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Torts–Jury Instructions–a Clarification of the Differences between the Humanitarian Negligence Instruction and the Apparent Danger Instruction in Missouri

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which has arisen under the section and rule 10b-5 suggests that the purchase or sale requirement should not be disregarded. The *Penn Central* decision, while not presenting the most convincing rationale, is consistent with these policies. While the notion of purchase or sale has been expanded to include corporate mergers, the limits of this expanded notion do not extend to an internal reorganization, at least not to the type involved in *Penn Central*.

PAUL V. HERBERS

TORTS—JURY INSTRUCTIONS—A CLARIFICATION OF THE DIFFERENCES BETWEEN THE HUMANITARIAN NEGLIGENCE INSTRUCTION AND THE APPARENT DANGER INSTRUCTION IN MISSOURI

*Curran v. Bi-State Development Agency*¹

Plaintiff was injured when he was struck by a bus owned and operated by defendant. Testimony indicated that the bus started from a stopped position and struck plaintiff who was standing either about four feet in front of the bus or near the front door on the right side of the bus. Plaintiff sued for damages, alleging both primary and humanitarian negligence. Verdict and judgment were rendered in favor of plaintiff, from which defendant appealed. The St. Louis District of the Missouri Court of Appeals reversed, holding that the evidence did not support the humanitarian submission in plaintiff's verdict-directing instruction. The court held that the plaintiff's position of immediate danger was not so certain, immediate, and impending for a sufficient length of time for the humanitarian doctrine to be applied.² Also, where the immediate danger arises only because of something defendant is about to do, and immediate injury results from defendant's act, the case should be submitted on a theory of primary negligence, not humanitarian negligence.³

This case illustrates a problem which has often confronted attorneys handling automobile accident cases in Missouri: how to determine when there is sufficient evidence to submit the humanitarian negligence instruction, Missouri Approved Jury Instruction (MAI) 17.14,⁴ and when there

1. 522 S.W.2d 98 (Mo. App., D. St. L. 1975).
2. Id. at 99.
3. Id. at 100.
4. MO. APPROVED INSTR. § 17.14 (1969):
   Your verdict must be for plaintiff [whether or not plaintiff was negligent] if you believe:
   1. First, plaintiff was in a position of immediate danger of being injured and was injured, and
   2. Second, defendant knew or by using the highest degree of care could have known of such position of immediate danger, and
   3. Third, at the moment when defendant first knew or could have known...
is sufficient evidence to submit the primary negligence instruction for failure to act after danger of a collision becomes apparent, MAI 17.04.\textsuperscript{5} The function of a verdict-directing instruction is to relate to the jury the existing law as it pertains to the facts of the instant case. Thus there must be substantial evidence to support any verdict-directing instruction which is submitted to the jury.\textsuperscript{6} If both negligence theories are submitted, each must be supported by the evidence.\textsuperscript{7} If either submitted theory is not supported by the evidence, the submission of both is reversible error.\textsuperscript{8} It is clearly to the plaintiff’s advantage to submit his case on the humanitarian theory if the evidence supports such a submission because contributory negligence is not a defense to humanitarian negligence.\textsuperscript{9}

The major difference between the two instructions is the distinction between the requirement of a condition of “immediate danger” (humanitarian negligence) and the requirement of a condition of a “reasonable likelihood of a collision” (primary negligence). Courts have interpreted “immediate danger” to mean a situation in which plaintiff and defendant are on a collision course and in which the collision is practically certain to occur if the circumstances remain unchanged. The term “collision course” includes the situation where both plaintiff and defendant are moving toward a point of collision and the situation where plaintiff is stationary and defendant is moving directly toward him. “Reasonable likelihood of collision” does not require the existence of a collision course. It only re-


\begin{itemize}
  \item Of such position of immediate danger, defendant still had enough time so that by using the means available to him and with reasonable safety to himself and all others and by using the highest degree of care he could have avoided injury to the plaintiff by slackening his speed and swerving, and
  \item Fourth, defendant negligently failed to so slacken his speed and swerve, and
  \item Fifth, plaintiff’s injury directly resulted therefrom.
\end{itemize}

(Footnotes omitted). Evasive actions other than slackening and swerving may be hypothesized. MAI 17.15, the disjunctive humanitarian instruction, is substantially the same.

5. Mo. APPROVED INSTR. § 17.04 (1969), as typically used in conjunction with § 17.01:

Your verdict must be for plaintiff if you believe:
First, defendant knew or by the use of the highest degree of care could have known that there was a reasonable likelihood of collision in time thereafter to have slackened his speed but defendant failed to do so, and
Second, defendant was thereby negligent, and
Third, as a direct result of such negligence the plaintiff sustained damage.

8. Id.
quires that a collision be likely to occur—i.e., a collision course is likely to develop.

The facts required for the operation of the humanitarian rule were authoritatively set forth in Banks v. Morris & Company:10

(1) Plaintiff was in a position of peril ["immediate danger" under the present formulation]; (2) defendant had notice thereof (if it was the duty of defendant to have been on the lookout, constructive notice suffices); (3) defendant after receiving such notice had the present ability, with the means at hand, to have averted the impending injury without injury to himself or others; (4) he failed to exercise ordinary care to avert such impending injury; and (5) by reason thereof plaintiff was injured.11

The primary negligence submission herein discussed, MAI 17.04, includes requirements very similar to, if not exact equivalents of, the last four humanitarian factors.12 Both submissions require that defendant knew or should have known of the danger, that he had the ability to avoid the collision, that he was negligent in failing to take evasive action, and that his negligence caused plaintiff's injury. But the initial and basic requirements for the two submissions are distinguishable.

The humanitarian negligence instruction contains a prerequisite that plaintiff be in a position of "immediate danger,"13 whereas the primary negligence instruction is premised on the existence of a "reasonable likelihood of collision."14 To meet the humanitarian requirement of immediate danger, a bare possibility of injury is not sufficient. Plaintiff's peril must be "certain, immediate, and impending; it may not be remote, uncertain or contingent."15 Immediate danger has been defined as that position of danger in which, if the existing circumstances remain unchanged, injury is reasonably certain and not contingent on some other occurrence.16 The

10. 302 Mo. 254, 257 S.W. 482 (1924).
11. Id. at 257, 257 S.W. at 484.
12. See Bolhofner v. Jones, 482 S.W.2d 80, 83 (Mo. App., D. St. L. 1972), where the court said:

This submission has elements akin to a humanitarian negligence case in that a defendant's duty arises at the moment he has actual or constructive notice of the likelihood of a collision, and his negligence is measured by his ability thereafter to avoid the collision.

13. Mo. APPROVED INSTR. §§ 17.14, 17.15 (1969). The committee comments discuss the language used:

The words "immediate danger" have been substituted for the traditional words "imminent peril." In the past lawyers have used the words "imminent peril" and then given a definition instruction telling the jury that "imminent peril" means "certain and immediate danger." If "imminent peril" means "immediate danger" it seems far simpler to use the correct term in the first place and avoid the need for a further definition.

15. McClanahan v. St. Louis Public Service Co., 363 Mo. 500, 505, 251 S.W.2d 704, 707 (En Banc 1952). See also Clifton v. Crider, 486 S.W.2d 274 (Mo. En Banc 1972); Leap v. Gangelhoff, 416 S.W.2d 65 (Mo. 1967).
16. Clifton v. Crider, 486 S.W.2d 274, 277 (Mo. En Banc 1972); See also Brummet v. Parker, 509 S.W.2d 10 (Mo. 1974); Elam v. Allbee, 432 S.W.2d 379 (Mo., App. 1967).
court in *Curran* stated that there must be some "inexorable circumstance, situation or agency bearing down on the plaintiff."\(^{17}\)

Courts distinguish between physical peril, where plaintiff is physically unable to remove himself from danger, and mental peril, where plaintiff is physically capable of escaping the danger, but will not do so because he is oblivious to the danger.\(^{18}\) The latter is a wider zone of danger.\(^{19}\) When a case involves physical peril only, a plaintiff moving toward the path of a moving vehicle is not in a position of immediate danger until he is directly in the path of the vehicle, or so close thereto that, given his speed and all other existing conditions, he cannot stop short of its path.\(^{20}\) However, if plaintiff is oblivious, the zone of danger is expanded. If plaintiff is moving toward the path of a moving vehicle on a course which will produce a collision if he does not stop, and he is oblivious to the approach of the vehicle, he is at that early point in a position of immediate danger.\(^{21}\) Of course, where the zone of immediate danger is widened by plaintiff's obliviousness, the humanitarian rule still imposes no duty upon defendant until the fact of plaintiff's obliviousness is discoverable.\(^{22}\) In both physical peril and mental peril cases, it is clear that there is no position of immediate danger until plaintiff and defendant are on a collision course.\(^{23}\)

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18. See also Russell v. St. Louis County Cab Co., 493 S.W.2d 28 (Mo. App., D. St. L. 1973).
20. See Findley v. Asher, 334 S.W.2d 70 (Mo. 1960).
22. *Findley v. Asher*, 334 S.W.2d 70 (Mo. 1960); *State ex rel. Thompson v. Shain*, 349 Mo. 27, 35, 159 S.W.2d 582, 586 (En Banc 1941). When the facts of a case reveal that the issue of obliviousness could reasonably be raised, the plaintiff is presented with another problem. If he wishes to submit the humanitarian instruction, he will present evidence showing obliviousness in order to widen the zone of danger. But if he wishes to submit the primary instruction, he will want to keep out all evidence of obliviousness in order to avoid a finding of contributory negligence.
23. *State ex rel. Thompson v. Shain*, 349 Mo. 27, 35, 159 S.W.2d 582, 586 (En Banc 1941); Ewen v. Spence, 405 S.W.2d 521, 523-24 (Spr. Mo. App. 1966). At times the courts have stated that the *position of immediate danger itself does not arise until plaintiff’s obliviousness is discoverable*. See, e.g., *Findley v. Asher*, 334 S.W.2d 70, 73 (Mo. 1960). In either case, the humanitarian rule imposes no duty upon defendant until plaintiff’s obliviousness is discoverable. It seems more logical to treat the position of immediate danger as arising at the point at which plaintiff’s obliviousness will prevent him from avoiding a collision and let the discoverability of plaintiff’s obliviousness go to the requirement of notice, as the court did in *Thompson*. Otherwise, there exists the anomaly that plaintiff is in a position of immediate danger if defendant is able to discover his obliviousness (in which case defendant is likely to take action to avoid a collision), but plaintiff is not in a position of immediate danger if defendant cannot discover his obliviousness (in which case defendant is less likely to take evasive action).
In *Burns v. Maxwell*\(^24\) the Missouri Supreme Court upheld the submission of the humanitarian instruction. In that case a collision occurred at an intersection after plaintiff pulled out in front of defendant's approaching vehicle, defendant having had a clear view of the intersection. The court noted that the jury could find that sometime after plaintiff began to move across the intersection at a slow speed, she came into a position of immediate danger by reason of her fixed purpose of entering the path of defendant's travel. The position of immediate danger existed before plaintiff actually entered the path of defendant's oncoming vehicle, but *not* before the vehicles were on a collision course.

In *Yarrington v. Lininge*\(^25\) the supreme court found the submission of the same instruction reversible error. A collision occurred when a third party, attempting to pass plaintiff's vehicle, struck defendant's oncoming vehicle and deflected into the side of plaintiff's vehicle. The court held that plaintiff was not in a position of immediate danger until the passing vehicle started its sideways movement toward plaintiff's vehicle.\(^26\) Not until that moment was plaintiff on a collision course with the passing vehicle, and then it was too late for defendant to take evasive action.

The "reasonable likelihood of collision" concept stated in the primary negligence instruction is one which the courts have been less willing to define. The concept defines a condition which is much less certain to result in a collision than is a condition of immediate danger. A reasonable likelihood of collision exists when by the exercise of due care defendant would realize that a collision is likely to occur unless he takes evasive action.

MAI 17.04 was drafted in conformity with a rule of law\(^27\) which was first stated in *Stakelback v. Neff*.\(^28\) The court there stated that the driver of a motor vehicle has no duty, upon approaching an intersecting street, to stop, decrease his speed, or swerve merely because he sees another vehicle in the street ahead of him. Such duty to take evasive action arises only when the exercise of due care would lead him to believe that otherwise a collision would occur.\(^29\) More recently the Kansas City Court of Appeals stated that a motorist need not take evasive action merely because he sees another car approaching on his side of the road. The duty to take such action arises when the motorist should know that the driver of the approaching car is unable to or will not return to his side of the road.\(^30\)

The Missouri Supreme Court Committee on Jury Instructions cited a case,\(^31\) tried before the approved instructions were promulgated, in which

\(^{24}\) 418 S.W.2d 138 (Mo. 1967).

\(^{25}\) 327 S.W.2d 104 (Mo. 1959).

\(^{26}\) Id. at 110-11.


\(^{28}\) 1962, 2d 575 (St. L. Mo. App. 1929).

\(^{29}\) Id. at 577. See also Miller v. Greis, 396 S.W.2d 642, 646 (Mo. 1965); Hawkeye-Security Insurance Co. v. Thomas Grain Fumigant Co., 407 S.W.2d 622, 627 (K.C. Mo. App. 1966).


the Missouri Supreme Court approved the use of instructions similar to MAI 17.04. In that case a horse was killed and its rider injured when the horse backed into the side of defendant's passing truck.\(^{32}\) The court noted that the actions of the horse gave defendant notice of plaintiff's inability to control the horse twelve seconds before the collision. During that time, there existed a reasonable likelihood of collision, even though the truck and the horse were not on a collision course.

In *Offenbacher v. Sodowsky*\(^ {33}\) a collision between two cars occurred ahead of defendant's truck. Defendant, trying to go around the collision, struck one of the cars, the driver of which was killed. The court upheld the submission of MAI 17.04, hypothesizing a failure to stop. Disregarding defendant's contention that the evidence must show that defendant's truck and plaintiff's car were on a collision course, the court found the evidence sufficient for a jury to reasonably conclude that when the two cars collided there existed a reasonable likelihood of a collision involving defendant's truck. The court said that defendant should have known that colliding automobiles frequently do not remain in the traffic lane where the collision occurs. The court pointed out that in order for a reasonable likelihood of a collision to exist, it is not necessary that a person anticipate an occurrence exactly as it happened.\(^ {34}\)

The following hypothetical illustrates the difference in applicability of the two instructions. A small child is walking along the shoulder of a highway bouncing a ball 200 feet ahead of defendant's automobile which is traveling at 50 miles per hour. The ball eludes the child and bounces onto the highway. The child makes no immediate attempt to retrieve it. Defendant continues at a constant rate of speed. When defendant is 25 feet from the child, the child scampers into defendant's path to retrieve the ball. Defendant at this point is unable to stop or swerve and strikes the child. The humanitarian instruction does not apply because there was no collision course, and therefore no immediate danger, until the child began to move toward defendant's path. At that time it was too late to take evasive action. However, the dangerous situation existed and could be seen by defendant from 200 feet away when the ball bounced onto the highway. At that point defendant could have slackened his speed or taken other precautionary action. Therefore, the apparent danger instruction is applicable to this situation.\(^ {35}\)


\(^{33}\) 499 S.W.2d 421 (Mo. 1973).

\(^{34}\) *Id.* at 423-24; Creager v. Chilson, 453 S.W.2d 941, 945 (Mo. 1970).

\(^{35}\) As a practical matter, when the plaintiff is a child, instruction 17.04 may be as advantageous to the plaintiff as is the humanitarian instruction. This is because, although the fact that the plaintiff is a child does not preclude the defense of contributory negligence, the standard for judging a child's conduct is the care and prudence "ordinarily exercised by one of the age, intelligence, discretion, knowledge and experience of the particular plaintiff, under the same or similar circumstances." Bollman v. Kark Rendering Plant, 418 S.W.2d 39, 46 (Mo. 1967). Human nature being what it is, a jury is not likely to find that a child was contributively negligent except in an extraordinary case.
The apparent danger instruction and the humanitarian instruction are identical in several respects. Both require that defendant have actual or constructive notice of the danger; that defendant, after receiving such notice, have the present ability to avoid injury to the plaintiff; that defendant be negligent in failing to avoid such injury; and that there be a proximate causal connection between that negligence and plaintiff's injury.36

The major distinction between the two instructions goes to the very basis of each doctrine. For the humanitarian instruction to be submissible, the prerequisite of a condition of immediate danger is met only if the evidence shows that defendant and plaintiff were on a collision course. The apparent danger instruction's basic requirement of a reasonable likelihood of collision does not necessitate a showing that defendant and plaintiff were on a collision course. Only a showing that a collision was reasonably likely is required.

Of course, in all cases a collision course will eventually have developed because a collision will have occurred. But the crucial time for determining the necessity *vel non* of showing a collision course is the time at which defendant had the ability to take effective evasive action. For a submission of the humanitarian instruction, such a showing is required, whereas it is not required for a submission of the apparent danger instruction.

Proof of the existence of a danger of a collision should require less specific and detailed evidence than does proof of the existence of a collision course. So, although the evidentiary requirement is the same for purposes of showing that defendant had the present ability to take effective evasive action after the dangerous condition was actually or constructively known by him,37 the evidentiary requirement for purposes of showing that the dangerous situation existed in the first instance should be more lenient under the apparent danger instruction than under the humanitarian instruction.

The humanitarian instruction can be very helpful to a plaintiff who may have been contributorily negligent. However, as Curran and a significant number of other cases make clear, Missouri appellate courts readily reverse judgments based on that instruction when there was insufficient evidence to support its submission.

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36. MAI 17.04 is actually very similar to the general lookout instruction, MAI 17.05. These two instructions have been interpreted to entail the same requirements. MAI 17.05, like 17.04, requires evidence showing that there was time to take effective evasive action. See Young v. Grotsky, 459 S.W.2d 306 (Mo. 1970); Corbin v. Wennerberg, 459 S.W.2d 505 (K.C. Mo. App. 1970). MAI 17.05 applies even though defendant saw the dangerous situation, if he failed to take action to prevent the injury to plaintiff. See Young v. Grotsky, 459 S.W.2d 306 (Mo. 1970); Jackson v. Skelly Oil Co., 413 S.W.2d 239 (Mo. En Banc 1967).

37. Both MAI 17.04 and 17.14 normally require specific evidence of speed, stopping distances, visibility, and other factors to show that defendant had the ability to take effective action. See, e.g., Cook v. Cox, 476 S.W.2d 978 (Mo. 1972).