Denver Law Review

Volume 6 | Issue 9 Article 3

July 2021

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DICTA

Vol. VI JULY, 1929 No. 9

AUTOMOBILE COLLISIONS AT INTERSECTIONS

By Kenneth V. Riley

JUDGE DENISON pointed out in a recent article in Dicta that in these modern times a lawyer is paid more to be a prophet than an orator. It is obvious to every lawyer that an understanding of the chain of antecedent legal opinions bearing upon the issues involved, is essential to an intelligent prophecy upon the outcome of any contemplated legal controversy.

I like to think of these cases as landmarks or blazes on the trees along the trail through the deep woods of legal speculation to a correct conclusion. A traveler strikes out through a strange forest to reach a certain destination many miles away. If some woodsman has gone before and left his tell-tale blaze upon a tree from time to time along the trail, and the traveller is heedful in following the blazes, he is fairly certain to reach his destination. But if he fails to heed them, he will become lost. Just so, the lawyer must traverse the forest of legal speculation. He has knowledge of a few fundamental legal principles to help him. But if he does not follow the trail marked by the legal precedents, he is very likely to lose his way and fail to reach the proper destination.

The case-law on most subjects reaches back for many years, even centuries, into the past. But automobiles are a comparatively modern invention, and consequently automobile law, which in many respects had no counterpart in antecedent law, is also of fairly recent origin. In the days of horse drawn vehicles there were no collisions at street intersections resulting in law-suits. But now-a-days, such collisions occur every day between automobiles. This has resulted and continues to result in a vast amount of litigation. Our State Su-

preme Court in the short space of a dozen years, has built up a system of case-law on this subject, which, if studied and understood, will greatly assist the lawyer in predicting the outcome of contemplated legal controversies.

The first automobile intersection case which reached the Supreme Court of this State was *Livingston v. Barney,* 62 Colo. 528, decided in 1917. In that case Livingston was riding a motorcycle west on Twenty-sixth Avenue approaching its intersection with Downing Street in Denver. Barney was driving south on Downing Street, towards Twenty-sixth Avenue. Livingston entered the intersection and at some point therein collided with Barney's automobile. It was between six and seven o'clock in the evening and quite dark. Barney's car had side lamps lighted but no headlights. Livingston sued Barney and testified at the trial that he didn't look to the right when he entered the intersection, "but that he looked straight ahead without turning either to the right or left". The trial judge granted defendant a non-suit on the ground that under the municipal ordinance granting the right of way to the vehicle on the right, it was the positive duty of plaintiff to look to the right before he crossed the intersection. The Supreme Court affirmed the judgment, making the following interesting comment: (p. 532)

> "From the testimony which plaintiff himself gave it appears that on entering Downing Street he failed to look either way, and it also appears therefrom that his view was unobstructed. Had his vision been in any manner cut off, or interfered with, or had he looked or otherwise attempted to avoid injury, then the question might have been one of fact for the jury. But he failed totally to observe, by not looking to the right, the duty imposed upon him by positive law, as set forth in the ordinance. In addition he violated the law of self preservation founded on instinct, by which anyone driving on a public street is required at all times to use the faculties with which nature has endowed him to avoid injury."

This case settled that a driver who fails to look to the right at an intersection cannot recover. But as will be seen, it left other important questions undetermined.

At that time I think it was quite generally the opinion of lawyers and laymen alike that despite the right of way rule and ordinance, the first car into the intersection had the right of way. In *Golden Eagle Co. v. Mockbee* (1920) 68 Colo.

312, an action arising out of an automobile collision at a Denver street intersection, Judge Butler, now on the Supreme Bench, instructed the jury in accordance with this prevalent understanding. In logical accord with this view the judge further instructed the jury that: (p. 314)

"It was the duty of defendant's driver, in approaching the intersection, to look to the left to see whether any vehicle was approaching the intersection from that direction, and to so keep his car under control as to enable him to accord the right of way to the plaintiff, if she should reach the intersection before he reached the intersection."

On appeal the Supreme Court, speaking through Justice Denison, said:

"This instruction is erroneous, because it repeals the ordinance and because it is impracticable."

The Court succinctly explained its position as follows: (p. 314)

"It repeals the ordinance or rather inverts it, because since the rules of the road in cities require every vehicle to travel on the right hand side, the right hand car, when both are at or near the border of the street intersection, will be much nearer the intersection of the tracks of the two cars, the point of possible collision, than the left hand car will be; it follows that whenever the two cars are approaching at equal or nearly equal distances from that point (which is the only time when collision is likely) the right hand car must yield because the left hand car will reach the street intersection first; thus the right of way in practically all cases, except where no collision could occur anyway, is transferred from the right to the left."

The court deemed the instruction impracticable because in many cases in which collision is likely, if the drivers wait to see which will reach the intersection first, it will be too late to consider the right of way; and because to require every driver to look both right and left to see whether any of the cars on either side will touch the street intersection before or with him is impracticable. The court announced the correct rule to be as follows:

"We think the right rule is that it is the duty of every driver, when approaching a street intersection, to use reasonable care to see whether there is likelihood of collision with any car approaching from the right, and, if there is, to yeld to it the right of way and to keep his car under such control that he can do so. *Livingston v. Barney,* 62 Colo. 528, 163 Pac. 863; *Colo. etc. Ry. Co., v. Cohen,* 66 Colo. 149, 180 Pac. 307. The court below was clearly right however in warning the jury that the one having the right of way is not

absolved from reasonable care, and we think that the driver who has not the right of way is entitled to assume that the car on the right is not approaching at a negligent rate."

The above stated rule seems plain enough and yet lawyers and judges have found perplexities in its application. For instance, when if ever, is a driver justified in proceeding across an intersection in front of a car approaching on his right? Again, under what circumstances can a driver who has not the right of way assume that the car on his right is not approaching at a negligent rate?

Rosenbaum v. Riggs, 75 Colo. 408, decided in 1924, throws further light on the last stated question. This case arose out of an intersection collision which occurred in the City of Sterling. Plaintiff Riggs was on the left. He testified that he had reached the center of a fifty foot street, going not to exceed ten miles per hour, and could have stopped within five or six feet, when he saw defendant's car to his right about one hundred feet back, approaching at about forty miles per hour. He knew it was coming fast, but thought he had no reason to stop. The case went to the jury and plaintiff got judgment. Defendants appealed. The Supreme Court reversed the judgment. That court pointed out that under plaintiff's testimony, "it was very apparent that if neither one of them stopped, or slackened speed, there would be a collision". (p. 410.) It continued: (p. 410)

"The defendant, being at the right of the plaintiff, had the right of way, and it was plaintiff's duty to recognize that, having the right of way, she might not slacken speed. Under the ordinance he should have given her the right of way, and decreased his speed so that she could pass the point of intersection in safety. It appears from his evidence that he assumed that, because he was well towards the center line of the street, he had the right of way, thus, as this court said in *Golden Eagle Co. v. Mockbee,* 68 Colo. 312, 189 Pac. 850, inverting the procedure prescribed by the ordinance."

The court then referred to *Livingston v. Barney, supra,* and held that the plaintiff in that case, who failed to look, was no more negligent than the plaintiff in this case, "who knew of the approach of the defendant's car, and is presumed to have known that it had the right of way, and yet took a chance of getting across in advance of the other car". (p. 411)

In concluding its opinion the court said: (p. 411)

"Under the authority of the above cases we hold that the court erred in refusing to give instruction No. 2, requested by defendant, which was that, 'It was the duty of the plaintiff to look to the right, and the evidence is that if he had so looked he would have seen the car in time to have stopped, and if he saw defendant's car in time to stop but neglected to do so, he was guilty of contributory negligence and therefore cannot recover'."

The above was a case where a plaintiff saw and appreciated the speed of the car on his right, which fact was stressed in the opinion. Yet in view of some of the language in the opinion, and especially in view of the instruction approved therein, the question arose whether there ever could be an intersection collision in which the driver on the left could recover.

This question was touched upon but left unanswered in the next case, *St. Mary's Academy v. Newhagen,* 77 Colo. 471, decided in 1925. The car of plaintiff Newhagen, coming into Denver on the Littleton paved road, was struck by the defendant's car coming from the right at a speed of thirty or forty miles an hour—a negligent rate. Plaintiff's car was proceeding at twelve to fifteen miles an hour, and the driver saw defendant's car when she was about a hundred feet from the intersection and recognized its speed, yet she shifted her gaze to the left and drove into the intersection without looking again to the right. Plaintiff sued defendant for damages resulting from the ensuing collision and was permitted to recover in the lower court. The Supreme Court reversed the judgment, and held the plaintiff's driver guilty of negligence as a matter of law because she failed to accord the right of way to defendant's car coming from the right, though she saw and appreciated that it was approaching at a negligent rate. The court in commenting on the Golden Eagle case *supra,* said: (pages 472-473)

"We there suggested that the driver who has not the right of way is entitled to assume that the car on his right is not approaching at a negligent rate. That suggestion has been held to be the law in *Grant v. Marshall* (Del. Super.) 121 Atl. 664; but the question before us now is whether the plaintiff, having looked to the right and seen the defendant's car, and having seen that it was approaching at a negligent rate, has the right to assume that it will slow down and approach the intersection at a careful rate and upon that assumption pay no further attention to it. We cannot assent to this proposition."

It is interesting to note that the opinion in this, as in the earlier decisions of our Supreme Court, cites and relies upon

the preceding Colorado cases, whereas the doctrine of the only foreign case referred to is ignored. It is also interesting to observe that even after the above decision was handed down, lawyers were still puzzled as to when, if ever, a driver on the left could recover, if he had looked and had seen the car on his right approaching at a speed which, in reality, was excessive, but which he claimed not to have recognized as such.

Then came the decision in *Boyd v. Close,* 82 Colo. 150, handed down in 1927, which seemed to add to the perplexity. In that case the plaintiff was non-suited by the trial judge. His evidence disclosed that defendants were driving north on Broadway in Denver in a drunken condition at a highly excessive speed at two o'clock in the morning. Plaintiff was proceeding south on Broadway at a lawful speed and in the exercise of due care. He turned to the left across Broadway in front of defendant's car. Then, to quote from the opinion: (p. 153)

"As he started to turn he saw the approaching lights of the Phillips (defendant's) car 100 yards away but had no reason to, and did not believe that it was exceeding the speed limit. He was handicapped by the night, the lights, the location of the cars, and falling snow. Defendant's car was in fact approaching at 45 miles an hour, its driver was drunk and reckless, he did not signal, slow down, turn or use his brakes."

The Supreme Court reversed the judgment and remanded the case for submission of the issue of contributory negligence to a jury.

The court first distinguished the preceding cases above noted and then announced its ruling in the following emphatic language: (p. 154)

"We are now asked to fix responsibility in every case of automobile crossing collision in favor of the car having the right of way under the strict provisions of statute, ordinance, or rule of the road, notwithstanding drunkenness, gross negligence and excessive speed, and notwithstanding every reasonable precaution exercised by the other under circumstances which the first driver knew, or should have known, would in all probability prove ineffectual; to outlaw every left hand driver and give carte blanche to every right hand driver to run him down. The mere statement of the proposition is its own refutation. We know of no court that has ever countenanced it and we expressly repudiate it."

The court finally stated that whether the plaintiff should have noted the excessive speed of the defendant's car was a question of fact for the jury.

At this point lawyers and trial judges alike were divided into three groups with respect to their opinions on this subject. One group contended that the Boyd case overruled the preceding cases (though obviously it did not), and that thenceforth in every trial the plaintiff on the left who had looked to the right was privileged to go to the jury on the question of contributory negligence. The second group held that whenever the plaintiff testified that he had looked to the right and had not recognized that the approaching car was coming at an unlawful speed, such plaintiff had a right to go to the jury on the question of contributory negligence. The third group contended that in the absence of special circumstances, as in the Boyd case, which might justify the plaintiff in misjudging the speed, the plaintiff was bound at his peril to see and recognize that the car on the right was coming at an excessive speed.

The last case on the subject was handed down in March of this year. In the opinion in that case, *Kracaw v. Micheletti,* et al., Colo. 276 (p. 333), the court states the facts as follows: (p. 334)

"The accident occurred in broad day light. The undisputed evidence discloses that defendant, having the right of way, was driving excessively fast; that plaintiff was traveling at a moderate speed; that when she reached a point about fifteen feet from the easterly curb line of Pearl Street, she saw defendant's car approaching about two hundred feet distant; that she continued to watch defendant's car, but could not tell its speed; that thinking she had time to cross ahead of it, she failed to yield the right of way to defendant and the collision ensued."

The court held the plaintiff guilty of contributory negligence as a matter of law, saying: (p. 334)

"No reasonably prudent person in plaintiff's position would have failed to recognize the fact that defendant's car was approaching at an excessive and negligent rate of speed. Plaintiff cannot be heard to say that she failed to recognize the speed of defendant's automobile."

This opinion appears to vindicate the opinion of the third group mentioned above.

One should not rashly assert that these cases settle the legal questions arising from automobile collisions at intersections, in view of the myriad possibilities of variations in facts. But it can be said again in conclusion that a study of them should assist the practitioner materially in acquiring skill as a legal prophet.