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THE MISSOURI SUPREME COURT AND THE HUMANITARIAN DOCTRINE IN THE YEAR 1955

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For many years Missouri has permitted recovery in personal injury cases, notwithstanding contributory negligence, under the most liberal view of the common law last clear chance doctrine. And, Missouri has gone farther in permitting recovery in a situation not recognized by the common law last clear chance rule.¹

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1. For convenience, the common law last clear chance rule and the Missouri humanitarian rule are summarized in the following cases:

"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 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

In legal parlance in Missouri decisions, the terms "common law last clear chance" doctrine and the unique Missouri "humanitarian doctrine" are referred to without discrimination as falling within the "humanitarian doctrine." The application of the humanitarian doctrine in automobile cases in Missouri has created a dilemma, which, for all practical purposes, was absent in the railroad cases, because the trainmen and passengers of the railroad equipment involved seldom if ever sustained personal injuries. More recently, the doctrine has been applied freely in automobile cases. And, in automobile cases, it is quite likely that two operators of automobiles may sustain personal injuries, when each is negligently inattentive (in peril because of obliviousness) and each could have avoided injury to the other by timely action after imminent peril arose to both, with safety to himself by the means and appliances at hand.

An examination of the practical aspects of the humanitarian doctrine makes it readily apparent that two automobile operators injured in a collision can simultaneously make a case for recovery, each against the other, upon an assumed single version of the facts. This is impossible under the common law last clear chance doctrine. Furthermore, it is conceivable that, under a single assumed version of the facts in such a collision, the plaintiff may be guilty of exactly the same humanitarian negligence with which he charges the defendant. So, it has seemed to many practitioners in the field and students of the question that the Missouri Supreme Court will ultimately be required, unless the legislature intervenes, to answer the following questions: Under the humanitarian doctrine can each of two injured automobile operators in the same action, by claim and counterclaim, simul-

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.

taneously recover damages for injuries from the other?² Or, is true humanitarian negligence on the part of the plaintiff, contributing to his injury, a defense against negligence of the defendant of the same quality and timing? (Logically, this would seem to be true in a system of negligence law based upon relative fault and proximate cause.³) Or, does the first party to file his action have the sole right of recovery under the humanitarian rule? (This latter seems to be an absurd result, but could conceivably follow if the answer to the preceding question is negative.) During 1955, no case was presented to the Missouri Supreme Court which required an answer to these questions. And until the court is presented with a clear cut case, requiring a pronouncement upon these questions, there probably will be no determination of these questions by the court.

It is possible that the whole matter will be settled by legislation before the court solves the unsolved problems of the doctrine. For instance, at the last General Assembly, the Legislature had before it for consideration a bill which would have abolished the unique Missouri humanitarian doctrine, and also a bill which would have abolished contributory negligence as a defense in Missouri.⁴

The passage of either bill in the form submitted, or in other forms, would have resolved the doubt, uncertainty, and dilemma presented by the humanitarian doctrine. Unfortunately, neither bill passed.

As the humanitarian doctrine is earnestly discussed and debated by the Bench and Bar of Missouri, there has been an interesting development. Prominent lawyers whose principal practice is handling personal injury claims for injured persons have recognized the logical and practical defects in the true humanitarian rule as distinguished in the common law last clear chance rule. These lawyers, upon analyzing the humanitarian doctrine, suggest that the humanitarian doctrine is a temporary or transitional phase in the growth of the law; that it represents in a way, a temporary improvisation to mitigate the common law rule of contributory negligence

2. At least one competent authority in the field thinks so. TRUSTY, CONSTRUCTING AND REVIEWING INSTRUCTIONS 245 (1945).

3. But see *George v. Allen*, 245 S.W.2d 848 (Mo. 1952).

4. Becker, *The Supreme Court and the Humanitarian Doctrine*, 20 Mo. L. REV. 38 at 40, 41 (1955). The opportunity to correct an error in that article is taken here. In that article at page 43, it was erroneously recited that Judge Hyde was the author of the opinion in the case of *Johnson v. Cox*, 262 S.W.2d 13 (Mo. 1953). This opinion was written by Judge Coil.

until such time as the law may be changed to provide for abolition of contributory negligence as a defense. This makes it unnecessary to defend the true humanitarian doctrine as a permanent addition to the principles of negligence law. On the other hand, it is argued by those of the opposite persuasion, that Missouri through "judge-made law" has extended itself into an untenable position and must withdraw to a sound position under the common law last clear chance rule. Only a prophet can say which position will prove to be correct.

THE DECISIONS IN 1955

There was no decision of the Missouri Supreme Court *en banc* in 1955 involving the humanitarian doctrine.⁵ The decisions in 1955 were all of good quality and marked by the painstaking care with which the court reviewed the evidence and applied scientific, mathematical, and geometrical principles, including the Pythagorean Theorem.⁶

In the practical administration of cases under the humanitarian doctrine, as well as in other negligence cases, the court has developed a sound technique whereby it sets out in detail the proved and inferable facts involving relative speeds, distances, courses, and potentialities of the persons and machines involved. In order to sustain the submissibility of a last clear chance case or humanitarian case today, a lawyer must be able to point to proof of courses, distances, reaction times, and mathematical possibilities of the situation in definite mathematical terms.

In this regard, the court has moved far toward uniformity in the application of principles in this field.

In addition to the fundamental questions, there are problems of procedure remaining unsolved. For instance, Division Number One and Division Number Two appeared to hand down conflicting decisions on the question under what circumstances the plaintiff may rely upon defendant's evidence in order to make a submissible case.⁷

5. This article does not cover the cases reported in 279 S.W.2d and later cases.

6. *Fisher v. Gunn*, 270 S.W.2d 869 (Mo. 1954).

7. See *Fisher v. Gunn*, *supra* n. 6, and *Pitt v. Kansas City Public Service Company*, 272 S.W.2d 193 (Mo. 1954).

The decisions of last year also emphasized the importance of taking into account the reaction time of both the plaintiff and the defendant in cases submitted on failure to warn.⁸ The court was increasingly critical of language in humanitarian instructions which comments upon, or submits, as a basis of recovery or defense, any act or omission occurring prior to the time that the imminent peril arose. The court continued to have difficulty with "the almost escaping case,"⁹ where the plaintiff or his vehicle required only a fraction of a second to move out of a position of imminent peril, but where there was no expert testimony on the ability of the defendant to avoid the injury.

The cases decided last year follow.

DIVISION NUMBER ONE

*Fisher v. Gunn*¹⁰ grew out of a collision between meeting passenger cars as plaintiff made a left turn across the path of defendant's car into a driveway leading off a public highway. The fact situation involved was a common law last clear chance situation No. 1.¹¹ The case was submitted solely on the humanitarian doctrine in failure to slacken or swerve.

On the evidence most favorable to the plaintiff, the plaintiff was aware of the approach of the defendant's vehicle. The defendant was aware of plaintiff's peril substantially at all times. Plaintiff did not know defendant's speed. Plaintiff's sole witness on speed placed defendant's speed at more than 60 m.p.h. The defendant testified that he was travelling 35 m.p.h. When all the facts were in, it appeared that plaintiff did not have a submissible case if the speed were 60 m.p.h. as stated by plaintiff's witness, but did have a submissible case if plaintiff were permitted to avail himself of defendant's testimony on speed.

The case then turned on the procedural question: Under what circumstances may a plaintiff rely upon the defendant's testimony in conflict

8. Judge Conkling's decision in *Vietmeier v. Voss*, 246 S.W.2d 785 (Mo. 1952), is now firmly established as the leading case on failure to warn. It is no longer possible to make a warning case without allowing for the combined reaction times of the plaintiff and the defendant in a reasonable time thereafter to act.

9. See discussion in *Hunt v. Chi., M., St. P., & P. R.R.*, 225 S.W.2d 738 (Mo. 1950).

10. 270 S.W.2d 869 (Mo. 1954).

11. See n. 1, *supra*.

with that of his witnesses, or his theory of recovery? In holding that in the case at bar plaintiff was not entitled to avail himself of defendant's testimony on speed the court said:

"We think no formula may be evolved by which to determine when and under what particular circumstances plaintiff may rely upon defendant's evidence as to speed in order to make a submissible case. And we make no attempt to reconcile the adjudicated cases which have applied the aforesaid rules. We only rule that the facts and circumstances of this case cast it clearly in the category of those cases in which defendant's estimate of speed and any reasonable inference therefrom tended to establish a fact so contradictory of plaintiff's evidentiary theory, that plaintiff was not entitled to rely upon defendant's speed estimate."¹²

The crucial question is not confined to the humanitarian cases, but frequently arises in close cases under the humanitarian doctrine. While not a fundamental question many humanitarian cases turn upon its application. Perhaps the court *en banc* may find occasion to pronounce a definite and inclusive rule to guide trial courts in passing upon the question. Clarification is needed for within a month of the rendition of the decision in the *Fisher* case, Division Number Two, in the case of *Pitt v. Kansas City Public Service Company*,¹³ in dealing with the same question categorically stated:

"Moreover, the rule that plaintiff may not have the benefit of defendant's evidence which is in conflict with plaintiff's own testimony does not apply to plaintiff's estimates of speed, time and distances."

*Thompson v. Gipson*¹⁴ was an action by a guest against her host for personal injuries sustained in a collision between two meeting passenger cars at a highway junction. The plaintiff was physically helpless. The defendant was or should have been aware of the peril. If the doctrine was applicable this was a common law last clear chance case No. 1 or 2.¹⁵ It was submitted on humanitarian negligence and several grounds of primary

12. *Id.* at 875.

13. 272 S.W.2d 193 (Mo. 1954).

14. 277 S.W.2d 527 (Mo. 1955).

15. See n. 1, *supra*.

negligence including "failure of the defendant to properly control and operate (her) automobile at said time and place. Under the rule of *Crews v. Wilson*,¹⁶ the submission of humanitarian negligence and primary negligence based on lack of control was held to be error because the theories of submission were in inconceivable conflict, contradictory and inconsistent. It might be added that the conflict was one of fact, not of theory. Upon established principles, the opinion further held that a submission of general negligence is error when coupled with a submission of humanitarian negligence which constitutes a submission of specific negligence.

Finally, the court diplomatically suggests that since no submissible case of contributory negligence is made against the guest plaintiff the humanitarian doctrine is not applicable. Certainly, the doctrine was unnecessarily invoked, applicable or not.

The case of *Catanzaro v. McKay*¹⁷ arose out of an intersectional collision between passenger automobiles in the City of St. Louis. It was submitted solely on humanitarian negligence in failing to warn, slacken, and swerve. The plaintiff was in imminent peril resulting from physical helplessness. The peril was discoverable by defendant in the exercise of care. This was a common law last clear chance case No. 3.¹⁸ (Obliviousness was present but not apparent and material under the circumstances.)

On appeal, the court was required to rule upon the submissibility of plaintiff's case under the humanitarian doctrine, and the propriety of a defense instruction based upon the statute governing right of way at an intersection.

Judge Coil, writing the opinion, summarized the facts and inferences favorable to the plaintiff with great care and exactness. From the proved and inferable facts the court found that the defendant could have avoided the collision by timely action in slackening and swerving. The careful calculations allowed for reaction time of both drivers at three-fourths of a second.

As a result, it was found that while the defendant could have slackened and swerved after his reaction time expired, a warning would have been fruitless because plaintiff's reaction time would intervene before the plaintiff could act, in which event the collision was unavoidable. The doctrine

16. 312 Mo. 643, 281 S.W. 44 (1926).

17. 277 S.W.2d 566 (Mo. 1955).

18. See n. 1, *supra*.

announced by Judge Conkling in *Vietmeier v. Voss*¹⁹ and applied here has circumscribed the submissibility of the failure to warn cases.

The most interesting feature of the *Catanzaro* case is the rejection of the defendant's right of way instruction in language which read as follows:

"It seems to us apparent that the foregoing instruction is erroneous. This, for at least three reasons. First,—the instruction injects into a humanitarian case the contributory negligence of plaintiff, in that the instruction is so drawn that a jury probably would understand that if plaintiff's failure to yield the right of way was a contributing cause to his injury he could not recover. This was prejudicial error. *Mayfield v. Kansas City Southern R. Co.*, 377 Mo. 79, 90, 85 S. W. (2d) 116, 123 (6-10); *Reiling v. Russell*, 348 Mo. 279, 282, 283, 153 S. W. (2d) 6, 8 (1) (2). See also: *McCall v. Thompson*, 348 Mo. 795, 804, 155 S. W. (2d) 161, 166, 167; *Hangge v. Umbright*, Mo. Sup., 119 S. W. (2d) 382, 384 (5, 6)."

This instruction is held erroneous for at least three reasons: (1) injecting contributory negligence as a defense; (2) "portions of the instruction dealing with right of way had no place in this humanitarian case. . . .;" and (3) the instruction unduly limited the zone of imminent peril to the time plaintiff was in the intersection. Thus the defendant may not use failure to yield the right of way as a defense in this form at least.

*Cunningham v. Thompson*²⁰ was an action for personal injuries arising out of an automobile-train collision at a country grade crossing on a cold bright day. The plaintiff, driving a passenger car, was oblivious of the approach of the train, as he stopped then moved forward toward the track. The trainmen were charged with constructive notice of the plaintiff's imminent peril resulting from obliviousness. This is a true humanitarian case No. 4.

Judge Van Osdol, writing the opinion, carefully noted and analyzed the factual and mathematical data favorable to the plaintiff, and held that a humanitarian case was made upon both failure to warn and failure to

19. 246 S.W.2d 785 (Mo. 1952).

20. 277 S.W.2d 602 (Mo. 1955).

slacken speed; and that the evidence supporting one submission was not inconsistent with the other.

A verdict directing instruction, given on behalf of plaintiff, containing the following introductory paragraph, was held to be prejudicially erroneous:

“When the engine was approaching the highway crossing at the time and place in question, it was the duty of the railroad through the engine crew to keep a constant lookout to discover persons in imminent peril, as herein submitted, of being struck by the engine at the crossing.”

The court condemned the instruction as injecting defendant’s primary negligence into a humanitarian submission.

The introductory paragraphs in verdict directing instructions, whether requested by plaintiff or defendant, are in a very sensitive area. For instance, see the right of way references in the defendant’s instruction in the case of *Catanzaro v. McKay*.²¹

*Klecka v. Gropp*²² was an action arising from the striking of a pedestrian at a street intersection by an automobile approaching from the rear and turning across the pedestrian’s path. This was a true humanitarian case Number 4, or a common law last clear chance case Number 3,²³ since the plaintiff was oblivious of her peril.

On appeal the propriety of a “sole cause” instruction given by the defendant was questioned.

The instruction was held to be erroneous because it failed to hypothesize facts negating the plaintiff’s humanitarian case. The instruction condemned read as follows:

“The Court instructs the jury that if you find and believe from the evidence that on the occasion mentioned in evidence plaintiff was standing in Chippewa Avenue near the southeast corner of its intersection with Compton Avenue, looking eastward at west-

21. *Supra* n. 17.

22. 278 S.W.2d 790 (Mo. 1955).

23. See n. 1, *supra*.

bound traffic, and if you find that defendant operated an automobile northwardly on Compton Avenue, stopped at Chippewa, and turned eastwardly into Chippewa, and if you find that as defendant's car passed in front of plaintiff, plaintiff moved or stepped in a northwardly direction, and in so doing (if you so find) walked into and against the right side of defendant's automobile; and if you find that in looking eastward while starting to walk north (if you so find), plaintiff failed to exercise ordinary care for her own safety, and if you further find that such failure, if any, on plaintiff's part, was the sole cause of the collision mentioned in evidence and the sole cause of plaintiff's injury, if any, and that defendant was not negligent in any respect set forth in Instruction No. 1, then your verdict should be in favor of defendant Evelyn Gropp."

This case is another indication by the supreme court that a sole cause instruction will not be approved unless (1) it hypothesizes facts which show the defendant free of humanitarian negligence; (2) the evidence, available to defendant, shows a sole cause situation; and (3) the instruction is so framed that it is not misleading. For an approved instruction to use on a suitable occasion, see *Steffen v. Ritter*.²⁴

DIVISION NUMBER TWO

*Lang v. St. Louis-San Francisco Railway*²⁵ was an action by a pedestrian for personal injuries sustained when he was struck at night by a passenger train at a crossing in the City of Pacific. The case was submitted upon negligence of the railroad in failing to slacken and stop the train, after the engineer saw, or should have seen, the plaintiff in imminent peril and oblivious of the train's approach. It can be classified as a true humanitarian case No. 4 or in the alternative as a common law last clear chance case No. 3.²⁶

This was an "almost escaping" case where the pedestrian had passed over seven of eight rails of four parallel tracks and was stepping off the

24. 214 S.W.2d 28, l.c. 30 (Mo. 1948).

25. 273 S.W.2d 270 (Mo. 1954).

26. See n. 1, *supra*.

last rail when struck. Plaintiff attempted to comply with rule announced in *Hunt v. Chicago, M., St. P. & P. E. R.*,²⁷ by producing an expert witness, whose testimony was attacked as incredible and assumed to be so in the opinion. This left the case as one where the plaintiff almost escaped but there was no opinion or testimony to demonstrate that timely action by the engineer would have averted injury to plaintiff. However, the court in an opinion by Judge Barrett, carefully documented the mathematical factors concerning the position and movement of the plaintiff, the actual facts concerning the speed, position, movement, time of application of brakes, and stopping distance of the train. From these facts the court found it inferable that plaintiff would have escaped had the engineer exercised reasonable care to apply the brakes when plaintiff's obliviousness and intention to proceed into the path of the train became obvious. In so holding the court quoted:

"We have held that, when a car actually stops in a certain distance, there is no need theorizing upon inability to stop in that distance. In such case an expert is *functus officio*."

Plaintiff's principal instruction submitting the case was held "not so prejudicially erroneous as to demand a new trial," a much qualified approval.

This opinion is one of many notable for the careful mathematical calculations to prove or disprove application of the rule.

The case of *Pitt v. Kansas City Public Service Co.*²⁸ grew out of a collision between a passenger automobile, stalled on a streetcar track, and defendant's streetcar on a dark night during a rain. The plaintiff was aware of the approach of defendant's streetcar. He stated it slowed down as it approached him and the stalled car and he assumed it would stop, that it then suddenly speeded up and struck the stalled car. This is a case of helpless or inextricable peril on the part of the plaintiff which was discovered or discoverable by defendant. On plaintiff's evidence, this was a common law last clear chance case No. 1 or 2. The instructions are not set out at sufficient length to reveal the exact grounds of submission, probably because submissibility of the case was not challenged.

27. 225 S.W.2d 738 (Mo. 1950).

28. 272 S.W.2d 193 (Mo. 1954).

In affirming a judgment for the plaintiff the court, in an opinion of Special Judge Broadbuss, passed upon two questions of general interest.

The first was the statement, quoted above in the comment on *Fisher v. Gunn*,²⁹ that the rule that plaintiff may not have the benefit of defendant's evidence which is in conflict with plaintiff's own testimony, does not apply to plaintiff's estimates of speed, time, and distances. The apparent conflict between this case and the *Fisher* case is probably not real. The cases may be reconciled and both be correctly decided, but there is a conflict in language on the face of the opinions which should be resolved with authority.

The second question involves the propriety of the classic "tail" on the humanitarian instruction, instructing the jury that plaintiff might recover even though the jury found the plaintiff was, or may have been, guilty of negligence in getting into a position of imminent peril. The attack was on the unique ground that plaintiff's own testimony showed him free of negligence in getting into peril; that the instruction was in conflict therewith and therefore erroneous. The point might have been ruled on the finding that the error, if any, was harmless. However, the court found that plaintiff's testimony was such that he might have been found guilty of negligence in getting in peril, and ruled that the "tail" was not in conflict with plaintiff's case.

CONCLUSION

During the last year, the Missouri Supreme Court further reduced the field of uncertainty in the administration of the humanitarian doctrine. The practitioner contending that a submissible humanitarian case has or has not been made, may depend upon the careful, detailed, scientific analysis of the judicially noticeable, proved and inferable facts; and the practitioner had better be prepared to point out in detail the facts and scientific principles involved in the determination. The court is trying hard to bring uniformity to the decisions in the field of instructions to juries. Finally, it appears that the present members of the court who have inherited, in the automobile age, this dilemma born years ago in the age of the horse and buggy and the steam locomotive, may be depended upon to make an earnest effort to solve the fundamental problems of the doctrine as they are presented.

29. *Supra*, n. 10.