Missouri Law Review

Volume 20
Issue 1 *January 1955*

Article 8

1955

Missouri Supreme Court and the Humanitarian Doctrine in the Year 1954, The

William H. Becker

THE MISSOURI SUPREME COURT AND THE HUMANITARIAN DOCTRINE IN THE YEAR 1954

WILLIAM H. BECKER*

This discussion supplements the previous articles on the same subject, the last of which was published in 19 *Missouri Law Review* at page 48, and included the cases reported in 260 Southwestern Reporter, Second Series. This article closes with the cases reported in 269 Southwestern Reporter, Second Series.

During 1954, the Supreme Court continued to use the terms "humanitarian doctrine", "humanitarian rule", and "humanitarian negligence" to comprehend the common law last clear chance rule and the unique Missouri extension of the last clear chance rule.

The typical common law last clear chance cases which are recognized in other jurisdictions are 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.

*Attorney, Columbia. LL.B., University of Missouri, 1932.

"Common Law Last Clear Chance Case No. 3:

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

Under the general designation "humanitarian doctrine", the Missouri courts have recognized all three common law last clear chance cases and have added a fourth type of case wherein the injured party may recover despite his contributory negligence. This fourth type of case, which is the unique humanitarian case is 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 again invited to the fact that under the unique Missouri humanitarian doctrine, Case No. 4, both plaintiff and defendant can make cases simultaneously for recovery, each against the other, upon a single assumed version of the facts, provided both parties suffer personal injuries.

At the close of 1954, the two most perplexing questions concerning the true humanitarian doctrine remained unanswered. These questions are:

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?

In connection with these questions it should be noted they do not arise under common law last clear chance cases No. 1, No. 2, and No. 3, because it is impossible for the plaintiff and the defendant to make cases against each other under any single assumed version of the facts.

The common law rule of contributory negligence which defeats recovery regardless of the relative degree of fault between plaintiff and defendant has been generally regarded as a harsh rule. Various devices, judicial and statutory, have been created to lessen the harshness of the contributory negligence rule. The common law last clear chance rule is a judicial device. The statutory and constitutional enactments abolishing contributory negligence as a defense are examples of the nonjudicial approach. The comparative negligence rule and the proportional fault rules are other variations.

Since the humanitarian doctrine in Missouri does not logically fit into a system of recovery based on fault, and since the advent of automobiles, it became increasingly difficult for the courts to administer, there has been some sentiment for a restriction of the rule by judicial decision. Although the humanitarian rule is "judge made" law, the Supreme Court has not yet taken any action to restrict the rule.

In 1953, opponents of the rule caused to be introduced Senate Bill 106, which had as its objective abolition of the humanitarian rule and also of the common law rule of recovery in last clear chance case No. 3. The text of the bill was 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."

The Missouri Senate failed to report the bill for action.

The agitation for repeal of the humanitarian doctrine by legislative act produced a counter-action from those favoring the abolition of contributory negligence as a defense. As a result there has been introduced in the 1955 Legislature Senate Bill No. 144, which would substitute by

statute the rule of comparative negligence for the contributory negligence rule. This bill reads as follows:

> "Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or in injury to person or property, if such negligence was not as great as the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in proportion to the amount of negligence attributable to the person recovering."

Many variations, by committee substitute and by amendment, are possible. The initiative in regard to the change in the existing law seems to have passed from defendant's representatives to the claimant's representatives.

The Missouri Supreme Court in 1954

The Missouri Supreme Court in 1954 seemed to be concerned principally with questions regarding instructions, the submissibility of cases, and the disposition of reversed cases on appeal insofar as the humanitarian doctrine is concerned.

The opinions of the court continued to be of improved quality and showed laborious and painstaking efforts in the analyses of complicated fact situations.

In the period covered no case before the court afforded an opportunity for any fundamental action regarding the perplexing questions mentioned earlier in this article.

The Court En Banc

Paydon v. Globus[1] reviews an opinion of the St. Louis Court of Appeals.[2] This case involved a midday collision between two meeting automobiles travelling in opposite directions. The automobile in which plaintiff was riding struck an icy spot on the hghway, proceeded some 72 feet onward in plaintiff's right hand lane and then abruptly turned across the highway into the defendant's right hand lane where it was struck.

The Missouri Supreme Court in an opinion by Judge Tipton, applied previously declared rules in holding that no submissible case of humani-

1. 262 S.W.2d 601 (Mo. 1953).
2. Paydon v. Globus, 255 S.W.2d 61 (Mo. App. 1953).

tarian negligence was made. The earlier opinion of the St. Louis Court of Appeals in the same case, by the late lamented and always respected Judge Walter Bennick, was affirmed. This was a typical case illustrating the difficulty in making a submissible case of humanitarian negligence without eyewitness evidence of facts placing the plaintiff in a position of certain danger in time for the defendant to avoid the injury by the exercise of care.

DeLay v. Ward[3] involved a true humanitarian Case No. 4 situation. The plaintiff was a three year old child struck one afternoon by defendant's automobile when the child had nearly completed a dash across the highway in front of defendant's car. The case was submitted on failure to slacken, swerve, or warn under the humanitarian doctrine.

The Springfield Court of Appeals in the same case[4] held that no submissible humanitarian case was made. In so holding the court of appeals limited the defendant's duty under the humanitarian doctrine to a situation in which the defendant was aware of plaintiff's peril. This holding was rejected by the supreme court *en banc* in an opinion by Judge Dalton. Judge Dalton undertook a laborious study of the record and reconstructed the situation from the inferences and evidence most favorable to the plaintiff child, supplemented by matters of judicial notice. This case is notable for its minute consideration of the evidence and the deductions and calculations from known facts. It should be compared with *Vietmeier v. Voss*,[5] wherein recovery was denied. The difference in result in this case is based on the difference in facts of the two cases.

Division Number One

Hayes v. Coca Cola Bottling Company of St. Louis[6] was a suit by a street car motorman against a truck operator for personal injuries sustained by the motorman in a headon collision as the streetcar turned on a curved track into the path of the oncoming truck. The case was submitted on the humanitarian doctrine as a case of discovered or discoverable peril resulting from plaintiff's physical helplessness (last clear chance case No. 1 or No. 2). Applying settled principles to the evidence

3. 262 S.W.2d 628 (Mo. 1953).
4. 262 S.W.2d 626 (Mo. App. 1953).
5. 246 S.W.2d 785 (Mo. 1952).
6. 269 S.W.2d 639 (Mo. 1954).

and inferences most favorable to the plaintiff, Judge Hyde held that a humanitarian case was made. The case was close but calculations from the evidence were held to make a case of failure to stop and failure to swerve. The case was difficult to handle on appeal because of inconsistent estimates of speed and distance of plaintiff and his witnesses, but the court in keeping with settled rules relied on inferences and estimates most favorable to the defendant.

Johnson v. Cox[7] was an action for wrongful death arising out of a head on collision at night between an automobile and a motorcycle operated by plaintiff's decedent husband. The defendant was making a left turn across a public highway to reach a parking lot on her left side of the highway. When the defendant's automobile was five feet across the center line, the motorcycle without lights and travelling forty-eight miles per hour suddenly collided with the front center of the automobile of the defendant, according to defendant, the only surviving eyewitness. Plaintiff's case was submitted on failure to stop or swerve under the humanitarian doctrine. The jury's verdict under the lower court's judgment was for the defendant.

On appeal, in an opinion by Judge Hyde, the judgment was reversed for error in giving the following "sole cause" instruction:

> "The Court instructs the jury that if you find and believe from the evidence that Marvin Johnson, deceased, on the occasion described in the evidence, operated the motorcycle as described in the evidence, at a time after dark without a lighted headlight, or at a rate of speed of approximately 45 to 50 miles per hour, and if you further find that such rate of speed, if any, was high, dangerous and excessive, and if you further find and believe that such act or acts, if any, constituted negligence and were the sole cause of the collision described in the evidence, and that defendant was not guilty of negligence as submitted in favor of the defendant, Lovie Cox."

This instruction was held to be erroenous (1) for failing to hypothesize facts "from which a jury could find that deceased's negligence was the sole proximate cause of the collision" and (2) for being confusing, misleading, and tending to divert attention from the humanitarian issue. Further, the court held that under the record there were no facts in evidence to justify a proper sole cause instruction, and (unless further

7. 262 S.W.2d 13 (Mo. 1953).

facts appeared) on re-trial defendant's instruction should be a converse instruction, negativing some essential fact of the humanitarian case submitted by plaintiff.

This case, in passing on the form of the "sole cause" instruction is indicative of the tendency toward limitation of the use of the "sole cause" instruction in humanitarian cases. In 1950, the instruction barely survived *Janssens v. Thompson.*[8] With the personnel of the court changing from time to time it is not inconceivable that the minority opinion in the *Janssens* case may become the majorty opinion in the future. Meanwhile, the practitioner will use the "sole cause" instruction with caution and with the knowledge that it may be repudiated and abolished in some case yet to be decided.

This was a last clear chance, No. 2, or a true humanitarian case, number four in the alternative.

Caswell v. St. Louis Public Service Co.[9] involved the striking of an automobile in the rear by a swifter moving overtaking streetcar in the daytime. The case was submitted upon failure of the streetcar operation to slacken under the humanitarian doctrine. The submissibility of the humanitarian case and plaintiff's main instruction was upheld. The opinion by Judge Hollingsworth involves the application of previously declared principles. It is remarkable for a painstaking review of the facts, characteristic of the recent opinions of the court. This was a last clear chance case No. 3 or a humanitarian case No. 4.

Sauer v. Winkler[10] grew out of a collision between motor vehicles proceeding in opposite directions at or near an intersection of two highways. Plaintiff's case was submitted on primary and humanitarian negligence. On plaintiff's appeal from an adverse verdict, the court in an opinion by Judge Coil, held that a converse humanitarian instruction, given at the request of the defendant, which instructon directed a verdict for the defendant, and ignored the submission of primary negligence, was reversible error. There is *dictum* in the case taking a very tolerant view of the defendant's separate instruction on contributory primary negligence of the plaintiff which ignored the humanitaran negligence submission. This was a last clear chance case No. 1 or No. 2.

---

8. 228 S.W.2d 743 (Mo. 1950). See discussion in 17 Mo. L. REV. 32, l.c. 37-38 (1952).
9. 262 S.W.2d 40 (Mo. 1953).
10. 263 S.W.2d 370 (Mo. 1954).

Anderson v. Prugh[11] was a suit for personal injuries sustained by plaintiff, a twelve year old child injured when a sled she was riding in a village street collided with defendant's automobile in the forenoon near the junction of the village street and a county highway on which defendant was driving. The court in an opinion by Judge Dalton held that the defendant could have discovered plaintiff in imminent peril in time to stop, under the facts in evidence and permissible inferences favorable to plaintiff. The interesting feature of the case is the absence of either eyewitness witness or competent expert testimony of the speed of the sled as it approached the intersection. Ordinarily, some competent evidence of the speed of plaintiff as well as of defendant is required. Plaintiff's case was submitted on defendant's humanitarian or last clear chance negligence in failing to slacken speed and stop. The instruction contained a preliminary definition of a motorist's duty to keep a vigilant lookout. This preliminary definition was held to be erroneous because it injects primary negligence of the defendant (occuring before imminent peril of plaintiff arose) into the humanitarian submission. The condemned language of plaintiff's instruction is as follows:

> "The Court instructs the jury that it was the duty of Benton M. Prugh, while driving his automobile at the time and place mentioned in evidence, to keep a vigilant look-out, both ahead and to the sides, to discover other persons upon and approaching the county road on which he was driving, and to use the highest degree of care to avoid injuring such persons; therefore, you are further instructed that if * * *".

Certain language of the opinion in *Wilt v. Moody*[12] is sharply criticized as confusing primary and humanitarian negligence. An opinion of the court, *en banc,* reconciling the language of the *Anderson* case and the *Wilt* case, or overruling one of them is needed. This was a last clear chance case No. 2.

Breshears v. Myers[13] involved a headon collision between two approaching and meeting passenger automobiles. Plaintiff was turning left across the highway toward a service station on her left side of the road. She never saw defendant's automobile which came fast over the crest of a hill which for a time obscured it from view. The only estimate of speed was defendant's estimate that his car was travelling sixty-five to

11. 264 S.W.2d 358 (Mo. 1954).
12. 254 S.W.2d 15 (Mo. 1953).
13. 266 S.W.2d 638 (Mo. 1954).

seventy miles per hour when plaintiff slowly turned across the highway. The other evidence indicated that defendant's car was travelling at least sixty-five to seventy miles per hour. Plaintiff introduced evidence of defendant's ability to stop at sixty miles per hour but none at any other speed. In an appeal by the plaintiff from an adverse verdict, the court in an opinion by Judge Hyde, held that no submissible case was made because there was no evidence of ability to stop at the speed defendant was shown to be travelling.

In this case, defendant turned to his right and the collision occurred near defendant's right side of the road. The evidence indicated that by turning left the defendant could have avoided the collision. In holding that the failure to turn left rather than right was not negligence the court applied the rule of the case of *Vietmeier v. Voss*,[14] holding the defendant not negligent in choosing one of two possible courses of action in an emergency. This is a defense or concept which will probably be urged more and more since its emphasis in the *Vietmeier* case. The case if submissible would have been a last clear chance case No. 3 or humanitarian case No. 4.

Ukman v. Hoover Motor Express Co.,[15] was a suit for personal injuries suffered by plaintiff when the station wagon he was driving was struck by a truck at a city street intersection. The vehicles approached on collision courses at a right angle. On appeal by defendant from an adverse verdict, Judge Coil wrote a model opinion reviewing the evidence in detail and holding that a humanitarian case was made. The opinion handles the mass of detail and the calculations justified by the evidence logically and expertly. The principles applied are not new. Nor is the fact situation unusual. But the technique of the opinion and its economical but sufficient treatment of the material facts, inferences, and legal principles could serve as a guide in preparing cases for trial and in testing the submissibility of last clear chance and humanitarian cases. As an example of the methodical and proper approach to application of established rules to fact situations, the opinion is worth reading by any practitioner in the negligence field. Because the plaintiff was not apparently oblivious, but was physically helpless when peril arose, the case is a true last clear chance case No. 1 or No. 2.

---

14. 246 S.W.2d 785 (Mo. 1952).
15. 269 S.W.2d 35 (Mo. 1954).

Wapelhorst v. Lindner[16] was an action for wrongful death of a nine year old boy riding a bicycle who was struck and killed by defendant's automobile at twilight on Manchester Road or U. S. Highway No. 50 in St. Louis County. On appeal, the plaintiff complained of the failure of the trial court to submit the case on the humanitarian doctrine in failing to swerve or to warn. The court affirmed the action of the trial court, holding that the case was not submissible on the humanitarian doctrine. The only eye witness to the collision was the defendant, whose testimony and admissions construed most favorably to the plaintiff was that the defendant first saw the deceased child when he was ten feet in front of the defendant's automobile, which was travelling fifty miles per hour. The court, in an opinion by Judge Lozier, held that the record failed to show, directly or by inference, when or where the deceased child came into a position of peril before he was within ten feet of the automobile at which time his injury was unavoidable. This is one of those difficult cases where the person injured is killed and is not available to testify, and the only eye witness is the defendant whose own testimony fails to make a submissible case. There is no controversy about the legal principles to be applied. Disposition of the appeal turned upon the inferences to be drawn from the facts in evidence.

Largo v. Bonadonna[17] was a suit for personal injuries and property damage sustained as a result of an intersectional collision between two passenger automobiles at night in Kansas City. The case was submitted by the plaintiff solely under the humanitarian doctrine for failure to slacken, to stop, or to swerve. From an adverse verdict the plaintiff appealed, assigning his error to the giving of defendant's instruction number 9, which read as follows:

> "The Court instructs the jury that there was no duty resting upon the defendants mentioned in evidence to have slackened the speed of their automobile, or to have stopped said automobile, or to have turned the same aside until it became apparent in the exercise of the highest degree of care on the part of said defendants that the plaintiff was in a position of peril on the street mentioned and described in evidence.
>
> "So, therefore, if you find and believe from the evidence that the defendants automobile was being driven in a northerly direction on Troost Avenue, and that the plaintiff was driving his

16. 269 S.W.2d 865 (Mo. 1954).
17. 269 S.W.2d 879 (Mo. 1954).

automobile in an easterly direction on 19th Street, and if you further find and believe from the evidence that when the front end of defendants automobile had reached the south curb line of 19th Street that the plaintiff's automobile was some 10 feet west of the west curb line of Troost Avenue, if you so find, and if you further find and believe from the evidence that at said time plaintiff was driving his automobile in excess of 35 miles per hour, if you so find, and that the defendants automobile was proceeding at a speed of from 10 to 15 miles per hour, if you so find, and if you further find and believe from the evidence that plaintiff's automobile was driven into the intersection past the stop sign for eastbound traffic on the west side of Troost Avenue, if you so find, directly into the course of the automobile driven by the defendants, if you so find, and if you further find and believe from the evidence that plaintiff drove his automobile as aforesaid in such close proximity to the defendants automobile that by the exercise of the highest degree of care on the part of the defendants that they were unable to slow up their automobile, stop the same, or turn aside in time thereafter to avoid a collision with the automobile driven by the plaintiff, then you are instructed that the plaintiff is not entitled to recover against the defendants and your verdict shall be in favor of the defendants."

The opinion written by Judge Van Osdol conceded that the instruction was erroneous and should not be used as a model in any case, but, nevertheless, affirmed the judgment on the theory the errors in the instruction were harmless. The reasoning of this opinion is that all errors in verdict directing instructions are not reversible errors. There is much that can be said for said reasoning, but it remains a fact at this time that such reasoning is not consistently invoked in humanitarian cases. It should be noted that the prevailing party in this case is the defendant and that the court concluded there was no reversible error because "it would seem clear that plaintiff failed to sustain his version of jury persuasion". There remains the question whether a different rule concerning reversible error would be applied if the erroneous instruction were given by the party sustaining the burden of proof.

Division Number Two

Erickson v. Kansas City Public Service Co.[18] involved an early morning collision between an eastbound motorbus and a northwest bound

18. 265 S.W.2d 401 (Mo. 1954).

passenger automobile at an oblique junction of a paved city street and a paved county road. The pavement of both the street and highway were wet. The plaintiff entering the intersection saw the bus 120 feet away and accelerated her car to get out of its path. The bus driver put on his brakes and skidded to his left striking plaintiff's car. The evidence of both the plaintiff and the bus driver supported plaintiff's contention that the collision would not have occurred if the bus driver had reduced his speed and continued on his original course without skidding.

In an opinion by Judge Westhues it was held that a humanitarian case was made. Here the defendant was aware of plaintiff's peril but did the wrong thing attempting to avert it. Plaintiff was physically helpless to avoid the collision. The case was held to be submissible on the humanitarian doctrine for failure to slacken speed. This is a classic last clear case No. 1.

East v. McMenamy[19] grew out of a daytime collision on new Highway U. S. No. 40 between a passenger car and a truck, both proceeding eastwardly. The passenger car driven by plaintiff's husband who was instantly killed, struck the truck from the rear as the truck driver turned left at an intersecting highway junction. The plaintiff pleaded only the humanitarian doctrine. The court in an opinion by Judge Tipton, properly held that no humanitarian case was made, thereby approving the action of the trial court, which had directed a verdict for defendant. But the court then proceeded, out of grace, to reverse and remand the case to permit plaintiff to amend and plead primary negligence, on retrial. This is quite a contrast to the theory of abandonment sometimes invoked where plaintiff pleads and proves primary negligence but erroneously submits the case on unproved humanitarian negligence. Perhaps this *East* case under discussion is evidence of an amelioration of the doctrine of abandonment. Compare the opinion of Judge Conkling, speaking for the court *en banc* and presumably settling rules relating to abandonment of primary negligence, in *Smith v. St. Louis Public Service Co.*[20]

Welch v. McNeely[21] was heard in Division No. 2 by a court composed of one regular judge and Special Judges Stone and Dew, transferred

19. 266 S.W.2d 728 (Mo. 1954).
20. 259 S.W.2d 692 (Mo. 1953).
21. 269 S.W.2d 871 (Mo. 1954).

from the Springfield and Kansas City Courts of Appeal, respectively. The opinion was written by Special Judge Stone. The case involved a collision between two passenger automobiles on U. S. Highway No. 61 in the late afternoon. The plaintiff was attempting to drive his automobile from a parking area on his left side of the highway across defendant's traffic lane. A collision occured in the defendant's traffic lane. Plaintiff claims that after he started across defendant's traffic lane and was in a position of imminent peril, the defendant had ample time to stop and avoid the collision but failed to do so. The defendant claimed that the plaintiff from a position of safety off the highway, drove suddenly across and in front of defendant's automobile so close in front thereof that defendant had no time to stop. The case was submitted solely upon humanitarian negligence in failing to stop. The jury returned a verdict for the defendant. On appeal the supreme court, in an opinion by Special Judge Stone, held that the giving of the following instruction on behalf of the defendant was not error:

> "The Court instructs you that if you believe and find that at the time plaintiff's automobile entered a position of imminent peril the defendant could not, by the exercise of the highest degree of care, have prevented the collision by stopping his automobile, then, and in such event, plaintiff is not entitled to recover on his cause of action and you will find your verdict in favor of the defendant on plaintiff's cause of action."

The instruction was approved as a defense instruction, hypothesizing the absence of one of the constitutive elements of the humanitarian doctrine in a case submitted solely on failure to stop.

Conclusion

It has been frequently repeated that the life of the law has not been logic, but has been experience. So the Missouri humanitarian rule could survive its lack of logic as a doctrine of relative fault, if in experience it could be sustained on a utilitarian basis. The trouble is that on the basis of experience, some of the problems flowing from it are without a logical or practical solution. Now it appears that either the humanitarian doctrine must be restricted by judicial decision, or the harsh contributory negligence rule of the common law must be abolished by legislation. There is much to be said for each of the alternative remedies. There is little that can be said for continuance of the existing dilemma.

In this field of substantive law the legislature has an undoubted constitutional right to act. At the same time, since the rule was created by judicial decision, the supreme court likewise has a right to act when an appropriate case comes before it. No one knows how and when this problem will be solved. But it must be solved.