Washington Law Review

Volume 38
Issue 2 *Washington Case Law—1962*

7-1-1963

Torts—Intersection Collisions—Deception

Robert L. Beale

motive behind that conduct exceeds the limits or social standards of acceptability that the court will find a "willful wrong." "Willful," then, is used to describe conduct or motive which is permeated with a sense of maliciousness, recklessness or wantonness—that which the actor knows or should know is unacceptable.

In allowing recovery for the intentional infliction of emotional injury, Washington case authority appears to be in full accord with the present trend of American jurisdictions.[30] Apparently Washington now has two causes of action in tort for an intentional infliction of emotional injury unaccompanied by any physical violence. One action is based upon the outrageous nature of the *act* producing only an emotional disturbance. The other is based upon the nature of the actor's *motive* or purpose in the performance of an intentional act. A malicious motive solely intended to cause severe emotional distress may result in conduct which exceeds the bounds of reasonableness. Yet, as indicated in the comparison between the *Gadbury* and *Christensen* cases, this is not always the case. Therefore, it is submitted that recognition of "wrongful" motive as well as outrageous conduct as separate causes of action gives the injured party a broader remedy for the intentional infliction of emotional distress.

GUST S. DOCES

Intersection Collisions—Deception. The invitation to litigation issued by the Washington court when it decided *Martin v. Hadenfeldt*[1] in 1930 was again accepted by counsel in *Chavers v. Ohad.*[2]

David Ohad was driving his father's car along an arterial in Yakima about 2:00 in the morning. Mrs. Chavers stopped before entering the arterial, looked up the street and saw David about one block away, thought that she could pull out and make a left turn onto the arterial, and began doing so. The two cars collided in the intersection.

Mrs. Chavers recovered a judgment based on a verdict in her favor in the Superior court of Yakima county, but that judgment was reversed by the Washington Supreme Court. Judge Weaver noted that the case was controlled by a Yakima right-of-way ordinance,[3] and

[30] See note 1 *supra* and the discussion in note 14 *supra.*

[1] 157 Wash. 563, 289 Pac. 533 (1930). For an extensive discussion of the case, see Comment, 26 WASH. L. REV. 30 (1951).

[2] 59 Wn.2d 646, 369 P.2d 831 (1962).

[3] The ordinance is substantially the same as RCW 46.60.170. ("The operator of a vehicle entering upon an arterial highway, road, street, alley, way or driveway, shall come to a complete stop at the entrance of such arterial highway, and having stopped

that the rules laid down in the *Hadenfeldt* case govern the interpretation of such ordinances and of similar state statutes. The court held that the plaintiff, Mrs. Chavers, had not disproved the contributory negligence presumptively established by her violation of the ordinance by producing evidence sufficient to meet the requirements of rule 4 of the *Hadenfeldt* case,[4] the "deceit exception." The only evidence of the speed of the defendant's car was her opinion that the speed must have been "terrific" because of the force of the impact, and her previous estimate that the car had been "far enough" away from the intersection at the last time she had looked.

The implication of the majority opinion is that if the plaintiff could have proved that the defendant's speed was excessive, she would have succeeded in establishing deception by the defendant, thereby overcoming the presumption of contributory negligence. Judge Rosellini concurs specially, taking issue with this implication. He says that, "A disfavored driver should not be heard to say that speed, except in a change of pace situation, has deceived him and caused him to make a false determination that he had a margin of safety in clearing an intersection."[5] As will be seen, he states what he thinks the law should be, not what it has been.

There are many cases which indicate that the speed of the favored driver *can* deceive the disfavored driver. *Martin v. Hadenfeldt*,[6] announced the rule that a disfavored driver would be exonerated from blame if he brought forth proof that he had been deceived by the wrongful, negligent, or unlawful operation of the car driven by the favored driver. There the court volunteered an illustration to explain what was meant. The rule would apply, the court said, where a disfavored driver observes a car approaching on his right but cannot accurately judge its speed. If he then enters the intersection after having made such observations as would a reasonably prudent man, he will not be held negligent. In the year following the *Hadenfeldt*

shall look out for and give right of way to any vehicles upon the arterial highway simultaneously approaching a given point within the intersection, whether or not his vehicle first reaches and enters the intersection; . . .") 59 Wn.2d at 649, 369 P.2d at 833.

[4] The court held that where there is a collision within an intersection the cars are deemed to have been approaching simultaneously unless the following exception applies: "(4) The driver on the left assumes and meets the burden of producing evidence which will carry to the jury the question of fact as to whether or not [sic] the favored driver on the right so wrongfully, negligently, or unlawfully operated his car as would deceive a reasonably prudent driver on the left and warrant him in going forward upon the assumption that he had the right to proceed." 157 Wash. at 567, 289 Pac. at 535 (1930).

[5] 59 Wn.2d 646, 655, 369 P.2d 831, 836 (1962).

[6] 157 Wash. 563, 289 Pac. 533 (1930).

case the rule was applied to facts almost identical to those used in the illustration. In *Martin v. Westinghouse*[7] a disfavored driver saw the car of the favored driver approaching, thought it was far enough away, and entered the intersection where the collision occurred. Holding that speed could indeed be deceptive, the court affirmed a judgment for the disfavored driver.

Later cases are in accord. In *Gavin v. Everton*[8] where a disfavored driver defended in a suit brought by a favored driver on the grounds that he had been deceived by the speed of the favored driver, the court held that it was not error to give the issue of the defendant's deception to the jury. In *Plenderlieth v. McGuire*[9] Judge Hill extensively reviews the history of the application of rule 4 of the *Hadenfeldt* case, and concludes that on the question of whether the speed of the favored driver can be deceptive the law is that:

> A driver of an automobile upon the public highways has a right to assume that other drivers thereon will drive and operate their automobiles in compliance with the laws existing at the time and place of their operation, and that drivers upon the highways have the right to rely upon this assumption until they know or, by the exercise of ordinary care, should know to the contrary. In other words, if a disfavored driver is entitled to and does rely on that assumption and the favored driver is in fact exceeding the speed limit, the disfavored driver is deceived.[10]

The most recent case holding that speed can be deceptive is *Fazio v. Eglitis*.[11] There a suit by a disfavored driver who claimed to have been deceived by the speed of the favored driver was dismissed by the lower court for insufficiency of the plaintiff's evidence. The court reversed the judgment for the defendant, holding it error not to have submitted the issue of the plaintiff's deception to the jury.

There are, however, certain limitations upon the ability of the disfavored driver to claim deception because of speed. He must have seen the favored driver, he must not have known that the favored driver was exceeding the speed limit, and he must not have known exactly how fast the favored driver was traveling.

Until recently the cases have consistently held that a disfavored driver cannot be deceived if he does not see the car driven by the fav-

[7] 162 Wash. 150, 297 Pac. 1098 (1931).
[8] 19 Wn.2d 785, 144 P.2d 735 (1944).
[9] 27 Wn.2d 841, 180 P.2d 808 (1947).
[10] *Id.* at 849, 180 P.2d at 811-812.
[11] 54 Wn.2d 699, 344 P.2d 521 (1959).

ored driver.[12] However, from the recent case of *Bockstruck v. Jones*,[13] it now appears that a favored driver can deceive a disfavored driver merely by being unseen. According to Judge Hill, "a disfavored driver who properly looks to the right, can be deceived by a clear stretch of road as well as by the deceptive manner in which a favored driver operates his vehicle."[14] It is submitted that this is an improper use of the concept of deception. One who sees a clear stretch of road is not *deceived,* in any common sense use of the term, if there happens to be a speeding driver who is beyond his vision when he looks; he merely acts reasonably in entering the intersection, since the non-existence of traffic clearly gives him a reasonable margin of safety.[15]

The disfavored driver must see the favored driver, but he must not know that the favored driver is exceeding the speed limit, or he will lose his case. So held the court in *Plenderlieth v. McGuire*,[16] where it says, "whosoever is deceived soley by the admittedly excessive and unincreased speed of an approaching vehicle upon his right, is not a reasonably prudent and cautious man."[17]

Not only does a disfavored driver lose if he knew the favored driver was speeding, but he also loses if he was too accurate in his observations. In *Billingsley v. Rovig-Temple Co.*[18] a judgment for a disfavored driver was reversed because,

> The respondent was well aware of the exact locations of the two cars, their relative distances from the common point toward which they were both moving, the relative speeds at which they were traveling, and the continuity of speed maintained by each.[19]

[12] In Hauswirth v. Pom-Arleau, 11 Wn.2d 354, 371, 119 P.2d. 674, 683 (1941), the court said, "Richard Hauswirth never saw the Pom-Arleau car at all; he therefore could not have been deceived by its wrongful operation." *Accord,* Wilkinson v. Martin, 56 Wn.2d 921, 349 P.2d 608 (1960); King v. Molthan, 54 Wn.2d 115, 338 P.2d 338 (1959); Zorich v. Billingsley, 52 Wn.2d 138, 324 P.2d 255 (1958); Smith v. Laughlin, 51 Wn.2d 740, 321 P.2d 907 (1958); Thompson v. City of Seattle, 42 Wn.2d 53, 253 P.2d 625 (1953); Shultes v. Halpin, 33 Wn.2d 294, 205 P.2d 1201 (1949); Boyle v. Lewis, 30 Wn.2d 665, 193 P.2d 332 (1948).

[13] 160 Wash. Dec. 679, 374 P.2d 996 (1962).

[14] *Id.* at 682, 374 P.2d at 998.

[15] For a discussion of "reasonable margin of safety" in its application to intersection cases, see Comment, 26 WASH. L. REV. 30 (1951). For application of the same concept in a situation where the favored driver was exceeding the speed limit and the disfavored driver recovers, but the court does not mention deception, see Huber v. Hemrich Brewing Co., 188 Wash. 235, 62 P.2d 451 (1936); Brum v. Hammermeister, 169 Wash. 659, 14 P.2d 700 (1932); McIntyre v. Erickson, 168 Wash. 355, 12 P.2d 399 (1932).

[16] 27 Wn.2d 841, 180 P.2d 808 (1947).

[17] *Id.* at 850, 180 P.2d at 812. See Bell v. Bennett, 56 Wn.2d 780, 355 P.2d 331 (1960), where the court said that if the disfavored driver knew that the favored driver was speeding, his duty to yield the right of way would be intensified rather than diminished. See Saad v. Longworthy, 153 Wash. 598, 280 Pac. 74 (1929).

[18] 16 Wn.2d 202, 133 P.2d 265 (1943).

[19] *Id.* at 210, 133 P.2d at 268.

The same fate befell a disfavored driver who was cross-complaining in *Cramer v. Bock*[20] because, "her own testimony is that she noticed its speed from the time she saw it to her right and was at all times acquainted with its speed as it approached the intersection."[21]

The present state of the law is that a disfavored driver may be deceived by the speed at which a favored driver is approaching, but not if he is a good judge of speed or knows that the other's speed is excessive. The law as it now stands puts a premium upon bad judgment and careless observation. Carelessness frees a disfavored driver from contributory negligence instead of charging him with it. It seems more reasonable to follow Judge Rosellini's suggestion that a disfavored driver should never be allowed to claim that he was deceived solely by the speed of the favored driver.

ROBERT L. BEALE

Interspousal Immunity—The Effects of Community Property and Fraud. The Washington position on interspousal tort immunity should be reconsidered in view of two recent California decisions, *Self v. Self*,[1] and *Klein v. Klein*.[2]

The *Self* case involved an assault by a husband upon his wife while the couple were living together. The court overruled its longstanding immunity doctrine[3] and allowed the wife to recover.

Having created its own authority in *Self*, the court proceeded to decide the companion case, *Klein*, which was a negligence action by a wife against her husband. By washing the exterior deck of his pleasure boat with water, he made a slippery and unsafe walking surface upon which his wife fell while she was helping him to clean the boat. Here, too, the marital relationship existed at the time of the tort.

Washington's position on interspousal immunity as compared to the California court's complete abrogation of immunity is illustrated by *Goode v. Martinis*,[4] in which the husband, during the interim between commencement and completion of divorce and while the couple were legally separated, revisited the wife and sexually assaulted her. The Washington court indicated by the tenor of its language that it may be

[20] 21 Wn.2d 13, 149 P.2d 525 (1944).
[21] *Id.* at 16, 149 P.2d at 527. *Accord*, Pasero v. Tacoma Transit Co., 35 Wn.2d 97, 211 P.2d 160 (1949); Jamieson v. Taylor, 1 Wn.2d 217, 95 P.2d 791 (1939).

[1] 26 Cal. Rptr. 97, 376 P.2d 65 (1962).
[2] 26 Cal. Rptr. 102, 376 P.2d 70 (1962).
[3] Peters v. Peters, 156 Cal. 32, 103 Pac. 219 (1909).
[4] 58 Wn.2d 229, 361 P.2d 941 (1961), 37 WASH. L. REV. 233 (1962).