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THE MISSOURI SUPREME COURT AND THE HUMANITARIAN DOCTRINE IN THE YEARS 1961, 1962 AND 1963

TERENCE C. PORTER*

This article is a review of the decisions of the Supreme Court of Missouri for the years 1961, 1962 and 1963 which considered the "humanitarian doctrine." All cases have been reviewed, and a summary of notable cases follows later in this article.

Generally, the "humanitarian doctrine," "humanitarian rule" or "humanitarian negligence," as it is variously denominated, escaped the years reviewed herein with little change. None of the more significant and perplexing questions raised in previous articles were answered.¹

The early, landmark case of *Banks v. Morris & Co.*² sets out the elements of the humanitarian doctrine as follows:

- (1) Plaintiff was in a position of peril;
- (2) defendant had notice thereof (if it was the duty of defendant to have been on the lookout, constructive notice suffices);
- (3) defendant after receiving such notice had the present ability, with the means at hand, to have averted the impending injury without injury to himself or others;
- (4) he failed to exercise ordinary care to avert such impending injury; and
- (5) by reason thereof plaintiff was injured.³

These elements encompass, in addition to the body of law commonly referred to as the "last clear chance doctrine" which is in effect in many states, and an extension which is peculiar to Missouri jurisprudence. The extension which sets the "humanitarian doctrine" apart from the "last clear chance" cases is to allow recovery where plaintiff by his own *negligent inattentiveness* (obliviousness) places himself into a position of imminent peril of collision from which he could extricate himself, but for his obliviousness. The position of imminent peril is discoverable by the other driver involved, but due to the latter's negligent inattentiveness (obliviousness) he does

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1. Becker & Porter, *The Missouri Humanitarian Doctrine 1958-60*, 26 Mo. L. REV. 26 (1961).

2. 302 Mo. 254, 257 S.W. 482 (En Banc 1924).

3. *Id.* at 484.

not so discover in time thereafter to take some action within the means and appliances at hand to avoid the collision. In this situation, an injured plaintiff can make a submissible jury question on his right to recover for the other driver's negligence.

In other jurisdictions, where the last clear chance doctrine is applied, plaintiff would be precluded from recovery in the above situation. The last clear chance doctrine is usually recognized as being limited to the three following situations:

- (1) Plaintiff's peril results from *physical helplessness* which defendant *has actually* discovered, and defendant thereafter has the ability to avoid the accident and injury, or
- (2) Plaintiff's peril results from *physical helplessness* and defendant does not actually discover this peril, but in the exercise of proper degree of care *could have discovered* it and thereafter had the ability to avoid the accident and injury, or
- (3) Plaintiff's peril results from mere *negligent inattentiveness*, (obliviousness), not physical helplessness, which defendant has discovered and in time thereafter has the ability to avoid the accident and injury to the plaintiff.

Missouri goes the next step, as noted, and does not penalize plaintiff for getting himself into a position of peril by reason of his negligent inattentiveness, when defendant fails to discover the plaintiff by reason of his own negligent inattentiveness.

Although the scope of this article is restricted to a review of Missouri Supreme Court decisions, it seems appropriate to mention the recent adoption by the supreme court of the Missouri Approved Instructions.⁴ This action will probably have a more far-reaching effect on the humanitarian doctrine than any case decided during the period reviewed. One of the more significant changes brought about by the new instructions is the elimination of the "sole cause" instruction by Rule 1.03 which states: "No instruction shall be given on behalf of the defendant which hypothesizes that the conduct of one other than defendant was the sole cause of the occurrence."

This rule ends a long chapter of frustration on the part of the trial and appellate courts and lawyers involved in automobile accident litigation wherein the humanitarian doctrine is involved and a sole cause instruction is given. The death knell for the sole cause instruction has been sounding

4. Mo. R. Civ. Proc. 70.01.

for many years in Missouri, yet many practitioners have refused to heed the warnings.

The beginning of the end of the sole cause instruction (which up to now has been an inseparable, though often disreputable adjunct to the humanitarian doctrine) was marked by the decision of *Janssens v. Thompson*.⁵ Thereafter follows a long line of cases wrestling with the problem, but yielding little by way of solution to stem the tide of appeals on the ground that defendant's sole cause instruction was prejudicially erroneous. In the years reviewed the court made a very conscious effort to correct the abuses resulting from the use of the sole cause instruction. Foremost among the decisions is *Quigley v. Sneed*⁶ decided in 1963, in which the supreme court, in a rather resigned fashion, remarked:

We thus have presented again the ever vexing problem of the use of a sole cause instruction in a case in which plaintiff's submission is based on humanitarian negligence. We shall review the general rules.⁷

The court then proceeded to outline with clarity and simplicity the exact guidepost to be used in framing a sole cause instruction.

Apparently doubting that the mesesage would reach all quarters or that hearers would resist temptation, the court thereafter eliminated the problem by the "no-instruction" rule.

Much of the court's attention during the period was devoted to the question of submissibility. As in past years, painstaking consideration was given to factual detail and the inferences to be drawn from the evidence. Every effort was made to sustain the trial court's decision and in this effort some of the cases involved some rather novel approaches to the evidence. For example, in the case of *Appelhans v. Goldman*,⁸ defendant testified he had reduced his speed from twenty-five to five miles per hour in twenty-five feet. The court reasoned from this that the jury could have used the same ratio and thereby found defendant could have stopped in another six and one-fourth feet. In *Bell v. Pedigo*⁹ the court took judicial notice that a six-year-old boy, running in a semi-circle and covering fifteen feet of distance in all, would move at five to six miles per hour or would transverse this distance in this manner in two seconds.

5. 360 Mo. 351, 228 S.W.2d 743 (En Banc 1950).

6. 367 S.W.2d 637 (Mo. 1963).

7. *Id.* at 640.

8. 349 S.W.2d 204 (Mo. 1961).

9. 364 S.W.2d 613 (Mo. 1963).

On the question of where the zone of peril arises in a right-angle intersection collision, the court again pointed out that a jury can find plaintiff was in a position of imminent peril prior to the time he actually entered defendant's path. As stated in the case of *Reedy v. Missouri-Kansas-Texas R.R.*,¹⁰ the zone of peril may be extended beyond defendant's immediate path by plaintiff's obliviousness as well as by physical facts such as plaintiff's speed, the size of the vehicle or the nature of the terrain which reasonably indicate plaintiff will be unable to stop short of defendant's path.

In two cases¹¹ complaints were made concerning instructions which contained either misspelled words or errors in directions such as "east" for "west" and "right" for "left." As all that is necessary is the instruction be substantially correct, insignificant clerical errors do not amount to misdirection of the jury. Nor does the spelling of "imminent" as "eminent."

I. SUMMARY OF NOTABLE CASES

Hill v. St. Louis Pub. Serv. Co.,¹² arose as a result of a collision between a streetcar operating north on a fixed track on Grand Avenue in St. Louis, and an automobile driven by plaintiff's deceased husband. The automobile angled away from the right-hand curb in a northwesterly direction in front of the streetcar to the place of collision. The point of impact between the vehicles was the right front of the streetcar and left side of the automobile. The case was submitted to the jury on humanitarian negligence in failing to stop the streetcar to avoid the collision. Plaintiff recovered a judgment of \$12,500 in the trial court and defendant appealed charging plaintiff failed to make a submissible case. The supreme court affirmed the verdict and judgment of the trial court. The question of submissibility was determined in favor of plaintiff on the basis of inferences which were drawn from the testimony of the streetcar operator. The court made an interesting analysis of the evidence and determined that had the brakes on the streetcar been applied at the time the decedent entered a position of imminent peril the collision would not have occurred. The automobile was moving away from the streetcar and had the streetcar brakes been applied, the speed of the car, as compared with that of the streetcar, would have been sufficient to allow the decedent's automobile to move out of the way. (The automobile

10. 347 S.W.2d 111 (Mo. 1961).

11. *Wegner v. St. Louis County Transit Co.*, 357 S.W.2d 943 (Mo. 1962); *Edwards v. St. Louis Public Service Co.*, 365 S.W.2d 483 (Mo. 1963).

12. 340 S.W.2d 712 (Mo. 1960).

was traveling fifteen miles per hour and the streetcar twenty miles per hour at the time of peril.)

*Kirks v. Waller*¹³ was an action for personal injuries received by a five-year-old child as a result of being struck by a pickup truck. The accident occurred during daylight hours. Defendant was traveling west on 87th Street in Kansas City, Missouri, at thirty to thirty-five miles per hour when the child darted from south to north in front of the pickup. A jury verdict was returned in favor of defendant and the trial court sustained plaintiff's motion for new trial for error in giving an instruction. The supreme court reversed the trial court and reinstated the jury verdict on the ground that plaintiff had failed to make a submissible case of humanitarian negligence. Plaintiff's case was submitted to the jury on the theory "defendant could have swerved said truck and given a warning of its approach and thereby have avoided injuring plaintiff."¹⁴ This submission was similar to that contained in *Frandeka v. St. Louis Public Service Company*,¹⁵ where two acts had been submitted in combination as constituting negligence. The evidence in the *Kirks* case indicated the child started from a standstill from a point ten feet south of the pavement and ran some nineteen feet to a point just south of the center of the westbound lane, where he was struck by defendant's truck. The supreme court ruled the question of submissibility against plaintiff on the ground that after plaintiff's position of imminent peril was discoverable, neither of the submitted acts of negligence, either individually or in combination, would have been sufficient to have avoided the accident. As to the submission of failure to warn, the court discussed the double reaction time and held there would not have been time to have avoided the collision. Further, the court doubted the soundness of the theory that a warning would have been reacted upon favorably by plaintiff, who was five years old. The court would not hold defendant negligent for failure to swerve because there was evidence defendant had made an effective attempt to stop and had left fifty-eight feet of skidmarks. The court said as, in the available time, it was only possible to do one of two things and defendant did do one of those things, it was not negligence for defendant not to have done the other thing. This combination of the warning and the swerve submissions placed a burden upon defendant which was undue under the circumstances. Defendant had made a substantial effort to stop or

13. 341 S.W.2d 860 (Mo. 1961).

14. *Id.* at 864.

15. 361 Mo. 245, 234 S.W.2d 540 (1950).

slacken his speed and was not charged with the obligation, in addition thereto, to swerve.

*Reedy v. Missouri-Kansas-Texas Railway Company*¹⁶ arose out of a grade-crossing, train-truck collision which occurred during daylight hours, in Harwood, Missouri. Plaintiff recovered a verdict and judgment of \$17,000 against defendant railroad company in the trial court for the death of her husband. The opinion does not state the specific act of negligence submitted; however, since the opinion does state the case was submitted on the humanitarian doctrine, it will be presumed that the submission was for failure either to slacken speed or to stop. The evidence indicated the accident occurred as the decedent proceeded onto defendant's main line track traveling east at a time when defendant's diesel locomotive unit and passenger cars were traveling north. The right rear of the decedent's truck was struck by the right front of the diesel locomotive. Plaintiff's evidence showed the truck travelled at a constant speed of ten to twelve miles per hour from a point about 100 feet east of the track until the time of collision. Plaintiff attempted to sustain the submissibility of her case on the theory the zone of peril should have extended back to the point where certain obstructions along the track were likely to interfere with the view of the decedent in the direction from which the train approached. The court refused this contention and stated:

An engineer or fireman of a railroad locomotive upon seeing a motor vehicle approaching a crossing while such motor vehicle is still in a place of safety, and at such distance from the crossing as to allow the driver a reasonable time to stop before going upon the crossing and into the path of the train, is entitled to assume that the driver is not oblivious and will stop short of the path of the approaching train unless the driver shows some reasonable appearance of obliviousness. . . .

The defendant's duty under the humanitarian doctrine did not arise until its fireman or engineer saw or in the exercise of ordinary care could have seen that Mr. Reedy was oblivious of the approach of the train and intended to proceed across its path or that, oblivious or not, Mr. Reedy was unable to stop short of its path.¹⁷

The court found there was no evidence to warn the train crew of Mr. Reedy's obliviousness as his truck approached the track. The speed of his

16. 347 S.W.2d 111 (Mo. 1961).

17. *Id.* at 116.

truck did not indicate obliviousness and when the decedent reached a point where he was no longer able to stop short of proceeding into the path of the train, the train crew was unable to take any action to avoid the collision. The supreme court reversed the trial court's verdict outright and entered judgment for the defendant.

*Siegel v. Peters*¹⁸ is a companion case to *Rosenfeld v. Peters*¹⁹ reviewed in the last article on the humanitarian doctrine,²⁰ having arisen from the same automobile collision. Plaintiff was driving an automobile west on U. S. Highway 40 just outside the City of St. Louis at a point where Highway 40 is a four-lane divided highway with a grass median strip. Plaintiff stopped his vehicle and turned south into a cross-over and stopped to wait to turn back east toward St. Louis. After stopping and observing defendant's vehicle approaching from the west, plaintiff pulled into the eastbound portion of Highway 40. Plaintiff's vehicle was struck in the left rear as it completed the "U" turn. The case was submitted to the jury on humanitarian negligence in failing to sound a warning, and a verdict returned for defendant. On appeal plaintiff questioned the giving of certain of defendant's instructions. Both were converse instructions and are set out in full in the opinion. Both instructions were approved and the judgment affirmed. One instruction hypothesized that at the time plaintiff entered a position of peril, defendant's automobile was so close to plaintiff's that the sounding of a warning would not have avoided the collision. The other directed a verdict for defendant if the jury found a warning was in fact sounded. The supreme court rejected plaintiff's complaint that these instructions conflicted, and affirmed the judgment. Both instructions were simple converses of essential elements of plaintiff's verdict directing instruction.

*Appelhans v. Goldman*²¹ resulted from a right angle intersection collision where the left rear of the northbound vehicle in which plaintiff was a passenger was struck by the front of defendant's eastbound vehicle. The driver of plaintiff's automobile was her 16-year-old son, who was, according to defendant's testimony, oblivious to the danger. The case was submitted on failure to stop and the principal issue involved was the question of submissibility. The court reviewed the evidence in detail and after various mathematical calculations found a submissible case had been

18. 347 S.W.2d 881 (Mo. 1961).

19. 327 S.W.2d 264 (Mo. 1959).

20. Becker & Porter, *The Missouri Humanitarian Doctrine in the Years 1958-1960*, 26 Mo. L. Rev. 26 (1961).

21. 349 S.W.2d 204 (Mo. 1961).

made and affirmed a judgment pursuant to a jury verdict in favor of plaintiff for \$20,000. On the question of stopping distance, the court used defendant's testimony that he had reduced his speed from twenty-five to five miles per hour in twenty-five feet. The court found the jury could logically use this same ratio and thereby determine defendant could have stopped in another six and one-fourth feet. This evidence was held to be determinative on the question of stopping distance. The principles applied are not new. Nor was the fact situation unusual. The case is reviewed in sufficient detail to be a good guide for preparing cases for trial and testing the submissibility of humanitarian cases.

*McDonough v. St. Louis Public Service Company*²² arose from a right angle intersection case in which a westbound bus struck a police motorcycle or tri-car as it made a right turn onto the same street as the bus. The case was submitted to the jury on failure "to have swerved said motorbus and to have given a timely and adequate warning of the approach and proximity of the bus."²³ A jury verdict in the amount of \$29,000 was returned in favor of plaintiff. After carefully analyzing the evidence, the supreme court resolved the issue of submissibility in favor of plaintiff, but reversed and remanded the case for error in plaintiff's verdict directing instruction. The objectionable feature of plaintiff's instruction was the failure to relate the act of negligence hypothesized to the events following plaintiff's entry into a position of peril. The instruction read in part:

. . . that defendant's employee Maurath did fail to swerve said motorbus, and did fail to give a timely and adequate warning of the approach and proximity of said motorbus and was thereby negligent in so failing. . . .²⁴

It was felt the jury might have based its findings on antecedent negligence in failing to take the hypothesized action. This case shows the danger in departing from the tried and true format for a verdict directing humanitarian instruction.

*Davis v. Quality Oil Company*²⁵ involved a collision between an oil truck and an automobile driven by a sixteen-year-old boy at a "T" intersection on U.S. Highway 60. At this intersection, a side road "T'ed" into Highway 60 with an island in the side road which forced traffic desiring to

22. 350 S.W.2d 739 (Mo. 1961).

23. *Id.* at 740.

24. *Id.* at 745.

25. 353 S.W.2d 670 (Mo. 1962).

turn east on Highway 60 to take the right leg of the road around the island. Westbound traffic turned to its left around the island. The boy's vehicle was attempting to turn back east onto Highway 60 after following the left or westbound leg around the island. As he moved out onto Highway 60, he made a sweeping movement with his vehicle across the eastbound lane of traffic and into the westbound lane with his car headed east and southeast as defendant's truck approached from the east. At the time the automobile started onto Highway 60, the truck was some 300 feet away. The collision occurred when the automobile had moved back into the eastbound lane and was struck as the truck swerved south into the eastbound lane to attempt to avoid the car which an instant before had been in the north or westbound lane of traffic. The case was submitted on humanitarian negligence in failing to stop or slacken the speed of the truck. The undisputed evidence indicated the truck driver had applied his brakes and there were from 160 to 170 feet of skidmarks. After carefully reviewing the evidence, the court concluded the driver of the automobile did not enter a position of peril as he moved into the westbound lane of traffic since at that time the truck was so far to the east there was no certain, immediate, and impending danger of injury. Thereafter, as the car continued its course and started moving out of the westbound lane of traffic into the eastbound or south lane of traffic, it was moving out of the path of the truck. However, as the car got back into the south or eastbound lane of traffic and the truck approaching from the east also swerved to that lane of traffic, then and only then did it enter a zone of imminent peril. The evidence was clear that, thereafter, the truck driver had no ability to take any action to avoid the collision, particularly the submitted action of slackening the speed or stopping the truck because the undisputed evidence indicated that all four brakes were locked before the truck even went into the south or eastbound lane of traffic where it struck the automobile. Based on this review, the court held plaintiff had failed to make a submissible case and affirmed the judgment of the trial court entered on a jury verdict for defendant.

*Wegner v. St. Louis County Transit Company*²⁶ arose from a right angle intersection collision between an automobile and a bus at DeBaliviere and Lindell in St. Louis. The streets were wet, but the weather was otherwise clear. Trial resulted in a verdict in favor of defendant and plaintiff

26. 357 S.W.2d 943 (Mo. 1962).

appealed. The sole issue involved was the propriety of the trial court's refusal to give plaintiff's offered humanitarian instruction submitting failure to warn or in the alternative to slacken speed. From its mathematical computations from the evidence, the supreme court determined a submissible humanitarian case had been made and the trial court therefore had erred in its refusal to give the offered instruction. Defendant suggested the trial court did not err since the disputed instruction hypothesized that defendant's bus was traveling "east" when all of the evidence indicated the bus was traveling "west." Further, plaintiff had incorrectly spelled imminent as "eminent." The supreme court said these errors were obviously of a clerical nature and the instruction was *substantially correct*. No error would have resulted from giving an instruction containing clerical errors of this sort.

*Carlson v. St. Louis Public Service Company*²⁷ involved a collision which occurred when the right rear of plaintiff's car was struck by the right front of defendant's bus as plaintiff was attempting to turn into a driveway to the left, across and in front of the bus. The automobile and bus were approaching from opposite directions, during daylight hours, on a city street. Trial before a jury resulted in a verdict for defendant and plaintiff appealed. The supreme court first reviewed the evidence to determine whether plaintiff had made a submissible case on her verdict directing instruction which submitted: "failing to stop or slacken speed and thus avoid the collision."²⁸ After carefully reviewing the evidence, the supreme court held plaintiff had made a submissible case. The case was reversed and remanded for a new trial for error in the giving of one of defendant's instructions. This instruction was a sole cause instruction and was held to be erroneous as it failed to hypothesize some of the necessary factual elements. An instruction of this would appear to be prohibited under the new supreme court rules on instructions. This case contains a very detailed analysis of plaintiff's evidence on the question of submissibility. An attorney contemplating trial of a humanitarian case would do well to read this case to review the technical manner in which evidence in a humanitarian case must be presented.

*Trautmann v. Hamel*²⁹ arose out of a right angle intersection collision on U.S. Highway 40 at Sweet Springs, Missouri. Plaintiff sought damages

27. 358 S.W.2d 795 (Mo. 1962).

28. *Id.* at 798.

29. 358 S.W.2d 803 (Mo. 1962).

for the wrongful death of her husband, who was the operator of a northbound pickup truck which was struck by defendants' westbound automobile while crossing Highway 40. The left front of defendant's automobile struck the right front of the decedent's pickup as the front of the pickup was about two feet from the north edge of the pavement. The pavement was twenty-four feet wide. The pickup was traveling at a constant speed of five miles per hour. Defendant's automobile was traveling forty-five miles per hour at the time of impact. The case was submitted to the jury on humanitarian negligence in "failing to have slackened its speed and changed its course in a manner as to have avoided colliding with the pickup."³⁰ A jury trial resulted in a verdict for defendant, and plaintiff appealed alleging error in the refusal to permit plaintiff to read in evidence a deposition of a witness who was a resident of a county other than the site of the trial. Proof having been properly made of that fact, the supreme court, after finding plaintiff had made a submissible case, reversed and remanded the case for error in excluding the deposition. On the question of submissibility, the court reasoned that at the time decedent's truck entered the northbound lane of traffic, defendant's car was at least 166 feet east of the point of collision. From the testimony that a vehicle traveling at forty miles per hour could be stopped in 108 feet including reaction time, the court found that although plaintiff had abandoned the assignment of negligence of failure to stop, there was certainly sufficient evidence to warrant a submission of failure to slacken speed.

*Lucas v. Blanks*³¹ arose from an action for personal injuries to a three-year-old child who was struck by defendant's automobile in the City of Desoto, Missouri. The case was submitted to the jury on humanitarian negligence for failure to slacken, stop, swerve or sound a warning. A verdict was returned for defendant. On appeal, plaintiff challenged defendant's instruction hypothesizing that as plaintiff came into a position of peril defendant's automobile was "then so close that it was impossible for the Defendant to prevent his automobile striking Plaintiff."³² The evidence indicated the three-year-old child had been in a party of several children standing on the northwest corner of an intersection as defendant proceeded north across the same. The evidence was conflicting as to the position of plaintiff at the time she was struck by defendant's automobile.

30. *Id.* at 805.

31. 362 S.W.2d 736 (Mo. 1962).

32. *Id.* at 738.

The court did not get to the question of submissibility, as it determined the complained of instruction was not erroneous. This case is significant as it contains an approved defendant's instruction hypothesizing the exact facts submitted in plaintiff's verdict directing instruction and then (as a negative converse) that defendant, after finding plaintiff in a position of imminent peril was unable to take any action (as hypothesized in plaintiff's verdict directing instruction) to avoid the collision with plaintiff. The principal complaint made by plaintiff was that the instruction should have required the jury to find that defendant "in the exercise of the highest degree of care" could not have acted to avoid hitting plaintiff. This case should be compared with the following case. There, failure to include a standard of care was fatal. The distinction seems to be that here defendant hypothesized it was "impossible" to take evasive action whereas in the *Jolley* case defendant simply hypothesized defendant was "unable" to take evasive action. Impossible would seem to impose an even greater burden than the exercise of the highest degree of care.

*Jolley v. Lowe*³³ involved plaintiff's claim for personal injuries arising from an automobile-pedestrian case in St. Louis. Plaintiff was a twelve-year-old boy who struck defendant's automobile while running across Harrison Avenue. A jury returned a verdict for defendant and plaintiff appealed. Respondent did not file a brief on appeal and the supreme court confined itself to the alleged error in defendant's instructions. Plaintiff had submitted his case to the jury on the humanitarian negligence hypothesizing: "defendant could have sounded a warning or stopped his automobile and thereby have avoided colliding with plaintiff." Defendant's negative converse instruction read in part: "if you further find and believe that the defendant was unable, in time thereafter to sound a warning or stop his automobile, and that in so doing he was not negligent, then your verdict should be for the defendant and against the plaintiff."³⁴ This instruction was held erroneous first because there was no requirement in the instruction concerning the standard of care applicable to defendant. The court held it should have contained a finding that defendant in the exercise of "the highest degree of care" was unable to sound a warning or stop the automobile in time to avoid colliding with plaintiff. Second, the court held the instruction was indefinite and confusing because it failed to specify the desired result of the action defendant was unable to take. The court

33. 362 S.W.2d 741 (Mo. 1962).

34. *Id.* at 743.

held it should have contained a phrase "and thereby avoid colliding with plaintiff," or some similar expression.

*Finke v. United Film Service*³⁵ arose from an automobile intersection collision. Though the case does not contain any significant points from the strict technical aspects of the humanitarian doctrine, it is well worth reading by any trial attorney. The case was submitted to the jury on humanitarian negligence on the alleged failure to slow defendant's vehicle or swerve it and to prevent the collision after plaintiff and his vehicle were in a position of imminent peril. The trial before a jury resulted in a verdict and judgment in favor of defendant; plaintiff's appeal raised two principal issues. The first dealt with defendant's offer at the close of his case to read into evidence a Kansas City ordinance, relating to the right-of-way of vehicles at an intersection. Plaintiff's counsel objected, stating he was electing to submit his case to the jury on the humanitarian doctrine even though up to that point the case had been tried on primary and humanitarian averments in the pleadings. Defendant had also pleaded contributory negligence. Plaintiff complained that introduction of the ordinance would erroneously inject plaintiff's antecedent negligence into the case. The trial court refused to honor plaintiff's statements that he was electing to submit his case to the jury on a humanitarian instruction and allowed defendant to introduce the ordinance. This position was upheld by the supreme court, which felt the only way for plaintiff to save himself at this point would have been to dismiss the primary negligence averments in his petition. Having failed to do this, plaintiff was in no real position to complain of the reading of the right-of-way ordinance, particularly since in their opening statement, both plaintiff and defendant had relied and commented on the right-of-way situation at this particular intersection. Plaintiff further complained on appeal of defendant's argument to the jury concerning the actions of plaintiff in causing this accident. Plaintiff's complaint basically was that this was an attempt to inject contributory negligence into the case and was improper. This contention was likewise refused by the supreme court and the case was affirmed. On this latter point the supreme court noted that plaintiff's verdict directing humanitarian instruction, in addition to containing the usual "tail" which states to the jury that plaintiff is not precluded from recovery by virtue of his own contributory negligence, also contained a statement which indicates that

35. 363 S.W.2d 656 (Mo. 1962).

even though contributory negligence would not preclude the plaintiff from recovery, the jury must absolve him from any "sole cause" negligence. The "tail" of this instruction reads as follows: ". . . then your verdict must be for the plaintiff Mr. Finke, and this is the law and is true, even if you should believe that Mr. Finke was himself negligent, and thereby directly contributed to said collision, but did not solely cause same, if you so find."³⁶ The court felt that the plaintiff, by this instruction, had opened the door for defendant's argument.

*Bell v. Pedigo*³⁷ is more significant and more famous by reason of the fact that it conclusively established as clearly erroneous, burden of proof instructions using the expressions such as "reasonable satisfaction of jury" and "satisfaction of jury," than for any discussion of instructions. As stated in the last paragraph of the opinion, from and after date of this case instructions using such phrases are to be considered reversibly erroneous. The significance of this case has since been dimmed by the supreme court rules on instructions which tend to eliminate any of the heretofore acceptable burden of proof instructions and substitute a completely new concept of burden of proof or burden of persuasion.

The questions concerning the humanitarian doctrine that arose in this case involve submissibility. Plaintiff had filed suit to recover \$25,000 damages for the wrongful death of her six-year-old son. A jury verdict and judgment was rendered for defendant and plaintiff appealed. From the evidence most favorable to plaintiff, the supreme court found that the child had been standing along the east railing of a bridge spanning a creek as defendant's vehicle approached from the south. At some point, as defendant approached, the child had left the bridge railing and moved out into the roadway toward the center of the road, then some distance north and then back toward the east edge of the roadway. He was struck before he reached the shoulder of the roadway. From the testimony, the court found that the child had traveled in a semi-circle a distance of about 15 feet. The evidence was that the child was running and the court took judicial notice that a running child would move at a speed of five to six miles per hour. It reasoned the movement of the child would take approximately two seconds. Defendant testified that as he approached the bridge his truck was traveling twenty-five miles per hour. His brakes, tires and

36. *Id.* at 662.

37. 364 S.W.2d 613 (Mo. 1963).

horn were in good condition, and he could have stopped the truck at the speed and under the conditions there existing in fifteen to twenty feet. Traveling at twenty-five miles per hour, the court found defendant would have been seventy-three feet back to the south at the time the child moved from the bridge railing out into the pavement and started his semi-circle movement consuming the fifteen feet mentioned. The court then gave defendant the benefit of the doubt and assumed his testimony as to his ability to stop in fifteen to twenty feet did not involve reaction time. Therefore, his reaction time of three-quarters of a second at twenty-five miles per hour was added to the fifteen to twenty feet stopping distance and it was apparent that at the time the child left the bridge railing and started his movement out into the roadway defendant could have brought his vehicle to a stop within forty-eight feet and thereby have avoided striking the child.

In *Edwards v. St. Louis Public Service Company*,³⁸ plaintiff sought recovery for personal injuries received in a collision between his automobile and a bus. Plaintiff's westbound automobile and the eastbound bus were approaching each other from opposite directions at a point where it was necessary for plaintiff to make a "U" turn across and in front of the path of defendant's bus to get to his home on the south side of the street. The collision occurred after plaintiff's automobile had traveled about seven or eight feet across the centerline into the lane of traffic in which defendant's bus was traveling. Trial in the circuit court resulted in a jury verdict in favor of defendant and plaintiff appealed. On appeal the question of submissibility seems to have been conceded. Plaintiff's submission was on humanitarian negligence for failure to stop. Plaintiff's principal complaint on appeal involved two instructions given by defendant. Each instruction was in effect a negative converse of plaintiff's verdict directing instruction. One was considerably longer than the other, hypothesizing various facts and ending with a finding that, if after plaintiff placed himself in a position of imminent peril, it was then too late for the bus driver, with the means and appliances at hand and in the exercise of the highest degree of care, to have avoided the collision, the verdict should be for defendant. The other instruction given by defendant was very similar; however, it did not hypothesize any of the factual elements, but simply negated plaintiff's verdict directing instruction. Plaintiff complained of one instruction

38. 365 S.W.2d 483 (Mo. 1963).

because the word "right" had inadvertently been used instead of "left" and further, defendant had injected antecedent negligence into the case by hypothesizing that plaintiff had made a "U" turn. Both contentions were refused by the supreme court and the decision of the trial court was affirmed. Both of the instructions given by defendant are set out in their entirety. One seems to be a very acceptable model of a negative converse instruction in a humanitarian case and certainly seems to receive the approval of the supreme court. Of course, this instruction may be unacceptable at this time in view of the new rules concerning instructions.

*Rephlo v. Weber*³⁹ arose from an automobile-truck collision in St. Louis at the "T" intersection of Alfred and Magnolia Streets. Plaintiff was traveling south on Alfred Street, which dead-ends into Magnolia, and intended to turn to the left or toward the east. In so doing she was required to cross the path of defendant's westbound truck. Plaintiff's automobile was struck on the left rear side by defendant's truck as she was in the process of crossing the centerline at Magnolia Street. The case was submitted to the jury on humanitarian negligence in that "defendant failed to timely slacken the speed of his truck and that he failed to angle his truck toward and into the northernmost lane of Magnolia Avenue. . . ."⁴⁰ The jury returned a verdict for defendant. Plaintiff appealed complaining of defendant's converse instruction which after hypothesizing various facts stated: ". . . and further find that at such time the defendant Weber, in the exercise of the highest degree of care, could not avoid the collision by *slackening the speed of his motor vehicle*, then the Court instructs you your verdict must be in favor of the defendant Weber."⁴¹ (Emphasis added.) Plaintiff complained that this converse instruction completely ignored and was inconsistent with her verdict directing instruction which submitted in the conjunctive the slackening of speed and *turning to the right*. The supreme court agreed with plaintiff and reversed and remanded the case for the error in giving this instruction. The court found plaintiff's verdict directing instruction submitting slackening and turning to the right was one submission; therefore, under the facts both acts, that is, slackening and swerving, would be required to have a submissible case. Therefore, defendant's instruction which conversed only one of the two united elements of the submission was erroneous.

39. 367 S.W.2d 557 (Mo. 1963).

40. *Id.* at 559.

41. *Ibid.*

In *Quigley v. Sneed*,⁴² plaintiff was injured when her southbound automobile was struck in the left rear by defendant's westbound automobile as plaintiff attempted to pull out of a side street and turn left across defendant's path at a "T" intersection. A jury trial resulted in a verdict for defendant and plaintiff appealed. The supreme court reviewed the facts to determine the question of submissibility and held a submissible case had been made. The court then considered plaintiff's complaints with respect to defendant's sole cause instruction. The principal complaint was that the first paragraph of the sole cause instruction contained an abstract statement of the law to the effect that the driver of a vehicle shall stop at the entrance to a through highway and shall yield the right-of-way to other vehicles which have entered the intersection on the through highway. This is not a new complaint; instructions containing abstract propositions of law have often been held to be erroneous in many cases. The supreme court reversed the case and remanded it for a new trial for error in giving this instruction, stating that the abstract statement of the law tended to inject plaintiff's antecedent negligence into her case and was hereby erroneous. The court rather exhaustively reviewed the rules under which a sole cause instruction may be given. It has been mentioned earlier in this article that such instructions have now been eliminated from the trial of humanitarian cases. However, the opinion is noteworthy because it explains (as has been previously explained by the supreme court in *Rosenfeld v. Peters*⁴³) that such instructions in reality are not necessary in a humanitarian case since defendant can achieve the same result by a more legitimate and safer route.

II. CONCLUSION

The humanitarian doctrine at the end of 1963 was little changed by the decisions handed down in the years 1961, 1962 and 1963. However this is not to say that its use in the years to follow will not be affected by the supreme court's activity in this period.

The adoption of pattern instructions will undoubtedly have great effect on the practical use of the doctrine in the field of trial practice. Many of the supreme court's decisions of years past now will involve moot questions. No longer will it be necessary for the court to labor over

42. 367 S.W.2d 637 (Mo. 1963).

43. *Supra* note 19.

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pages of opinion to explain why the handiwork of some inspired attorney does or does not contain prejudicially erroneous direction to the jury. Hereafter, both the courts and the lawyers will be freed from the time consuming and ultrahazardous field of writing jury instructions and will thereby have more time to devote to orderly and effective development of the factual basis necessary for application of the doctrine. Perhaps this will result in an early presentation to the court of the old hypothetical question: "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?"⁴⁴

44. Becker, *The Missouri Humanitarian Doctrine 1956-57*, 23 Mo. L. REV. 420, 422 (1958).