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COMMENTS

CONTRIBUTORY NEGLIGENCE OF THE DISFAVORED DRIVER UNDER THE RIGHT OF WAY STATUTE

JOHN HUSTON

The automobile collision at intersections of two streets, neither of which is arterial, is perhaps one of the most common subjects of litigation. For the past twenty-three years such litigation has been governed in part by the statute entitled "Look out approaching intersection—Vehicles to right,"¹ which provides as follows: "It shall be the duty of every operator of any vehicle on approaching public highway intersections to look out for and give way to vehicles on their [sic] right, simultaneously approaching a given point within the intersection, and whether such vehicle first reach and enter the intersection or not: Provided, This section shall not apply to operators on arterial public highways." This enactment is the statutory basis of the doctrine which is commonly termed the "Favored Driver Rule." This "rule" gives the motorist on the right the right of way over another entering the same

¹ REM. REV. STAT. § 6360-88 [P.P.C. § 295-27].

intersection to the left of the first. It is the purpose of this comment to ascertain the limits to which the court will extend this right in barring recovery against this favored driver in actions commenced by the driver on the left with whom the former collides in a nonarterial intersection.

In order to place the statute in its proper historical light, it seems well here to summarize the leading article on this subject which appeared in this *Review* in 1934.²

The priority rule was, for all practical purposes, the basic law applicable to nonarterial collisions prior to 1927.³ Its application meant, in effect, that the first motorist to enter the intersection was the holder of the right of way, and the other motorist was obliged to yield to him. The first right of way statute was construed to give the driver on the right the right of way if the approach were simultaneous, which amounted to saying that it was inapplicable to cases in which the two vehicles did not enter the intersection at the same moment. In the light of the cases, this event is a rarity, and the net effect of the holding was to award the right of way in practically all cases to the person who won the race to the intersection. Although this rule may have been satisfactory when cars were few and traffic sparse, it became quite unsatisfactory as the number of vehicles on Washington highways increased, since it was clear that the enforcement of the rule placed the courts in the position of virtually encouraging reckless speed at nonarterial intersections.

In order to counteract what was considered an unhealthy condition, the Legislature, in 1927, passed the second right of way statute⁴ which is practically identical to the statute presently in force. Scarcely three years later, however, it appeared that the problem of simultaneous approach, which had moved the Supreme Court to scuttle the original right of way statute, would emasculate its successor. In *Garrett v. Byerly*,⁵ the court said: ". . . vehicles are not simultaneously approaching a given point within the meaning of the statute when one or the other is being driven in violation of statutory regulations."⁶ At this juncture, it seemed that the speeding driver, approaching from the

² Fitzgerald, *Right of Way at Highway Intersections in Washington*, 9 WASH. L. REV. 19 (1934).

³ As Mr. Fitzgerald points out, the 1921 statute, Wash. Laws 1921, p. 272, § 28, s.s. 6, was in existence, but closely limited. *Op. cit. supra*, note 2.

⁴ REM. REV. STAT. § 6362-41, s.s. 14.

⁵ 155 Wash. 572, 284 Pac. 343 (1930).

⁶ *Id.* at 361, 284 Pac. at 346.

right, was again beyond the pale of the statute, contrary to the decision (a year before) in *McHugh v. Mason*⁷ that the collision was conclusive of the fact that the approach was "simultaneous" within the statute, and that it was a question for the jury whether the disfavored driver, having looked out for, but not having seen, the speeding favored driver, acted reasonably in entering the intersection. In an effort to negate what appeared to be a substantial repudiation of its previous cases under the new statute, the Supreme Court set down in *Martin v. Hadenfeldt*⁸ the standard by which future cases should be decided. In this case, *P*, the disfavored driver looked to his right from a proper place and saw *D*, the favored driver, approaching from his right at a downtown intersection. Because of the fact that he observed *D* head-on, he did not accurately judge his speed, which was "excessive," and proceeded into the intersection where *D* struck him. Said Mr. Justice Tolman, in deciding the case, "This provision [citing the statute] is only a part of the rules of the road, and the various other statutory elements must, so far as applicable, be read into it, and by doing so, it seems to us that an instruction upon the subject should embody all of the following elements: (1) All rights of way are relative, and the duty to avoid accident or collisions at street intersections rests upon both drivers; (2) The primary duty of avoiding such accidents rests upon the driver on the left, which duty he must perform with reasonable regard to the maintenance of a fair margin of safety at all times; (3) If two cars collide within the intersection, then they were simultaneously approaching a given point within the intersection, within the meaning of the statute, unless . . . (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 no 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."⁹ This is the foundation upon which the disfavored driver cases rest. One should note, in passing, that although the usual situation in which this doctrine is applied is that in which the parties collide upon entering the nonarterial intersection at right angles to one another, the doctrine of the *Hadenfeldt* case has been applied to the left-

⁷ 154 Wash. 572, 283 Pac. 184 (1929).

⁸ 157 Wash. 563, 289 Pac. 533 (1930).

⁹ *Id.* at 567, 289 Pac. at 535.

turn,¹⁰ "U"-turn,¹¹ and arterial intersection cases,¹² together with the situation wherein a pedestrian, having been struck by one of the vehicles careening from the point of impact, sues both favored and disfavored drivers.¹³ Moreover, since the *Hadenfeldt* case sets out the duties of both parties, it is generally used as a basis of decision when the favored driver brings the action.¹⁴ However, these cases are mentioned herein mainly to demonstrate the attitude of the court towards the other motorist.

As often occurs when a large number of cases are decided in accordance with rules set down in a landmark opinion, the litigation falling under the *Hadenfeldt* rule tends to cluster around a number of problems implicit in the leading case. Perhaps the most important of these are four: (1) the meaning of the fourth rule in the opinion—when is the disfavored driver "deceived"? (2) the effect of obstructions to his view upon the duty of the disfavored driver; (3) the determination of the point at which the driver on the left must first turn his attention to traffic on his right; (4) the meaning of the term "give way to vehicles on their right" as found in the statute.

THE "DECEIT" EXCEPTION

Upon the decision of *Martin v. Hadenfeldt*, the rules contained therein were generally employed by the superior courts. Hence, the meaning of the fourth rule—which came to be called the "deceit" exception—and just what fact-patterns justified its use by the trial court in the particular case, became matters of importance. In the *Hadenfeldt* case itself, the disfavored driver convinced the court that his failure to judge the defendant's excessive speed accurately was not

¹⁰ *McIntyre v. Erickson*, 168 Wash. 355, 12 P. (2d) 399 (1930); *Sather v. Blodgett*, 169 Wash. 25, 13 P. (2d) 60 (1932); *Levine v. Owen Lumber Co.*, 196 Wash. 673, 84 P. (2d) 353 (1938); *Shultes v. Halpin*, 33 Wn. (2d) 294, 205 P. (2d) 1201 (1949).

¹¹ *Vance v. McCleary*, 168 Wash. 296, 11 P. (2d) 823 (1932).

¹² *Brum v. Hammermeister*, 169 Wash. 659, 14 P. (2d) 700 (1932); *Weinkert v. Daniels*, 178 Wash. 416, 35 P. (2d) 22 (1934); *Finical v. McDonald*, 185 Wash. 121, 52 P. (2d) 1250 (1936); *Hefner v. Patee*, 1 Wn. (2d) 607, 96 P. (2d) 583 (1939); *Hauswirth v. Pom-Arleau*, 11 Wn. (2d) 354, 119 P. (2d) 674 (1941); *Gavin v. Everton*, 19 Wn. (2d) 785, 144 P. (2d) 735 (1944).

¹³ *Young v. Smith*, 166 Wash. 411, 7 P. (2d) 1 (1932).

¹⁴ *Stokoe v. Paulson*, 168 Wash. 1, 10 P. (2d) 247 (1932); *Harry v. Beatty*, 177 Wash. 153, 31 P. (2d) 97 (1934); *Weinkert v. Daniels*, 178 Wash. 416, 35 P. (2d) 22 (1934); *Perren v. Press*, 196 Wash. 14, 81 P. (2d) 867 (1938); *Bowen v. Odland*, 200 Wash. 257, 93 P. (2d) 366 (1939); *Warner v. Keebler*, 200 Wash. 612, 94 P. (2d) 175 (1939); *Hughes v. Wallace*, 6 Wn. (2d) 396, 107 P. (2d) 910 (1940); *McLean v. Continental Baking Co.*, 9 Wn. (2d) 176, 114 P. (2d) 159 (1941); *White v. Fenner*, 16 Wn. (2d) 226, 133 P. (2d) 270 (1943); *Cramer v. Bock*, 21 Wn. (2d) 13, 149 P. (2d) 525 (1944); *Beiler v. Wolff*, 23 Wn. (2d) 368, 161 P. (2d) 145 (1945).

due to his own carelessness, but to the fact that he had observed the defendant's onrushing automobile practically head-on, from which view a reasonable person might well conclude that an automobile was traveling a good deal slower than it actually was. In a parallel case¹⁵ decided a year later it was indicated that it would not be held that there was not a "reasonable margin of safety" where there was nothing to indicate to the disfavored plaintiff that the favored motorist was driving at an unlawful speed. The court observed that the plaintiff was not contributorily negligent for the same reasons that exculpated the plaintiff in the principal case. It should be observed that in the *Hadenfeldt* case, the "deceit" was purely a matter of speed, and speed alone carried to the jury the "question of fact as to whether or no the favored driver on the right so wrongfully, negligently, or unlawfully operated his car as would deceive" the plaintiff in this case, "and warrant him in going forward upon the assumption that he had the right to proceed."¹⁶ Whether there may be factors other than speed which will elicit from the court a pronouncement of "deceit" seems an open question. The 1932 decision of *Thompson v. Fiorito*¹⁷ suggested an affirmative answer to that query. In that case the defendant favored driver operated his heavily laden truck at a high rate of speed, and there was evidence that he was increasing his speed as he approached the crossing, due to his driving with the clutch disengaged. But it should be noted that the case apparently turned on speed alone. Said the court: "It is clear from the evidence that the accident would not have occurred if the truck had not been grossly exceeding the speed limit. It is equally clear, and the jury was justified in so finding, that the [disfavored] driver could easily and readily have been deceived as to the speed at which the truck was traveling down the hill approaching the intersection."¹⁸ There seem to be no square holdings which indicate that the reference to wrongful, negligent, or unlawful operation of a motor vehicle means any more today than it did when the *Hadenfeldt* case was decided.

In the handling of these cases, the court has not lost sight of the fact that it has laid down four conditions which must be met by the disfavored plaintiff in order to qualify under the "deceit" exception: First, the plaintiff must look for the disfavored driver; second, he must

¹⁵ *Martin v. Westinghouse Electric and Manufacturing Co.*, 162 Wash. 150, 297 Pac. 1098 (1931).

¹⁶ See notes 8 and 9 *supra*.

¹⁷ 167 Wash. 495, 9 P. (2d) 789, 12 P. (2d) 1119 (1932).

¹⁸ *Id.* at 503, 9 P. (2d) at 792.

see him; third, he must not engage in a race with him; and fourth, he must be misled into an assumption concerning the operation of the other car which is in fact false.

As to the first condition, it is manifest that the driver who does not look to his right is not exercising even the slightest care. *Strouse v. Smith*¹⁹ is such a case, and there the court held the disfavored driver contributorily negligent as a matter of law for his failure to turn his attention to the right. Where the disfavored driver claims to have looked, but in light of the evidence his failure to see the approaching favored driver can be explained only by rejecting that claim as false, the result is the same. In *Hoening v. Kohl*,²⁰ the plaintiff appealed from a judgment n.o.v. awarded the defendant in spite of such a claim. Said Mr. Justice Tolman in affirming the trial court, "If the appellant looked, as it is said he did, then he saw, or was charged with the duty of seeing, the approaching car, and was bound in law to know that its rights in the intersection were superior to his own. Being the disfavored driver, it was incumbent on him to yield the right of way unless the situation was such as to clearly indicate that he could cross with a fair margin of safety. . . . No reasonable mind would believe the appellant exercised that care which the law required of him."²¹ And if it be necessary further to prove the existence of the second condition—that the disfavored driver see the favored driver—it may be submitted that *Hauswirth v. Pom-Arleau*²² supplies that proof. Here, the opinion of the majority stated: "The exception noted in [the *Hadenfeldt*] case, with respect to a situation where the disfavored driver is 'deceived' by the wrongful operation of the favored driver, has no application here, for the reason that, in this case, Richard Hauswirth never saw the Pom-Arleau car at all; he therefore could not have been deceived by its wrongful operation. The exception referred to in the *Hadenfeldt* case presupposes a situation where the disfavored driver sees or has the opportunity of observing the favored vehicle and is deceived by the actions of the driver of that vehicle."²³ Note that this reasoning also excludes from the "deceit" exception that class of drivers whose failure

¹⁹ 166 Wash. 643, 8 P. (2d) 411 (1932).

²⁰ 182 Wash. 248, 46 P. (2d) 728 (1935).

²¹ *Id.* at 248, 46 P. (2d) at 729. *Accord*, Department of Labor and Industries v. Hickel, 1 Wn. (2d) 475, 96 P. (2d) 577 (1939). *Cf.* Roberts v. Leahy, 135 Wash. Dec. 613, 214 P. (2d) 673 (1950).

²² 11 Wn. (2d) 354, 119 P. (2d) 674 (1941).

²³ *Id.* at 371, 119 P. (2d) at 683.

to see the approaching favored driver is due to the latter's distance away, a curve in the street, or weather conditions.²⁴

The third condition may be aptly illustrated by *Roed v. Washington Laundry Co.*,²⁵ wherein the court declined to regard as "deceived" a disfavored driver who speeded up to avoid the favored driver, and thus was, according to the opinion, engaged in a race for the crossing.²⁶ It seems reasonable to assume that in order to prevail this condition must be met by the driver on the left, since the situation is the one which both the first and second right of way statutes were designed to avoid. Finally, it would seem that the disfavored driver must show that the assumption he made concerning the operation of the other vehicle was in fact untrue. This rule will obtain whether the "deceit" be attributable to the speed or abnormal operation of the other auto. If he judges the speed of the approaching favored driver accurately, even though it is excessive, he is not "deceived."²⁷ So also if it is clear to him that if he does not yield the right of way he will be struck, he cannot recover because the favored driver failed to avoid the collision, even though he may have some reason to assume the favored driver should have stopped.²⁸

The Supreme Court has endeavored to limit the "deceit" exception in recent years. In 1939²⁹ it claimed to have "clearly demonstrated in two recent decisions" . . . that application of the exception or limitation [paragraph (4)] of the *Hadenfeldt* rule must be confined to fact situations which closely resemble those which obtained in the *Hadenfeldt* case." Nonetheless, the "deceit" exception is still vigorous, given the proper environment. In the latest pronouncement of the Washington court in a favored driver controversy,³¹ the driver on the right won a new trial on grounds of improper instructions. Said the court: "If the disfavored driver was, or should have been, aware of the factor or

²⁴ See *Vercruysse v. Cascade Laundry Co.*, 193 Wash. 184, 74 P. (2) 920 (1938).

²⁵ 160 Wash. 166, 294 Pac. 1023 (1931).

²⁶ Said the court, "Respondent's truck was on the right and had the right of way; it was appellant's duty to look out for it and give it the right of way. In accelerating his own speed in an attempt to beat the truck across the intersection, appellant was himself guilty of such negligence as precludes any recovery of damages on his part. We find nothing in the testimony which brings this case within the fourth of the rules laid down in the case of *Martin v. Hadenfeldt* . . ." *Id.* at 169, 294 Pac. at 1024. *Accord*, *Emanuel v. Wise*, 11 Wn. (2d) 198, 118 P. (2d) 969 (1941).

²⁷ *Plenderlieth v. McGuire*, 27 Wn. (2d) 841, 180 P. (2d) 808 (1947).

²⁸ *Sather v. Blodgett*, 169 Wash. 25, 13 P. (2d) 60 (1932).

²⁹ In the opinion of *Jamieson v. Taylor*, 1 Wn. (2d) 217, 227, 95 P. (2d) 791, 796 (1939).

³⁰ Here the court is referring to its decisions in *Bowen v. Odland*, 200 Wash. 257, 93 P. (2d) 366 (1939), and *Delsman v. Bertotti*, 200 Wash. 380, 93 P. (2d) 366 (1939).

³¹ *Pasero v. Tacoma Transit Co.*, 135 Wash. Dec. 90, 211 P. (2d) 160 (1949).

factors which cause deception, then he cannot be heard to say that he was deceived, as such would not be the fact."³²

THE OBSTRUCTION CASES

As already mentioned, a showing of the failure of the disfavored driver to look out for vehicles approaching from his right has almost uniformly resulted in the court's refusal to apply the "deceit" exception.³³ In those cases in which the motorist's view of the street on his right is obscured by some physical obstruction which conceals the approach of the (generally) speeding favored driver, the result has been, until 1950, quite the same. In its first pronouncement on the matter,³⁴ the court made it clear that failure to observe the favored driver's speeding automobile was not excused by the fact that plaintiff's view was obstructed by the side-curtains on his touring-car—"an obstruction," concluded the author of the opinion, "which he himself had arranged."³⁵ Again and again where the facts disclosed that the disfavored driver's view was obstructed by such things as houses,³⁶ buildings,³⁷ trees,³⁸ shrubbery,³⁹ hedges,⁴⁰ brush,⁴¹ walls,⁴² parked automobiles,⁴³ and vehicles waiting in the intersection to turn,⁴⁴ it has been

³² *Id.* at 94, 211 P.(2d) at 163.

³³ *But cf.* *Vercruysey v. Cascade Laundry Co.*, 193 Wash. 184, 74 P.(2d) 920 (1938). There the disfavored driver was unable to see the favored driver because of a snowstorm. The court used an interesting method in affirming judgment for the driver on the left. Citing four cases, two of which follow *Martin v. Hadenfeldt*, they rejected the doctrine upon which they rested the *Hoenig* case, *supra*, note 20, which doctrine is itself a bar to the application of the "deceit" exception. Thus, by showing that there was no failure of one of the "conditions" precedent to recovery on that doctrine, the court seems to have applied rule (4) of *Martin v. Hadenfeldt* without so much as citing the case, despite the fact that *P* did not see *D* disfavored driver prior to the moment of impact.

³⁴ *Rhodes v. Johnson*, 163 Wash. 54, 299 Pac. 976 (1931).

³⁵ *Id.* at 56, 299 Pac. at 977. Here the court is referring to the contention of respondent that "He had a closed car and the vision through the windshield of a closed car is necessarily restricted."

³⁶ *Beiler v. Wolff*, 23 Wn.(2d) 368, 161 P.(2d) 145 (1945); Department of Labor and Industries v. *Hickle*, 1 Wn.(2d) 475, 96 P.(2d) 577 (1949).

³⁷ *Langer v. Auto Interurban Co.*, 28 Wn.(2d) 343, 183 P.(2d) 188 (1947).

³⁸ Department of Labor and Industries v. *Hickle*, *supra*, note 36; *McClellan v. Great Western Fuel Co.*, 32 Wn.(2d) 202, 201 P.(2d) 221 (1948).

³⁹ *Murphy v. Hunziker*, 164 Wash. 40, 2 P.(2d) 270 (1931); *Fisher v. Hemrich Brewing Co.*, 183 Wash. 489, 49 P.(2d) 1 (1935); *Beiler v. Wolff*, 23 Wn.(2d) 368, 161 P.(2d) 145 (1945).

⁴⁰ *Delsman v. Bertotti*, 200 Wash. 380, 93 P. (2d) 371 (1939); *Boyle v. Lewis*, 30 Wn. (2d) 665, 193 P. (2d) 332 (1948).

⁴¹ *Winston v. Bacon*, 8 Wn. (2d) 217, 111 P. (2d) 764 (1941). *But see* *Teshirogi v. Belanger*, 167 Wash. 278, 9 P. (2d) 66 (1932).

⁴² *Beiler v. Wolff*, 23 Wn. (2d) 368, 161 P. (2d) 145 (1945); *Langer v. Auto Interurban Co.*, 28 Wn. (2d) 343, 183 P. (2d) 188 (1947); *Boyle v. Lewis*, 30 Wn. (2d) 665, 193 P. (2d) 332 (1948).

⁴³ *Beiler v. Wolff*, 23 Wn. (2d) 368, 161 P. (2d) 145 (1945); *Langer v. Auto Interurban Co.*, 28 Wn. (2d) 343, 183 P. (2d) 188 (1947); *Boyle v. Lewis*, 30 Wn. (2d) 665, 193 P. (2d) 332 (1948).

decided that the presence of an obstruction imposes upon the driver on the left the duty to proceed carefully to a point at which he *can* gain an unobstructed view of the street to his right, and to do any less amounts to contributory negligence as a matter of law. In none of these cases had the presence of an obstruction justified the plaintiff's failure to observe the favored driver, and the first clear exception to the normal holding did not appear until February, 1950, when *Roberts v. Leahy* was decided.⁴⁵ In this case, *P*, upon entering a downtown intersection at twelve to fifteen miles per hour, looked down the street to his right, and failing to observe *D*'s oncoming taxi, proceeded into the intersection, where the two vehicles collided. A mound of earth, extending from curb to center line of the street to *P*'s right, and rising to the height of four feet, was claimed by *P* to have obscured the speeding taxi from his view. In this case, the majority held: "If the disfavored driver looks to his right from a *proper place* and cannot see the favored vehicle because it is hidden by a condition *in the street*, he has discharged his duty of using due care and is not guilty of negligence as a matter of law in proceeding into the intersection."⁴⁶ But the dissent maintained that⁴⁷ "The approval of this and [*McClellan v. Great Western Fuel Co.*]⁴⁸ leaves this court in the peculiar position of holding a disfavored driver guilty of contributory negligence when cars approaching to his right are hidden by trees, but innocent when they are hidden by an earth mound." And despite the guarded language in which the author couched the rule of decision, it might be added that the peculiarity of the position may be enhanced by the prospect of having to decide whether parked and double-parked automobiles⁴⁹ fall within the exception, and precisely what is to comprise the limits of "the street."

THE POINT OF OBSERVATION

Any discussion of the obstruction cases would be incomplete without including the question of the point at which the motorist on the left must turn his attention to the traffic approaching from the favored direction. Under the statute, drivers are obliged to "look out for and

⁴⁴ *Shultes v. Halpin*, 33 Wn. (2d) 294, 205 P. (2d) 1201 (1949). *But cf.* *Gavin v. Everton*, 19 Wn. (2d) 785, 144 P. (2d) 735 (1944).

⁴⁵ 135 Wash. Dec. 613, 214 P. (2d) 673 (1950).

⁴⁶ *Id.* at 616, 214 P. (2d) at 675.

⁴⁷ *Id.* at 624, 214 P. (2d) at 680.

⁴⁸ 32 Wn. (2d) 202, 201 P. (2d) 221 (1948).

⁴⁹ Cases cited note 43 *supra*.

give way to vehicles on their right. . . ." In *Strouse v. Smith*,⁵⁰ the first case to turn upon this precise point, it was held that since the plaintiff had not looked until the front end of his auto had entered the intersection, he had violated the statute. The location at which the observation is to be taken is set out in *Fetterman v. Levitch*⁵¹ as some place between the curb line, where the corner is obstructed, and a point a variable distance back from the curb line.

That rule is applied in *Plenderlieth v. McGuire*,⁵² where the court, holding the plaintiff contributorily negligent in taking his first look to his right when behind a safety island in the center of a complicated Seattle intersection, said⁵³ "We know of no case which holds that the first look of a driver on the left may be from a point within the curb line." No doubt the *Fetterman*⁵⁴ rule is fairly satisfactory in dealing with the mishap in the unobstructed intersection. However, as has been pointed out, the cases hold that in an obstructed intersection, the driver on the left must advance to a point at which he can obtain an unobstructed view. In *Delsman v. Bertotti*,⁵⁵ for instance, the court stated, "A perfectly clear and unobstructed view was available to [the driver on the left] after his car advanced only a few feet from where he took the observation upon which he relied. In failing to do so, he was negligent."⁵⁶ In *Beiler v. Wolff*,⁵⁷ however, the peril at which he takes that observation may be seen. The court was following the normal rule when it observed that the parked cars which obstructed the view of the disfavored driver "imposed on him a greater duty than if there had been no automobiles there. He had no right to come out onto Sullivan Street unless he had reasonable grounds for believing that there was a reasonable margin of safety."⁵⁸ Now, according to the opinion, the first point at which the disfavored driver could see for any distance down Sullivan Street was about seven feet from the point of impact. Although this case turned on the fact that the disfavored

⁵⁰ 166 Wash. 643, 8 P. (2d) 411 (1932).

⁵¹ 7 Wn. (2d) 431, 109 P. (2d) 1064 (1941).

⁵² 27 Wn. (2d) 841, 180 P. (2d) 808 (1947).

⁵³ *Id.* at 851, 180 P. (2d) at 812. In an intersection shaped like the letter "A," the plaintiff, proceeding from the end of the right arm, made a left turn into the cross-arm, and collided at the intersection of the cross-arm and the left arm. Query: did he create a risk of collision at the intersection to the *left* by failure to look out for approaching traffic until he had turned on to the cross arm? It would seem that here the rule of *Fetterman v. Levitch*, *supra*, note 51, is inapplicable.

⁵⁴ *Supra*, note 51.

⁵⁵ 200 Wash. 380, 93 P. (2d) 371 (1939).

⁵⁶ *Id.* at 390, 93 P. (2d) at 375.

⁵⁷ 23 Wn. (2d) 368, 161 P. (2d) 145 (1945).

⁵⁸ *Id.* at 373, 161 P. (2d) at 148.

driver did not see what was there for him to observe, under the *Hoenig v. Kohl* ruling, *supra*,⁵⁹ it may be said to suggest that the rule will break down in the case in which the motorist, in a sincere endeavor to carry out the mandate of the court, moves his machine far enough into the intersection to obtain an unobstructed view, and in so doing, moves directly into the defendant's path. *McClellan v. Great Western Fuel Co.*⁶⁰ was nearly such a case. There the plaintiff emerged from behind an obstruction to be struck by a fuel truck twenty-two feet in length, with five of its seven feet of width on the wrong side of the center line, and its left side a scant eight feet from the plaintiff's curb line. There the obstruction was such that plaintiff could see the right side of the street for some distance, and the court concluded that "Some part of appellant's truck was there to be seen on its right side of the street, and they cannot claim they were deceived when they did not see the part they had a duty to see . . . if they saw the part of the truck that was in its own right-hand lane, they would have been aware of its presence and its right to the right of way. . . . The respondents are guilty of contributory negligence as a matter of law."⁶¹ One wonders how, in a similar situation, this case could be followed, were a clear showing made that the plaintiff was trying to follow the court's admonition in *Delsman v. Bertotti*, *supra*.⁶²

YIELDING THE RIGHT OF WAY

The *McClellan*⁶³ case seems to overlook another matter. The statute commands motorists to "give right of way to vehicles on their right." The meaning of the phrase is set out clearly in two cases. In *Geitzenauer v. Johnson*,⁶⁴ decided in 1931, the disfavored plaintiff, in attempting to yield the right of way, finally succeeded in stopping her auto just seventeen inches over the center line of the intersecting road. The defendant collided with the front six inches of the halted car. There the court held that "where the disfavored driver is attempting to surrender the right of way, he must surrender at least the entire portion of the street to the right of the center line—that failing to do so is a violation of the statute and . . . constitutes negligence."⁶⁵ *Dyer v. Wallner*,⁶⁶ on

⁵⁹ *Supra*, note 20.

⁶⁰ 32 Wn. (2d) 202, 201 P. (2d) 221 (1948).

⁶¹ *Id.* at 203, 201 P. (2d) at 222.

⁶² *Supra*, note 56.

⁶³ *Supra*, note 60.

⁶⁴ 161 Wash 444, 297 Pac. 174 (1931).

⁶⁵ *Id.* at 448, 297 Pac. at 176.

⁶⁶ 189 Wash. 486, 65 P. (2d) 1281 (1937).

the other hand, states: "The converse of this is equally true, that the favored driver may not encroach upon the half of the street upon which the other car may lawfully proceed or stand."⁶⁷ Were this case generally followed, it would seem that in *Cramer v. Bock*,⁶⁸ where the disfavored driver had in fact yielded all of the roadway on her side of the center line, and *Pasero v. Tacoma Transit Co.*,⁶⁹ where the man on the left stopped three or four feet short of the intersection when the collision occurred, the discussion as to whether or not the "deceit" instruction should have been given are totally unnecessary, since in each of the cases, the disfavored driver had in fact done all that the law required of him. And again, it would be extremely difficult to justify the *McClellan*⁷⁰ result, *supra*, unless it be ascertained (as it was not in this opinion) that the disfavored driver had in fact crossed the center line before the truck struck him, since up to that time he had not violated the statute.

THE BASIS OF THE DECISIONS

The system of cases which deals with the negligence of the disfavored driver may perhaps be explained by one of two rationalizations. The first is the mechanical approach, seemingly employed by the court itself in the individual case. In the beginning, the Legislature established a rule of conduct, which by strict construction could have constituted an absolute bar to the recovery of the disfavored driver in all cases. The state commanded the motorist at the nonarterial intersection to "look out for and yield right of way to" the favored driver approaching from his right. The purpose of the statute was to prevent collisions at such intersections. When a collision did occur, the harm was certainly within the risk that the statute was designed to protect against, and the violation of the statute constituted a substantial factor contributing to the injuries which the violator sustained. Thus, he is, under the naked statute strictly construed, guilty of a form of negligence *per se*, which would operate to bar his recovery against the favored motorist. At various times, other courts have enforced absolute contributory fault in such a situation.⁷¹ However, the Washington court was unwilling to enforce so harsh a rule in every case. It sought to avoid it in the *McHugh* case, *supra*,⁷² by sending to the jury an issue

⁶⁷ *Id.* at 491, 65 P. (2d) at 1283.

⁶⁸ 21 Wn. (2d) 13, 149 P. (2d) 525 (1944).

⁶⁹ 135 Wash. Dec. 90, 211 P. (2d) 160 (1949).

⁷⁰ *McClellan v. Great Western Fuel Co.*, *supra*, note 60.

⁷¹ See Note, 89 A.L.R. 838 (1934), supplemented in 136 A.L.R. 1497 (1942).

⁷² *McHugh v. Mason*, *supra*, note 7.

of negligence. It succeeded in circumventing the statute in *Garrett v. Byerly, supra*,⁷³ but went too far. The rules in *Martin v. Hadenfeldt* gave the court a doctrine with which it might take a deserving case out of the statute, by a finding of a failure of the statutory requirement of simultaneous approach, and having taken it out of the statutory rule, substitute a "reasonably prudent driver" standard in order to evaluate the pre-crash conduct of the driver on the left. Thus the disfavored plaintiff must not only prove that he is "deceived" in order to get his case to the jury, but must thereafter prove to the satisfaction of the jury that he acted as a "reasonably prudent driver." In the ideal case, his proof of "deceit" coupled with a showing that there was a "fair margin of safety" will fulfill the requirements of the "favored driver rule." Furthermore, it seems that the disfavored driver has a right to assume that the favored driver is operating his vehicle at a legal speed, in absence of notice to the contrary.⁷⁴

The mechanical approach of *Martin v. Hadenfeldt* makes no provision, however, for those cases in which the disfavored plaintiff did not see the car on his right until it was too late to avoid the mishap. In these cases, the court had to choose between the rule of the *Hoenig*⁷⁵ case—"if appellant looked, as it is said he did, then he saw, or was charged with the duty of seeing, the approaching car . . ."—or some new avenue of escape. In *Hamilton v. Lesley*,⁷⁶ the court passed on a case in which the first two rules of the *Hadenfeldt* case comprised the sole instructions on the rights of the parties in the intersection. There it was held that, in absence of objections by the favored driver, such instructions sufficed. Thereafter, although the term "margin of safety" was utilized in connection with "deceit," its use in cases wherein the application of the "deceit" exception was mechanically impossible⁷⁷ indicated that

⁷³ *Supra*, note 5.

⁷⁴ See, e.g., *Plenderlieth v. McGuire*, 27 Wn. (2d) 841, 849, 180 P. (2d) 808, 811 (1947).

⁷⁵ Observe that this rule was in force not only before the *Hoenig* case was decided, but also prior to *Martin v. Hadenfeldt*. The case usually cited in connection with it is *Silverstein v. Adams*, 134 Wash. 430, 235 Pac. 784 (1925). *Hoenig v. Kohl* established its validity in relation to the *Hadenfeldt* rules. One should note, however, that in *Eggert v. Schumacher*, 173 Wash. 119, 22 P. (2d) 52 (1933), the court appears to allow "deceit" to be established despite the fact that the disfavored plaintiff did not observe the advent of the favored vehicle. See the court's rationalization of the holding in *Delsman v. Bertotti*, 200 Wash. 380, 390, 93 P. (2d) 371, 374 (1939).

⁷⁶ 174 Wash. 517, 25 P. (2d) 102 (1933).

⁷⁷ *Huber v. Hemrich Brewing Co.*, 188 Wash. 235, 62 P. (2d) 451 (1936); *Garcia v. Moran*, 194 Wash. 328, 77 P. (2d) 988 (1938); *Gibson v. Spokane United Railways*, 197 Wash. 58, 84 P. (2d) 349 (1938); *Pyle v. Wilbert*, 2 Wn. (2d) 429, 98 P. (2d) 664 (1940); *Pasero v. Tacoma Transit Co.*, 135 Wash. Dec. 90, 211 P. (2d) 160 (1949).

rule (2) of the *Hadenfeldt* case was the basis of decision. And if one is to give weight to the flat statement of the court that it does not intend to extend the exception indicated in rule (4) of *Martin v. Hadenfeldt*,⁷⁸ the second rule assumes additional importance.

A third class of cases falls under neither classification. In each of these cases the disfavored driver failed to see the approach of the motorist to his right. In each of them, reference to the *Hadenfeldt* case was confined to explaining that the "deceit" requirement had been satisfied or did not exist, and the "margin of safety" reasoning was not specifically invoked.⁷⁹ Yet even here the main line of reasoning persists—that when the disfavored driver satisfies the requirement of reasonable conduct, he will be allowed to recover despite the fact that he did not comply with the mechanical requirements of the "deceit" doctrine. "We fail to see what other precautions respondent could have taken," said Mr. Justice Blake in expressing the unanimous opinion of the court sitting *en banc* in *Bredemeyer v. Johnson*.⁸⁰ "He was not only not guilty of contributory negligence as a matter of law, but if his evidence is to be believed [and the jury did believe it], he is free of contributory negligence as a matter of fact."

Thus one must conclude that in assigning reasons for the holdings where it was unwilling to find the disfavored plaintiff contributorily negligent as a matter of law, the Washington Court has set the cases into three categories, depending upon their facts. When the situation warrants its application, they seem to prefer the "deceit" exception in *Martin v. Hadenfeldt*, and when it is inapplicable, they apply the "margin of safety" doctrine in preference to the finding that there was little more that the plaintiff could do to insure his own safety. And the

⁷⁸ See *Jamieson v. Taylor*, 1 Wn. (2d) 217, 95 P. (2d) 791 (1939).

⁷⁹ In *Teshirogi v. Belanger*, 167 Wash. 278, 281, 9 P. (2d) 66, 67 (1932), the court concluded: "This . . . statute does not necessarily require the disfavored driver to stop and let the driver of the vehicle on his right pass through the intersection before the disfavored driver enters it. Neither does the law accord the favored driver the right to collide with any vehicle in the intersection that may be on his left when the driver of that vehicle has complied with the statute and accorded to the favored driver ample space in which, by the exercise of reasonable care, to pass safely across the intersection. The right of way accorded the favored driver is merely a relative right, and must be reasonably asserted." *Fetterman v. Levitch*, 7 Wn. (2d) 431, 109 P. (2d) 1064 (1941) was decided on the question of whether *P*, after being stopped in the intersection by the unexpected appearance of pedestrians, acted reasonably in relying on an observation previously made of the street to his right when he again proceeded. There the court held it properly a jury question. *Roberts v. Leahy*, 135 Wash. Dec. 616, 205 P. (2d) 672 (1950) is turned on the facts and on grounds that reasonable minds could differ as to *P*'s contributory negligence. See also, *Vercruyse v. Cascade Laundry Co.*, note 33 *supra*.

⁸⁰ 179 Wash. 225, 36 P. (2d) 1062 (1934). The quotation appears at p. 227, 36 P. (2d) 1063.

meaning of "deceit" and "margin of safety" and every other device used to exculpate the disfavored plaintiff is: The disfavored driver fulfilled his obligation to use reasonable care.

It is plain that the method of the court is literally to ascertain whether the ordinary reasonable motorist in the position of the disfavored driver would have proceeded into the intersection when equipped with the information such driver would have derived from the physical situation which surrounded him. Then, if this hypothetical conduct coincides with that of the disfavored driver, the latter's violation of the statute is justified. Complications have arisen because it has been the practice of the Supreme Court to state categorically that in certain of these instances the conduct of the driver on the left fell so far below the standard that reasonable men could not but agree that he was guilty of contributory fault.⁸¹ But it is submitted that in following again and again these convenient statements of the policy of the law, there has been an occasional tendency on the part of the court to lose sight of the fact that the norm which is followed is, in the final analysis, simply a declaration of what constitutes reasonable conduct in the light of a given fact-pattern.⁸² Moreover, so doing, it has set the courses of lines of authority so that they seem destined to collide. In this latter connection, for instance, the court might consider the wisdom of confining the favored driver to his right side of the street, thus allowing the other motorist in any event the remaining half in which to look to his right at the obstructed corner and bring his machine to a halt. By crystallizing the center line as the limit of the portion of the street the motorist on the left must yield, the court might accomplish three ends: the obviation of difficulty regarding the point at which one must look to his right at the obstructed corner before proceeding, the attainment of a less harsh result in dealing with the favored driver on the wrong side of the street, and the recognition of the *Dyer*⁸³-*Geitzenauer*⁸⁴ rule as the true norm, allowing the disfavored driver to rely on the "right-of-center" statute⁸⁵ in absence of notice to the contrary. But

⁸¹ RESTATEMENT, TORTS § 285, comment *g* (1934).

⁸² At one point, the court expressed an awareness of the dangers inherent in this practice: "We have no other rule than that it is a question of law only when it can be said that reasonable minds could not differ on the issue. The particular facts in each case must control that question." Continuing that any other rule would strike out the function of either the court or the jury, they conclude, "Neither of these positions is sound." *Gavin v. Everton*, 19 Wn. (2d) 785, 789, 144 P. (2d) 735, 738 (1944).

⁸³ *Dyer v. Wallner*, 189 Wash. 486, 65 P. (2d) 1281 (1937).

⁸⁴ *Geitzenauer v. Johnson*, 161 Wash. 444, 297 Pac. 174 (1931).

⁸⁵ "Whenever any person is operating any vehicle upon any public highway of this state he shall at all times drive same to the right of the center of the highway . . ." REM. REV. STAT. 6360-75 [P.P.C. 295-1].

each rule seems to invite the exceptional case, and a case in which the favored driver was compelled to use the center or wrong side of the road, and the driver on the left had no notice of the fact,⁸⁶ might well provide the suggested revision with its own first exception.

The suggested rule and the hypothetical case are submitted not only as a possible method of temporarily averting the collision of lines of authority, but in argument for the ultimate proposition that the court seems to be recognizing, *i.e.*, that the practice of laying down from time to time, rules of negligence governing particular fact-patterns should be abandoned in favor of a more flexible application of the standard of ordinary care. An acknowledgment by the court that the actual theory upon which the cases are decided is that of justification, by a showing of reasonable conduct, of violations of the regulatory statute,⁸⁷ might well enable it to reach satisfactory results without resort to tools so expanded and embellished by successive adaptations that they seem no longer suitable to the task.

⁸⁶ The hypothetical situation is not unlike the facts in *Beiler v. Wolff*, 23 Wn. (2d) 368, 161 P. (2d) 145 (1945).

⁸⁷ "In the ordinary case, all that is required is reasonable diligence to obey the statute, and it frequently has been recognized that a violation of the law is reasonable, and may be excused. Although such cases often speak of a supposed intent and an 'implied exception' in the statute itself, they seem rather to indicate that, in the absence of a clear declaration by the legislature, the courts reserve the final authority to determine whether the civil standard of reasonable conduct will always require obedience to the criminal law." PROSSER, TORTS, § 39, p. 272.