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## Recent Cases

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# Recent Cases

## CONFLICT OF LAWS—TORTS—LAW GOVERNING WHERE PLAINTIFF INJURED ON INTERSTATE BRIDGE

### *Smoot v. Fisher*<sup>1</sup>

Plaintiff and her escort, the defendant driver, were returning to their respective homes in St. Louis, Missouri, from a social function in East St. Louis, Illinois. A collision occurred on MacArthur Bridge, which spans the Mississippi River, the middle of which forms the boundary between the two states. Plaintiff sued for personal injuries. The trial court, which was sustained by the St. Louis Court of Appeals, refused to admit defendant's offer to prove that the accident occurred on the east side of the main channel of the Mississippi (thus in Illinois), which he sought to show in order to assert the well recognized rule that the *lex loci delicti* governs in determining whether or not a tort has been committed.<sup>2</sup> On this basis, defendant attempted to plead the Illinois Guest Statute<sup>3</sup> which sets up a standard of care toward gratuitous guests in automobiles such that the driver can only be held for "gross and wanton misconduct."

While this decision appears to be an extreme departure from the well-established rule of Conflict of Laws that the law of the place where the act occurred governs, the doctrine of "concurrent jurisdiction" which was applied by the court is a fairly well recognized exception of the rule.<sup>4</sup> This doctrine has resulted from judicial construction of the various enabling acts which generally provide, when a river forms the boundary of two or more states that the states involved shall have concurrent jurisdiction "on the river."<sup>5</sup> In construing the words, "concurrent jurisdiction," it was early decided by the courts that while said jurisdiction was not

1. 248 S.W. 2d 38 (Mo. App. 1952).

2. RESTATEMENT, CONFLICT OF LAWS § 378 (1934): "The law of the place determines whether or not a person has sustained a legal injury." *Hall Motor Freight v. Montgomery*, 357 Mo. 1188, 212 S.W. 2d 748 (1948); *Mitchell v. J. A. Tobin Construction Co.*, 236 Mo. App. 916 159 S.W. 2d 709 (1942); *Boneau v. Swift and Co.*, 66 S.W. 2d 172 (Mo. 1934); *Taylor v. Integrity Mutual Casualty Co.*, 216 Mo. App. 599, 265 S.W. 881 (1924); *Michael v. Kansas City Western Ry.*, 161 Mo. App. 53, 143 S.W. 67 (1912).

3. ILL. REV. STAT. Ch. 95½, § 58a (1949): "No person riding in a motor vehicle as a guest, without payment for such ride, . . . shall have a cause of action for damages against the driver . . . for injury . . . unless such accident shall have been caused by willful and wanton misconduct of the driver . . . contributed to the injury . . . for which the action is brought."

4. BEALE, CONFLICT OF LAWS §§ 44.3, 44.4, 44.5 (1935); *Wiggins Ferry Co. v. Reddig*, 24 Ill. App. 260 (1887); *Memphis and C. Packet Co. v. Pikey*, 40 N.E. 527 (Ind. 1895); *Sherlock v. Alling, Adm's.*, 44 Ind. 184 (1873), *affirmed* 93 U.S. 99 (1876); *Opsahl, Adm'x. v. Judd*, 30 Minn. 126, 14 N.W. 575 (1883); *Sanders v. St. Louis and N.O. Anchor Line*, 97 Mo. 26, 10 S.W. 595 (1889); *Swearingen and Couill v. Steamboat Lynx*, 13 Mo. 519 (1850).

5. Act of Admission, Sec. 2, Mo. REV. STAT. p. 36 (1949), V.A.M.S. p. 63. For discussion and citation of similar provisions in other states see 49 AM. JUR., *States, Territories and Dependencies*, § 24.

exactly extraterritorial in its effect, the states involved did have the power to define and punish crimes occurring on the river, regardless of where they occurred,<sup>6</sup> the power to serve process anywhere on the stream,<sup>7</sup> and, when the injury involved was on the river itself, or in a boat on the river, to take jurisdiction of certain tort claims which arose as defined by said state.<sup>8</sup> It is noteworthy that most of the tort cases here involved wrongful death claims, and no issue has been raised in any of these cases as to the possible application of the substantive law of another state, Lord Campbell's Act and its successors having been generally adopted throughout the country. In *Wiggins Ferry Co. v. Reddig*,<sup>9</sup> however, the defendant did attempt to assert the common law of Missouri, alleging that the collision occurred on the Missouri side of the Mississippi. The Illinois court disallowed the claim, applying the law of the forum as if all the river were in the jurisdiction of the court first taking jurisdiction.

The courts have generally justified the application of the doctrine on the ground of expediency.<sup>10</sup> The difficulties and harrassments which would confront law enforcement officers, process servers, and the courts themselves once they assert, or attempt to assert jurisdiction, have been pointed to, and the slight departure from the theories of sovereignty have been deemed necessary. It has been recognized, however, that such difficulties exist only with the stream as such, and objects floating thereon, and the courts have refused to extend the rule to fixed objects which are in any way connected with the land.<sup>11</sup> Some dissent from this "fixed objects" qualification is found in a Minnesota case,<sup>12</sup> which presents the closest resemblance to the fact situation in the principal case. The Minnesota court refused to consider the proven fact that the defendant had committed the act of larceny in question on a bridge on the Wisconsin side of the river, that particular part of the bridge being over dry land (an island). The court justified its decision on the ground that the primary reason for the doctrine of "concurrent jurisdiction" was to prevent criminals from escaping the hands of justice. The court in the principal case recognized the "fixed objects" qualification to the doctrine, but found that it had no application to the facts in question. The view was taken that the "fixed objects" rule only applied when the fixed object itself was in dispute, such as title to the same, but when the fixed object was a bridge and the matter in dispute was

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6. *State v. Moyers*, 136 N.W. 896 (Ia. 1912); *State v. Mullen*, 35 La. 199 (1872); *State v. George*, 63 N.W. 100 (Minn. 1895); *State v. Cunningham*, 59 So. 76 (Miss. 1912); *State v. Metcalf*, 65 Mo. App. 681 (1896); *Alsos v. Kendall*, 227 Pac. 286 (Ore. 1924). For limitations to this power see *Neilsen v. Oregon*, 29 Sup. Ct. 383 (U.S. 1909); *In re Mattson*, 69 Fed. 535 (Cir. Ct. D. Md. 1895).

7. *Wedding v. Meyler*, 192 U.S. 573, 24 Sup. Ct. 322 (1904).

8. See cases cited at note 4, *supra*.

9. *Supra* note 4.

10. See cases and authorities cited at notes 4, 6 and 7, *supra*.

11. *Wedding v. Meyler*, *supra* note 7 (where the Court said at 24 Sup. Ct. 325: "To avoid misunderstanding it may be well to add that the concurrent jurisdiction given is jurisdiction 'on' the river, and does not extend to permanent structures attached to river bed and within the boundary of the other state.") *Gilbert v. Moline Power Co.*, 19 Ia. 319 (1865); *Robert v. Fullerton*, 93 N.W. 1111 (Wis. 1903); BEALE, *supra* note 4, § 44.5.

12. *State v. George*, *supra* note 6.

an act or transaction occurring thereon, the bridge was analagous to a steamboat or other means of transportation across the river, and therefore there was a "legitimate connection" with the river, justifying the exercise of concurrent jurisdiction and the application of the law of the forum.

While it is clear that a bridge has a "legitimate connection" with the river which it spans, it is submitted that the reasons of expediency which the courts have pointed to in justifying the doctrine of "concurrent jurisdiction" are not generally present when an automobile collision occurs on the bridge. While the exact boundary between the two states would be difficult to ascertain, in the usual case the determination of *which side* of the boundary the act occurred on would be simple enough. There is little danger of the automobiles involved floating to the other side and confusing the issue, and there is no need for hasty decisions such as might be required by a police officer in pursuit of a criminal. Some precedent for the abandonment of the doctrine when the reasons for it no longer exist is found in *Cooley v. Golden*<sup>13</sup> an early Missouri case. In that case an action of forcible entry and detainer was commenced in regard to land which formerly was under the Missouri River, on the Nebraska side of the boundary. The river had abandoned its former channel suddenly during a flood, the boundary therefore remaining where the middle of the channel had formerly been.<sup>14</sup> The plaintiff asserted the Missouri court's jurisdiction under the doctrine of "concurrent jurisdiction," but the court refused to hear the case, saying, in part: "The concurrent jurisdiction of Missouri and Nebraska under their enabling acts does not in any case extend beyond their common boundary, except when that boundary is the middle of the channel of the Missouri River."<sup>15</sup>

The extension of the doctrine of "concurrent jurisdiction" in the principal case can possibly be justified by the "hard facts" which were presented; *e.g.*, both parties were citizens of Missouri, who started from and were returning to Missouri driving a Missouri automobile and in litigation in a Missouri court. If these "hard facts" should be controlling (which in the opinion of the writer, is questionable), it is submitted that the court could have refused to apply the Illinois statute on the ground that such standard of care was contrary to the public policy of this state.

The Missouri policy is rather strongly expressed, the General Assembly having declared that the driver of an automobile "shall exercise the highest degree of care,"<sup>16</sup> with no exception being made in the case of guest passengers. The Missouri courts have in a number of decisions<sup>17</sup> refused to enforce a right acquired under

13. 52 Mo. App. 229 (1893).

14. See GOULD ON WATERS § 159 (2d Ed. 1891).

15. 52 Mo. App. 229, at 235.

16. MO. REV. STAT. § 304.010 (1949).

17. *Edwards Brokerage Co. v. Stevenson*, 160 Mo. 516, 61 S.W. 617 (1901); *Maxe v. Railey & Bros. Banking Co.*, 57 S.W. 2d 1091 (Mo. App. 1933); *Austin v. Hough*, 10 S.W. 2d 655 (Mo. App. 1928); *Claiborne Commission Co. v. Stirlen*, 262 S.W. 387 (Mo. App. 1924); *J. E. Hood & Co. v. McCune*, 235 S.W. 158 (Mo. App. 1921); *Parker-Harris Co v. Stephens*, 205 Mo. App. 373, 224 S.W. 1036 (1920); *Johnston v. Chicago Great Western R.R.*, 164 S.W. 260 (Mo. App. 1914); *Atwater v. A. G. Edwards Brokerage Co.*, 147 Mo. App. 436, 126 S.W. 823 (1910); *Kerwin v. Doran*, 29 Mo. App. 397 (1888).

a foreign law which was deemed to be contrary to the strong public policy of this state.<sup>18</sup> In the principal case, however, the factor involved was a *defense* provided by the law of another state, rather than what is strictly known as a "right." To torture this "defense" into a "right," and therefore say that the defendant had the right under Illinois law to be ordinarily negligent towards guest passengers would no doubt shock the Illinois Legislature. Although decided on other grounds, the Missouri Supreme Court in *Asel v. Order of United Commercial Travelers of America*<sup>19</sup> indicated that it would refuse to enforce a six month limitation which was incorporated in the terms of an insurance policy even though the law of the place of contract might call for enforcement of the same. While this term of the insurance contract could be denominated a "right" acquired by contract, it seems closer to a "defense," since the insurer cannot be said to have acquired the right not to pay if he is not sued in a given time, but rather he has a duty to pay whether or not suit happens to be brought within the given time, and the six month provision therefore amounts to a defense to liability under the contract. With this case in mind, there would seem to be some precedent for refusing to apply the Illinois law in the principal case, recognizing that there is involved a "defense" rather than a "right" acquired under the law of the state involved.

In the opinion of the writer the application of the proposed "public policy" ground for the decision would produce a result little better than the "concurrent jurisdiction" doctrine relied on by the court. However, it is submitted that if the "hard facts" justify the application of Missouri law the better alternative is to follow bad law which is already on the books, rather than create an additional exception to the doctrine of *lex loci delicti*.

DONALD J. HOY

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TORTS—HUMANITARIAN DOCTRINE—POSITION OF IMMINENT PERIL

*McClanahan v. St. Louis Public Service Co.*<sup>1</sup>

Plaintiff, a boy ten years old, sustained personal injuries when he fell from the side of defendant's streetcar while it was in motion. The boy jumped onto the car while it was traveling between five and ten miles per hour and was clinging to the handholds on the outside of the rear door of the vehicle with his toes on "that little ledge by the door." There was evidence that the operator of the streetcar saw plaintiff clinging to the handholds and motioned to him three times to get off.<sup>2</sup>

Plaintiff submitted his case to the jury upon negligence under the humanitarian rule and alleged that defendant's operator knew of plaintiff's perilous position and did not stop or slacken speed, but directed plaintiff to get off and, when plaintiff did not do so, the operator negligently accelerated the speed of and violently jerked the streetcar and thereby threw plaintiff therefrom when, by the exercise of

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18. See RESTATEMENT, CONFLICT OF LAWS § 612 (1934); RESTATEMENT OF THE LAW § 612 and *comment a* (1948 Supp.).

19. 355 Mo. 658, 197 S.W. 2d 639 (1946).

1. 251 S.W. 2d 704 (Mo. 1952).

2. Facts as stated in *McClanahan v. St. Louis Public Service Co.*, 242 S.W. 2d 265 (Mo. App. 1951).

ordinary care, defendant's said operator could have stopped said streetcar and caused plaintiff to get off or slackened the speed so that plaintiff could have gotten off with reasonable safety and thereby could have avoided injuring plaintiff. The jury returned a verdict for the plaintiff for \$6,000. Defendant thereafter made a motion for judgment in accordance with its former motion for a directed verdict which was overruled and defendant appealed to the St. Louis Court of Appeals. There the judgment of the trial court was affirmed but the case was transferred to the Supreme Court of Missouri for it to re-examine the question as to whether the existing law of Missouri, when applied to the evidence, justified the submission of plaintiff's case to the jury under the humanitarian rule. The question being whether or not defendant discovered or should have discovered plaintiff in a position of physical helplessness from which he could not when the danger was imminent, by the exercise of due care, extricate himself. If defendant did discover or should have discovered plaintiff in such position of imminent peril in time thereafter to avert the impending injury without injury to himself or others by the exercise of reasonable care after such discovery, defendant is liable, notwithstanding plaintiff's negligence.<sup>3</sup> The supreme court reversed the judgment and remanded the case to permit plaintiff to amend the petition to charge defendant with willful, wanton or reckless conduct.

Counsel for plaintiff practically conceded "plaintiff was not in the the legal position of imminent peril<sup>4</sup> from what the streetcar was doing as he clung to it as it moved along."<sup>5</sup> Therefore, plaintiff was forced to rely on the proposition that he was in a position of imminent peril "from what the operator was about to do . . . what the operator was going to do—speed up the car and jerk the car."<sup>6</sup>

If this contention were true, the humanitarian doctrine would be applicable to any situation "if plaintiff was in a situation such that, while not in imminent peril, absent the negligent act of defendant in question, he was in imminent peril if such act was committed."<sup>7</sup> However, such position is untenable under the Missouri humanitarian doctrine.<sup>8</sup> "Many cases . . . impliedly hold that a situation of im-

3. Plaintiff, being a trespasser admitted that recovery on primary negligence was barred. However, contributory negligence will not bar recovery under the humanitarian doctrine. *Banks v. Morris & Co.*, 302 Mo. 254, 257 S.W. 482 (1924); *Bobos v. Krey Packing Co.*, 317 Mo. 108, 296 S.W. 157 (1927).

4. The position of imminent peril has been defined in *Banks v. Morris & Co.*, 302 Mo. at 273, 257 S.W. at 486-487, by Judge White as existing when there "is no time for deliberation on the part of the person in peril between its appearance and the impending calamity" and "when the ordinary and natural effort to be expected in such person would not put him in a place of safety." In *Blaser v. Coleman*, 358 Mo. 157, 160, 213 S.W. 2d 420, 421 (1948), the court said, "The meaning of the term imminent peril as the basic fact of the humanitarian doctrine has been well settled. The peril truly must be imminent—that is, certain, immediate, and impending; it may not be remote, uncertain or contingent. A likelihood or bare possibility of injury is not sufficient to create imminent peril."

5. *McClanahan v. St. Louis Public Service Co.*, 242 S.W. 2d 265, 268 (Mo. App. 1951).

6. *Ibid.*

7. *Ridge v. Jones*, 335 Mo. 219, 225, 71 S.W. 2d 713, 715 (1934).

8. There is no humanitarian case until the person is in a position of imminent peril. This is because no duty to act arises merely in such person may soon be in,

minent peril is the basic fact of the humanitarian doctrine; that no duty whatever arises under that doctrine, unless and until a situation of peril comes into existence; and that when such peril arises the doctrine seizes upon the situation as it then exists. . . .<sup>9</sup> Also, in one of the basic opinions in Missouri on the humanitarian doctrine, the court set out the constitutive facts of a cause of action under the doctrine.<sup>10</sup> Thus, it is noticed that one of the elements of the action is that defendant, after receiving notice of plaintiff's peril, must have the present ability, with the means at hand, to have averted the impending injury without injury to himself or others.<sup>11</sup>

The court adopted the analysis of the St. Louis Court of Appeals as to when plaintiff was in imminent peril and said:<sup>12</sup>

"It is true that the facts in this case do not fall into the conventional and orthodox humanitarian pattern. There was no inexorable circumstance, situation or agency bearing down on plaintiff with reasonable probability of injury, prior to the negligent act of defendant's operator. True enough, plaintiff was in a precarious position, indeed one fraught with perilous possibilities, as he clung to the side of the streetcar, but something would have to happen other than that which was then happening before injury would befall plaintiff. . . . 'Imminent peril' as it is generally understood would not arise under the facts of this case until the occurrence of the negligent act of accelerating and jerking the streetcar. Furthermore, since the arising of the situation of imminent peril and the happening of the casualty were practically simultaneous there was no sufficient time interval for the defendant to have taken any action to avoid the casualty after the arising of the peril. There was not time after plaintiff's hands were pulled away from the grabirons for the defendant's motorman to have taken any effective action to prevent or avoid the plaintiff's injuries."

There were several Missouri authorities supporting plaintiff's proposition. Among those authorities was *Bobos v. Krey Packing Co.*,<sup>13</sup> in which the plaintiff climbed upon the step of the defendant's truck. The driver started the truck so violently and suddenly that the plaintiff was thrown under the wheels. In allowing recovery under the humanitarian doctrine, the court said:<sup>14</sup> "As to this it is sufficient to say that 'perilous position' as used in defining and applying the

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or is approaching or is about to come into a position of imminent peril. *Roach v. Kansas City Public Service Co.*, 141 S.W. 2d 800 (1940); *Yeaman v. Storms*, 358 Mo. 774, 217 S.W. 2d 495 (1949).

9. *State ex rel. Fleming v. Bland*, 322 Mo. 565, 572, 15 S.W. 2d 798, 800-801 (1929); *Banks v. Morris & Co.*, 302 Mo. 254, 257 S.W. 482 (1924); *Steuernagel v. St. Louis Public Service Co.*, 211 S.W. 2d 696 (1948).

10. *Banks v. Morris & Co.*, 302 Mo. 254, 267, 257 S.W. 482, 484 (1924). They are: "(1) Plaintiff was in a position of peril; (2) defendant had notice thereof (if it was the duty of defendant to have been on the lookout, constructive notice suffices); (3) defendant after receiving such notice had the present ability, with the means at hand, to have averted the impending injury without injury to himself or others; (4) he failed to exercise ordinary care to avert such impending injury; and (5) by reason thereof plaintiff was injured."

11. *Branscum v. Glaser* 234 S.W. 2d 626 (Mo. 1950).

12. 251 S.W. 2d 704, 706 (Mo. 1952); 242 S.W. 2d 265, 268 (Mo. App. 1951).

13. 317 Mo. 108, 296 S.W. 157 (1927).

14. *Id.* at 117, 296 S.W. 157, 161.

'humanitarian rule' is a relative term. The position of plaintiff while in the act of climbing onto the truck, considered with reference to its standing still, or moving slowly, was no doubt a comparatively safe one, but with reference to the truck's being 'suddenly and violently started forward' it was extremely perilous. There was therefore a present existence' of plaintiff's perilous position before the driver started the truck."

Also *Huckleberry v. Missouri Pac. R.R.*,<sup>15</sup> supports plaintiff's contention. In this case defendant had turned over one of its tank cars causing gasoline to be spilled along its track. Deceased was standing beside the track when the defendant started its engine causing sparks to be emitted therefrom which ignited the gasoline and burned deceased. The court, in holding that the plaintiff made a case under the humanitarian rule, said: "So in the instant case it may be said that the position of deceased in the absence of fire was a comparatively safe one, but in the presence of fire it was extremely perilous. When defendant operated its engine so near that sparks and coals of fire therefrom could fall into the gasoline and vapor surrounding the deceased, as the evidence here shows, his peril was imminent, that is, certain, immediate and impending."<sup>16</sup>

However, the court in *Ridge v. Jones*<sup>17</sup> refused to follow the line of authority set forth in the above cases. Here plaintiff was injured while standing beside a car as a result of the defendant's starting it in such manner as to cause it to skid on the icy street, thereby hitting plaintiff. Plaintiff contended that if he were in such a position that to start the car, in the manner in which it was started, would place him in imminent peril and likely injure him and defendant knew or should have known before he started the car, the humanitarian rule would apply even though the same negligent act created the imminent peril and immediately produced the injury. The supreme court refused such contention and said that the fact situation did not meet the requirements of a humanitarian case in that the peril which menaced plaintiff could not be created by the same negligent act of defendant which immediately and without time or opportunity for further action on defendant's part, produced the injury.<sup>18</sup>

15. 324 Mo. 1025, 26 S.W. 2d 980 (1930).

16. *Id.* at 1034, 26 S.W. 980, 984. Other cases supporting plaintiff's contention are *Dalton v. Missouri, K. & T. Ry.*, 276 Mo. 663, 208 S.W. 828 (1919); *Weed v. American Car & Foundry Co.*, 322 Mo. 137, 14 S.W. 2d 652 (1929); *Menard v. Goltra*, 328 Mo. 368, 40 S.W. 2d 1053 (1931). In these cases the court held the humanitarian doctrine applicable although the plaintiff was not in imminent peril except for the commission of the negligent act of the defendant which immediately produced the injury without time or opportunity intervening between such negligent act and injury for the defendant to have done anything to avert the injury; this on the theory, that the plaintiff was in a situation such that, while not in imminent peril, absent the negligent act of the defendant in question, he was in imminent peril if such act was committed, although the injury was not necessarily certain to follow the negligent act, yet the peril itself was certain and imminent.

17. *Supra* note 7.

18. It is to be noted that the court did not overrule the line of decisions supporting plaintiff's contention but rather distinguished them on the theory that the peril was not certain and imminent which appears to be the basis of the decisions

Thus, it is clearly shown by these cases that two conflicting views existed in Missouri as to what constituted a humanitarian case. The case under discussion is important in that it expressly overruled the view represented by *Bobos v. Krey Packing Co.* and *Huckleberry v. Missouri Pac. R.R.* and the other cases cited.<sup>19</sup> Although the court held that the submission of the case under the humanitarian doctrine was erroneous, the court remanded the case and granted plaintiff permission to amend his petition and charge defendant with willful, wanton or reckless mis-conduct, to which defendant can not successfully plead plaintiff's contributory negligence as a defense.

This case represents a continuation of the efforts of the supreme court to restrict and clarify the application of the humanitarian doctrine in Missouri. But quare? What was the effect of the position taken by plaintiff's counsel in the court of appeals practically conceding that "plaintiff was not in the legal position of imminent peril from what the streetcar was doing as he clung to it as it moved along;" thereby being forced to rely on the proposition that plaintiff was in a position of imminent peril "from what the operator was about to do . . . what the operator was going to do—speed up the car and jerk car."<sup>20</sup> In other words, is this not a discovered physical helpless common law last clear chance situation?

DOYLE M. WEATHERS

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TORTS—LIABILITY OF THE OWNER OF EARTH-MOVING VEHICLES FOR INJURY  
TO A BYSTANDER WHERE SUCH MACHINES ARE LEFT UNATTENDED IN A  
PUBLIC PLACE AND OPERATED BY INTERMEDDLERS

*Zuber v. Clarkson Construction Company*<sup>1</sup>

This was an action for wrongful death of plaintiffs' father. Defendant moved for dismissal of plaintiff's petition on the ground that plaintiff had failed to state a claim upon which relief could be granted. The trial court sustained defendants' motion and entered a judgment of dismissal and plaintiff appealed. The case came up on appeal without having been tried, and therefore the facts have not been fully developed.

Plaintiffs' petition alleged that defendant was a contractor engaged in constructing a levee on the bank of the Missouri River in Kansas City, Missouri, and that the defendant customarily left its large diesel earth-moving tractors and trailers (known as Euclid Carry-alls) parked in a public place on or near the levee at the close of each day's work with the machinery in gear and the switch and ignition unlocked, and with the brakes inoperative. It was alleged that each evening curious adult persons gathered around these machines and inspected them and that some of the persons started the machines and drove them up and down the levee to demonstrate how they worked; that this was the usual and customary procedure each evening; and that defendant knew or by the exercise of ordinary care

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19. *Supra* note 16.

20. *Supra* notes 5 and 6.

could and should have known prior to May 29, 1949, of the operation of said machines by members of the public and the dangers incident thereto. It was alleged that on May 29, 1949, plaintiffs' deceased and another person were attracted to the machines and that while plaintiffs' decedent was standing near the rear tractor wheel of one of defendants' Carry-alls which was then stationary, the other person started it up and drove it forward over the decedent, causing his almost immediate death.

Defendant asserted in his appeal brief that the vehicles were not inherently dangerous, that defendant could not reasonably foresee that intermeddlers would unlawfully operate the machines and negligently injure others, but even if a duty were found, the act of the other person was the intervening cause of the injury. After the hearing on appeal, Division I of the Supreme Court of Missouri, with one dissent, reversed the decision of the trial court and remanded the cause for trial.<sup>2</sup>

The court stated in its opinion that the previous cases cited were not helpful since they did not involve vehicles parked in similar situations; that the Carry-alls were different in appearance and in technique of operation than ordinary automobiles and trucks; and stated that it would apply foundation principles of negligence to the facts stated in plaintiff's petition.

The court found that where the petition alleged that defendant, who left his machines in operating condition, unattended, without operative brakes, in a public place, in or near a densely populated area, knew or should have known that curious intermeddlers, some of whom would be reckless and unskilled, were making a practice of operating the machines, the defendant should have foreseen that some injury was likely to occur to bystanders. Defendants' alleged failure to take the precautions a reasonable man would take to avoid the injury constituted a breach of duty. The court found that although the machines were of great economic value in public works, the probability and seriousness of foreseeable injury was so great that the cost of rendering the vehicles immobile by locks or other precautionary measures was not out of proportion to the hazard involved.

From the allegations of the petition it might have been possible for the court to come to the conclusion that defendant contractor, by reason of his contract (presumably with a public body) was entitled to the exclusive possession of the area encompassed by the levee construction project for the duration of the project. In this connection it is believed that most construction contracts expressly or impliedly give control over the land area at the site of the work exclusively to the contractor for the purposes of the work and for the duration of the work specified in the contract. This fact is borne out by the inclusion in many construction contracts of a clause which expressly provides that the owner, his architect, and other agents of the owner may have access to the area and to the work at all reasonable times for purposes of inspection.<sup>3</sup> True, such contracts generally

2. Motion for rehearing or to transfer to court *en banc* denied Sept. 8, 1952.

3. The usual form of contract used by one public body in Missouri contains the following clause: "The Architects, Owner and their representatives shall at all times have access to the work wherever it is in preparation of progress and Contractor shall provide proper facilities for such access and for inspection and super-

contain provisions that the contractor is to provide guard rails, fences, etc., for the protection of the public, but these provisions are generally intended to prevent access to the site or injury to those who use a public way adjacent to the site. If the court had come to the conclusion that defendant was entitled to exclusive possession of the land, thus denying the right of members of the general public to be rightfully on the premises during the duration of the work, the decision in the instant case might have been different. Plaintiff and the other person who started the machine would then have become trespassers as to defendant contractor. The general rule as to the liability of a possessor of land to a trespasser for dangerous conditions is that there is no duty to warn or make safe, the possessor being allowed to assume, even if he knows of the trespasser, that the trespasser will be alert to the danger and yield to it.<sup>4</sup> This view would seem to support defendant's claim that there was a failure to state a cause of action.

Assuming, however, as alleged by plaintiff, that decedent was rightfully on the site of the work and not a trespasser,<sup>5</sup> does the fact that the vehicle was operated by an intermeddler, whose acts amounted to felonious conduct under Missouri law<sup>6</sup>

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vision." Other clauses read: "Contractor shall limit his operations and storage of materials to area near building, and he shall not encroach on neighborhood property." "Contractor for the above mentioned general divisions of work shall afford all other contractors reasonable opportunity for the introduction and storage of their materials. . . ."

4. RESTATEMENT, TORTS § 386 (1934) provides: "Any person, except the possessor of land or a member of his household or a licensee acting on his behalf, who creates or maintains upon the land a structure or other artificial condition which he should realize as involving an unreasonable risk of death or serious bodily injury to others whom he should recognize as likely to be upon the land, is subject to liability for bodily harm thereby caused to them, irrespective of whether they are lawfully upon the land, by the consent of the possessor or otherwise, or are trespassers as between themselves and the possessor." See also McCleary, *The Liability of a Possessor of Land in Missouri to Persons Injured While on the Land*, 1 MO. L. REV. 45 at 47 (1936). For the rule that a possessor is entitled to expect the trespasser to be on the alert for dangers, see *Carrier v. Mo. Pac. Ry.*, 175 Mo. 470, 74 S.W. 1002 (1903). *Contra*: See PROSSER ON TORTS 609 (1941), where it is said that a possessor is liable for the conduct of trespassers or conditions resulting from such conduct where the possessor knows or should know of the danger to others of such conduct and fails to exercise proper care, citing as authority two cases: *General v. Heatley*, 1 Ch. 560 (1897); and *City of Bowie v. Hill*, 258 S.W. 568 (Texas Civ. App. 1923).

5. Decedent was alleged to be rightfully on the levee as a member of the public on public property. Quære as to defenses which might be raised when other members of the public were at the controls of the vehicles. Such considerations are beyond the scope of this article.

6. MO. REV. STAT. § 560.175 (1949): "1. No person shall drive, operate, use or tamper with a motor vehicle or trailer without the permission of the owner thereof. 2. No person shall, without the permission of the owner or person in charge thereof, climb upon or into, or swing upon any motor vehicle or trailer, whether the same is in motion or at rest, or sound the horn or other sound-producing device thereon, or attempt to manipulate any of the levers, starting device, brakes, or machinery thereof, or set the machinery in motion, or hold to such vehicle while riding a bicycle or other vehicle . . ." § 560.180 provides that violation of subsection 1 of § 560.175 shall be deemed guilty of a felony punishable by imprisonment in the penitentiary for a maximum term of five years, and that violation of subsection 2 is punishable by imprisonment in the county jail for a maximum term of two years. The above statutory provisions were not presented in the defendant's appeal brief, and therefore were not a factor in the holding of the case.

and who was technically a trespasser on the vehicle,<sup>7</sup> constitute an intervening cause which would cut off defendant's liability?<sup>8</sup> The answer, according to the cases, seems to be clear that it does not. Plaintiff alleged that defendant had knowledge or should have known of the previous acts of intermeddlers, and the intervention of such forces was therefore foreseeable. Where defendant's original negligence in leaving the machines in operative condition continues contemporaneously with an intervening act of a third person which might reasonably have been anticipated, the original negligence of the defendant is generally regarded as a concurrent cause of the injury.<sup>9</sup> But where the act of the intermeddler in operating the vehicle constitutes the commission of a felony, there would seem to be less reason to require defendant to anticipate that such extraordinary and criminal conduct would be repeated.<sup>10</sup>

It would seem by analogy that the decision in the instant case would tend to undermine the line of cases in Missouri which hold that the possessor who leaves an automobile or truck standing at the curb in a public street with the keys in the ignition is not liable for injuries to others where a thief or intermeddler subsequently operates the vehicle.<sup>11</sup> The theory in these cases seems to have been that an automobile or truck is not a dangerous instrumentality and that a reasonable man could not foresee that a reckless or unskilled person would commit a felony by operating the vehicle and thereby causing some injury. (The court attempted to prevent this analogy by referring to the difference in appearance and technique of operation of the Carry-alls.) The analogy seems clear in every respect except that

7. RESTATEMENT, TORTS § 217 and 218 (1934).

8. "An intervening force is one which actively operates in producing harm to another after the actor's negligent act or omission has been committed." RESTATEMENT, TORTS § 441 (1934).

9. *Berry v. Emery, Bird, Thayer Dry Goods Co.*, 357 Mo. 808, 211 S.W. 2d 267 (1951); *Gray v. Kurn*, 345 Mo. 1027, 137 S.W. 2d 558 (1950); *State ex rel. Kearney v. Finn*, 87 Mo. 310 (1885); *Teasdale v. Beacon Oil Co.*, 266 Mass. 25, 164 N.E. 612 (1929); RESTATEMENT, TORTS § 302 (1934) "A negligent act may be one which: . . . (b) creates a situation which involves an unreasonable risk to another because of the expectable action of the other, a third person, an animal, or a force of nature."

10. But see RESTATEMENT, TORTS § 448 to the effect that intentionally tortious or criminal acts done under opportunity afforded by an actor's negligence are a superseding cause where harm results to another, except where the actor knew or should have known of the likelihood that a third person might avail himself of the opportunity to commit such crime or tort. BOHLEN, *STUDIES IN TORTS* 505 (1926) (footnote): "It is true that if the intervening act be intentional, the defendant is usually not liable, because there is normally no reason to anticipate willful wrongdoings of others. In exceptional circumstances even willfully wrongful acts of others are normal and expectable." See also Feezer, *Intervening Crime and Liability for Negligence*, 24 MINN. L. REV. 635 (1940), wherein it is stated at page 642: "The more one considers this question of responsibility for intervening crime and the more cases one reads involving it, the more evident it becomes that in every such case the basic question is one of policy."

11. *Rath v. Knight*, 55 S.W. 2d 682 (Mo. 1932) (evidence that a thief took defendant's automobile from parking place in public street and caused injury to plaintiff held sufficient to deny liability of defendant); *Nance v. Lansdell*, 73 S.W. 2d 346 (Mo. App. 1934) (liability of owner of automobile denied where plaintiff was injured when defendant-owner's automobile was operated by another without the owner's consent or knowledge or approval)

in the instant case the practice of adults to operate the machines provided the opportunity to charge defendant with actual or constructive knowledge of the hazard. However it would not seem to be too great a step, in the light of the instant case, to find that a reasonable man knows or should know that reckless or unskilled thieves or intermeddlers frequently operate cars or trucks left in the street with the keys in the ignition, creating a risk of some injury to the person or property of others. It is obviously less of a burden to the motorist to remove his keys when leaving his automobile in a public place than it is for contractors to provide all machinery left in public places with locking devices or other precautionary measures. Nevertheless, the courts have been reluctant to extend the liability of the owner of an ordinary truck or automobile to this extent, even where statutes or ordinances prohibit leaving a parked vehicle with the keys in the ignition.<sup>12</sup> The Missouri statute is limited to non-commercial vehicles, and provides specifically that failure to lock the ignition shall have no bearing in any civil action, which would seem to prevent its use to show negligence *per se*.<sup>13</sup> A similar Kansas City ordinance would appear to be in point in the instant case if the levee location could be regarded as a public street.<sup>14</sup> No cases were found where either this Missouri statute or a city ordinance of this type was used in an attempt to establish negligence on the part of the owner of the vehicle.

The Missouri court has been chary of finding liability in the attractive nuisance situations, where the attractive instrumentality is in a public place.<sup>15</sup>

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12. Galbraith v. Levin, 323 Mass. 255, 81 N.E. 2d 560 (1948) (liability denied on ground that act of third person was intervening cause where keys were left "over the sun visor"); Anderson v. Theisen, 231 Minn. 369, 43 N.W. 2d 272 (1950) (liability denied on ground that injury occurred outside the zone of the risk, although an ordinance prohibited leaving key in ignition); Ross v. Hartman, 78 U.S. App. D. C. 217, 139 F. 2d 14 (1943), *certiorari denied*, 321 U.S. 790 (1944) (owner held liable on basis that violation of ordinance constituted negligence *per se*). *In accord*: Ostergard v. Frisch, 333 Ill. App. 359, 77 N.E. 2d 537 (1948). See also 19 KAN. CITY L. REV. 112 (1951).

13. MO. REV. STAT. § 304.150 (1940): "No person shall leave a motor vehicle unattended on the highway without first stopping the motor and cutting off the electric current, and no person shall leave a motor vehicle, except a commercial motor vehicle, unattended on the highway of any city having a population of more than seventy-five thousand unless the mechanism starting device or ignition of such motor vehicle shall be locked. The failure to lock such motor vehicle shall not mitigate the offense of stealing the same, nor shall such failure be used to defeat a recovery in any civil action for the theft of such motor vehicle, or the insurance thereon, or have any other bearing in any civil action." § 304.570 provides that violations are punishable by a fine or by imprisonment in the county jail for a maximum of two years, or both.

14. Revised Ordinances of Kansas City, Chapter 31, § 31-111 (1946). Ordinance No. 10943, Sec. 31-103.4 (1947): "Removal of Ignition Key. Every person parking a motor vehicle on any public street or alley in the city shall remove and take with him the key to the ignition thereof, and it shall be unlawful for any person to fail to remove such key."

15. O'Hara v. Laclede Gaslight Co., 244 Mo. 395, 148 S.W. 884 (1912) (large iron pipes piled in street; children played upon them and rolled pipe on nine year old plaintiff. Case presented on general negligence and upon attractive nuisance grounds; liability denied, the court holding that the pipes were not inherently dangerous and that the act of the other children constituted an intervening cause). That the doctrine of attractive nuisance has not been extended to vehicles standing in a public street see 14 Mo. L. Rev. 119 at 122 and 123 (1949).

Such cases usually present a clear case of liability if fundamental negligence principles are applied, since defendant has maintained an instrumentality in a place where the child has a right to be, and from a previous course of conduct of children, defendant knows or should have known of the risk involved. Fundamental principles of negligence seem more favorable to the plaintiff in these cases than the attractive nuisance doctrine, which is generally held to be applicable when the instrumentality is maintained on the land of the possessor, and which has numerous limitations intended to limit the liability of the possessor of land to trespassing children.<sup>16</sup>

It is submitted that the decision in the instant case emphasizes considerations tending to prevent future injuries of this kind in an increasingly complex modern civilization. The necessary cost of elimination of the hazards will of course be reflected in higher insurance rates or costs of construction, either of which are ultimately paid by the public.<sup>17</sup>

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16. RESTATEMENT, TORTS § 339 (1934). For additional limitations imposed on the attractive nuisance doctrine in Missouri, see 14 Mo. L. Rev. 199 at 121 (1949).

17. “. . . a quickening social conscience and the general trend toward wider liability have led courts to perceive risks in ordinary activities of men where not so long ago they ruled them out of the permissive range of what might be found.” James, *The Qualities of the Reasonable Man in Negligence Cases*, 16 Mo L. Rev. 1