burden thus placed on insurance companies the public is the ultimate sufferer because of the high insurance rates sure to follow.[12] The Texas holding alleviates considerably the problem in such a situation. Those who oppose it dislike the undue favor which they allege has been bestowed on insurance companies by legislatures.

It has also been urged in some quarters as a criticism of the common law view that an analogy should be drawn from the gratuitous bailee cases, where liability exists only as a result of gross negligence.[13] This thesis is based on the theory that he who undertakes to perform a duty gratuitously should not be under the same measure of obligation as he who enters upon the same undertaking for pay.[14]

One unusual case refutes the common law view on the ground that it is "unsportsmanlike" and puts an undue burden on the driver. It was also maintained in that case that such a rule works against public policy inasmuch as it tends to discourage the giving of rides to those who are in need and deserving of the same.[15]

Criticism of the common law theory will apply *a fortiori* to the stricter Missouri view. It is suggested, therefore, that Missouri revise its present statutory enactment so as specifically to exclude the driver from being held to the highest degree of care as to his gratuitous guest. The substitution of the gross negligence doctrine is to be recommended.

C. J. D.

TORTS—HUMANITARIAN DOCTRINE AS A DEFENSE—[Texas].—In *Charbonneau v. Hupaylo*[1] the Texas Court of Civil Appeals held that the plaintiff could not recover from a defendant driver who negligently turned his car across the path of the plaintiff's following car, if the facts showed that the plaintiff could have avoided the accident after discovering the defendant in a position of peril. Cases rarely arise in which the discovered peril or last clear chance doctrine is utilized as a defense.[2] The English[3] and

12. Cf. comment, 12 Texas L. Rev. 303 (1933).

13. Goddard, *Outlines of Bailments and Carriers*, (2d ed. 1928) 44; Sales v. Funk, 175 Mo. App. 500, 161 S. W. 1175 (1913); Adler v. Planter's Hotel Co., 181 S. W. 1062 (Mo. 1916).

14. Massaletti v. Fitzroy, 22 Mass. 487, 118 N. W. 168 (1917).

15. O'Shea v. Lavay, 175 Wis. 456, 185 N. W. 525, 20 A. L. R. 1008, 1010 (1921); comment, 18 Calif. L. Rev. 184 (1929).

1. 100 S. W. (2d) 745 (Tex. Dec. 1936).

2. Comment, 14 Boston U. L. Rev. 850 (1934).

3. Butterfield v. Forrester, 11 East. 60, 103 Eng. Rep. 926 (1809). The plaintiff was riding along the road on horseback and was injured when he ran into an obstruction negligently left across the roadway by the defendant. The court refused recovery, becoming the first court to enunciate the doctrine that a plaintiff who could have avoided the accident by the use of ordinary care following defendant's negligence cannot recover. The decision preceded by 33 years the case of Davies v. Mann, 10 M. & W. 547, 152 Eng. Rep. 588 (1842), which is now recognized as the leading case upon the Last Clear Chance Doctrine.

Virginia[4] courts have expressly recognized the use of the doctrine in that manner. Where such cases do arise it is often feasible for the courts to dispose of them on other grounds; such as plaintiff's concurrent negligence or his willful and wanton conduct.[5] Whatever reasoning or terms the courts employ, the fact remains that the plaintiff will be refused recovery because of his wrongful conduct.[6]

Missouri lawyers may speculate as to what attitude their own courts would take in applying the Humanitarian Doctrine[7] to facts similar to those in the instant case. Would the court permit the Humanitarian Doctrine to be invoked as a defense? The Missouri Courts have repeatedly said that this doctrine rests upon the law's regard for human life.[8] The law undoubtedly holds the same regard for human life whether it be that of a plaintiff or a defendant. Surely then it would not be inconsistent for the court to hold a plaintiff precluded from recovery for simple negligence when the facts plainly indicate that he saw or should have seen defendant obliviously in or approaching[9] a position of peril in sufficient time to have warned the defendant of the danger.

Should such a set of facts arise in Missouri, an application of the Humanitarian Doctrine as a defense would not work an injustice. Obliviousness to peril is not an uncommon element in automobile accidents, and should not work to the benefit of only one party where both are in control of the same type of mechanical and dangerous instrument.[10] Both plaintiff and defendant should share equally the duty to protect human life. Although it would not lessen the ease with which cases go to the jury[11] under the Humanitarian Doctrine, it would tend to strengthen the defense in the eyes of the jury and thus probably prevent an indiscriminate return of plaintiff's verdicts in automobile accidents.

L. H. B.

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4. McNamara v. Rainey Luggage Corp. et al., 139 Va. 197, 123 S. E. 515 (1924).

5. 45 C. J., Negligence (1928) 988, sec. 540.

6. Island Express Inc. v. Frederick, 5 Harr. 569, 171 A. 181, (Del. 1934).

7. This doctrine, as it is frequently expressed by the Missouri courts, is that a plaintiff may recover despite his own contributory negligence if the defendant saw or should have seen the plaintiff in a position of peril in sufficient time to have avoided the accident with the facilities and instruments then at hand, and failed to do so. Alexander v. St. Louis San Francisco Ry. Co., 4 S. W. (2d) 888 (Mo. App. 1928); Banks v. Morris & Co. 302 Mo. 254, 257 S. W. 482 (1924).

8. Banks v. Morris & Co., supra, note 7.

9. The Missouri Supreme Court in the recent case of Perkings v. Terminal Ry. Co. of St. Louis, 102 S. W. (2d) 915 (Mo. 1937) has further extended the Humanitarian Doctrine, holding that the defendant is liable if he sees or should have seen plaintiff *approaching* a position of peril and failed to warn him of his danger. See infra, p. 583.

10. Gaines, The Humanitarian Doctrine in Missouri (1935) 20 ST. LOUIS LAW REVIEW 113, 118.

11. ". . . As the Humanitarian rule exists today it is a very convenient method of getting judgment for the plaintiff in almost any damage suit, regardless of his contributory negligence." Ibid., 129.