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Recommended Citation
Glenn A. McCleary, Torts in Missouri, 24 Mo. L. Rev. (1959)
Available at: http://scholarship.law.missouri.edu/mlr/vol24/iss4/7

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TORTS IN MISSOURI*

GLENN A. MCCLEARY**

This portion of the survey of the work of the Missouri supreme court, covering the eighteen months from January 1, 1958, includes 84 decisions but excludes the humanitarian cases which will be discussed by Mr. Becker in the next issue of the Review. For purposes of statistical interest, there were more than 100 decisions in the torts field in this period. This number reflects the vast amount of litigation and large proportion of the time and energies required of an appellate court in this field.

To give prominence to the decisions of more than ordinary interest the writer has selected from the list four cases which will be discussed out of their usual classification. One of the developing areas in tort law involves the liability of suppliers of food and beverages which come in sealed packages or containers and which are non-inspectable by the consumer. When the liability of the manufacturer first came before courts, the tort of negligence had not been fully developed. Out of a desire to protect infant industries, at a time when modern methods of production were not developed, the courts found no basis for liability in negligence to the consumer unless there was privity of contract. The breakdown of the privity requirement, and the recognition that ordinary principles of negligence are applicable where there is a foreseeable risk of injury to the consumer, are interesting developments of the common law. The same development is seen where the theory of liability of a supplier of food and drink in sealed packages and containers is based upon a theory of implied warranty of fitness for the purpose for which the food or drink is sold. Although warranty arises as a contractual undertaking, the privity of contract requirement in cases involving the above products is no longer required by many courts, upon the theory that the enterprise should bear the risks where the consumer suffers injuries from impurities contained in these products which are to be taken internally. Where privity of contract is not required, the theory of

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*This Article contains a discussion of selected 1958 and 1959 Missouri court decisions.
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liability becomes one of strict liability. Other courts requiring privity of contract for liability based on implied warranty, find a fictitious privity from advertisements of the product or on a theory of implied warranty of fitness running with the product into the hands of the consumer. The Missouri courts of appeals have applied strict liability in cases involving sealed food and beverage in several decisions, but the Missouri supreme court had not as yet passed on the liability of the manufacturer, until the cases of Midwest Game Co. v. M.F.A. Milling Co. and Ozark Trout Farm v. M.F.A. Milling Co.¹

In both of these cases, the petitions were identical. In each case the defendant's motion to dismiss the petition for failing to state a claim was sustained by the trial court. On appeal, the cases were treated by the parties as consolidated. The actions were against the manufacturer of fish food for damage to trout which the plaintiffs raised for commercial purposes. The first count of the petition asked for relief upon two theories: (a) for defendant's breach of an implied warranty of fitness for the purpose for which the food was sold, and (b) for negligence in failing to warn plaintiffs that the food was not fit for the purposes for which the food was sold, in that it was not a complete fish food and was inadequate without supplementation to sustain the normal health and growth of fish, thus causing the fish to become sick and die. On appeal, it was held that a recovery could be predicated upon either theory and that a claim for relief was stated in the petition. Limitations of space prevent at this point a full analysis of the problems raised by the decision, but the case is quite significant in that the privity of contract requirement, where the food is not in its raw state but where it has been processed and packaged by the manufacturer, was not required for liability based upon the theory of implied warranty. In ruling on defendant's motion to dismiss plaintiff's petition for failure to state claims upon which relief could be granted, the decision is based on the assumption that the fish food was not purchased directly from the defendant; otherwise there would have been privity of contract and it would not have been necessary to discuss that problem. The defendant had conceded the existence of the above theories of liability and their applicability to the sale of food for human consumption. However, liability based on a theory of implied warranty, where there was no privity of contract, has not as yet been passed upon by the Missouri

1. 320 S.W.2d 547 (Mo. 1959).
supreme court in the cases concerning food and beverage for human consumption. This decision would seem to indicate that the Missouri supreme court will approve this theory of liability, as developed in the Missouri courts of appeals in recent years, where the injuries are sustained by human consumption of deleterious food and beverage.

An individual's right of privacy, the right to have one's private affairs kept free from public gaze, is another interest which is receiving extended protection as our civilization becomes more complex. While the Missouri decisions which have recognized this legally protected interest are few in number, yet they have been recognized as able contributions to the development in this area of tort law. These cases involved the publication of pictures and printed matters. The case of *Biederman's of Springfield v. Wright*\(^2\) recognizes the invasion of privacy with respect to unreasonable and oppressive methods employed to enforce the collection of debts. In that case an action was brought for the balance of an account for merchandise purchased by the defendants. The defendants counterclaimed for damages allegedly caused by the tortious conduct of the plaintiff in attempting to collect the account. It was alleged that the agent of the plaintiff appeared in the cafe in which the defendant-wife worked as a waitress and, among other things, that he followed her around the restaurant and stated in a loud voice that she and her husband had refused to pay their bill, that they were deadbeats, that they did not intend to pay for certain furniture when they got it, and that he intended to get both of them fired from their jobs. Plaintiffs further alleged that declaiming such things in a loud and threatening manner tended to degrade and humiliate them in public. The court held that the counterclaim stated a cause of action for invasion of defendants' right of privacy. The decision is a contribution to that area of liability for the invasion of the right of privacy with respect to unreasonable and oppressive methods employed for the collection of debts. The opinion recognized that "most of the cases applying the doctrine to methods of debt collection have been concerned with the use of obnoxious letters, placards, advertisements, and other printed material calculated to coerce payment without resort to legal remedies." The court was of the opinion that "the oral publication of a private matter with which the public has no proper concern may be just as devastating and damaging as a written communication."\(^8\)

\(^2\) 322 S.W.2d 892 (Mo. 1959).
\(^3\) Id. at 896-97.
It is the law of this state that an unemancipated minor cannot sue his parents for injuries received by reason of an unintentional tort. With employment so widespread among the teenage group living at home, the fact of emancipation may be present, and the above rule would not bar an action by the minor against the parents who have been negligent in causing injuries to the minor. *Wurth v. Wurth*\(^4\) points out factors which prove emancipation for such a suit. The facts in that case were that the defendant was taking his plaintiff-daughter to work as was his habit. The icy condition of the street caused the plaintiff to admonish her father not to drive so fast. Shortly thereafter, the car went into a spin and struck a lamp post causing the injuries complained of. The plaintiff's evidence showed that she began to work at her job when 19 years of age. This was about a year and a half before she was injured. She retained her wages, paid for her clothing, medical and doctor's bills, paid her parents for board and room, and, in general, paid all of her own bills. She paid the hospital bills incurred in this injury. No evidence was submitted that her parents paid for any of her needs after she had begun work at 19, or that they had assumed any obligation on her behalf. The verdict for the plaintiff in the trial court was set aside on defendant's motion and judgment was entered for the defendant. On appeal to the St. Louis Court of Appeals, the judgment of the trial court was affirmed. The case was ordered transferred by the supreme court which, in an en banc decision, held the burden of proof, resting upon a party asserting emancipation of a minor, had been sustained. The verdict for the minor was ordered reinstated and judgment thereon to be entered. Two judges dissented.

An interpretation of the Wrongful Death Act\(^5\) pricks the conscience which permits a negligent driver of an automobile, who caused the death of two members of a family, to escape liability because his identity was not discovered for seventeen months as a result of concealment on his part. In *Frazee v. Partney*,\(^6\) it was held that a cause of action for wrongful death accrues at the time of the death and not at the time of the discovery of the identity of the alleged tort-feasor, so that the one-year limitation of the Wrongful Death Act was not tolled, or the period extended, by the alleged tort-feasor's fraudulent concealment of his identity and his criminal violation of the statute requiring a report of

\(^{4}\) 322 S.W.2d 745 (Mo. 1959) (en banc).
\(^{5}\) § 516.280, RSMo 1949.
\(^{6}\) 314 S.W.2d 915 (Mo. 1958).
accidents. The decision is an interpretation of the intention of the legislature in providing an action for wrongful death where no exception extends the time for bringing the action by reason of the conduct shown by the defendant in this case. The one year limitation was held to be a condition imposed on the right itself and part of the cause of action. The court recognized that "a hardship has resulted here, and this decision has not been easy. We are forced to construe the cold, clear words of the statute, and if its scope is to be enlarged we feel that the remedy is legislative, not judicial." Where a defendant admits that at the time of the accident he was drowsy and had dozed off, that on being aroused by his wife he realized he had forced plaintiff's car to swerve off the road to avoid a collision (defendant being on the wrong side of the road and directly in the path of the plaintiff's car), that he stopped after reaching the top of the hill to look back but could see nothing, that he stopped again about a mile farther on and discussed the fact that there might have been an accident, but then proceeded on to St. Louis, that he made no report of the accident as required by statute, justice requires that something be done about this situation. Furthermore, the basic purpose of the act has been defeated by concealment. There was the germ of an idea in the concluding part of the opinion: "We deem it unnecessary to discuss what would have been the effect of a 'John Doe' suit against a fictitious defendant, as argued pro and con, for no such suit was in fact filed."

I. NEGLIGENCE

A. Duties of Persons in Certain Relations

1. Possessors of Land

There were the usual number of cases in which the negligence of occupiers of stores was in issue as to injuries received by invitees. These cases turn to whether or not the condition, contended to constitute an unreasonable risk, was obvious to the customer in the exercise of ordinary care, or was actually known to the invitee, in which situation there is no duty on the occupier to warn the invitee. In this situation the invitee already has the information relative to the condition which a

7. Id. at 921.
8. Ibid. A more extended discussion of the case may be found in Rahoy, Torts—Wrongful Death Statute in Missouri—Application of General Statutes of Limitation, 24 Mo. L. Rev. 397 (1959).
warning would give. In Wilkins v. Allied Stores, the injuries received by a prospective purchaser were sustained when she slipped on the terrazzo floor of the entranceway into the defendant's store early in the afternoon on a rainy, cloudy day. The court held that the danger of walking on the terrazzo entranceway, which was spotted or mottled and more slippery when wet during a rain than the sidewalk of poured concrete, was open and obvious to the invitee, and there was insufficient evidence to establish that the lighting conditions or color of the terrazzo, as compared to the concrete sidewalk, concealed the floor by making it indistinguishable in color and appearance to the non-slippery adjacent sidewalk.

The same analysis was made in Howard v. Johnoff Restaurant Co., where dining tables in defendant's restaurant were located beside the dance floor which had an obviously smooth, slick, and shiny surface. There was no duty to warn a patron that the floor was slippery. The condition being obvious, or as well known to the plaintiff as to the defendant, the invitee had the information which a warning would convey. There was no evidence that the floor of the dance area was improperly waxed, or that the wax had excessively or unevenly accumulated on the surface as to render the floor not reasonably safe for one walking across it. That portion of the floor was known by the plaintiff to have been set apart for dancing and would be expected to be of more than ordinary smoothness. Furthermore, there was no necessity on the part of the plaintiff in leaving the dining tables to walk across the dance floor.

The obvious danger, in Gregorc v. Londoff Cocktail Lounge, was the sight by the plaintiff patron of another patron of a cocktail lounge holding a gun on a third patron for fifteen to twenty minutes, and the exchange of revolver fire between a police officer and the patron with the gun, whom the officer was trying to disarm and arrest. The means for escaping the perilous situation were readily available. Since the plaintiff, who was injured in the exchange of revolver fire, was aware that the conduct of the patron with the gun was dangerous to the safety of the

9. 308 S.W.2d 623 (Mo. 1958).
10. 312 S.W.2d 55 (Mo. 1958).
other patrons, he was not entitled to be warned of that which he already knew. An instruction on failure to warn the injured patron of the danger constituted error.

The condition of danger in *Freeman v. Myron Green Cafeterias Co.*\(^\text{12}\) was the leg of a clothes tree in defendant's cafeteria, on which the plaintiff customer caught her toe. Having used the clothes tree, she knew it was there and occupied a certain position on the floor. But it was for the jury to determine whether, in the exercise of ordinary care, plaintiff was required to have observed that the clothes tree was so constructed that it had legs which extended out from the center post for nine and one-half inches, each of which rested on a wood block so that each leg was elevated one and one-half inches above the floor and that, unless she was careful not to get too close, the toe of her shoe was likely to catch under one of the elevated legs, or whether there was a duty by the occupier to warn of this danger. However, the instruction to the effect that if the plaintiff had looked at the floor and the tree she could have seen the legs resting on the floor constituted reversible error, for the fact that the plaintiff could have seen by looking or that it was physically possible to have seen by looking was not essentially important. The essential fact to be found was whether the plaintiff in the exercise of ordinary care saw or should have seen that the legs of the tree were so constructed as to constitute an unsafe condition.

The same question was before the court in *Harbourn v. Katz Drug Co.*,\(^\text{13}\) where the plaintiff sustained injuries when she fell over the platform of a plainly visible scale standing in front of a column between two sets of double doors at the entrance to the store. The platform of the scale, extending away from the column, was approximately two feet in length and six inches high and had a black rubber surface. In front of the scale was an open area or entrance way fourteen to fifteen feet across. In departing from the store, the invitee went first to the locked set of doors, then turned to go to the unlocked doors and, as she turned, the scale was directly at her feet. It was held to be a jury question whether this condition involving an unusual risk of injury was obvious to the invitee, or actually known to her. The risk here "was not merely the presence of the scale between the two sets of double doors but it consisted

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\(^{12}\) 317 S.W.2d 303 (Mo. 1958) (en banc).

\(^{13}\) 318 S.W.2d 226 (Mo. 1958).
of the combination of circumstances of one set of the doors being locked and the scale being so located that when an invitee went to the locked set of doors and then turned to go to the unlocked doors the scale was directly at his feet outside his normal range of vision and directly in his path. By plaintiff's own evidence it was established that the presence of the scale was open and obvious and that she knew of its presence, but there was no evidence that she knew or should have known that the set of doors which she first tried was locked. The case was reversed, however, for error in an instruction which imposed a greater duty on the defendant than the law requires, in directing a verdict for the plaintiff if the jury found that defendants failed to warn of the location of the platform of the scale and failed to erect barriers, that is if they failed to do both.

2. Automobiles

While the negligence cases involving automobile accidents comprised one-fourth of the opinions of the court in the torts field, the issues on appeal involved instructions and presented little that was new or different in the law itself. Before an analysis of these instructions would be possible or profitable, a full statement of the facts in evidence would have to be set forth, and then it is doubtful if the discussion would have much carry over to other factual situations. Here is an area in the law providing the basis for most of the appeals which has defied systematic treatment so that instructions as a subject can be taught. The few general requirements are readily understandable, but the drafting of instructions applicable to a set of facts, no two cases having identical facts, can only be done by a close study of other decisions with similar fact situations. It is unfortunate that instructions, which are intended to guard the untrained mind of the jury against error in applying the law to the facts of a particular issue, become themselves our most prolific source of error.

In Evans v. Colombo, the action was for injuries sustained in an automobile collision which occurred when the motorist's vehicle, in

14. Id. at 231.
15. Since there was an incorrect statement of the law in the conjunctive submission, the doctrine of nonprejudice in a conjunctive submission where several grounds of negligence are hypothesized, each ground alone being sufficient to support a verdict but one or more of such grounds being unsupported by the evidence, though there is sufficient evidence to support the other hypothesized ground of negligence, did not apply.
16. 319 S.W.2d 549 (Mo. 1959) (en banc).
making a left-hand turn on the highway from the intersection, skidded on wet pavement, crossed the center line of the street, and collided with plaintiff's automobile which was stopped waiting for the traffic light to change. While negligence may not be inferred from skidding alone, the court en banc held that it may be found or inferred from circumstances in evidence of which skidding is a part. The speed in making the turn on wet asphalt streets, the lack of the use of the brakes or of the steering mechanism after the skidding started, and other factors provided evidence from which a jury might infer that there was negligence in the continued operation or driving of the car across the center line and into collision with the plaintiff. The plaintiff had a verdict in the trial court; the court of appeals reversed and remanded the case, holding that plaintiff had not made a submissible case and finding error in the verdict-directing instruction of the plaintiff; the supreme court held that a submissible case was made but reversed and remanded the cause for error in the instructions. The principal errors were that the instruction ignored the factual element of skidding, and that it assumed that the defendant operated her automobile across the center line, thus excluding the possibility of an accidental or non-negligent skidding as the proximate cause.

Driving an automobile by the plaintiff in violation of a statute forbidding any person to operate a motor vehicle while in an intoxicated condition constitutes negligence per se, but violation of the statute does not constitute proximate cause either to constitute contributory negligence in plaintiff's cause against a negligent defendant or to enable the defendant to recover on his counterclaim against the plaintiff. In *Bowman v. Heffron*, the facts necessary to establish causal connection between the violation of the statute and the collision and injuries to the defendant, and between the violation of the statute and the plaintiff's own injuries should have been hypothesized and submitted to the jury. No facts were submitted in the instruction on the issue of proximate cause "as to how or why such condition of plaintiff produced the collision and injuries to the defendant, nor as to why or how plaintiff's intoxicated condition in operating the car contributed to his own injuries. The submission of proximate cause in general terms constituted reversible error.

3. Carriers

The number of reversals of the Missouri supreme court on certiorari

17. 318 S.W.2d 269 (Mo. 1958).
18. Id. at 274.
to the United States Supreme Court in cases based on the Federal Employers' Liability Act,\(^{19}\) would seem to indicate that the interpretation of the act is tending to make the employer an insurer of the safety of the employees while on duty. In *Moore v. Terminal R.R. Ass'n*,\(^{20}\) the injuries were sustained by a mail and baggage handler employed by the defendant, when a train while backing into the station came into contact with a flat wagon the plaintiff was pulling and caused him to be pushed against a train standing on another track. A verdict for the employee in the trial court was reversed on appeal to the Missouri supreme court on the grounds the evidence established that plaintiff's act of turning his wagon more sharply than was necessary caused the contact with the train, and that there was no evidence of negligence on the part of the defendant. The per curiam opinion by the United States Supreme Court reversed the fully considered opinion by the Missouri supreme court as follows:

The petition for writ of certiorari is granted. The judgment of the Supreme Court of Missouri is reversed and the case is remanded for proceedings in conformity with this opinion. We hold that the proofs justified with reason the jury's conclusion that employer negligence played a part in producing the petitioner's injury... [citing cases].\(^{21}\)

Mr. Justice Whittaker, with who Mr. Justice Burton joined, dissented on the ground that the Missouri supreme court was right in holding that there was nothing to submit to the jury to show negligence on the part of the employer:

To hold that these facts are sufficient to make a jury case of negligence under the Act is in practical effect to say that a railroad is an insurer of its employees. Such is not the law.\(^{22}\)

On remand, the Missouri supreme court\(^{23}\) considered instructions refused and given but found no prejudicial error.

Much the same problem was presented in *Rogers v. Thompson*\(^{24}\) where the United States Supreme Court had reversed the Missouri supreme court which had held that the plaintiff had failed to make a sub-


\(^{20}\) 312 S.W.2d 769 (Mo. 1958).

\(^{21}\) 358 U.S. 31 (1958).

\(^{22}\) Id. at 35.

\(^{23}\) 321 S.W.2d 458 (Mo. 1959).

\(^{24}\) 308 S.W.2d 688 (Mo. 1958)
missible case under the Federal Employers' Liability Act for personal injuries. In remanding the case "for proceedings not inconsistent with this opinion," what questions were left exclusively for consideration and disposition by the Supreme Court of Missouri? The latter court in ruling that the plaintiff had not made a submissible case, had not passed upon the instructions nor on the matter of the excessiveness of the damages. Since the reversal by the United States Supreme Court held that a submissible case had been made under the Federal Employers' Liability Act, on remand the Missouri supreme court interpreted that action as disposing of the contention now made that the plaintiff's instruction was erroneous because it failed to hypothesize certain facts essential to plaintiff's recovery, even though it had not been considered or passed on by the Missouri supreme court when the case was first before it. But the question of the excessiveness of the verdict being a nonfederal question, could now be passed upon on the remand.

In an action by a bus passenger against the defendant bus company for injuries allegedly sustained while alighting from the bus, an instruction "that when the operator of a common carrier stops a bus and opens the door thereof that said common carrier is assuring passengers thereon that they can alight from said bus in safety" was held, in Lockhart v. St. Louis Pub. Serv. Co., to make "the carrier an insurer of the safety of the passengers in alighting from the bus when the carrier is only required to use the highest degree of care in selecting a reasonably safe place for that purpose." The judgment was reversed on other grounds, however.

25. Id. at 689.
26. 318 S.W.2d 177 (Mo. 1958).
27. Id. at 180.
28. In Henderson v. Taylor, 315 S.W.2d 777 (Mo. 1958), it is recognized that a public ferryman is a common carrier and is legally responsible to exercise the highest degree of care in equipping the ferry with proper safeguards to protect automobiles from going off the ferry into the water, but he is not required to equip his boat so as to prevent abnormal casualties of a character not reasonably to be anticipated. Here the foot brakes failed completely on plaintiff's automobile before or after plaintiff started his automobile down a rather steep approach to the river ferry landing. The impact broke the log chain across the river end of the ferry and the automobile plunged into the river. The log chain was adequate to prevent automobiles from going off the ferry because of normal or usual movements of automobiles on the ferry. There is no duty on a ferryman to inspect each automobile before it is driven on the ferry to ascertain whether its brakes are in good working order and the defendant had no knowledge of the condition of the brakes on plaintiff's automobile. No submissible case was made.
4. Supplier of Articles

The en banc decision in Haberly v. Rearden Co., although applying New York law because the accident occurred in that state, is considered in some quarters as one of the big, important cases in the still-expanding area of products liability. The action was by a twelve year old boy for damages resulting from the permanent blinding of the boy when cement base paint, known as Bondex, accidentally lodged on the eye ball. The boy was assisting his father scrape away debris from bricks which the father wanted to paint. While the boy was shifting position, his right eye came in contact with a paint brush dripping with Bondex which his father was holding at his side. Immediate pain was experienced and the parents quickly ran water into the eye. Within five to seven minutes, the boy was on the operating table of a hospital, but the eye was so burned that sight, other than ability to distinguish between light and dark, was permanently gone. In a four to three decision, the court held that a jury question was presented as to whether the manufacturer could have reasonably anticipated the likelihood of paint getting into the eyes of the user or of those who would be helping users, and that it was not the exact manner of the occurrence which must have been reasonably foreseeable but merely the hazard or risk that such paint by some accidental means would lodge in the eye of one helping the user or otherwise in the vicinity of its user. Under the law of New York, the manufacturer was held to owe a duty to the son adequately to warn his father, as the user of the paint, of the danger to the son if the paint lodged in the son's eyeball as a result of the use of the paint in the usual and expected manner, unless the danger was known or should have been known to the father or unless the danger was patent.

The decision is worth careful study on the problem of foreseeable risks by the supplier of products and on the adequacy of a warning of dangers printed on the container of the product. Judge Hyde dissented on the ground:

that, while a manufacturer may be liable for injuries caused by the use of his product in the manner and for the purpose for which it is supplied, he is not liable for negligence of those who use it. In short, he warrants the safety of his product for its

29. 319 S.W.2d 859 (Mo. 1958) (en banc).
intended use but does not warrant that all users will act without negligence in using it.\textsuperscript{30}

He was of the opinion that the negligence of the plaintiff and his father was the sole cause of the injury.

Although there may be a duty as to foreseeable risks owed to the person supplied by the supplier of a chattel this duty may be performed by an adequate warning. In \textit{Rice v. Allen},\textsuperscript{31} a truck owner had asked a mechanic to get the truck and check the brakes. The owner informed the mechanic that the foot brakes were out of repair, and there was no showing that the owner knew that the hand brake was not in good working order. The mechanic chose to drive the truck to the garage, rather than to have it towed in. While driving the truck both the foot brakes and the hand brakes failed and he was injured. The court held that violation of the statute requiring that all motor vehicles be provided at all times with two sets of adequate brakes, kept in good working order, was negligence per se, but there are factors of excuse or justifiable violations:

as long as there is warning of known dangers to those entitled to notice, it is certainly an 'excusable' or 'justifiable' violation of a mandatory brake statute for the owner to seek the repair of his brakes at the hands of an experienced mechanic and in this circumstance the violation of the statute may be wholly irrelevant to the plaintiff's particular claim upon this appeal.\textsuperscript{32}

The trial court's direction of a verdict in favor of the defendant was affirmed.\textsuperscript{33}

\textsuperscript{30} Id. at 870. Judge Leedy and Judge Storckman also dissented.
\textsuperscript{31} 309 S.W.2d 629 (Mo. 1958).
\textsuperscript{32} Id. at 632.
\textsuperscript{33} In \textit{Cohagan v. Laclede Steel Co.}, 317 S.W.2d 452 (Mo. 1958), the use which was being made of the manufactured product was not the purpose for which it was manufactured. A shipment of steel, which was being unloaded, fell due to the soft metal binder wire breaking when the steel buyer's employees placed a hard metal hook under the comparatively soft wire binder and undertook to lift a bundle of steel by means of a crane. The purpose of the wire binder was to hold together the more than 300 strips of steel in the bundle. There was no evidence of any agreement, express or implied, on the part of the manufacturer to wrap the bundle with wire of such strength that it could be hooked into for lifting the bundle of steel from the truck with an overhead crane when unloading the shipment. The fact that the wire wrapping may have been misused with impunity on isolated occasions did not establish a duty on the part of the manufacturer to make the wire in such manner that it could be safely misused. A judgment entered upon a directed verdict in favor of the seller and the transportation company was affirmed.
5. Municipal Corporations

Although the mere fact that one has been injured by a fall on a street is insufficient to support the inference of a city's negligence or of sufficient substantiality to support a submission of the issue of negligence, an instruction to the effect that the mere fact that a pedestrian was injured by a fall upon the city's street was no evidence that the city was negligent in keeping its streets in a reasonably safe condition, and that the pedestrian had the burden of proof of showing negligence, was held, in *Ritterhouse v. City of Springfield*,\(^{34}\) to be prejudicially erroneous in excluding from the jury's consideration, in determining the issue of the city's negligence, the fact that the pedestrian was injured by a fall upon the city's street. The opinion further states: "in fact, we believe it to be absolutely untrue to say that the mere fact that plaintiff was 'injured by a fall' upon City's street was *no evidence* of itself that defendant was negligent;" and that "the mere fact of itself is some evidence of the city's negligence" which should not be excluded from the jury's consideration as a circumstance to be considered on the issue of negligence in conjunction with the other shown facts and circumstances. The opinion observes "It is possible that this court has not always been of this opinion."\(^{35}\)

6. Humanitarian Negligence

The torts cases predicated on the humanitarian doctrine will be covered separately in the next issue of the Review by Mr. Becker, so that more adequate consideration may be given to this important Missouri doctrine.

B. *Res Ipsi Loquitur*

The applicability of the rule of res ipso loquitur to the bursting of an underground water main owned, operated, and under the exclusive control of a city had not been directly decided by an appellate court in Missouri, until the case of *Adam Hat Stores v. Kansas City*.\(^{36}\) There the action was against the city for water damage resulting from a break in the city's underground water main, installed and maintained under the exclusive control of the city. One of its six-inch cast-iron mains, laid approximately four feet below the surface of the street at some time

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34. 319 S.W.2d 518 (Mo. 1959).
35. *Id.* at 520-21.
36. 316 S.W.2d 594 (Mo. 1958) (en banc).
prior to 1900, had split open. The cause of the break was unknown. Expert testimony stated that ninety percent of all municipal water mains were made of cast iron, having a minimum duration expectancy of 100 years or more, and that cast-iron water mains break because of excessive internal water pressure, excessive impact from traffic over the surface of the street, settlement of soils, and electrolysis. The expert witness was of the opinion that the pipe could have broken because of uneven settlement of the soils. The court en banc in holding that the doctrine res ipsa loquitur was applicable in making a submissible case of negligence said:

Admittedly, a water main, if properly laid and sound when laid, ordinarily would last without breaking for a minimum of 100 years, in the absence of internal or external violence. It is reasonable to infer therefore, that when the main broke after some 53 years of service, approximately one-half of its minimum expected duration, the pipe either was defective when laid, was carelessly laid or maintained or was subjected to such internal or external force as to cause it to break, or that it broke as a result of a combination of one or more of those causes.37

The opinion may be considered as another contribution to this area of negligence law. Two judges dissented on the ground that the court could not “take judicial notice, as a matter of common knowledge and experience, that the accident could not have occurred but for negligence on the part of the defendant.”38

The doctrine res ipsa loquitur was also applied to injuries received by a switchman when he was struck by a swinging rear door of a truck while he was guarding a crossing;39 to injuries sustained by one doing work for defendant when a metal scaffold furnished by defendant, on which the plaintiff was standing, fell over;40 to injuries sustained when a plate glass window of defendant’s building abutting the sidewalk broke as the plaintiff was viewing merchandise through the window in a show room in that building;41 and to injuries received by a passenger in an automobile when it went onto the highway shoulder and overturned,

37. Id. at 598.
38. Id. at 601.
39. Bone v. General Motors Corp., 322 S.W.2d 916 (Mo. 1959).
41. Leisure v. J. A. Bruening Co., 315 S.W.2d 705 (Mo. 1958).
allegedly as a result of trying to avoid bales of hay which had fallen on the roadway from an approaching truck driven by the defendant.43

C. Proximate Cause

Where negligent conduct impairs the physical condition of another's body, whether the defendant is also liable for an injury sustained in a subsequent accident which would not have occurred had the other's bodily efficiency not been impaired, was presented in Bowyer v. Te-Co.44 There the first injury due to the defendant's negligence was to the plaintiff's right ankle. After the cast was removed and plaintiff was advised to bear weight on the leg and ankle, he discarded his crutches and attempted to resume his duties without the use of a cane, but his right ankle was still stiff and had been weak ever since the original break. The following month, he attempted to step from the ground to a porch extending in front of his granary. The porch was seven inches above the ground. As he placed his weight upon his right ankle to lift his left foot to the porch his right ankle would not hold him and he fell, the fall breaking his left ankle. Where through no fault of his the plaintiff rebreaks the same leg while recuperating, or where after the leg mends he suffers another break to the same leg due to its permanently weakened condition and which would not have broken otherwise, the courts have little difficulty in finding that the original negligence was the cause of the subsequent injury. The instant case goes one step further in that the second accident causes an injury to some other part of the plaintiff's body. The evidence was held sufficient "to support a finding that the second fracture was a natural and proximate consequence of the same negligent act which caused plaintiff's first fall and fracture."44

D. Defenses in Negligence Cases

In Welcome v. Braun,45 an instruction in an intersection collision was held to be prejudicially erroneous which provided that after plaintiff entered the intersection if she could have seen the approaching automobile of the defendant if she had looked to the north, could have realized that there was danger of a collision and could have brought her auto-

42. Layton v. Palmer, 309 S.W.2d 561 (Mo. 1958).
43. 310 S.W.2d 892 (Mo. 1958).
44. Id. at 900.
45. 319 S.W.2d 586 (Mo. 1958).
mobile to a stop before going into the path of defendant's car, that failure to do these things was contributory negligence. The court held that this placed upon the plaintiff the absolute duty of seeing and knowing what she could have seen and known and the additional duty of stopping if she could have done so, whereas plaintiff was only required to exercise the highest degree of care in looking, seeing, realizing and in endeavoring to stop.

A motorist familiar with a railroad crossing and knowing of its exact location drove his automobile at nighttime into the side of defendant's moving freight train. The approach to the crossing was around an "S" curve which did not straighten out until approximately 100 feet before coming to the crossing. Driving at a rate of speed which precluded him from stopping after he could see the freight train moving across the highway crossing, was held in Turner v. Illinois Cent. R.R.\textsuperscript{46} to constitute contributory negligence as a matter of law.\textsuperscript{47}

To drive an automobile at night into the rear of an unlighted trailer unit which was parked along the curb in a city where vehicles normally park and may be expected to be, was held in Lemken v. Brooks Truck Lines, Inc.\textsuperscript{48} to constitute contributory negligence as a matter of law. The motorists view to the place where the trailer unit was parked was unobstructed for 250 feet, the night was dark and clear, the motorists' headlights and brakes were in good working order, the motorists needed to turn to his left only two or three feet to have cleared the trailer unit, and there was no other diverting or distracting event. The case was distinguished from collisions with stationary vehicles which were blocking travel portions outside the limits of a city, where there would be no reason to anticipate the presence of stationary trucks.

\textbf{E. Burden of Proof}

The court for some time had been admonishing against the giving of

\textsuperscript{46} 319 S.W.2d 539 (Mo. 1959).
\textsuperscript{47} Under Kansas law is Caraway v. A.T. & S.F. Ry., 318 S.W.2d 331 (Mo. 1958), where it was held that a motorist, traveling at such speed as to be unable to stop his vehicle short of the pathway of an approaching train when he came to a place where his view was unobstructed, would be contributorily negligent as a matter of law; but in view of other evidence that a warning device had failed, contributory negligence was for the jury.
\textsuperscript{48} 322 S.W.2d 803 (Mo. 1959).
a burden of proof instruction which includes the phrase "to the satisfaction of the jury." In Highfill v. Brown,\(^4^9\) the court again says:

Instruction on burden of proof in civil cases requiring the jury to find that the burden of proof must be sustained by 'the greater weight of the credible evidence, to the satisfaction of the jury' have been condemned by this court so often that it is difficult to understand that any party litigant would risk asking that such instruction be given. In fact, such instructions should not contain the phrase, 'to the reasonable satisfaction of the jury.' All that should be required is that the party on whom the burden is cast must prove his case by a preponderance, that is, the greater weight of the credible evidence. [Citing Missouri cases condemning this phrase.]

If the trial court grants a new trial containing these "satisfaction" phrases, the supreme court will defer to that ruling.\(^6^0\)

\(^{49}\) 320 S.W.2d 493, 497 (Mo. 1959). There is also a similar warning in Hustad v. Cooney, 308 S.W.2d 647 (Mo. 1958).

\(^{50}\) Ilgenfritz v. Quinn, 318 S.W.2d 186 (Mo. 1958). In Jewell v. Arnett, 318 S.W.2d 277 (Mo. 1958), an instruction to the effect that the burden of proof rests upon the plaintiff to prove by the preponderence or greater weight of "all the evidence" in the case was held not to constitute prejudicial error because of the omission of the word "credible".