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## **THE SUPREME COURT AND THE MISSOURI HUMANITARIAN DOCTRINE IN THE YEARS 1950 AND 1951**

WILLIAM H. BECKER, JR.\*

Suppose that the operators of two automobiles are approaching each other, on a collision course at equal rates of speed. Suppose each is negligently inattentive and unaware of the imminence of collision and probable personal injury to both. Suppose that each automobile is in good working order and that each of the operators could avoid the imminent collision by timely action by the means and appliances at hand. But suppose that neither does take any action to avoid the collision of their automobiles and suppose that both suffer substantial personal injuries as a result of the collision.

Under such circumstances neither automobile operator is in a position to recover for personal injuries on the grounds of primary common law or statutory negligence, because each is guilty of contributory negligence in failing to look out for other vehicles.

In Missouri, however, each operator can make a submissible case against the other under the formula of the humanitarian rule. And although the humanitarian rule has existed in Missouri for many years, we do not yet know the answer to these important questions: Can each of the injured automobile operators, in the same action, by claim and counterclaim, recover damages for personal injuries from the other? (Some competent authorities think so.<sup>1</sup>) Or, may neither recover against the other since they are equally at fault? Or, does the first to file his action have the sole right of recovery under the humanitarian rule?

Only when these important questions are answered by the Supreme Court of Missouri, will we know what this humanitarian doctrine is and what its future will be. The humanitarian doctrine is facing a pragmatic test.

### **DISTINCTION BETWEEN LAST CLEAR CHANCE RULE AND HUMANITARIAN RULE**

Over the years the Bench and Bar of Missouri have come to use the terms "humanitarian doctrine," "humanitarian negligence," and "humanitarian rule" without distinguishing between common law last clear chance

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1. See TRUSTY, CONSTRUCTING AND REVIEWING INSTRUCTIONS 245 (1945).

cases and the common law last clear chance rule, and the true humanitarian rule.

Under the common law last clear chance rule, there are three typical cases wherein an injured party is permitted to recover damages despite or regardless of his own contributory negligence. Hardly any one challenges the basic soundness of a common law last clear chance rule in the three typical situations. The common law last clear chance rule in the three typical fact situations has a good logical foundation; namely, that the party against whom recovery is permitted is chargeable with a greater degree of fault in the last critical moments when, by timely action, he might avoid injury to the party permitted to recover. *And what is equally important in the practical administration of the last clear chance rule is the fact that, in common law last clear chance cases where both parties are injured, they cannot simultaneously make cases for recovery each against the other, upon any assumed single version of the facts.* So, the courts have devised the common law last clear chance rule, soundly basing the rule upon relative degrees of fault; and, at the same time, in an excellent display of judicial craftsmanship, avoided the dilemma facing the Missouri courts by refusing to extend the rule to fact situations where the parties were equally at fault and had equal opportunities to avoid the casualty.

It is submitted that a great number of the cases dealt with by the Missouri courts as cases under the humanitarian rule are really common law last clear chance cases, and could be determined without the reference to the humanitarian rule. Probably, before there can be any resolution of the dilemma presented by the humanitarian rule, the courts will have to restrict the use of the words "humanitarian rule" to the true humanitarian case, illustrated as Case No. 4 hereinafter.

For the purposes of further reference and for the purposes of definition, the three typical common law last clear chance cases are stated as follows:

*Common Law Last Clear Chance Case No. 1:*

The peril to plaintiff's person, property, or both results from physical helplessness caused by plaintiff's lack of care. Defendant actually discovers the peril in time, thereafter, with safety to himself, to avoid damage to plaintiff by the exercise of care. This is a simple last clear chance case. The plaintiff may recover for personal injury and property damage despite his negligence in practically all common law jurisdictions. This result is well settled in Missouri

and not expected to be challenged; but this is *not* a humanitarian negligence case.

*Common Law Last Clear Chance Case No. 2:*

The facts are the same as in Case 1, except that the defendant does not actually discover the peril, but in the exercise of care he should have discovered it in time to avoid damage, by the exercise of care and with safety to himself. As in Case 1, a majority of courts permit plaintiff to recover for personal injury or property damage under the last clear chance rule. This is not a humanitarian negligence case, and the rule is not expected to be challenged.

*Common Law Last Clear Chance Case No. 3:*

The peril to plaintiff's person, property or both, results from plaintiff's negligent inattentiveness (obliviousness in Missouri judicial parlance). Defendant (as in Case 1) actually discovers the peril in time, thereafter, to avoid damage to plaintiff by the exercise of care. This is a last clear chance case. It is not a humanitarian case. The rule that plaintiff may recover seems settled in Missouri and elsewhere. There appears to be no serious challenge to the soundness of the right of plaintiff to recover in this case.

The Missouri courts have added a fourth type of case wherein the injured party may recover despite or regardless of his contributory negligence. It is this fourth type of case which is the subject of the true humanitarian doctrine. Under the true humanitarian doctrine, an injured party, whose peril is caused by his own negligent inattentiveness (obliviousness) can recover against another who was also negligently inattentive (oblivious), and not aware of the injured party's peril.

*In considering this true humanitarian case, it should be borne in mind that, upon a single assumed state of facts, each party can make a case for recovery under the humanitarian rule against the other, provided both parties suffer personal injuries.*

The typical true humanitarian case may be stated as follows:

The injured person is in a position of imminent peril as a result of his negligent inattentiveness (obliviousness). The injured party could extricate himself from his peril by his own efforts, if he were aware of his peril and used care. The defendant or party against whom claim for damages is made does not actually discover the peril of the injured party. Nevertheless, in the exercise of care the party causing injury should have discovered the peril in time

thereafter with safety to himself by the use of care to have avoided injury to the plaintiff. In other words the party causing injury is also negligently inattentive (oblivious). The Missouri courts permit recovery by the injured party in this case; and in this respect are more liberal than courts of other jurisdictions.

For years, during the horse and buggy age, there was little occasion to question the soundness of the operation of the Missouri humanitarian rule, since the defendant in the ordinary case was operating a railroad train and sustained no personal injury. The plaintiffs were usually pedestrians or occupants of light horse drawn vehicles, neither of them capable of causing injury to the defendant operator of the locomotive and train involved. So for many years, the Missouri courts without unsolvable difficulties, applied the Missouri humanitarian rule, merged with it the common law last clear chance rule, and referred to the combination of the two rules as the "humanitarian doctrine." But times changed. The automobile displaced the horse, and motorists began to drive their motor vehicles into each other with ever increasing fervor. Liability insurance became common, and it became possible for severely injured persons to secure verdicts in automobile personal injury cases from juries with some regularity if the plaintiff could avoid a directed verdict by the trial and appellate courts. Sometimes the true humanitarian rule offered the only possible theory of recovery.

Where, by chance, one operator sustained personal injuries in an automobile collision and the other did not, no difficulty in administering the humanitarian rule was readily apparent. It is true that attempts were probably made from time to time to assert the rule defensively in behalf of the uninjured defendant, but these attempts were rebuffed with the ready answer that the rule grew out of humane considerations and applied only in favor of persons sustaining personal injury.

But there were collisions in which both operators suffered substantial personal injuries, and both were negligently inattentive and each had equal opportunity to avoid collision and consequent injury to the other by timely use of the means and appliances available. What should be the result if, in such a case, each operator asserts a claim for damages against the other, and each asserts humanitarian negligence as a defense to the other's claim? For years a decision of the questions presented has been avoided by the Missouri courts.

Once, a case came to the Supreme Court of Missouri wherein a jury had rendered verdicts for both plaintiff and defendant. Fortunately, or unfortu-

nately, as one sees it, the supreme court found it did not have jurisdiction to entertain the appeal and sent the case to the Kansas City Court of Appeals for disposition.<sup>2</sup> Confronted with the dilemma, the court of appeals grudgingly accepted jurisdiction and was able to find that an erroneous instruction had been given and approved the granting of a new trial. Again, fortunately, or unfortunately, as one sees it, the case was disposed of without again vexing the appellate courts.<sup>3</sup>

#### THE CASES IN 1950 AND 1951

During the years 1950 and 1951, a substantial number of cases involving the humanitarian rule or the last clear chance rule were decided by the court *en banc*. The sole cause defense instruction continued its stormy career, very nearly becoming exterminated in *Janssens v. Thompson*.<sup>4</sup> In that case, by a four to three decision, the sole cause defense instruction survived.<sup>5</sup> During 1950 and 1951, the court continued to be pre-occupied with the propriety of instructions, and the submissibility of last clear chance and humanitarian cases. Sometimes the controversy over instructions involved more than procedural questions. Frequently, consideration of the propriety of an instruction turned upon factors touching the nature of the doctrine itself. In fact, much of the disagreement and unsettled condition of the decisions results from the attempt of the court to make the doctrine a workable one in automobile cases without radical reexamination of the underlying principles. There is one aspect of the decisions for the years 1950 and 1951 which may be applauded by most practitioners. In some instances, the court has undertaken not only to point out error in instructions, but has followed this negative declaration with an exposition and example of what it considered to be a proper instruction.<sup>6</sup> In *Hunt v. Chicago, M. St. P. & P. R.R.*,<sup>7</sup> the court *en banc* analyzed the "almost escaping cases" based upon the once leading case of *Gann v. Chicago, R. I. & P. Ry.*,<sup>8</sup> and overruled the

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2. *Ashbrook v. Willis*, 338 Mo. 226, 89 S.W. 2d 659 (1936).

3. *Ashbrook v. Willis*, 231 Mo. App. 460, 100 S. W. 2d 943 (1937). See the amusing opinion of Presiding Judge Shain therein, protesting the action of the Supreme Court in transferring the case to the court of appeals.

4. 228 S.W. 2d 743 (Mo. 1950).

5. The history of this instruction in Missouri is ably covered in Dean McCleary's article, *The Defense of Sole Cause in Missouri Negligence Cases*, 10 Mo. L. Rev. 1 (1945).

6. See *Harrington v. Thompson*, 243 S.W. 2d 519 (Mo. 1951) and *Colvin v. Mills*, 232 S.W. 2d 961 (Mo. 1950).

7. 225 S.W. 2d 738 (Mo. 1949).

8. 319 Mo. 214, 6 S.W. 2d 39 (1928).

*Gann* case as that case was understood by some members of the Bar.

On the whole, the opinions for 1950 and 1951 in this field appear to be written with more care and understanding than in the past, and there appears to be greater participation by all the members of the court in each case. Now, there is less evidence of the "one man opinion" in this field. So far as stability in the rules and reliability of the cases are concerned, this is a healthy development.

The St. Louis Court of Appeals transferred to the Supreme Court the case of *McClanahan v. St. Louis Public Service Company*,<sup>9</sup> because of the apparent conflict in the decisions of the supreme court dealing with a situation where the same negligent act creates the imminent peril and immediately produces the injury. For an example of the apparent conflict see *Bobos v. Krey Packing Co.*<sup>10</sup> and *Blaser v. Coleman*.<sup>11</sup> This is a problem common to last clear chance cases as well as humanitarian cases. A definite ruling is to be expected from the supreme court in 1952. Judge Houser in the *McClanahan* case carefully analyzes the problem and illustrates the confusion existing in this area. The theory is suggested that, at least in these cases, the rationale of the humanitarian rule is that the defendant's negligence is the equivalent of wilful wanton negligence rendering the contributory negligence immaterial, citing Judge Gant's opinion in *Cox v. Terminal R. Assn. of St. Louis*.<sup>12</sup> The ruling of the supreme court will be awaited with interest by the Bar.

#### *Cases Decided by the Court En Banc*

*Janssens v. Thompson*.<sup>13</sup> This was a death action arising out of a motor truck collision at a grade crossing of a railroad track by a slippery, muddy, gravel road. The court classified the case as a "muddy road" case wherein the apparent difficulties of the motor vehicle operator are sufficient to indicate obliviousness or negligent inattention.

The case was submitted solely upon "humanitarian" negligence in failing to slacken the speed of the train. There apparently was full concurrence in the decision that the case was submissible. However, it is significant that the Judges Tipton, Conkling, and Clark, in a special concurring opinion by

9. 242 S.W. 2d 267 (Mo. App. 1951).

10. 317 Mo. 108, 296 S.W. 151 (1927).

11. 358 Mo. 157, 213 S.W. 2d 420 (1948).

12. 331 Mo. 910, 55 S.W. 2d 685, 1. c. 686 (1932).

13. 228 S.W. 2d. 743 (Mo. 1950).

Judge Tipton, reached the conclusion that a sole cause instruction has no part in a humanitarian or last clear chance case. There is no assurance that this minority opinion will not become a majority opinion at some time in the future. Unless Judge Hollingsworth, who has succeeded one of the minority, aligns himself with the majority the giving of a sole cause instruction in a humanitarian case now becomes a calculated risk. The majority refers to Dean McCleary's excellent article upon the sole cause instruction.<sup>14</sup>

The *Janssens* case is also notable for its approval of a defense instruction in a crossing case and for its rejection of two defense instructions, one of which defined the term "imminent peril" and the other of which undertook to submit sole cause. The sole cause instruction in question was disapproved by all members of the court *en banc* because of its failure to hypothesize a factual situation which would exonerate the defendants, and for its tendency to inject antecedent contributory negligence into the case as a defense. In the majority opinion, Judge Hyde not only pointed out the error in the sole cause instruction in review, but undertook, with admirable courage, to set forth what would constitute a good instruction.

The sole cause defense instruction in humanitarian cases has been the subject of continual change of requirements by the supreme court, and it now appears it may not survive at all in humanitarian and last clear chance cases.

The *Janssens* case was a combination last clear chance case and humanitarian negligence case. Apparently, the jury were permitted to find for the plaintiff on the ground that the factual situation permitted a recovery under any of the four fact situations.

(The approval of the defense instruction was qualified. The opinion is subject to the interpretation that a trial court might find the instruction misleading and be sustained by the Supreme Court.)

*Pearson v. Kansas City Public Service Company*.<sup>15</sup> This case involved the striking of a pedestrian by a street car at an irregular street intersection in Kansas City. The case was submitted solely on "humanitarian" negligence in failing to stop. The plaintiff was in inextricable peril at the time the defendant's duty arose. Consequently, this is a last clear chance case number two or number three. The case was submitted in the alternative as a case of discovered or discoverable peril. The principal issue in the case

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14. *Supra*, n. 5.

15. 225 S.W. 2d 742 (Mo. 1950).



turned on factual interpretation of the record and prior testimony of the plaintiff. The court held that the plaintiff's prior testimony did not destroy his testimony at the trial, and that the case was submissible.

*Hillhouse v. Thompson*.<sup>16</sup> This case involved a daytime motor truck-train grade crossing collision. The case was submitted on "humanitarian" negligence in failing to slacken and to warn in the conjunctive as is permitted by Missouri practice. The deceased motor vehicle operator, who was killed as a result of the collision, was in peril because of his negligent inattentiveness (obliviousness). The defendant was either aware of the peril or negligently inattentive. The principal instruction submitted last clear chance negligence (Case 3) and true humanitarian negligence (Case 4). The opinion is notable for the reason that the court *en banc* approves the opinion of Division No. 1 in *Harrington v Thompson*,<sup>17</sup> in its interpretation of prior decisions concerning the necessity of submitting to the jury a finding as to the exact place where the injured party came into peril.

The opinion was written by Judge Ellison and concurred in fully by Judges Leedy and Tipton. Judges Dalton, Hyde, Hollingsworth, and Conkling concurred in the result only. The concurring opinion was written by Judge Dalton and is actually the majority opinion. Judge Dalton's majority opinion holds that a submissible case was made only upon the issue of failure to slacken speed. It further holds that while no submissible case was made upon the issue of failure to warn, error in submitting that issue was not prejudicial since the jury was required to find that both negligent omissions occurred. In view of the failure of a majority of the court to concur in Judge Ellison's opinion, it might be dangerous to accept Judge Ellison's opinion as a guide to the future.

In the *Hillhouse* case, the Springfield Court of Appeals, which rendered an opinion therein, held that evidence offered on pleaded primary negligence, which assignment of primary negligence was later abandoned, constituted error. Judge Ellison's opinion, for what it is worth, reversed the Springfield Court of Appeals on this issue.<sup>18</sup>

*Cable v. Chicago, B. & Q. R.R.*<sup>19</sup> This was an action for damages for personal injuries resulting from a grade crossing collision between a truck

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16. 243 S.W. 2d 531 (Mo. 1951).

17. 243 S.W. 2d 519 (Mo. 1951).

18. The opinion of the Springfield Court of Appeals is reported in 240 S.W. 2d 224 (Mo. App. 1951).

19. 236 S.W. 2d 328 (Mo. 1951).

operated by the plaintiff and one of the defendant's trains. The case was submitted solely on "humanitarian" negligence in failing to warn.

The plaintiff was unaware of the approach of the train. The fireman was aware of the approach of the truck. The question was whether the obliviousness of the plaintiff was reasonably apparent. Plaintiff's evidence showed that he approached the track on a serpentine road with his view obscured by high weeds; that at a point approximately thirty-eight feet from the crossing, he slowed nearly to a stop, shifted gears, and gradually increased his speed until he ran into the path of the train. During its last approach, the truck never exceeded three miles per hour and could have been stopped within two feet. Since the defendant was aware of the truck's approach, this was really a common law last clear chance case number three. In the course of the opinion, a court of appeals case cited by the railroad was overruled,<sup>20</sup> because it unduly limited the extent of the zone of peril wherein the plaintiff was oblivious. The time element involved in the *Cable* case from the time peril arose until the collision was from eight to fifteen seconds. The plaintiff's principal instruction was held to be erroneous because it permitted a finding that imminent peril existed when the plaintiff was only approaching a position of imminent peril. The court indicated that the instruction "submitted no proper finding of facts to guide the jury in determining the issuable fact of imminent peril or in reaching a conclusion as to when, where, and how the position of peril came into existence, or as to when the duty of the defendant under the humanitarian doctrine arose to sound a warning."

It should be noted that this case was also explained, clarified, and limited by the subsequent opinions in *Newman v. St. Louis Public Service Co.*,<sup>21</sup> *Harrington v. Thompson*,<sup>22</sup> and *Hillhouse v. Thompson*.<sup>23</sup> In drafting a principal instruction in a crossing case, it should be sufficient to comply with the requirements of the *Harrington* case, *supra*.

*Hunt v. Chicago, M. St. P. and P. R.R.*<sup>24</sup> This was an action arising out of an automobile-train collision at a grade crossing. In the trial court, evidence was offered upon primary negligence and "humanitarian" negligence in failing to warn as well as in failing to slacken speed. The case was

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20. Thomasson v. Henwood, 235 Mo. App. 1211, 146 S.W. 2d 88 (1940).

21. Not yet reported.

22. 243 S.W. 2d 519 (Mo. 1951).

23. 243 S.W. 2d 531 (Mo. 1951).

24. 225 S.W. 2d 738 (Mo. 1949).

submitted solely on "humanitarian" negligence in failing to slacken speed. After verdict and judgment for the plaintiff, the trial court set aside the verdict and entered judgment for the defendant upon the ground that no submissible case was made upon the negligence submitted, namely, failure to slacken speed. On appeal the plaintiff challenged the ruling of the trial court and asserted that in any event the cause should be reversed and remanded so that he might submit the cause upon other assignments of negligence. A divided court affirmed the judgment of the trial court, holding that no submissible case was made upon the grounds submitted, and that all other grounds for submission of the case had been deliberately abandoned.

First, the majority opinion used precise language in describing the facts involved. The case is described as involving a plaintiff who "was in a position of inextricable discoverable peril." (This clearly described a last clear chance case number three). The evidence of the plaintiff showed he stopped the car ten or twelve feet north of the north rail of the railroad track, looked for trains, then got in the car and drove at a gradually accelerated speed across the track and needed but an additional one-fourth of a second to have escaped by passing beyond the path of the train. Plaintiff's evidence also showed he saw the train a hundred feet away, travelling twenty to twenty-five miles per hour, and that the train did not diminish speed in the last one hundred feet. This was one of the "almost escaping" cases. In holding no submissible case made, the court pointed out there was no evidence of the width of the overhang of the train, and no evidence as to the amount of the reduction of the speed of the train possible in the last hundred feet, and called attention to the failure of the plaintiff to take into account reaction time and the time lag between the application of the brakes and the moment the brakes began to reduce the speed of the train.

The case was a close one, and the difference between the majority and the minority opinion apparently depended on factual interpretation of the record. The most notable feature of the case is the ruling that the case should not be remanded for a new trial upon other assignments of negligence presumably proven. If other assignments of negligence had been proved the motion for directed verdict at the close of all the evidence could not be sustained. But, under the rule of this case, the failure to instruct upon all the assignments constitutes an abandonment of those proved and the motion for directed verdict is presented in a new light after verdict and judgment. This does not seem to be desirable. It seems to visit a penalty of some sort upon counsel who may in good faith choose to submit the case upon the

theory that seems to be soundest at the time. Two lessons for those dealing with the humanitarian doctrine can be drawn from this case; namely, (1) do not abandon submission on primary negligence unless you are certain of your submission upon last clear chance or humanitarian negligence; and (2) do not rely upon negligence in failing to slacken speed unless you have positive evidence that the speed of the train or other vehicle can be slackened sufficiently to permit the plaintiff to escape after making proper allowance for reaction time and the time lag in the mechanical operation of the brakes.

The leading case of *Gann v. Chicago R. I. & P. Ry.*,<sup>25</sup> involving an "almost escaping" situation to the extent that it has been interpreted as permitting submission without positive evidence of the reduction of speed under the circumstances, is limited or overruled. The opinion represents a tendency toward more conservative application of the last clear chance and humanitarian negligence rules.

*Dister v. Ludwig*.<sup>26</sup> This was a suit for personal injuries suffered by a pedestrian who walked fast across a city street to reach a safety zone and board a street car. In so doing, he was struck by an automobile approaching from his left. The case was submitted upon "humanitarian" negligence in failing to stop, swerve, slacken speed, or warn in the disjunctive. The plaintiff was fully aware of the approach of the defendant's automobile. Consequently, this could not be a true humanitarian case. The supreme court held that a submissible case was made in failing to stop, swerve, and slacken speed. On the other hand, it was properly held that there was no submissible case made on the failure to warn, since the plaintiff was not oblivious to his peril. The principal opinion written by Judge Hollingsworth is based on inferences concerning speeds and distances which would justify submission of the case. The calculations are precise and considerable data is derived from judicial notice as to stopping distances of an automobile driven at fifteen miles per hour, and of the ordinary walking gait of man. Judge Tipton dissented and Judge Conkling concurred in the result, expressing doubt as to the conclusion of the submissibility of the case. The case (and others decided in 1951) is an indication, if a slight one, that Judge Hollingsworth, the newest member of the court, will not be unusually conservative in last clear chance and humanitarian negligence cases when dealing with factual problems.

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25. 319 Mo. 214, 6 S.W. 2d 39 (1928).

26. 240 S.W. 2d 694 (Mo. 1951).

*Davis v. Kansas City Public Service Company.*<sup>27</sup> This case grew out of a streetcar-automobile collision at a metropolitan street intersection. The streetcar overtook a passenger automobile turning left across the tracks in front of the streetcar. The plaintiff was oblivious of the peril. The defendant was either aware of the peril, or negligently inattentive. The case was submitted solely on last clear chance or humanitarian negligence in failing to slacken or to warn. By a four to three majority the court *en banc* held that a submissible case was made. The principal opinion written by Judge Ellison contained an exhaustive statement of the evidence, concluding that the motions for directed verdict should have been overruled. Judges Hollingsworth, Dalton, and Leedy concurred. Judges Tipton and Hyde concurred in Judge Conkling's dissenting opinion. The difference between the majority and the minority seemed to be a difference of factual interpretation. Judge Ellison, who wrote the majority opinion, usually is found to be conservative in cases where an extension of the humanitarian principle is involved. Judge Conkling, author of the dissenting opinion, continued in this case to be conservative in permitting inferences to be drawn from facts in evidence. The basis of the humanitarian doctrine was not discussed or examined in this case.

It is submitted this case could have been based on primary negligence in several particulars. A refusal to apply the true humanitarian rule would not have resulted in a directed verdict, under either the majority or the minority opinion.

*Newman v. St. Louis Public Service Co.*<sup>28</sup> This was an action for damages resulting from personal injury to the plaintiff, a pedestrian, who was struck by defendant's streetcar while crossing a city street at a point other than the regular intersection. Plaintiff was confused, negligently inattentive, and moving to and fro in the path of the streetcar while oblivious to its approach. The case was submitted under the last clear chance or humanitarian doctrine for failure to warn or to stop. In this case, the court upheld a principal instruction which did not hypothesize specific facts showing the place or time plaintiff came into peril. Speaking through Judge Tipton, the court, *en banc*, distinguished and clarified the case of *Cable v. C. B. & Q. Ry.*<sup>29</sup> on the requirements of an instruction concerning the place peril arises. As held by Division No. 1 in *Harrington v. Thompson*,<sup>30</sup> the court

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27. 233 S.W. 2d 669 (Mo. 1950).

28. November 12, 1951 (not yet reported).

29. 236 S.W. 2d 338 (Mo. 1951).

30. 243 S.W. 2d 519 (Mo. 1951), *infra*.

holds that the term "position of imminent peril" is itself an issuable fact and no hypothesis of the time, place and manner of the arising of peril is required of an instruction submitting humanitarian or last clear chance negligence. Here Judge Tipton shows liberality in technical matters of trial practice.

#### DIVISION NUMBER ONE

*Cosentino v. Heffelfinger*.<sup>31</sup> This case arose out of a daytime intersectional automobile collision. It did not involve a true humanitarian negligence case, because the plaintiff was not oblivious or negligently inattentive. It was held that no submissible case was made, because the plaintiff was aware of the defendant's approach and consequently did not come into a position of imminent peril until the plaintiff was unable to avoid injury by his own efforts. The defendant was negligently inattentive, but was unable to avoid the collision by action taken after the plaintiff came into a position of imminent, inextricable peril. The real question involved was whether or not the plaintiff was able to make a common law last clear chance case number three. This is the type of ruling which has caused critics to remark that the law gives greater protection to the negligently inattentive driver than to the attentive one. But that is an infirmity, if such it be, of the common law last clear chance rule, and not of the true humanitarian rule.

*Branscum v. Glaser*.<sup>32</sup> This was a death case arising out of an automobile-tank truck collision at a highway intersection. The operator of the automobile was killed and damages were sought because of his death. Both primary and "humanitarian" negligence were pleaded. The case was submitted solely on "humanitarian" negligence. There was no evidence in the record of distances, speed, and relative positions necessary to make either a last clear chance or humanitarian negligence case. It was clear that the plaintiff was negligently inattentive and thereby guilty of contributory negligence. A case if made would have been a case type three or four. There is simply not sufficient evidence of the essential facts to analyze the case.

*Frandeka v. St. Louis Public Service Co.*,<sup>33</sup> This case grew out of a daytime motorbus-automobile collision at a street intersection. It was an unusual case in that the plaintiff was the operator of a fire chief's automobile speeding through downtown St. Louis to answer an alarm. The case was

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31. 229 S.W. 2d 546 (Mo. 1950).

32. 234 S.W. 2d 626 (Mo. 1950).

33. 234 S.W. 2d 540 (Mo. 1950).

submitted solely on primary negligence. On appeal, the supreme court, in a carefully considered opinion by Judge Hyde, held that the case was not submissible on primary negligence because of contributory negligence of the plaintiff. But the court further held that a humanitarian case was made for failure of the motorbus operator to slacken *and* swerve the course of the bus. This was a true humanitarian case upon the theory that the case was held to be submissible. It appears that the plaintiff was negligently inattentive and oblivious, and that the defendant was negligently inattentive and oblivious. The time element involved was two seconds. The fact situation is not likely to recur often, but the opinion holds that a humanitarian case may be submitted, under proper circumstances, upon failure of the defendant to slacken *and* swerve when neither slackening or swerving alone would suffice to avoid injury to the plaintiff. This is a humanitarian case number four.

*Eller v. Crowell*.<sup>34</sup> This is a personal injury action brought by a passenger involved in the collision of two automobiles. The two automobiles collided head-on while both were astride the center line of a four-lane highway. While the drivers of both automobiles were sued, the jury returned a verdict against the driver of the automobile in which the plaintiff was an occupant and found in favor of the other driver involved. There was no question of submissibility of the case, and the principal humanitarian doctrine instruction was held to be free of error even though it did not require a finding that timely action could be taken by the appellant with safety to others upon the highway. It was pointed out by Judge Hollingsworth that there was no indication in the record that action under the humanitarian doctrine would likely cause injury to others. It is indicated, of course, that the ruling would be otherwise were there substantial evidence in the record that action under the humanitarian doctrine would cause injury to others. This is apparently a true humanitarian number four case, or in the alternative, a common law last clear chance case number three. It could have been submitted on primary negligence alone.

*Schneider v. St Louis Public Service Co.*<sup>35</sup> This is a personal injury action by a passenger on a motorbus to recover for damages sustained in a motorbus-motor tractor collision at a street intersection in St. Louis. An instruction on humanitarian or last clear chance negligence, which clearly did not comply with the basic requirements of such an instruction, was held

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34. 238 S.W. 2d 310 (Mo. 1951).

35. 238 S.W. 2d 350 (Mo. 1951).

to be erroneous. This is the type of case which is easily submitted on primary negligence. The passenger is chargeable with no contributory negligence. In any event, the passenger is sufficiently helpless and in inextricable peril so far as his own efforts are concerned. The case as submitted is a last clear chance case number one, or number two, depending upon whether the peril was discovered or discoverable.

*Lilly v. Boswell*.<sup>36</sup> This was a passenger's suit growing out of a daytime collision between two automobiles at a street intersection in Cape Girardeau. This case was submitted solely on the "humanitarian" doctrine on failure of defendant to stop, slow, or swerve. It was held that a submissible case was made. This case could have been submitted on primary negligence without difficulty. As submitted, it was a last clear chance case number three or a humanitarian case number four.

*Fantin v. L. W. Hays*.<sup>37</sup> This case involved a collision between two automobiles meeting on a curved icy bridge on a highway. The plaintiff lost control of his automobile and collided with the defendant's oncoming truck on the plaintiff's left hand side of the highway. The defendant secured a verdict in its favor on plaintiff's claim. On appeal, the court upheld a converse defense instruction and a sole cause instruction based on plaintiff's operation of his automobile so as to cause the same to "suddenly go from a position of safety on the right side of the bridge to the left of said bridge and closely in front" of defendant's truck. This was a common law last clear chance case number one or two. The plaintiff was in inextricable peril according to his theory.

*Lefkowitz v. Kansas City Public Service Co.*<sup>38</sup> This was a personal injury action for damages resulting from a pedestrian-street car collision at a pedestrian crossing of a city street. The plaintiff saw the street car 200 to 300 feet away, but thereafter looked away and was oblivious to her peril on her version of the facts. In reversing a judgment for the defendant the court held the following instruction to be error, because it advised the jury there was no duty to act when there was "likelihood of injury":

"The Court instructs the jury that this case is submitted solely on what is known as the humanitarian doctrine. Now under such doctrine, the operator, Harry Jenson, owed the plaintiff no legal duty whatever unless and until after plaintiff was actually in what is defined below as a position of 'imminent peril,' if she was, from the

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26. 242 S.W. 2d 73 (Mo. 1951).

37. 242 S.W. 2d 509 (Mo. 1951).

38. 242 S.W. 2d 530 (Mo. 1951).



movements of said street car, and under circumstances that would charge a reasonably careful street car operator with knowledge that such "imminent peril" existed to the plaintiff.

"By such 'imminent peril' the Court does not mean the mere possibility of danger, or of injury, to her, but the Court means certain, immediate and impending peril of injury to her, *and a likelihood of injury would not and does not constitute such imminent peril*, or a position of imminent peril that would place upon the operator of the street car any duty towards the plaintiff." (Emphasis added).

This case is in the alternative a common law last clear chance case number three or true humanitarian case number four.

*Harrington v. Thompson*.<sup>39</sup> This action grew out of a daytime train-automobile collision at an unobstructed grade crossing. The plaintiff was negligently inattentive. The defendant saw and knew of the peril. This is a common law last clear chance case, type number three. The case was submitted on "humanitarian" negligence in failing to warn. The time intervening between the moment the peril arose and the last moment for the automobile operator to act to save himself was from two to two and a half seconds. In a carefully prepared opinion by Judge Coil it was held, with full concurrence of the court, that a submissible case was made. The opinion is notable particularly on the question of the proper wording of instructions. In the first place, the opinion with logical and practical soundness points out the reasons that the words "approaching the railroad crossing" may be used while the words "approaching a position of peril" cannot be used properly in a last clear chance or humanitarian negligence instruction. On this score, the case of *Buehler v. Festus Mercantile Co.*<sup>40</sup> is followed.

This opinion also undertook to answer the question whether a last clear chance or humanitarian instruction is required to contain an hypothesis of the precise time and place at which the peril commences. This question is answered in the negative.

And finally the opinion has the virtue of undertaking to set out and frame for future use the proper phrasing of a last clear chance or humanitarian negligence instruction in a grade crossing train-auto collision. This is a hazardous, but certainly a worthy venture. The opinion further undertook to allay misapprehension resulting from language used in the case of

39. 243 S.W. 2d 519 (Mo. 1951).

40. 343 Mo. 139, 119 S.W. 2d 961 (1938).

*Cable v. Chicago B. & Q. R.R.*<sup>41</sup> The opinion represents an effort to diminish the confusion existing in the highly technical field of drafting instructions.

#### DIVISION NUMBER TWO

*Austin v. Hemperley*.<sup>42</sup> This case was a death action arising out of a late afternoon motorbus-automobile collision on a curving, slippery highway. The bus and the automobile were meeting with the automobile out of control on the wrong side of the road. The case was submitted on the "humanitarian doctrine" in failing to stop. The automobile operator and passenger were in inextricable peril when two hundred feet distant from the bus. The evidence showed the bus could not be stopped within a hundred feet. In a well written opinion, by Judge Westhues, the court held that the plaintiff made a submissible case. Since the injured party was in inextricable peril, this was really a common law last clear chance case, number one or number two.

*Colvin v. Mills*.<sup>43</sup> This case involved a daytime pedestrian-automobile collision in a city street at a point between intersections. The sole question on appeal was whether or not the defendant's converse instruction was proper. It is not made clear (since statement thereof was not necessary to the decision) what was the precise theory of submission of the case and the case is difficult to classify. The defendant's converse instruction was held to be erroneous for failure to take into account the duty of the defendant to discover the plaintiff in the exercise of care. Judge Leedy, in holding the defendant's converse instruction to be erroneous, took pains to quote an approved instruction from a prior decision. This represents part of the growing practice of the court to say what is right as well as what is wrong in the framing of instructions.

*Harrow v. Kansas City Public Service Co.*<sup>44</sup> This was a death action involving a night-time collision of a street car with a pedestrian standing in the path of the street car waiting for automobile traffic to pass before crossing from the street car track to the curb. The time element involved was two seconds. The injured party was negligently inattentive or oblivious of his peril. The defendant was either aware of the danger to the deceased or negligently inattentive. The case was submitted solely on "humani-

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41. 236 S.W. 2d 328 (Mo. 1951).

42. 228 S.W. 2d 712 (Mo. 1950).

43. 232 S.W. 2d 961 (Mo. 1950).

44. 233 S.W. 2d 644 (Mo. 1950).

tarian" negligence in failing to stop, to slacken, to warn, all in the disjunctive. The pedestrian was immobile during the time of his peril and up until struck. In an opinion by Judge Bohling,, the court held that the plaintiff had failed to make a case on slackening of speed of the street car. The opinion on this issue contains the following noteworthy statement:

"The humanitarian negligence involved in a failure to stop differs from that involved in a failure to warn or slacken speed in that, broadly put, the avoidance of an impending peril through ability to stop rests solely with the defendant whereas the avoidance of an impending peril through a timely warning or a slackening of speed presupposes cooperative action on the part of the one imperiled in time to escape."

Plaintiff's principal instruction was held to be erroneous for failure to limit consideration of defendant's negligence to the time from and after the condition of imminent peril arose . The case was submissible in the alternative as a common law last clear chance case number three or a humanitarian case number four.

*Pearson v. Kansas City Ice Company.* <sup>45</sup> This case arose out of the death of a boy who was thrown into the path of an overtaking truck. After being thrown the boy was in peril and physically unable to escape. The defendant was aware of the peril of the boy. Consequently, the case was a true common law last clear chance case number one.

The case was submitted on "humanitarian" negligence in failing to stop and to slacken. In an opinion written by Judge Barrett, in which great care was taken to state the facts, the court held that a submissible case was made. The truck was moving at the slow speed of ten to fifteen miles per hour, and there was evidence of ability to stop and to swerve the truck. The time involved was about two seconds.

In this case, the defendant's sole cause instruction was held erroneous for failure to hypothesize sufficient facts to establish the defense. This case is one of several which represent a tendency toward strictness in the requirements of a sole cause instruction in a last clear chance or humanitarian case.

*Douglas v. St. Louis Public Service Co.*<sup>46</sup> This was a personal injury action for damages by a passenger on a motor bus which collided with a tractor-trailer truck at a street intersection. A judgment was rendered

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45. 234 S.W. 2d 783 (Mo. 1950).

46. 231 S.W. 2d 157 (Mo. 1950).

against the motor bus operator and appealed. It seems clear that the passenger was physically helpless to extricate himself from the peril. The motor bus operator was negligently inattentive or aware of the peril. Consequently, this was a common law last clear chance case number one or number two. However, the passenger, not being in control of either vehicle, had a perfectly good submissible case of primary negligence, as is indicated in Judge Westhues' opinion. This case was submitted on negligence in failing to slacken. The judgment for the plaintiff was reversed and the cause remanded because of the failure to give a converse humanitarian instruction requested by the defendant.

*Johnson v. St. Louis Public Service Co.*<sup>47</sup> This was a companion case to *Frandeka v. St. Louis Public Service Company*,<sup>48</sup> decided by Division Number One. The plaintiff in this case, a fire chief for whose death this action was brought, was not driving the automobile in which he was riding. The automobile was a fire department car equipped with radio and siren. It collided with a motor bus at an intersection in downtown St. Louis while answering a fire alarm. The case was submitted upon "humanitarian" negligence for failure to stop, slacken the speed of or swerve the bus. The submission was in the disjunctive. The plaintiff was negligently inattentive and oblivious to his danger. The defendant bus operator was negligently inattentive. Consequently, this was a true humanitarian case in which no personal injuries were sustained by the defendant, so far as the record shows. The supreme court held in this case that a submissible case was made in two of the three assignments of humanitarian negligence. The record and evidence differed from the record and evidence in the *Frandeka* case. The case was reversed and remanded because of the submission of primary negligence in a case in which the deceased was guilty of contributory negligence as a matter of law. Assuming that the motor bus driver suffered personal injuries in this collision, the question might well be asked whether he also was entitled to recover against the fire chief's estate or the operator of the fire chief's automobile.

#### *Conclusion*

The Missouri humanitarian doctrine, as distinguished from the common law last clear chance doctrine, seems to be in peril itself. Perhaps the peril is not imminent, but a re-examination of the propriety of the rule and the

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47. 237 S.W. 2d 136 (Mo. 1951).

48. 234 S.W. 2d 540 (Mo. 1950).

true humanitarian case seems to be in order. From the standpoint of results to persons injured in casualties, an elimination of the true humanitarian case will not make much difference. In fact, an elimination of the true humanitarian case from Missouri jurisprudence would probably relieve a great deal of the pressure toward conservative application of the common law last clear chance cases. But, be that as it may, the law as a science, based on experience as well as logic, would benefit from a careful re-examination of the bases of the humanitarian rule and its soundness.

Lack of sympathy with the harsh common law doctrine that contributory negligence bars recovery is responsible for creation of the last clear chance rule and the humanitarian doctrine. If it is desired to abolish contributory negligence as a defense it should be done by legislation in the true humanitarian situation.