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## THE MISSOURI HUMANITARIAN DOCTRINE IN THE YEARS 1958-1960\*

WILLIAM H. BECKER\*\* and TERENCE C. PORTER\*\*\*

The major questions concerning application of the Missouri humanitarian doctrine remained unanswered as of the close of the year 1960. However, there were major developments in this fluid field of the law.

Among the unanswered questions is the crucial one: May two negligently inattentive (oblivious) motor vehicle operators who drive their vehicles into collision, each of whom had equal opportunity to avoid the collision, and each of whom suffers personal injuries, recover damages simultaneously?<sup>1</sup> Under the common law last clear chance doctrine, neither could recover on a single assumed version of the facts. Under the formula

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\*This review covers selected cases reported in the years 1958, 1959, and 1960, including the advance sheet 340 S.W.2d No. 1 dated December 27, 1960.

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1. For detailed discussion see Becker, *The Missouri Humanitarian Doctrine—1956, 1957*, 23 Mo. L. REV. 420 (1958). For convenience note 1 of that article is repeated:

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

#### Discovered Helpless Peril

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:*

#### Discoverable Helpless Peril

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:*

#### Discovered Oblivious Peril

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.

of the Missouri humanitarian rule, each can make a submissible case against the other.<sup>2</sup>

Another unanswered question is this: May a claimant recover for property damages under the true humanitarian situation where its peril or his peril was a result of negligent inattentiveness (obliviousness)? This question was propounded in the opinion of the Springfield Court of Appeals in *Glenn v. Offutt*,<sup>3</sup> but it remains unanswered in 1960.

Since the humanitarian doctrine is "judge made law," litigants have repeatedly sought a solution to the unanswered questions from the Supreme Court, without success so far. Attempts to secure change or clarification of the doctrine from the legislature have also failed. The attitude of the legis-

There appears to be no serious challenge to the soundness of the right of plaintiff to recover in this case.

Under the general designation "humanitarian doctrine," the Missouri courts have recognized all three common law last clear chance cases and have added a fourth type of case wherein the injured party may recover despite his contributory negligence. This fourth type of case, which is the unique humanitarian case is as follows:

*True Humanitarian Case No. 4:*

Discoverable Oblivious Peril

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 in permitting recovery than courts of other jurisdictions.

2. Seldom do the Missouri courts distinguish between common law last clear chance cases and humanitarian cases. The phrase "humanitarian rule" is used usually to embrace all four situations noted above. The "constitutive facts" of the humanitarian doctrine are set out in the leading case of *Banks v. Morris & Co.*, 302 Mo. 254, 257 S.W. 482, 484 (1924) (en banc), as follows:

The constitutive facts of a cause of action under the humanitarian rule, stated in their simplest terms, without any of the refinements, limitations, or exceptions which might arise on a particular state of facts, are contained in this formula:

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

Add to this the rule that the position of peril may result from claimant's inattentiveness or obliviousness of danger as well as from physical helplessness and the formula is complete. See *Perkins v. Terminal R. Ass'n*, 340 Mo. 868, 102 S.W.2d 915 (1937) (en banc), on obliviousness as a cause of peril.

3. 309 S.W.2d 366, 368 (Spr. Ct. App. 1958).

lature so far seems to be that the doctrine is the creation of the judiciary and should be controlled by the judiciary.

### I. GUEST V. HOST CASE

Nevertheless, the signs of the court's dissatisfaction with the rule and the struggle to limit its application continue to be visible in the current opinions. For instance, in the last decision of 1960, the latent question of applicability of the doctrine in a guest-passenger driver-host relationship (long assumed) reached issue in the en banc decision in *Price v. Nicholson*.<sup>4</sup>

By a narrow majority of one vote, 4-3, the doctrine was held applicable where there is a guest-host relationship. The principal opinion of Special Judge Hunter pointed out that the formula of *Banks v. Morris & Co.*<sup>5</sup> could by its terms apply in the guest-host case. The minority relied upon two concepts which had been growing in the movement to limit rather than revoke the humanitarian rule. The first concept was that of necessity. It holds that the "niceties" of imminent peril need not be inflicted upon a jury, court, or counsel "needlessly" in words of Judge Storckman's dissent in *Price v. Nicholson*.<sup>6</sup> In the words of Chief Justice Hyde's dissent: "In this case, a humanitarian negligence submission was completely unnecessary . . ." This idea that the doctrine does not apply where unnecessary to support a submission of the case has never been expressly recognized, though it seems to have been a silent consideration in the holding that certain cases were submissible on wilful and wanton negligence rather than on humanitarian negligence as in *McClanahan v. St. Louis Pub. Serv. Co.*<sup>8</sup>

The other concept which has underlain limitations on the doctrine was featured by the minority. This concept is that the doctrine does not apply where the peril is created by the defendant's own act rather than the act of plaintiff or a third person. This may be another way of stating the rule of necessity, for if plaintiff did not cause his own peril and defendant or a third person did cause it, it is difficult if not impossible to invoke contributory negligence as a matter of law.

In any event, by a narrow margin the concept of necessity and the related concept of peril caused solely by defendant were overruled in this latest guest-passenger driver-host case. It is anyone's guess whether the ruling in *Price v. Nicholson* has laid these concepts to rest. It is doubtful. In

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4. 340 S.W.2d 1 (Mo. 1960) (en banc).

5. *Supra* note 2.

6. 340 S.W.2d at 12.

7. *Id.* at 14, 15.

8. 242 S.W.2d 265 (St. L. Ct. App. 1951).

day to day application the dissatisfaction with the rule, of which this narrow conflict is but a symptom, will persist. It will persist mainly because the rule contains a built-in dilemma, the question of simultaneous recoveries by equally oblivious, equally negligent personal injury claimants.

## II. THE SOLE CAUSE INSTRUCTION

When the basic rationale of the doctrine is either not settled, or is variously interpreted by the judges, division of opinion on matters of practice including instructions is bound to occur frequently. One of the most fertile fields of controversy and reversal is the giving of the sole cause instruction in humanitarian cases.

In *Janssens v. Thompson*,<sup>9</sup> the court en banc by a 4-3 decision refused to condemn the instruction outright. But the giving of the sole cause instruction continued to be a source of difficulty.

### A. Plaintiff's Acts as Sole Cause

For example, attention is invited to *Sheerin v. St. Louis Pub. Serv. Co.*,<sup>10</sup> which warned the bar that use of the words "negligence" or "negligently," or reference to plaintiff's duty to use care, to characterize the acts of plaintiff constituting "sole cause" were in all probability reversibly erroneous. This case was followed in 1959 in *Landau v. St. Louis Pub. Serv. Co.*<sup>11</sup>

### B. Acts of Third Party as Sole Cause

Despite the *Sheerin* case, the court later said in *Rosenfeld v. Peters*<sup>12</sup> that an instruction containing the words "negligence" referring to a third party's negligence as the sole cause was permissible. In this case Chief Justice Hyde undertook to distinguish between a simple converse instruction and a sole cause instruction, saying:

It is sometimes overlooked 'that any defendant's instruction based on the theory that a plaintiff's injuries were caused solely by his own negligence actually submits a converse situation from the plaintiff's humanitarian submission;' and this is likewise true as to the sole negligence of a third party.<sup>13</sup> In the *Happy* case,<sup>14</sup>

9. 228 S.W.2d 743 (Mo. 1950) (en banc).

10. 300 S.W.2d 483 (Mo. 1957).

11. 322 S.W.2d 132 (Mo. 1959).

12. 327 S.W.2d 264, 267-268 (Mo. 1959).

13. Citing *Janssens v. Thompson*, *supra* note 9, at 750; *Happy v. Blanton*, 303 S.W.2d 633, 637 (Mo. 1957).

14. *Happy v. Blanton*, *supra* note 13.

we held the sole cause instruction therein failed to hypothesize fact [*sic*] showing a sole cause situation saying: '[A]n instruction submitting the issue of nonliability on the part of a defendant because the negligence of a third party was the sole proximate cause of plaintiff's injuries must do more than direct a verdict for that defendant only upon a finding that the third party was in some manner negligent.' As to a sole cause instruction, we further pointed out therein: 'This latter form of an instruction, as contrasted to a converse instruction, concedes that the injuries to plaintiff resulted from the negligence of someone, and it authorizes a finding by the jury for the defendant only if it finds that the negligence of the plaintiff, or someone other than the defendant, was the sole proximate cause of the injuries, and also that defendant was not negligent, or if he was negligent that his negligence was not concurring negligence. Therefore, if the defendant undertakes to absolve himself from liability to plaintiff on the basis of sole cause negligence, he thereby assumes the burden of hypothesizing a statement of facts, supported by the evidence, from which a jury could find that not only did his negligence not contribute in causing plaintiff's injuries, but in addition thereto that the sole proximate cause of plaintiff's injuries was the negligence of someone other than him, and the hypothesization of facts in the instruction, or by proper reference to other instructions, must be complete in both respects.' (As to true converse instructions that do not require hypothesization of facts see also *Liebow v. Jones Store Co.*<sup>15</sup> and *Schaefer v. Accardi.*)<sup>16</sup>

The *Rosenfeld* case was followed in *Villines v. Vaughn.*<sup>17</sup>

It is apparent that the doctrine of the *Sheerin* case restricting the language of a sole cause instruction based on plaintiff's act may be equally applicable to a sole cause instruction based on a third party's acts, since antecedent negligence of a third party is no more a defense in a humanitarian case than antecedent (contributory primary negligence) of the plaintiff. If it is misleading to refer to negligence and the duty to use care in respect of plaintiff's conduct submitted as the sole cause, is it not equally misleading to instruct on the duty to use care and negligence of a third party (plaintiff's host-driver for example)? At least such a holding is a possibility. The form of instruction in this field is by no means finally settled. If one has a good

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15. 303 S.W.2d 660, 663 (Mo. 1957).

16. 315 S.W.2d 230, 234 (Mo. 1958).

17. 330 S.W.2d 782 (Mo. 1959).

defense the wise thing to do is to play safe in requesting the court to instruct the jury.

*Carney v. Stuart*<sup>18</sup> contains a good summary of the recent cases, pointing out certain errors and dangerous areas in a sole cause submission.

### III. CROSS-CLAIMS BETWEEN DEFENDANTS

Under the practice of permitting cross-claims between defendants, we encounter another novel problem. This is illustrated in the case of *Page v. Hamilton*.<sup>19</sup>

In the *Page* case, plaintiff sued her host-driver and the driver of an oncoming vehicle involved in a headon collision. The peril occurred when plaintiff's host-driver pulled into his left lane to pass a line of vehicles traveling in the same direction. The vehicle in which plaintiff was riding collided with a vehicle traveling in the opposite direction on its right hand side. Plaintiff submitted her case against both drivers on the humanitarian doctrine in failing to slacken and swerve. The driver of the oncoming vehicle cross-claimed against the host-driver on primary negligence. The host-driver submitted contributory negligence as a defense to the cross-claim.

The jury found for plaintiff against both defendants, thereby finding each guilty of humanitarian negligence contributing to the collision. But the jury also found on the cross-claim that the oncoming driver was not guilty of contributory negligence and was entitled to damages. On complaint that the verdict on the cross-claim was inconsistent with the verdict for plaintiff, the Supreme Court held that the verdicts should be affirmed, overruling *McGuire v. Southwestern Greyhound Lines, Inc.*<sup>20</sup> The reasoning was that the same result could be reached in separate trials, therefore there is no reason to forbid it in one trial.

### IV. SUMMARY OF NOTABLE CASES

*Glosser v. Becker*<sup>21</sup> arose from a pedestrian and truck collision on a street in Kansas City. The plaintiff was struck by the right side of an east-bound milk truck as he stood on the traffic side of his parked vehicle oblivious to the approach of the milk truck. The case was submitted on humanitarian negligence in failing to swerve. Upon appeal the court held

18. 331 S.W.2d 558 (Mo. 1960).

19. 329 S.W.2d 758 (Mo. 1959).

20. 291 S.W.2d 621 (St. L. Ct. App. 1956).

21. 308 S.W.2d 728 (Mo. 1958).

that a submissible case had been made. The principal argument involved the question of when the plaintiff came into a position of peril. The court said it could be found that plaintiff's peril arose when the truck driven by the defendant was 75 to 100 feet from the plaintiff, who was clearly oblivious at all times. It was not necessary that this case be submitted on humanitarian negligence.

*Pennington v. Carper*<sup>22</sup> arose from the collision of a pickup truck with a passenger car at the intersection of The Paseo and Eighth Street in Kansas City. The Paseo consists of north and south lanes of traffic separated by a parkway. The collision occurred as the plaintiff's vehicle, west bound on Eighth Street, reached a point about midway of the northbound lanes. The refusal of the trial court to submit the plaintiff's case on a humanitarian instruction charging in the conjunctive failure to swerve and slacken and to stop was upheld. The court said that the evidence did not sufficiently demonstrate that the defendant had the ability to take action to avoid the collision. The court commented that the plaintiff had not presented evidence of the ability of the defendant to stop or slacken speed and said that those facts could not be judicially noticed. The court also held that the plaintiff's verdict directing instruction was defective because it omitted "with safety to others," and here there was evidence of another vehicle alongside and to the left of defendant's vehicle at the time of the collision.

*Downing v. Dixon*<sup>23</sup> arose out of a collision of two passenger cars at a "T" intersection. The plaintiff was a guest in the vehicle driven by the defendant Dixon which had stopped at a stop sign on a side road, and then proceeded onto the highway into the path of an oncoming auto driven by the defendant Hullet. Both drivers were sued. The defendant Hullet cross-claimed against plaintiff's host who in turn counterclaimed against Hullet. There was a verdict in favor of Hullet on plaintiff's claim and on his cross-claim against Dixon based on primary negligence. No verdict was returned on Dixon's claim against Hullet. The plaintiff submitted his case against his host on an instruction of humanitarian negligence in failing to stop, and received a verdict in his favor. Upon appeal this was reversed and remanded because his instruction contained a paragraph: ". . . persons traveling on Highways must exercise highest degree of care." This was held to have injected antecedent negligence into the case.

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22. 309 S.W.2d 596 (Mo. 1958).

23. 313 S.W.2d 644 (Mo. 1958).



In addition to remanding the plaintiff's claim against his host, the court also remanded Hullet's cross-claim against Dixon (as opposed to reversing the verdict outright for contributory negligence as a matter of law in failing to maintain a lookout) and Dixon's counterclaim against Hullet (the latter for the reason that the jury had erroneously failed to return a verdict thereon).

*Kelley v. Terminal R. Ass'n*<sup>24</sup> arose from a collision between an automobile in which plaintiff was a passenger and a freight train at a street intersection in St. Louis. The plaintiff's case was submitted on primary negligence in failing to sound warning and to provide a headlight on the engine and on humanitarian negligence in failing to stop. The defendant received a verdict in the trial court and the plaintiff contended on appeal that defendant's sole cause instruction was erroneously given. The court did not review the sole cause instruction but stated "there being no substantial evidence whereon to base the submission of the defendant's ability to stop, it must be held that for such want or omission the plaintiff failed to make a case on that issue."<sup>25</sup>

The plaintiff did not offer expert testimony of ability to stop the train, but instead relied on defendant's engineer, who testified that the train could have been stopped in 10 to 12 feet, including reaction time, at a speed of 15 to 25 miles per hour. The court said that this was not substantial evidence upon which a submission of the case could be justified because this evidence was incredible, impossible and contrary to scientific principles established by the law of physics.<sup>26</sup>

*Shirley v. Norfleet*<sup>27</sup> arose from a no-contact situation which occurred when the driver of the plaintiff's vehicle attempted to pass the defendant's passenger car on a straight stretch of highway. Just as the plaintiff's driver started to pass, the defendant pulled out to pass a car in front of him. The vehicle in which plaintiff was riding went off the road to the left and plaintiff was injured. The case was tried before the court and judgment for defendant was entered. Upon appeal the judgment of the trial court was affirmed. No issues of submissibility or improper instructions were involved and the court reviewed the evidence to determine if an improper conclusion had

24. 315 S.W.2d 699 (Mo. 1958).

25. *Id.* at 703.

26. At 25 miles per hour the train would travel in excess of 10 to 12 feet in reaction time alone, not taking into consideration the time necessary for effective application of the brakes of a train.

27. 315 S.W.2d 715 (Mo. 1958).

been reached by the lower court since no findings had been requested. On the issue of primary negligence the court held that since the vehicle in which the plaintiff was riding was operated by her son, she was barred by his negligence, he being her agent. On humanitarian negligence the court said that plaintiff couldn't recover because her peril did not arise until, when plaintiff's driver was within 10 feet of defendant's car, defendant pulled out to pass, and it was not apparent that thereafter the defendant could have taken action to avoid the mishap.

*Davis v. St. Louis Pub. Serv. Co.*<sup>28</sup> arose when the plaintiff, a pedestrian, was struck by the defendant's bus which crossed an intersection on a green light after having stopped to pick up passengers. The case was submitted on humanitarian negligence in failing to stop, and there was a jury verdict for defendant, after which the trial court granted plaintiff's motion for a new trial. Upon appeal the Supreme Court held that the plaintiff had failed to make a submissible case. The plaintiff's evidence failed to establish the location of the defendant's bus when she came into a position of imminent peril and therefore did not establish that the driver could thereafter have taken action to avoid striking the plaintiff.

*Millar v. Berg*<sup>29</sup> involved another vehicle-pedestrian collision, which occurred as the plaintiff was attempting to cross Vandeventer Boulevard in St. Louis. The defendant was making a left turn south onto Vandeventer from Laclede. The plaintiff submitted his case on humanitarian negligence in failing to stop or swerve, and there was a jury verdict in his favor. The plaintiff's evidence established he was 35 feet from the curb when struck and that the average walking speed of a man is two to three miles per hour; therefore the court found that the plaintiff was in a position of peril for at least seven seconds within which time the defendant could have taken action to avoid striking the plaintiff. The court, in holding that a submissible case had been made, commented that the plaintiff could have the benefit of the defendant's more favorable estimate of speed since his own estimate was based on a split second observation just prior to being struck.

In *Fenneren v. Smith*<sup>30</sup> the plaintiff's passenger car collided with the defendant's approaching dump truck just off the end of a one-lane bridge on a gravel road. The plaintiff offered to submit her case on both primary negligence and humanitarian negligence in failing to stop but the trial court

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28. 316 S.W.2d 494 (Mo. 1958).

29. 316 S.W.2d 499 (Mo. 1958).

30. 316 S.W.2d 602 (Mo. 1958).

granted defendant's motion for directed verdict and subsequently granted plaintiff's motion for new trial. On appeal the court held that the plaintiff had not made a case of submissible humanitarian negligence, but remanded the case for a new trial. The court said the plaintiff did not make a submissible case for the reason that she could not have the benefit of the defendant's estimates of speed. The court said that a plaintiff can, in some situations, have the benefit of a defendant's estimates of speed, but that she could not in establishing humanitarian negligence in this instance because such estimates were contrary to her theory of primary negligence, which hypothesized excessive speed.

*Nored v. St. Louis Pub. Serv. Co.*<sup>31</sup> arose from a right angle intersection collision between the plaintiff's passenger car and the defendant's streetcar. The plaintiff submitted his case on primary negligence for violation of a 30 miles-per-hour speed limit and on humanitarian negligence in failing to slacken speed. A jury verdict was returned for the plaintiff. On appeal the court held that the plaintiff made a submissible case on primary and humanitarian negligence.

On the question of humanitarian negligence the Supreme Court discussed two problems. The first involved the place where the plaintiff came into the zone of imminent peril. The plaintiff's testimony was that he had observed the defendant's streetcar 170 feet away and had thereafter attempted to cross the tracks. The court said that although the plaintiff was not oblivious to the "approach" of the defendant's streetcar he was oblivious to the "danger" it presented. This being the case, the jury could find that at some point between the curb of the street and the point where the plaintiff could last stop short of the overhang of the streetcar, he entered a zone of peril.

The other problem discussed arose because the plaintiff had not produced testimony of ability to slacken the speed of the streetcar. Instead the plaintiff introduced evidence of the actual stopping of the streetcar after collision which was 31 to 86 feet. The court took judicial notice of the fact that the overhang of a streetcar was "approximately two feet" and "assumed" that the plaintiff's car did not exceed twenty feet in length. Using these facts and the plaintiff's "average" speed of three miles per hour and the defendant's speed of 45 miles per hour, as testified to by the plaintiff's witnesses, the court was able to *calculate* that defendant's streetcar

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31. 319 S.W.2d 608 (Mo. 1958).

was far enough back up the track to give the operator the ability to have slackened the speed enough to avoid hitting plaintiff.

The humanitarian submission of this case seems to have been upheld principally upon the assumption that the ability to slacken the speed of a streetcar is in some way related to its ability to come to a stop while dragging an automobile in front of it. This may not always prove to be a reliable guidepost for submitting a "slackening speed" case and the production of expert testimony would seem to be better recommended.

*Allen v. Hayen*<sup>32</sup> was a wrongful death action to recover for the death of the deceased who was struck by a passenger car while sitting intoxicated in the westbound lane of a highway at night. The testimony indicated that just prior to striking the deceased the defendant was traveling 60 miles per hour and had just met a string of cars. The shoulders of the highway were muddy. The plaintiff's case was submitted on humanitarian negligence in failing to stop. On appeal the Supreme Court reversed outright a judgment of the lower court in favor of the plaintiff, entered pursuant to a jury verdict. The court said that the plaintiff's evidence was not sufficiently substantial to warrant a submission of the case to the jury.

The plaintiff attempted to make a submissible case on ability to stop on the testimony of an expert witness who had performed a series of experiments and on the testimony of a lay witness who had previously seen the deceased sitting in the road. The expert testified that he had made a number of stopping-distance tests using a bag of straw in the highway, and further testified as to distances when it became visible and his ability thereafter to stop a car similar to the defendant's short of the bag. His testimony was apparently destroyed as substantial evidence by his admission that oncoming headlights would necessarily alter the distance within which he could see the bag of straw. The testimony of the lay witness who said he saw the deceased when 60 to 80 feet away was also held inconclusive as to the ability of the defendant, who was hindered by oncoming headlights, to see the deceased. The court said that the jury should not be permitted to speculate on when the defendant should have seen the deceased sitting in the road.

*Johnson v. Presley*<sup>33</sup> arose out of a headon collision at night between a passenger car being operated by the plaintiff and defendant's tractor-trailer

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32. 320 S.W.2d 441 (Mo. 1959).

33. 320 S.W.2d 518 (Mo. 1959).

truck on Highway 166. The plaintiff's evidence indicated that as he slowed to let a car in front of him make a left turn, the car that he was towing caused the car he was operating to be jackknifed out into the path of defendant's oncoming truck. The plaintiff's case was submitted on humanitarian negligence in failing to stop. A jury verdict and judgment for the plaintiff was reversed and remanded because the plaintiff's verdict directing instruction failed to apply the standard of "highest degree of care" to the statement in the instruction that the defendant "by keeping a lookout . . . could have or should have known that the plaintiff" was in a position of peril. The court felt that if the standard is not mentioned there is, in effect, an absolute duty to maintain a lookout imposed upon the defendant.

An interesting sidelight of this case was the argument advanced by the appellant that plaintiff's expert testimony on the ability of the defendant to stop was insufficient to make a submissible case on that issue since it was in conflict with plaintiff's evidence of the defendant's actual skidmarks. The issue was not determinative in this case, but it is conceivable that under some circumstances it could lead to difficulty.

*Williams v. Miller*<sup>34</sup> arose from injuries received by plaintiff who was crossing a street when struck by defendant's truck. The plaintiff had walked into the street from in front of a parked bus which defendant was attempting to pass. Plaintiff's case was submitted on humanitarian negligence. A verdict and judgment for defendant was reversed on appeal because one of defendant's instructions injected plaintiff's antecedent negligence into the case because it directed the jury's attention to the conduct of the plaintiff before and leading up to the position of imminent peril. The objectionable part of the instruction read: ". . . if you find and believe from the evidence that in getting into such a position of imminent peril that he [plaintiff] ran across in front of the standing bus, into the path of the truck . . . when the truck was so close that the defendant could not . . . avoid striking the plaintiff . . . ."

*Landau v. St. Louis Pub. Serv. Co.*<sup>35</sup> arose from a collision between a passenger car operated by the plaintiff's wife and a streetcar owned by the defendant. The collision occurred when the plaintiff's wife, who was traveling in a lane of traffic to the right of and adjacent to the streetcar tracks, drove her car to the left and ahead of the streetcar in an attempt to pass a truck which was double parked. Plaintiff's suit was for medical expenses and loss of

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34. 321 S.W.2d 452 (Mo. 1959).

35. *Supra* note 11.

services and society of his wife, and his case was submitted on humanitarian negligence in failing to slacken speed. The trial resulted in a judgment for the defendant. On appeal this was reversed because of the giving of defendant's erroneous sole cause instruction which contained an abstract statement of law to the effect that the plaintiff's wife was bound to exercise the highest degree of care for her own safety at the time and place.<sup>36</sup> The court said that this error was not cured by the so-called "tail" on plaintiff's verdict directing instruction which read: "and this is true even though you find and believe from the evidence that Mrs. Landau was guilty of negligence in getting into the aforesaid position of peril . . . ."

*Hickerson v. Portner*<sup>37</sup> arose from a daylight, right angle, intersection collision between a passenger car in which plaintiff was riding and an automobile driven by the defendant. The case was submitted on both primary negligence and humanitarian negligence in failing to swerve. In the lower court defendant received a jury verdict. On appeal this was overturned and the case remanded. The plaintiff's contention that the defendant's sole cause instruction erroneously injected antecedent negligence into the case was sustained. The instruction contained an abstract statement of law that "it is the duty of the driver of every vehicle entering a through highway to exercise the highest degree of care to yield the right-of-way to other vehicles which are approaching so close on the through highway as to constitute an immediate hazard . . . ."

*Yarrington v. Lininger*<sup>38</sup> arose from a collision involving a very interesting fact situation. The plaintiff was driving a vehicle south on Highway 136 and was being followed by defendant Lininger. Both vehicles were approaching a vehicle coming from the opposite direction driven by defendant Bucholz. When the plaintiff's vehicle and the Bucholz vehicle were about 600 feet apart Lininger started to pass the plaintiff. The vehicles of the plaintiff and Lininger traveled side by side until an instant before the collision when Lininger started to pull the front of his vehicle to the right, to go around the plaintiff, but had as yet not pulled into the plaintiff's path. While moving to the right the vehicle driven by Lininger was hit on the left rear by the Bucholz vehicle knocking it into the front of plaintiff's vehicle causing her to veer to the right into the ditch. The plaintiff submitted her case on primary negligence against Lininger and on humanitarian negligence

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36. Following the case of *Sheerin v. St. Louis Pub. Serv. Co.*, *supra* note 10.

37. 325 S.W.2d 783 (Mo. 1959).

38. 327 S.W.2d 104 (Mo. 1959).

against Bucholz. A jury verdict was returned in plaintiff's favor and only Bucholz appealed. The Supreme Court held that the plaintiff did not make a submissible case of humanitarian negligence against Bucholz for the reason that at no time prior to the time the Bucholz car struck the Lininger vehicle was the plaintiff in a position of imminent peril, since at no time prior to that was there any vehicle in her path, and further there was no evidence that Bucholz could have taken any action to avoid plaintiff's injuries after the collision between the Lininger and Bucholz vehicles.

It is interesting to note that the misadventure of the plaintiff in submitting her case against Bucholz on humanitarian negligence was not fatal as the court remanded the case and pointed out there would be no reason why her case against Bucholz could not be made and submitted on primary negligence.

*Ornder v. Childers*<sup>39</sup> arose from a collision when plaintiff attempted to make a left turn in front of defendant who was following plaintiff's vehicle. The plaintiff submitted his case on humanitarian negligence in failing to swerve. Judgment pursuant to jury verdict was entered for the plaintiff. On appeal this was reversed and the case remanded for the reason that the plaintiff's verdict directing instruction did not sufficiently hypothesize where the plaintiff came into peril. The instruction hypothesized that the plaintiff came into imminent peril as he "approached" the intersection where he intended to make a left turn. This was insufficient since he was not actually in peril until he started to move to his left into the lane in which defendant was attempting to pass.

*Schmittzehe v. City of Cape Girardeau*<sup>40</sup> involved a right angle intersection collision on wet streets. Plaintiff's automobile was almost through the intersection when struck in the right rear by defendant's truck. The Supreme Court held that the case was submissible both on primary negligence and humanitarian negligence. There are two items of interest in the case. The first was that there was no expert testimony of the ability to slacken the speed of defendant's vehicle. The court supplied this deficiency by computing the defendant's location when the plaintiff went into a zone of peril. The court said: "It must be recognized that in some situations the facts speak for themselves without the aid of expert evidence."<sup>41</sup> The second point of interest in the case was the contention of the defendant that the

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39. 327 S.W.2d 913 (Mo. 1959).

40. 327 S.W.2d 918 (Mo. 1959).

41. *Id.* at 924.

plaintiff's verdict directing humanitarian instruction was bad because it said "slackened and swerved it to left or right." The defendant contended this was bad because there was no evidence in the case that the defendant could have avoided the collision by swerving right. The court said that since plaintiff had made out a case for failure to slacken speed alone this did not matter, because this was a "slacken *and* swerve" case and not a "slacken *or* swerve" case.

*Villines v. Vaughn*<sup>42</sup> arose from an intersection collision on a major highway. The car in which plaintiff was riding had been driven north off a gravel road into the path of the defendant's westbound ambulance. The case was submitted to the jury on humanitarian negligence and a verdict was returned for the defendant. On appeal the sole question was the propriety of a portion of the defendant's sole cause instruction which stated: "and if you further find that *immediately* thereafter the said Mings operated said automobile onto the paved portion of said highway and directly and *immediately* into the path of the approaching ambulance . . . when there was *immediate* danger of a collision . . . ." The principal complaint was that the use of the words *immediate* or *immediately* unduly narrowed the zone of peril. The contention was refused by the court principally for the reason that other portions of the defendant's instruction sufficiently hypothesized facts bearing on the zone of peril and where it arose. Further the court said that these words themselves did not, in the circumstances of the case, tend to improperly narrow the zone of imminent peril.

*Carney v. Stuart*<sup>43</sup> arose from a collision at the intersection of Highway 40 and Olive Street road in or near St. Louis. The plaintiff who was east bound on Highway 40 attempted to turn her automobile left onto Olive Street and in so doing turned her vehicle into the path of the defendant's westbound passenger car. The collision occurred during daylight hours on a dry pavement. The plaintiff's case was submitted on humanitarian negligence in failing to slacken and swerve and judgment pursuant to a jury verdict was entered for the defendant. On appeal the issues involved the propriety of the defendant's sole cause instruction. The Supreme Court reversed the judgment and remanded the case for error in the giving of that instruction.

The first and most obvious error was similar to that in the *Sheerin*<sup>44</sup>

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42. *Supra* note 17.

43. *Supra* note 18.

44. *Sheerin v. St. Louis Pub. Serv. Co.*, *supra* note 10.



case. The instruction commenced with a paragraph which embodied for the most part the statutory duty of a driver making a left turn. This was held erroneous because it injected plaintiff's antecedent negligence into the case. Secondly the court said that the defendant's sole cause instruction was bad because it contained language to the effect that the sole cause of the collision was the plaintiff's "negligence" in failing to yield the right of way. The court alluded to the language of *Rosenfeld v. Peters*<sup>45</sup> and said that a defendant in a humanitarian case has two theories upon which he can instruct a jury in a manner which will exonerate him. The first is a converse humanitarian negligence instruction by which the defendant can negative one or all of the elements upon which plaintiff's case is based. (The court noted that an instruction of this sort may be submitted without supporting evidence.) The other exonerating instruction is the sole cause instruction. On this facet of the case the court explained that this type of instruction can be appropriately used in a humanitarian case only if the defendant hypothesizes (1) a situation where he himself is guilty of no humanitarian negligence (established by the converse instruction) and (2) that the collision was due solely to the "acts" of the plaintiff, and that in so framing a sole cause instruction the defendant should not attempt to hypothesize that such acts were "negligence," since by doing so he is injecting a confusing element into the case and in most cases is erroneously injecting antecedent negligence into the case. The suggestion is made that if this case is read in conjunction with the case of *Rosenfeld v. Peters*<sup>46</sup> many of the pitfalls attended by the use of the sole cause instruction can be avoided.

This case serves also to bring the cases of Division Two into line with the heretofore decided cases of Division One wherein mention of plaintiff's negligence in a sole cause instruction in a humanitarian case has been condemned.

*Lay v. McGrane*<sup>47</sup> arose out of a right angle intersection collision between the passenger car in which plaintiff was riding and the passenger car defendant was operating. The collision occurred at a street intersection without traffic control devices on a clear dry day. The plaintiff submitted his case against his driver on humanitarian negligence in the disjunctive in failing to slacken his speed or swerve and against the driver of the other

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45. *Rosenfeld v. Peters*, *supra* note 12.

46. *Id.*

47. 331 S.W.2d 592 (Mo. 1960).

vehicle on primary negligence in failing to maintain a lookout. The jury returned a verdict for the plaintiff and the host defendant appealed.

In reviewing the plaintiff's verdict directing humanitarian instruction against his host the Supreme Court said that since the defendant did not raise the point that the humanitarian doctrine is inapplicable as between guest and host, they would assume for the purpose of this appeal, without deciding that issue, that the plaintiff could submit his case against that defendant on that theory. Nevertheless the case was reversed and remanded because in hypothesizing the defendant's various duties in a humanitarian situation the plaintiff did not tie this duty to a standard of care, e.g., "saw or could have seen the automobile" should have been "saw or *in the exercise of the highest degree of care* should have seen."

Another point worth noting in this case was the charitable disposition of the court in pointing out (after observing the case would have to be remanded because of the errors mentioned in connection with the instruction) that plaintiff would probably be better served by submitting his case against the host on primary negligence or in the event it was resubmitted on humanitarian negligence, it should be submitted in the conjunctive in failing to slacken *and* swerve as opposed to slacken *or* swerve.

Judge Hyde concurred in the result because he felt that the plaintiff's evidence made a case of primary negligence against his host but stated that it was his view that the humanitarian negligence rule was not applicable to a situation where a plaintiff is riding as a guest in a defendant's automobile.

*Findley v. Asher*<sup>48</sup> arose from a right angle intersection collision between two passenger cars. The defendant's vehicle was traveling south on a major highway and the plaintiffs' decedent was approaching from defendant's left, going west on a side street marked with a stop sign. The deceased's vehicle was struck near its front-right by the front-left of defendant's auto. The collision occurred in the daytime on a wet pavement. The plaintiffs' case was submitted on humanitarian negligence in failing to slacken and swerve and a jury verdict was returned in their favor.

Upon appeal the Supreme Court held that plaintiffs failed to make a submissible case for the reason that it was not shown that after the time the plaintiffs' decedent entered a zone of peril the defendant could have taken the action suggested to have avoided the collision. The plaintiffs attempted to place the remote end of the zone of peril back beyond the

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48. 334 S.W.2d 70 (Mo. 1960).

stop sign at the edge of the highway on the basis of the plaintiffs' decedent's speed of 20 miles per hour. The court refused to permit this and said: "Because of the stop sign, defendant's duty to act under the humanitarian rule would not commence until, in the exercise of the highest degree of care, he could have seen deceased approaching so closely to the stop sign at such a speed that it would not be possible for her to stop short of his path, unless the reasonable appearances before that time were that she intended to disregard it."<sup>49</sup> The court concluded there was no such evidence in the case.

The plaintiffs also tried to make an "almost escaping" case, but after careful mathematical computation the court held this was impossible, and observed that rarely can an "almost escaping" case be made when, as here, the front of the deceased's auto is struck.

*Montgomery v. Sabel*<sup>50</sup> arose from a "T" intersection collision between passenger cars driven by plaintiff and defendant. The plaintiff's case was submitted on humanitarian negligence in failing to slacken speed and stop. A jury trial resulted in verdict for defendant. On appeal the only issue was the propriety of the defendant's converse humanitarian instruction. This instruction, which is set out in full in the report of the case, was held to be proper and the judgment for defendant was affirmed.

#### CONCLUSION

It is submitted that the only reasonable solution to the problems arising from Missouri's unique humanitarian rule available to the court is to overrule the application of the last clear chance doctrine in the true humanitarian case involving mutually discoverable and mutually avoidable oblivious peril.

A solution by legislation abolishing contributory negligence as a defense, and prescribing a doctrine of proportional fault or comparative negligence, is always possible but no progress has been made in that field despite several attempts.

If the judicial revocation of the application of the doctrine in cases of mutually discoverable and avoidable oblivious peril is accompanied by a policy of permitting the jury to pass on all but obviously clear cases of contributory negligence, and by an expansion of the use of wilful and wanton negligence in cases where plaintiff's negligence is a minor antecedent factor, no really deserving claims will suffer.

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49. *Id.* at 73.

50. 334 S.W.2d 112 (Mo. 1960).