions because of their affirmative nature. After reading the decisions on sole cause instructions, one is impressed with the distinct risk of asking for the instructions even though the evidence amply supports the defense. Instead, it may be better to attempt to get the defense over to the jury in some other way and trust to their fair judgment on the entire case.

## II. THEORY OF SOLE CAUSE AS DEFENSE

Since instructions on sole cause must be tendered by the defendant if he wishes to be certain that the jury consider the defense, it is necessary to have a theory on which that defense is based if the instructions are to be drawn properly. The typical set of facts involving sole cause is an action for damages brought by the plaintiff against the defendant based on the alleged negligence of the defendant. At the trial the defendant introduces sufficient evidence by which a jury may find that plaintiff's harm was due solely to his own fault, or due solely to the fault of a third person for whose conduct the defendant is in no manner responsible. There is nothing novel or new about the principle of law involved. No one questions a rule of law that a defendant should not be made to pay for another's harm if he had nothing whatever to do with bringing it about. There is a real difficulty, however, in explaining the abstraction "sole cause" to the jury which will meet with the approval of the supreme court of this state.<sup>19</sup> How should the

---

19. It is said in *Shields v. Keller*, 348 Mo. 326, 335, 153 S. W. (2d) 60, 64, (1941), that the case of *Borgstede v. Waldbauer*, 337 Mo. 1205, 88 S. W. (2d) 373 (1935) (by the court *en banc*), "first authorized sole cause instructions." This was a humanitarian case. In *Millhouser v. Kansas City Pub. Serv. Co.*, 331 Mo. 933, 940, 55 S. W. (2d) 673, 676, (1932), decided three years before the *Borgstede* case, Division I had held a sole cause instruction erroneous in a humanitarian case on the ground that "the only defense in a case properly submitted on the humanitarian rule is to disprove one or more of the basic facts on which that rule rests."

concept of sole cause be translated to the jury to assist them in understanding the theory of the defense and in their duty of finding the facts. The court has been almost wholly concerned with the technique in using it rather than its legal content. A legal analysis of the abstraction has not been so important, for in most cases the theory has been that the defendant has not even been negligent and, therefore, the plaintiff or some third person or force caused the harm. But there is a great deal more included in the theory of the abstraction. There is more than one concept or theory involved in this defense.

#### A. *Sole Negligence as Sole Cause*

If the defendant shows that he was in no manner negligent, this should suffice to relieve him of responsibility. In general, our concept of liability is one based upon fault. Since juries are prone to look with sympathy upon an injured plaintiff, the defendant runs considerable risk in persuading the jury that he had nothing to do with the plaintiff's harm by showing merely that his conduct measured up to that of the reasonable man under the circumstances by merely denying negligence. An accident did happen; the defendant was involved. After the event and in the presence of the injured plaintiff it is difficult for him to absolve himself from all blame. To make his position still more clear to the jury, and to show that he was not negligent merely by denying lack of due care, the defendant has found another device for absolving himself of liability.<sup>20</sup> Through the sole cause instruction he focuses the attention of the jury away from his own involvement in the accident and plays the spotlight straight to the conduct of the plaintiff or someone else. It is elementary that evidence of his theory to make a submissible case must be introduced making it possible for the jury to find him fully exonerated of any fault before he is entitled to a sole cause instruction.<sup>21</sup> He

---

20. "It was simply one way of showing that defendant was not negligent." *Smith v. Kansas City Pub. Serv. Co.*, 328 Mo. 979, 996, 43 S. W. (2d) 548, 551, (1931) (*en banc*). "There is no magic in the word 'sole' nor in the phrase 'sole cause' and perhaps they have been used overmuch . . . but for a lack of more expressive and apt language they have been employed to describe another means by which a defendant may absolve himself of liability. If a defendant can present a state of facts (aside from showing contributory negligence on the part of the plaintiff or imputing some third party's negligence to him through an agency relationship) which if found by the jury would absolve him of fault and consequent liability and demonstrate as a matter of fact, if true and found, that some other person or agency than the defendant was 'alone; that is the only one' at fault, 'the sole author' of the collision and injuries complained of he is, of course, entitled to do so." Barrett, C., in *Semar v. Kelly*, 176 S. W. (2d) 289, 291 (Mo. 1943).

21. *Crews v. Kansas City Pub. Serv. Co.*, 341 Mo. 1090, 111 S. W. (2d) 54 (1937); *Long v. Mild*, 347 Mo. 1002, 149 S. W. (2d) 853 (1941).

then has the opportunity in argument before the jury to focus attention entirely on another as the one responsible. On strict analysis this is not a theory of sole causation but one of sole negligence.

The pleading of sole negligence gives no difficulty where the defendant's theory is that there was no negligence on his part and the defense may be raised under the general denial.<sup>22</sup> For the purpose of pleading it is not an affirmative defense. It is in the instructions where the theory of sole negligence is strained. If it is not an affirmative defense (as it is not for the purpose of pleading), then should it be so treated in the instructions submitting the issue? The cases so require and hold that the defendant must hypothesize facts based upon his evidence showing a sole cause situation and a finding of sole cause and of his freedom from any negligence charged against him.<sup>23</sup> Of course the latter fact is sufficiently hypothesized if the instruction negatives the negligence in any particular set out in the other instructions,<sup>24</sup> or by reference to other instructions where such facts are hypothesized.<sup>25</sup> The

22. *Watts v. Moussette*, 337 Mo. 533, 85 S. W. (2d) 487 (1935) (although in this case the specific acts of negligence of a third person were pleaded); *Stanich v. Western Union Tel. Co.*, 348 Mo. 188, 153 S. W. (2d) 54 (1941); *Long v. Mild*, 347 Mo. 1002, 149 S. W. (2d) 853 (1941); and see *Smith v. Kansas City Pub. Serv. Co.*, 328 Mo. 979, 43 S. W. (2d) 548 (1931).

23. *Borgstede v. Walbauer*, 337 Mo. 1205, 88 S. W. (2d) 373 (1935) (*en banc*); *McGrath v. Meyers*, 341 Mo. 412, 107 S. W. (2d) 792 (1937); *Reiling v. Russell*, 345 Mo. 517, 134 S. W. (2d) 33 (1939); *State ex rel. Snider v. Shain*, 345 Mo. 950, 137 S. W. (2d) 527 (1940); *Hopkins v. Highland Dairy Farms Co.*, 348 Mo. 1158, 159 S. W. (2d) 254 (1941); *Shields v. Keller*, 348 Mo. 326, 153 S. W. (2d) 60 (1941); *Stanich v. Western Union Tel. Co.*, 348 Mo. 188, 153 S. W. (2d) 54 (1941); *Long v. Mild*, 347 Mo. 1002, 149 S. W. (2d) 853 (1941); *Mendenhall v. Neyer*, 347 Mo. 881, 149 S. W. (2d) 366 (1941); *Semar v. Kelly*, 176 S. W. (2d) 289 (Mo. 1943); *Bootee v. Kansas City Pub. Serv. Co.*, 183 S. W. (2d) 892 (Mo. 1944). But in *Jurgens v. Thompson*, 169 S. W. (2d) 353 (Mo. 1943), defendant did not include in his instructions an hypothesization of facts negating any negligence on his part. Since plaintiff had hypothesized such facts which if found to be true constituted negligence on the defendant, it was held that defendant did not have to negative all those facts in his instruction. It should also be noticed that defendant did not refer either to plaintiff's instructions. The decision is much more liberal than the long list of cases preceding it.

24. *Long v. Mild*, 347 Mo. 1002, 149 S. W. (2d) 853 (1941).

25. *Johnson v. Dawidoff*, 177 S. W. (2d) 467 (Mo. 1944); *Jurgens v. Thompson*, 350 Mo. 914, 169 S. W. (2d) 353 (1943); *Branson v. Abernathy Furniture Co.*, 344 Mo. 1171, 130 S. W. (2d) 562 (1939); and see *Kick v. Franklin*, 345 Mo. 752, 137 S. W. (2d) 512 (1940). In *Jurgens v. Thompson*, *supra*, the defendant's instruction was held in proper form which did not even refer to the other instructions by the plaintiff in negating negligence on its part. In the same case, an attack on the defendant's instruction for assuming that the driver of the car in which plaintiff was riding was negligent, was not sustained because the driver was negligent as a matter of law. On the same proposition, see *Rishel v. Kansas City Pub. Serv. Co.*, 129 S. W. (2d) 851 (Mo. 1939).

defendant, however, is not restricted to and seldom does submit his defense, upon the facts shown by the evidence of the plaintiff which he disputes.<sup>26</sup> If two sole causes are submitted as alternative grounds absolving defendant of liability, the facts supporting each cause must be sufficiently hypothesized.<sup>27</sup>

Various reasons have been given for this requirement in submitting this defense. One, the defendant has the same right as the plaintiff to set forth facts which, if found by the jury to be true, would, under the law, absolve him from liability,<sup>28</sup> and he is not limited merely to submit negative instructions.<sup>29</sup> Two, since the plaintiff where general negligence is charged and where the pleading is unchallenged must, except in a *res ipsa* case, submit the case on specific negligence, and since a defendant pleading contributory negligence must submit that issue on specific negligence, the same reasoning impels a defendant in a negligence case who invokes as a defense the negligence of plaintiff or third person as being the sole cause to submit the specific negligence.<sup>30</sup> However, the analogies are affirmative matters which must be so pleaded and, therefore, the reasoning from these analogies is not convincing. In the analogies used the burden of proof is on the party propounding the theory, yet our court, where the sole cause issue is in the case, has made it very clear that the burden of proof does not shift to the

26. *Robb v. St. Louis Pub. Serv. Co.*, 178 S. W. (2d) 443 (Mo. 1944); *Long v. Mild*, 347 Mo. 1002, 149 S. W. (2d) 853 (1941). This is true even if the testimony by the defendant's witnesses produces facts contrary to plaintiff's evidence and is highly contested.

27. *Long v. Mild*, 347 Mo. 1002, 1010, 149 S. W. (2d) 853, 858, (1941). In this case sole negligence was based on swerving of the car and excessive speed. The facts of the first were properly hypothesized, but the second required only a finding that the third person driving the car in which the plaintiff was riding as a guest "was operating same at a high and excessive rate of speed under the circumstances." Said the court: "Such a separate independent ground hypothesized as a complete defense by itself must, of course, be complete and sufficient in itself, in the findings it requires, as well as warranted by the evidence, or it is reversible error." The court further explained that the instruction was bad because it did not refer to speed at the place of the collision, and was not connected with the previously required finding on the other negligence charge as to the position of the truck off the highway. It would not justify a finding of negligence on the part of the driver as the sole cause of the collision unless the driver's car ran into defendant's truck when it was completely off the highway.

28. *Borgstede v. Waldbauer*, 337 Mo. 1205, 88 S. W. (2d) 373 (1935); *Semar v. Kelly*, 176 S. W. (2d) 289 (Mo. 1943).

29. *Doherty v. St. Louis Butter Co.*, 339 Mo. 996, 98 S. W. (2d) 742 (1936).

30. *Watts v. Moussette*, 337 Mo. 533, 85 S. W. (2d) 487 (1935); *Doherty v. St. Louis Butter Co.*, 339 Mo. 996, 98 S. W. (2d) 742 (1936).

31. *Smith v. Kansas City Pub. Serv. Co.*, 328 Mo. 979, 43 S. W. (2d) 548 (1931) (holding such instruction error); *Long v. Mild*, 347 Mo. 1002, 149 S. W.

defendant on this issue.<sup>31</sup> In a number of cases it has been distinctly stated that it is not an affirmative defense.<sup>32</sup>

It should be observed that the court *en banc* in the leading case recognizing sole cause as a defense was more concerned with the reason whereby it should reverse its earlier decision *en banc* rather than with the hypothesization itself. In *Causey v. Wittig*,<sup>33</sup> the court *en banc* by a four to three division had refused defendant's instruction setting forth facts which if found by the jury would make plaintiff solely responsible for the collision. Seven years later, in *Borgstede v. Waldbauer*,<sup>34</sup> the court *en banc* adopted the dissent in the *Causey* case and reversed itself. To justify its change of position, the court set forth the following as a reason and not as a requirement: "As a rule a plaintiff's instruction, authorizing a verdict, sets forth the facts in evidence relied on for a recovery. Has this court ever condemned such an instruction because it gave undue prominence to facts favorable to plaintiff? Then why should a defendant's instruction be condemned because it sets forth facts which, if found to be true by the jury, would, under the law, absolve him from liability? A plaintiff, by filing suit, hails a defendant into court and seeks recovery from him upon certain facts established by his evidence and submitted to the jury by instructions. If the jury find such facts to be true, the instruction authorizes a favorable verdict. *By every rule of justice a defendant should be accorded the same right and have his theory submitted to the jury in the same manner.*" (Italics the writer's.)

A third reason given for hypothesizing defendant's sole cause defense, and a more practical one, running through the decisions is how could the defendant "show a state of facts which would place the entire blame for the injury upon the plaintiff, or a third person, unless such facts did negate defendant's negligence." To state abstractly that plaintiff cannot recover from the defendant if his injuries resulted from his own negligence, or that of a third person, is likely to confuse the jury in finding the defendant not

(2d) 853 (1941) (holding it is not erroneous to instruct in another instruction besides the sole cause instruction that the plaintiff has the burden to prove the defendant negligent and his negligence caused or contributed to cause plaintiff's injury).

32. *Smith v. Kansas City Pub. Serv. Co.*, 328 Mo. 979, 43 S. W. (2d) 548 (1931); *Long v. Mild*, 347 Mo. 1002, 149 S. W. (2d) 853 (1941); *Borrson v. Missouri-Kansas-Texas R. R.*, 351 Mo. 214, 172 S. W. (2d) 826 (1943); but see *Branson v. Abernathy Furniture Co.*, 344 Mo. 1171, 130 S. W. (2d) 562 (1939).

33. 321 Mo. 358, 11 S. W. (2d) 11 (1928).

34. 337 Mo. 1205, 1215, 88 S. W. (2d) 373, 378 (1935).

responsible even if his own negligence concurred.<sup>35</sup> It is a means of disentangling sole and concurring negligence.<sup>36</sup> So sure is the court of this inability of the jury that even an abstract concurring negligence instruction given for the plaintiff, in an attempt to cure defendant's abstract sole cause instruction, does not sufficiently prevent the jury from misunderstanding what facts must be found to justify a sole cause finding for the defendant.<sup>37</sup> It is thought the jury might assume the instruction meant that, if plaintiff's negligence, or that of a third person, was last in point of time in operating to cause the accident he could not recover even though defendant was also negligent.<sup>38</sup> In a number of cases the court has attempted to guide in the

35. *Boland v. St. Louis-San Francisco Ry.*, 284 S. W. 141 (Mo. 1926); *Peppers v. St. Louis-San Francisco Ry.*, 316 Mo. 1104, 295 S. W. 757 (1927); *Long v. Mild*, 347 Mo. 1002, 149 S. W. (2d) 853 (1941); *Stanich v. Western Union Tel. Co.*, 348 Mo. 188; 153 S. W. (2d) 54 (1941); see also, *McGrath v. Meyers*, 341 Mo. 412, 107 S. W. (2d) 792 (1937); *Crews v. Kansas City Pub. Serv. Co.*, 341 Mo. 1090, 111 S. W. (2d) 54 (1937); *Reiling v. Russell*, 345 Mo. 517, 134 S. W. (2d) 33 (1939); *Bootee v. Kansas City Pub. Serv. Co.*, 183 S. W. (2d) 892 (Mo. 1944). This seems to explain some of the older cases before the defense was recognized at all. *Boland v. St. Louis-San Francisco Ry.*, 284 S. W. 141 (Mo. 1926); *Decker v. Liberty*, 39 S. W. (2d) 546 (Mo. 1931); *Crowley v. Worthington*, 71 S. W. (2d) 744 (Mo. 1934).

36. In *Long v. Mild*, 347 Mo. 1002, 1014, 149 S. W. (2d) 853, 860, (1941), on rehearing, the court said: "We also held (and we reaffirm that holding) that merely to require a finding of negligent excessive speed, without any finding of facts as to where defendants' truck was when the collision occurred, was not sufficient because this authorized a verdict for defendants even if both drivers were negligent. In other words, the situation, which the jury was required to find, was so generally stated that it would include a concurring cause (as a reason for finding for defendants) as well as sole cause. Therefore, we could not say that the jury found a sole cause situation unless we would assume that the jury could correctly apply the law of sole cause to the evidence without any guidance as to specific facts required to be found to reach a correct result. If we would make such an assumption as to a sole cause defense we might just as well give juries only abstract general statements of law in any kind of defense, or for that matter in the submission of a plaintiff's case." Query, why would not other instructions on concurring causation inform the jury sufficiently to trust their intelligence in making a just finding?

37. *Stanich v. Western Union Tel. Co.*, 348 Mo. 188, 153 S. W. (2d) 54 (1941); *Hopkins v. Highland Dairy Farms Co.*, 348 Mo. 1158, 159 S. W. (2d) 254 (1941). See suggested instructions by the plaintiff on concurring negligence to offset defendant's sole cause instruction in *TRUSTY, CONSTRUCTING AND REVIEWING INSTRUCTIONS* (1941) 248, 251, 254. It is error not to instruct for the plaintiff on concurring negligence where a sole cause instruction has been given for the defendant. *Peppers v. St. Louis-San Francisco Ry.*, 316 Mo. 1104, 295 S. W. 757 (1927). For a converse sole cause instruction, see *Hollister v. Aloe Co.*, 348 Mo. 1055, 156 S. W. (2d) 606 (1941), and *Kick v. Franklin*, 345 Mo. 752, 137 S. W. (2d) 512 (1940).

38. *Hopkins v. Highland Dairy Farms Co.*, 348 Mo. 1158, 159 S. W. (2d) 254 (1941).

drafting of sole cause instructions by showing what facts were or were not hypothesized.<sup>39</sup> Since, however, the theory and facts of each case are always somewhat different, this assistance will not enable counsel to be very certain that he can draft a sole cause instruction which will pass scrutiny. Instructions on sole cause never can approach the more or less standardized humanitarian instruction.

### B. *Sole Cause a Theory of Causation*

A second theory behind the abstraction "sole cause" is implicit in the phrase itself—a theory of causation, and there is some indication in the cases that occasionally the judge writing the opinion had this theory in mind.<sup>40</sup> This broadens the concept and includes some of the most difficult notions in the law in so far as making the legal concept clear to a jury. "Sole negligence" is comparatively simple to understand, for if the defendant was not even negligent the accident cannot be charged to him. As a problem of causation, however, it must be assumed that the defendant was negligent, and the question becomes one of finding whether or not the negligent defendant has so produced the harm, for which he is sought to be held responsible, as to regard in law his conduct as the legal cause of the harm. Furthermore, before a defendant may be a legal cause of the plaintiff's harm

---

39. *McGrath v. Meyers*, 341 Mo. 412, 107 S. W. (2d) 792 (1937); *Reiling v. Russell*, 345 Mo. 517, 134 S. W. (2d) 33 (1939); *Long v. Mild*, 347 Mo. 1002, 149 S. W. (2d) 853 (1941); *Shields v. Keller*, 348 Mo. 326, 153 S. W. (2d) 60 (1941); *Semar v. Kelly*, 176 S. W. (2d) 289 (Mo. 1943); *Bootee v. Kansas City Pub. Serv. Co.*, 183 S. W. (2d) 892 (Mo. 1944).

40. In *Boland v. St. Louis-San Francisco Ry.*, 284 S. W. 141, 145, (Mo. 1926), the court had before it an instruction given below for the defendant: "If you find and believe from all the evidence in the case that the collision between the passenger train and the automobile described in the evidence was the result of the sole negligence of the driver of said automobile, then plaintiff is not entitled to recover against the defendant and your verdict must be for the defendant." Said the court: "Of course the defendant is not liable if its alleged negligence had nothing whatever to do with bringing about plaintiff's injury. But the cryptic way in which this information was conveyed to the jury was calculated not to enlighten, but to confuse." In *Hollister v. Aloe Co.*, 348 Mo. 1055, 1059, 156 S. W. (2d) 606, 608, (1941): "The appellant contends that respondent was injured by the sole negligence of her husband . . . in stopping his car. . . . We agree with the principle of law relied on by the appellant that 'a defendant sued for negligence is liable therefor only when such negligence is the direct and proximate cause of the injury. If there is an intervening act of negligence of another party, itself the efficient, direct, and proximate cause of the injury, it becomes in law the sole cause.'" See *Borrson v. Missouri-Kansas-Texas R. R.*, 351 Mo. 214, 172 S. W. (2d) 826 (1943), for a theory of "sole proximate cause." In *Mendenhall v. Neyer*, 347 Mo. 881, 892, 149 S. W. (2d) 366, 373, (1941), it was said, "If defendant was negligent, then the automobile operator's act could not constitute the *sole negligence cause*." (Italics the writer's) See, also, the interpretation by Ball, *The Vanished Sole Cause Instruction* (1942) 13 Mo. B. J. 50.



the defendant must have been negligent toward the plaintiff. Although he may have been negligent because his conduct involved a foreseeable risk of causing harm to a third person, unless there was a recognizable risk also to the plaintiff, or to a class of persons of which plaintiff is a member, the fact that harm resulted to the plaintiff does not make the defendant responsible to him in damages. This is elementary, but the difference between negligence and causation is often obliterated by courts, and, where negligence is doubtful, the courts not infrequently make the question one of causation, without inquiring into the negligence issue.<sup>41</sup> Causation is a very narrow problem, and in many instances it is submitted to the jury as a question of negligence, only stated a little differently. In determining negligence, our inquiry is whether defendant should as a reasonable person have realized an unreasonable risk of causing harm to the plaintiff, or to the class of persons of which the plaintiff is one. It is foresight; not hindsight. In determining whether the negligence was a cause of the harm our inquiry begins after the event and seeks to trace the sequence of events by looking back from the harm to the defendant's negligent conduct.

Causation is used in different senses, however the usual practice is to lump all matters pertaining to causation and call it proximate or legal cause. There is cause in fact, proximate or legal cause, supervening or intervening cause and concurring cause. Each is a problem of causation and each has entirely different meanings in the law. Actual cause, or cause in fact, is a very inclusive concept and includes any number of events without which the happening would not have occurred. If there is any physical relation in fact between the defendant's conduct and the plaintiff's injury causation in this broad sense has been established. The existence or non-existence of actual cause is determined by inquiring whether or not the harm would have happened but for the negligence of the defendant. Very little guidance in finding this fact can be given to a jury other than to state the abstraction. Usually, however, the abstraction is not difficult to understand and apply.<sup>42</sup>

---

41. RESTATEMENT, TORTS (1934) § 430; Green, *The Negligence Issue* (1928) 37 YALE L. J. 1029; Green, *The Duty Problem in Negligence Cases* (1928) 28 COL. L. REV. 1014; Green, *A New Development in Jury Trial* (1927) 13 A. B. A. J. 715.

42. The purpose of this paper is not a treatment of the subject of causation, except as to point out the possibilities in the abstraction "sole cause." Therefore, the reader interested in a thorough treatment of actual cause or cause in fact will find other discussion much more helpful in which the cases are collected. RESTATEMENT, TORTS (1934) § 430; Carpenter, *Proximate Cause* (1942) 15 SO. CALIF. L. REV. 187, 427; HARPER, TORTS (1933) § 109; PROSSER, TORTS (1941) 321; Springer v. Security Nat. Bank Sav. & Trust Co., 175 S. W. (2d) 797 (Mo. 1943).

The usual usage of causation is that of proximate or legal cause. This is a delimitation of actual cause and cannot exist without the latter. If there is no causation in fact there can be no problem of proximate or legal causation. To prevent confusion and needless work for the jury, the court will put the entire question of causation as one of legal cause. Since some connection in fact is not difficult to establish in the great bulk of the cases, the court pushes to the final objective of whether, under the proper legal formula, the defendant's negligence was the cause in law of the plaintiff's harm. There must be stopping points for responsibility in a popular sense. To assist the jury in knowing to what extent liability is to be carried, where the stopping points are, certain formulas have been used by the courts. These are not rules as we find in property law or contracts; they are merely guides to the jury. Thus we find courts explaining causation in this sense by instructing, after the sequence of events is known, that liability attaches to negligent conduct if the conduct was the proximate cause, or the direct cause, or the efficient cause, or a substantial factor of the term, or in terms whether the harm was the natural and probable result of the conduct, although the harm may seem altogether different from the result which should have been recognized at the time of the defendant's negligence as likely to result therefrom. If the result does not appear too highly extraordinary the conduct may be said to be the cause in law of the harm.<sup>43</sup>

We have many examples of this in our case law covering the humanitarian rule. It is well settled that the antecedent negligence of either party is not to be considered in a last chance or humanitarian situation, yet each was negligent and each antecedent negligence was a substantial factor in causing the ultimate crisis.<sup>44</sup> It has never been doubted but that plaintiff's contributory negligence in a last chance or humanitarian case was a sub-

---

43. Legal treatises are full of discussions of proximate or legal cause. Helpful discussion may be found in the following: RESTATEMENT, TORTS (1934) §§ 431-439; PROSSER, TORTS (1941) 311-326, 340-352; HARPER, TORTS (1933) §§ 110-129; Smith, *Legal Cause in Actions of Tort* (1912) 25 HARV. L. REV. 103, 223, 303; Beale, *The Proximate Consequences of an Act* (1920) 33 HARV. L. REV. 633; McLaughlin, *Proximate Cause* (1925) 39 HARV. L. REV. 149; Carpenter, *Workable Rules for Determining Proximate Cause* (1932) 20 CALIF. L. REV. 229, 396, 471; Carpenter, *Proximate Cause* (1942) 16 SO. CALIF. L. REV. 1.

44. Leading cases are: *State ex rel. Fleming v. Bland*, 322 Mo. 565, 572, 15 S. W. (2d) 798, 801, (1929) ("The ruling that the antecedent negligence of defendant may be taken into consideration in determining whether he was negligent under the humanitarian rule would in many cases permit an unwarranted recovery for primary negligence through the elimination, under the guise of that rule, of the defense of contributory negligence.") Expressly disapproving earlier decisions by the Kansas City Court of Appeals to the contrary: *Todd v. St. Louis-San Francisco Ry.*,

stantial factor and one of the causes of his injury, but due to other principles of law applicable under our case law which excuses his own negligence our courts find that he was not sufficiently culpable as to make him responsible in law for his own harm. All this comes out in the formula that his contributory negligence was not the proximate cause of his injury.<sup>45</sup> That it was a very substantial factor in the accident is seen where the negligence of both plaintiff and defendant combines to injure a third person. There is no question here but that the third person may recover from either or both on the theory of legal or proximate causation.<sup>46</sup>

There is still another aspect of causation known as intervening or supervening cause. This is an act of a third person or force of nature which by its intervention prevents the defendant from being liable in law for the plaintiff's harm, although the defendant's antecedent negligence is a substantial factor in bringing about the harm. In determining whether an intervening force will relieve a defendant, irrespective of whether his antecedent negligence was or was not a substantial factor in bringing about the harm, various considerations have been made by the courts. Did the new force bring about harm different from that which otherwise would have resulted from the defendant's negligence? Does this force, looked upon after the event, appear extraordinary rather than normal, in viewing the circumstances which existed at the time of its operation? In looking back over the sequence of events, could this force be said to be foreseeable? Was this force operating independently, or was it the normal response of the stimulus of the situation created by the defendant's negligent conduct? These and other considerations involved in an analysis of intervening cause are more fully treated elsewhere, and are not intended to be treated at length here.<sup>47</sup>

---

37 S. W. (2d) 557 (Mo. 1931); *Mayfield v. Kansas City So. Ry.*, 337 Mo. 79, 85 S. W. (2d) 116 (1935), noted in (1936) 1 Mo. L. Rev. 103; and see *Bumgardner v. St. Louis Pub. Serv. Co.*, 340 Mo. 521, 102 S. W. (2d) 594 (1936), noted in (1937) 2 Mo. L. Rev. 525.

45. See discussion by the writer, *The Bases of the Humanitarian Doctrine Re-examined* (1940) 5 Mo. L. Rev. 56, 57-63; James, *Last Clear Chance: A transitional Doctrine* (1938) 47 YALE L. J. 704, 707; Otis, *The Humanitarian Doctrine* (1912) 46 AM. L. REV. 381, 385; Notes (1934) 92 A. L. R. 47, and (1939) 119 A. L. R. 1041.

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

47. RESTATEMENT, TORTS, MO. ANNOT. (1936) §§ 440-453; HARPER, TORTS (1933) §§ 113 *et seq.*; PROSSER, TORTS (1941) 352-375; Carpenter, *Proximate Cause* (1943) 16 So. CALIF. L. REV. 61, 275.

In treating sole cause as found in the Missouri decisions, it is beyond the purpose of the writer to attempt a full length treatment of the subject of causation. A bare introduction to the many aspects of causation is made to show the possible scope of the abstraction "sole cause." When the defendant seeks to relieve himself of liability, he could be basing his theory on any one of the three forms of causation set forth above. It could mean that there was no causal relation in fact between the defendant's conduct and the plaintiff's harm. It could mean that, although there was some relation in fact, it was so extraordinary that it would be carrying the responsibility of the defendant unreasonably far. Or it could mean that, although there was actual causation and the defendant's conduct was a substantial factor in producing the harm, still there was a supervening force which operated as an intervening cause to relieve the defendant of responsibility.

If "sole cause" is a problem of causation, how should it be translated to the jury so that they might understand it sufficiently to apply the facts of the case? In the phases of causation mentioned above it has been passed to the jury by formulating adaptable phrases of proximate or legal cause. The jury is asked to determine whether or not the defendant's negligence was a substantial factor in causing plaintiff's harm, or the natural and probable cause, or by other formulas which have been devised. It is a problem in the use of language, but nowhere has a court attempted to do more than to dump the problem into the jury's lap abstractly. It requires the facts of negligence relied upon to be hypothesized, but when it comes to causation courts have found it inexpedient to do more than call the attention of the jury to the problem on which the judgment of the jury is desired. The causation issue is a different issue than the negligence issue and calls for a different sort of judgment. In determining negligence judgment is required on all the factors to see if reasonable care was exercised under the circumstances; causal relation calls for another kind of judgment based on physical fact to measure the effects of various factors in fixing responsibility. There is no more understandable way to express it than to ask the jury to decide if defendant's negligence was the proximate or legal cause of the plaintiff's injuries. The jury then has a wide latitude for considering the whole case.<sup>48</sup> In submitting the problem of causation to the jury by the use of the word "proximate," our court has not felt that the jury would be at sea or that it was given a roving commission because of the use of the term proximate

---

48. GREEN, JUDGE AND JURY. (1930) ch. 6.

cause: "To hold that the jurors might have been 'mystified' by the language used in the above instructions would be equivalent to holding that they were lacking in ordinary intelligence. If counsel was fearful that the jurors might be misled by the language above quoted, he should have asked an instruction defining his own theory of the law on that subject."<sup>49</sup>

Should it be thought that, in the ordinary negligence instruction, proximate cause is submitted on hypothesized facts, it should be pointed out that the facts hypothesized go to the element of negligence and not to causation. Otherwise, causation and negligence would all be lumped together, or the negligence issue is being submitted the second time, under a supposedly proximate cause formula.<sup>50</sup>

If "sole cause" is a problem of causation, certainly it can be submitted to the jury in much more simple and understandable language than through the devise of requiring the defendant to hypothesize all the facts of the plaintiff's negligence, or that of a third person, and also negate the facts pertaining to his own negligence. By the formulation of adaptable phrases which would explain to the jury in a primary negligence action that "sole cause" means the one and only cause, excluding all other causes, or in a humanitarian case the difference between sole cause and concurring or contributing negligence, and in other cases, *e.g.*, the guest cases, where the defendant seeks to show that the driver of the other car was solely responsible, that sole cause could not be found if there was concurring negligence by the defendant, it would seem that the jury would come closer to being less mystified than under the present hypothesization.<sup>51</sup> Furthermore, it would make possible the formulation of instructions by the average lawyer who does not specialize in negligence cases, so that he could hold his verdict in a type of defense where reversals have been so numerous. The specialist, perhaps, may be able to draft instructions to meet the present requirements of the court, but this does not contribute to the wise administration of a branch of the law with which every lawyer must deal in serving his clients in the general practice.

---

49. *Maloney v. United Rys.*, 237 S. W. 509, 515, (Mo. 1921), quoted again in *Brinkley v. Shell*, 349 Mo. 1227, 1247, 164 S. W. (2d) 325, 335, (1942) (submitting causation in the manner discussed above in negligence cases).

50. GREEN, JUDGE AND JURY (1930) 195.

51. In *Fassi v. Schuler*, 349 Mo. 160, 167, 159 S. W. (2d) 774, 777, (1942), sole cause was defined as "the act or negligence of the plaintiff or a third party directly causing the injury without any concurring or contributory negligence of the defendant." See a good example of an offsetting instruction on concurrent negligence in *Hollister v. Aloe Co.*, 348 Mo. 1055, 156 S. W. (2d) 606 (1941).

## III. OTHER PROBLEMS INVOLVED IN THE SOLE CAUSE DEFENSE

Beyond the possible theories of the abstraction "sole cause," numerous problems are found in the cases in applying the concept. Compared to the plaintiff's position in preparing his pleadings and instructions under the humanitarian rule, where he can be fairly certain as to the essential legal propositions which he must establish by his allegations and hypothesization of the facts, the defendant in this defense is employing an abstraction, the legal content of which is different in varying fact situations. Limitations of space in an article of this nature prevents an exhaustive treatment of each of these problems; all that can be accomplished is to set forth briefly the various types of problems which have been passed upon by the court up to the present.<sup>52</sup>

A. *Sole Cause in the Humanitarian Cases*<sup>53</sup>

The availability of sole cause was recognized as a defense in a humanitarian case in the first decision approving of its use.<sup>54</sup> The question was more fully treated in *Doherty v. St. Louis Butter Co.*:<sup>55</sup> "Should a defendant, under the humanitarian rule, be restricted to disprove one or more of the facts upon which that rule rests? Or may he affirmatively show a state of facts which, if true, would place the entire blame for the injury upon the

52. A somewhat different classification of the cases is found in TRUSTY, CONSTRUCTING AND REVIEWING INSTRUCTIONS (1941) § 34.

53. The humanitarian cases involving sole cause are: (1) Collision between plaintiff, a pedestrian, and defendant's automobile, *Causey v. Wittig*, 321 Mo. 358, 11 S. W. (2d) 11 (1928) (*en banc*); *rev'd* in *Borgstede v. Waldbauer*, 337 Mo. 1205, 88 S. W. (2d) 373 (1935) (*en banc*); *Doherty v. St. Louis Butter Co.*, 339 Mo. 996, 98 S. W. (2d) 742 (1936); *Johnston v. Ramming*, 340 Mo. 311, 100 S. W. (2d) 466 (1937); *Reiling v. Russell*, 345 Mo. 517, 134 S. W. (2d) 33 (1939); *State ex rel. Snider v. Shain*, 345 Mo. 950, 137 S. W. (2d) 527 (1940); *Shields v. Keller*, 348 Mo. 326, 153 S. W. (2d) 60 (1941); *Johnson v. Dawidoff*, 177 S. W. (2d) 467 (Mo. 1944); *Bootee v. Kansas City Pub. Serv. Co.*, 183 S. W. (2d) 892 (Mo. 1944). (2) Collision between an automobile operated by plaintiff and defendant's automobile, *Dilallo v. Lynch*, 340 Mo. 82, 101 S. W. (2d) 7 (1936); *Smithers v. Barker*, 341 Mo. 1017, 111 S. W. (2d) 47 (1937); *Branson v. Abernathy Furniture Co.*, 344 Mo. 1171, 130 S. W. (2d) 562 (1939). (3) Collision between automobile in which plaintiff was riding as a guest and defendant's automobile, *McGrath v. Meyers*, 341 Mo. 412, 107 S. W. (2d) 792 (1937); *Hollister v. Aloe Co.*, 348 Mo. 1055, 156 S. W. (2d) 606 (1941). (4) Collision between automobile in which plaintiff was riding as a guest and defendant's train, *Kick v. Franklin*, 345 Mo. 752, 137 S. W. (2d) 512 (1940); streetcar, *Robb v. St. Louis Pub. Serv. Co.*, 178 S. W. (2d) 443 (Mo. 1944).

54. *Borgstede v. Waldbauer*, 337 Mo. 1205, 88 S. W. (2d) 373 (1935) (*en banc*), disapproving of *Causey v. Wittig*, 321 Mo. 358, 11 S. W. (2d) 11 (1928) (*en banc*).

55. 339 Mo. 996, 1006, 98 S. W. (2d) 742, 746, (1936).

plaintiff, and *by an appropriate instruction submit that question to the jury?*" The court likened a rule which would limit the defendant merely to submit negative instructions "to compelling a man to enter a boxing contest and by the rules restrict him to dodging the other fellow's blows."

The problem here is to frame the instructions so as to leave no room for the jury to consider contributory negligence as still being in the case, for contributory negligence passes out of the case when it is submitted solely under the humanitarian doctrine.<sup>56</sup> Any instruction which permits contributory negligence to defeat plaintiff's recovery under that doctrine is erroneous.<sup>57</sup> The availability of such an instruction would seem to overcome some of the advantages given to plaintiffs under the humanitarian rule, by broadening the defense so that defendant is not limited to disproving one or more of the basic facts on which that rule rests.

A closely related problem is whether a sole cause instruction in a humanitarian case should plainly exclude plaintiff's contributory negligence from consideration as a defense, so that the jury will make no mistake or become confused between sole negligence and contributory negligence on the part of the plaintiff. A few years ago it was held in *Dilallo v. Lynch*,<sup>58</sup> in submitting a sole cause defense to the humanitarian rule, there must be a plain direction that contributory negligence is not to be considered in determining recovery under that rule. It is true that the case was submitted under both primary and humanitarian negligence, but the case has since been expressly disapproved as to this requirement, regardless of whether the defense is submitted under both or only under humanitarian negligence.<sup>59</sup>

Another closely related problem is whether the plaintiff in his instructions submitting humanitarian negligence may inform the jury that contributory negligence will not defeat recovery. Where sole cause is not an

56. See difficulty in recognizing the defense of sole cause in a humanitarian case in *Causey v. Wittig*, 321 Mo. 358, 11 S. W. (2d) 11 (1928); *Borgstede v. Waldbauer*, 337 Mo. 1205, 88 S. W. (2d) 373 (1935); *Doherty v. St. Louis Butter Co.*, 339 Mo. 996, 98 S. W. (2d) 742 (1936); *Branson v. Abernathy Furniture Co.*, 344 Mo. 1171, 130 S. W. (2d) 562 (1939); *Bootee v. Kansas City Pub. Serv. Co.*, 183 S. W. (2d) 892 (Mo. 1944).

57. *Dilallo v. Lynch*, 340 Mo. 82, 101 S. W. (2d) 7 (1936).

58. *Ibid.*

59. *Stanich v. Western Union Tel. Co.*, 348 Mo. 188, 153 S. W. (2d) 54 (1941); *Shields v. Keller*, 348 Mo. 326, 153 S. W. (2d) 60, (1941); *Hopkins v. Highland Dairy Farms Co.*, 348 Mo. 1158, 159 S. W. (2d) 254 (1941); and see *Branson v. Abernathy Furniture Co.*, 344 Mo. 1171, 130 S. W. (2d) 562 (1939).

issue, such words at the end of the plaintiff's main instruction does not inject a foreign issue into the case.<sup>60</sup> But where the jury would have been warranted in finding that plaintiff's negligence was the sole cause of the injury, this last phrase to the plaintiff's instruction has been disapproved,<sup>61</sup> on the ground that it would be in conflict with a proper sole cause instruction for the reason "it would eliminate as a defense any negligence of plaintiff, either contributory negligence or sole negligence."<sup>62</sup> However, the point has not been entirely settled in view of the more recent decision of *Kick v. Franklin*,<sup>63</sup> where the court sought to distinguish the instruction in that case from that in *Smithers v. Barker*.<sup>64</sup> It was contended that the last phrase of plaintiff's instruction, ". . . and this is the law and is true, if you should also believe that any act or omission, if any, of Frank Kick directly contributed to him getting into such danger . . .", conflicted with the defendant's sole cause instruction. The court's reply was: "This cannot be so because the negligence here referred to is limited only to *contributory* negligence. Furthermore, the issue of respondent's sole cause is also presented in the beginning of the very instruction under attack and this phrase complained of, contained in the same instruction, is in harmony."<sup>65</sup>

There is also considerable difference between the theory of a converse humanitarian instruction and a sole cause instruction, in that each is based upon a different set of facts. A converse humanitarian instruction negatives an essential element of the humanitarian doctrine submitted by the plaintiff, "tending 'to disprove one or more of the basic facts on which that rule rests.'" It authorizes a verdict on the basis of what defendant's duty was, not upon what the plaintiff did. It "does not submit an affirmative defense

---

60. *Crews v. Kansas City Pub. Serv. Co.*, 341 Mo. 1090, 111 S. W. (2d) 54 (1937), noted in (1938) 3 Mo. L. Rev. 324; and reaffirmed in *Smithers v. Barker*, 341 Mo. 1017, 111 S. W. (2d) 47 (1937).

61. *Smithers v. Barker*, 341 Mo. 1017, 111 S. W. (2d) 47 (1937).

62. *State ex rel. Snider v. Shain*, 345 Mo. 950, 956, 137 S. W. (2d) 527, 530, (1940).

63. 345 Mo. 752, 762, 137 S. W. (2d) 512, 515, (1940).

64. 341 Mo. 1017, 111 S. W. (2d) 47 (1937).

65. See *State ex rel. Snider v. Shain*, 345 Mo. 950, 954, 137 S. W. (2d) 527, 529, (1940), where the last phrase of plaintiff's instruction read: "then you are instructed that regardless of any other fact or circumstance in evidence, your verdict must be in favor of the plaintiff and against the defendant." This was held not to conflict with *Smithers v. Barker*, 341 Mo. 1017, 111 S. W. (2d) 47 (1937), as it would not lead the jury to understand that they could find for plaintiff "regardless of any negligence on her part."



and, therefore does not need to be as specific concerning plaintiff's acts as a sole cause instruction."<sup>66</sup>

### B. *Sole Cause in Cases Based on Primary Negligence*

The cases involving sole cause which have been submitted on primary negligence have, with very few exceptions, had to do with injuries alleged to have been caused by the defendant and received by plaintiff while riding in a car driven by a third person. These are usually referred to in the decisions as guest cases and, in most of these cases, defendant also was operating an automobile or train.<sup>67</sup> In these cases the defense has been that the negligence of the driver of the car, in which plaintiff was riding, was the sole cause of the injuries complained of.

One of the principal problems raised has been whether or not it was necessary in a sole cause instruction to submit the specific negligence of the third person. This has been discussed elsewhere under the hypothesization of the facts. Another problem has been whether it was necessary, in a sole cause instruction, specifically to negative the idea of imputed negligence to the plaintiff from the driver of the automobile in which plaintiff was riding. The first cases held that the defendant's instruction must clearly advise the jury that the negligence, if any, of the third party cannot be

66. Hyde, C., in *Branson v. Abernathy Furniture Co.*, 344 Mo. 1171, 1181, 130 S. W. (2d) 562, 568, (1939); and see *Stanich v. Western Union Tel. Co.*, 348 Mo. 188, 153 S. W. (2d) 54 (1941).

67. In the following cases plaintiff, riding as a guest in an automobile driven by a third person was injured in a collision with an automobile operated by the defendant: *Smith v. Star Cab Co.*, 323 Mo. 441, 19 S. W. (2d) 467 (1929); *Crowley v. Worthington*, 71 S. W. (2d) 744 (Mo. 1934); *Watts v. Moussette*, 337 Mo. 533, 85 S. W. (2d) 487, (1935); *Rishel v. Kansas City Pub. Serv. Co.*, 129 S. W. (2d) 851 (Mo. 1939); *Mendenhall v. Neyer*, 347 Mo. 881, 149 S. W. (2d) 366 (1941); *Long v. Mild*, 347 Mo. 1002, 149 S. W. (2d) 853 (1941); *Gower v. Trumbo*, 181 S. W. (2d) 653 (Mo. 1944). In the following cases the plaintiff, riding as a guest in an automobile operated by a third person, was injured in a collision with defendant's train, *Boland v. St. Louis-San Francisco Ry.*, 284 S. W. 141 (Mo. 1926); *Peppers v. St. Louis-San Francisco Ry.*, 316 Mo. 1104, 295 S. W. 757 (1927); *Jurgens v. Thompson*, 350 Mo. 914, 169 S. W. (2d) 353 (Mo. 1943); *Borrson v. Missouri-Kansas-Texas R. R.*, 351 Mo. 214, 172 S. W. (2d) 826 (1943). In *Stanich v. Western Union Tel. Co.*, 348 Mo. 188, 153 S. W. (2d) 54 (1941), plaintiff, riding as a guest in an automobile operated by a third person, was injured in a collision with a barricade maintained by the defendant. In *Schroeder v. Rawlings*, 348 Mo. 824, 155 S. W. (2d) 189 (1941), plaintiff's automobile was struck from behind by an automobile operated by a third person, when the defendant suddenly stopped his automobile. In *Fassi v. Schuler*, 349 Mo. 160, 159 S. W. (2d) 774 (1942), plaintiff sought to hold the possessor of a building for failure to maintain fire escapes, resulting in alleged injuries.

imputed to the plaintiff.<sup>68</sup> But these cases are no longer followed; the later cases holding that it would make no difference whether the driver's negligence was imputed or not,<sup>69</sup> and it should be left to the plaintiff whether or not so to instruct.<sup>70</sup>

While it is not necessary to use a sole cause instruction where the theory of the defense is the contributory negligence of the plaintiff, no harm is done in using it in addition to an instruction on contributory negligence.<sup>71</sup> Although there may be a difference in legal theory, they should not be considered as inconsistent defenses.

C. *Are the Words "Sole Cause" Essential to a Sole Cause Instruction*

The problem whether the defendant, in using a sole cause instruction, must employ specific language, in addition to the other requirement for such instruction, has undergone changes. In *Casey v. Wittig*,<sup>72</sup> the court *en banc* held an instruction erroneous "because it did not require the jury to find that the negligent acts of deceased . . . were the *sole cause* of the collision and his resulting injuries and death." This was for the reason that, without these words, the instruction ignored the issue of concurrent negligence. Seven years later, in *Borgstede v. Waldbauer*,<sup>73</sup> the court *en banc* overruled the earlier decision, and held that "a finding, by the jury, of the facts as contained in the instruction mentioned, was equivalent to a finding that the deceased's negligence was the sole cause of the collision." In neither case did the instruction use the phrase "sole cause," the reasoning being that defendant should be accorded every right to submit his theory in the same manner as the plaintiff, and the jury instructed that they should return a verdict for him, if they find such facts to be true.<sup>74</sup> While the words "sole cause" need not be used, it has been pointed out by the court that "there is no particular reason why they should not be employed, and they certainly

68. *Peppers v. St. Louis-San Francisco Ry.*, 316 Mo. 1104, 295 S. W. 757 (1927); *Smith v. Star Cab Co.*, 323 Mo. 441, 19 S. W. (2d) 467 (1929); *Watts v. Moussette*, 337 Mo. 553, 85 S. W. (2d) 487 (1935); *Dilallo v. Lynch*, 340 Mo. 82, 101 S. W. (2d) 7 (1936); *Long v. Mild*, 347 Mo. 1002, 149 S. W. (2d) 853 (1941).

69. *Mendenhall v. Neyer*, 347 Mo. 881, 149 S. W. (2d) 366 (1941).

70. *Stanich v. Western Union Tel. Co.*, 348 Mo. 188, 153 S. W. (2d) 54 (1941).

71. *Schroeder v. Rawlings*, 348 Mo. 824, 155 S. W. (2d) 189 (1941); and see suggested combination sole cause and contributory negligence instruction, TRUSTY, CONSTRUCTING AND REVIEWING INSTRUCTIONS (1941) 253.

72. 321 Mo. 358, 367, 11 S. W. (2d) 11, 14, (1928).

73. 337 Mo. 1205, 1216, 88 S. W. (2d) 373, 378 (1935).

74. See further treatment of these two cases in *Stanich v. Western Union Tel. Co.*, 348 Mo. 188, 153 S. W. (2d) 54 (1941); also see instruction approved in *Johnston v. Ramming*, 340 Mo. 311, 100 S. W. (2d) 466 (1937).

would make the instruction much clearer."<sup>75</sup> In several cases the court has quoted with approval the statement in *Dilallo v. Lynch*:<sup>76</sup> "If a humanitarian defense instruction is to have recognition in the practice, then when a cause is submitted under primary negligence and the humanitarian rule, such instruction should, in order to avoid confusion and conflict, contain the sole cause provision and what we may term a *not due* to the negligence of the defendant provision."<sup>77</sup> At least it is error to instruct the jury that their verdict must be for the defendants if they find that the plaintiff's negligence was "the direct and proximate cause of the collision," it being confusing to the jury as it "could easily mean that plaintiff's negligence, whether the sole cause or not, would bar his recovery under the humanitarian rule,"<sup>78</sup> and the same words used in a guest case, where the defendant seeks to make responsible the third person who was driving the car in which plaintiff was riding, have been held susceptible of absolving defendant even if his negligence were a concurrent cause, and, therefore, erroneous.<sup>79</sup>

#### IV. CONCLUSIONS

Ten years of experience with the defense of sole cause make possible certain observations. Certainly no one may contend that the administration of the defense has produced very satisfactory results to the litigants or to the public interest in the judicial process. Due to a failure properly to hypothesize the facts on which the defendant depended approximately twice as many reversals have resulted as affirmances. Certainly this condition cannot be considered satisfactory in administering a principle of law about which there can be no disagreement. It is an interesting example of a court having too little confidence in the jury or the trial court insisting that the members of the bar follow a technique of hypothesizing the facts on which the defense rests and also negating any negligence on his part—a very difficult standard to expect of the average member of the profession who has occasion to prepare such an instruction only infrequently in these days of diminishing litigation. The court itself has admitted that "there may

---

75. Hays, J., in *Hopkins v. Highland Dairy Farms Co.*, 348 Mo. 1158, 1163, 159 S. W. (2d) 254, 257, (1942).

76. 340 Mo. 82, 92, 101 S. W. (2d) 7, 13, (1936).

77. Quoted with approval in *McGrath v. Meyers*, 341 Mo. 412, 418, 107 S. W. (2d) 792, 795, (1937), and in *Reiling v. Russell*, 345 Mo. 517, 523, 134 S. W. (2d) 33, 38, (1939), and see *Semar v. Kelley*, 176 S. W. (2d) 289 (Mo. 1943).

78. *Dilallo v. Lynch*, 340 Mo. 82, 91, 92, 101 S. W. (2d) 7, 12, 13 (1936).

79. *Hopkins v. Highland Dairy Farms Co.*, 348 Mo. 1158, 159 S. W. (2d) 254 (1941).

be some confusion and question as to how this problem should and can be properly submitted in various types of cases.”<sup>80</sup> In an effort to lay down requirements in complicated situations to prevent the jury from being “mystified,” it seems that now both the jury and lawyers are “mystified,” leaving the appellate court alone in possession of the secret. The judges deal with the sole cause instructions frequently enough to work with their own concepts of the defense but the same degree of specialization cannot be expected of others who must draft the instructions. It may be that in time these notions may be sufficiently grasped but only at great cost to litigants. Similar periods may be found with phases of the humanitarian doctrine. But the difficulties in eliminating defendant’s negligence through a proper hypothesization of the facts, which will pass the court, are more difficult in using the defense of sole cause, because they are quite different from a converse humanitarian instruction, or one denying liability under that doctrine. Nor is the argument valid that it is just as simple to draft a sole cause instruction as to draft one on contributory negligence or one in negligence by the plaintiff, because of the strictness required in hypothesizing facts which will eliminate every conceivable possibility of a jury finding against the plaintiff when the defendant has concurred in fault, or in cases where the plaintiff’s contributory negligence is not a defense. Would not more simple instructions informing the jury of the theory of sole cause as a defense, of the effect of concurring negligence by the defendant, of the difference between sole cause and contributory negligence in the humanitarian cases, come nearer in enabling the jury to understand the problem and the lawyers and trial judges in the case in preparing such instructions? In adopting this suggestion the court would be placing more confidence in the ability of the jury to understand general legal principles and the jury would come closer to understanding these more general principles than in following the involved type of instruction which attempts to hypothesize every possible finding of fact. Only the purest speculation could cause one to fear that a jury would arrive at different results.

Perhaps a better remedy for assisting the jury in their duty would be to return to the trial judge some of his power which legislatures abolished in the Jacksonian era. By setting out orally and explaining in simple and clear language the really controverted issues of fact, by reviewing and summarizing the evidence, by presenting applicable principles of law, not as

---

80. *Semar v. Kelly*, 176 S. W. (2d) 289, 291, (Mo. 1943).

abstract propositions of law, but as rules related to the particular issues involved in the case at hand, and then further explaining to them what their verdict should be in the alternatives as they find the facts to exist, the members of the jury, probably sitting for their first experience, could come much nearer to understanding and formulating their judgment on the issues.<sup>81</sup>

Many of the difficulties relating to instructions could be eliminated by abolishing the general verdict and using the jury only to make specific findings of fact, the court applying the applicable principles and rendering judgment. While the general verdict is retained in form, we have hemmed the jury in by the most minute hypothesization of facts, so that, in effect, we are making the general verdict over into special questions if the jury does follow the instructions. Of course, they can still make their own decisions regardless of the effort of the trial judge to restrict them. While the present statutes require the general verdict in issues for the recovery of money,<sup>82</sup> there has been a certain circumvention of the statute by trying to limit the jury to special findings of fact as hypothesized. If the purpose of instructions is to inform the jury as to what they are supposed to do, the special question seems to be the answer.<sup>83</sup>

The most promising solution of the apparent difficulties, in framing instructions presenting the defense of sole cause, may come from the new rules of civil procedure. Section 105 provides that "The Court shall afford ample opportunity for counsel to examine the instructions before the same are given and to make objections out of the hearing of the jury."<sup>84</sup> Section 122 abol-

81. Otis, *Comment to the Jury by the Trial Judge* (1941) 27 A. B. A. J. 749; Chestnut, *INSTRUCTIONS TO THE JURY, JUDICIAL ADMINISTRATION MONOGRAPHS, Series A, No. 6* (American Bar Association), giving selected bibliography. The federal practice also permits the trial judge to comment on the evidence. For a fuller discussion of this problem, see Otis, *The Judge to the Jury* (1937) 6 KAN. CITY L. REV. 3.

82. MO. REV. STAT. (1939) §§ 1119-1121.

83. For materials on special verdicts and special questions, see Coleman, *Advantages of Special Verdict* (1929) 13 J. AM. JUD. SOC. 122; Dooley, *The Use of the Special Issues Under the New State and Federal Rules* (1941) 20 TEX. L. REV. 32; Farley, *Instructions to Juries—Their Role in the Judicial Process* (1932) 42 YALE L. J. 194; Hyde, *Fact Finding by Special Verdict* (1941) 24 J. AM. JUD. SOC. 144; Lipscomb, *Special Verdicts Under the Federal Rules* (1940) 25 WASH. U. L. Q. 185; McCormick, *Jury Verdicts upon Special Questions in Civil Cases* (1941) JUDICIAL ADMINISTRATION MONOGRAPHS, Series A, No. 8 (American Bar Association); Morgan, *A Brief History of Special Verdicts and Special Interrogatories* (1923) 32 YALE L. J. 575; Note (1939) 34 ILL. L. REV. 96.

84. The section reference is to the General Code of Civil Procedure, MO. LAWS 1943, p. 386. This section dealing specifically with instructions provides: "Any party may request that court instruct jury in writing on law applicable to

ishes formal exceptions and requires in lieu thereof that the party "makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor."<sup>85</sup> Supreme Court Supplemental Rule 3.21 provides that "Objections to instructions shall be made before the case is finally submitted to the jury, and shall be made in the manner provided in Section 122." It is clearly the purpose of these provisions construed together "that a party should put into record his objections to any instructions and grounds therefor before the instruction goes to the jury," and "to require claimed error to be pointed out to the trial judge at a time when he still has the opportunity to correct it and the court to see that the jury is correctly instructed."<sup>86</sup>

However, unless the supreme court limits the kind of objections which are necessary and requires that they be sufficiently specific to preserve the right of appeal, there may be little gained, for a general type of objection may continue the present practice in an unjustifiable number of cases of requiring more than one trial to settle disputes. Federal Rule 51 provides

---

issues, when.—(a) At the close of all the evidence, or at such earlier time during the trial as the Court may reasonably direct, any party may request that the Court instruct the jury in writing on the law applicable to the issues in evidence in the case. Such instructions so requested to be submitted in writing by the party requesting the same, and may be given or refused by the Court according to the law and the evidence in the case. The court may also instruct the jury in writing of its own motion. The court shall afford ample opportunity for counsel to examine the instructions before the same are given and to make objections out of the hearing of the jury.

(b) Instructions which are refused shall be so marked by the Court and filed with the clerk. All instructions given shall be carried by the jury to their room and returned and filed at the conclusion of their deliberations. All instructions refused and all instructions given shall be kept as part of the record of the cause."

85. Mo. Laws, 1943, p. 389: "Exceptions to rulings or orders of the court. Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him."

86. Hyde and Douglas, *Trial Provisions of the 1943 Civil Code Act* (1944) 15 Mo. B. J. 19, at 20. Section 3.27 of the Supreme Court's Supplemental Rules provides: "Plain Errors may be considered. Plain errors affecting substantial rights may be considered on motion for a new trial or on appeal, in the discretion of the court, though not raised in the trial court or preserved for review, or defectively raised or preserved, when the court deems that manifest injustice or miscarriage of justice has resulted therefrom." It would be regrettable if the court construed insufficient hypothesization or similar insufficiencies of form to constitute errors affecting substantial rights.

that "No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection." The federal courts uniformly have ruled that, where no request is made for a more specific instruction, no objection can be made on appeal to the form or sufficiency.<sup>87</sup> Several federal district courts have their own local rules treating this requirement. In the District Court of Arizona and the Southern District of California, the adverse party must state in writing his objections, specifying distinctly the matter to which he objects, and his objections must be accompanied by a list of authorities on which he relies in opposition to such instructions. If no objection is made to any requested instructions, the Arizona District Court is justified in assuming that the adverse party stipulates that the offered instructions state the law. The local rule in the federal court for the southern district of Indiana requires, in addition to stating specifically the part objected to and the grounds of the objection, that the party must state the modification desired.<sup>88</sup>

Our court, too, will be called upon at the outset of the new rules to devise a standard or gauge to test whether the objections are sufficiently specific to satisfy the new rules. It is suggested that this should be an objective standard as to whether or not a reasonable effort was made by adverse counsel to point out to the trial judge any error which would be committed if he gave the offered instruction. Various factors may be considered as to whether or not the effort to inform the court was reasonable. (1) Were the objections reduced to writing or dictated to the court reporter? No effort should be considered reasonable unless the trial judge has been given a fair opportunity to know the specific objections. (2) Were the objections specific in nature, showing just how or in what regard the proposed instruction was

---

87. See *Dallas Ry. & Term. Co. v. Sullivan*, 108 F. (2d) 581 (C.C.A. 5th, 1940); *Armit v. Loveland*, 115 F. (2d) 308 (C.C.A. 3d, 1940); *Baltimore & Ohio R. R. v. Corbin*, 118 F. (2d) 9 (App. D. C. 1940); *Krug v. Mutual Ben. Health & Accident Ass'n*, 120 F. (2d) 296 (C.C.A. 8th, 1941); *Grand River Dam Authority v. Thompson*, 118 F. (2d) 242 (C. C. A. 10th, 1941); *Williams v. Powers*, 135 F. (2d) 153 (C.C.A. 6th, 1943); *Alcaro v. Jean Jordan, Inc.*, 138 F. (2d) 767 (C. C. A. 3d, 1943); *Alabama Great Southern Co. R. R. v. Johnson*, 140 F. (2d) 968, (C. C. A. 5th, 1944); *Shimabukuro v. Nagayama*, 140 F. (2d) 13 (App. D. C. 1944).

88. The rules of the Federal District Court of South Dakota provide that "all objections to the charge of the court and to refusals of the court to charge shall be in writing or dictated to the court reporter. All objections must state distinctly the matter objected to and the grounds of the objections . . . ."

deficient? In what way was it an abstract statement? In what regard did it assume a fact? What fact or facts were not properly hypothesized? (3) Did adverse counsel suggest the exact modification in the wording of the instruction which would satisfy his specific objection? (4) Did adverse counsel attempt to substantiate his objection by helpful citation to the authorities? If he has carefully prepared his own instructions he will be able to give the court guidance through his own authorities. (5) Were the objections of a general nature which indicate an attempt to avoid being specific and helpful to the trial court?

On the other hand, if the court attempts to define just what technical objections will be sufficient for the purpose of the rules, there will be little improvement in our procedure arising from the trial of cases. Two of our judges have stated that "Nothing in our practice has caused so much delay, expense, and useless work (and we must admit just criticism by laymen) as trying cases over (and sometimes over and over again) because of errors in instructions that could have been pointed out and corrected at the first trial."<sup>89</sup> Rather than detailed rules as to when an objection is specific, the matter should be kept as an objective standard of reasonable effort to be specific, just as reasonable care in the field of negligence is a standard. If the appellate court will gauge objections through some standard of reasonable effort to cooperate with the trial judge, then the latter should see to it that counsel have every opportunity to study the proposed instructions, and make a serious effort with counsel for both parties to make the objections as perfect as possible. The application of such a standard will, in a short time, cause counsel to enter into the drafting of instructions in a manner envisaged by the new rules. If counsel sees that he will be denied an opportunity for a new trial by his failure to make specific and helpful objections, he will become cooperative.

There are other obvious advantages to be gained from such requirement: it should give the trial court opportunity to examine the authorities which will be cited by well prepared counsel; it should make the technical construction of instructions easier; it should cause counsel to prepare their cases more thoroughly so as to be ready to make or to meet objections, thus assisting the trial court with its responsibility; and it will undoubtedly make for shorter instructions. At least they will be better instructions because

---

89. Hyde and Douglas, *Trial Provisions of the 1943 Civil Code Act* (1944) 15 Mo. B. J. 19.



they will represent the composite effort of counsel and the trial court. The result cannot help but be more technically perfect and more intelligible for the jury.

Nowhere could these suggestions be better applied than to the present difficulties inherent in the required hypothesization in sole cause instructions.

---

#### APPENDIX

Chronological order of the Missouri decisions developing the defense of sole cause in negligence actions with name of judge writing the opinion.

1926—Boland v. St. Louis-San Francisco Ry., 284 S. W. 141 (Mo. 1926) (Division 1) (Ragland) pp. 2, 14, 15, 24

1927—Peppers v. St. Louis-San Francisco Ry., 316 Mo. 1104, 295 S. W. 757 (1927) (Division 2) (Davis) pp. 2, 14, 24, 25

1928—Causey v. Wittig, 321 Mo. 358, 11 S. W. (2d) 11 (1928) (*en banc*) (Henwood) pp. 2, 21, 22

1929—Smith v. Star Cab Co., 323 Mo. 441, 19 S. W. (2d) 467 (1929) (Division 1) (Gantt) pp. 24, 25

1931—Decker v. Liberty, 39 S. W. (2d) 546 (Mo. 1931) (Division 2) (Westhues) p. 14

Smith v. Kansas City Public Service Co., 328 Mo. 979, 43 S. W. (2d) 548 (1931) (*en banc*) (Atwood) pp. 10, 11, 12, 13

1934—Crowley v. Worthington, 71 S. W. (2d) 744 (1934) (Division 2) (Fitzsimmons) pp. 14, 24

1935—Watts v. Moussette, 337 Mo. 533, 85 S. W. (2d) 487 (1935) (Division 1) (Bradley) pp. 11, 12, 24, 25

Borgstede v. Waldbauer, 337 Mo. 1205, 88 S. W. (2) 373 (1935) (*en banc*) (Westhues) pp. 9, 11, 12, 21, 22

1936—Doherty v. St. Louis Butter Co., 339 Mo. 996, 93 S. W. (2d) 742 (1936) (Division 2) (Westhues) pp. 12, 21, 22

Dilallo v. Lynch, 340 Mo. 82, 101 S. W. (2d) 7 (1936) (Division 1) (Bradley) pp. 21, 22, 25, 26

1937—Johnston v. Ramming, 340 Mo. 311, 100 S. W. (2d) 466 (1937) (Division 1) (Ferguson) pp. 21, 25

McGrath v. Meyers, 341 Mo. 412, 107 S. W. (2d) 792 (1937) (Division 1) (Hyde) pp. 11, 14, 15, 21, 26

Smithers v. Barker, 341 Mo. 1017, 111 S. W. (2d) 47 (1937) (Division 1) (Hyde) pp. 21, 23

Crews v. Kansas City Pub. Serv. Co., 341 Mo. 1090, 111 S. W. (2d) 54 (1937) (Division 1) (Hyde) pp. 10, 14, 23

1939—Rishel v. Kansas City Pub. Serv. Co., 129 S. W. (2d) 851 (Mo. 1939) (Division 1) (Dalton) pp. 11, 24

Branson v. Abernathy Furniture Co., 344 Mo. 1171, 130 S. W. (2d) 562 (1939) (Division 1) (Hyde) pp. 11, 13, 21, 22, 24

- Reiling v. Russell, 345 Mo. 517, 134 S. W. (2d) 33 (1939) (Division 1) (Hays) pp. 11, 14, 15, 21, 26
- 1940—Kick v. Franklin, 345 Mo. 752, 137 S. W. (2d) 512 (1940) (Division 1) (Douglas) pp. 11, 14, 21
- State *ex rel.* Snider v. Shain, 345 Mo. 950, 137 S. W. (2d) 52 (1940) (*en banc*) (Clark) pp. 11, 21, 23
- 1941—Mendenhall v. Mayer, 347 Mo. 881, 149 S. W. (2d) 366 (1941) (Division 2) (Bohling) pp. 11, 15, 24, 25
- Long v. Mild, 347 Mo. 1002, 149 S. W. (2d) 853 (1941) (Division 1) (Hyde) pp. 2, 10, 11, 12, 13, 14, 15, 24, 25
- Stanich v. Western Union Telegraph Co., 348 Mo. 188, 153 S. W. (2d) 54 (1941) (Division 1) (Hyde) pp. 2, 11, 14, 22, 24, 25
- Shields v. Keller, 348 Mo. 326, 153 S. W. (2d) 60 (1941) (Division 1) (Hyde) pp. 3, 9, 11, 15, 21, 22
- Schroeder v. Rawlings, 348 Mo. 824, 155 S. W. (2d) 189 (1941) (Division 1) (Hyde) pp. 24, 25
- Hollister v. A. S. Aloe Co., 348 Mo. 1055, 156 S. W. (2d) 606 (1941) (Division 2) (Tipton) pp. 14, 15, 20, 21
- Hopkins v. Highland Dairy Farms Co., 348 Mo. 1158, 159 S. W. (2d) 254 (1941) (Division 1) (Hays) pp. 11, 14, 22, 26
- 1942—Fassi v. Schuller, 159 S. W. (2d) 774 (Mo. 1942) (Division 2) (Tipton) pp. 20, 24
- 1943—Jurgens v. Thompson, 169 S. W. (2d) 353 (Mo. 1943) (Division 2) (Westhues) pp. 11, 24
- Borrson v. Mo.-Kansas-Texas R. R., 172 S. W. (2d) 826 (Mo. 1943) (Division 2) (Ellison) pp. 13, 15, 24
- Semar v. Kelly, 176 S. W. (2d) 289 (Mo. 1943) (Division 2) (Barrett) pp. 10, 11, 12, 15, 26, 27
- 1944—Johnson v. Dawidoff, 177 S. W. (2d) 467 (Mo. 1944) (Division 2) (Westhues) pp. 11, 21
- Robb v. St. Louis Public Service Co., 178 S. W. (2d) 443 (Mo. 1944) (Division 1) (Clark) pp. 12, 21
- Gower v. Trumbo, 181 S. W. (2d) 653 (Mo. 1944) (Division 2) (Barrett) p. 24
- Bootee v. Kansas City Public Service Co., 183 S. W. (2d) 892 (Mo. 1944) (Division 1) (Dalton) pp. 11, 14, 15, 21, 22