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THE MISSOURI HUMANITARIAN DOCTRINE-- 1956, 1957*

WILLIAM H. BECKER**

In Missouri when two negligently inattentive (oblivious) drivers drive their vehicles into collision, and each suffers personal injuries, each may make a submissible case for damages under the formula of the Missouri humanitarian rule (as distinguished from the common law last clear chance rule)¹ despite the contributory negligence of each as a matter of law.

*This Article contains a discussion of selected 1956 and 1957 Missouri court decisions.

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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:

Discovered Helpless Peril

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:

Discoverable Helpless Peril

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:

Discovered Oblivious Peril

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 of 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

This humanitarian doctrine is "judge made" law.²

The Missouri humanitarian doctrine evolved before the modern automobile was in general use. It had as its purpose the amelioration of the harsh common law rule of contributory negligence. The doctrine is stated in the language of the common law last clear chance case utilizing its terminology and concepts of fault, degrees of care, negligence, and proximate cause. It purports to be and is administered by the courts as a rule of negligence and causation.³

In administering the common law last clear chance doctrine, the Missouri supreme court ordinarily refers to common law last clear chance and humanitarian doctrine cases without discrimination.⁴

As much as the Missouri humanitarian rule resembles the common law last clear chance rule, the extension of the right to recover to cases of discoverable, oblivious peril, in this age of the automobile, involves problems and questions which cannot arise under the common law last clear chance rule, the comparative negligence rule, and the proportionate fault rule.

This is true because under the common law last clear chance rule, plaintiff and defendant cannot simultaneously make submissible cases each against the other upon any single assumed version of the facts, but

despite his contributory negligence. This fourth type of case, which is the unique humanitarian case is as follows:

True Humanitarian Case No. 4:
Discoverable Oblivious Peril

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.

2. Perkins v. Terminal R.R. Ass'n of St. Louis, 340 Mo. 868, 102 S.W.2d 915 (1937) (en banc); McCleary, *The Bases of the Humanitarian Doctrine Reexamined*, 5 Mo. L. Rev. 56 (1940); Schwarz, *The Questionable Birth of the Humanitarian Doctrine*, 14 J. Mo. B. 28 (1958).

3. The classic statement of the formula is found in Banks v. Morris & Co., 302 Mo. 254, 264-66, 257 S.W. 482, 484 (1924) (en banc).

4. But not always. Occasionally the court recognizes the distinction as in Wabash R.R. v. Dannen Mills, 288 S.W.2d 926 (Mo. 1956) (en banc).

under the humanitarian doctrine⁵ they may. At the close of 1957, these important questions in respect to the humanitarian doctrine in Missouri remained unsolved:

(1) When plaintiff and defendant each are guilty of humanitarian negligence of the same quality and timing, may each recover damages from the other for personal injuries?

(2) Is the humanitarian doctrine applicable to damage to property not involving personal injury?⁶

(3) To what extent may the defendant invoke the doctrine defensively and offensively?⁷

(4) Is legislation necessary to solve the dilemma?⁸

These uncertainties about the nature and the future of the humanitarian doctrine are reflected in the opinions of the supreme court in problems involving instructions and submissibility of cases.

There are several possible solutions to the dilemma confronting the bench and the bar of Missouri in the application of the Missouri humanitarian doctrine. The three most often mentioned are:

(1) Missouri should enact some statutory rule abolishing contributory negligence as a defense;⁹

(2) The legislature should by statute set out the common law last clear chance rule in some form as the law of this state and eliminate the humanitarian doctrine; and

(3) Since the humanitarian rule is judge-made law, the problem should be solved by the court in judicial decisions.

Attempts have been made in recent years along all three lines without results. The claimants' representatives have sought to abolish contributory negligence by statute. At the same time, the defendants sought to abolish the humanitarian rule and part of the common law last clear chance rule by statute.¹⁰

5. See note 1 *supra*, Case 4.

6. See opinion of Stone, J. in *Glenn v. Offutt*, 309 S.W.2d 366, 268-69 (Spr. Ct. App. 1958).

7. See note 4 *supra*; *George v. Allen*, 245 S.W.2d 848 (Mo. 1952).

8. *Sheerin v. St. Louis Pub. Serv. Co.*, 300 S.W.2d 483, 488 n.1 (Mo. 1957).

9. This might not provide a solution if the FELA cases are applicable. *Mooney v. Terminal R.R. Ass'n of St. Louis*, 352 Mo. 245, 176 S.W.2d 605 (Mo. 1944).

10. Becker, *The Missouri Supreme Court and the Humanitarian Doctrine in the Year 1954*, 20 Mo. L. Rev. 38, 40-41 (1955).

Both bills failed to pass, and the situation remained unchanged in early 1958. Currently, it seems that the political power of the economic interests involved is too weak or too evenly balanced to remedy the situation by statute. This condition could change quickly but there is no evidence it will.

WILSON CASE—A NEAR MISS

In 1957, it looked as if the supreme court was going to be confronted with a concrete case which would require it to take the final step of holding simultaneous recoveries by plaintiff and defendant permissible, or to retreat to the common law last clear chance doctrine. The occasion was the second appeal of the case of *Wilson v. Toliver*.¹¹

In this case, the plaintiff and defendant had each submitted their cases in the trial court under the humanitarian doctrine, and the jury had returned verdicts on the claim and counterclaim, allowing each to recover. The trial court had offset the recoveries and entered judgment for the difference in favor of the defendant who had the greater recovery. Here, it seemed, was the long awaited case which would settle the nature, and perhaps the future, of the humanitarian doctrine. But it became unnecessary for the supreme court to answer the critical question when the court held that the plaintiff had failed to make a submissible case. The collision out of which *Wilson v. Toliver* arose, occurred at a "Y" junction. If the collision had occurred at an intersection, or while plaintiff and defendant were meeting on a two-way road, there would have been no question concerning the submissibility of both cases, provided both were negligently inattentive to the same degree.

So, in 1956 and in 1957 most of the uncertainty concerning the nature of the humanitarian doctrine was reflected in the decisions on instructions and submissibility of cases under different factual circumstances.

At the close of the year 1957, both the survival and the proper form of the sole cause instruction remained in doubt and subject to change without notice. The form of the converse instruction continued to perplex practitioners. The submissibility of the "almost escaping case" continued to cause difficulty. The use of the "tail" clause in a humanitarian instruction, advising the jury that plaintiff's and decedent's negligence was

11. 305 S.W.2d 423 (Mo. 1957).

of no consequence became safer than it had been since *Smithers v. Barker*.¹² And of course, the questions of dual recovery, right to recover for property damage, and the availability of the doctrine defensively remained in doubt.

THE MYSTERY OF THE SOLE CAUSE INSTRUCTION

The sole cause instruction based on plaintiff's negligence has provided one of the most active and most sensitive areas of humanitarian doctrine law for many years. The use of the sole cause instruction in humanitarian cases was accepted and carefully guarded by the supreme court in use by a line of decisions of which *Shields v. Keller*,¹³ *Dilallo v. Lynch*,¹⁴ and *Borgstede v. Waldbauer*¹⁵ are illustrative.

In *Janssens v. Thompson*,¹⁶ the court very nearly exterminated the sole cause instruction in a 4-3 decision which sustained the use of the sole cause instruction based on plaintiff's negligence.

Despite the approval of the use of the instruction in the *Janssens* case, the court has been very critical of the sufficiency of the evidence to justify its submission, and of its tendency to mislead by injecting antecedent contributory negligence of the plaintiff as a defense. This critical attitude possibly stemmed from dissatisfaction with the decision in the *Janssens* case, and an underlying lack of agreement on what our humanitarian doctrine really is.

Recently in *Sheerin v. St. Louis Pub. Serv. Co.*,¹⁷ division number one, speaking through Judge Hollingsworth, announced that a sole cause instruction which mentions the plaintiff's duty to use care or which characterized his acts or conduct as negligence will probably be held to be prejudicially erroneous. This is a condemnation of the sole cause instruction based on plaintiff's negligence. What is permitted is a converse instruction submitting facts which if found conflict with an element or element of plaintiff's humanitarian case. Under this decision there remains only the converse instruction in which negligence of plaintiff cannot be mentioned.

12. 341 Mo. 1017, 111 S.W.2d 47 (1937).

13. 348 Mo. 326, 153 S.W.2d 60 (1941).

14. 340 Mo. 82, 101 S.W.2d 7 (1936).

15. 337 Mo. 1205, 88 S.W.2d 373 (1935) (en banc). See McCleary, *The Defense of Sole Cause in the Missouri Cases*, 10 Mo. L. Rev. 1 (1945).

16. 228 S.W.2d 743 (Mo. 1950) (en banc).

17. 300 S.W.2d 483, 488 n.1 (Mo. 1957).

But as late as 1956 in *Parmley v. Henks*,¹⁸ division number two approved an instruction of this type condemned in the *Sheerin* case.

The conflict between these decisions should be resolved and the rule stabilized by the court en banc. (The underlying stress created by our unique humanitarian rule may prevent stabilization as it has in the past.)

A SUGGESTED SOLUTION

The author of the opinion in the *Sheerin* case recognized the inequitable operation of the humanitarian doctrine in cases where the plaintiff's negligence is gross. In a footnote the following suggestion was made:

It is the view of many writers that application of the doctrine of humanitarian negligence to persons in a position of discoverable peril (against defendants chargeable with a duty to maintain a lookout) frequently results in the unjust award of fully compensatory damages to grossly negligent plaintiffs from slightly negligent defendants. But so long as we continue to apply the harsh rule that any contributory negligence on the part of plaintiff, however slight, constitutes a bar to recovery of any damages for primary negligence on the part of defendant, however gross, the evils of the first may serve to offset the evils of the second. Of course, two wrongs do not make one right and the adoption of the doctrine of diminution of damages of a plaintiff or the apportionment of damages between counter-claimants on the basis of comparative negligence would seem to be clearly preferable. The problem is, perhaps, legislative rather than judicial. See the articles by Mr. Laurence H. Eldredge in the January 1957 issue and by Mr. David G. Bress in the February 1957 issue of the American Bar Association Journal.¹⁹

Perhaps this is the answer. Until now the legislature has shown no indication that it will concern itself. If the legislature does not act favorably on the suggestion, should the court act?

THE PROPERTY DAMAGE QUESTION

Usually in personal injury cases applying the true humanitarian rule property damage has been a minor element and has been ignored. Recovery for damage to property frequently is allowed under a finding

18. 285 S.W.2d 710 (Mo. 1956).

19. 300 S.W.2d at 488 n.1.

for the claimant under the humanitarian rule, as distinguished from the common law last clear chance rule which covers property damage.

From time to time theorists speculate on the logic of a rule, proceeding from a tender humanitarian regard for life and limb of human beings, being invoked to recover compensation for inanimate property.

One of our appellate judges, of unquestioned ability, endowed with an undoubted sense of humor comments on the problem as follows:

Defendant has not challenged and briefed, and so we do not determine and rule, the applicability of the humanitarian doctrine (as distinguished from the last clear chance doctrine) in a case involving only the *discoverable peril* of an inanimate, parked, unoccupied motor vehicle. However, we observe in passing that, if the humanitarian doctrine "proceeds upon the precepts of humanity and of natural justice to the end that every person shall exercise ordinary care for the preservation of another after seeing him in peril or about to become imperiled" [as averred in *Dey v. United Rys. Co. of St. Louis*, 140 Mo. App. 461, 467, 120 S.W. 134, 136, confirmed in the landmark case of *Banks v. Morris & Co.*, 302 Mo. 254, 266, 257 S.W. 482, 484, and reiterated in literally "scores of cases" (see *Sheerin v. St. Louis Public Service Co., Mo.*, 300 S.W.2d 483, 489)], and if the doctrine "is reasoned upon precepts of humanity—that tender regard every man must have for the life and limb of other men in times of peace" [*Krause v. Pitcairn*, 350 Mo. 339, 350, 167 S.W.2d 74, 78], it would be difficult indeed for us to find room for plaintiff's cold, lifeless, mud-splattered pickup within the enveloping warmth of the "Mother Hubbard," already bursting at the seams, which our humanitarian doctrine has come to be by expansion far beyond its original concept. *Smith v. Siedhoff, Mo. (banc)*, 209 S.W.2d, 233, 236: * * * * But, "(s)ufficient unto the day is the evil thereof" and, leaving to those in position to speak with judicial finality any further consideration of whether our humanitarian doctrine has or should become "all things to all men" in vehicular tort actions, we pass to a determination of whether the evidence in the instant case would permit a judgment for plaintiff under the humanitarian doctrine, assuming the applicability of that doctrine in this class of suits.²⁰

A NO-CONTACT CASE

Theoretically, it has always been possible to make a case under the

20. *Glenn v. Offutt*, 309 S.W.2d 366, 368-69 (Spr. Ct. App. 1958).

humanitarian doctrine where there was no actual contact between the vehicles or the persons involved. But the court apparently had not been required to pass on a no-contact case until the decision in *Homfeld v. Wilcoxon*.²¹

This case involved a near collision of two motor vehicles but no actual contact. As the automobile driven by the plaintiff approached a "Y" junction, the defendant saw, or could have seen, the plaintiff in imminent peril of collision and injury with defendant's vehicle. The defendant negligently failed to take means to avoid the impending collision. The plaintiff, who had been oblivious, became aware of the imminent peril and extricated herself from collision and injury by evasive action. In so doing, she ran into loose gravel and skidded into a bridge abutment. The case was submitted on humanitarian or last clear chance negligence. In passing upon the submissibility of the case under the humanitarian doctrine, the supreme court made it clear that the humanitarian doctrine could apply in a situation where there was no contact. However, the court held the doctrine not applicable to the facts, and reversed the case for trial on primary negligence.

This case focuses attention on whether there are any circumstances under which a plaintiff may recover on the humanitarian doctrine when there is no collision and the injury results from evasive action to avoid collision. For instance, suppose the plaintiff is driving on a road along the edge of a cliff. A situation of imminent peril of collision and injury to plaintiff arises in which the defendant is guilty of humanitarian negligence. Suppose in the emergency, in an attempt to avoid the collision and injury, the plaintiff drives over the cliff and is injured. On principle it would seem that the plaintiff should be able to recover. The real basic fact of the humanitarian doctrine is a situation of imminent peril of *personal injury*. It is not imminent peril of *collision* alone. The imminent peril of injury may involve injury either as a result of collision or of evasive action to avoid collision. In the *Homfeld* case, plaintiff simply did not really avoid the peril and injury, but simply chose the alternative of evasive action to a collision. The evasive action did not avoid the peril of injury which resulted from a skid in the loose gravel. The *Homfeld* case was a close case, and the principles involved cannot be said to be finally settled.

21. 304 S.W.2d 806 (Mo. 1957).

NOTABLE CASES

Discussion of cases of more than ordinary interest follows:

*Levin v. Caldwell*²² arose out of a collision of two passenger automobiles in the daytime at a city street intersection controlled by conventional traffic lights. The intersecting streets were The Paseo and 47th Street in Kansas City. The Paseo consists of a north and south bound lane divided by a parkway. The plaintiff passenger made a submissible case of primary negligence and recovered against both defendants, each of whom claimed to have the green traffic light in his favor. The humanitarian doctrine arose on the cross-claim of one defendant against the other. The defendant Caldwell submitted his cross-claim against the defendant Kotelov on humanitarian negligence hypothesized in his primary instruction on discovered or discoverable peril. A jury verdict against the cross-claimant was reversed because of error in the converse humanitarian doctrine given at the request of the successful defendant. This instruction directed a verdict in favor of the defendant Kotelov if the peril of the cross-claiming defendant Caldwell "*became apparent to the defendant, Irwin Kotelov*"²³ when the automobile driven by Kotelov was so close that the speed could not be slackened or the automobile swerved. In keeping with the opinion of the supreme court in *Wilt v. Moody*,²⁴ the instruction was held error because of the omission of the element of discoverable peril. The earlier case of *Sackmann v. Wells*²⁵ was expressly overruled.

It was held that a case of discoverable helpless peril, which is a common law last clear chance case, was made by the defendant Caldwell. The case involves an uncommon factual situation wherein both automobiles are proceeding in opposite directions in separate lines of a divided street, and one turns left and is driven in front of the other at an intersection.

Parmley v. Henks,²⁶ decided by division number two, arose out of the collision between a passenger automobile and a pedestrian crossing the concrete two lane highway No. 13 south of Warrensburg in the nighttime. When struck by the right front fender of the defendant's automo-

22. 285 S.W.2d 655 (Mo. 1956).

23. *Id.* at 661.

24. 254 S.W.2d 15 (Mo. 1953).

25. 41 S.W.2d 153 (Mo. 1931).

26. *Supra* note 18.

bile, the plaintiff was one step from a position of safety. The case was submitted upon the humanitarian doctrine for failure to slacken or swerve. The jury returned a verdict for the defendant. On appeal, in an opinion by Judge Barrett, the defendant's sole cause instruction and converse instruction based on plaintiff's negligence were held not to be reversibly erroneous. Defendant's evidence made a submissible issue on sole cause. The instruction in this case does not meet the test later laid down by division number one in *Sheerin v. St. Louis Pub. Serv. Co.*, because it uses the word "negligence" and does not fully hypothesize the factual situation. Until this question is settled by the court en banc, the instruction should not be used as a model and may be held to be error under different circumstances and different assignments of error.

The converse instruction complained of is not set out in the opinion.

*Wabash R. R. v. Dannen Mills*²⁷ arose out of a daytime train-truck collision at a grade crossing. The railroad sued for damage to its locomotive. The defendant submitted his counterclaim for personal injuries upon humanitarian negligence. The jury found for the plaintiff railroad on its primary negligence property claim and against the defendant on his humanitarian counterclaim. On appeal reviewing the duties of an engineer in a grade crossing collision case, the court, in an opinion by Judge Hyde, held that the defendant had made a last clear chance case under the common law rule of discovered oblivious peril. In so holding, the court cited the *Restatement of Torts*,²⁸ and pointed out that a case was made under the last clear chance rule as distinguished from the Missouri humanitarian rule. The opinion contains an exhaustive review of the duty of the engineer to act when it becomes reasonably apparent that the plaintiff is inattentive, and in this connection, the duty to warn and to slacken are clearly set forth. After holding that a humanitarian case was made by the defendant, the court held that plaintiff's principal instruction directing a verdict on the finding of primary negligence was in direct conflict with the defendant's instructions submitting humanitarian or last clear chance negligence. The case may have the appearance of a new development in the law, because the humanitarian negligence was asserted by the defendant on a counterclaim. This actually is of no consequence, since it should not matter whether the party asserting the

27. 288 S.W.2d 926 (Mo. 1956) (en banc).

28. § 480 (1934).

humanitarian claim is nominally a plaintiff or a counterclaiming defendant. The court reversed the Kansas City Court of Appeals which had held that no humanitarian case was made by the defendant.

*Faught v. Washam*²⁹ arose out of a nighttime collision between defendant's automobile and plaintiff's damaged, disabled, and unlighted automobile resting across a bridge on U. S. Highway 35 in Macon County. The case was submitted solely on humanitarian doctrine, and a jury verdict for the defendant resulted. On appeal, the court in an opinion by Judge Storckman held erroneous defendant's instruction number 5 which told the jury that the defendant had a right to assume in absence of notice to the contrary, that defendant's automobile would not be stopped on the highway at nighttime without a red light on the rear visible for 500 feet and that the defendant had no duty to act until he could have seen that the plaintiff's automobile was stopped on the highway. The court held that this instruction was erroneous and misleading because it does not properly state the defendant's continuous duty to keep a lookout, and permits consideration of antecedent primary negligence of the plaintiff. The use of language concerning defendant's "right to assume"³⁰ or defendant being "entitled to assume"³¹ was criticised. Further, the instruction was criticised for the use in this case of the words "in the absence of notice to the contrary"³² defendant had no duty to act. Cases containing approved instructions using the language "entitled to assume" in cases where the presence of the plaintiff is known, or the applicable degree of care is different are distinguished. This case indicates that the court is becoming increasingly critical of abstract statements of law about what the defendant is entitled to assume, where the defendant has a duty to keep a lookout.

*Nelson v. O'Leary*³³ involved the striking of the plaintiff, a pedestrian, near Broadway and Keber Street in the city of St. Louis at night. Plaintiff submitted his case solely upon humanitarian doctrine for failure to swerve or to slacken and swerve.

Plaintiff was apparently intoxicated and walking in the middle of the street between the lines of traffic when he was struck. On appeal, the

29. 291 S.W.2d 78 (Mo. 1956).

30. *Id.* at 81.

31. *Ibid.*

32. *Ibid.*

33. 291 S.W.2d 142 (Mo. 1956).

supreme court in an opinion by Judge Van Osdol held that a submissible case of humanitarian negligence was made on failure to swerve and on failure to slacken and swerve. It was further held that giving the direction that contributory negligence of the plaintiff is not a defense in a separate instruction was not error. The court pointed out that ordinarily this direction may be appended to the form of a "tail" clause; and since the instructions are read together, it is not error to give a separate instruction on the subject. The instruction given is short and clearly worded and reads as follows:

The Court instructs the jury that if under the evidence and the instructions of the Court you find that the defendant was negligent, as submitted to you in Instruction No. II and that such negligence of the defendant directly contributed to cause the casualty mentioned in evidence and that plaintiff was thereby injured, then the Court instructs you that the fact that plaintiff's own conduct directly contributed to his own injury is no defense in this case.³⁴

*Bank v. Koogler*³⁵ arose out of a collision at the intersection of U. S. Highways 40 and 65 at Marshall Junction between a light truck driven by plaintiff and a passenger car driven by defendant. The plaintiff was travelling east on U. S. Highway 40 through the intersection. The defendant travelling south on U. S. Highway 65 into the intersection passed a stop sign controlling south bound traffic. Plaintiff submitted his case on primary negligence in failing to observe the stop sign and under the humanitarian doctrine, the failure to stop, slacken the speed, and to swerve. The defendant submitted his counterclaim under the humanitarian doctrine. Plaintiff's primary negligence instructions did not make reference to defendant's humanitarian instructions on the counterclaim, but did require a finding that the plaintiff was exercising the highest degree of care in the operation of his vehicle. On appeal, the supreme court in an opinion by Judge Stockard held that the instructions were not in conflict, since the plaintiff in his primary negligence instruction required the finding that he was exercising the highest degree of care, thereby eliminating any conflict in the instructions. The case of *Wabash R. R. v. Dannen Mills* is distinguished. The court also held upon established principles that a submissible humanitarian case was made by the plaintiff.

34. *Id.* at 148.

35. 291 S.W^{2d} 883 (Mo. 1956).

*Williams v. Ricklemann*³⁶ was an action by a nine year old pedestrian struck by defendant's automobile while crossing a city street in the daytime. The case was submitted on the humanitarian doctrine for failure to slacken or to swerve. The court refused to submit failure to give timely warning under the humanitarian doctrine. The verdict and judgment for the defendant was reversed by the supreme court in an opinion by Judge Storckman. This is a classic humanitarian case where a plaintiff is in peril because of her obliviousness of the approach of defendant's vehicle. The defendant was negligently inattentive. The evidence made a submissible case of ability of the defendant in the exercise of the highest degree of care to have avoided striking plaintiff by stopping, slackening, swerving, or giving warning of his approach. The court made a careful calculation from the record of speed, stopping distance, and visibility, and upon the physical circumstances found that the defendant had ample time to avoid injuring plaintiff after her peril became discoverable in the exercise of care. This case should be compared with *Vietmeier v. Voss*,³⁷ in which the time interval after peril arose was too short to avoid the injury.

Williams v. Ricklemann, is the type of case in which there is natural sympathy for the plaintiff's claim for recovery, upon which advocates of our humanitarian doctrine base their claims for its continuance. It is argued that the case would not be submissible under common law last clear chance principles in the absence of the humanitarian doctrine, but it is not clear that this case would fail of submission on primary negligence. In fact, it is reasonable to believe that the court would hold this nine year old child not be guilty of contributory negligence as a matter of law (since a bus driver gave her the signal to cross the street). Therefore, the case was probably submissible on defendant's primary negligence.

Peterson v. Tiona,³⁸ was an action for wrongful death of plaintiff's fifteen year old son killed at night on U. S. Highway 71 while riding an unlighted motorcycle. The defendant's passenger automobile was overtaking the motorcycle and ran into it from the rear. There was no expert evidence of the distance in which defendant could stop; and there was no expert evidence concerning the visibility created by defendant's

36. 292 S.W.2d 276 (Mo. 1956).

37. 246 S.W.2d 785 (Mo. 1952).

38. 292 S.W.2d 581 (Mo. 1956).

headlights. While the motorcycle was unlighted, there were two red reflectors and one green one suspended from the seat which were visible from the rear. In an opinion by Judge Coil, the court held that a submissible humanitarian case was made for failure to stop, to slacken, and to swerve. The deficiency in expert testimony on stopping distance was supplied by evidence concerning the distance at which the stop was actually made from the time the defendant discovered the decedent in peril. The deficiency in expert testimony concerning the visibility created by the defendant's headlights was supplied by the presumption that the headlights met the requirements of the Missouri statute requiring that the upper beam of automobile headlamps should reveal persons and vehicles at a distance of 350 feet. In this case, plaintiff's principal instruction contained the "tail" directing the jury that plaintiff's contributory negligence is no defense. The court held that it was not error to give a principal instruction containing the "tail" clause because, first, the defendant did not submit a sole cause instruction; and second, the clause is not error in every case where sole cause is properly submitted.

*Stephens v. Thompson*³⁹ was an action for wrongful death of plaintiff's husband who was instantly killed in a daytime grade crossing collision when the car he was driving was struck by defendant's freight train. The plaintiff attempted to make a case upon the depositions of the four members of the train crew. Both the trial court and the supreme court, in an opinion by Judge Holman, held that no submissible case was made. A very unusual fact situation was involved. As the train approached the crossing, members of the train crew saw the decedent approach the crossing, stop his automobile, then proceed forward with ample time to pass over the crossing in safety. Thereafter, the decedent's car stalled in the center of the track. The decedent tinkered with the automobile, then got out of the car and had started off the track when the collision occurred. Applying established principles, the court held that the deceased was not in imminent peril until the car stalled. There was insufficient evidence to show that the defendant could thereafter have avoided the collision. This was a difficult type of case for the plaintiff, where, because of the death of the driver, the plaintiff was required to rely upon defendant's employees to make a case.

39. 293 S.W.2d 392 (Mo. 1956).

*Silverstein v. St. Louis Pub. Serv. Co.*⁴⁰ was an action for wrongful death by the wife of a pedestrian against the operator of a street car. Plaintiff's decedent, while crossing Delmar Boulevard in the daytime, was struck by a west bound street car, knocked down and rolled or dragged thirty or forty feet. A verdict and judgment for the plaintiff was affirmed by the supreme court in an opinion by Judge Barrett. The case was submitted under the humanitarian doctrine for failure to slacken speed and failure to warn. The decedent, a pedestrian, was crossing Delmar Boulevard in the middle of the block. The defendant maintained two street car tracks at the point of crossing. One was an east bound track; one was a west bound track. The decedent was struck by the west bound street car. He had passed safely over the west bound track in full view of the west bound motorman. When he reached the center of the east bound track, he found himself in the path of an east bound car, became excited, or panicked, pivoted around to the northwest and walked swiftly into the path of the west bound car, obviously oblivious of its approach. There was no opinion evidence concerning the distance in which the street car could have stopped, but evidence showed it was actually stopped in 30 to 40 feet after the impact. Upon the basis of the evidence most favorable to the plaintiff and using actual stopping distance in lieu of opinion evidence, the court held that the plaintiff made a submissible case of failure to warn and failure to slacken. The case involved application of established principles to mathematical calculations based on the testimony and physical facts and circumstantial evidence.

*West v. St. Louis-San Francisco Ry.*⁴¹ arose out of grade crossing collision between a pick-up truck and defendant's passenger train in the daytime in the village of Leasburg. The collision occurred on the main line track which was eight to ten feet south of a passing track on the north side, from which direction plaintiff approached. The plaintiff testified he drove on to the main line track without stopping—that he continued to look for the passenger train, driving eight to ten miles an hour, until he reached the passing track, at which point he saw nothing and shifted into second gear to start across the main line track. Upon appeal from judgment in favor of the plaintiff, the supreme court in an opinion by Judge Dalton held that no submissible humanitarian case was made. It was held that as a matter of law, the plaintiff was not in

40. 295 S.W.2d 37 (Mo. 1956).

41. 295 S.W.2d 48 (Mo. 1956).

imminent peril until he reached the passing track and determined to pass over the main line track. Mathematical calculations indicated that only one second passed between the time the plaintiff came into imminent peril and passed into the path of the train. Allowing three-quarters of a second for reaction time, it was held there was no showing that action could be taken by the defendant to avoid the collision. The courts then considered plaintiff's theory that the case was submissible as an "almost escaping case."⁴² Careful mathematical calculations were made to determine whether there was a permissible inference that action could have been taken that would have permitted plaintiff to have passed over the track and out of the path of the defendant's train. These calculations show that two to two and a half seconds intervened between the time peril was discoverable until the collision. Allowing three-quarters of a second for reaction time, one and a quarter to one and three-quarters of a second were available for application of the brakes and slackening of speed. There was no opinion evidence and no circumstantial evidence to show that an effective application of the brakes could have been made in this time. On the issue of ability of the defendant to permit the plaintiff to escape by warning, the court pointed out that there was involved the reaction time of both the trainmen and the plaintiff, as well as the necessary time for each to act. The opinion is particularly valuable for its review of the "almost escaping case" in which recovery is permitted. These cases are distinguished on the facts from the *West* case.

In *Moody v. Missouri-Kansas-Texas R.R.*,⁴³ the plaintiff brought an action for wrongful death of his wife and for damages to his tractor. Plaintiff's wife was killed when the tractor she was driving was struck by defendant's train at a private grade crossing on plaintiff's farm in the daytime. The case was submitted solely on the humanitarian doctrine for failure to warn and to slacken. In an opinion by Judge Westhues, the court reaffirmed its previous holdings that there is no inherent inconsistency in the submission of a failure to warn and a failure to slacken. The holding of *Kick v. Franklin*,⁴⁴ in which an inconsistency was found, was again discussed and distinguished by the court. In disposing of the *Kick* case, the court used this strong language:

42. *Id.* at 53.

43. 296 S.W.2d 51 (Mo. 1956).

44. 117 S.W.2d 284 (Mo. 1938).

It is, indeed, difficult to conceive a situation wherein slackening of speed and sounding a warning would be inconsistent.⁴⁵

This case was an "almost escaping case." The tractor had nearly passed over the path of the locomotive when it was struck at the rear wheels. The plaintiff produced definite evidence of the relative speed and movements of the tractor and train but did not depend upon inference from this lay evidence to make a submissible case of ability to avoid the collision after the peril of the deceased was discoverable. The plaintiff produced expert testimony of the length of time the arrival of the train at the point of impact could be delayed by timely braking of the train. This is the safest method for the plaintiff in trying an "almost escaping case." When such evidence is produced, the court and jury are not required to make the calculations necessary to draw an inference involving intricate calculations and deductions from the available factual data.

This case was notable in another regard. The crossing in question was apparently a private crossing with fencing and gates on each side. The freight train was an extra, not regularly operated at the time. Although this was a private crossing, the court held there was a duty to keep a lookout, treating the case as one of "discoverable imminent peril."⁴⁶ In holding the case submissible, however, the court also held that the jury might find that an application of the brakes after the discovery of the peril would have avoided the collision.

The *Moody* case was a true humanitarian case—both parties were negligently inattentive or oblivious—but it was also submissible as a common law last clear chance case of discovered oblivious peril. In view of the question about applicability of the humanitarian doctrine to property damage, attention is invited to the fact that plaintiff was permitted to recover for damage to his tractor, in addition to the fatal injury of his wife. This is a practice commonly followed but being challenged frequently on the ground that humanitarian principles were not devised to protect inanimate property.

*Hendershot v. Minich*⁴⁷ was an action for wrongful death of plaintiff's eleven year old son. Plaintiff's son was struck and killed by

45. 296 S.W.2d at 54.

46. *Id.* at 53.

47. 297 S.W.2d 403 (Mo. 1956).

defendant's passenger car in a daytime collision while riding his bicycle from a nearby school across a paved highway at the intersection with a gravel road. The case was submitted to the jury solely upon the humanitarian doctrine for failure of the defendant to warn, to stop, to slacken, and to swerve. The verdict of the jury for the defendant was set aside by the trial court and a new trial granted for error in giving an instruction and because the verdict was against the weight of the evidence. Defendant's evidence showed that the defendant was aware of the approach of the deceased on his bicycle thirty-five feet from the two lane pavement and that the deceased was oblivious of his peril and intent on proceeding without stopping, into the path of the defendant's car. Expert evidence as to the ability to stop the defendant's automobile was offered by plaintiff. The court in an opinion by Judge Eager held that a submissible case was made for failure to stop, to slacken, to warn, and possibly upon other grounds. The order granting a new trial was affirmed.

One of the most important cases decided recently is *Sheerin v. St. Louis Pub. Serv. Co.*⁴⁸ That case, as pointed out above, severely restricted the sole cause instruction previously used. Since the *Sheerin* case, it is no longer safe to give anything more than a converse instruction. In the *Sheerin* case, the plaintiff was a pedestrian under the influence of intoxicants who walked into the path of a street car obviously oblivious of his peril. It was an "almost escaping" case. And it was a true humanitarian case wherein both the plaintiff and the defendant were negligently inattentive. It was held to be submissible. And the sole cause instruction, based upon the plaintiff's negligence, was held to be prejudicially erroneous. This case is an example of the unnecessary risks in giving a sole cause instruction in a case in which the defendant has a good chance to win a jury verdict. Until the sole cause instruction rules are stabilized a defendant who has a reasonable chance of securing a jury verdict should not give such an instruction.

48. 300 S.W.2d 483 (Mo. 1957).

*Wilson v. Toliver*⁴⁹ involved a dual recovery in the trial court on claim and counterclaim each under the humanitarian rule. The claims arose out of a nearly head-on collision at a "Y" intersection of two highways between two motor vehicles travelling at the same speed on a dry level highway on a bright day with an equally unobstructed view for each driver. The only unequal factor (and the decisive one) was that the plaintiff, as he approached the "Y" junction, intended to leave the highway on which both vehicles were travelling to emerge on the joining highway by turning left of the center for that purpose. For a quick mental image of the physical background the exhibits reproduced in the opinion are helpful.⁵⁰

After analyzing the evidence, the court concluded that only the defendant had a submissible case upon the humanitarian rule. Therefore, the court found it unnecessary to determine whether there may be simultaneous recoveries by plaintiff and defendant under the rule. The critical finding of the court is found in this language of the opinion: "The drivers of the two vehicles involved did not have an equal opportunity to avoid the collision."⁵¹ If the collision in the *Wilson* case had occurred on an ordinary highway or at a right angle intersection, an answer to this question would have been demanded.⁵²

Opinions may differ on the interpretation of the facts by the court, but it seems obvious that someday the question of dual recovery will be presented so that it must be answered, unless legislation intervenes. Legislation appears unlikely in the present equipoise of political forces, but this of course may change quickly.

49. 305 S.W.2d 423 (Mo. 1957).

50. *Id.* at 425.

51. *Id.* at 431.

52. In this case the simultaneous recoveries were offset by the trial court and judgment entered for the net amount in favor of the defendant with the larger recovery. This raises another question. Suppose plaintiff and defendant are well insured and suffer damages reduced to the same sums by favorable verdicts for each. The verdicts are offset and neither collects anything. Is this the essence of humanity? "Draconian" principles of the "harsh" rule of contributory negligence would produce the same result.

CONCLUSION

The judges of the supreme court of today have inherited the problem of the humanitarian doctrine. In its day-to-day administration, they have greatly improved the quality of the opinions by attention to detail and by careful and painstaking review of the factual details. Except for the ebb and flow in the propriety in form of instructions, and except for the large unanswered questions, the performance of the supreme court in recent years has been of excellent quality. More stability and unanimity in ruling on instructions is desirable in this field. But those ends may not be achieved until the larger questions are answered by the court or by the legislature.