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Comments

INCONSISTENT PLEADING UNDER MISSOURI STATUTES

Ever since the enactment of the General Code for Civil Procedure in 1943,¹ there have been questions as to the effect of inconsistent pleading under this new code.

To best analyze this problem we will first compare the wording of the Missouri statute with that of the federal rule concerning consistency of pleadings. The Missouri statute reads as follows: "A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has whether based on legal or on equitable grounds or both." In contrast, the federal rule reads as follows: "A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or on equitable grounds or both. All statements shall be subject to the obligations set forth in Rule 11." (Emphasis added.) As will be noted, the main difficulty under the Missouri statute is the omission of the words "regardless of consistency.

At this point it might be well to define what is meant by "inconsistent pleading." Decades of judicial interpretation and definition have given us a definition to the effect that the pleading is inconsistent if proof of one of the allegations or defenses will necessarily disprove the other. It has further been said that allegations in a petition are not inconsistent unless they are such that, if the allegations supporting one theory are true, the allegations supporting the other must be false.

The federal courts have almost universally construed the federal rule exactly to its letter and as a result have allowed all claims and defenses to be pleaded without

2. § 509.110, RSMo 1949.
3. F.R. Civ. P. 8(e) (2).
4. § 509.110, RSMo 1949.
regard to their consistency. They have even gone so far as to say that inconsistent or alternative claims may be pleaded within a single count and a motion to dismiss must be denied if the pleading is sufficient under any one of the theories pleaded.\textsuperscript{9} They have even said that one, when asserting benefits under a contract, may at the same time repudiate the contract and sue under the common counts on an implied contract,\textsuperscript{10} and even that inconsistent claims for rescission and for breach of contract may be joined in one pleading.\textsuperscript{11} The courts have also said that a party may plead as many defenses as he has in his answer and if any defense is sustained, it is fatal to the plaintiff's cause of action irrespective of the fact that the separate defenses are inconsistent.\textsuperscript{12} It has also been held that, in an action for slander, the defendant is permitted to deny the utterance of the slanderous words and also rely on the defense of qualified privilege even though they are wholly inconsistent.\textsuperscript{13}

After examining the import of the federal rule\textsuperscript{14} on the subject, the question is presented as to the effect of the Missouri statute\textsuperscript{15} on inconsistency or repugnancy in pleadings particularly in light of the absence of the words "regardless of consistency" from the text of the statute. In quest of a solution to this problem, we will turn our attention next to the legislative background and history of what is now section 509.110, Missouri Revised Statutes (1949).

In 1939 the general assembly invited the supreme court to make suggestions for a revised code and rules of civil procedure and as a result the court appointed a committee of fifty-three lawyers and judges to assist in the preparation of the tentative proposals. In late 1940 the committee made its first report in which it offered two alternate proposals. Plan I consisted of various amendments to the present code and plan II completely revised eleven of the twenty articles of the General Code for Civil Procedure. In 1941 the general assembly extended until the 1943 session the time for the court to submit the suggestions. The court then appointed a special committee to distribute the printed plans among the members of the bar and to receive suggestions. As a result, the committee reported that the prevailing sentiment of the bar was in favor of the adoption of plan II. In November 1942 the original supreme court committee made its final report which, in consideration of the various suggestions, perfected plan II and submitted it to the supreme court. At this point it might be observed that in plan II the section concerning inconsistent pleading\textsuperscript{16} was identical with the similar section of the Federal Rules of

\textsuperscript{9} D. Loveman & Son, Inc. v. Westinghouse Elec. Corp., 14 Fed. Rules Serv. 8E.611, Case 1 (N.D. Ohio 1950) (apparently the pleading was set up in the alternative, but the court treated alternative pleading synonymously with inconsistent pleading).
\textsuperscript{12} Jessen v. Aetna Life Ins. Co., 209 F.2d 453 (7th Cir. 1954).
\textsuperscript{13} Washington Annapolis Hotel Co. v. Riddle, 171 F.2d 732 (D.C. Cir. 1948).
\textsuperscript{14} Fed. R. Civ. P. 8 (e) (2).
\textsuperscript{15} § 509.110, RSMo 1949.
\textsuperscript{16} Proposed Revised Code of Civil Procedure in Missouri, art. 5, § 11 (1942).
Civil Procedure\textsuperscript{17} which did contain the words "regardless of consistency." The court then proceeded to study plan II and reduce it to bill form. Among the changes made by the supreme court was the elimination of the words "regardless of consistency" from article 5, section 11 of plan II.\textsuperscript{18}

The reason for the supreme court's striking of these words cannot easily be found. Admittedly, by this move the court did not seek completely to condemn inconsistent pleading as such, but on the other hand, it appears that the court did not wish to give the comprehensive license to plead inconsistently that was provided for under the Federal Rules of Civil Procedure. It is submitted that the result of this move might be to permit inconsistent pleading in some instances while prohibiting it in other instances. Further, it seems that the court felt there might be cases where a pleading was so inconsistent that the opposing party would not know what the pleader meant, and in those cases the inconsistent pleadings should not be allowed.

Subsequently, the bill was presented in the legislature and was passed into law as the Civil Code of Missouri to take effect January 1, 1945.\textsuperscript{19} The section with which we are concerned, section 42 of the Civil Code, as presented to the legislature and as enacted did not contain the words "regardless of consistency," and it has remained unchanged to date.\textsuperscript{20}

This brings us to the consideration of the problem as to what is the present status of inconsistent pleading in Missouri. Under an early statute,\textsuperscript{21} it was held that two inconsistent counts in a petition were bad against timely objection notwithstanding the fact that they were pleaded in the alternative,\textsuperscript{22} and under a subsequent statute\textsuperscript{23} it was held that a defendant might plead several defenses but that they must be consistent.\textsuperscript{24} A later statute also permitted pleading in the alternative\textsuperscript{25} but it was held under that statute, that the alternatives need not be consistent.\textsuperscript{26} It was also required under the latter statute that the pleader declare his belief in one or the other, but his ignorance as to which one it was.\textsuperscript{27} Under this same statute it was required that each alternative state a good cause of action or defense,\textsuperscript{28} but that has been changed by the present section so that the alternatives will be considered separately and the pleading will not be considered insufficient on the ground

\begin{itemize}
  \item \textsuperscript{17} Fed. R. Crv. P. 8 (e) (2).
  \item \textsuperscript{18} Teasdale, \textit{Progress of the Proposed Revised Code of Civil Procedure}, 14 Mo. BAR J. 38 (1943).
  \item \textsuperscript{19} Mo. Laws 1943, at 357, §§ 2-3.
  \item \textsuperscript{20} § 509.110, RSMo 1949.
  \item \textsuperscript{21} § 1828, RSMo 1909.
  \item \textsuperscript{22} Wade v. Douglass, 161 Mo. App. 348, 143 S.W. 830 (Spr. Ct. App. 1912).
  \item \textsuperscript{23} § 1233, RSMo 1919.
  \item \textsuperscript{24} Vaughn v. Conran, 20 S.W.2d 968 (Spr. Ct. App. 1929).
  \item \textsuperscript{25} § 798, RSMo 1929.
  \item \textsuperscript{26} State ex rel. Dunklin County v. McKay, 325 Mo. 1075, 30 S.W.2d 83 (1930).
  \item \textsuperscript{27} State ex rel. Dunklin County v. McKay, 325 Mo. 1075, 30 S.W.2d 83 (1930).
  \item Manchester Iron Works v. E. L. Wagner Const. Co., 341 Mo. 389, 107 S.W.2d 89 (1937); Crowley v. Behle, 131 S.W.2d 383 (St. L. Ct. App. 1939).
  \item \textsuperscript{28} Duncan v. Thompson, 146 S.W.2d 112 (Spr. Ct. App. 1940), rev'd, 315 U.S. 1 (1941).
\end{itemize}
that one of the alternatives is insufficient, provided, of course, there is at least one alternative that states a good cause of action.29

Under the new code section,30 there is genuine confusion as to the present permissibility of inconsistent pleading. It is felt by at least one writer that inconsistent claims, defenses, and facts must be pleaded in the alternative and if not so pleaded, will be held defective.31 Although there is little doubt as to the wisdom of such a practice, I believe that such a comprehensive and categorical statement might be misleading for the reason that there have been cases in which the courts have held allegations and defenses which would seem on their face to be repugnant, to be consistent when appearing in the same pleading. For example, the court has found allegations of negligence and allegations of wilful, wanton, and reckless conduct not to be necessarily repugnant.32 And a court of appeals has found allegations that the car was driven at a negligent rate of speed and allegations that it could have been stopped and the collision avoided not to be necessarily inconsistent.33 In other instances it has been held that allegations that defendant failed to have a truck under control so as to be able to stop at the first sign of danger were not inconsistent with allegations of negligence under the humanitarian rule.34 It has also been held that allegations that plaintiff was invited on the premises by defendant were not inconsistent with allegations that plaintiff was there with defendant's permission and knowledge.35 One court has even gone so far as to say that a plea of general denial and of contributory negligence in the same answer were not inconsistent defenses.36

On the other hand, no cases can be found in which the court has denominated allegations or defenses in a pleading to be inconsistent and has still allowed them to stand. When the claims or defenses were inconsistent the courts have deemed them insufficient37 except when they were pleaded in the alternative.38 But it should be noted, there has been no case in which it was held, categorically, that the present statute entirely prohibits inconsistent pleading.

Some writers have pointed out that alternative pleading and inconsistent pleading are synonymous conceptions, but this seems to be a rather inaccurate presumption, as the Missouri courts have not treated them as one and inseparable. A more accurate concept would denote an inconsistent pleading to be one in which the pleader

30. § 509.110, RSMo 1949.
31. 1 CARR, MISSOURI CIVIL PROCEDURE § 171 (1947).
34. Danklef v. Armbruster, 91 S.W.2d 660 (St. L. Ct. App. 1936); Pabst v. Arm-bruster, 91 S.W.2d 652 (St. L. Ct. App. 1936).
38. Five Twelve Locust, Inc. v. Mednikow, supra note 37; State ex rel. Dunklin County v. McKay, 325 Mo. 1075, 30 S.W.2d 83 (1930); King v. Guy, supra note 37.
alleges two repugnant or mutually destructive claims or defenses in which the proof of one would necessarily disprove the other and the pleader claims both to be true and the opposing party cannot fully understand what is being claimed. In contrast, an alternative pleading is one in which the pleader alleges one or the other of the acts to be true, but not both, and the opposing party then has better information as to what is being claimed. The claims or defenses might or might not be consistent with each other, to wit, proof of one might or might not necessarily disprove the other, but the important point to be remembered is that the pleader is claiming either one or the other to be true—he is not claiming that both are true.

It is submitted that there are many instances in which the pleader will, of necessity, want to plead two or more different theories of law defensively, or in an attempt to recover, and might wish to plead two or more sets of facts when the true course of events is unknown and he is pleading on information and belief. But a mere cursory glance at the various situations which might require the pleader to allege repugnant claims or defenses will reflect the conclusion that, without reservation, any time a pleader would have occasion to plead inconsistently, he could just as easily draft his pleading in the alternative and accomplish the same purpose. When the pleader sets up inconsistent allegations, he knows that one of the allegations must of necessity be false and it is repugnant to common sense for a person to allege two things to be true when if either one were found to be true the other, ipso facto, would be false. The result of such pleading would accomplish no more than the confusion of the opposing party.

The solution to our problem can be found in the drafting of the pleading. In light of the fact that the words "regardless of consistency" were not included in the Missouri statute and in light of the court decisions on the matter, it can be seen that a pleading which is inconsistent might very well meet its doom. On the other hand, the statute specifically allows pleading in the alternative and it has been held that the alternatives need not be consistent with each other. This, then, can be reconciled with the scheme of the supreme court in deleting the words "regardless of consistency" from the proposed draft of the statute, to wit, to decrease the ambiguity created by inconsistent pleading. The result follows that one may plead two or more repugnant claims or defenses provided he draft his pleadings in the alternative or the hypothetical, or at least draft the pleadings in a manner which will make it very clear to the opposing party that the pleader is relying on either one or the other of his inconsistent allegations, but not on both.

William M. Howard


40. § 509.110, RSMo 1949.

41. See notes 37 and 38 supra.

42. See note 38 supra.

A possessor's liability to entering firemen has been announced for the first time by the Supreme Court of Missouri in two recent cases—Anderson v. Cinnamon and Nastasio v. Cinnamon. In the Anderson case the plaintiff, a member of the Kansas City fire department, was injured by the collapse of a porch on defendant's burning apartment building, from which plaintiff was attempting to fight the fire. Plaintiff alleged the defendant was on the premises at the time, had knowledge of plaintiff's presence on the porch, and had knowledge that the porch was dangerous and unsafe. Plaintiff based his claim on defendant's negligence in failing to repair the porch and put it in a reasonably safe condition, and on defendant's negligent failure to warn plaintiff of such condition of the porch and in permitting him to go into a dangerous trap. The trial court dismissed the petition for failure to state a claim on which relief could be granted and, on appeal, this was affirmed by the supreme court en banc.

In the Nastasio case, the plaintiff in a wrongful death action was the widow of another member of the Kansas City fire department. Mr. Nastasio was off duty at the time the alarm for the fire involved in the Anderson case was given, but responded to the alarm. He is described in plaintiff's petition as a "volunteer" who "...proceeded to go upon said premises for the primary purpose of saving life and limb of the tenants..." Due to mention and admission in briefs of the parties that deceased was a member of the fire department, the petition was construed by the court as containing this information. The theory of plaintiff's petition seems to be that defendant's negligence placed the tenants of the building in danger to which deceased responded and, while rescuing persons from the fire, the porches of the building collapsed upon deceased due to the negligence of defendants in the maintenance of the porches in a dangerous condition amounting to a trap, and in the failure of one of the defendants present to warn deceased of the imminent danger of the porch's collapse. The supreme court in division No. 1 affirmed the trial court's judgment of dismissal of plaintiff's petition.

In the Anderson opinion the court approaches the problem of the possessor's duty to repair in this way: firemen are generally held to be licensees; a possessor's duty to firemen is the same as that owed licensees; Missouri law is well settled that the possessor owes no duty as to maintenance of premises toward a licensee, who takes the premises as he finds them except for the possessor's (a) "wantoness" or (b) "some form of intentional wrong," or (c) "active negligence"; and therefore since neither

1. 282 S.W.2d 445 (Mo. 1955) (en banc).
2. 285 S.W.2d 117 (Mo. 1956).
3. Apparently the same porches are involved in the Anderson case, supra note 1.
4. From the opinions in both cases, Westhues, J., dissented.
5. Generally said to be "under a commission to enter given by law." See Annots., 13 A.L.R. 637, 638 (1921); 141 A.L.R. 584 (1942); 122 A.L.R. 1162 (1939); 61 A.L.R. 1028 (1929).
(a), (b), or (c) above were present, there was no negligence in failure to repair on the part of defendant.

The court in the Anderson case discusses the duty to warn a licensee in this manner: there is a conflict of authority in the United States on the duty to warn;7 cases on which plaintiff relies involve "unusual hazard from highly dangerous substances kept on the premises such as gasoline or explosive material";8 the Missouri courts have never recognized a possessor's duty as outlined in the Restatement of Torts;9 Missouri decisions do recognize the possessor's duty not to "knowingly let him [licensee] go into a hidden peril ..." [but] we think the explosive material cases are a good example of what is meant by letting one go into hidden peril. ... Thus it is unusual hazard that requires warning to licensees”;10 “We have never held there is a duty to warn licensees of structural conditions, due to age and natural deterioration or to improper construction, or to warn of conditions due to casual negligence of persons with respect to objects or materials not inherently dangerous ...”;11 the rules applicable to unusual hazards should not be applied to structural conditions; and in any event the petition shows insufficient opportunity to warn in alleging merely that an owner (defendant) knew of plaintiff's presence on the porch.

As to plaintiff's position on appeal that under the pleaded facts defendant was

9. 2 Restatement, Torts §§ 342, 345 (1934). § 342: "Dangerous Conditions Known to Possessor. A possessor of land is subject to liability for bodily harm caused to gratuitous licensees by a natural or artificial condition thereon if, but only if, he (a) knows of the condition and realizes that it involves an unreasonable risk to them and has reason to believe that they will not discover the condition or realize the risk, and (b) invites or permits them to enter or remain upon the land, without exercising reasonable care (i) to make the condition reasonably safe, or (ii) to warn them of the condition and the risk involved therein."
§ 345: "Dangerous Conditions Known to Possessor. A possessor of land is subject to liability for bodily harm caused by a natural or artificial condition thereon to others who are privileged to enter the land for a public or private purpose, irrespective of his consent, if he (a) knows that they are upon the land or are likely to enter it in the exercise of their privilege, and (b) knows of the condition and realizes that it involves an unreasonable risk to them and has no reason to believe that they will discover the condition or realize the risk, and (c) fails to exercise reasonable care (i) to make the condition reasonably safe or (ii) to warn them of the condition and the risk involved therein."
10. Anderson v. Cinnamon, 282 S.W.2d 445, 448 (Mo. 1955) (en banc).
11. Ibid.
guilty of "active negligence," the court took the position that failure to warn is negative rather than active in nature when such failure is not connected with affirmative conduct on the possessor's part.12

The precise holding of the Anderson case is this: "We limit our decision herein to holding, where it is not alleged that the possessor of land was informed that firemen intended to enter and use the porch of his building with their fire-fighting equipment before they went on it, he cannot be held liable for failure to warn them to leave it after he knew of their presence there. Our conclusion is that our law imposes no duty to warn under such circumstances."13

Judge Westhues in his dissenting opinion reasoned: "To say that a property owner would be liable if he failed to warn firemen if he had opportunity to do so before the firemen went onto a porch that he knew was likely to fall, and not be liable for failure to warn after the firemen had entered upon the porch, is to draw a distinction where no difference exists."14

Having taken its position in the Anderson case, the court in the Nastasio case rejects the argument that deceased came under the rescue doctrine and was therefore an invitee, because he was not in truth a volunteer but an admitted fireman. Deceased was thus a licensee, with no duty owed to him with respect to repair, and "inasmuch as there is no allegation in plaintiff's instant petition that the defendants knew that plaintiff's decedent intended to enter the premises and be under the porch before he went onto the premises, defendants cannot be held liable for failure to have warned plaintiff's decedent to leave his position under the porch after defendants knew of his presence there."15

Judge Westhues again dissented. Clarifying his position in the Anderson case, he felt that firemen should not be treated as licensees, but believed them to be sui generis,16 and as such they should be warned of at least unusual, hidden dangers, when the possessor knows of them and has opportunity to warn. Whether the Ander-

13. 282 S.W.2d at 450.
14. Id. at 451.
15. 295 S.W.2d at 121.
16. The leading case expressing this view is Shypulski v. Waldorf Paper Products Co., 232 Minn. 394, 396, 45 N.W.2d 549, 550 (1951): "The first thing to be recognized is that firemen, policemen, and similar personnel have a status sui generis." This case (holding plaintiff fireman had stated a cause of action by alleging defendant failed to warn of a dangerous wall before plaintiff inspected the premises to make certain fire was out) apparently gave the court the most difficulty. It was distinguished as relying on explosion cases, the New York progeny of Meiers v. Fred Koch Brewery, 229 N.Y. 10, 127 N.E. 491 (1920), and the RESTATEMENT OF TORTS, which the court thought inappropriate analogies for a structural condition case. The firemen have equally as good judgment due to experience as to the results of stresses and strains on structural conditions as the possessor. Further the Missouri court felt inspection to see if a fire were out "might" justify the use of the rule as to inspectors (Jennings v. Industrial Paper Stock Co., 248 S.W.2d 43 (K.C. Ct. App. 1952)), whereas in the two instant cases the work of fire fighting was in progress at the time of injury.
son porch should be considered such a hidden danger should have been, in his opinion, a question for the jury.

A review of firemen cases suggests that—as a facet of the many cases involving a possessor’s liability to entrants— they continue to evidence the same liberalizing forces suggested in 1936, when Dean McCleary wrote:

“Thus the law pertaining to the rights and duties of a possessor of land, having for its roots the traditional position of the possessor which recognized the right of a petty sovereign to use his land as he pleased and to determine for himself in what condition he would keep the premises, is developing rights and duties founded in the modern principles of tort law. This change of approach to the problems of liability of a possessor of land emphasizes the interest of society in preserving the safety of its members, but recognizing at the same time the legitimate interests of possessors to the use of their land.”

This liberalizing trend was further recognized by Professor James in 1953:

“It would be surprising, however, if the general trend over the last one hundred years towards wider accident liability had left the land occupier’s citadel untouched. It has not. The tendency of the law, here as elsewhere, has been towards an ever fuller application of the requirement of reasonable care under all the circumstances, and this tendency has included something of the leavening which has taken place generally within the negligence principle itself so as to make it approach a system of liability without fault.”

The possessor’s conduct, when liability is attached to it, is said to be negligent, but decisions are reluctant to analyze the possessor’s conduct in terms of the reasonable man of negligence law generally. Rather, as did the Missouri court, the emphasis is upon the status of the entrant. Is he trespasser, licensee, invitee, business visitor, licensee with license given by law, or sui generis? Once we find the entrant’s status, then the courts proceed to apply more or less rigidly defined standards of care to what the defendant has or has not done. Although the standards of care as set out in the Restatement of Torts generally amount to what a reasonable man would do in each of the various circumstances outlined, even there the possessor’s conduct is not discussed in terms of reasonableness. This is due, it is believed, not only to the fact that this area cuts across legally protected interests in property and legally protected interests of members of society, but also to the fact that within the field

17. For a general discussion of the possessor’s liability see the annotations and cases cited notes 5 and 7, supra; 38 Am. Jur., Negligence §§ 92-141 (especially § 125) (1941); 65 C.J.S., Negligence §§ 23-89 (especially § 35) (1950); PROSSER, Torts, c. 15 (especially § 78) (2d ed. 1955). Related material on a possessor’s duty in Missouri may be found in: McCleary, The Liability of a Possessor of Land in Missouri to Persons Injured While on the Land, 1 Mo. L. Rev. 45 (1936); Tipton, Liability of Possessor of Premises to Governmental Employees, 2 Mo. L. Rev. 110 (1937).
18. McCleary, supra note 17, at 60.
20. See e.g., EHNENZWEIG, NEGLIGENCE WITHOUT FAULT (1951).
22. Ibid.
of tort law itself what has caused the injury in most of the cases had been the failure of the defendant to act affirmatively. When a court says, for example, that a plaintiff has stated a cause of action by alleging defendant's failure to warn of a dangerous condition, the court is penalizing inaction and increasing for the future the burdens of property ownership. This is liability for omissions and it has always been hard come by in the law. Without finding some relational connection between plaintiff and defendant no duty to take affirmative action is found. This has been the approach. And with it has come an indefinitely large number of decisions devoted to whether plaintiff X is a licensee, invitee, or trespasser. Though this approach does not properly focus the court's attention on the reasonableness of defendant's conduct, as an analysis based on negligence would suggest, the conventional analysis will be slow in giving way.

The liberalization which interjects itself in this area of the law will come about by the recognition of a type of entrant as "sui generis" to whom a duty is owed, or by placing the entrant within a class of persons to whom a sufficient duty is owed to warrant a recovery under the facts of a particular case.

With respect to firemen, liberalization is shown in those cases analyzed by the Missouri court as involving unusual hazards from highly dangerous substances kept on the premises, wherein recovery was allowed and which the Missouri court would apparently approve. The Missouri court has further suggested another possible extension of the possessor's liability where the defendant knew the fireman was about to enter the defendant's property to fight the fire and there was sufficient time to have given an opportunity to warn of dangerous conditions which the fireman might encounter. It is believed, however, that Judge Westhues in his dissenting opinions properly points his inquiry at the defendant's conduct and not to the plaintiff's status.

With respect to city officers and employees such as firemen, who have access to private premises under license of law rather than from the possessor's consent or invitation, and whose entry is principally beneficial to the public generally, it is

23. See Bohlen, The Moral Duty to Aid Others as a Basis of Tort Liability, 56 U. Pa. L. Rev. 217 (1908), and Frouser, Torts, Acts and Omissions, § 38 (2d ed. 1955). It has always seemed incongruous to the writer for the law to recognize no general duty to rescue those in peril, and yet accept Justice Cardozo's dictum, "The risk of rescue, if only it be not wanton, is born of the occasion. The emergency begets the man." Wnager v. International Ry., 232 N.Y. 176, 133 N.E. 437 (1921).


25. See Wolfson v. Chelist, 278 S.W.2d 39 (St. L. Ct. App. 1955), aff'd, 284 S.W.2d 447 (1955), holding a social guest to be a licensee, and rejecting a different analysis.

26. Firemen were so held in Shypulski v. Waldorf Paper Products Co., 232 Minn. 394, 45 N.W.2d 549 (1951).

27. Voluntary firemen held an invitee, Clinkscales v. Mundkoski, 183 Okla. 12, 79 P.2d 562 (1938). Note also, the plaintiff's attempt in the Nastasio case to bring deceased within the category of an invitee via the rescue doctrine.

28. See cases cited note 8 supra.
believed a partial solution is available. Each Missouri municipality may elect to bring itself within the workmen's compensation law. The allowance of this type of recovery would not only compensate presently otherwise helpless plaintiffs, but has the merit of spreading the risk of loss among the property owners of the city who stand to gain most from fire protection as the insurance coverage could be purchased with tax revenue. As in the field of industry, certain personal injuries are inevitable among city firemen, and compensation therefore should be viewed as a legitimate expense of city government.

John F. Stapleton

MISSOURI LAW ON THE ADMISSIBILITY OF EVIDENCE OF SUBSEQUENT REPAIRS

The rule to which the courts in Missouri have unanimously adhered is that, in an action based on negligence, evidence of subsequent repairs is inadmissible for the purpose of showing, or of raising an implication of an admission of, negligence on the part of the defendant. In support of the rule it has been stated that if such

29. Admittedly the suggestion in this paragraph skirts the real point in issue, i.e. whether the possessor has acted reasonably under the circumstances, nor does it consider what problems may remain under possible subrogation provisions in policies of insurance which the cities might take out. Rather it seeks only to compensate the injured employee.

30. Although primarily the employments by municipal corporations are excluded from Missouri's Workmen's Compensation Law (§ 287.080, RSMo 1949), municipalities may elect to come within the act (§ 287.030, RSMo 1949). However, of the major Missouri cities, only Columbia has made such an election with respect to their firemen. Mr. Spencer H. Givens, Director of the Division of Workmen's Compensation, in a letter to the writer commented, "... As you know, of course the law specifically exempts municipalities and Kansas City, St. Louis, Springfield, and St. Joseph have not overcome that exemption by written acceptance. Some autonomous units of the larger cities have filed acceptances of the law; for example the municipal utilities of Springfield, Missouri..."

31. With respect to the workmen's compensation insurer's rights of subrogation, see Annot., 16 A.L.R. 2d 1269, 1271, n.4 (1951) and cases there cited. As to public officers being included within provisions of workmen's compensation acts referring to "employees," see Annot., 5 A.L.R. 2d 415 (1949). With respect to the right of firemen and policemen to recover under workmen's compensation acts generally, see Annot., 10 A.L.R. 201 (1921).

1. Columbia & P. S. R.R. v. Hawthorne, 144 U.S. 202 (1892); Henwood v. Chaney, 156 F.2d 392 (8th Cir. 1946), cert. denied, 329 U.S. 760 (1946); Hickey v. Kansas City So. Ry., 290 S.W.2d 58 (Mo. 1956); Wallingford v. Terminal R.R. Ass'n of St. Louis, 337 Mo. 1147, 88 S.W.2d 361 (1935); Derrington v. Southern Ry., 328 Mo. 283, 40 S.W.2d 1069 (1931), cert. denied, 284 U.S. 662 (1931); Schloemer v. St. Louis Transit Co., 204 Mo. 99, 102 S.W. 565 (1907); Bailey v. Kansas City, 108 Mo. 503, 87 S.W. 1182 (1905); Mahaney v. St. Louis & H. Ry., 108 Mo. 191, 18 S.W. 895 (1892); Alcorn v. Chicago & A. Ry., 14 S.W. 943 (1890), aff'd on rehearing, 16 S.W. 229 (1891), aff'd by court en banc, 108 Mo. 81, 18 S.W. 188 (1891); Brennan v. St. Louis, 92 Mo. 482, 2 S.W. 481 (1888); Hipsley v. Kansas City, St. J. & C.B. R.R., 88 Mo. 348 (1885); Ely v. St. Louis, K.C. & N. Ry., 77 Mo. 34 (1882); Gignoux v. St. Louis Public Service Co., 180 S.W.2d 784 (St. L. Ct. App. 1944); Erule v. Mayflower Apartments Co., 113 S.W.2d 1058

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evidence were admitted it would afford no legitimate basis for construing such an act as an admission of previous neglect of duty; it would introduce into the transaction a new element and test of negligence; it would unjustly penalize the person who, out of an overabundance of caution and acting in accordance with the promptings of humanity, takes steps to prevent the recurrence of such an accident; and it would hold out an inducement for continued negligence (if, indeed, there were any negligence at the outset) in that it would tend to restrain the making of needful repairs after the accident for fear it would be taken as a tacit admission of negligence in failing to have made the repairs prior to the injury. Thus it would establish a new standard of care by which liability for the previously existing condition might be measured.2

Although the rule is that evidence of subsequent repairs is inadmissible to show negligence, it is sometimes admissible as bearing on issues other than negligence.3 Thus, frequently evidence of consequent repairs is admitted to show that a defective road or sidewalk had been accepted by the city as previously dedicated, or was under the defendant's possession, management, and control, and was therefore something that the defendant was bound to repair.4 This sort of evidence has been admitted to show that conditions at the time of an accident were different from the conditions

shown in a photograph which defendant proposed to exhibit to the jury showing the scene of the accident.\textsuperscript{5} In \textit{Alcorn v. Chicago \& A. Ry.},\textsuperscript{6} the witness testified that on the day following the accident he had seen a new wooden block between the rails at the point where the injury had occurred. The majority opinion held that this evidence was inadmissible. However, the minority opinion thought the testimony should be admitted on the ground that there was an issue whether the block added anything to the safety of the men. Such evidence is also admissible to rebut the testimony of the defendant's witness that no repairs were made.\textsuperscript{7}

If the defendant asks his witness about repairs, he has opened the subject, and it is proper for the plaintiff to cross-examine the witness as to any and all repairs which have been made.\textsuperscript{8}

The Supreme Court of Missouri has held that letters written by the defendant relating to future protective measures which it was going to take were admissible by the plaintiff because the defendant had alleged that the chemical to which the plaintiff had been exposed was not harmful.\textsuperscript{9}

Evidence of subsequent repairs by the defendant has been admitted where its effect is to show that the defendant had, after the accident, made the repairs in order to conceal a condition alleged by plaintiff as showing the manner in which the accident happened.\textsuperscript{10}

There are several cases in Missouri where the issue has arisen as to the practicability of installing a protective device on a machine or in a certain area. The fact that after the plaintiff's accident the employer had installed various protective devices or taken some protective measure has been admitted as showing the practicability of guarding the machine.\textsuperscript{11}

Where the defendant's opening statement raised the inference that a gutter could not be filled due to the drainage problem, the court allowed photographs showing

\textsuperscript{5} Henwood v. Chaney, 156 F.2d 392 (8th Cir. 1946), cert. denied, 329 U.S. 760 (1946). See also Gignoux v. St. Louis Public Service Co., 180 S.W.2d 784 (St. L. Ct. App. 1944) in which this rule is impliedly recognized, although the issue was not before the court.

\textsuperscript{6} 16 S.W. 229 (1891), aff'd by court en banc, 108 Mo. 81, 18 S.W. 188 (1891).

\textsuperscript{7} Schloemer v. St. Louis Transit Co., 204 Mo. 99, 102 S.W. 565 (1907).

\textsuperscript{8} Clonts v. Laclede Gaslight Co., 160 Mo. App. 456, 140 S.W. 970 (St. L. Ct. App. 1911).

\textsuperscript{9} Orr v. Shell Oil Co., 352 Mo. 288, 177 S.W.2d 608 (1944).


\textsuperscript{11} Wagner v. Gilsonite Construction Co., 220 S.W. 890 (Mo. 1920) ("We know of no more effective or cogent proof of [the practicability of the protective measure] than proof of the fact that it was actually done whether before or after the accident." p. 898); Bujalo v. St. Louis Basket and Box Co., 227 S.W. 844 (St. L. Ct. App. 1921); Phillips v. Hamilton Brown Shoe Co., 178 Mo. App. 196, 165 S.W. 1183 (K.C. Ct. App. 1914); Miniea (sic) v. St. Louis Cooperage Co., 175 Mo. App. 91, 157 S.W. 1006 (St. L. Ct. App. 1913) (dictum).
alterations which were made subsequent to the accident. The court said the evidence was admissible to rebut evidence or contentions that the use or condition then existing could not have been improved or made safer, or that such condition was a necessary one.\textsuperscript{12}

On the other hand, where there is no issue in the case other than negligence, or where the fact upon which the evidence would properly bear has been admitted by the defendant to be true, or where there is ample proof of a fact from other means and the obvious purpose of the evidence is to get before the jury some implication of negligence on the part of the defendant, then the evidence of subsequent repairs has been said to have no proper place in the case.\textsuperscript{13}

\begin{itemize}
\item \textsuperscript{12} Hickey v. Kansas City So. Ry., 290 S.W.2d 58 (Mo. 1956) ("We think of no better way to show that fact than proof that it actually was so reconstructed." p. 62).
\item \textsuperscript{13} Dimond v. Terminal R.R. Ass'n of St. Louis, 141 S.W.2d 789 (Mo. 1940) (evidence of subsequent replacement of warning system did not tend to prove crossing was extra hazardous or unusually dangerous or that appellant knew thereof prior to respondent's injury); Bond v. Weiner, 140 S.W.2d 25 (Mo. 1940) (evidence of repair of coal-hole cover properly excluded; it would not have given owner or tenant of building any notice of anything not already known); Boone v. St. Joseph, 1 S.W.2d 227 (Mo. 1927) (action of trial court in refusing to allow defendant to show who made repairs after the accident said valid); Marshall v. Kansas City, 297 Mo. 304, 249 S.W. 82 (1923) (no claim that original plank walk was improperly constructed); Bailey v. Kansas City, 189 Mo. 503, 87 S.W. 1182 (1905) (no issue in case upon which evidence could be admitted, since stipulation of facts modified general denial in that city admitted sidewalk was under its control); Mahaney v. St. Louis & H. Ry., 108 Mo. 191, 18 S.W. 895 (1892) (only purpose of evidence was to show consciousness of defendant at time of accident that track was dangerous); Alcorn v. Chicago & A. Ry., 14 S.W. 943 (1890) (only apparent purpose of evidence was to establish an implied admission by defendant that he was negligent toward plaintiff), aff'd on rehearing, 16 S.W. 229 (1891) (no proper issue raised by pleadings; not a particle of testimony was offered to show who made the repairs; other testimony could have been introduced to show necessity for proper block; evident and only object of evidence was to convict defendant company of a confession of negligence because of making repairs; misleading), aff'd by court en banc, 108 Mo. 81, 18 S.W. 188 (1891); Hipsley v. Kansas City, St. J. & C.B. R.R., 88 Mo. 348 (1885) (no proper issue in case); Ely v. St. Louis, K.C. & N. Ry. 77 Mo. 34 (1882) (no issue in case); Foley v. Coca-Cola Bottling Co. of St. Louis, 215 S.W.2d 314 (St. L. Ct. App. 1948) (no bearing on issue being tried—an attempt to show replacement of machinery for purpose of impeaching statement of defendant's witness that a tack could not get into a bottle in the machine, but witness had explained that new machinery was necessary because production had doubled); Gignoux v. St. Louis Public Service Co., 180 S.W.2d 784 (St. L. Ct. App. 1944) (condition not an issue before jury); Cannon v. S.S. Kresge Co., 233 Mo. App. 173, 116 S.W.2d 559 (K.C. Ct. App. 1938) (defendant introduced photographs showing repairs, but court refused to allow him to show who had made them, it being immaterial under the circumstances of the case); Brule v. Mayflower Apartments Co., 113 S.W.2d 1058 (St. L. Ct. App. 1938) (evidence admitted without objection, but court, at close of case, instructed jury not to consider the evidence since defendant had specifically admitted ownership of the post in question); Minea v. St. Louis Cooperage Co., 179 Mo. App. 705, 162 S.W. 741 (St. L. Ct. App. 1913) (evidence of subsequent repair not admissible as showing, as a matter of fact, it was possible to guard the machine); Minea (sic) v. St. Louis Cooperage Co., 175 Mo. App. 91, 157 S.W. 1006 (St. L. Ct. App. 1913) (evidence of subsequent protective measure stricken by trial court; court of appeals held evidence should not have been admitted because the issue of the possibility of guarding machine could have been and was shown by other evidence); Tetrick v. Kansas City, 128 Mo. App. 355, 107
Evidence of subsequent repairs is generally said to be unfairly prejudicial. However, it is not so prejudicial as to require reversal where an objection to it is sustained, and the testimony is ordered stricken. The court has also refused to recognize such testimony as reversible error when the defendant has failed to make a motion to strike it. And it has been said that if defendant allows some evidence of repairs to be admitted without objection, he cannot thereafter be heard to complain that similar evidence was improperly admitted over his objection.

It would seem to be obvious that where the evidence is admissible for some other purpose than to show negligence, a specific objection to the evidence would be required, and admission of the evidence over a general objection would not constitute reversible error. But when the evidence is not admissible for any purpose, a general objection will be sufficient. A general objection to the evidence of subsequent repairs has been sustained for the reason that (1) no proper issue was raised by the pleadings, (2) no testimony was offered to show who made the repairs, and (3) other testimony could readily have been introduced to show the necessity for the repairs.

When the evidence is properly admissible, it would seem to be expedient for the defendant to request the court at that time to tell the jury the purpose for which it is admitted, and to request a like instruction to the jury at the close of the case. There should be no question but that it is the duty of the defendant to request these instructions limiting the jury in its consideration of evidence of subsequent repairs.

S.W. 418 (K.C. Ct. App. 1908) (avowed object of evidence was to show place of injury, but this was held to be mere evasion since place could be shown in a number of ways); Bokamp v. Chicago & A. Ry., 123 Mo. App. 270, 100 S.W. 689 (St. L. Ct. App. 1907) (subsequent method of operation inadmissible as tending to imply prior method was dangerous and as showing safer methods could have been used); Schermer v. McMahon, 108 Mo. App. 36, 82 S.W. 535 (St. L. Ct. App. 1904) (evidence of subsequent bracing of trench inadmissible as tending to impress jury with belief that at the time of the injury the sides of the trench were unsupported or unbraced); Bowles v. Kansas City, 51 Mo. App. 416 (K.C. Ct. App. 1892) (evidence of repair inadmissible because there was no evidence associating repairmen with defendant).


20. Alcorn v. Chicago & A. Ry., 18 S.W. 229 (1891), aff'd by court en banc, 108 Mo. 81, 18 S.W. 188 (1891).

and the court's failure to give such an instruction, if not requested by the defendant, should not be reversible error. Yet, in the second Minea case the court, before admitting the evidence (which would have been proper as showing that it was possible to guard a machine), engaged in a discussion with the lawyers as to the admissibility of the evidence. Although the court finally admitted the evidence, it failed to instruct the jury thereon, and no ruling was made by which the attention of the jury was called to the fact that it was admitted subject to any limitation. On appeal the court held that while it is the general rule that it is the duty of counsel to ask an instruction limiting testimony admitted to a particular purpose, that rule had no application here. The admission of the evidence without qualification and without calling the attention of the jury to the fact that it was admitted for a specific purpose only, was under the circumstances held to be reversible error.

In Wright v. Hines, evidence of repair was offered for the purpose of showing that the defendant exercised control over a walk, and not as an admission of negligence in failing to keep the walk in repair. The court did not explain the purpose for which this testimony was admitted. The defendant offered no instruction limiting the effect of the testimony, and the court gave none. The court then granted the defendant's motion for a new trial. Although the court of appeals decided that the action of the trial court in this particular case was not vital, it said the better practice is to give the explanation to the jury at the time of the admission of the evidence, and also at the close of the case. The granting of the new trial was affirmed. The court added (by way of a warning) that should the case be retried and the same evidence be offered, the jury's attention should be called to the purpose for which it is admitted at the time.

Thus, it can be seen that, on the whole, the Missouri law on the admissibility of evidence of subsequent repairs is well settled. All the cases recognize the general rules. The only variations appear in the application of those rules to particular cases. A logical pattern is followed which generally attains an equitable result.

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