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Automobile Liability: The Nebraska Range of Vision Rule: *Vrba v. Kelly*, 198 Neb. 723, 225 N.W.2d 269 (1977); *C. C. Natvigs' Sons, Inc. v. Summers*, 198 Neb. 741, 255 N.W.2d 272 (1977)

Tim Engler
University of Nebraska College of Law, tengler@hslegalfirm.com

Note

Automobile Liability: The Nebraska Range of Vision Rule

Vrba v. Kelly, 198 Neb. 723, 225 N.W.2d 269 (1977); *C.C. Natvigs' Sons, Inc. v. Summers*, 198 Neb. 741, 255 N.W.2d 272 (1977).

I. INTRODUCTION

In *Vrba v. Kelly*[1] and *C.C. Natvig's Sons, Inc. v. Summers*,[2] the Supreme Court of Nebraska again considered the legal effect of the range of vision rule in automobile liability cases. The Court reiterated its adherence to this rule, and in so doing, attempted to specifically define the respective roles of the judge and the jury in applying the rule.

As it has been developed by the court, the range of vision doctrine can be stated as follows: As a general rule, it is negligence as a matter of law for a motorist to drive an automobile on a highway in such a manner that he cannot stop or turn aside in time to avoid a collision with an object within the range of his vision.[3] The basis for the rule is that automobile drivers are legally obligated to keep such a lookout that they can see what is plainly visible before them, and they cannot relieve themselves of that duty. Addition-

1. 198 Neb. 723, 255 N.W.2d 269 (1977).
2. 198 Neb. 741, 255 N.W.2d 272 (1977).
3. *See, e.g.*, C.C. Natvig's Sons, Inc. v. Summers, 198 Neb. 741, 255 N.W.2d 272 (1977); Vrba v. Kelly, 198 Neb. 723, 255 N.W.2d 269 (1977); Mays v. Siekman, 197 Neb. 77, 247 N.W.2d 613 (1976); Duling v. Berryman, 193 Neb. 409, 227 N.W.2d 584 (1975); Wrasse v. Gustavson, 193 Neb. 41, 225 N.W.2d 274 (1975); Botsch v. Reisdorff, 193 Neb. 165, 226 N.W.2d 121 (1975); McClellen v. Dobberstein, 189 Neb. 669, 204 N.W.2d 559 (1973); O'Connor v. Kientz, 184 Neb. 554, 168 N.W.2d 703 (1969).

   The rule also applies to driving at night. In these cases the rule is that it is negligence, as a matter of law, for motorists to drive on highways in such a manner that they cannot stop or turn aside in time to avoid a collision with an object within the range of their headlights. *See, e.g.*, Robins v. Sandoz, 177 Neb. 894, 131 N.W.2d 648 (1964); Robins v. Sandoz, 175 Neb. 5, 120 N.W.2d 360 (1963); Miers v. McMaken, 147 Neb. 133, 22 N.W.2d 422 (1946); Roth v. Blomquist, 117 Neb. 444, 220 N.W. 572 (1928).

ally, they must drive their automobiles so that when they see an object, they can stop their automobile or turn aside in time to avoid it.[4] The effect of this rule in automobile negligence cases is to remove the question of a driver's negligence from the jury, with the judge applying the rule as a matter of law. The rationale is that where a driver of an automobile collides with an object which is clearly visible, reasonable minds could not differ on the issue of the driver's negligence; therefore, this issue is not to be submitted to the jury.

As with most specific rules of law in a negligence context, the range of vision rule in Nebraska is not without exceptions. The court, however, has not been entirely clear in articulating those situations in which the rule will apply or when instead an exception will apply. On several occasions the court has stated that where reasonable minds could differ as to whether an operator of an automobile was exercising the care, caution, and prudence of a reasonably careful, cautious person, the rule does not apply and the question of negligence is for the jury.[5] Yet in other situations the court has suggested that the rule is inapplicable only in situations in which the object struck was not plainly visible to the driver of the automobile.[6]

If the standard that the question is for the judge unless reasonable minds could differ is, in fact, the proper interpretation of the range of vision rule, then it is interesting to contrast this with the normal standard for deciding whether a question of negligence is for the jury or for the court. The normal standard is that the question of negligence is for the jury, but if reasonable minds could not differ as to whether a person was exercising the care, caution, and prudence of a reasonably careful, cautious person, the judge decides the driver's negligence as a matter of law.[7] However, when the range of vision rule is involved, the initial determination is for

4. *See* Stanley v. Ebmeier, 166 Neb. 716, 90 N.W.2d 290 (1958); Bramhall v. Adcock, 162 Neb. 198, 75 N.W.2d 696 (1956).

5. *See* Bartosh v. Schlautman, 181 Neb. 130, 147 N.W.2d 492 (1966); Robins v. Sandoz, 177 Neb. 894, 131 N.W.2d 648 (1964); Robins v. Sandoz, 175 Neb. 5, 120 N.W.2d 360 (1963); Thurow v. Schaeffer, 151 Neb. 651, 38 N.W.2d 732 (1949); Miers v. McMaken, 147 Neb. 133, 22 N.W.2d 422 (1946); Fulcher v. Ike, 142 Neb. 418, 6 N.W.2d 610 (1942).

6. *See* C.C. Natvig's Sons, Inc. v. Summers, 198 Neb. 741, 255 N.W.2d 272 (1977); Vrba v. Kelly, 198 Neb. 723, 255 N.W.2d 269 (1977); Kehm v. Dumpert, 183 Neb. 568, 162 N.W.2d 520 (1968); Guynan v. Olson, 178 Neb. 335, 133 N.W.2d 571 (1965).

7. *See* Bartosh v. Schlautman, 181 Neb. 130, 147 N.W.2d 492 (1966); Robins v. Sandoz, 177 Neb. 894, 131 N.W.2d 648 (1964); Robins v. Sandoz, 175 Neb. 5, 120 N.W.2d 360 (1963); Thurow v. Schaeffer, 151 Neb. 651, 38 N.W.2d 732 (1949); Miers v. McMaken, 147 Neb. 133, 22 N.W.2d 422 (1946); Fulcher v. Ike, 142 Neb. 418, 6 N.W.2d 610 (1942).

the judge, as a matter of law, and it is only if reasonable minds could differ that the defendant is entitled to have the question of liability go to the jury. Under the range of vision rule there is a presumption that the judge will decide unless the defendant can prove that reasonable minds could differ. In light of this standard, it would seem the range of vision rule is not a specific rule of law at all, but merely a method of determining when the question of negligence should be decided by the judge.

If, however, the range of vision rule applies except when the object is not plainly visible to the driver, then the rule is, in fact, an established community standard of what constitutes reasonable conduct.

Since this apparent discrepancy exists in when an exception to the rule will apply so that the case can be tried to a jury, it is interesting to note how *Vrba* and *Summers* fit into the scheme, and to analyze the present court's interpretation of the effect of the range of vision rule on the role of the judge and jury.

II. THE RANGE OF VISION RULE

A. Early Cases

The court's decisions in *Vrba* and *Summers* clearly indicate an adherence to the range of vision rule. It is also evident that the court is attempting to delineate the rule's application to specic fact situations. However, in order to effectively analyze how *Vrba* and *Summers* fit into the rule's application, it is necessary to first consider the court's development of the range of vision rule.

The range of vision doctrine as a specific rule of law was originally adopted by the Nebraska Supreme Court in *Roth v. Blomquist*.[8] In *Roth*, plaintiff collided with a horse-driven wagon owned by defendant. Plaintiff alleged defendant was negligent in failing to have proper lighting on the wagon. Defendant claimed plaintiff was contributorily negligent. In reversing a jury verdict for plaintiff, the Nebraska Supreme Court announced the rule that a driver has a duty to have strong enough headlights to enable him to keep sufficient control of his car to stop and avoid an obstruction within the range of his vision:

> This general rule is supported by sound reasons and the overwhelming weight of authority. When applicable to the facts a violation is of itself negligence precluding a recovery in favor of the motorist for resulting injuries to himself or to his property. Without such a rule the hazards at farm and highway crossings and at other places on the lines of public travel would be unnecessarily and alarmingly increased. There are at night instances in which persons in charge of domestic animals or other property

8. 117 Neb. 444, 220 N.W. 572 (1928).

> suddenly or temporarily, in absence of negligence, obstruct a highway without opportunity to give drivers of approaching automobiles instant notice. A farmer in the exercise of due care may return from his own field at dusk with a team and wagon and cross a highway to his barn.[9]

Thus, in *Roth* plaintiff was deemed contributorily negligent as a matter of law. Even with the initial adoption of the rule, however, the court recognized certain exceptions. These exceptions included factual situations in which the object or obstruction could not be seen except at very close range, or in which the object blended in with the color of the highway.[10]

Seven years later in *Cotten v. Stolley*,[11] *Roth* was interpreted to stand for the rule that a motorist was negligent as a matter of law for driving an automobile so fast on a highway that he could not stop in time to avoid a collision with an object within the range of his vision. This clearly established the range of vision rule as a specific rule of law with a few limited exceptions.

At the time of *Roth* and *Cotten*, the necessity for the rule was probably supported by numerous policy considerations. Highways bore little relationship to modern thoroughfares, and obstructions were probably not that uncommon. However, since *Roth* and *Cotten*, advanced technology has drastically changed the role of the automobile in our society. In light of this change, it is questionable whether the rule is still sound today. One thing seems clear, since *Cotten* the court has struggled with the application of the rule and has had to formulate appropriate exceptions to meet these changing circumstances. The rule has remained basically unchanged, but the development of the exceptions to the rule has led to confusion and contradictory results.

B. Exceptions to the Rule

One of the first attempts by the court to articulate a general statement of when an exception to the range of vision rule applied was in *Fulcher v. Ike*.[12] Plaintiff alleged that the defendant had

9. *Id.* at 447, 220 N.W. at 572-73.
10. *Id.* at 447-48, 220 N.W. at 573. The court noted the following exceptions: Day v. Metropolitan Utils. Dist., 115 Neb. 711, 214 N.W. 647 (1927) (corner of a platform with the narrow edge extending from a drag line over a street car track and discernable only at close proximity); Frickel v. Lancaster County, 115 Neb. 506, 213 N.W. 826 (1927) (obstruction consisting of a pile of gravel similar in color to the surface of the highway); Tutsch v. Omaha Structural Steel Works, 110 Neb. 585, 194 N.W. 731 (1923) (unbarricaded, unknown, open, unlighted ditch across a highway that could only be seen at close range and was not anticipated).
11. 124 Neb. 855, 248 N.W. 384 (1933).
12. 142 Neb. 418, 6 N.W.2d 610 (1942). Defendant testified that because of the road's topography, he was unable to see plaintiff's vehicle until he was approximately 80 feet away, a fact which did not allow him sufficient time or

violated the range of vision rule by striking plaintiff's vehicle from the rear. The trial court, relying on *Roth*, held defendant negligent as a matter of law.

Initially the court outlined the proper Nebraska test for withdrawing a negligence question from the jury:

> In a jury case where different minds may draw different conclusions or inferences from the adduced evidence, or if there is a conflict in the evidence, the matter at issue must be submitted to the jury, but where the evidence is undisputed, or but one reasonable inference or conclusion can be drawn from the evidence, the question is of law for the judge.[13]

Without discussing the merits of the range of vision rule, the court then centered on the exceptions to the rule:

> It would appear, therefore, that the general rule with exceptions, which provides that it is negligence as a matter of law for a motorist to drive an automobile so fast on a highway at night that he cannot stop in time to avoid a collision with an object within the area lighted by the lamps on the automobile, should embrace in the exceptions all situations wherein reasonable minds may differ on the question of whether or not the operator of the automobile exercised the care, caution and prudence required of a reasonably careful, cautious and prudent person under the circumstances of the particular situation. *Any lesser limitation of this general rule would have the effect of destroying, to that extent, the fundamental concept of negligence, and, to that extent, of transferring a jury function to the judge.*[14]

The court's initial articulation of the rule and its exceptions is confusing. If, as the court stated, the normal standard for determining whether a negligence question is for the jury or the judge is determinative of when the exceptions apply, it would seem the range of vision rule is not a separate rule of law at all, but, consistent with the normal division of the functions of judge and jury.

Following the decision in *Fulcher*, the court decided the case of *Miers v. McMaken*,[15] which affirmed its holding in *Fulcher*. Plaintiff, who was traveling in the same direction as defendant, failed to observe defendant's vehicle until it was too late to avoid a collision. Defendant appealed a jury verdict for plaintiff, arguing plaintiff was contributorily negligent more than slight as a matter of law for violating the range of vision rule. The supreme court, in concluding that the trial court was correct in submitting the questions of negligence and contributory negligence to the jury, noted that de-

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space to stop. Plaintiff, on the other hand, claimed defendant should have seen the vehicle at least 130 feet away.

13. *Id.* at 423, 6 N.W.2d at 613.
14. *Id.* at 426, 6 N.W.2d at 615 (emphasis added).
15. 147 Neb. 133, 22 N.W.2d 422 (1946). Defendant testified that while driving home, he ran out of gas and parked his vehicle on the shoulder with the rear end partially obstructing the road. Plaintiff traveling in the same direction was blinded by an oncoming vehicle, and by the time he observed defendant's vehicle, it was too late to stop or turn aside to avoid a collision.

fendant had alleged a violation of the range of vision rule, and that plaintiff had alleged facts within the exceptions under *Fulcher*. Relying on *Fulcher*, the court reasoned that this was a situation in which reasonable minds could differ on the standard of care and, therefore, it would have been inappropriate for the judge to decide as a matter of law.[16] In *Miers* it appears the court was simply applying the normal negligence standard even though it was couched in terms of an exception to the range of vision rule.

In *Thurow v. Schaeffer*,[17] the Court further emphasized the limited application of the range of vision rule. In *Thurow*, the accident occurred when plaintiff struck defendant's combine from the rear. Defendant appealed a jury verdict for plaintiff, arguing that the trial court should have granted him a directed verdict because, as a matter of law, plaintiff was contributorily negligent for violating the range of vision rule.[18]

The court, in upholding the trial court's decision to submit the issue of negligence to the jury, considered both the normal standard for submitting negligence questions to the jury, and the standard under the *Fulcher* interpretation of the exceptions to the range of vision rule. It concluded:

> [The rule was] never intended to be arbitrary. . . [Its] purpose was to remove from the jury the question of negligence and to cause it to be determinable as a matter of law *only* in those cases where the facts were not in dispute or where they were so conclusive in character that reasonable minds could not differ in relation thereto. It has been made clear in these later cases that in cases where the evidence was seriously in dispute and where reasonable minds might draw different conclusions from the evidence the question of negligence or contributory negligence was not determinable as a matter of law but was for the jury.[19]

It could be argued that *Schaeffer*'s interpretation of the range of vision rule, together with that of *Fulcher*, makes the rule indistinguishable from any other issue of a driver's negligence. Nevertheless, the range of vision rule has continued to be referred to in Nebraska automobile negligence cases as a separate rule of law, and has led to some inconsistent results.

A good example of the inconsistent results that may follow when a judge makes a determination as a matter of law instead of

16. *Id.* at 137, 22 N.W.2d at 424.
17. 151 Neb. 651, 38 N.W.2d 732 (1949). The facts of the case were similar to most range of vision cases. Defendant had been driving a combine on the highway when plaintiff came over a hill, attempted to swerve around the combine, but collided with its rear end. The parties disputed the evidence as to how much of the road the combine covered, and how far below the hill the combine had traveled when plaintiff first had an opportunity to observe it.
18. *Id.* at 653, 38 N.W.2d at 735.
19. *Id.* at 662, 38 N.W.2d at 738 (emphasis added).

turning the issue over to the jury is found in *Robins v. Sandoz*.[20] In *Robins*, plaintiff had stopped his vehicle on the side of the road where it was struck from the rear by defendant's vehicle.[21] In upholding a jury verdict for defendant on his counterclaim, the court concluded that even though plaintiff had a temporary right to stop under Nebraska law,[22] the issue of his contributory negligence was a question for the jury. Furthermore, the question of defendant's negligence in violating the range of vision rule was also for the jury. The court reasoned that the facts of *Sandoz* brought it within the exceptions to the general range of vision rule because "the evidence is such that reasonable minds might draw different conclusions therefrom."[23] The court believed the jury could very well have concluded from the evidence either that defendant was not negligent or plaintiff's negligence was gross in comparison to de-

20. 177 Neb. 894, 131 N.W.2d 648 (1964).

21. 175 Neb. at 12, 120 N.W.2d at 364. There was also an earlier supreme court appeal of the same case. Robins v. Sandoz, 175 Neb. 5, 120 N.W.2d 360 (1963).

Both decisions arose out of the same fact situation. Plaintiff had stopped his car on the highway to change a flat tire, and was at the rear of his vehicle when the accident occurred. Defendant testified that he had met and passed a vehicle traveling in the other lane approximately 100 feet before meeting plaintiff's vehicle, and upon seeing plaintiff's vehicle, he only had time to "whip" the wheel to the left before colliding. There was conflicting evidence as to whether there were any lights on plaintiff's vehicle, and to the location of plaintiff's vehicle in relation to the center line and the shoulder of the road.

The case was initially tried to a jury, but at the close of the evidence, the trial court directed a verdict for plaintiff on the ground that "as a matter of law . . . the plaintiff was guilty of no negligence and the defendant's negligence was the sole cause of plaintiff's damage." *Id.* at 6, 120 N.W.2d at 361. The Nebraska Supreme Court reversed on the ground that "there was a disputed question of fact as to whether or not the plaintiff was guilty of negligence which caused or contributed to the collision which question should have been submitted to a jury for determination." *Id.* at 11, 120 N.W.2d at 364. On remand, the jury returned a verdict for defendant on his counterclaim and plaintiff appealed.

22. NEB. REV. STAT. § 39-757 (Reissue 1960) (repealed L.B. 45 § 125, 1973) provides:

> No person shall park or leave standing any vehicle, whether attended or unattended, upon the paved or improved or main traveled portion of any highway, outside of a business or residence district, when it is practical to park or leave such vehicle standing off the paved or improved or main traveled portion of such highway; *Provided*, in no event shall any person park or leave standing any vehicle, whether attended or unattended, upon any highway unless a clear and unobstructed width of not less than fifteen feet upon the main traveled portion of said highway opposite such standing vehicle shall be left for free passage of other vehicles thereon, nor unless a clear view of such vehicle may be obtained from a distance of two hundred feet in each direction upon such highway . . . . The provisions of this section shall not apply to the driver of any vehicle which is disabled while on the paved or improved or main traveled portion of a highway in such manner and to such extent that it is impossible to avoid stopping and temporarily leaving such vehicle in such position.

23. 177 Neb. at 897, 131 N.W.2d at 650.

fendants under the comparative negligence standard.[24]

The initial application of the range of vision rule by the trial court, and the subsequent jury result demonstrates that the range of vision rule is contrary to modern standards of driver conduct. The trial judge attempted to apply a mechanical test for determining liability, but the jury verdict's measure of the community standard of conduct demonstrates that the mechanical test may no longer be supported by sound policy reasons.

In *Guynan v. Olson*[25] the court stepped back from its former broad generalization of the exceptions to the range of vision rule, and attempted to factually categorize when the rule would not apply. The court, in holding the defendant guilty of negligence as a matter of law for violating the range of vision rule, noted that past cases indicated the exceptions had been applied in situations in which the object struck was the same color as the roadway or, for some other reason, the object could not be observed by the exercise of due care. The court generalized the exceptions to the rule by stating:

> They generally embrace factual situations involving various factors which might reasonably be considered to relieve a driver of the duty to see the object or vehicle in time to avoid it. They deal with situations in which the driver did not see the object ahead of him until a very short distance before he was upon it.[26]

In comparing this case with the prior decisions, the question posed is whether the court was attempting to limit the application of the exceptions to the range of vision rule or whether it was simply trying to distinguish past cases in which the rule had not been applied.

C. *Bartosh* and *Kehm*—Criticism of the Rule

Undoubtedly one of the most confusing and controversial range of vision cases to be decided was that of *Bartosh v. Schlautman*.[27] Three opinions were written in *Bartosh* and the ultimate effect of the case on the range of vision rule is unclear. One commentator[28] suggested that *Bartosh* could possibly be read as the demise of the rule. Subsequent cases have rejected this reading of the decision,

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24. *Id.*
25. 178 Neb. 335, 133 N.W.2d 571 (1965).
26. *Id.* at 339, 133 N.W.2d at 574.
27. 181 Neb. 130, 147 N.W.2d 492 (1966). *Bartosh* arose out of an accident in which plaintiff had been operating a combine on the highway, and was forced to stop when the gears of the combine jammed. Plaintiff immediately began making repairs without placing any flares or lights indicating the combine's presence. Defendant, traveling in the same direction as plaintiff, struck the rear of the combine while plaintiff was in the process of repairing it.
28. Schmeling, *The Range of Vision Rule in Nebraska*, 49 NEB. L. REV. 1 (1969).

but as the commentator concluded, the *Bartosh* decision, "leaves the range of vision rule in an extreme state of confusion at best."[29]

In *Bartosh* plaintiff, whose combine was stopped on the road when struck from the rear by defendant's vehicle, specifically alleged a violation of the range of vision rule, and requested a jury instruction on the rule. Defendant's answer specifically alleged facts within the exceptions to the rule. At trial defendant attempted to show the highway surface was of a light color and the color of the combine blended in with the road. He argued that this, together with the fact that it was twilight, made it very difficult for him to see the combine. Two witnesses who had passed the combine prior to the accident both testified that the tractor had been difficult to see. The trial court refused to instruct on the range of vision rule and instead instructed the jury on the duty of a driver to keep a proper lookout and control of his vehicle.[30]

On appeal from a jury verdict for defendant on his counterclaim for damages, the supreme court affirmed. In an opinion written by Judge McCown, the court reasoned that the general rule had been undercut by numerous exceptions, and pointed out the range of vision rule was not an "automatic rule of thumb nor a rigid formula," but rather the application of the rule depended upon individual circumstances.[31] The court added: "Where an exception applies, the general rule does not apply. Where the general rule does not apply as a matter of law, the determination of negligence is for the jury under the rules and standards of due care under the particular circumstances as applied in motor vehicle cases."[32] The court held that because an exception to the general rule clearly applied, the giving of an instruction on the range of vision rule would have confused the jury and prejudiced the plaintiff.

Chief Justice White, in a dissenting opinion,[33] strongly criticized the majority for holding that as a matter of law an exception to the rule applied. He reasoned that it was for the jury to determine if the exceptions applied because the question regarding the

29. *Id.* at 20.

30. The court gave the following jury instruction:

> It is the duty of drivers of vehicles to keep such diligent watch and lookout and have their vehicles under such reasonable control at all times as will enable them to avoid collision with others, assuming that such others will also exercise ordinary care. . . . Each driver must use such senses of sight and hearing, and such other instruments as are at his command, to use ordinary care to avoid an accident, and it is the duty of drivers of vehicles to look and see that which is in plain sight.

181 Neb. at 132, 147 N.W.2d at 494.

31. *Id.* at 133, 147 N.W.2d at 495.

32. *Id.* at 134, 147 N.W.2d at 495.

33. *Id.* at 135, 147 N.W.2d at 496 (White, C.J., dissenting).

visibility of the combine was the crucial issue in the case. Because there was evidence supporting a determination either way, the jury had a right to determine if the combine was clearly visible, and a further right to know what the applicable law was if the jury determined that the rule applied rather than an exception.[34]

Judge Newton, also dissenting,[35] agreed the issue of negligence was for the jury, and stated that the refusal to give an instruction on the range of vision rule was erroneous. Judge Newton disagreed with the majority's conclusion that the general rule did not apply as a matter of law. He felt the effect of that conclusion was a determination by the majority that no jury question was presented on the issue of the visibility of plaintiff's vehicle, and on the basis of the majority opinion, a directed verdict for defendant should have been given.[36]

Applying the majority opinion's interpretation of the effect of the range of vision rule in an automobile liability case could leave four possible alternatives open to a trial judge depending upon the particular facts. One alternative would be for the trial judge to conclude that a party was negligent as a matter of law for violating the range of vision rule. A second alternative would be that if the trial judge concluded that reasonable minds could differ as to whether a party violated the rule or whether an exception applied, the issue would be submitted to the jury with an appropriate range of vision rule instruction. Third, if the trial judge concluded as a matter of law the range of vision rule did not apply, the question of negligence would be submitted to the jury, but no range of vision rule instruction would be given. Finally, the trial court could conclude that a party was simply not negligent and direct a verdict.

The problem with these alternatives is that up to and including the decision in *Bartosh*, the court had not been entirely consistent on when the rule was to be applied as a separate rule of law. This inconsistency forced trial judges to encroach on the role of the jury by forcing them to decide additional questions of fact. If nothing else, one thing appears clear from the *Bartosh* decision: Chief Justice White and Judge Newton believed the issue in a range of vision case is one of visibility. If the object is visible, the rule applies, and if the object is not visible, the exceptions apply.

The pivotal decision for future range of vision cases appeared to be *Kehm v. Dumpert*,[37] which followed *Bartosh*. The views of Chief Justice White and Judge Newton apparently prevailed in *Kehm*, because Judge Newton wrote for the majority, and Judge

34. *Id.*
35. *Id.* at 139, 147 N.W.2d at 498 (Newton, J., dissenting).
36. Id.
37. 183 Neb. 568, 162 N.W.2d 520 (1968).

McCown was forced to write a separate opinion. The facts of the case were similar to most range of vision cases with defendant striking plaintiff's vehicle from the rear.[38] The majority reasoned the defendant was guilty of negligence as a matter of law for violating the range of vision rule because there was no evidence which would bring him within the exceptions.

Judge McCown, concurring in the result,[39] called for abolishment of the range of vision rule as a separate rule of law. He agreed that a new trial should not have been granted, but had this to say about the rule:

> I disagree with the pronouncement of a flat and rigid rule that it is negligence, as a matter of law, for a motorist to drive so fast on the highway at night that he cannot stop in time to avoid collision with an object within the area lighted by his headlights. The rule was never intended as an automatic rule of thumb nor a rigid formula to be applied regardless of circumstances. It is already subject to so many exceptions that it is often difficult to tell where the rule ends and the exceptions begin.
>
> Where the exceptions embrace (as they do) those situations where reasonable minds might differ as to whether the motorist was exercising due care under the particular circumstances, it is difficult to justify the retention of the old "general rule."[40]

Judge McCown used the following example to demonstrate the apparent conflicts encountered in retaining the rule. A motorist driving approximately 75 miles per hour on the interstate highway at night with low-beam headlights would be guilty of negligence as a matter of law for violating the plain vision rule, but if he was charged with negligence in exceeding the speed limit, the jury would simply be instructed that violation of the speed limit is not, in itself, negligence, but may be evidence of negligence.[41]

Recent cases considering the range of vision rule indicate that

38. The jury returned a verdict for defendant, but the trial judge ordered a new trial. Defendant appealed, and the supreme court reversed on the issue of the trial court's decision to grant a new trial. The majority, however, allowed defendant to retain the verdict not on the issue of liability but on the issue of damages. With respect to the damages issue, immediately after the accident, plaintiff had told defendant she was not hurt, but the next day she consulted a doctor complaining of a whiplash. Defendant's evidence was based upon a medical examination conducted prior to trial. Defendant's doctor reported he could find no whiplash, no abnormalities, and plaintiff was not suffering from any disability. The doctor also testified plaintiff had consulted him prior to the accident concerning her back, that she had fallen down a flight of stairs prior to the accident, that she had fallen on the ice, and that she had fallen getting out of bed one morning. Based on this, the court felt the jury could have concluded defendant was not entitled to damages. *Id.* at 570-71, 162 N.W.2d at 522.

39. *Id.* at 568, 574, 162 N.W.2d 520, 524 (McCown, J., concurring in result).

40. *Id.*

41. *Id.*

Judge McCown's position is clearly in the minority.[42] These cases represent an adherence to the rule as a separate rule of law, and there appears to be no trend to eliminate the rule.

III. *VRBA* AND *SUMMERS*

A. *Vrba v. Kelly*

In *Vrba v. Kelly*,[43] an action was brought to recover damages to plaintiff's car as a result of an automobile accident. The defendant counterclaimed for the damage to his car. The accident occurred when Vrba's vehicle became stuck in a snowdrift about ninety feet below the crest of a small hill during a severe snowstorm. Unable to dig the car out, plaintiff left the car parked on the right side of the road without placing any flares, without leaving the lights on, and without giving any other warning of the car's presence. The next morning, defendant collided with plaintiff's vehicle. At trial, defendant testified that as he reached the crest of the hill, he was traveling approximately twenty-five to thirty miles per hour when his range of vision was suddenly reduced to approximately fifty feet by blowing snow. When he observed the vehicle, he was unable to stop or turn aside in time to avoid the collision.[44]

In reversing the dismissal of plaintiff's claim, the Nebraska Supreme Court reasoned that defendant was negligent as a matter of law for violating the range of vision rule. The court noted that the existence of the adverse weather conditions which affected defendant's range of vision did not excuse his conduct but rather emphasized his negligence.[45] Defendant had argued that plaintiff was negligent in leaving his vehicle on the public highway without lights or flares in a place in which there was no clear view for a distance of 200 feet in each direction, in violation of a Nebraska statute.[46] The court, however, held the statute did not apply to plaintiff because his vehicle was disabled. Relying on *Haight v. Nelson*,[47] the court reasoned that plaintiff substantially complied

42. *See* Mays v. Siekman, 197 Neb. 77, 247 N.W.2d 613 (1976); Wrasse v. Gustavson, 193 Neb. 41, 225 N.W.2d 274 (1975); Botsch v. Reisdorff, 193 Neb. 165, 226 N.W.2d 121 (1975); Duling v. Berryman, 193 Neb. 409, 227 N.W.2d 584 (1975); McClellen v. Dobberstein, 189 Neb. 669, 204 N.W.2d 559 (1973); O'Conner v. Kientz, 184 Neb. 554, 168 N.W.2d 703 (1969).

43. 198 Neb. 723, 255 N.W.2d 269 (1977).

44. *Id.* at 725, 255 N.W.2d at 270. The county court had dismissed plaintiff's claim, and entered judgment for defendant. On appeal to the district court, both the claim and counterclaim were dismissed. The Nebraska Supreme Court reversed the dismissal of plaintiff's claim, and affirmed the dismissal of defendant's claim.

45. *Id.* at 725, 255 N.W.2d at 270-71.

46. NEB. REV. STAT. § 36-670(1) (Reissue 1974).

47. 157 Neb. 341, 59 N.W.2d 576 (1953).

with the requirements of the statute: He had parked as far to the right as possible, he had left an unobstructed space to pass, and he was unable to provide a clear view of the vehicle for 200 feet in either direction because of the weather conditions. The court, therefore, concluded plaintiff could not have been negligent.[48]

B. *C.C. Natvig's Sons, Inc. v. Summers*

The same day as *Vrba*, the court handed down the decision in *C.C. Natvig's Sons, Inc. v. Summers*.[49] The trial court's decision was based on depositions of plaintiff's driver and defendant's driver. The driver of plaintiff's vehicle testified that he was traveling about thirty to thirty-five miles per hour during a snowstorm. He proceeded over a small hill when his visibility was reduced to approximately sixty feet due to blowing snow. When he observed defendant's vehicle he was about 200 to 300 feet away, and the vehicle was blocking the entire roadway. His testimony indicated that it had been difficult to observe defendant's vehicle because it was "silhouetted" against the white background. He could not go around the vehicle because there were ditches and banks on both sides of the road. Plaintiff's driver applied the brakes, but was unable to avoid a collision. The driver also indicated he had not seen any lights on defendant's vehicle nor had he seen any warning signals indicating the vehicle would be blocking the road.[50] Defendant's driver's testimony essentially established that he became stuck in a snowdrift, and after obtaining the assistance of a nearby farmer, pulled his vehicle free, momentarily leaving the vehicle positioned crossways in the center of the highway. It was at this time that the collision occurred.[51]

The specific issue before the court was whether plaintiff's driver by violating the range of vision rule was contributorily negligent more than slight as a matter of law. The Nebraska Supreme Court reversed the trial court's verdict for defendant because it concluded there was a factual issue for the jury with respect to whether plaintiff's driver's negligence was slight compared to the possible gross negligence of defendant's driver.[52]

The court reasoned that even though the trial court was correct in concluding plaintiff's driver was negligent as a matter of law under the operation of the range of vision rule, the jury was to decide under the Nebraska comparative negligence statute whether that negligence was slight in comparison to any possible negli-

48. 198 Neb. at 726-27, 255 N.W.2d at 271.
49. 198 Neb. 741, 255 N.W.2d 272 (1977).
50. *Id.* at 742-43, 255 N.W.2d at 274-75.
51. *Id.* at 743-44, 255 N.W.2d at 275.
52. *Id.* at 749, 255 N.W.2d at 277.

gence on the part of defendant's driver. The court pointed out the evidence indicated possible active negligence by defendant's driver in blocking the highway in a place he knew or should have known was unreasonably dangerous, in failing to place any warning signals, and in failing to keep a proper lookout. Whether this constituted negligence, and whether this negligence was gross in comparison to plaintiff's driver's negligence were questions of fact making a summary judgment inappropriate.[53]

C. Brodkey's Concurrence in *Vrba*[54]

Judge Clinton dissented in *Summers*[55] because he was unable to reconcile the decision with *Vrba*. Judge Brodkey, who wrote the majority opinion in *Summers*, added a concurring opinion to *Vrba*[56] in response to Judge Clinton's dissent. Judge Brodkey delineated the apparent inconsistency between *Summers* and *Vrba* by pointing out that in *Vrba* the court held that defendant was contributorily negligent more than slight as a matter of law for violating the range of vision rule, whereas in *Summers* the court held that the question of the plaintiff's driver's contributory negligence in violating the range of vision rule was a question for the jury under the Nebraska comparative negligence statute.[57] Judge Brodkey reconciled this inconsistency by reasoning that in *Vrba*, plaintiff could not have been negligent; therefore, since defendant was negligent for violating the range of vision rule, there was no issue of comparative negligence and judgment for the plaintiff was proper. In *Summers*, however, the defendant may have been negligent. Therefore, even though plaintiff was contributorily negligent as a matter of law for violating the range of vision rule, there still remained for jury determination the question of whether the negligence was slight in comparison to defendant's possible negligence. As stated by Judge Brodkey:

> Although in some circumstances it may be proper for the trial court to determine as a matter of law that a person violating the range of vision rule is guilty of negligence more than slight, so as to prevent recovery, such as where the other party was not negligent in any respect, yet we have never held that a driver violating that rule is guilty of negligence more than slight in every circumstance, regardless of the actions or negligence of the person with whom he collides.[58]

53. *Id.*
54. 198 Neb. 723, 727, 255 N.W.2d 269, 271 (1977) (Brodkey, J., concurring).
55. 198 Neb. 741, 749, 255 N.W.2d 272, 277 (1977) (Clinton, J., dissenting).
56. 198 Neb. 723, 727, 255 N.W.2d 269, 271 (1977) (Brodkey, J., concurring).
57. NEB. REV. STAT. § 25-1151 (Reissue 1975).
58. 198 Neb. at 728, 255 N.W.2d at 272.

D. The Rule Today

Vrba and *Summers* exemplify adherence to the range of vision rule. They are consistent with the cases since *Bartosh* which indicate that the crucial issue which decides the application of the range of vision rule or the exceptions to the rule is the visibility of the object struck. The court's emphasis on this visibility element as the controlling issue seems to eliminate any other considerations of whether the operator of the vehicle was exercising the care and caution of a reasonable person. Thus, it appears that the articulation in *Fulcher* and *Schaeffer* of when the exceptions apply[59] has been superseded by the visibility issue.

This is evident in *Vrba* and *Summers*, for the court no longer questioned the validity of the rule, but only addressed itself to the practical effect of a violation of the rule. Apparent in these opinions is a further mechanization of the range of vision rule as a separate rule of law. Under these decisions, it appears that if there is no question as to visibility of the object, a violation of the range of vision rule will automatically make a plaintiff contributorily negligent, with the only issue left to the jury being the determination of the ratio of that negligence to defendant's negligence.

IV. RULES OF LAW

Negligence is conduct that fails to measure up to an acceptable standard. The standard employed in the law of torts is that of a reasonably prudent person acting under the same or similar circumstances. Whether or not the standard has been attained is normally a jury question, and only under the most extreme situations, in which reasonable minds could not differ upon the facts or the inferences to be drawn therefrom, can the case be taken from the jury. If honest differences of opinion between persons of average intelligence exist, the issue should not be resolved by the courts.[60]

With this general standard in mind, the concept of negligence law in automobile negligence cases must also be interpreted in light of the common law system of stare decisis. The decision of an appellate court that under certain circumstances a particular type of conduct is clearly negligent, or not negligent, or that the issue is for the jury as one on which reasonable persons may differ, establishes a precedent for other cases in which the facts are identical, or substantially the same. To that extent, it may define the standard of reasonable conduct which the community requires.[61] This

59. *See* notes 17-19 & accompanying text *supra*.
60. *See, e.g.*, McKinney v. Yelavich, 352 Mich, 687, 90 N.W.2d 883 (1958). For Nebraska cases, see note 7 & accompanying text *supra*.
61. W. PROSSER, TORTS 188 (4th ed. 1971).

is what the Nebraska Supreme Court has done with the range of vision rule. It has crystallized the law into mechanical rules, and has treated past precedents as fixing definite rules of uniform application. But as some of the cases indicate, the rule has been abrogated by the necessity of applying the standard to the particular circumstances.

The exercise of caution in formulating specific standards of conduct or rules of law was suggested by Dean Roscoe Pound:

> Standards are late developments in law. Thus the standards of the Roman law belong to the classical period; the standard of due care in our law of negligence is the work of the nineteenth century, and the standards of reasonable service and reasonable facilities in our law of public utilities were not understood until the end of the last century. Moreover, nineteenth-century courts distrusted these standards and sought to put them into straitjackets. Degrees of negligence, attempts to lay down that this or that was negligence "as a matter of law," and the "stop, look and listen" rule bear witness to distrust of standards and desire to subject conduct to fixed detailed rules. But elimination of circumstances in order to get a rule makes the rule impossible as a practical compromise between the interests of the several participants in the infinitely variable situations of human conduct. In framing standards of conduct the law seeks neither to generalize by eliminating the circumstances nor to particularize by including them; instead, the law seeks to formulate the general expectation of society as to how individuals will act in the course of their undertakings, and thus to guide the common sense or expert intuition of jury or commission when called on to judge a particular conduct under particular circumstances.[62]

The "stop, look and listen" rule referred to by Dean Pound is a classic example of the need to exercise caution in framing standards of behavior that amount to rules of law. The rule stemmed from the case of *Baltimore & Ohio Railway v. Goodman*. Plaintiff approached a railroad crossing, and being unable to see an approaching train because of an obstruction, proceeded across the tracks and was struck by the train. The United States Supreme Court held the plaintiff contributorily negligent as a matter of law. Mr. Justice Holmes writing for the majority announced the "stop, look, listen, and get out" rule:

> In such circumstances it seems to us that if a driver cannot be sure otherwise whether a train is dangerously near he must stop and get out of his vehicle, although obviously he will not often be required to do more than to stop and look . . . . It is true . . . that the question of due care very generally is left to the jury. But we are dealing with a standard of conduct, and when the standard is clear it should be laid down once for all by the courts.[64]

Although the standard of conduct required of a driver seemed clear to Justice Holmes, that rule of law was short lived, and was

62. 44 REPORTS OF AMERICAN BAR ASSOCIATION 445, 456-57 (1919).
63. 275 U.S. 66 (1927).
64. *Id.* at 70 (citations omitted).

overruled only seven years later in *Pokora v. Wabash Railway*,[65] in an opinion written by Justice Cardozo.

The present status of the range of vision rule raises the same questions as those presented by the "stop, look and listen rule." Even though the standard of conduct may have been very clear to the Nebraska Supreme Court in 1926 when it originally adopted the rule, the policy considerations and existing circumstances may not be the same today. Perhaps the doctrine of stare decisis has locked the court into a rule that disregards the changes in particular fact circumstances resulting in a rule undercut by so many exceptions that the rule is no longer necessary. The rule itself has taken from the jury its primary function of determining what is an appropriate standard of conduct and turned that function over to the judge to base his or her decision on particular rules of law.

V. CONCLUSION

One commentator[66] has suggested three possible alternatives to the range of vision rule. One alternative would be that a violation of the range of vision rule would not make a driver negligent as a matter of law, but would merely be evidence to be considered by the jury in deciding the case.[67] A second alternative would be to do away with the range of vision concept altogether and determine the issue of the driver's negligence by reference to other rules of the road or statutes such as "a speed reasonably prudent under existing conditions."[68] A third alternative would be to determine just what cases merit application of the rule. This would be done by modifying the rule to add a separate condition that the driver violating the rule has the right to assume that all persons using the highway will observe the law.[69] Under this third alternative, the test of whether the rule was applicable would not be whether the object was visible, but rather whether the object struck was illegally placed and maintained or illegally driven upon the highway.[70]

Although that commentator concluded that the third alternative was the most viable in Nebraska, the first alternative would best eliminate any problems inherent in a specific rule of law. It would prevent a judge from deciding issues of negligence as a matter of law and turn that function over to the jury. Furthermore, it would not weaken the rule nor create a void because the rule

65. 292 U.S. 98 (1934).
66. Schmeling, *supra* note 28, at 1.
67. *Id.* at 33.
68. *Id.*
69. *Id.* at 34.
70. *Id.*

would be replaced by the normal standard for deciding when a case should be decided as a matter of law and when it should be left to the jury. This would eliminate any fear that the jury might find a driver against whom the rule is applied non-negligent in cases in which the driver is clearly at fault.

The merits of this standard would be (1) the elimination of confusion among trial courts as to when the rule is to be applied, (2) the elimination of confusion in instructing the jury as to the rule and its exceptions, (3) the return to the real issue in the case—the negligence of the driver and not the question of visibility, and (4) the return to the jury of its true function in an automobile negligence case, that is, to compare defendant's conduct with that of an ordinary reasonable person under the same or similar circumstances to determine if defendant fell below the acceptable standard of conduct of the community.

Tim Engler '79