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Torts—Unavoidable Accident Instruction

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Unavoidable Accident Instruction. *Cooper v. Pay-N-Save Drugs, Inc.*,[1] and *Schultz v. Cheney School Dist.*[2] concerned the use of the unavoidable accident instruction[3] by trial courts. The court held that the giving of the instruction was error in the *Cooper* case but not error in the *Schultz* case.

In the *Cooper* case a customer in the defendant's store went to a shelf to select merchandise. At the base of the shelf she observed a portable barbecue set. In turning to leave she caught her foot on the barbecue and fell to the floor.

In the *Schultz* case a bus driver for the defendant school district received a bee sting which diverted his attention and, while he tried to remove the bee from the inside of his shirt, the bus went into the ditch. The plaintiff fell from her seat in the bus and was injured.

The court in the *Cooper* case reviewed its prior decisions on the unavoidable accident instruction and derived the following rule:

> [S]tated affirmatively . . . it is proper to give the instruction if there is affirmative evidence that an unavoidable accident[4] occurred; stated negatively, it is error to give the instruction if there is no evidence of an unavoidable accident or if the only issue possible under the facts is that of negligence and contributory negligence.[5]

When a review of the record disclosed no issues except negligence and contributory negligence, the court decided that the unavoidable accident instruction should not have been given. Applying the same rule

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[1] 59 Wn.2d 829, 371 P.2d 43 (1962).

[2] 59 Wn.2d 845, 371 P.2d 59 (1962). Both the *Cooper* case and the *Schultz* case were departmental decisions; they came from different departments.

[3] A typical unavoidable accident instruction is found in the Uniform Jury Instructions for King County, Washington No. 44 (1955): "In law we recognize what is termed an unavoidable or inevitable accident. These terms do not mean literally that it was not possible for such an accident to be avoided. They simply denote an accident that occurred without having been proximately caused by negligence. Even if such an accident could have been avoided by the exercise of exceptional forsight, skill or caution, no one may be held liable for injuries resulting from it."

[4] In Jackson v. City of Seattle, 15 Wn.2d 505, 513, 131 P.2d 172, 176 (1942), the court defined unavoidable accident: "An accident may be inevitable in that it resulted without human agency and by so-called 'act of God.' But the term 'unavoidable accident,' in a more restricted sense, means an accident that could not have been prevented by the exercise of due care on the part of human actors involved. This court approved the giving of an instruction employing the term in this narrow sense in Hayes v. Staples, 129 Wash. 436, 225 Pac. 417 . . . . So employed, 'unavoidable accident' has been defined as meaning an accident which cannot be avoided by that degree of prudence, foresight, care, and caution which the law requires of everyone under the circumstances of the particular case, which is not occasioned in any degree, either remotely or directly, by the want of such care and skill as the law holds every man bound to exercise, or which occurs without fault attributable to anyone. And, in this sense, it has been held to be equivalent to, or synonymous with, 'mere accident' or 'pure accident.' 1 C.J.S., 443, 444."

[5] 59 Wn.2d 829, 835-836, 371 P.2d 43, 47 (1962).

in the *Schultz* case the court reached an opposite result upon concluding that there was evidence of an unavoidable accident.

Unavoidable accident cases usually turn on the propriety of giving the instruction and not on its form or content.[6] Arguments against giving the instruction are: (1) The burden of proving the defendant's negligence is already placed upon the plaintiff by instructions on negligence, proximate cause and burden of proof. The defendant receives adequate protection from those instructions and from the customary instruction that "a party is not entitled to recover solely because there has been an accident." The instructions on negligence and unavoidable accident differ only in their approach to the same question: Was the defendant negligent?[7] (2) The unavoidable accident instruction over-emphasizes the defendant's case since the same point covered in the unavoidable accident instruction is also covered in other instructions.[8] (3) The instruction actually confuses and misleads the jury.[9] If the jury are confused on issues of negligence, contributory negligence or proximate cause, they may be prone to give the easy answer of unavoidable accident.

Arguments in favor of giving the instruction are: (1) The jury may lose sight of the fact that there are injuries for which no one is at fault. Especially in cases involving issues both of negligence and contributory negligence, the jury are likely to think that the injury would not have happened unless one or the other or both of the parties were at fault. The unavoidable accident instruction should be given so that proper weight will be attributed to the possibility that

[6] Annot., 65 A.L.R.2d 12, 119 (1959).

[7] Butigan v. Yellow Cab Co., 49 Cal. App. 2d 652, 320 P.2d 500 (1958); Comment, *The Unavoidable Accident Instruction*, 33 So. CAL. L. REV. 72 (1959).

Concerning the burden of proof on the unavoidable accident question, the burden remains on the plaintiff since this is still the question of negligence, but phrased differently. See Hardman v. Younkers, 15 Wn.2d 483, 492, 131 P.2d 177, 181 (1942). Compare Taylor v. Lubetich, 2 Wn.2d 6, 97 P.2d 141 (1939), and Lauber v. Lyon, 188 Wash. 644, 63 P.2d 389 (1936).

In general, the Washington court does not treat the question of unavoidable accident as a separate issue, see note 30 *infra*, with the result that the question can be raised by the defendant by his denial of negligence and without affirmative defense. See Hardman v. Younkers, *supra* at 492, 131 P.2d at 181; and note 30 *infra*.

[8] Butigan v. Yellow Cab Co., 49 Cal. App. 2d 652, 659, 320 P.2d 500, 505 (1958). The court in the *Butigan* case criticizes the instruction on unavoidable accident: "In reality the so called defense of unavoidable accident has no legitimate place in our pleading." *Id.* at 658, 320 P.2d at 504. The split court (four-to-three) said it did not approve of the outmoded doctrine, except in special circumstances. The question in California is now: What are those special circumstances?

[9] This reason is given by the court in Butigan v. Yellow Cab Co., 49 Cal. App. 2d 652, 320 P.2d 500 (1958). The court suggests that the jury is prone to treat the unavoidable accident question as an issue distinct from negligence. For a criticism of the *Butigan* decision, see Palmer, *The Avoidable Decision*, 33 LOS ANGELES BAR BULL. 299 (1958).

neither party was negligent.[10] (2) The instruction may clarify the other instructions which were perhaps more confusing.[11] If the unavoidable accident instruction merely repeats what has already been said, then duplication should aid the jury, rather than hinder or confuse them. (3) At the trial, the term "unavoidable accident" has been used by counsel in front of the jury, and, to prevent confusion, the court should explain the term.[12]

No Washington case states reasons for giving or not giving the instruction. Generally the Washington court bases its decisions on conclusionary statements to the effect that before the instruction is to be given there must be something more in issue than negligence and contributory negligence. Then the court has concluded that there was or was not evidence of an unavoidable accident.[13]

The *Cooper* rule may change the use of the instruction by imposing a prerequisite for the giving of the instruction, *viz.*, that there be actual evidence of an unavoidable accident. This apparently means that there must be at issue the question whether *anyone* was negligent. It is not enough that there be dispute over whether the defendant was negligent or the plaintiff contributorily negligent.[14]

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[10] In Wheeler v. Glazer 137 Tex. 341, 153 S.W.2d 449, 452 (1941), the court said: "The only legitimate purpose to be served in submitting unavoidable accident is . . . so that the jury will understand that they do not necessarily have to find that one or the other parties to the suit was to blame. . . ."

[11] See Butigan v. Yellow Cab Co., 49 Cal. App. 2d 652, 320 P.2d 500, 506 (1958) (dissenting opinion).

[12] See Palmer, *The Avoidable Decision*, 33 LOS ANGELES BAR BULL. 299 (1958).

[13] In Lindsey v. Elkins, 154 Wash. 588, 283 Pac. 447 (1929), the defendant testified that his car was moving when the plaintiff's car struck the defandant from the rear. The plaintiff's claim was that the defendant had parked the car on the highway on a dark and rainy night. If the defendant had not been stopped at the time of the collision the accident might have been unavoidable, justifying the instruction. However, the court stated that there were no facts from which the jury could find that the accident was unavoidable. See Barnes v. Labor Hall Ass'n, 51 Wn.2d 421, 319 P.2d 554 (1957), where the court said the only issues involved were of negligence. Plaintiff fell on defendant's stairway, and there was some evidence from which the jury might have inferred that a clamp on a hand rail crystalized and broke through no negligence of the defendant. In spite of this, the court refused to say that there was any evidence of an unavoidable accident.

Compare Jackson v. City of Seattle, 15 Wn.2d 505, 131 P.2d 172 (1942), where the question of unavoidable accident dependent upon the place at which the defendant's bus driver stopped the bus. The bus driver testified he stopped east of the pole, so the plaintiff could not have stepped in the holes which were west of the pole. The court approved of the giving of the unavoidable accident instruction in this case.

In each of these three cases the supreme court affirmed the trial court's decision with respect to the giving or refusal of the unavoidable accident instruction. In each case the evidence was from the testimony of the defendant or his agent.

This apparent inconsistency can be explained by reluctance to reverse the trial court's or jury's findings. See text accompanying notes 35-36 *infra*.

[14] Brewer v. Berner, 15 Wn.2d 644, 650, 131 P.2d 940, 943 (1942), implies this interpretation when the court says: "There was no evidence that the collision between the two cars was the result of an unavoidable accident. On the contrary, the evidence

Accordingly, it is clearly error to give the instruction when either party is negligent as a matter of law. In that situation there has been no unavoidable accident,[15] since the injury could have been prevented by the exercise of due care.

As a corollary, if the accident could not have happened unless either one or both of the parties were negligent, the instruction should not be given, since the accident then too was avoidable.[16] The instruction may seem proper, since the accident might have been unavoidable by the defendant and the instruction would not prejudice a contributorily negligent plaintiff. This was the California position before 1958, the result of which was to find the instruction proper in any case where the defendant was not negligent as a matter of law.[17]

Washington nearly reached the same conclusion in *Pement v. F. W. Woolworth Co.*[18] Relying on a leading California case, *Parker v. Womack*,[19] the Washington court said: "[I]f there was no claim that the *defendant* was negligent as a matter of law—that is to say, if the issue of negligence was one of fact for the jury's determination, there was no error in instructing upon unavoidable accident."[20] (Emphasis added.)

The *Pement* case suggests that the instruction is proper whenever negligence is in issue and the *defendant* is not negligent as a matter of

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presented but two questions for the jury to decide, and those questions were negligence on the part of the respondent and contributory negligence on the part of the appellant."

[15] In Gaylord v. Schwartz, 46 Wn.2d 315, 281 P.2d 247 (1955) (dictum), the court stated that where the plaintiff is contributorily negligent as a matter of law, the giving of an unavoidable accident instruction is improper but not prejudicial, and therefore not reversible error. The plaintiff would have lost the case anyway. See Oatman v. Frey 108 Ohio App. 72, 160 N.E.2d 664 (1958) (by implication).

[16] See Rettig v. Coca-Cola Bottling Co., 22 Wn.2d 572, 156 P.2d 914 (1945). *Cf.*, Brewer v. Berner 15 Wn.2d 644, 131 P.2d 940 (1942). *But see* Webb v. City of Seattle, 22 Wn.2d 596, 157 P.2d 312 (1945), where a fourteen year-old child ran into the street with his classmates, chasing a bus, when he fell or was pushed under one of the wheels. The court indicated that the unavoidable accident instruction was proper in this case since the boy may have been pushed. *Quaere:* Even if the boy were pushed was he not contributorily negligent in subjecting himself to the chance of being pushed when chasing a bus with a crowd of children? See McClarren v. Buck, 340 Mich. 300, 72 N.W.2d 31 (1955).

[17] Annot., 65 A.L.R.2d 12, 21 (1959).

[18] 53 Wn.2d 768, 337 P.2d 30 (1959). The plaintiff sustained a fall allegedly because of the defendant's misapplication of "Myco-Sheen," a floor preparation. The trial court instructed the jury with reference to unavoidable accident. The verdict for the defendant was affirmed.

[19] 37 Cal. App. 2d 116, 230 P.2d 823 (1951). The *Parker* case was a leading case for the lenient use of the unavoidable accident instruction in California and one which Butigan v. Yellow Cab Co., 49 Cal. App. 2d 652, 320 P.2d 500 (1958), specifically overruled in 1958. The court in the *Butigan* case said that the instruction was outmoded and should not be given. For an account of the development of the unavoidable accident instruction in California, see Comment, *The Unavoidable Accident Instruction*, 33 So. CAL. L. REV. 72 (1959).

[20] Pement v. F. W. Woolworth Co., 53 Wn.2d 768, 772, 337 P.2d 30, 32 (1959).

law[21] (in contrast to the usual Washington statement requiring evidence that neither party is negligent). The rule stated in *Pement* no longer has vitality, since in *Cooper* the court recognized that it conflicts with earlier cases. But the facts of the *Pement* case did include evidence of unavoidable accident. Therefore that case can be factually reconciled with other Washington cases, including *Cooper,* even though it sanctioned a broader rule of law than the holding of the *Cooper* case would allow.

Application of the *Cooper* rule raises the troublesome question whether the instruction is proper when the jury may find both parties free from fault.[22] The majority view permits the instruction in this situation.[23]

But what does the court mean in the *Cooper* case by saying there must be affirmative evidence of an unavoidable accident? Does it mean that in addition to evidence tending to show that neither party was at fault, there must also be evidence of the real cause of the accident?[24] If the instruction were given, the jury might think it necessary to find someone negligent, unless they could ascertain the true cause. On this view the court should have concluded in *Jackson v. City of Seattle,*[25] *Gaylord v. Schwartz*[26] and *Pement v. F. W. Woolworth Co.,*[27] that the unavoidable accident instruction was improper. Yet in each case the court upheld the trial court which had given the instruction.

In speaking of affirmative evidence of an unavoidable accident the

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[21] In support of this statement and as an indication that the Washington Supreme Court intended what it said, it also cited Hughes v. MacDonald, 133 Cal. App. 2d 74, 283 P.2d 360 (1955), and Shouten v. Crawford, 118 Cal. App. 2d 59, 257 P.2d 88 (1953), in which cases the California court stated that where proximate cause or negligence is a question for the jury, it is not error to instruct on unavoidable accident. This meant the instruction was proper in practically every negligence case.

[22] In Washington, the cases of Gaylord v. Schwartz, 46 Wn.2d 315, 281 P.2d 247 (1955), and Jackson v. City of Seattle, 15 Wn.2d 505, 131 P.2d 172 (1942), indicate the answer should be yes. For an opposite conclusion, however, see Barnes v. Labor Hall Ass'n, 51 Wn.2d 421, 319 P.2d 554 (1957), and Lindsey v. Elkins, 154 Wash. 588, 283 Pac. 447 (1929). For a possible explanation of the apparent inconsistency see note 13 *supra* and text accompanying notes 35-37 *infra.*

[23] Cantrill v. American Mail Line, 42 Wn.2d 590, 257 P.2d 179 (1953); Brewer v. Berner, 15 Wn.2d 644, 131 P.2d 940 (1942). This seems to be the majority view concerning the propriety of giving the instruction. See Annot., 65 A.L.R.2d 12, 36-37 (1959) and cases cited. The annotation indicates there is a lack of uniformity as to the circumstances in which the instruction may be given. The variety of circumstances is well illustrated there.

[24] One could interpret Hicks v. Brown, 136 Tex. 399, 151 S.W.2d 790 (1941), as having taken this view. However, in Wichita Transit Co. v. Sanders, 214 S.W.2d 810 (Tex. Civ. App. 1948), there is some confusion on this point.

[25] 15 Wn.2d 505, 131 P.2d 172 (1942).

[26] 46 Wn.2d 315, 281 P.2d 247 (1955).

[27] 53 Wn.2d 768, 337 P.2d 30 (1959).

court probably means that anything which disproves either negligence or unavoidable accident must affirmatively prove the other. Evidence tending to show lack of negligence is, then, affirmative evidence of unavoidable accident.[28]

It is not enough that each party tries to absolve himself of fault solely by evidence of the other's negligence, since these efforts would not satisfy the requirements that there be evidence of non-negligence,[29] and the unavoidable accident instruction could not properly be given.[30]

The crux of the dispute, therefore, is whether anyone did in fact introduce evidence showing an absence of negligence. Two prominent features of unavoidable accident cases furnish a partial guide to answering this question under the facts of a particular case: The court is likely to find the evidentiary test satisfied so long as the case involves: (1) a surprising event or act combined with (2) circumstances making a fair issue of whether failure of the defendant to anticipate and guard against the danger is consistent with the conclusion that he exercised due care.[31]

In the *Cooper* decision, the court had before it cases ranging from the most lenient to the most strict in the application of rules regarding the unavoidable accident instruction. It decided (without telling us why) to adopt neither extreme, but to refortify its previous position as stated in 1942 in *Brewer v. Berner*.[32]

At the present time, a Washington defendant who obtains a favorable verdict and the unavoidable accident instruction faces little chance of reversal on appeal, so long as he has introduced evidence from which

[28] In Gaylord v. Schwartz, 46 Wn.2d 315, 317, 281 P.2d 247, 248 (1955), the court said: "Since there was evidence to support a finding that neither . . . was negligent, it follows that it was proper for the court to give the instruction on unavoidable accident." See also O'Connell v. Home Oil Co., 180 Wash. 461, 467, 40 P.2d 991, 994 (1935), where the court said: "It is true that the answer did not raise that particular issue [unavoidable accident] by way of affirmative defense. It is also true that each party insisted throughout the trial that the other was negligent. But it is likewise true that each of the parties asserted and emphasized his or their own freedom from negligence. The evidence, when sifted by the jury according to its view of the credibility, was reasonably subject to the inference that the accident was an unavoidable one. . . ."

[29] Brewer v. Berner, 15 Wn.2d 644, 131 P.2d 940 (1942).

[30] Hodgson v. Pohl, 9 N.J. 488, 89 A.2d 24 (1952); Mittelstadt v. Hartford Accident & Indemnity Co., 2 Wis. 2d 78, 85 N.W.2d 793 (1957). However, in Gaylord v. Schwartz, 46 Wn.2d 315, 281 P.2d 247 (1955), the court stated that there was not necessarily proof of negligence on the part of the bicycle rider, plaintiff's ward, from the mere fact he fell into the path of a truck. Using that statement as its premise the court concluded: "Since there was no evidence to support a finding that neither . . . was negligent, it follows that it was proper for the court to give the instruction on unavoidable accident." *Id.* at 317, 281 P.2d at 248.

[31] Annot., 65 A.L.R.2d 12, 23 (1959). See Cordell v. Scott, 111 N.W.2d 594 (S.D. 1961).

[32] 15 Wn.2d 644, 131 P.2d 940 (1942).

the innocence of both parties may be inferred.[33] The trial judge, for fear of being reversed, may be reluctant to instruct on unavoidable accident. To this date, Washington, with the majority of states,[34] has not held it reversible error for the trial court to refuse to give the instruction.[35] The reason generally given is that the instructions on negligence, proximate cause, and burden of proof adequately protect the defendant.[36]

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UNEMPLOYMENT COMPENSATION

Part Time Farming—Partial Unemployment. "We . . . hold that a person is not automatically ineligible for unemployment compensation simply because he engages in some remunerative activity of a personal or self-directed nature. Respondent . . . was unemployed within the meaning of RCW 50.04.310."[1]

In these words the Washington Supreme Court permitted the recovery of unemployment compensation, under our statute, by a claimant who, though temporarily unemployed, assisted in the operation of his dairy farm.

This decision marks two important developments in the construction of RCW Title 50, which contains the Washington Unemployment Compensation statute. It represents the first attempt by the court to define "self-employed," which the statute omits to define, and, perhaps more importantly, it rests on a basis of reason and reflection, rather than on a dogmatic adherence to precedents from other jurisdictions. Both seem to carry importance for the future.

Mr. Bartel, the claimant, was customarily employed in various types of work for other employers in his locale. In addition, he and his wife and nineteen-year-old son opearted a small dairy farm, from which

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[33] In Van Ry. v. Montgomery, 58 Wn.2d 46, 47, 360 P.2d 573, 574 (1961), the court said: "In determining whether the court properly submitted to the jury the question of whether the accident was unavoidable, the evidence must be viewed in the light most favorable to the defendants." See Tomblinson v. Wise, 163 Wash. 341, 300 Pac. 1056 (1931).

[34] See Annot. 65 A.L.R.2d 12, 136 (1959).

[35] Cooper v. Pay-N-Save Drug Co., 59 Wn.2d 829, 835, 371 P.2d 43, 47 (1962).

[36] Wellman v. Noble, 12 Utah 2d 350, 366 P.2d 701 (1961). *Contra,* Haynes v. Martinez, 260 S.W.2d 369 (Tex. Civ. App. 1953).

[1] Bartel v. Employment Security Department, 160 Wash. Dec. 710, 720, 375 P.2d 154, 161 (1962).