

THE HUMANITARIAN DOCTRINE IN MISSOURI

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I. INTRODUCTORY

Channing Pollock, American playwright and sentimentalist, once referred to the efforts of his contemporaries in the field of the drama as "a grand conglomeration of garbled verbiage and verbal garbage." The applicability of this description to the interpretations of the humanitarian doctrine as it exists in Missouri is somewhat pronounced.

In order to come to a better understanding of the humanitarian doctrine it will be wise to turn back to the English case of *Butterfield v. Forrester*¹ decided by Lord Ellenborough in the Court of King's Bench in 1809, in which case the general rule as to contributory negligence was first distinctly announced. This was an action on the case for obstruction of an highway, by means of which obstruction the plaintiff was injured while riding on his horse. The obstruction blocked but one side of the highway, and the plaintiff, who was riding fast and in the dark, failed to see the clear passage. Lord Ellenborough declared that two things contributed equally to the accident and the plaintiff's resultant injury: (1) the obstruction in the road by fault of the defendant; and (2) the want of ordinary care on the part of the plaintiff to avoid it. Hence the rule was established that although a defendant may have failed to exercise ordinary care, still a plaintiff will not be entitled to recover damages, if he did not use ordinary care for the safety of his own person and property, and if such lack of care contributed proximately to the injury complained of.²

Thirty-three years later, in England, the famous "donkey case," *Davies v. Mann*,³ was decided by Lord Abinger in the Court of Exchequer. The plaintiff in that case had negligently fettered his donkey in the highway, so that the animal could not get out of the way of passing vehicles. The defendant, while driving a wagon in the street, negligently ran down and killed the plaintiff's donkey. It was held by the Court of Exchequer that the

¹ 11 East 60, 103 Eng. Rep. R. 926.

² Beach, *The Law of Contributory Negligence* (2nd Ed. 1892) p. 10; Comment 7 St. Louis Law Review 189.

³ (1842) 10 Mees & W. 546, 152 Eng. Reprint 588.

plaintiff was entitled to recover on the theory that although the plaintiff may be guilty of negligence tending to produce the injury complained of, he may, nevertheless, recover damages for the injury, if the defendant could, in spite of such negligence, by the exercise of ordinary care upon his part have avoided inflicting the injury.

Obviously the two cases are contrary to each other. Applying the simple doctrine of *Butterfield v. Forrester* to the factual setup in *Davies v. Mann*, a court could do but one thing—give judgment for the defendant. The two cases have, however, marched along together down the decades of legal history, and their doctrines exist today—sometimes so distorted by ramifications and exceptions as hardly to be recognizable.

The case of *Davies v. Mann* established what is now known as the *last clear chance* doctrine. This rule has been set out by Judge Cooley in the following manner: "If, therefore, the defendant discovered the negligence of the plaintiff in time, by the use of ordinary care, to prevent the injury, and did not make use of such care for that purpose, he is justly charged with reckless injury, and cannot rely upon the negligence of the plaintiff as a protection. Or it may be said that in such a case the negligence of the plaintiff only put him in a position of danger and was, therefore, only the remote cause of the injury, while the subsequently intervening negligence of the defendant was the proximate cause. The rule is frequently spoken of as the doctrine of the last clear chance, which is that the one who has the last clear chance to avoid the injury and fails to do so is solely responsible for its happening, as his negligence is the proximate cause of the same."⁴ This doctrine of the last clear chance was adopted in Missouri.⁵

The so-called humanitarian doctrine is a direct outgrowth of the doctrine of the last clear chance. Some courts recognize no distinction between the two. The difference seems to be that under the last clear chance doctrine, as enunciated above, the negligent plaintiff can recover when the defendant saw the plaintiff and then negligently failed to avoid the injury, while under the humanitarian doctrine a duty is imposed on the defendant to see the plaintiff, and if he could, by the exercise of ordinary

⁴ Cooley, *Law of Torts* (Throck. Ed. 1930), pp. 649-650.

⁵ *Burham v. St. Louis & I. M. R. R. Co.* (1874) 56 Mo. 338.

care have seen the plaintiff in a position of peril, yet failed to do so, the defendant is nevertheless liable.⁶

Another striking distinction is that under the doctrine of the last clear chance is implied the cessation of negligence on the part of the plaintiff, and the commencement or continuation thereof on the part of the defendant; while under the humanitarian doctrine it makes no difference whether the plaintiff's negligence ceases or continues up to the time of the accident.⁷ The reason for this distinction is that the humanitarian doctrine has as a fundamental principle the obligation of the defendant, out of regard for human life, to use reasonable or ordinary care to prevent the death or injury of one who is in a position of peril.⁸

Thus it becomes apparent that this humanitarian doctrine is an outgrowth or an extension of the last clear chance doctrine. They accomplish like results in that they both absolve the plaintiff from the usual consequences of his contributorily negligent acts—the only difference being that the humanitarian doctrine extends the theory of absolution somewhat further than does the last clear chance doctrine—i. e. in the two respects noted above.

We turn now to the decisions of the Missouri courts, in order to determine what treatment they have accorded this unusual gloss on the law of contributory negligence.

II. EARLY CASES UNDER THE HUMANITARIAN DOCTRINE IN MISSOURI

A. *In General.*

The text writers and authors of law review notes generally cite the case of *Kellny v. Missouri Pacific Railroad Company*⁹ as the first case decided under the humanitarian doctrine in Missouri.¹⁰ Although it is true that the *Kellny* case was the first to embody all the principles of the doctrine and to speak of it as

⁶ *Banks v. Morris* (1924) 302 Mo. 254, 27 S. W. 482. *Brown v. Kansas Electric Utilities Co.* (1922) 110 Kan. 283, 203 Pac. 907. *Nicol v. Oregon-Washington R. & N. Co.* (1912) 71 Wash. 409, 128 Pac. 628.

⁷ *Gibbard v. Cursan* (1923) 225 Mich. 311, N. W. Indianapolis Traction Co. v. Croly (1913) 54 Ind. App. 566. *Atchinson, etc. R. R. Co. v. Bratcher* (1924) 99 Okla. 74.

⁸ *Thompson v. Quincy, etc. Ry. Co.* (1929) 322 Mo. 886, 18 S. W. (2d)

40. *Banks v. Morris & Co.* (1924) 302 Mo. 254, 257 S. W. 482.

⁹ *Kelley v. Mo. Pac. Railroad Co.* (1890) 101 Mo. 67, 13 S. W. 806.

¹⁰ *The Humanitarian Rule*, 64 U. S. Law Review 453.

a generally recognized exception to the rule in regard to contributory negligence, nevertheless there were earlier cases which spoke of the "humane rule" and enunciated the general theory or basis of the humanitarian doctrine.^{11a-e}

The case of *Ishbel v. Railroad Company*^{11a} was decided by the Supreme Court of Missouri in 1875. That was a case where a negligent engineer had run down a child on the track of the defendant's railroad. The court, although seeming to apply the last clear chance doctrine, held that the defendants should be liable "if they could have avoided the accident by the exercise of ordinary caution and *watchfulness*." This use of the word "watchfulness" would seem to indicate that the court for the first time is imposing liability upon a defendant when he should have seen the plaintiff but failed to. In other words, the duty to look, which is one of the bases of the humanitarian doctrine, is for the first time stressed in this case.

In the case of *Harlan v. St. L., K. C. & No. Railway Company*^{11b} decided in 1878 the court sets out the humanitarian doctrine and decides the case squarely under it, saying that a defendant will be liable even though the plaintiff has negligently placed himself in danger, "if by the exercise of reasonable care, after a discovery by the defendant of the danger in which the injured party stood, the accident could have been avoided, or if the company failed to discover the danger through the recklessness of its employees, when the exercise of ordinary care would have discovered the danger and averted it."

Although the court had not yet spoken of the rule as the humanitarian doctrine, it had nevertheless formulated, adopted, applied, and affirmed the rule in the line of cases which commenced with *Harlan v. Railway Company* in 1878.

That other Supreme Court cases applied the humanitarian doctrine before the *Kelny* case is evidenced by the cases cited in the footnote 11, c-g.

^{11a} *Ishbel v. H. & St. J. R. R. Co.* (1875) 60 Mo. 475.

^{11b} *Harlan v. St. L., K. C. & No. Ry. Co.* (1877) 65 Mo. 22 (1. c. 25)

^{11c} *Kelly v. Hannibal & St. Joseph R. Co.* (1881) 75 Mo. 138.

^{11d} *Frick v. St. L., K. C. & No. Ry. Co.* (1881) 75 Mo. 595.

^{11e} *Werner v. Citizens' Ry. Co.* (1884) 81 Mo. 368.

^{11f} *Donohue v. St. L., I. M. & S. R. Co.* (1886) 91 Mo. 357, 2 S. W. 424.

^{11g} *Dahlstrom v. St. L. I. M. & S. R. Co.* (1888) 96 Mo. 99, 8 S. W. 777.

B. Treatment of Trespassers in Early Cases.

It would seem that at the outset the humanitarian doctrine was intended not to apply to trespassers. The case of *Williams v. K. C. S. & M. R. Co.*,¹² decided in 1888, was a suit for damages caused by the loss of plaintiff's son who was killed by the defendant's train while trespassing on the defendant's tracks. The court held that where the company has the right to anticipate a clear track, liability of the defendant to one wrongfully on the track cannot be predicated on the ground that the defendant's servant should have seen the plaintiff by the exercise of ordinary care. The court further points out that the basis of liability in a case under the humanitarian doctrine (although the court does not call it by that name) is a branch of the duty not to be wanton or reckless, and that does not require the defendant to be on the look-out for trespassers. Thus, the court takes a definite stand against trespassers, in so far as the humanitarian doctrine is concerned, and seems to exclude them from the privilege of submitting their case under that rule.¹³

In a case¹⁴ decided by the Supreme Court of Missouri in 1891 the plaintiff submitted his cause under the humanitarian doctrine, and judgment for him was affirmed. The court, however, placed much emphasis on the point that the deceased and others were on the defendant's track by tacit permission and, therefore, were not trespassers. The inference obviously is that had the deceased been a trespasser on the defendant's property, the plaintiff could not have invoked the humanitarian rule.

In 1892,¹⁵ the court cited with approval the *Williams* case and made much of the fact that the plaintiff was on the defendant's track on his way to work at the direction of the defendant's foreman and therefore was not a trespasser. The court felt that in the case of a trespasser there would be some question as to the applicability of the humanitarian doctrine. It is only, however, in the cases where the defendant calls attention to the fact that the plaintiff was a trespasser that the matter is discussed. In most of the cases it does not appear whether the plaintiff was a trespasser or not. Nevertheless the policy of the court as set

¹² (1888) 96 Mo. 275, 9 S. W. 573.

¹³ *Berbos v. Railway Co.* (1888) 95 Mo. 50, 11 S. W. 254; *Dlanki v. Railway Co.* (1891) 105 Mo. 645, 16 S. W. 281.

¹⁴ *Guenther v. Railway Co.* (1891) 108 Mo. 18, 18 S. W. 846.

¹⁵ *Schelereth v. Mo. Pac. Ry. Co.* (Mo. 1892) 19 S. W. 1134.

out in the early cases, in regard to trespassers, is obvious—the later holdings of the Supreme Court of Missouri involving trespassers will be examined later.¹⁶

C. Limitation of the Doctrine to Dangerous Instrumentalities.

In the early days of the humanitarian doctrine, the Supreme Court confined its application to cases where the negligent plaintiff was injured by one negligently operating dangerous instrumentalities. The court felt that as a matter of public policy an extra duty to be on the lookout for persons in positions of peril should be imposed upon the operators of such dangerous instrumentalities. That is to say, the duty owed by the operator of a dangerous machine was owing not only to the person who might be injured but to society also.¹⁷ Another case proceeded on recognition of the fact that a locomotive is an instrument of danger to those who happen to be on the track when the wheels are in motion.¹⁸

The fact that all of the early decisions in Missouri under the humanitarian doctrine where railroad cases would seem to lend weight to the theory that the rule originally was intended to apply to those operating dangerous machines;¹⁹ and, as indicated by the case last cited, by “dangerous machines” was meant railroad trains. The court lost no time, however, in extending the scope of the rule beyond railroads to include accidents on street cars.²⁰ From street cars the court extended the doctrine to virtually everything that moved, and to some things that did not. It is obvious from a reading of these early decisions that the original intention was to confine the doctrine to those cases where a railroad company was the defendant.

D. Contrast Between City and Country Cases.

Some of the very earliest decisions of the Missouri Supreme Court applying the humanitarian doctrine pointed out that the wisdom of the rule was apparent because of the danger attending the running of trains in large and populous cities.¹²

¹⁶ *Infra*: Part III B.

¹⁷ *Czezewzha v. Benton-Bell. Ry. Co.* (1893) 121 Mo. 201, 25 S. W. 911.

¹⁸ *Kelly v. Union Ry. F. Co.* (1888) 95 Mo. 279, 8 S. W. 420.

¹⁹ *Hanlon v. Mo. Pac. Ry. Co.* (1891) 104 Mo. 381, 16 S. W. 233.

²⁰ *Werner v. Citizens' Ry. Co.* (1884) 81 Mo. 368; *Klockenbrinck v. St. L. & M. R. Co.* (1903) 172 Mo. 678, 72 S. W. 900.

²¹ *Werner v. Citizens' Ry. Co.* (1884) 81 Mo. 368; *Schelereth v. Mo. Pac. Ry. Co.* (Mo. 1892) 19 S. W. 1134. The court says: “A recognized rule of

The court does not say so specifically, but these cases would seem to indicate that this reason for the rule would not obtain in rural sections where the engineer has a right to expect a clear track. Indeed in cases which have arisen in the country where the engineer had the right to expect a clear track, the liability of the defendant railroad has been limited in such cases to negligence or want of ordinary care, occurring after the exposed and dangerous position of the injured party *came to the knowledge* of the servants charged with the want of care.²² The holding in these cases certainly indicates that the doctrine was never intended to apply generally but only in those cases where public policy and the interests of humanity would be better served by application of the rule. Further proof is found in the fact that most of the early cases involving the humanitarian doctrine in Missouri were railroad or street car cases arising in large cities such as St. Louis and Kansas City.²³

Another point of interest which is worthy of notice is that in most of the cases cited below the particular act of negligence of which the defendant was guilty was the violation of a city ordinance²⁴ or a state statute.²⁵

The policy of these early cases was based on the premise that persons operating dangerous instrumentalities in places gener-

law, founded upon principles of humanity requires those running engines and trains in *populous cities* to exercise reasonable care to discover and avoid injuring those, at least, who may be upon the track by right or license."

²² *Dunkman v. Wabash Ry. Co.* (1887) 95 Mo. 232, 4 S. W. 670; *Yarnall v. Railway Co.* (1882) 75 Mo. 583; *Maher v. Ry. Co.* (1876) 64 Mo. 267.

²³ *Kelly v. H. & S. J. R. Co.* (1881) 75 Mo. 138; *Frick v. Railway Co.* (1882) 75 Mo. 595; *Werner v. Railway Co.*, note 21 *supra*; *Donohue v. Railway Co.* (1886) 91 Mo. 357, 2 S. W. 424; *Jennings v. Railway Co.* (1889) 99 Mo. 394, 11 S. W. 999; *Kellny v. Railway Co.* (1890) 101 Mo. 67, 13 S. W. 806; *Schelereth v. Railway Co.*, note 21 *supra*; *Sullivan v. Railway Co.* (1893) 117 Mo. 214; 23 S. W. 149; *Klackenbrinck v. Railway Company* (1903) 172 Mo. 678, 72 S. W. 900.

²⁴ Violation of a city ordinance: *Kelly v. Railroad Co.*; *Donohue v. Railway Co.*; *Jennings v. Railway Co.*, *Kellny v. Railway Co.*; *Sullivan v. Railroad Co.*; . . . all note 23 *supra*.

²⁵ *Lloyd v. St. L. etc. Ry. Co.* (1895) 128 Mo. 595, 29 S. W. 153. It was proved that the defendant had violated a Missouri statute which imposed liability upon railroads for failure to have a signal at their crossings. R. S. Mo. (1889) sec. 2608. Supreme Court of Mo. held that the violation warrants a finding for the plaintiff, notwithstanding his negligence where (as here) it appears that obedience to the statute would have prevented the injury, and the case may be submitted to the jury under the humanitarian doctrine. Affirmed on rehearing in banc, (1895) 128 Mo. 595, 31 S. W. 110.

ally used by pedestrians owed the duty to discover such persons when in danger and to avoid injuring them if that could be done by the exercise of ordinary care. The duty was owed to society as well as to the individual in the position of danger.

III. THE HUMANITARIAN DOCTRINE AS IT EXISTS TODAY

A. *Banks v. Morris & Company.*

Probably the most important case on the subject of the humanitarian doctrine ever decided by the Supreme Court of Missouri is the case of *Banks v. Morris & Company*.²⁶ The opinion was written by Justice Ragland in 1923. The proposition of law which the decision established is, in a word, that a plaintiff need not allege in the petition that he was oblivious of peril and that the defendant knew it. Although this holding has been followed and approved by all subsequent cases, the decision is also important for an additional reason.

During the course of the opinion Justice Ragland set out the elements essential to a cause of action under the humanitarian rule. His exact words follow:

“The constructive facts of a cause of action under the humanitarian rule, stated in their simplest terms, without any 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 the defendant to have been on the lookout, constructive notice suffices); (3) the 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) the defendant failed to exercise ordinary care to avert such impending injury; and (5) by reason thereof the plaintiff was injured. Evidence tending to prove these facts makes a prima facie case for the plaintiff.”

This “formula” enunciated by Justice Ragland has been cited and followed by subsequent cases up to the present time.²⁷ The constitutive facts set out in *Banks v. Morris & Co.* necessary to bring a cause of action under the humanitarian rule have never

²⁶ (1923) 302 Mo. 254, 257 S. W. 482.

²⁷ *Suegel v. Wells* (Mo. App. 1926) 287 S. W. 775; *Bode v. Wells* (1929) 322 Mo. 386, 15 S. W. (2d) 335; *Huckleberry v. Railroad Co.* (1930) 324 Mo. 1025, 26 S. W. (2d) 980; *Phillips v. Henson* (1930) 326 Mo. 282, 30 S. W. (2d) 1065.

been deviated from in any case. That case settled the law in Missouri as far as any dispute over the essential elements of the humanitarian doctrine was concerned.

There are, however, four situations that arise in the cases which would seem worthy of note. They are: (1) the applicability of the humanitarian doctrine where the plaintiff is a trespasser; (2) the danger zone; (3) antecedent negligence of the defendant; and (4) the degree of care required of motorists. These situations will now be discussed in the order named.

B. Applicability of the Humanitarian Doctrine to Trespassers.

In an earlier part of this paper the cases involving trespassers who sought to submit their cases under the humanitarian doctrine were set out.²⁸ By 1892 the general rule seemed to have been established to the effect that the humanitarian doctrine did not apply in those cases where the plaintiff was a trespasser on the defendant's property.²⁹ The reason for this position is that an engineer or other agent of a defendant is not bound to foresee the wrongful presence of persons upon the track, and therefore a court cannot impute vision of the trespasser to them, as is done in cases where the humanitarian doctrine is applied.³⁰ In the case last cited it appeared that the defendant company had built fences, posted warnings, and had generally done everything possible to keep trespassers off their tracks. The court held that under these circumstances the defendant was entitled to expect a clear track, and therefore it owed the plaintiff no duty to be on the lookout for him; and since "should have seen" cannot be said, the humanitarian doctrine cannot be applied.

In time a modifying gloss was added to the rule. The court has held that where the evidence establishes a custom of walking on the tracks, then the trespasser is at liberty to invoke the humanitarian doctrine.³¹ The reason for this gloss is that because of the custom (of which the defendant company must have known) the defendant is not entitled to expect a clear track, and hence the defendant can be held liable for negligently failing to see the plaintiff when he would have done so if ordinary care had

²⁸ See Part II, section B.

²⁹ *Schelereth v. Mo. Pac. Ry. Co.*, note 21 above.

³⁰ *Frye v. St. L., etc. Ry. Co.* (1906) 200 Mo. 377, 48 S. W. 566.

³¹ *Morgan v. Wabash Railroad Co.* (1900) 159 Mo. 262, 60 S. W. 195; *Fearous v. K. C. El. Ry. Co.* (1903) 180 Mo. 208, 79 S. W. 394; *Everett v. St. L. & S. F. Ry. Co.* (1908) 214 Mo. 54, 112 S. W. 486.

been exercised.³² The rule simply stated is that the railroad company waives its right to a clear track when it knew of and acquiesced in a use of the track by pedestrians.³³ Of course, even in the case of a trespasser a duty arises on the part of the engineer to exercise ordinary care to avoid injuring the trespasser after he has actually been discovered.³⁴ Indeed in the case of *Feidler v. Railroad Company*³⁵ the court says: "This humane rule of law applies even to a trespasser in case the perilous situation in which he has placed himself is discovered by the engineer in time to prevent injury to him."

It would be more accurate to say that after the plaintiff is actually discovered in a position of peril by the defendant, the last clear chance doctrine applies. That is, the defendant under such circumstances must exercise ordinary care to avoid injuring the plaintiff, else his failure to do so will be considered the proximate cause of the accident, and the plaintiff's negligence in getting into the position of peril will not bar his recovery. This, however, is a sharp distinction and of little utility, because, as was pointed out in the introduction to this paper, the humanitarian doctrine includes within it the doctrine of the last clear chance.

C. *The Danger Zone.*

One of the constitutive facts of a cause of action under the humanitarian rule set out by Justice Ragland in the case of *Banks v. Morris & Co.*³⁵ is that the plaintiff must be in a position of peril. In fact the position of peril of the plaintiff might be denominated the chief element of liability.³⁶

Most of the cases refer to the "danger zone" in deciding whether or not the plaintiff was in a "position of peril." The two terms are used synonymously.

An early case held that the "position of peril" was reached when the plaintiff stepped upon the railroad track.³⁷ In the case

³² Supra note 31.

³³ *Crossno v. Terminal RR. Ass'n.* (1933) 333 Mo. 733, 62 S. W. (2d) 1092.

³⁴ *Morgan v. Wabash Railroad Co.* (1900) 159 Mo. 262, 60 S. W. 195; *Scullin v. Wabash Railroad Co.* (1904) 184 Mo. 695, 83 S. W. 760.

³⁵ *Feidler v. Railroad Co.* (1891) 107 Mo. 645, 18 S. W. 847.

³⁶ *Banks v. Morris & Co.*, note 26 above.

³⁷ *State ex. rel. v. Trimble* (1923) 300 Mo. 92 253 S. W. 1014; *Thompson v. Quincy, etc. R. Co.* (Mo. 1929) 18 S. W. (2d) 401.

³⁸ *Boyd v. Wabash R. Co.* (1891) 105 Mo. 371, 16 S. W. 909.

of *Koonty v. Wabash Railroad Company*.³⁸ the court held that if a person approaching the track has knowledge of the approaching train and he so acts as to let the engineer know he has knowledge of it he is not in the "danger zone" until the track is practically reached by him. The court, however, holds that this is not the case when the plaintiff does not know of the approaching train; in such case the "danger zone" extends beyond the track.³⁹

Some decisions have even attempted to locate the "danger zone" with reference to the number of feet from the track.⁴⁰

Justice White in his separate concurring opinion in *Banks v. Morris & Co.* stated the rule in regard to the "position of peril" in the best manner noted. It was his thought that "imminent peril" means that a situation has arisen where the ordinary and natural efforts to be expected of a person in such a position would not put him in a place of safety. The question as to when or where this situation arose is one of fact to be decided by the jury after hearing the evidence. Hence, no set rules should be laid down for the establishment of a "danger zone"; for the reason that the extent of such a zone is dependent upon the factual set-up of the particular case. This is in regard to adult plaintiffs injured by railroads or street cars and attempting to bring their cases under the humanitarian rule.

In the case of a child, however, the case is somewhat different; as the motorman and engineer cannot rely upon the child's getting out of the path of the car. For example, while the "danger zone" for adults may be the tracks, for a child of four years of age the zone is much larger, and the duty of the operator to exercise ordinary care begins some time earlier, before the child reaches the tracks.⁴¹ In the case of *Livingston v. Wabash Railroad Company*⁴² the court held reversible error an instruction which ignored the duty of an engineer to see a child and com-

³⁸ (Mo. App. 1923) 253 S. W. 413; case cited and followed in *State ex. rel. v. Trimble* (Mo. 1924) 260 S. W. 1000.

³⁹ Accord: *State ex. rel. v. Reynolds* (1921) 289 Mo. 479, 233 S. W. 219.

⁴⁰ *Keele v. A. & S. F. R. Co.* (1914) 258 Mo. 62, 167 S. W. 433 "Danger zone" is three steps from the track at the most." *McGowan v. Wells* (1929) 324 Mo. 652, 24 S. W. (2d) 633. The plaintiff did not enter the "danger zone" until he took the last step or so before going into the course that the car would take.

⁴¹ *Cytron v. Transit Co.* (1907) 205 Mo. 692, 104 S. W. 117 (1. c.)
Cornonski v. Transit Co. (1907) 207 Mo. 263, 106 S. W. 51.

⁴² (1902) 170 Mo. 452 71 S. W. 136.

mence the exercise of ordinary care to avoid injury to the child until it was actually on the track.

Here again the special facts surrounding circumstances of the particular case are the criteria for determining when the plaintiff enters the "danger zone" or "position of peril", but it can safely be said that in the case of infants the extent of the "danger zone" is greater than in the case of adults.

In the case of *Bobas v. Krey Packing Company*⁴³ the plaintiff was injured while climbing on to the defendant's truck. The defendant argued that the plaintiff was not in a position of peril and that, therefore, the humanitarian doctrine could not apply. The court, however, held that while the position of the plaintiff with reference to the truck's standing still, or moving slowly, was a comparatively safe one, yet "with reference to the truck's being suddenly and violently started forward, it was extremely perilous." So, also, where the plaintiff was burned when gasoline spilled from the defendant's train along its right of way was ignited by the sudden starting of the defendant's engine, it was held that, while there was no fire the plaintiff was in a comparatively safe position; yet in the presence of the fire it became extremely perilous.⁴⁴

The two cases point out that the "danger zone" is sometimes established by the act of the defendant, and although the act of the defendant creating the "danger zone" and the act of negligence rendering the defendant liable are one and the same, nevertheless the humanitarian doctrine applied.

In a case where the plaintiff was run down by the defendant's automobile while attempting to cross the street, the court held that the plaintiff's peril arose as soon as it became apparent that he was going to cross an intersection without stopping.⁴⁵ Hence, the defendant was bound to exercise the requisite degree of care from that time. Since he did not, he was liable under the humanitarian doctrine.

It has also been held that where a person is apparently walking across a street his position of peril becomes imminent to the

⁴³ (1927) 317 Mo. 108, 296 S. W. 157.

⁴⁴ *Huckleberry v. Railroad Co.* (1930) 324 Mo. 1025, 26 S. W. (2d) 980.

⁴⁵ *Phillips v. Henson* (1930) 326 Mo. 282, 30 S. W. (2d) 1065. Here the defendant was driving east and the plaintiff was driving west, on the same street. At an intersection with a north and south street, the defendant suddenly made a left turn.

driver when he leaves the curb—not when he reaches the middle of the street.⁴⁶ The court also held that the “danger zone” was not limited to such narrow confines as the last step into the path of the automobile.⁴⁷

Thus it is seen that the extent of the “danger zone”, as far as automobiles are concerned is somewhat greater than in the cases involving railroads or street railways. The reason for this may be found in the fact that a Missouri statute⁴⁸ exacts the “highest degree of care” of the operators of motor vehicles.⁴⁹ It is submitted, however, that the real reason is found in the fact that automobiles are for the most part driven in places where pedestrians or other automobiles usually are and have a right to be, whereas railroads and street cars, moving as they do on *tracks*, in most cases have the right of way, and the operators thereof can usually presume that persons will stay off the tracks when they see or hear a car approaching. Of course, they will do the same in the case of automobiles, but the pedestrian knows that automobiles can be stopped more quickly, and therefore he will take greater chances than in cases where railroads or street railways are concerned. For this reason, the driver of a motor vehicle does not have the same expectation of a clear course that the engineer of a railroad train, or the motorman of a street car has, and therefore the “danger zone” is essentially broader in the case of the former than the latter.

D. Antecedent Negligence on the Part of the Defendant.

In a case⁴⁹ decided by the Kansas City Court of Appeals, the following instruction to the jury was affirmed:—“The law . . . is that although the motorman (of the defendant’s car) could not avoid the injury by the use of ordinary care after he saw or by the exercise of ordinary care could have seen the plaintiff in a position of peril on the track, the defendant is nevertheless liable if the motorman’s inability to avoid the injury was caused by his negligence before the peril arose.”

⁴⁶ Gray v. Columbia Term. Co. (1932) 331 Mo. 73 52 S. W. (2d) 809.

⁴⁷ Cf. Burke v. Pappas (1927) 316 Mo. 1235, 293 S. W. 142; Hornbuckle v. McCarty (1922) 295 Mo. 162, 243 S. W. 327, 25 S. L. R. 1508; Rowe v. Hammond (1913) 172 Mo. App. 203, 157 S. W. 880.

⁴⁸ R. S. Mo. (1929) Sec. 7775.

⁴⁹ Martin v. Fehse (1932) 331 Mo. 861 55 S. W. (2d) 440.

⁴⁹ Murphy v. Fleming & Wilson, Receivers. (Apparently there is no report of this case.

In other words, the jury was instructed that the defendant was liable for its antecedent negligence. The defendant receivers brought the case to the Supreme Court of Missouri by writ of certiorari, as a result of which the judgment of the Court of Appeals was quashed.⁵⁰

In quashing the judgment the court held that it directly contravened the case of *Sullivan v. Railroad Company*⁵¹ in which case it was pointed out that if the defendant were held liable for his antecedent negligence, the result would be to abrogate the entire doctrine of contributory negligence. The Court in the *Sullivan* case also pointed out that the emanation of this doctrine of antecedent negligence was from the unfortunate and redundant dicta contained in earlier cases.⁵²

The real error is that this rule of liability for antecedent negligence as it appeared in the two last mentioned cases was applied only to cases arising in the country where, at that time, the humanitarian doctrine was not applied at all, but rather the doctrine of the last clear chance.⁵³ At any rate there was no doubt from the decision in the *Fleming* case that any rule as to the antecedent negligence on the part of the defendant is no longer in effect; for at the end of the opinion the court cited several Court of Appeals cases⁵⁴ which took into consideration the antecedent negligence of the defendant in cases submitted under the humanitarian doctrine, and specifically over-ruled them.⁵⁵

The *Bland* case has ever since been cited for the proposition that prior or antecedent negligence on the part of the defendant cannot be considered under the humanitarian doctrine.⁵⁶

Indeed the law is that the prior or antecedent negligence of

⁵⁰ State ex. rel. *Fleming v. Bland* (1929) 322 Mo. 565, 15 S. W. (2d) 798.

⁵¹ *Sullivan v. Railroad Company* (1893) 117 Mo. 214, 23 S. W. 149.

⁵² *Maher v. Railroad* (1876) 64 Mo. 267 (l. c. 276). The court, after deciding that if after discovery of the plaintiff it was impossible to avoid the accident, the defendant could not be held liable, "unless (defendant was) guilty of negligence before, which created the impossibility. This holding was affirmed in *Dunkman v. Wabash Railway Company* (1888) 95 Mo. 232, 4 S. W. 670, l. c. 674.

⁵³ See Part II, sec. D.

⁵⁴ *Ruenzi v. Payne* (1921) 208 Mo. App. 113, 231 S. W. 294; *Goben v. Railroad Co.* (1920) 206 Mo. App. 5, 226 S. W. 631; *Williams v. Railroad Co.* (1910) 149 Mo. App. 489, 131 S. W. 115; *Murrell v. Railroad Co.* (1903) 105 Mo. App. 88, 79 S. W. 505.

⁵⁵ *Bland* case, note 50 above. 322 Mo. 565, 15 S. W. (2d) l. c. 801.

⁵⁶ *Alexander v. St. L., etc. Railroad Co.* (1931) 327 Mo. 1012, 38 S. W. (2d) 1023; *Freeman v. Berberich* (1933) 332 Mo. 831, 60 S. W. (2d) 393.

neither the plaintiff nor the defendant enters into the humanitarian doctrine; the humanitarian rule, when applicable, blots out all that preceded and measures the defendant's liability solely on its ability and failure to avoid the accident under the existing circumstances;—that is from the time of the discovery of the plaintiff or when the duty to discover him arose.⁵⁷ Further, it is reversible error to submit instructions as to primary negligence under the humanitarian doctrine together, unless they are carefully distinguished.⁵⁸ The cases do hold, however, that the plaintiff may have his cause submitted under the humanitarian doctrine and also under the theory that the defendant is liable for primary negligence,⁵⁹ but the important point is that the two theories must be kept separate; so as not to mislead or confuse the jury.

It should be pointed out that while the cases do say that all prior or antecedent negligence vanishes where the humanitarian doctrine applies, this does not militate against the plaintiff's recovery on the ground of the defendant's primary negligence, in the event the jury find that the facts are not such as will support a case under the humanitarian doctrine. The only duty imposed upon the trial court is to see that instructions on the two theories are kept separate and distinct.

It would seem that this requirement is reasonable; for as Commissioner Sturgis remarked in commenting on the necessity of clear instructions upon the humanitarian rule:⁶⁰

“While most lawyers know something of the limitations of this (humanitarian) rule and what facts the jury must find in order to find for the plaintiff thereunder, a jury of laymen could no more understand the rule itself or how to apply it to the facts in evidence than they do about extracting the cube root of a number in five figures, or perhaps applying ‘Einstein’s theory of relativity’, whatever that may be.”

The advisability of such separation is not questionable.

⁵⁷ *Gray v. Columbia Terminations Company* (1932) 331 Mo. 73, 52 S. W. (2d) 809.

⁵⁸ *Freeman v. Berberich* (1933) 332 Mo. 831, 60 S. W. (2d) 393; *Wolfson v. Cohen* (Mo Sup. 1932) 55 S. W. (2d) 677; *Klockner v. Pub. Service Co.* (1932) 331 Mo. 396, 53 S. W. (2d) 1043.

⁵⁹ *Huckleberry v. Railroad Co.* (1930) 324 Mo. 1025, 26 S. W. (2d) 980; *Freeman v. Berberich*, note 58 above.

⁶⁰ *Iman v. Freund Bread Co.* (1933) 332 Mo. 461, 58 S. W. (2d) 477, l. c. 481.

E. The Degree of Care Required of Motorists.

A statute of Missouri⁶¹ requires that operators of motor vehicles shall exercise the highest degree of care while driving on the highways of Missouri. So it has been held that in determining whether the operator of a motor vehicle was guilty of negligence under the humanitarian rule, it is held that the motorist must have exercised the highest degree of care, rather than ordinary care, as is the usual case.⁶² More specifically the law is that the driver of an automobile is liable if he saw, or if by the exercise of the *highest degree of care* could have seen the plaintiff, and then failed to use all available means at hand to avoid the injury, such as sounding his horn, swerving to one side, or stopping.⁶³

It has been noted already how this higher degree of care enlarges the "danger zone" in regard to automobile cases arising under the humanitarian doctrine.⁶⁴ In other respects the treatment of cases involving the humanitarian doctrine, where the defendant is an operator of a motor vehicle is the same as applied in cases involving the railroads and street railways.

IV. CONCLUSION

There has been much dispute over the advisability of extending the humanitarian doctrine so far as it has been extended by the Supreme Court of Missouri. One writer remarked that it actually placed a premium on negligence on the part of pedestrians. This is very good in theory but it would seem doubtful that anyone ever acted negligently in reliance upon the protection of the humanitarian doctrine. Most laymen know nothing of the doctrine; so the statement that they contemplate it when acting negligently can hardly be based in fact.

The humanitarian doctrine, as was stressed in the discussion of the early cases, was never intended to apply to all the situations to which it has been applied. Judicial interpretation, however, has extended the doctrine even beyond the realms of dangerous instrumentalities and public policy.

⁶¹ R. S. Mo. (1929) sec. 7775.

⁶² *Rowe v. Hammond* (1913) 172 Mo. App. 203, 157 S. W. 880; *Martin v. Fehse* (1932) 331 Mo. 861, 55 S. W. (2d) 440.

⁶³ *Martin v. Fehse*, note 62 above.

⁶⁴ Cf. Part III, sec. C.

In any case, criticism of the doctrine as a judicial enunciation is of little avail. The humanitarian rule is so firmly established in Missouri case law that the only means by which a change could be effected in its application is through legislative enactment. If and when such legislation is enacted the doctrine should be limited to cases involving large corporations operating dangerous instrumentalities. In a word, the public policy back of the doctrine as first interpreted should bound it—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. It is submitted that the length to which the Missouri courts have gone in their interpretation of this rule is, in reality, contrary to public policy. This interpretation should be reformed by appropriate legislation.