

1953

Missouri Supreme Court and the Humanitarian Doctrine in the Year 1952, The

William H. Becker Jr.

Follow this and additional works at: <https://scholarship.law.missouri.edu/mlr>



Part of the [Law Commons](#)

Recommended Citation

William H. Becker Jr., *Missouri Supreme Court and the Humanitarian Doctrine in the Year 1952, The*, 18 Mo. L. REV. (1953)

Available at: <https://scholarship.law.missouri.edu/mlr/vol18/iss1/7>

This Article is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Missouri Law Review by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact bassettcw@missouri.edu.

THE MISSOURI SUPREME COURT AND THE HUMANITARIAN DOCTRINE IN THE YEAR 1952

WILLIAM H. BECKER, JR.*

This discussion supplements the series of annual reviews of the treatment of the humanitarian doctrine by the Missouri Supreme Court, published in the *Missouri Law Review*. It closes with the cases reported in Volume 252, Southwestern Reporter, 2d Series.

As stated in prior discussion in this *Review*, the terms "humanitarian doctrine," "humanitarian negligence," and "humanitarian rule" have come to be used by the Bench and the Bar of Missouri to comprehend the common law last clear chance rule, and also the unique Missouri humanitarian doctrine. The Missouri courts permit recovery, despite contributory primary negligence, in each of the three typical common law last clear chance cases and in the true humanitarian case as well. The typical common law last clear chance cases are restated from an earlier article 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 from plaintiff's negligent inattentiveness (obliviousness in Missouri ju-

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

dicial 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 of 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.

In an earlier article,² 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.

In the operation of motor vehicles, cases frequently arise in which both plaintiff and defendant are injured. Under such circumstances, the

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

2. *Ibid.*

question is frequently asked: Can both plaintiff and defendant recover from each other simultaneously? Or the same question is stated in a different manner as follows: Is humanitarian negligence of the plaintiff a defense to the recovery under the humanitarian doctrine as primary negligence of the plaintiff (causally connected with the injury) is a defense to an action based on primary negligence of the defendant?

In the common law last clear chance situations, these questions do not occur, because, upon any single assumed version of the facts, the plaintiff and the defendant cannot simultaneously make cases against each other.

An answer to these questions is anxiously awaited by those interested in the theory and the practice under the Missouri humanitarian doctrine.

THE CASES THROUGH 1952

In 1952, as usual, much was written on the form of instructions and upon the submissibility of cases under special factual circumstances.

The quality of the opinions dealing with the humanitarian doctrine were much improved because of painstaking and minute review of the factual circumstances, incorporating precise mathematical calculations where the submissibility of last clear chance cases or humanitarian cases was in doubt. And the court continued to write opinions reviewing instructions in such a manner as to provide guidance for drafting instructions in future cases. There seemed to be fewer opinions apparently expressing personal views of the author unrelated to the views of the court as a whole.

There were developments of importance in 1952. In *McClanahan v. St. Louis Public Service Company*,³ the court *en banc* clarified the law applicable in cases where the negligent act complained of created the peril and almost simultaneously caused the injury. There had been two conflicting lines of decisions governing the applicability of the humanitarian rule under these circumstances. In the *McClanahan* case one line of decisions was overruled and the humanitarian doctrine held inapplicable. At the same time, in such cases the plaintiff was given the opportunity to seek application of the rule which permits recovery for wilful, wanton, and reckless conduct despite contributory negligence.

In another important case, *Vietmeier v. Voss*,⁴ a carefully constructed opinion by Judge Conkling announced a subsidiary doctrine which should

3. 251 S.W. 2d 704 (Mo. 1952).

4. 246 S.W. 2d 785 (Mo. Division No. 1, 1952).

make the *Vietmeier* case the leading case in Missouri on the submissibility of failure to warn under the humanitarian doctrine and the last clear chance rule.

In 1952, the court continued to have difficulty with the "almost escaping cases." See for instance *Stith v. St. Louis Public Service Company*⁵ and *Turbett v. Thompson*,⁶ discussed hereinafter; and compare *Hunt v. Chicago M., St. P. & P. R. R.*,⁷ discussed in an earlier article.⁸

Division Number 2, in *George v. Allen*,⁹ had an opportunity to discuss fully the vexing question of whether humanitarian negligence of the plaintiff is a defense to his action based on humanitarian negligence, but did not do so.

In the course of the year 1952, indications were that the true humanitarian doctrine (as distinguished from the common law last clear chance doctrine) would be called into question on the bases of its lack of logic and its impracticability of administration in the age of automobiles. There also were indications that there would be assaults upon the doctrine in the legislature and attempts to substitute by legislation the rule of comparative negligence, or proportional fault, or removal of the bar of contributory negligence as a substitute for the humanitarian doctrine.

Cases in the Court En Banc

*Melton v. St. Louis Public Service Company*¹⁰ was a personal injury action resulting from a street car-pedestrian collision at a street intersection. The plaintiff was in oblivious peril, that is, negligently inattentive and unaware of his peril. The defendant either was aware of the peril or in the exercise of care should have been aware thereof. The plaintiff's principal instruction submitted the case under the "humanitarian rule" upon the theories, in the alternative, that the defendant was aware or should have been aware of plaintiff's peril. Consequently, this case was submitted in the alternative as a last clear chance case number three or true humanitarian case number four. A verdict for the defendant was affirmed. Five of the judges expressly concurred in the holding of the principal opinion that the plaintiff was guilty of contributory negligence as a matter of law. One

5. 251 S.W. 2d 693 (Mo. 1952).

6. 252 S.W. 2d 319 (Mo. 1952).

7. 225 S.W. 2d 738 (Mo. 1949).

8. 17 Mo. L. Rev. 32, at 36, 37, 40-42. (1952).

9. 245 S.W. 2d 848 (Mo. 1952).

10. 251 S.W. 2d 663 (Mo. 1952).

judge concurred and one judge dissented. From the standpoint of the humanitarian doctrine, the opinion is notable for its approval of defense instruction Number 4 hypothesizing the inferable fact situation exonerating the defendant.¹¹

The case of *McClanahan v. St. Louis Public Service Company*,¹² the opinion in which was written by Judge Van Osdol, Commissioner of Division Number 1, is one of the most important cases dealing with the humanitarian doctrine decided in recent years. In an earlier consideration of the same case by the St. Louis Court of Appeals, that court, speaking through Judge Houser, invited attention to the prior application of the humanitarian rule to situations wherein a plaintiff could have been in imminent peril only because of something the defendant was about to do, and when defendant did it, plaintiff's injury almost immediately ensued. It was also pointed out that recent decisions were in conflict on this point with earlier cases.

In the *McClanahan* case, the court *en banc* expressly overruled the decisions holding the humanitarian rule to be applicable in situations where the plaintiff was in imminent peril because of something the defendant was about to do, and where plaintiff's injury almost immediately ensued following defendant's act. For instance, the doctrine of *Bobos v. Krey Packing Co.*,¹³ and of all similar cases, was expressly overruled. At the same time, the court held that such a case might be submissible as a case of wilful, wanton, or reckless conduct, to which contributory negligence is not a defense or against which a trespasser has a right to be protected. (In the past, the humanitarian rule was sometimes invoked in behalf of a trespasser who was not in a position to recover on primary negligence though he was not contributorily negligent.)

The *McClanahan* case was an action for damages for personal injuries to a ten year old trespasser who was clinging to the outside of defendant's moving street car. The operator was aware of the plaintiff's presence and directed him to get off. When the plaintiff refused to get off, the operator suddenly accelerated the speed of the street car and jerked the plaintiff off causing his injury. The case was submitted on the "humanitarian rule." The Missouri Supreme Court held that the case was not submissible under the "humanitarian doctrine."

Technically speaking, under the definitions set out in the beginning of

11. *Id.* at 672.

12. 251 S.W. 2d 704 (Mo. 1952).

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

this article, the case would be a common law last clear chance case number three if it were submissible on negligence principles. The plaintiff was negligent in his conduct in continuing to cling to the moving car. He was in danger but probably not in certain impending danger which constitutes *imminent* peril. He was probably unaware of the intention of the operator to suddenly speed up the car and throw him off. The operator was fully aware of the presence and condition of danger to the plaintiff and of the imminent peril which would result from the sudden acceleration of the street car.

The court *en banc* held that the case was not submissible under the humanitarian doctrine, but submissible as a case of wilful, wanton, and reckless conduct to which contributory negligence is not a defense. The opinion, while out of accord with many earlier decisions of the court, is technically sound. This is an illustration of a type of case which for years has been submitted under the formula of the humanitarian doctrine, but which at common law is submissible under another theory. Under common law principles, the case would be submissible in other states without reference to the humanitarian doctrine, as a case of wilful misconduct.

This may be the beginning of a trend to confine the use of the term "humanitarian doctrine" and the formula of the humanitarian doctrine to cases which are technically and strictly humanitarian cases.

For the practitioner, the case has a practical lesson. If the application of the humanitarian doctrine to the case in hand is doubtful, wilful, wanton, and reckless conduct should be pleaded and submitted, provided the facts warrant the necessary averments of fact.

Cases in Division Number One

The case of *Vietmeier v. Voss*¹⁴ announces a doctrine which should make this the leading case in Missouri on the submissibility of "warning cases" under the humanitarian doctrine and the last clear chance doctrine. The *Vietmeier* case was a suit for damages resulting from personal injuries to a five year old boy struck by a passing automobile as the boy ran into a public street to retrieve a ball. The plaintiff claimed that a case was made under the humanitarian doctrine in failing to warn. The court, in a carefully constructed opinion by Judge Conkling, held that no case was made under the humanitarian doctrine. The time available for action by the defendant and reaction time by the plaintiff was about two seconds, which

14. 246 S.W. 2d 785 (Mo. 1952).
<https://scholarship.law.missouri.edu/mlr/vol18/iss1/7>

elapsed from the time peril arose until the time the automobile struck the plaintiff. The significant language of Judge Conkling's opinion which will probably be considered authoritative in future cases based upon failure to warn reads as follows:

"A humanitarian case upon the theory of failure to warn is different from the usual humanitarian case upon the theory of failure to stop. The theory of failure to stop is predicated solely upon the basis that if the defendant himself had caused the instrumentality to be stopped that the injury would have been thereby avoided. But when plaintiff's theory and submission is predicated upon defendant's failure to warn there is presupposed (and time must be allowed for) a timely co-operative action by plaintiff in which to heed the warning and escape injury. This principle is recognized by the adjudicated cases. *Harrow v. Kansas City Public Service Co.*, Mo. Sup., 223 S. W. 2d 644.

"This court has often written in recognition of the wisdom of that rule. To make a submissible jury case under the theory of failure to warn under the humanitarian doctrine the evidence must disclose that a reasonably sufficient time was afforded, after the duty to warn arose during which time it was reasonably possible for the horn on the car to have been sounded, for plaintiff to have heard, understood and heeded the horn and for the plaintiff then to have stopped short of running into the automobile. *Smith v. Siedhoff*, Mo. Sup., 209 S.W. 2d 233, 237; *Kirkpatrick v. Wabash R. Co.*, 357 Mo. 1246, 212 S.W. 2d 764, 769; *Rose v. Thompson*, 346 Mo. 395, 141 S.W. 2d 824; *Thomasson v. Henwood*, 235 Mo. App. 1211, 146 S.W. 2d 88; *Bach v. Diekroeger*, Mo. App., 184 S.W. 2d 755."¹⁵

*Kilroy v. Gulf, Mobile & Ohio R.R.*¹⁶ was a suit for personal injuries which arose out of a locomotive-pedestrian collision at an unidentified point on defendant's railroad tracks. In an opinion by Judge Hyde, it was held, on established principles, that no humanitarian case was made. The opinion held there was a lack of proof of sufficient facts from which to infer the constituent elements of the doctrines. In this case, the plaintiff was in oblivious peril. Consequently, a submissible case if made would have been a last clear chance case number three and a true humanitarian case number four.

*Silver v. Westlake*¹⁷ arose out of a collision between a motor truck and a bicycle rider in or near a city street. There was a verdict for the de-

15. *Id.* at 789.

16. 247 S.W. 2d 660 (Mo. 1952).

17. 348 S.W. 2d 628 (Mo. 1952).

fendant, which was affirmed on appeal. The case was submitted on primary or "humanitarian negligence." The facts are not sufficiently clear to classify the case. The case is notable for its holding that a sole cause defense instruction, set out in the opinion, was not prejudicially erroneous under the facts of the case. The instruction is no model, as Judge Van Osdol states in the opinion of the court. In fact, any sole cause defense instruction in a humanitarian case should be framed and used with caution, since the decision of the court *en banc* in the case of *Janssens v. Thompson*.¹⁸

*Stith v. St. Louis Public Service Co.*¹⁹ was an "almost escaping case." The "almost escaping case" doctrine originally exemplified by *Gann v. C. R. I. & P. R.R.*²⁰ has caused considerable difficulty in administration.²¹

The action in the *Stith* case was one for personal injuries resulting from a street car-pedestrian collision in a street car loading zone. The case was submitted on the humanitarian doctrine in failing to slacken the speed of the street car. The plaintiff was aware of the approach of the street car but oblivious of the imminent peril and not physically helpless. The defendant was aware of the plaintiff's oblivious peril. Consequently, this is a common law last clear chance case number three and not a true humanitarian case. In an opinion prepared by Judge Lozier, four of the seven judges concurred in the result only. The case illustrates the unsettled condition of the law in the "almost escaping" situation.

In the *Stith* case, it was held that the plaintiff made a submissible case; that the zone of imminent peril includes the zone in which the plaintiff approached the defendant's track while apparently unaware of the peril resulting from his movement and the proximity and speed of the street car, even though the plaintiff was aware of the approach of the street car.

The *Stith* case was held submissible on the ground that the evidence supported the inference that the plaintiff *could* have escaped (not simply *might* have escaped) in the time and space available if the speed of the street car had been slackened by timely action. The evidence showed that the plaintiff lacked only a step of clearing the zone of imminent peril when he was struck by the street car. Only one-third of a second was needed to permit the plaintiff to clear the zone of peril. The evidence supported an inference that there were two and a quarter seconds after the plaintiff was

18. 228 S.W. 2d 743 (Mo. 1950).

19. 251 S.W. 2d 693 (Mo. 1952).

20. 6 S.W. 2d 39 (Mo. 1928).

21. Cf. *Hunt v. Chicago, M. St. P. & P. R.R.*, 225 S.W. 2d 738 (Mo. 1949).

in imminent peril. The court held that the jury might find under those circumstances that the street car could have been slackened sufficiently to have permitted the plaintiff to escape injury. In view of the limited concurrence with the opinion in this case, it seems fair to state that the rule in the "almost escaping" cases is still unsettled and will have to receive further attention by the court before it can be stated with reasonable certainty.

On long established principles, a plaintiff's instruction in the *Stith* case was held erroneous because it permitted consideration of antecedent negligence in a case submitted on the humanitarian or last clear chance doctrine.

*Turbett v. Thompson*²² was another "almost escaping" case considered by Division Number 1. In the *Turbett* case it was held that no submissible case was made. The case involved a suit for damages for personal injuries resulting from a locomotive-pedestrian collision at a regular crossing at night. The plaintiff was aware of the approach of the locomotive but claimed to be oblivious of the danger of peril resulting from its approach. The defendant was aware of the presence and movements of the plaintiff but held not to be chargeable with knowledge of plaintiff's imminent peril until the plaintiff was actually in the path of the locomotive or so close to it that it was apparent from his speed and manner of moving that he would not stop before reaching it. Under the peculiar facts of the *Turbett* case, the doctrine of the *Stith* case, *supra*, was held to be inapplicable.

The *Turbett* case was not a true humanitarian case. The defendant was aware of the presence and movements of the plaintiff. Consequently, the case, if submissible, would have been a common law last clear chance case number one or number three.

*Wofford v. St. Louis Public Service Company*²³ arose out of a motor bus-pedestrian collision at a regular public street crossing at dusk. The plaintiff was in oblivious peril. The defendant was aware of plaintiff's peril. The case was submitted on the "humanitarian doctrine" in failing to stop or to warn. Since the defendant was aware of plaintiff's peril and the plaintiff was oblivious thereof, this was a common law last clear chance case number three.

Upon established principles, in an opinion by Judge Conkling, it was held that the plaintiff made a submissible case for failure to stop and failure

22. 252 S.W. 2d 319 (Mo. 1952).

23. 252 S.W. 2d 529 (Mo. 1952).

to warn. The case is notable for the feature of adherence by the court to the clarification of *Cable v. Chicago B. & Q. R.R.*²⁴ in the opinion in *Harrington v. Thompson*²⁵ and other recent cases of similar import.²⁶ It is held again in the *Wofford* case that the plaintiff's principal instruction need not have hypothesized the exact point where the imminent peril arose.

Division Number Two

*Pulley v. Scott*²⁷ was a suit for personal injuries sustained by a pedestrian running along the highway at night and struck from behind by an automobile. The plaintiff was in oblivious peril. The defendant was aware of the peril or in the exercise of care ought to have been aware thereof. It was held that the plaintiff made a submissible case upon similar and established principles. The plaintiff made a submissible common law last clear chance case number three and a true humanitarian case number four.

*Brandenburg v. Kasparian*²⁸ was a personal injury case growing out of a pedestrian-automobile collision at a regular crossing in a business street. The pedestrian was in oblivious peril. The defendant either saw or should have seen the pedestrian in peril in time to avoid the collision. In an opinion by Judge Westhues, it was held that a submissible case was made under the last clear chance or humanitarian rule. Under the facts a submissible case was made under the last clear chance rule (Case 3) and in the alternative, the true humanitarian rule (Case 4).

In the *Brandenburg* case, the following instruction submitting sole cause based upon plaintiff's negligence was held erroneous:²⁹

"The Court instructs the Jury that if you find and believe from the evidence that on the occasion in question plaintiff was walking from the north side towards the south side of Lindell Boulevard at the place mentioned in evidence, and that defendant was driving an automobile west on Lindell Boulevard approaching the place plaintiff was crossing, and that by the exercise of ordinary care plaintiff could have discovered defendant's automobile so approaching, and if you further find and believe from the evidence that plaintiff failed to discover the presence and approach of defendant's automobile before walking into the path of same, and that such failure, if any, was negligent, and that such negligence, if any, was the sole, direct

24. 236 S.W. 2d 338 (Mo. 1951).

25. 243 S.W. 2d 519 (Mo. 1951).

26. See the prior discussion in 17 Mo. L. REV. 40, 43, and 47-48 (1952).

27. 247 S.W. 2d 767 (Mo. 1952).

28. 247 S.W. 2d 806 (Mo. 1952).

29. 141 at 607-608.

and proximate cause of plaintiff's colliding with said automobile, and that defendant was not guilty of the acts of negligence submitted to you in instruction numbered two, then your verdict should be in favor of defendant and against plaintiff."

The court held that the foregoing instruction did not require the finding of any facts which would exonerate "the defendant in not seeing the plaintiff." This case is evidence of the continued critical appraisal of sole cause defense instructions in cases arising under the last clear chance or humanitarian doctrines.³⁰

*Kelley v. St. Louis Public Service Company*³¹ involved a stationary pedestrian struck by the swinging over-hang of a street car emerging from a loop track. The plaintiff was oblivious of his peril. The operator of the street car knew or should have known of the peril. The plaintiff made a submissible case of last clear chance negligence (Case 3) and, in the alternative, humanitarian negligence (Case 4).

In the *Kelley* case, the principal instruction under the "humanitarian doctrine" given on behalf of the plaintiff was condemned for requiring a finding that the street car's "over-hang extended out dangerously beyond the rails and over the sidewalk" as the street car rounded the curved track. It was held that the quoted language was a submission or injection of primary negligence of the defendant on the authority of *Robinson v. Kansas City Public Service Company*.³² This holding will seem hypertechnical to some.

There was also criticism in the *Kelley* case of the principal instruction for unduly extending the time and zone of imminent peril. This criticism is interesting only in regard to the particular fact situation involved.

*Johnson v. St. Louis Public Service Company*³³ arose out of a street car-pedestrian collision near a street intersection. The plaintiff was in oblivious peril but not helpless. The defendant was either aware of the peril or in the exercise of care should have been aware thereof. The case was submitted on the humanitarian doctrine for failure to warn. The plaintiff made a submissible case of last clear chance negligence (Case 3) and, in the alternative, humanitarian negligence (Case 4).

In an opinion by Judge Westhues, the principal instruction was held to be erroneous for its failure to clearly indicate that the only negligence,

30. See *Janssens v. Thompson*, 360 Mo. 351, 228 S.W. 2d 743 (1950).

31. 248 S.W. 2d 597 (Mo. 1952).

32. 345 Mo. 764, 137 S.W. 2d 548 (1939).

33. 251 S.W. 2d 76 (Mo. 1952).

considerable by the jury, was the breach of duty after imminent peril arose. No new principles were announced in this case. Well established principles were applied to a familiar fact situation. In determining the submissibility of the case, Judge Westhues carefully analyzed the facts and was reasonably liberal in drawing inferences favorable to the injured party.

*George v. Allen*³⁴ was a case in which Division Number Two had an opportunity to discuss whether or not a plaintiff who was guilty of negligence under the humanitarian doctrine might recover thereunder. Perhaps the discussion would have been *obiter*, perhaps not.

The *George* case arose out of the collision of two automobiles at a street-highway intersection. The plaintiff sued for damages resulting from personal injuries and the defendant asserted a counter claim for property damage. Both plaintiff and defendant submitted their claims for recovery solely under the "humanitarian doctrine." A trial by jury resulted in a verdict against the plaintiff on his claim and against the defendant on his counterclaim. The plaintiff appealed. The plaintiff was not oblivious but was physically helpless when the peril arose. The defendant was aware of the peril to the plaintiff. This was really a common law last clear chance case number one. The defendant's sole cause instruction was held to be erroneous for assumption of a controverted fact and because defendant's instruction "E" was held to extend the doctrine of contributory negligence to negligence in humanitarian cases.

The interesting feature of the *George* case is the ruling upon Instruction "E" directing a verdict against the claim and counterclaim if both parties were equally guilty of last clear chance or humanitarian negligence. The opinion treated the instruction as a contributory negligence instruction, and perhaps it was, but it was *not* an instruction on contributory primary negligence. The instruction was held erroneous upon the authority of cases dealing with the submission of contributory *primary* negligence in the last clear chance or humanitarian cases. This instruction "E" submitted as a defense that plaintiff and defendant were both guilty of last clear chance or humanitarian negligence, of exactly the same quality and timing.

Instruction "E" reads as follows:

"The court instructs the jury that if you find and believe from the evidence in this case that on September 27, 1947, plaintiff and defendant collided at Highway 78 and Spring Branch Road, if so,

³⁴ 245 S.W. 2d 848 (Mo. 1952).
<https://scholarship.law.missouri.edu/mlr/vol18/iss1/7>

and if you further find that when both cars reached a position of immediately impending peril of collision with the other, the drivers of each car, while in the exercise of the highest degree of care, saw or could have seen the other in peril in time thereafter to have slowed down, swerved or stopped and thereby have avoided said collision, but that they both negligently failed so to do, if so, then in such event neither party hereto is entitled to recover herein and your verdict should be in favor of plaintiff on defendant's counterclaim and in favor of defendant on plaintiff's claim."

It may be that the instruction in form was contradictory and confusing, but we doubt that the Supreme Court of Missouri will eventually hold, where the question is squarely presented, that a plaintiff guilty of humanitarian negligence may nevertheless recover on humanitarian negligence of the defendant of the same quality and timing, especially if both sustain personal injuries.

In common law last clear chance cases one, two and three, the parties cannot be guilty of last clear chance negligence simultaneously upon any single version of the facts in the very nature of the acts involved. But in the true humanitarian case number four, plaintiff and defendant can be simultaneously guilty of humanitarian negligence resulting in personal injury to each. And in such a case an instruction of the type submitted in the *George* case as instruction "E" would seem to be proper, unless simultaneous recoveries are to be permitted by way of claim and counterclaim based on humanitarian negligence.

Since it seems that in the *George* case the plaintiff was not in imminent peril until he was so close to the path of defendant's automobile that he could not stop before entering its path, this is not a true humanitarian case number four. Therefore, the disapproval of this type of instruction may be sound under the circumstances, but the authorities cited do not seem to be in point.

In disapproving instruction "E," the court said:

"The instruction is novel, indeed, and defendant cites no case in support of it."

In a true humanitarian case, would not the instruction (assuming it to be proper in form) be supported by the many cases holding that a defendant is not limited to converse instructions but may submit as a defense any fact situation inferable from the evidence which would exonerate him?

CONCLUSION

The decisions in 1952 indicate a continuing effort on the part of the supreme court to clarify the humanitarian doctrine, to earnestly analyze the involved fact situations presented, and to arrive at a fixed guide to instructions.

There remains to be confronted and disposed of the task of answering the questions suggested earlier in this discussion concerning the true humanitarian case number four. The common law last clear chance features of the humanitarian doctrine are sound and cause no difficulty. It is in the true humanitarian case number four that the basic difficulties in logic and experience will continue to arise.