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I. ORIGIN AND HISTORICAL DEVELOPMENT

As the automobile came into general use and accidents multiplied, the courts soon found it necessary to develop new legal concepts in order to adapt to the increasing volume of motor vehicle accident litigation. One such development was the "range of vision" rule. The first statement of this rule in the United States was made in 1909 in *Lauson v. Fond du Lac*,[1] a case which arose when an automobile crashed through an unlighted barricade one night and plunged into a ditch. The evidence showed that the single headlight on the auto illuminated the highway from ten to twenty feet ahead and that the vehicle, traveling at eight miles per hour, could not have been brought to a stop short of fifteen to twenty feet. The court laid down the rule that:

> [T]he driver of an automobile... is not exercising ordinary care if he is driving the car at such a speed that he cannot bring it to a standstill within the distance he can plainly see objects or obstructions ahead of him. If his light be such that he can see objects for only a distance of 10 feet, then he should so regulate his speed as to be able to stop his machine within that distance, and, if he fails to do so, and an accident results from such failure, no recovery can be had.[2]

The first case to apply the range of vision rule in Nebraska was *Roth v. Blomquist*,[3] decided in 1928. Plaintiff Roth was driving about thirty-five miles per hour during the early evening when defendant's employee drove an unlighted, horsedrawn wagon across the highway and was struck by Roth. Regarding the duty of a driver traveling at night, the Nebraska Supreme Court held that he must:

> ... have such a headlight as will enable him to see in advance the face of the highway and to discover grade crossings or other obstacles in his path, and to keep such control of his car as will enable him to stop and avoid obstructions that fall within his vision. ... [It then observed that] 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.[4]

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1 141 Wis. 57, 123 N.W. 629 (1909).

2 *Id.* at 60, 123 N.W. at 630.

3 117 Neb. 444, 220 N.W. 572 (1928).

4 *Id.* at 446, 220 N.W. at 572-73.

The court pointed out that according to plaintiff's own testimony he first saw the wagon at a distance of twenty to twenty-five feet. The fact that he was unable to stop before striking the wagon demonstrated that plaintiff had been driving at a speed so great that he could not stop within the range of his headlights' illumination, and was, therefore, negligent.

The final step in the formulation of the range of vision rule in Nebraska occurred in *Cotten v. Stolley*.[5] In *Cotten*, the plaintiff was pushing a baby carriage along the right hand side of the road at night when struck by defendant's car. The court stated that the rule laid down in *Roth* was applicable and that the defendant was guilty of negligence *as a matter of law*.[6] *Cotten* thus clarified the holding in *Roth* and laid down the current rule in Nebraska,[7] that

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[5] 124 Neb. 855, 248 N.W. 384 (1933).

[6] *Id.* at 861, 248 N.W. at 386.

[7] Waite v. Briggs, 175 Neb. 104, 120 N.W.2d 547 (1963); Mabe v. Gross, 167 Neb. 593, 94 N.W.2d 12 (1959); Guerin v. Forburger, 161 Neb. 824, 74 N.W.2d 870 (1956); Davis v. Spindler, 156 Neb. 276, 56 N.W.2d 107 (1952); Remmenga v. Selk, 150 Neb. 401, 34 N.W.2d 757 (1948); Buresh v. George, 149 Neb. 340, 31 N.W.2d 106 (1948); Anderson v. Robbins Incubator Co., 143 Neb. 40, 8 N.W.2d 446 (1943); Redwelski v. Omaha & Council Bluffs St. Ry., 137 Neb. 681, 290 N.W. 904 (1940); Anderson v. Lee, 130 Neb. 258, 264 N.W. 666 (1936); Cotton v. Stolley, 124 Neb. 855, 248 N.W. 384 (1933); Murphy v. Shibiya, 125 Neb. 487, 250 N.W. 746 (1933).

It is perhaps somewhat misleading to say that in Nebraska one who violates the range of vision rule is *negligent as a matter of law* without taking into consideration the effect of the comparative negligence statute, NEB. REV. STAT. § 25-1151 (Reissue 1964). The statute requires that when contributory negligence is urged to preclude recovery by the plaintiff such negligence will not defeat recovery if the negligence of the plaintiff is slight compared to that of the defendant. The question then arises as to the degree of the negligence of a plaintiff or defendant who has violated the range of vision rule. Few Nebraska cases discuss this point, but it is submitted that McQueen v. Navajo Freight Lines, Inc., 293 F.2d 590 (8th Cir. 1961), correctly handles this problem. There the court states, after analyzing the various Nebraska decisions: "If this court should hold that the defendant here were guilty of such negligence as a matter of law that the issue of comparative negligence should not have been given to the jury, it would go far to undermine the positive requirements of the comparative negligence statute. When the *Roth* doctrine has been applied by the Nebraska Supreme Court, it has done so on the theory that the party against whom it is applied is guilty of ordinary negligence as a matter of law, and where there has been an issue of comparative negligence it has been submitted to the jury." *Id.* at 594.

Thus, negligence under the *Roth* rule is not in and of itself gross negligence for purposes of the comparative negligence statute. Neither is it gross negligence within the meaning of the guest statute, Fairman v. Cook, 142 Neb. 893, 8 N.W.2d 315 (1943).

one who drives at a speed such that he cannot stop within the range of his vision, whether he be a plaintiff[8] or a defendant,[9] is negligent as a matter of law.

The range of vision rule, as it has been developed and refined by the Nebraska Supreme Court, involves two separate elements: speed and lookout. The first of these elements, speed, is illustrated by *Roth* where the driver was simply traveling at such a speed that he could not stop within the area of the road illuminated by his headlights.

The lookout aspect of the rule is perhaps best illustrated by *Stanley v. Ebmeier*.[10] In that case the plaintiff, Stanley, was approaching an intersection in his pickup truck and slowed to make a left turn onto the intersecting road. Defendant's driver was following Stanley in an oil transport and met a flatbed truck with a brooder house on it. There was evidence that the oil transport driver took his eyes off the road to look at the brooder house and when he turned his attention back to the road, he noticed for the first time that Stanley had slowed to make a turn. The transport driver was unable to stop in time and crashed into the rear of Stanley's pickup. The Nebraska Supreme Court held the oil transport driver negligent as a matter of law, citing the range of vision rule and quoting from the earlier Nebraska case of *Bramhall v. Adcock*[11] to the effect that:

> The basis of the foregoing general rule is that the driver of an automobile is legally and mandatorily obligated to keep such a lookout that he can see what is plainly visible before him and to operate his automobile in such a manner that he can stop it and avoid collision with any object in front of him.[12]

The oil transport driver had probably been driving at a sufficient interval behind the pickup driven by Stanley initially, but his momentary inattention to the road ahead allowed the interval to narrow rapidly, and, when the oil transport driver directed his attention back to the traffic lane in front of him, the pickup was no longer outside his stopping distance.

The viability of the range of vision rule is at least questionable in 1969, when the assumptions of that rule as initially set forth are subjected to examination. Those assumptions are perhaps best set out in the case which initially espoused the range of vision rule in the United States, *Lauson v. Fond du Lac*:

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[8] Guerin v. Forburger, 161 Neb. 824, 74 N.W.2d 870 (1956).
[9] Remmenga v. Selk, 150 Neb. 401, 34 N.W.2d 757 (1948).
[10] 166 Neb. 716, 90 N.W.2d 290 (1958).
[11] 162 Neb. 198, 75 N.W.2d 696 (1956).
[12] 166 Neb. at 729, 90 N.W.2d at 298 (1958).

> The driver on a country road knows that bridges and culverts must be rebuilt; that highways must be repaired; that washouts occasionally occur; that live stock [*sic*] roam about the roads unattended; that travelers on foot, on horseback, and in various kinds of vehicles are found using the highways at all seasons of the year and at all times of the day and night. Such a driver has no right to expect and does not expect a free and unobstructed right of way over a well-defined track, as does the engineer of a locomotive or even the motorman of an electric car.[13]

While this may have been an accurate description of the perils of highway travel in 1909, it is clearly inapplicable to the society and highway system we find sixty years later. Therefore, an analysis of both the scope and application of the rule, in Nebraska and other states as well, in conjunction with positing some remedial alternatives is very much in order.

II. SCOPE OF THE RULE

A. When Rule Applied—Relationship of Striking Vehicle to Object Struck

(1) *Moving Vehicle Colliding with Stationary Object in Its Lane of Traffic*

The range of vision rule has most frequently been applied where a driver strikes an obstruction which is relatively stationary, either in his own lane of travel or on the right shoulder of the road. Nebraska decisions have applied the *Roth* rule where the obstruction completely blocked the right hand lane of travel,[14] where the obstruction only partially blocked the lane of travel[15] and where the obstruction was on the shoulder of the road but was so close to the lane of travel that it interfered with normal traffic.[16] It is clear, however, that the obstruction need not be stationary. Several cases have applied the rule where the vehicles struck were moving very slowly or were stopping.[17]

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[13] 141 Wis. 57, 59-60, 123 N.W. 629, 630 (1909).

[14] Mundy v. Davis, 154 Neb. 423, 48 N.W.2d 394 (1951).

[15] Anderson v. Robbins Incubator Co., 143 Neb. 40, 8 N.W.2d 446 (1943).

[16] Buresh v. George, 149 Neb. 340, 31 N.W.2d 106 (1948).

[17] Guerin v. Forburger, 161 Neb. 824, 74 N.W.2d 870 (1956) (truck moving very slowly); Greyhound Corp. v. Lyman-Richey Sand & Gravel Corp., 161 Neb. 152, 72 N.W.2d 669 (1955) (bus slowed down and stopped in front of truck). The recent case of Newkirk v. Kovanda, 184 Neb. 127, 165 N.W.2d 576 (1969), even applied the range of vision rule to a motorist who had come to a halt behind a stopped vehicle and then struck it when he tried to pull out around it. Three justices dissented arguing that the rule had no application to a situation of this nature.

(2) *Vehicles Approaching One Another on Hilltops and Curves*

The rule has also been applied to vehicles which collided as they met on hills or curves where the driver's range of vision was shortened.[18] For instance, in *Most v. Cedar County,*[19] where a motorcycle came over the crest of a hill and collided with a road scraper being operated up the wrong side of the hill against traffic, the court held that the motorcyclist was negligent in not being able to avoid the collision.

In *Ross v. Carroll,*[20] the court applied the range of vision rule where two trucks collided on a blind curve. The driver of the truck which had swerved into the wrong lane was held negligent as a matter of law for not being able to stop or avoid hitting the other truck.

A later Nebraska case[21] held that the rule should not be applied to vehicles meeting one another on a curve, impliedly, but not

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[18] Hardung v. Sheldon, 133 Neb. 427, 275 N.W. 586 (1937) (cars collide head on at hill top); Ross v. Carroll, 138 Neb. 1, 291 N.W. 726 (1940) (trucks collide in middle of blind curve). *Contra,* Fulcher v. Ike, 142 Neb. 418, 6 N.W.2d 610 (1942) (defendant came over crest of hill, struck car that was stopped in his lane of travel, court refused to apply rule since defendant's lights shown upward as he topped hill, thus not revealing stopped car). Only one Nebraska case has been found which has applied the range of vision rule to a vehicle attempting to make a left turn. In Davis v. Spindler, 156 Neb. 276, 56 N.W.2d 107 (1952), a truck driver who attempted to make a left turn into a filling station collided with a car traveling the opposite direction. The court applied the range of vision rule and held the truck driver negligent as a matter of law for not being able to stop before he struck the car which entered his range of vision as he started his turn.

The Nebraska court refused to apply the range of vision rule in the one Nebraska case in which the rule was asserted to be applicable to vehicles meeting on a straight and level portion of road where the range of vision of neither driver was obstructed. This case, O'Neill v. Henke, 167 Neb. 631, 94 N.W.2d 322 (1959), arose when a driver, who had been drinking and weaving recklessly at seventy miles per hour down a gravel road, swerved into the path of an oncoming truck. The court refused to hold the truck driver negligent as a matter of law for not being able to stop when the car swerved into his path. Due to the extremely reckless conduct of the driver of the car and the fact that he had been drinking, this case did not present a clear-cut opportunity to the court to decide whether the range of vision rule would be applied to vehicles meeting on a straight and level stretch of road. *See also* Bainter v. Appel, 124 Neb. 40, 245 N.W. 16 (1932) (plaintiff traveling at eight miles per hour through cloud of dust collided head on with defendant's dump truck being driven on wrong side of highway, court held range of vision rule not applicable).

[19] 126 Neb. 54, 252 N.W. 465 (1934).

[20] 138 Neb. 1, 291 N.W. 726 (1940).

[21] Davis v. Dennert, 162 Neb. 65, 75 N.W.2d 112 (1956).

expressly overruling the decision in *Ross*. Therefore, applicability of the range of vision rule to such conditions as were presented in *Ross* seems to be uncertain.

(3) *Objects Turning or Crossing in Front of Driver*

The first range of vision case in Nebraska, *Roth v. Blomquist*,[22] held that the range of vision rule may be applied to a driver who strikes another vehicle crossing his path. The rule was also held applicable in *Schwartz v. Hibdon*[23] where a slow-moving farm tractor turned onto the highway in front of plaintiff's truck and plaintiff was unable to stop before colliding with the tractor. In *Armer v. Omaha & Council Bluffs St. Ry.*[24] the rule was similarly applied where a girl on a bicycle turned left into an alley in front of a city bus driven by defendant's driver.

(4) *One Vehicle Overtaking and Passing Another*

It has been established that the range of vision rule will not be applied to a driver who increases his speed to overtake and pass another vehicle traveling in the same direction.

In *Warren v. Bostock*,[25] the plaintiff attempted to pass the defendant as the defendant moved into the left lane to make a left turn onto a county road and the plaintiff hit the rear of defendant's pickup truck. Defendant alleged that plaintiff was negligent as a matter of law in not being able to stop within the range of his vision. The Nebraska Supreme Court observed:

> This rule [range of vision] recognized in certain situations, has no application to an operator of a vehicle who undertakes to pass another. The very nature of the movement contemplates the one engaged in passing another vehicle will travel at a greater speed than the vehicle being passed. The application of the rule to one engaged in passing another vehicle would effectively prevent passing other vehicles on a highway without being subject to a charge of negligence as a matter of law.[26]

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[22] 117 Neb. 444, 220 N.W. 572 (1928). *Contra*, Union Pac. R. Co. v. Denver-Chicago Trucking Co., 202 F.2d 31 (8th Cir. 1953) (truck struck switch engine moving slowly across highway, engine moving slowly when first seen by driver; court held driver not contributorily negligent as a matter of law in not being able to stop within the range of his headlights; court said driver had right to assume engine would stop and let him pass before proceeding across highway).

[23] 174 Neb. 129, 116 N.W.2d 187 (1962).

[24] 151 Neb. 431, 37 N.W.2d 607 (1949).

[25] 170 Neb. 203, 102 N.W.2d 55 (1960).

[26] *Id.* at 207, 102 N.W.2d at 58. The holding in *Warren* was followed in the more recent case of Scoffield v. Haskell, 180 Neb. 324, 142 N.W.2d 597 (1966).

B. SPECIAL CONDITIONS CAUSING A DRIVER'S RANGE OF VISION TO DECREASE

The presence of certain vision-reducing conditions, such as snow,[27] smoke,[28] dust,[29] blinding glare from the sun[30] and fog or mist,[31] have been held to impose upon a driver the duty to travel at a slower speed and to be more watchful than would normally

[27] Doleman v. Burandt, 160 Neb. 745, 71 N.W.2d 521 (1955) (heavy snow; plaintiff held negligent as a matter of law; court held, however, his contributory negligence not proximate cause of accident that occurred when defendant's truck broke through snow drift on wrong side of road); Allen v. Clark, 148 Neb. 627, 28 N.W.2d 439 (1947) (snow and fog); Fairman v. Cook, 142 Neb. 893, 8 N.W.2d 315 (1943) (heavy snow; issue of negligence submitted to jury since gross negligence had to be shown under guest statute); Murphy v. Shibiya, 125 Neb. 487, 250 N.W. 746 (1933) (snow).

[28] Anderson v. Byrd, 132 Neb. 588, 272 N.W. 572 (1937), *former opinion withdrawn and judgment affirmed, modified on rehearing*, 133 Neb. 483, 275 N.W. 825 (1937) (smoke held to be a condition and not an intervening cause).

[29] Reeder v. Rinne, 183 Neb. 734, 164 N.W.2d 203 (1969) (defendant traveling 55 m.p.h. on country road went through two clouds of heavy dust and hit rear of truck traveling in same direction); Bosiljevac v. Ready Mixed Concrete Co., 182 Neb. 199, 153 N.W.2d 864 (1967) (motorcyclist traveling down gravel road following car which was raising cloud of dust, motorcyclist turned onto private road and hit chain blocking it, throwing him from machine, held driver negligent as a matter of law); Allen v. Kavanaugh, 160 Neb. 645, 71 N.W.2d 119 (1955) (plaintiff traveling dusty road at night and hit defendant's vehicle stalled in middle of highway, no recovery for plaintiff); Huston v. Robinson, 144 Neb. 553, 13 N.W.2d 885 (1944) (dust blowing across highway which obscured driver's vision, held driver was negligent in not reducing speed).

[30] Elliott v. Swift & Co., 151 Neb. 787, 39 N.W.2d 617 (1949) (driver traveling eastward into rising sun, blinded by it and did not see car approaching from south at crossroad).

[31] Guerin v. Forburger, 161 Neb. 824, 74 N.W.2d 870 (1956) (mist; plaintiff attempted to use its presence to excuse his hitting stopped truck; held that the mist was a condition requiring greater care and not an intervening cause); Fridley v. Brush, 161 Neb. 318, 73 N.W.2d 376 (1955) (dicta as to fog; evidence did not prove fog was actually present at time of accident); Dickenson v. County of Cheyenne, 146 Neb. 36, 18 N.W.2d 559 (1945) (plaintiff failed to turn where county road came to a dead end; fog present; court held presence of fog required driver to travel at a slower speed; fact that dead end poorly marked held immaterial); Fischer v. Megan, 138 Neb. 420, 293 N.W. 287 (1940) (truck struck train crossing highway; fog and rain). *See also* Barney v. Adcock, 162 Neb. 179, 75 N.W.2d 683 (1956), which seems to hold that icy highways require reduced speed under the range of vision rule. This is the only Nebraska case which indicates that a weather condition which does not shorten the driver's range of vision brings the range of vision rule into play. Other conditions such as snow and sleet increase one's stopping distance but also shorten the driver's range of vision.

be required. These conditions materially reduce the distance a driver can see and identify objects in the road ahead, and the court has held that they are *conditions* rather than intervening causes, and that a driver who strikes an object because of the presence of one or more of these conditions will not be excused for having violated the range of vision rule.

In *Mundy v. Davis*,[32] the evidence showed that defendant was driving during a heavy snow storm. A number of cars were stopped in the right hand lane of travel, the last one belonging to the plaintiff who had left his car and was standing behind it. The defendant was unable to stop as he came upon the line of cars and smashed into plaintiff's car, pinning plaintiff between the two vehicles. In holding the defendant negligent as a matter of law, the court pointed out that the driver "knew the conditions of the road and the fact that his visibility was limited by the falling snow. In view thereof he was duty bound to drive at such a rate of speed that he could stop when an object came within the area lighted by his headlights."[33] This he failed to do.

The Nebraska court was undecided for a while as to whether accidents caused by glaring headlights from approaching vehicles, which momentarily decrease a driver's range of vision, should give rise to the application of the range of vision rule. In *Giles v. Welsh*,[34] the first Nebraska case in which this question arose, the court refused to hold a driver negligent as a matter of law because he did not slow down when temporarily blinded by the lights of an approaching car and struck a stalled gasoline transport. The court reached the opposite result, however, in *Nichols v. Havlat*,[35] a case in which a truck struck an inebriate who had been seen staggering around in the middle of the street. Defendant truck driver claimed the lights from an approaching car blinded him so that he did not see the man until the truck was two to three feet from him. The court said:

> [T]he existence and presence of smoke, snow, fog, mist, blinding headlights, or other similar elements which materially impair or wholly destroy visibility, are not to be deemed intervening causes, but rather as conditions which impose upon the drivers of automobiles the duty to assure the safety of the public by the exercise of care commensurate with such surrounding circumstances.[36]

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[32] 154 Neb. 423, 48 N.W.2d 394 (1951).

[33] *Id.* at 431, 48 N.W.2d at 399.

[34] 122 Neb. 164, 239 N.W. 813 (1931).

[35] 140 Neb. 723, 1 N.W.2d 829 (1942).

[36] *Id.* at 730, 1 N.W.2d at 834.

The most recent case[37] to pass on the subject of blinding headlights follows the conclusion reached in *Nichols*, indicating that the court is now firmly committed to the position that blinding headlights are a condition rather than an intervening cause.

C. EXCEPTIONS TO THE RULE—NATURE OF THE OBJECT STRUCK

(1) *Night Driving*

Even where the object struck was in a position in relation to the vehicle which struck it so as to give rise to the application of the range of vision rule, the court has refused to apply the rule if the object struck was difficult to see. In *Buresh v. George*,[38] the court set out the underlying philosophy upon which the range of vision rule is based, stating that a driver of an automobile is legally obligated to keep such a lookout that he can see what is *plainly visible* before him.

The range of vision rule states that a driver must govern his speed so that he will be able to stop short of plainly visible obstructions appearing before him, and thus not overdrive his range of vision, but this rationale assumes a plainly visible obstruction. To apply the rule to factual situations in which the object struck is not plainly visible would be requiring the driver to do the impossible, *i.e.*, to see an object at a distance, which, because of its nature, could not possibly be seen until the driver was quite close to it. No matter how carefully the driver watched the road ahead and how reasonably he governed his speed, he would not be able to see such objects in time to stop before hitting them. In such a case the object would finally become discernible *well within* the driver's range of vision and *short of* his stopping distance, making it inequitable to apply the range of vision rule. Thus, an exception to the rule has arisen where the object struck is not plainly visible.

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[37] Shields v. County of Buffalo, 161 Neb. 34, 71 N.W.2d 701 (1955); Benton v. State, 124 Neb. 485, 247 N.W. 21 (1933). *But see* Pierson v. Jensen, 150 Neb. 86, 33 N.W.2d 462 (1948) (car crashed into parked truck which was partially on highway; plaintiff said he was blinded by lights from approaching car; held not contributorily negligent as a matter of law); and Miers v. McMaken, 147 Neb. 133, 22 N.W.2d 422 (1946) (plaintiff blinded by approaching vehicle's lights, did not see stalled truck in time to stop, swung left to avoid truck and hit oncoming truck; not held contributorily negligent as a matter of law). In these two cases, it was apparently felt that the blinding headlights contributed little in causing the accidents, since the objects struck were not plainly visible.

[38] 149 Neb. 340, 31 N.W.2d 106 (1948).

Many cases which have been held to fall within this exception have involved motorists who collided with other vehicles which were stalled or stopped on the highway and which were not plainly visible either because their lights were off, they were nearly the same color as the highway surface on which they were standing, or they were so dirty that they would not reflect light from the headlights of vehicles approaching them from the rear.[39] Illustrative of such an exception is *Monasmith v. Cosden Oil Co.*,[40] in which the defendant's car was stopped in the right hand lane of traffic while defendant was fixing a flat tire. The car was faded green, dusty, and nearly the same color as the gravel road on which it was standing. The trunk lid was raised so that the rear window was covered and could not reflect the plaintiff's headlights. The court decided that this factual situation presented exceptional circumstances which made it inequitable to apply the general rule, and it set out the test that:

> Where an object on a highway in front of one driving thereon at night is so nearly the color of the road that it may be difficult to distinguish it until quite close, it cannot be said, as a matter of law, that such person was guilty of more than slight negligence in his failure to see it in time to stop his car or to prevent running against it.[41]

The court held that under such circumstances the driver would not be held negligent as a matter of law, and his negligence, if any, should be determined by the jury.

An exception has also been made for objects, other than stopped or stalled vehicles, which were in the highway and were not plainly

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[39] Robins v. Sandoz, 175 Neb. 5, 120 N.W.2d 360 (1963) (car with flat tire partially on highway, dispute as to whether lights on or not; verdict for defendant affirmed on second appeal); Robins v. Sandoz, 177 Neb. 894, 131 N.W.2d 648 (1964); Fick v. Herman, 159 Neb. 758, 68 N.W.2d 622 (1955) (gas transport out of gas, clearance lights blinking, flares placed, back of truck muddy); Haight v. Nelson, 157 Neb. 341, 59 N.W.2d 576 (1953) (stalled car, dark, mud spattered, no lights on, dark oil mat); Plumb v. Burnham, 151 Neb. 129, 36 N.W.2d 612 (1949) (truck stalled, out of gas, lights off, no flares or flags); Pierson v. Jensen, 150 Neb. 86, 33 N.W.2d 462 (1948) (truck unlighted, no flags or flares); Dickman v. Hackney, 149 Neb. 367, 31 N.W.2d 232 (1948) (back of car dirty, tail lights not lit); Miers v. McMaken, 147 Neb. 133, 22 N.W.2d 422 (1946) (truck stalled, out of gas, only corner of truck projecting onto highway, no lights or flares, back of truck dirty); Holberg v. McDonald, 137 Neb. 405, 289 N.W. 542 (1940) (green beet truck stopped partially on black oil pavement with no lights burning, no flares or warning devices placed); Lewis v. Rapid Transit Lines, 126 Neb. 158, 252 N.W. 804 (1934) (bus stalled in lane of travel without lights, mud spattered, appeared gray and blended with fog and surface of highway).

[40] 124 Neb. 327, 246 N.W. 623 (1933).

[41] *Id.* at 330, 246 N.W. at 624.

visible.[42] In *Swinford v. Finck*[43] an endgate from a truck had been left lying in the highway after it bounced loose from defendant's cattle truck. Plaintiff's auto struck it, causing a blowout which made plaintiff lose control of his car and go off the highway. The court held that plaintiff was not contributorily negligent, as a matter of law, in not being able to stop before he hit the endgate. The court pointed out that, since the endgate was lying flat in the highway and was difficult to see until the driver was quite close to it, the rule would not be applied.

The court has likewise made an exception to the rule where motorists have struck pedestrians who were not plainly visible because of clothing they were wearing, or because of their general position in the road.[44] *Anderson v. Nincehelser*,[45] a case which

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[42] Cromwell v. Fillmore County, 122 Neb. 114, 239 N.W. 735 (1931) (unprotected ditch and holes washed out by hard rain); Day v. Metropolitan Utils. Dist., 115 Neb. 711, 214 N.W. 647 (1927) (edge of dragline platform of unlighted dragline extending over streetcar track); Frickel v. Lancaster County, 115 Neb. 506, 213 N.W. 826 (1927) (piles of gravel along gravel road); Tutsch v. Omaha Structural Steel Works, 110 Neb. 585, 194 N.W. 731 (1923) (unguarded ditch and pile of dirt). For an interesting case involving two cartons of lettuce in the road, see Mabe v. Gross, 167 Neb. 593, 94 N.W.2d 12 (1959). Normally the cartons of lettuce would have been within the exception to the general rule, since they were not "plainly visible." But the defendant testified that he had seen the cartons *beyond* the range of his headlights in the headlights of oncoming cars. The court held the rule of *Roth v. Blomquist* applied.

[43] 139 Neb. 886, 299 N.W. 227 (1941).

[44] Heeney v. Churchill, 154 Neb. 848, 50 N.W.2d 72 (1951) (deceased dressed in dark clothes, trees obstructed driver's view around curve, lights thrown to left by curve did not pick up deceased walking along right side of road); Weisenmiller v. Nestor, 153 Neb. 153, 43 N.W.2d 568 (1950) (plaintiff wearing dark clothes); Floyd v. Edwards, 150 Neb. 41, 33 N.W.2d 555 (1948) (deceased wearing dark blue overalls, dark blue jacket, dark cap, street poorly lighted); Johnson v. Anoka-Butte Lumber Co., 141 Neb. 851, 5 N.W.2d 114 (1942) (deceased wearing dark clothes, truck moving slowly); Adamek v. Tilford, 125 Neb. 139, 249 N.W. 300 (1933) (man struck down by another car, lying flat in street, dark clothes, street poorly lighted, pavement wet and body same color as pavement). *Contra*, Beck v. Trustin, 177 Neb. 788, 131 N.W.2d 425 (1964) (man in dark blue and white checkered overcoat crossing street); Stocker v. Roach, 140 Neb. 561, 300 N.W. 627 (1941) (car stalled, lady wearing black dress standing on blacktop behind car trying to flag traffic; plaintiff testified he saw something on highway; held case within range of vision rule); Anderson v. Lee, 130 Neb. 258, 264 N.W. 666 (1936) (pedestrian struck was visible for some distance, case submitted to jury under emergency doctrine); Cotten v. Stolley, 124 Neb. 855, 248 N.W. 384 (1933) (lady pushing baby buggy along right side of highway, no mention in opinion about color of her clothing).

[45] 152 Neb. 857, 43 N.W.2d 182 (1950).

arose out of a jailbreak, is illustrative of this line of cases. Roadblocks were set up in an attempt to recapture the escapee. At one such roadblock a car was parked along the right side of the highway with its parking lights on, and two men were stationed to flag down passing cars with flashlights and check the occupants. Defendant's auto struck one of the men who was standing in the middle of the highway with only a small flashlight to warn of his presence. The court refused to hold defendant negligent as a matter of law since it was shown that deceased was difficult to see at the time of the accident. Rather, defendant's negligence, if any, was for the jury to determine.

A recent case, *Bartosh v. Schlautman*,[46] announces a rather significant corollary to the not plainly visible exception to the range of vision rule. In that case the evidence was in dispute as to the visibility of the plaintiff's tractor and wagon which had stalled in the right hand lane of travel when the tractor's gears jammed. Plaintiff immediately tried to repair the tractor but did not leave the lights on nor did he place any flares or other warning devices. There was conflicting evidence as to whether defendant's vehicle struck plaintiff's wagon before or after sunset, the extent of the darkness and the extent of visibility on the highway. One vehicle traveling on the highway had seen the stopped wagon in time and had passed it on the left. A second vehicle went into the right hand ditch to avoid the wagon, and the third vehicle to approach the wagon from the rear was defendant's truck.

At trial plaintiff requested the standard range of vision instruction, but the trial judge refused to give it, substituting general instructions on control and lookout. Plaintiff assigned the refusal of the trial judge to give the range of vision instruction as error on appeal.

The Nebraska Supreme Court, in the majority opinion by Justice McCown, reviewed the evidence and concluded:

> Under such circumstances, the exceptions involving visibility of the object clearly applied rather than the general rule. Under the evidence here, the giving of the instruction requested by the plaintiff would not only have been confusing to the jury, it would have been prejudicial to the defendant and did not correctly state the law upon the issue presented by the pleadings and the evidence.[47]

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[46] 181 Neb. 130, 147 N.W.2d 492 (1966).

[47] *Id.* at 134-35, 147 N.W.2d at 495-96.

The dissent of Chief Justice White, concurred in by Justice Brower, argues that:

> The parties pleaded the rule and the exception thereto, and there was evidence to support a finding either way by the jury. It was, therefore, the court's duty irrespective of any request to properly instruct the jury as to the rule and as to the exceptions thereto, as applicable to this case....
>
> The majority opinion states: 'Where an exception clearly applies, the general rule does not apply.' The point is that this question is for the jury to determine under all the circumstances of the case. This court has no right or power, as a matter of law, to determine that an exception 'clearly applies' in this case. The evidence was conflicting. There was evidence to support the existence of the exceptions and to support a finding that the object was not visible or discernible by the use of ordinary care. Surely the jury was entitled to determine this essential fact of the case. The majority opinion holds, in effect, that as a matter of law this case comes within the exceptions to the rule. Although submitting the case to the jury, the effect of the holding is to determine, as a matter of law, that the tractor and the wagon could not be discovered by the exercise of reasonable care under the circumstances.[48]

The Chief Justice concludes:

> It would seem that the range of vision rule, by the holding in this case, is now withdrawn from jury consideration in the State of Nebraska. If any evidence is introduced supporting the exceptions the rule is destroyed as far as the jury's consideration of it is concerned. Moreover, the confusion that will result is apparent from this case. The court in this case specifically holds that the range of vision rule was submitted to the jury and that this was proper. And yet, at the same time, this court holds that it was not necessary or proper for the court to instruct the jury as to the rules of law applicable.[49]

Bartosh presents possibly the most significant range of vision case to be decided in recent years. It appears that the court has held, for the first time, that an exception to the rule applies as a matter of law.

If the rule itself is justifiably criticized in that its operation tends to withdraw jury consideration of what is often the central issue of the case, the visibility of the object struck, then the remedy provided in *Bartosh* is subject to the same criticism. If the rule is to continue to remain viable as a part of Nebraska negligence law, the better result in situations like *Bartosh* would be to set forth in the instruction (NJI 7.03A) both the general rule and the exceptions, and allow the jury to apply the rule or exception as it may

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[48] *Id.* at 136-37, 147 N.W.2d at 496-97.
[49] *Id.* at 138-39, 147 N.W.2d at 497.

determine from its consideration of the testimony. If, however, *Bartosh* should be read as the demise of the range of vision rule altogether, a precise explanation in forthcoming opinions is clearly needed. *Bartosh* leaves the range of vision rule in an extreme state of confusion at best.

The question arises as to how close to the object struck before he sees it must a driver be before he can claim that its "not plainly visible" character excused his failure to avoid striking it. Two Nebraska cases have discussed this point and provide some guidance. The most recent case is *Guynan v. Olson*,[50] in which the defendant driver struck the plaintiff who was mounted on a horse and herding cattle across a bridge. The accident occurred at 6:50 A.M., and the defendant testified that it was just about dawn and that he could see 300 to 400 feet in front of him but that it was difficult to see and distinguish objects at that time of day. Defendant placed his speed at about 45 or 50 miles per hour. The trial court entered a judgment against the plaintiff, and the supreme court reversed, holding that the trial court had erred in failing to instruct the jury to find the defendant negligent as a matter of law. Defendant had argued successfully in the trial court that, because the plaintiff had been difficult to see, the exceptions to the range of vision rule should be applied. The supreme court noted:

> We do not believe this case comes within the exceptions. 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.... We feel that if the rule applies at all, at a minimum it must be applicable to the situation present in this case.[51]

The court cited as authority for its holding the earlier case of *Dryer v. Malm*[52] in which the plaintiff struck a flock of sheep which completely blocked a county road. She testified that the sheep were about 400 feet away from her when she first saw them as she came over the crest of a hill. The court applied the general rule and found her negligent as a matter of law.

Thus, it would seem that, for the exceptions to the general rule to apply, the object struck must not only have been difficult to see, but the driver must not have actually seen the object until he was only a short distance away and too close to avoid the collision.

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[50] 178 Neb. 335, 133 N.W.2d 571 (1965).
[51] *Id.* at 339, 133 N.W.2d at 574.
[52] 163 Neb. 72, 77 N.W.2d 804 (1956).

(2) *Daytime Travel*

The range of vision rule is, of course, also applied to daylight travel.[53] During day the driver's range of vision is the distance he can see and identify objects in the road ahead, rather than the "range of headlights" test applicable to nighttime travel. The vast majority of daytime cases have involved motorists who ran into other motor vehicles which obstructed the highway,[54] but there is no reason why the court should not apply the rule to other types of obstructions and pedestrians as well, as illustrated by the nighttime cases, where the object struck is "plainly visible."

The court has decided two daytime cases in which the object struck was not "plainly visible" and was held to be within the exceptions to the general rule. In *Andelt v. County of Seward,*[55] a vehicle was driven into a deep ditch, dug to repair a bridge approach, which was left open with no warning other than a crude barrier one-half mile from the danger area. The evidence conclusively showed the ditch could not be seen until the driver was quite close to it. In *Thurow v. Schaeffer,*[56] the court was presented with a case involving a collision between an auto and a wheat combine at the top of a hill. The court pointed out that the combine was difficult to see as it ascended the hill, and that even though the driver might have caught a glimpse of the top of it, he could not foresee that the combine blades were hanging into his lane of travel. In both cases, as in the nighttime exception cases, the court refused to hold the drivers negligent, as a matter of law, for

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53 Most v. Cedar County, 126 Neb. 54, 252 N.W. 465 (1934).

54 Swartz v. Hibdon, 174 Neb. 129, 116 N.W.2d 187 (1962) (defendant truck driver hit rear of farm tractor which turned onto highway in front of him; held within rule); Greyhound Corp. v. Lyman-Richey Sand & Gravel Corp., 161 Neb. 152, 72 N.W.2d 669 (1955) (defendant gravel truck driver struck plaintiff's bus which gradually stopped in front of him; held negligent as a matter of law); Ricker v. Danner, 159 Neb. 675, 68 N.W.2d 338 (1955) (plaintiff coming over crest of hill confronted with cars passing stalled truck in opposite lane, could not stop before hitting car in front of him, swung out and hit cars passing stalled truck; general rule applied); Armer v. Omaha & Council Bluffs St. Ry., 151 Neb. 431, 37 N.W.2d 607 (1949) (bus struck child on bicycle who turned left in front of it); Ross v. Carroll, 138 Neb. 1, 291 N.W. 726 (1940) (defendant drove truck thirty miles per hour around blind curve on wrong side of highway, could not stop or turn aside before hitting plaintiff); Hardung v. Sheldon, 133 Neb. 427, 275 N.W. 586 (1937) (defendant went up hill on wrong side of road to avoid sand blow, plaintiff came over crest of hill and collided with defendant's car; court intimated plaintiff was contributorily negligent as a matter of law).

55 157 Neb. 527, 60 N.W.2d 604 (1953).

56 151 Neb. 651, 38 N.W.2d 732 (1949).

not being able to comply with the range of vision rule. Their negligence, if any, was for the jury to determine.

III. THE RANGE OF VISION RULE IN OTHER STATES

All of the states which apply the range of vision rule agree that a motorist should be required to travel at a speed such that he can stop his vehicle before hitting an obstruction in the road, but they disagree as to the effect of a violation of this duty. A majority of the states adhere to the view that, in cases in which the rule is applicable, a driver who violates it will be held *negligent as a matter of law.*[57] Nebraska falls within this group.[58] The courts in these states, just as in Nebraska, have made exceptions to the rule in factual situations where the obstruction struck was not plainly visible.[59]

A minority of the states decline to hold that a violation of the rule is negligence as a matter of law. In these states violation of the range of vision rule is merely evidence of negligence, and, like other

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[57] DELAWARE: Staker v. McSweeney, 55 Del. 192, 185 A.2d 892 (1962); FLORIDA: Cases collected in 9 U. FLA. L. REV. 234 (1956); INDIANA: Pennsylvania R. Co. v. Huss, 96 Ind. App. 71, 180 N.E. 919 (1932); KANSAS: Bottenberg Implement Co. v. Sheffield, 171 Kan. 67, 229 P.2d 1004 (1951); LOUISIANA: Ramsey v. Langston, 140 So. 2d 775 (La. 1962); MICHIGAN: Morrison v. Demogala, 336 Mich. 298, 57 N.W.2d 893 (1953); MISSOURI: Robb v. Wallace, 371 S.W.2d 232 (Mo. 1963); NEW MEXICO: Frei v. Brownlee, 56 N.M. 677, 248 P.2d 671 (1952); NORTH CAROLINA: Singletary v. Nixon, 239 N.C. 634, 80 S.E.2d 676 (1954); NORTH DAKOTA: Wisnewski v. Oster, 110 N.W.2d 283 (N.D. 1961); OHIO: Cox v. Polster, 174 Ohio St. 224, 188 N.E.2d 421 (1963) (Rule adopted by statute, OHIO REV. CODE ANN. § 4511.21 (Anderson 1965)—Violation of statute is negligence per se); SOUTH DAKOTA: King v. Farmers Educ. & Co-op Oil Co., 72 S.D. 280, 3 N.W.2d 333 (1948); TENNESSEE: Garner v. Maxwell, 50 Tenn. App. 157, 360 S.W.2d 64 (1961); UTAH: Hirshbach v. Dubuque Packing Co., 7 Utah 2d 7, 316 P.2d 319 (1957); VERMONT: Slate v. Hogback Mountain Ski Lift, 122 Vt. 8, 163 A.2d 851 (1960); WEST VIRGINIA: Jenkins v. Chatterton, 143 W. Va. 250, 100 S.E.2d 808 (1957); WISCONSIN: Barker Barrel Co. v. Fisher, 10 Wis. 2d 197, 102 N.W.2d 107 (1960). For a good collection of cases on the range of vision rule see the following A.L.R. annotations: Annot., 44 A.L.R. 1403 (1926); *Cf.* Annot., 58 A.L.R. 1493 (1929); 87 A.L.R. 900 (1923); 97 A.L.R. 546 (1935); 133 A.L.R. 967 (1941); 22 A.L.R. 2d 292 (1952); and 42 A.L.R.2d 13 (1955).

[58] Roth v. Blomquist, 117 Neb. 444, 220 N.W. 572 (1928).

[59] *E.g., see* the Kansas, Louisiana, and North Dakota cases at note 57 *supra,* which hold that even though these three states adhere to the strict view of the range of vision doctrine, there are certain exceptions to the rule. *See also* the Vermont case at note 57 *supra,* which recognizes that the case involves an exception to the range of vision rule as applied in Vermont.

evidence presented in the case, must be weighed by the jury in determining the negligence of the driver.[60]

This latter view is expressed in the Virginia case of *Twyman v. Adkins*,[61] where the plaintiff ran into defendant's auto which had stalled and was left standing on the right hand side of the highway with its lights off and without any warning devices having been placed. The court, in refusing to hold plaintiff negligent as a matter of law, stated:

> We all agree that reasonable care should be demanded of automobile drivers, but that reasonable care is a flexible standard under the facts and circumstances of each case. And after all, *whatever the degree of care required, its presence or absence, under the facts and circumstances of each case, is for the jury to determine.*[62]

Pennsylvania has evidently adopted a view somewhere between these two positions. The Pennsylvania court has said that a person who hits an object or obstruction on the highway is negligent as a matter of law, but if the driver's failure to stop within his range of vision was because his vision had been impaired by blinding lights, snow or smoke, his negligence is for the jury to determine.[63] Thus, the driving circumstances may be considered as intervening causes, rather than mere conditions as in Nebraska.

A large number of states, apparently feeling that the rule is too fraught with difficulty to serve as a sure and meaningful test of negligence, do not utilize the range of vision rule at all. California, for example, has expressly rejected the concept,[64] while in other states the cases do not mention the range of vision rule in factual situations in which the rule is normally applied, and thus reject the concept by implication.

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[60] ARIZONA: Alabam Freight Lines v. Phoenix Bakery, 64 Ariz. 101, 166 P.2d 816 (1946) (Arizona had followed the strict view up until this case); ARKANSAS: Coca Cola Bottling Co. v. Shipp, 174 Ark. 130, 297 S.W. 856 (1927) (on rehearing); CONNECTICUT: Kaufman v. Hegeman Transfer & Literage Terminal, Inc., 100 Conn. 114, 123 A. 16 (1923); IDAHO: Stanger v. Hunter, 49 Idaho 723, 291 P. 1060 (1930); IOWA: Knaus Truck Lines v. Commercial Freight Lines, 238 Iowa 1356, 29 N.W.2d 204 (1947) (discussing application of Iowa assured clear distance statute, see text at note 89 *infra*); MARYLAND: Brumage v. Blubaugh, 204 Md. 144, 102 A.2d 568 (1954); MASSACHUSETTS: Woolner v. Perry, 265 Mass. 74, 163 N.E. 750 (1928); MINNESOTA: Lee v. Smith, 253 Minn. 401, 92 N.W.2d 117 (1958); OREGON: Murphy v. Hawthorne, 117 Ore. 319, 244 P. 79 (1926); TEXAS: Cases collected in 28 TEXAS L. REV. 120 (1949); WASHINGTON: Morehouse v. Everett, 141 Wash. 399, 252 P. 157; Annot., 58 A.L.R. 1482 (1929).

[61] 168 Va. 456, 191 S.E. 615 (1937).

[62] *Id.* at 465, 191 S.E. at 618-19 (emphasis added).

[63] McElroy v. Rozzi, 194 Pa. Super. 184, 166 A.2d 331 (1960).

[64] Burgesser v. Bullock's Estate, 190 Cal. 673, 214 P. 649 (1923).

IV. MISAPPLICATION OF THE RULE

A. The Nature of a Driver's Range of Vision

In order to understand how the range of vision rule may be misapplied, the exact nature of a driver's range of vision must be understood. The range of vision of a driver in a moving vehicle resembles a cone extending outward in front of the vehicle.[65] The cone moves down the highway in front of the vehicle at the same speed that the vehicle is traveling. The range of vision rule requires a driver to travel at such a speed that his stopping distance will always be *shorter* than the maximum length of his cone of vision so that he will be able to stop before hitting an obstruction which becomes visible just as it penetrates the end of the cone.

It does not follow, however, that the range of vision rule is violated every time an object penetrates the driver's cone of vision and is struck. When an object penetrates the driver's cone of vision from the side rather than the end it usually becomes discernable short of the driver's safe stopping distance, and it is physically impossible to avoid a collision by applying the brakes. To apply the rule under such circumstances is most unjust. In effect it fastens negligence upon the driver regardless of any fault, and bears a striking resemblance to strict liability. If he is to avoid this result, it would force a driver to travel at an extremely slow rate of speed and observe the road beyond the usual requirement of reasonable care. Surely the court which formulated the range of vision rule must not have intended such a harsh application. When the courts say a driver must be prepared to stop before striking an object which enters his range of vision, they must impliedly be adding the proviso that the object must penetrate the driver's cone of vision from the end of the cone and thus beyond the reasonable stopping distance of the driver.

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[65] The fact that the field of vision of a driver in a moving car resembles a cone has been established by scientific testing. A study undertaken by the Keystone View Company of Meadville, Pennsylvania, indicates that when a vehicle is stopped the driver has a field of vision of 180 degrees or more. At 30 miles per hour or more the field of vision is reduced to approximately 96 degrees, that is, one-half of what it was in a stationary vehicle. At 60 miles per hour the driver's field of vision has narrowed to only 42 degrees, and the driver is, in effect, looking through a tunnel. The *Nebraska Driver's Manual* published by the Department of Motor Vehicles states, at page 43: "Driver vision is greatly affected by speed. A person driving at 50 miles per hour sees 14% less than when driving at 45 miles per hour. And at 60 miles per hour, his usable vision is narrowed to about the width of the road."

B. Vehicles Approaching Each Other on a Straight and Level Highway

The Nebraska court has dealt with only one case in which the range of vision rule was sought to be applied to vehicles which were approaching each other on a straight and level stretch of road. In *O'Neill v. Henke*[66] the defendant had been drinking and was weaving down a gravel road at seventy miles an hour. He swerved into the wrong lane of travel a short distance in front of plaintiff's truck and the two vehicles collided. The defendant claimed that plaintiff was contributorily negligent as a matter of law in not being able to stop before the collision occurred. The court, obviously impressed with defendant's reckless conduct and intoxicated state, refused to apply the range of vision rule as to the plaintiff.

This disposition of the case was proper even if the evidence had failed to show that drinking and reckless driving on the part of the defendant were involved. When the defendant swerved into the plaintiff's lane a short distance in front of him, he penetrated the plaintiff's cone of vision from the side only a short distance in front of plaintiff's truck, thus not affording plaintiff a reasonable opportunity to stop.

It is submitted that the range of vision rule should not be applied to collisions between vehicles meeting each other when one vehicle strays into the improper lane of travel, unless the vehicle enters the wrong lane of travel a sufficient distance in front of the other vehicle so that it penetrates the driver's cone of vision from the end rather than from the side, and thus affords that driver a sufficient distance to stop.

C. Hilltop Collisions

The Nebraska court has applied the range of vision rule in a number of cases[67] involving hilltop collisions, including the first daytime range of vision case, *Most v. Cedar County.*[68] In *Most* a motorcyclist struck a road scraper just after he came over the crest of a hill. The road scraper was being operated against traffic up the wrong side of the hill without any warning that it was being so operated. The court held the motorcyclist contributorily negligent as a matter of law and denied him recovery.

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[66] 167 Neb. 631, 94 N.W.2d 322 (1959).

[67] For these Nebraska cases see the *Hardung* and *Fulcher* cases at note 18 *supra.*

[68] 126 Neb. 54, 252 N.W. 465 (1934).

Other hilltop cases have involved cars which were stopped in the lane of travel just over the crest of a hill and cars which were somewhat off the road but still interfering with traffic. Such obstructions are difficult to anticipate, and applying the range of vision rule to drivers who strike them would seem undesirable. In *Andelt v. County of Seward*,[69] a case in which the court refused to apply the rule because the object struck was not "plainly visible," the Nebraska court observed that if the range of vision rule were applied strictly to every case "any motorist driving Nebraska highways would be required to maintain a rate of speed that would enable him to stop in 50 to 100 feet, lest he hit a hidden defect in a highway not discernible theretofore and be barred from recovery as a matter of law. Such is not the law."[70] However, it would seem that the court is requiring a speed such that a driver must always be prepared to stop within 50 to 100 feet on hilly roads when the court applies the range of vision rule to hilltop accidents. The driver must creep over the crest of the hill or run the risk of being held negligent as a matter of law if he strikes an obstruction beyond his view just over that crest.

It is true that a driver approaching the crest of a hill finds his range of vision ahead momentarily decreased, but should he have to decrease his speed every time he goes over a hill? In the hilly parts of Nebraska, such a rule would materially slow the flow of traffic. A motorist nearing the crest of a hill should be able to assume that the road ahead is free of negligently placed obstructions, absent warning to the contrary, and cases in other states have so held.[71] As between the driver coming over the hill and the person responsible for obstructing the highway, the person obstructing the highway is in a better position to prevent the accident. In addition, to apply the range of vision rule to the driver who has struck a vehicle ascending the hill on the wrong side of the road, as in *Hardung v. Sheldon*,[72] would emasculate the statute which says that drivers shall not pass on hills or curves where their vision is impaired.

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[69] 157 Neb. 527, 60 N.W.2d 604 (1953).

[70] *Id.* at 532, 60 N.W.2d at 607.

[71] The Arizona court in Alabam Freight Lines v. Phoenix Bakery, 64 Ariz. 101, 166 P.2d 816 (1946), said: "A person traveling upon a highway, ascending a hill, on a curve and through a cut, is not presumed to anticipate that a vehicle ascending the hill from the opposite direction will be traveling on the wrong side of the road...." *Id.* at 115, 166 P.2d at 824.

[72] 133 Neb. 427, 275 N.W. 586 (1937).

D. VEHICLES APPROACHING EACH OTHER ON CURVES

While it is true that a sharp curve also impairs a driver's vision, a literal application of the range of vision rule to vehicles which collide as they meet on a curve could often achieve an unjust result. In the early Nebraska case of *Ross v. Carroll*,[73] the rule was applied where two drivers collided on a blind curve. It appeared that one of the drivers had entered the curve too fast, was forced to take the curve wide, and was in the wrong lane when the accident occurred. The court applied the range of vision rule against the driver who had strayed into the wrong lane to hold him negligent as a matter of law. The case was probably decided correctly upon the facts presented, but application of the range of vision rule to the vehicles in this case is questionable. Speed, insofar as it related to stopping distance, was not the cause of this accident. The proximate cause was speed in relation to the driver's ability to negotiate the turn while remaining in his own lane of travel. A later case involving vehicles meeting on a curve is *Davis v. Dennert*,[74] where *the driver of the vehicle which strayed into the wrong lane* and was struck claimed that the other driver had not been driving within the range of his vision, since he could not stop in time to avoid the accident. The court properly refused to apply the rule, stating that the rule was correctly applied only:

> ...where the collision was between a moving automobile and an object which relative to the automobile was stationary.... But to apply it to approaching vehicles colliding with each other would violate the very reason by which the rule is supported.
>
> A user of the highways may assume, unless and until he has warning, notice, or knowledge to the contrary, that other users of the highway will use them in a lawful manner....[75]

The courts in other states have said that the rule should not be applied against a driver who strikes another vehicle being operated in the wrong lane around a curve.[76] They agree that a driver should be able to assume, absent suitable warning, that others will not travel around curves in the wrong lane in violation of state statutes and rules of the road.

E. OBJECTS TURNING OR CROSSING IN FRONT OF DRIVER

When a vehicle turns onto the highway, crosses the highway or otherwise crosses the path of a driver a short distance in front of

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[73] 138 Neb. 1, 291 N.W. 726 (1940).

[74] 162 Neb. 65, 75 N.W.2d 112 (1956).

[75] *Id.* at 71, 75 N.W.2d at 117.

[76] It would seem that the rationale of the hill cases also applies to curves. Note the language in the *Alabam Freight Lines* case at note 71 *supra*. *See also* Davis v. Dennert at note 74 *supra*.

his car, that vehicle penetrates the driver's cone of vision from the side, and the range of vision rule should not be applied.

Such a situation was presented in *Roth v. Blomquist.*[77] The court seized upon plaintiff's testimony that his headlights lighted the road forty to fifty feet ahead, but that he first saw the horses twenty to twenty-five feet ahead, plus the fact that he was unable to stop before colliding with the wagon, as proving that plaintiff was not alert and was not driving at a speed that allowed him to stop within the range of his vision. From the testimony given in the case it is equally probable that the reason Roth did not see the horses in time to stop was that the horses entered the area illuminated by his headlights from the side—within his cone of vision—but that possibility was completely ignored by the court. Assuming the latter probability to be true, the fact that Roth could not stop before the accident happened did not mean he was traveling so fast that he could not stop within the range of his headlights, but rather that the horses and wagon crossed his path within his cone of vision and short of his stopping distance, so that he could not possibly stop in time.

Clearly then, the rule should not be applied unless it can be shown that the object crossing the highway crossed far enough ahead of the driver so that it penetrated his cone of vision from the end rather than from the side, thus affording him an opportunity to stop in time.

Another such example is presented in *Schwartz v. Hibdon.*[78] In that case, plaintiff turned his slow-moving farm tractor onto the highway in front of defendant's truck, and defendant was unable to stop or otherwise avoid a collision. Here again, the vehicle entered the driver's cone of vision from the side, and the range of vision rule should not have been applied.

Probably the most inappropriate application of the rule, however, took place in *Armer v. Omaha & Council Bluffs St. Ry.*[79] In *Armer,* a nine-year-old girl on a bicycle turned left into an alley from the middle of the street across the path of a bus driven by defendant's driver. The evidence showed that the girl had given no signal and had turned directly in front of the bus. The driver was traveling forty miles per hour in a twenty-five mile per hour zone, so the result of the case, allowing the girl to recover, was probably correct. However, the court should not have utilized the range of vision rule to hold the bus driver negligent in this factual

[77] 117 Neb. 444, 220 N.W. 572 (1928).
[78] 174 Neb. 129, 116 N.W.2d 187 (1962).
[79] 151 Neb. 431, 37 N.W.2d 607 (1949).

situation. The obstruction entered the driver's cone of vision from the side and so close to the bus that the driver could scarcely have gotten his foot on the brake pedal, let alone stop.[80]

Courts in other states have recognized that the rule should be inapplicable when the obstruction enters the driver's cone of vision from the side. In *Smiley v. Arrow Spring Bed Co.*,[81] the Ohio court reviewed many decisions involving the "range of vision" or "assured clear distance" rule, both from the states which had adopted the rule by statutory enactment and those which had done so by judicial decision. The court concluded that while the rule requires a driver to drive in such a manner that he can stop before hitting an obstruction that comes within his range of vision, it should not be applied where:

> ... such assured clear distance ahead is suddenly cut down or lessened, without his fault, by the entrance within such clear distance ahead and into his path or line of travel of some obstruction which renders him unable, in the exercise of ordinary care, to avoid colliding therewith.[82]

The court held that, in such cases, the driver's negligence, if any, was for the jury to determine. This statement of the rule would ensure that the court would not misapply the range of vision concept to accidents where the obstruction entered the driver's cone of vision from the side rather than from the end in such a manner that it is not possible for the driver to stop. It is submitted that the Nebraska Supreme Court should expressly adopt this qualification to the range of vision rule.

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[80] A recent case, Beck v. Trustin, 177 Neb. 788, 131 N.W.2d 425 (1964), indicates a better handling of this situation. The evidence was in dispute as to whether a pedestrian had stepped into the beam from the headlights of defendant's car sufficiently ahead of defendant to allow him a reasonable opportunity to stop. The court refused to hold defendant negligent as a matter of law and submitted the question to the jury. However, the court's language is disturbing where it observes: "The defendant argues the plaintiff approached at a right angle to the path of travel of his automobile. *This does not change the situation.*" *Id.* at 801, 131 N.W.2d at 433 (emphasis added). This quotation would indicate the court is still not prepared to recognize an exception to the range of vision rule when the object struck enters the driver's cone of vision from the side. *But see*, Brazier v. English, 177 Neb. 889, 131 N.W.2d 601 (1964) where the court did recognize this exception to the rule where plaintiff's auto moved into defendant's lane just in front of defendant and then suddenly stopped to make a right turn without signaling. The court properly submitted the issue of defendant's negligence to the jury rather than holding him negligent as a matter of law. *See also* Waite v. Briggs, 175 Neb. 104, 120 N.W.2d 547 (1963) (plaintiff turned from side street onto street in front of bus).

[81] 138 Ohio St. 81, 33 N.E.2d 3 (1941).

[82] *Id.* at 88, 33 N.E.2d at 7.

V. INEQUITY OF THE NEBRASKA VIEW

NEGLIGENCE AS A MATTER OF LAW

It has already been asserted that the viability of the range of vision rule in Nebraska is subject to some question. Its origin was in an earlier age, and is neither desirable, nor needed in our modern society. Horsedrawn vehicles have nearly disappeared. Livestock is no longer legally allowed to roam the roads. Roads, for the most part, are paved and washouts are infrequent. When road repairs must be made, those making them have a duty to provide adequate warning. The strict duty of care imposed upon the driver of 1909 is no longer realistic in the age of seventy-five mile an hour interstate highway travel.[83] As the Connecticut court said as early as 1923:

> The defendants would force the traveler to assume that the highway was liable to be obstructed, and in view of this to so travel that he should not collide with any obstruction in the highway, however negligently it may have been maintained upon it. It would thus impose upon the traveler the exercise of extraordinary care instead of ordinary care....[84]

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[83] In fact the driver on the interstate seldom drives within the range of his vision, especially at night, if he travels at the seventy-five miles an hour allowed. The posted speed limit is certainly misleading if the interstate driver assumes that by staying below it he can avoid being held negligent in case of an accident. NEB. REV. STAT. § 39-780 (Reissue 1968) provides that all vehicles traveling on Nebraska highways shall be equipped with headlights such that the driver can discern a man standing two hundred feet in front of his vehicle. Assuming that headlights reach at least that far, a vehicle traveling seventy-five miles an hour cannot stop short of two hundred thirty five feet under the best conditions, that is, on new, rough concrete which is dry. Thus, at seventy-five miles per hour the driver is overdriving his range of vision. This point was articulated in the concurring opinion in Kehm v. Dumpert, 183 Neb. 568, 162 N.W.2d 520 (1968), wherein Justice McCown argues that in all range of vision cases the question of the driver's negligence should be decided by the jury rather than by the trial court as a matter of law. He observes: "All sorts of conflicts are apparent in retention of the rule. For example, a motorist driving on the interstate highway at night with low-beam headlights at anything close to the 75-mile per hour speed limit, would be guilty of negligence as a matter of law; while if he is charged with negligence in exceeding the 75-mile speed limit, the jury is simply instructed that violation of the speed limit is not, in and of itself, negligence, but may be evidence of negligence. It seems obvious that the general rule in its old form no longer fits present circumstances of traffic and highway regulations." *Id.* at 574, 162 N.W.2d at 524.

See Cook, *Speed Calculations and the Expert Witness*, 42 NEB. L. REV. 100, 125-26 (1962) (Appendix A and B) for stopping distance calculations.

[84] Kaufman v. Hegeman Transfer & Literage Terminal, Inc., 100 Conn. 114, 117, 123 A. 16, 17 (1923).

The Washington court has pointed out that strict application of the rule serves to excuse the negligence of others and tends to completely emasculate the statutes which prohibit parking on the highway and those which require the placing of a warning sign to mark obstructions. That court stated that a driver traveling at night has at least some right to assume that the road ahead of him is safe for travel unless dangers on the road are marked by red lights at night or flags and signs by day.[85]

It has also been pointed out that requiring a driver to slow down every time his vision is impaired temporarily could cause more harm than good:

> To make the rule hard and fast would prevent the forward motion of a car meeting another with brilliant lights on a street or highway, or making left turns. It would frequently present a situation where the stopping of a car on a street or highway, or the lessening of its speed, would create a greater hazard than to go forward.[86]

Bearing in mind the general improvement of our highways and the desirability of swift travel, it is obvious that a rule which forces a driver to assume that the road will be obstructed at every turn and requires him to creep along so that he can stop before hitting an obstruction or be held negligent as a matter of law, belongs to an earlier age of highway travel. In Nebraska in 1969, a driver should be able to assume, absent any warning, that at least the interstate, federal highways, major paved state highways and arterial city streets will be free from negligently placed obstructions.

Another telling criticism of the Nebraska application of the range of vision rule is that the court may tend to erroneously apply the rule in some cases where the appearance of the object struck is such that it is not plainly visible. The court looks at the evidence and decides that the appearance of the object is such that the case will not fall within the "not plainly visible" exception to the rule and withdraws the question of the appearance of the object from the jury. This is not to say that there are no cases in which the appearance of the object struck is such that reasonable minds could not differ as to its visibility. No one would dispute the plainly visible character of a clean, shiny, red auto on the shoulder of the road on a clear day when visibility was good. At night no one would have much doubt about a car parked along the side of the road with all its lights on and suitable warning devices placed to warn that the vehicle was partially obstructing the highway. How-

[85] Morehouse v. Everett, 141 Wash. 399, 409, 252 P. 157, 160 (1926).
[86] Twyman v. Adkins, 168 Va. 456, 464, 191 S.E. 615, 618 (1937).

ever, there can be a wide variation in the appearance of various types of obstructions, and the court has had a great deal of difficulty deciding whether reasonable minds could differ as to the visible character of certain obstructions. The Nebraska court has said that the "not plainly visible" exception should embrace every situation in which reasonable minds could differ, but its decisions do not always measure up to this test.[87] It seems that in most cases the question of whether the driver should have seen the obstruction should be one for the jury. It is submitted that the court should move carefully when making pronouncements *as a matter of law* in such a difficult area.

Even where the testimony of witnesses as to the appearance of the obstruction has been in dispute, the court has not hesitated to decide, as a matter of law, whether the obstruction was plainly visible. An extreme example of this is presented in *Guerin v. Forburger*.[88] In *Guerin*, the accident took place as it was growing dark. Plaintiff's automobile smashed into the back of defendant's flat bed truck which was either stopped or moving very slowly in the right hand lane of travel. The truck was hauling stone which was a chalky white to yellow in appearance and blended with the mist which was falling in the growing dusk. The back of the truck was striped black and white, but was dirty. From the evidence it appeared that most of the lights on the truck were lit, but there was dispute as to whether the left tail light and left clearance light were lit at the time of the accident. A number of witnesses testified as to the appearance of the truck shortly before the accident. Some said the truck was quite difficult to see when they passed it,

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[87] Compare the following cases which hold that the driver was bound to see the obstructing vehicle with the cases at notes 39 and 42 *supra*, which hold that the obstructing vehicle was within the "not plainly visible" exception to the general rule: Remmenga v. Selk, 150 Neb. 401, 34 N.W.2d 757 (1948) (car parked partly on highway, stopped to add oil, dispute as to whether lights on or off); Buresh v. George, 149 Neb. 340, 31 N.W.2d 106 (1948) (stalled truck, out of gas, dark paint, no reflectors, tail light not lit, lattice truck body, difficult to see; held within rule, since nearby streetlight somewhat illuminated truck); Hendren v. Hill, 131 Neb. 163, 267 N.W. 340 (1936) (car stopped with flat tire, no lights burning, hauling furniture piled high on car, mattress which was fastened to back of car was light gray which blended with pavement). The distinction the court draws between these two groups of cases is very thin. Certainly in close cases like these the court ought not be casting cases on one side or the other as a matter of law. In close factual situations like these, a jury question is presented.

[88] 161 Neb. 824, 74 N.W.2d 870 (1956). *But see*, Bartosh v. Schlautman, 181 Neb. 130, 147 N.W.2d 492 (1966) and the discussion concerning that case at text accompanying footnote 46 *supra*.

and others said it was readily visible. The Nebraska court, however, announced that the appearance of the truck was such that the driver should have seen it and held the plaintiff negligent as a matter of law, thus upsetting a jury verdict for the plaintiff in the trial court.

The court should generally refrain from making a determination of the plainly visible character of the object struck. Rather, that question should be left for the jury to decide, and it should certainly do so in cases like *Guerin* where the evidence as to the appearance of the obstruction is in dispute.

VI. REMEDIAL PROPOSALS

Strict application of the range of vision rule has troubled the Nebraska court, as evidenced by its attempt to moderate the harsh effect of the rule in certain cases by creating exceptions. But instead of providing a solution for a complex problem, this creation of exceptions has led to a tangle which leaves the Nebraska law on the subject in a great state of confusion. A solution is needed which gives a greater role to jury findings on questions of fact and eliminates the need of creating the bothersome exceptions and wrestling with the problem of the plainly visible obstruction as a matter of law in close cases.

One alternative is to adopt the minority view, that violation of the range of vision rule does not make a driver negligent as a matter of law but is merely evidence of negligence to be considered by the jury in deciding the case. This solution would eliminate many of the problems presented by the Nebraska cases because it frees the court from deciding the applicability of the rule as a matter of law in close cases. However, it has the disadvantage of weakening the effect of the range of vision rule in cases in which the rule may be properly applied, since the jury may find the driver against whom the rule is applied non-negligent in cases in which the driver is clearly at fault. The argument contra is that most drivers are unaware of the rule, and, as a deterent to speeding, posted speed limits rigidly enforced, are much more effective; in other words, the rule is simply a tool in determining compensation, not in deterring wrongful conduct.

A second alternative is to do away with the range of vision concept altogether, as has been done in some states, and determine the issue of the driver's negligent speed by reference to other rules of the road or statutes, such as "a speed reasonably prudent under existing conditions." This approach does not simply weaken the range of vision rule but rather scraps it altogether in favor of other

concepts which may prove as difficult of application to varying facts as did the range of vision rule. However, this view may more adequately reflect a realistic approach to travel on controlled access highways where the perils of the road mentioned in *Lauson* have, for the most part, disappeared.

Unfortunately, all Nebraska highways do not meet interstate standards and it may be concluded that the range of vision rule still is proper in this state until more controlled access highways are constructed. The criticisms directed at the range of vision rule tend to obscure the fact that it is a perfectly just rule when applied in proper factual situations. The real problem, of course, is to determine just what cases merit application of the rule. In Iowa, where the range of vision rule has been adopted by statute, the courts apparently experienced similar difficulties as in the application of the Nebraska view. Their solution merits consideration as a third alternative. In order to remedy the difficulties presented by the Nebraska view, the Iowa assured clear distance statute was amended and now reads:

> ... and no person shall drive any vehicle upon a highway at a speed greater than will permit him to bring it to a stop within the assured clear distance ahead, *such driver having the right to assume, however, that all persons using said highway will obsevre the law.*[89]

This modification would eliminate many of the problems which plague the range of vision rule in Nebraska. Although the change in the Iowa rule was made by statutory amendment, probably no legislative action would be necessary to modify the rule in Nebraska, since our rule was created by judicial decision and may be changed in the same manner.

Under the Iowa rule, the difficulty of the plainly visible test is eliminated. The question is no longer whether the driver could see the obstruction. Instead the test is whether the object struck was illegally placed and maintained or illegally driven upon the highway. If it is shown that the person responsible for the presence of the obstruction violated some legal duty in allowing it to be there, the driver striking the obstruction is excused. In nearly all of the Nebraska cases in which the court has excused the driver who collided with the obstruction because it was not plainly visible, the obstruction's poorly visible character was due to a violation of some legal duty on the part of the person responsible for the obstruction. The "violation of a legal duty" test is much more certain

[89] IOWA CODE ANN. § 321.285 (Reissue 1966) (emphasis denotes the amendment).

and is easier to apply than the "plainly visible" test. Of course, not every illegal act of the person responsible for the obstruction would excuse the driver who struck it for having violated the range of vision rule. The illegal act or omission must be shown to be the proximate cause of the driver's failure to see the object, and thus the reason for his inability to stop before he struck the object which entered his range of vision. The proximate cause determination is made by the jury.

One can envision some instances in which the obstruction would not be visible because of no illegal act or omission on the part of the person responsible for the obstruction. For example, where a car stalls in the middle of the highway at night with its lights shorted out through no fault on the part of its driver and is struck by a vehicle following it, its poorly visible character was not due to the failure of its driver to observe the law. In these cases, the court would have to apply the old plainly visible test, but should generally leave the determination of the plainly visible character of the obstruction to the jury. Hopefully there will be few such cases.

The range of vision rule would continue to be applied in those cases in which the person responsible for the obstruction had not violated some legal duty in placing the obstruction where it was, or where violation of the legal duty was not the proximate cause of the accident. Negligence as a matter of law would not seem an unfair rule when the range of vision rule encompasses the exception the Iowa modification would make, and where the application of the rule is confined to factual situations in which the obstruction enters the driver's cone of vision from the end rather than from the side. For instance, where an auto strikes a vehicle which has suddenly turned onto the highway in front of it, the case would present an exception to the range of vision rule, since the turning vehicle did not "observe the law" when it failed to yield the right of way until the other auto had passed. Similar considerations would govern accidents caused by cars in the wrong lane on hills or curves, cars swerving when meeting one another on a straight and level stretch of road, and cars which obstruct the road by stopping or parking on the pavement just over the crest of a hill.

Adoption of the Iowa modification would shift the burden of preventing accidents from the traveler who is unaware that the highway is obstructed to the person who, through some illegal act or omission, is responsible for the hazard to travel, and who, after all, is in a better position to prevent the accident. It would allow the driver to assume, absent adequate warning, that the highway ahead is clear.

The conditions which compelled the decision in the *Lauson* case in 1909 have disappeared, and the range of vision rule should be modified in accordance with the changed conditions. Adoption of the Iowa modification to the range of vision rule would best accomplish this change while leaving the rule viable enough to be applied in factual situations in which that application would reach a just result.