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THE MISSOURI SUPREME COURT AND THE HUMANITARIAN DOCTRINE IN THE YEAR 1953

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This discussion supplements the articles on the same subject in *18 Missouri Law Review,* which included the cases reported in *252 Southwestern Reporter, Second Series,* and closes with the cases reported in *260 Southwestern Reporter, Second Series.*

For purposes of definition and at the risk of undue repetition, it is repeated that the term "humanitarian doctrine", "humanitarian rule", and "humanitarian negligence" are used by the Bench and the Bar of Missouri to comprehend the common law last clear chance rule and a unique Missouri extension or addition to the last clear chance rule.

The typical common law last clear chance cases are restated as follows:

"Common Law Last Clear Chance Case No. 1:

"The peril to plaintiff's person, property, or both results from physical helplessness caused by plaintiff's lack of care. Defendant actually discovers the peril in time, thereafter, with safety to himself, to avoid damage to plaintiff by the exercise of care. This is a simple last clear chance case. The plaintiff may recover for personal injury and property damage despite his negligence in practically all common law jurisdictions. This result is well settled in Missouri and not expected to be challenged; but this is *not* a humanitarian negligence case.

"Common Law Last Clear Chance Case No. 2:

"The facts are the same as in Case 1, except that the defendant does not actually discover the peril, but in the exercise of care he should have discovered it in time to avoid damage, by the exercise of care and with safety to himself. As in Case 1, a majority of courts permit plaintiff to recover for personal injury or property damage under the last clear chance rule. This is not a humanitarian negligence case, and the rule is not expected to be challenged.

"Common Law Last Clear Chance Case No. 3:

"The peril to plaintiff's person, property or both, results

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from plaintiff's negligent inattentiveness (obliviousness in Missouri judicial parlance). Defendant (as in Case 1) actually discovers the peril in time, thereafter, to avoid damage to plaintiff by the exercise of care. This is a last clear chance case. It is not a humanitarian case. The rule that plaintiff may recover seems settled in Missouri and elsewhere. There appears to be no serious challenge to the soundness of the right to plaintiff to recover in this case."[1]

These three cases are sometimes referred to for brevity as follows:

Last clear chance case No. 1: Discovered helpless peril.
Last clear chance case No. 2: Discoverable helpless peril.
Last clear chance case No. 3: Discovered oblivious peril.

Under the general designation "humanitarian doctrine", the Missouri courts have added a fourth type of case wherein the injured party may recover despite or regardless of his contributory negligence. It is this fourth type of case which is the subject of the unique Missouri humanitarian doctrine. A typical true humanitarian case may be described as follows:

True Humanitarian Case No. 4

The injured person is in a position of imminent peril as a result of his negligent inattentiveness (obliviousness). The injured party could extricate himself from his peril by his own efforts, if he were aware of his peril and used care. The defendant or party against whom claim for damages is made does not actually discover the peril of the injured party. Nevertheless, in the exercise of care the party causing injury should have discovered the peril in time thereafter with safety to himself by the use of care to have avoided injury to the plaintiff. In other words the party causing injury is also negligently inattentive (oblivious). The Missouri courts permit recovery by the injured party in this case; and in this respect are more liberal in permitting recovery than courts of other jurisdictions.

Attention is invited to the fact that under the unique Missouri humanitarian doctrine (Case 4), both plaintiff and defendant can make a case for recovery, each against the other, upon a single assumed version of the facts, provided both parties suffer personal injuries.

A number of perplexing questions concerning the true humanitarian doctrine remained unanswered in 1953. Among these questions are

1. Becker, *The Supreme Court and the Missouri Humanitarian Doctrine in the Year 1950 and 1951*, 17 Mo. L. Rev. 32, 33-34 (1952).

these: Can both plaintiff and defendant recover from each other simultaneously under the true humanitarian doctrine? Is humanitarian negligence of the plaintiff, of the same quality and timing as that of the defendant, a defense to plaintiff's recovery under the humanitarian doctrine? These questions do not arise under last clear chance cases 1, 2, and 3 because it is impossible for plaintiff and defendant to make cases against each other under any single assumed version of the facts; the contrary is true under humanitarian case No. 4, *supra*.

Resort to Legislature

In 1953, the scene of controversy concerning the humanitarian doctrine was moved temporarily to the legislature.

There was introduced in the General Assembly during the year, Senate Bill 106 which had as its object limiting the right to recover, notwithstanding contributory negligence of the claimant, to common law last clear chance cases 1 and 2 above, in which the claimant was in helpless peril, and perhaps to situations involving wilful, wanton, and reckless misconduct.

The text of Senate Bill 106 read as follows:

> "The 'Humanitarian Doctrine' in negligence actions, as now recognized by the courts in Missouri, is hereby limited and confined to those cases wherein, and during the time, the plaintiff, the person injured or killed, or the property involved, is in a position of helpless or inescapable peril."

Passage of this bill would have moved Missouri from one of the most liberal positions in the United States to that of the most conservative, so far as recovery despite contributory negligence is concerned. The hearings on the bill before the Senate Judiciary Committee attracted great attention. Representatives of bar associations and other legal groups and business and commercial interests appeared to oppose or support the bill or to suggest amendments thereto. After hearing the arguments pro and con and after receiving briefs and memoranda, the Senate Committee failed to report the bill or any version thereof. So the attempt to change the present rule by legislation failed. The attitude of the Committee seemed to be that the rule originated in judicial decisions, and should be clarified or changed by judicial decision, if it should be changed at all.

The Missouri Supreme Court in 1953

The most significant decision of the supreme court, in the period

covered, was one involving procedural but highly important rules from the standpoint of the practitioner. This was the decision in *Smith v. St. Louis P. S. Co.*,[2] laying down the rule governing when the supreme court will reverse outright for failure to make a humanitarian case, and when it will remand for a new trail on the proved but unsubmitted grounds of primary negligence "abandoned" in the submission to the jury. From a practical standpoint, this decision, discussed hereinafter, is the most notable recent opinion in the field of practice dealing with "humanitarian negligence".

Division Number 2 in an opinion by Judge Ellison rendered a significant opinion overruling or refusing to follow several prior opinions which had approved a defense instruction apparently in fairly general use.

The opinions of the court were of good quality and painstaking, particularly in the analysis of complicated fact situations.

There was no opportunity in the cases reported in the period covered to answer any of the great questions touching the very nature of the doctrine.

The Court En Banc

Frequently a plaintiff pleads assignments of both primary and humanitarian negligence as a basis of defendant's liability. Often the evidence sustains one or more assignments of primary negligence, and plaintiff's counsel mistakenly assumes that the evidence will support submission of humanitarian negligence. The defendant at the close of all the evidence submits a motion for directed verdict which is properly overruled *at the time,* but is subject to renewal after verdict in accordance with the Code of Civil Procedure.[3] After the overruling of the motion for directed verdict, the plaintiff requests and the trial court approves submission of the case to the jury solely upon the humanitarian doctrine which denies to the defendant submission of plaintiff's contributory negligence. The plaintiff secures a verdict which is attacked after trial by motion for judgment in accordance with the prior motion for directed verdict. The denial of the motion for directed verdict was obviously correct *when made* because the evidence made a submissible case of primary negligence. Should the motion for directed verdict be viewed in a different light after verdict because of the failure of plaintiff's counsel to submit primary negligence? Prior to 1953, the supreme court

2. 259 S.W. 2d 692 (Mo. 1953).
3. Mo. Rev. Stat. § 510.290 (1949).

sometimes granted a new trial on remand in such cases.[4] And at other times the court reversed outright the judgment for plaintiff and discharged the defendant from liability.[5] Until 1953, the decision seemed to turn on the exercise of discretion of the appellate court with no uniform rule. However, a standard rule of appellate procedure in such cases was laid down by the supreme court *en banc* in the opinion of Judge Conkling in the case of *Smith v. St. Louis Public Service Co.*,[6] in which opinion the entire court concurred.

In the *Smith* case, the supreme court holds that, in exercising the appellate court's discretion to reverse outright or to remand for retrial on the issues of primary negligence, the appellate court will look to the whole record, and if the facts have been fully developed, will reverse outright if the failure to submit primary negligence was a matter of "legal strategy" rather than "misadventure" based on a misconception of the nature and extent of the humanitarian doctrine. Judge Conkling reconciled the two last decisions[7] of the court *en banc* to produce the rule of the *Smith* case.

The opinion in the *Smith* case does not expressly state that the rule governs practice where the trial court, realizing its error in submitting the case on humanitarian negligence, orders a new trial, setting aside the judgment and verdict for the plaintiff. Related problems of right of appeal and reviewability of the trial court's ruling on motions for new trial are involved. *Quaere:* If the trial court orders a new trial on its own motion, or defendant's alternative motion for new trial, may the defendant secure a review and outright reversal under the rule of the *Smith* case?

In any event, if there is a submissible case on primary negligence, the cautious plaintiff should not abandon it by failing to request instructions thereon, unless plaintiff is certain that the humanitarian or last clear chance case is submissible.

Cases in Division Number One

Romandel v. Kansas City Public Service Co.[8] was an action by a pedestrian for damages sustained when struck by defendant's street car

4. Blaser v. Coleman, 358 Mo. 157, 213 S.W. 2d 420 (1948).
5. Hunt v. Chicago M., St. P. & P. R.R., 359 Mo. 1089, 225 S.W. 2d 738 (1949).
6. 259 S.W. 2d 692 (Mo. 1953).
7. Hunt v. Chicago, M., St. P. & P. R.R., 359 Mo. 1089, 225 S.W. 2d 738 (1950), and Blaser v. Coleman, 358 Mo. 157, 213 S.W. 2d 420 (1948).
8. 254 S.W. 2d 585 (Mo. 1953).

as she crossed the street car tracks on her way from a safety zone to the opposite side of the street, walking parallel to but not in the regular pedestrian crosswalk. This was a case of discovered or discoverable oblivious peril. (Last clear chance case No. 3 or humanitarian case No. 4 depending on the awareness of the street car operator) The case was submitted on primary as well as "humanitarian" negligence. After verdict and judgment for the plaintiff, defendant appealed. The fact situation involved Kansas City's new "Walk" and "Don't Walk" traffic control lights for pedestrian traffic. It was conceded that a submissible humanitarian case was made for failure to warn, but the question of submissibility of the humanitarian case for failure to slacken or stop was also involved. In an opinion based upon nice mathematical calculations drawn from the record and judicially noticeable factors, Judge Lozier held that the evidence made a submissible case of humanitarian negligence for failure to stop or slacken. On the issue of slackening this was an "almost escaping" type of case and was ruled on the authority of *Stith v. St. Louis Public Service Co.*[9] discussed in 18 *Mo. Law Rev.* 27, 28. It is on the issue of whether a humanitarian stopping case was made that the closest question arises. Because of the apparent obliviousness of the plaintiff to the street car's approach the court, reconstructing the sequence of events from a series of mathematical calculations, holds that there was ample time to stop short of the point of collision after notice of imminent peril. This case is an example of the complexity of the fact situations which must be analyzed in close cases. Judge Lozier has done a painstaking job and the conclusion as in most close cases depends upon the factual interpretation.

Cases in Division Number Two

Wilt v. Moody[10] involved the application of the "humanitarian" doctrine to a situation where a headon collision of meeting motor vehicles resulted when one was struck from behind by a third vehicle and projected into the path of the other. It was not claimed that there was a failure to make a submissible case. Under the facts the plaintiff's motor vehicle which was first struck from the rear was in helpless peril. Consequently, this was a last clear chance case No. 1 or No. 2, depending on the awareness of the peril by the defendant.

The case is notable because of the exhaustive opinion of Judge

9. 251 S.W. 2d 693 (Mo. 1952).
10. 254 S.W. 2d 15 (Mo. 1953).

Ellison on the defendant's instruction which is summarized in the opinion as follows:

> "Plaintiff-appellant Wilt's fourth contention is that defendant-respondent Moody's Instruction B was contrary to law and in conflict with appellant's instructions. We think the instruction was erroneous. It told the jury, in substance, that respondent Moody had a right to assume appellant Wilt would drive his automobile on his own right side of the highway, and that the third party McMillan would not drive his truck against Wilt's automobile hereby forcing the latter into the path of Moody's truck; and that *Moody was under no duty to slow down, stop or swerve his truck 'until it became apparent to him, in the exercise* of the highest degree of care' that appellant Wilt's automobile was traveling to the left and into the path of his (Moody's) truck, if so."[11]

In holding this instruction erroneous, Judge Ellison with the concurrence of Judge Leedy, and limited concurrence of the remaining judge of the division, held that the instruction was incorrect on two grounds, (1) that the limitation of duty to act to a situation where the peril is *apparent* is wrong and (2) the charge that a motorist may *assume* another will keep to his side of the road, and owes the other no duty until the contrary is *apparent,* is erroneous in view of Section 340.010, *Missouri Revised Statutes* (1949).

The opinion in this case refuses to follow earlier opinions of both divisions of the court holding similar instructions not prejudicially erroneous.[12]

There is in the language of the opinion a warning about directing a jury in the introduction to an instruction about what an actor can *assume,* particularly in the case where the actor is a motor vehicle operator.

The instruction numbered 3 in the case of *See v. Wabash R.R.*[13] seems to be free of the objection that the word "apparent" is misused as in the *Wilt* case, but whether the direction in instruction 3 of the *See* case concerning the engineer's right to assume a motor vehicle will stop is correct remains to be seen. In the *Wilt* case is the germ of a new emphasis instructions in humanitarian negligence actions. It is contained in this language:

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11. Id. at 19.

12. See Sackman v. Wells, 41 S.W. 2d 153 (Mo. 1931) and other cases cited in the Wilt case, 254 S.W. 2d 15, l.c. 20 (Mo. 1953).

13. 259 S.W. 2d 828, l.c. 831 (Mo. 1953).

"The motor vehicle act exacts a precautionary vigilance or alertness on the part of a motorist before an emergent situation has arisen, and even while the other party is *approaching* a position of imminent peril. But it does not require him to *act* to avert a casualty until the later *goes into peril*"[14]

Carpentier v. Middlewest Freightways[15] was an action for damages for personal injuries brought by a guest in a passenger car travelling on a major highway, struck at an intersection by a tractor-trailer motor truck entering the major highway from an intersecting minor street and failing to stop at a stop sign. The assignments of error, relevant to this discussion, challenge the submissibility of the case as a humanitarian case. In an opinion by Judge Westhues the case is held to be submissible. The case could be submitted on established principles as a last clear chance case of discovered oblivious peril (No. 3), or as a true humanitarian case (No. 4), or both in the alternative.

Possibly, since the plaintiff had no direct control over the automobile in which she was riding the case could have been submitted also as a last clear chance case of discovered or discoverable helpless peril (Cases 1 and 2). There was ample evidence that the motor truck could be stopped after plaintiff came into a position of imminent peril. The case was not unique and was properly decided on settled considerations.

See v. Wabash R.R.[16] is the second appeal of a decedent's widow from a verdict and judgment for the engineer and railroad in an action for damages resulting from the death of decedent who was killed in a crossing collision while operating a motor truck. On the former appeal[17] it was held that the plaintiff widow made a submissible case of "humanitarian" negligence. (Last clear chance case No. 3 or true humanitarian case No. 4, based on discoverable or discovered oblivious peril.) Three instructions given for the defense are set out in the opinion and are held not to be prejudicially erroneous. The instructions (1) define imminent peril (2) caution the jury that the injury and death of decedent and suit of plaintiff claiming negligence of defendants are not evidence of negligence and (3) direct a verdict for defendants if it was too late to sound an effective warning when it was, or should have been apparent

14. Wilt v. Moody, 254 S.W. 2d 15, 21 (Mo. 1953).
15. 259 S.W. 2d 816 (Mo. 1953).
16. 259 S.W. 2d 828 (Mo. 1953).
17. See v. Wabash R.R., 362 Mo. 489, 242 S.W. 2d 15 (Mo. 1951).

that the truck was in a position of imminent peril. This last instruction was as follows:

> "The Court instructs the Jury that the defendants had a right to assume that a truck approaching the crossing would stop before going upon a crossing into danger of being struck by a train, and said defendants were under no duty to signal or slacken speed until they saw or should have seen that the truck would not stop and was in a position of danger.
>
> "If you find and believe from the evidence that as soon as it became or should have become apparent to the defendants, under the circumstances that the truck was in a position of imminent peril, it was then too late for the engineer or fireman to sound a warning of the approach of the train or slacken the speed thereof in time to avoid a collision, the plaintiff cannot recover and your verdict should be in favor of the defendants."

Although Judge Westhues, author of the opinion, reviewed the three instructions, in the absence of specific assignments of error required by Rule 1.08 of the Supreme Court, the opinion lacks the authority found in approval of instructions in opinions where there are specific assignments of error attacking the instructions upon every reasonably arguable ground. Judge Westhues has, in the statement of the record on appeal, generously undertaken the task of gleaning the assignment from the argument and cases cited by appellant. Under these conditions, the instructions should be copied for use in other cases, with caution.

Conclusion

The judges of the present court have a tremendous problem, inherited from their predecessors, and precipitated by the development of automotive traffic. Someday, somehow, there will be presented squarely to the court the necessity of determining whether the humanitarian doctrine shall be confined within the rules of relative fault, or established as a doctrine of liability without regard to or mitigated by relative fault. The dilemma has grown out of an attempt to ameliorate the harsh common law doctrine of contributory negligence, a worthy motive. But the essential reasonableness of the judicial process is involved and must not be compromised.