Washington Law Review

Volume 29 | Number 1

2-1-1954

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THE DUTY OF THE FAVORED DRIVER UNDER THE RIGHT OF WAY STATUTE TO MAINTAIN A REASONABLE AND PROPER LOOKOUT

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What duty is imposed on the favored driver at an intersection under the current right of way statute?[1] The right of way given is not absolute;[2] the court has said that "the duty to avoid . . . collisions . . . rests on both drivers . . . [though] . . . the primary duty . . . rests with the driver on the left."[3] It is clear that speeding or lack of control on the part of the favored driver will bar his recovery if it contributes to the collision.

Must the favored driver keep a lookout to the left? The court evaded the issue in the case of *Massengale v. Svangren.*[4] In that case two cars were approaching an intersection at approximately the same time and at approximately the same speed, 30 miles per hour. Neither driver saw the other until it was too late to avoid the collision. The majority of the court preferred to place its finding on the ground that since the favored driver "had the right to assume" that the disfavored driver would observe him and yield the right of way, the favored driver's failure to look until too late could not be a proximate cause of the collision.[5] The opinion refused to "decide whether the favored driver had a duty to look to his left."[6]

The principal problem in the *Massengale* case, and in similar cases involving the standard of care of the favored driver, is the problem inherent in the *right to assume that the disfavored driver will yield the right of way.*

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[1] RCW 46.60.150 RIGHT OF WAY ON APPROACHING INTERSECTIONS. Every operator of a vehicle on approaching public highway intersections shall look out for and give right of way to vehicles on his right, simultaneously approaching a given point within the intersection, and whether his vehicle first reaches and enters the intersection or not; *Provided,* That this section shall not apply to operators on arterial highways. For a discussion of the position of the disfavored driver, see Huston, *Contributory Negligence of the Disfavored Driver under the Right of Way Statute,* 26 WASH. L. REV. 30 (1951).

[2] McHugh v. Mason, 154 Wash. 572, 283 Pac. 184 (1929); accord Martin v. Hadenfeldt, 157 Wash. 563, 289 Pac. 533 (1930).

[3] Martin v. Hadenfeldt, *supra* note 2.

[4] 41 Wn.2d 758, 252 P.2d 317 (1953).

[5] *Id.* at 761, 762, 252 P.2d at 319.

[6] The dissent argued that although the favored driver owed no duty to the disfavored driver, "he did owe a duty to himself to protect himself from the negligence of the disfavored driver."

Stated abstractly and divorced from the circumstances of a particular case this principle of reliance on the due care of another is not helpful. It does not work as a absolute rule of the thumb in determining the question of liability in intersection cases. The rule has not been applied to all favored driver cases.

Contributory negligence as a limitation of the right to rely. The early case of *Breithaupt v. Martin*[7] held that the favored driver proceeding at a proper speed, on the proper side of the street, had a right to assume that the disfavored driver would yield the right of way because, having no notice of the disfavored driver's failure to yield the right of way until so late that the collision was unavoidable, the favored driver's failure to see the disfavored driver was immaterial. This was the first application of the principle to intersection cases under the right of way statute. The argument that a driver can rely on the exercise of due care by the other driver was pressed by the *dis*favored driver in the next case of *Saad v. Langworthy*[8] but such argument was rejected by the court by applying a reasonable limitation to the effect that the reliance on the assumption that the favored driver would not be speeding does not license the driver on the left to "omit any of the care the law requires of him . . . and he is not obsolved from the consequences of his own contributory negligence."[9]

The fact that the *Saad* case involved the right of the disfavored driver should not make any material difference when the favored driver invokes the right. While no favored driver case has been found where the court has used language similar to that of the *Saad* case, the principle that a favored driver who is himself negligent cannot rely on any assumption of due care and proper conduct on the part of the disfavored driver has been given approval at least by inference.[10] The absence of explicit language on this point is best explained by the fact

[7] 153 Wash. 192, 279 Pac. 568 (1929).
[8] 153 Wash. 598, 280 Pac. 74 (1929).
[9] *Id.* at 606, 280 Pac. at 77.
[10] For example, see Graham v. Roderick, 32 Wn.2d 427, 202 P.2d 253 (1948) in which two cars were proceeding in the same direction on an arterial highway. The forward car swung off the road and then back onto the road in attempting to execute a "U" turn. The following car travelling 35 miles per hour in a 25 miles per hour zone did not see the maneuver. The following car's driver in his appellant's brief argued that it was an intersection case because the forward car had left the intersection and that he was the favored driver and had a right to rely on an assumption that the disfavored driver would give a proper signal and yield the right of way. The court did not discuss the reliance point and affirmed the trial court's finding of contributory negligence. Compare Jamieson v. Taylor, 1 Wn.2d 217, 95 P.2d 791 (1939) where the favored driver was held to have a right to rely on the assumption that a driver approaching from the opposite direction would give a proper signal and yield the right of way before attempting to make a left turn.

that in any case one of the basic questions is whether the favored driver is guilty of substandard conduct (usually speed) proximately causing or contributing to the collision.[11] If the facts support a finding of negligence any dictum regarding "reliance" or refinements thereon would be merely surplusage. This problem was presented to the court in the recent case of *Sebastian v. Rayment*[12] in which the majority of the department of the court affirmed the trial court's finding of negligence where the evidence supported the trial court's conclusion that the favored driver was speeding and not looking. Justice Donworth, in dissent, argued that the favored driver had a right to assume that the right of way would be yielded apparently on the theory that the right of way is absolute.[13]

Actual or Imputed Knowledge of the Disfavored Driver's Negligence. A second limitation was placed on a driver's right to assume that the other driver is exercising due care in the early case of *McHugh v. Mason*,[14] where the court stated that the *dis*favored driver could assume that the favored driver would not be speeding, unless he had "actual or imputed knowledge" to the contrary. This limitation is almost inseparable from the requirement that the favored driver can not recover if he failed to avail himself of an "opportunity" to avoid the accident.[15] The right of way being relative,[16] too firm an insistance upon the right is contributory negligence where the favored driver actually sees the disfavored driver and knows that the driver on the left is oblivious of the favored driver.[17] Failure to maintain a proper lookout where there was an opportunity to avoid a collision has been held contributory negligence in the following cases: where the dis-

[11] Chess v. Reynolds, 189 Wash. 547, 66 P.2d 297 (1937) where the favored driver was speeding and not looking; Bennett v. Karnowsky, 24 Wn.2d 487, 166 P.2d 192 (1946) a driver on an arterial who was speeding and not looking can not recover; *accord*, Whisler v. Weiss, 26 Wn.2d 446, 174 P.2d 766 (1946). In the Bennet case the court cited with approval a statement from a Wisconsin case "The possession . . . [of the right of way] . . . does not of course justify the possessor in plunging ahead regardless of consequences, nor in the failure to exercise ordinary care to avoid injury to others, but the fact is an important one to be considered in deciding the question of negligence." Glatz v. Kroeger Bros., 168 Wis. 635, 170 N.W. 934 (1919).

[12] 42 Wn.2d 108, 254 P.2d 456 (1953).

[13] *Id.* at 112, 254 P.2d at 458 (apparently not recognizing the principle that the right to assume that the right of way will be yielded does not excuse the driver from the consequences of his own contributory negligence).

[14] *Supra* note 2. "Early case" is used in reference to the passage of the statute in 1927.

[15] Young v. Smith, 166 Wash. 411, 7 P.2d 1 (1932) (favored driver could have stopped his car and avoided the accident if he had "looked straight ahead"). *Accord*, Stoke v. Paulson 168 Wash. 1, 19 P.2d 247 (1932).

[16] *Supra* note 2.

[17] Ellestad v. Leonard, 18 Wn.2d 118, 138 P.2d 200 (1943).

favored driver stopped or stalled within the intersection but leaving ample space for the favored driver to pass;[18] where the disfavored driver entered the intersection before the favored driver and the favored driver could have avoided the impact if he had looked;[19] and where on an arterial a disfavored driver attempts to cross in front of the favored highway driver.[20]

In the recent case of *Bos v. Dufault*[21] the favored driver was held liable to a guest passenger on a motor scooter where the moter scooter turned left onto the road travelled on by the favored driver and where the favored driver "failed to act promptly after . . . negligently failing to observe the disfavored driver crossing . . . the intersection immediately ahead of him . . ."[22] The court distinguished the *Massengale* case[23] on the ground that in the *Bos* case there was an opportunity to avoid the collision.

Acts in an Emergency — Lack of opportunity to avoid the Impact. The co-relative of the rule that the favored driver is contributorily negligent if he fails to avail himself of an opportunity to avoid the collision is the situation presented by the *Massengale* case.[24] If the favored driver without negligence on his own part does not become aware of the disfavored driver's usurpation of the right of way until such time as it is too late to avoid the collision,[25] or until he is confronted with an emergency[26] the favored driver cannot be charged with contributory negligence. This is the situation where the court is most apt to use the language of reliance on the assumption that the dis-

[18] Butzke v. Hendrickson, 172 Wash 302, 20 P.2d 7 (1933); Geitzmauer v. Johnson 161 Wash. 444, 297 Pac. 174 (1931).

[19] *Supra* note 15; *accord,* Justice v. Lavagetto, 9 Wn.2d 77, 113 P.2d 1025 (1941).

[20] McCormick v. Hanneberg, 170 Wash. 133, 15 P.2d 939 (1932); Weikert v. Daniels, 178 Wash. 416, 35 P.2d 22 (1934), Finical v. McDonald, 185 Wash. 121, 52 P.2d 1250 (1936).

[21] 42 Wn.2d 641, 257 P.2d 775 (1953).

[22] *Id.* at 646, 257 P.2d at 778.

[23] *Supra* note 4.

[24] *Supra* note 4.

[25] Breighaupt v. Martin, *supra* note 7; Jamieson v. Taylor *supra* note 10, Bleiler v. Wolff, 23 Wn.2d 368, 161 P.2d 145 (1945).

[26] One confronted with an emergency not of his own creation cannot be held, to the exercise of the same degree of care as he would be held if time were allowed within which to deliberate and choose the safest course. Ritter v. Johnson, 163 Wash. 153, 300 Pac. 518 (1931). The case of Winston v. Bacon, 8 Wn.2d 216, 111 P.2d 764 (1941) was an obstructed intersection case, the favored driver kept a lookout but watched primarily to his right and did not see the disfavored driver until only a few feet away. The court held that the emergency rule was applicable and that the favored driver was not liable where he slammed on his brakes and skidded into the other car. *Cf.* Murry v. Banning, 17 Wn.2d 1, 134 P.2d 715; Hook v. Kirby, 175 Wash. 352, 27 P.2d 567 (1933); *accord,* Nystuen v. Spokane County, 194 Wash. 312, 77 P.2d 1002 (1938) (driver on arterial).

favored driver will yield the right of way. The use of this language sometimes obscures the fact that before the emergency rule can come into operation the party to be relieved by the rule must not have occasioned the emergency by his own substandard conduct.[27]

Priority into the Intersection. The fact that it is the favored driver that hits the disfavored driver will not necessarily be determinative of whether there was an opportunity to avoid the collision. In the case of *Warner v. Keebler*[28] plaintiff, the favored driver actually saw the disfavored driver and momentarily slowed down, but thinking that the disfavored driver also was slowing down plaintiff looked ahead, released his brake and went headlong into the other car. Findings of fact against the favored driver were reversed in an unanimous departmental opinion. When the disfavored car suddenly crosses the path of the favored car it becomes a question of fact whether the favored driver should have seen the disfavored car in time to avoid the collision,[29] or whether the favored driver was justified in relying on the assumption that the right of way would be yielded until too late to avoid the impact.[30] On the other hand there is some authority to the effect that even though the disfavored driver hits the favored driver the latter may be guilty of negligence and may be liable to a guest in the disfavored car.[31] But in view of the reliance aspect in the *Massengale* case it appears that liability would only be imposed in this situation if the favored driver was speeding.

Duty to Look to the Left—Conclusion. The favored driver who is proceeding at a proper speed with his car under control does not have a "primary duty" to keep a lookout for cars approaching from the left. Failure to keep a lookout is not negligence that will defeat recovery as a matter of law. On the other hand it is well settled that if the disfavored driver does not keep a reasonable and proper lookout

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[27] Ritter v. Johnson, *supra* note 26; *cf.* Sebastion v. Rayment, *supra* note 13.

[28] 200 Wash. 608, 94 P.2d 175 (1939); *cf.* Winston v. Bacon *supra* note 26.

[29] See cases noted at 15, 18, 19 and 20 *supra.*

[30] See cases noted at 24, 25, and 26 *supra.*

[31] Gaskil v. Amadon, 179 Wash. 375, 38 P.2d 229 (1934). Verdict for plaintiff guest was affirmed in holding that it was a question for the jury whether had the favored driver looked to the left he would have seen the disfavored driver "proceeding wildly into the intersection." Four judges dissenting argued that as a matter of law the favored driver could not be charged with negligence where he had a right to assume (1) that the disfavored driver would yield the right of way (Breithaup v. Martin, *supra* note 7) and (2) that the disfavored driver would not be speeding (Pearson v. Adams Company, 154 Wash. 630, 283 Pac. 194 (1929). It is this writer's opinion that on the basis of the Massengale case the Gaskil case is no longer authoritative in this state.

he is guilty of negligence as a matter of law.[82] This difference is explained simply because it is the statutory duty of the disfavored driver to lookout for and yield the right of way to favored drivers. It is the duty of the favored driver to avoid a collision if by the exercise of reasonable care he could have avoided it. Reasonable care of the favored driver, with respect to a duty to keep a lookout, appears to be a slight departure from the common law rules. It is the standard of conduct of a hypothetical reasonably prudent driver who is conscious of his statutory right of way and who has the privilege to rely on that right. In the normal case where the facts are in dispute, it will be a question for the jury whether the failure of the favored driver to see the disfavored driver deprived him of an opportunity to avoid the accident.[83]

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[82] Hoeing v. Kohl, 182 Wash. 245, 46 P.2d 728 (1935); Delsman v. Bertolli, 200 Wash. 380, 93 P.2d 371 (1939); Dept. of Labor and Industries v. Hickle, 1 Wn.2d 475, 96 P.2d 577 (1939); Calvert v. City of Seattle, 23 Wn.2d 817, 162 P.2d 441 (1945). Contrast McLean v. Continental Bakery Co., 9 Wn.2d 176, 114 P.2d 159 (1941) where the favored driver looked but did not see the disfavored driver—findings of fact in favor of the favored driver affirmed in a five to four opinion.

[83] Contrast these instructions to the jury: (1) "If you find from the evidence that the favored driver saw or should have seen the disfavored driver after it became apparent that the disfavored driver was intending to cross the intersection, in time by the exercise of ordinary care to avoided a collision therewith, then I instruct you that the favored driver would be liable" with (2) "If you find from the evidence of this case that the favored driver by the exercise of a reasonable lookout could have seen that the disfavored driver was crossing in front of him in time to have stopped or slowed his car so as to have prevented the collision, and that the favored driver failed so to do and that such failure on his part caused or contributed to the collision, the favored driver cannot recover." Instruction (1) was held error in Huber v. Hemrick Brewing Co., 188 Wash. 235, 62 P.2d 451 (1936) as an erroneous statement of last clear chance. Instruction (2) held proper in Weikert v. Daniels, *supra* note 20. For a review of the doctrine of last clear chance in Washington, see Notes, 8 WASH. L. REV. 145 (1934) and 27 WASH. L. REV. 158 (1952). *Cf.* Warren v. Hynes, 4 Wn.2d 128, 102 P.2d 691 (1940) where the disfavored driver struck the favored driver. The favored driver had looked to his left when he was 150 feet from the intersection and there was nothing in sight. Whether the favored driver should have taken a second look the court said was a question for the jury in a situation where there was conflicting evidence of the speed of both cars.