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Unavoidable Accident Instruction Held Reversible Error in Negligence Actions

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to rule on this point, but cases concerning it have arisen in other jurisdictions.[25]

A liberal view should characterize the interpretation and application of the workmen's compensation law, with the object of providing compensation for every employee suffering injury from an industrial accident, regardless of his mere technical or unavoidable non-compliance with the provisions for notice and filing claims. It is submitted that the policy of the Act would have justified employing principles of apparent agency in the instant case, and would justify extension of the statutory period in the case of a latent injury. If, however, the statutory limitation on notice is jurisdictional as a number of cases suggest, this is a place where fairness calls for amendment of the statute.

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UNAVOIDABLE ACCIDENT INSTRUCTION HELD REVERSIBLE ERROR IN NEGLIGENCE ACTIONS.—The deceased, while shoveling sand onto a slippery highway from the back of a highway maintenance truck, fell into the path of the defendant's transport truck and was killed. The plaintiffs claimed as negligence the transport driver's failure to see the turn signal indicator on the maintenance truck, his failure to sound the horn of his own truck, and his failure to slow down for a potentially dangerous situation. The court gave an unavoidable accident instruction and the jury returned a verdict for the defendants. On appeal to the Montana Supreme Court, *held,* reversed and remanded for a new trial. If there is any evidence from which the jury can infer negligence on the part of the defendant, an instruction on unavoidable accidents is reversible error. *Leach v. Great Northern Ry. Co.,* 360 P.2d 94 (Mont. 1961) (Justice Castles dissenting).

Jury instructions should "outline the elements of legal liability, explain the concept of burden of proof . . . and describe the respective functions of judge and jury."[1] The formulation of brief and clear instructions is the best assurance that the jury will give them the proper weight. In the instant case the question is whether the instruction given on unavoidable accidents was necessary in order for the jury to completely understand the substantive law or whether it was superfluous, misleading, and confusing. The disputed instruction read as follows:[2]

> 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 de-

[25]See Rutledge v. Sandlin, 181 Kan. 369, 310 P.2d 950 (1957), 19 MONT. L. REV. 170 (1958). See also cases cited in 2 LARSON, WORKMEN'S COMPENSATION LAW § 78.42(b) (1952), and supplement thereto.

[1]2 HARPER AND JAMES, THE LAW OF TORTS 886 (1956).

[2]Instant case at 97. The wording of the instruction is identical with the unavoidable accident instruction found in 1 CALIFORNIA JURY INSTRUCTIONS, CIVIL (B.A.J.I.) 310, No. 134 (4th ed. 1956).

note an accident that occurred without having been proximately caused by negligence.

Even if such an accident could have been avoided by the use of greater foresight, caution or skill than was required in the circumstances in the exercise of ordinary care, still no one may be held liable for the injuries resulting from it.

Bear in mind, however, that if any defendant failed to exercise care, and if that failure was a proximate cause of the accident in question, then, whether or not such conduct was the sole cause, the accident was not unavoidable, and the defense of unavoidability may not be maintained by the defendant.

Whether or not the accident in question in this case was unavoidable is, of course, a question of fact for you to determine; and in giving the foregoing instruction I do not imply any opinion or suggestion as to what your finding should be.

In the ordinary negligence case the jurors are told that the plaintiff, to recover compensation for his injuries, must show by a preponderance of the evidence that the defendant was negligent and that the defendant's negligence was the proximate cause of these injuries.[3] Since an unavoidable accident is simply an accident in which the defendant is not guilty of negligence[4] adequate instructions on negligence, proximate cause, and the respective burdens of proof should fully inform the jurors of the law in regard to any accident which is unavoidable. But on the question of whether the unavoidable accident instruction helps promote a *better* understanding of the law among the jurors, there is much dispute.

Those opposed to use of the instruction urge that it is not only unnecessary but also confusing and misleading because it tends to repeat and over-emphasize the defendant's case and tends to make jurors believe that an "unavoidable accident" is a separate ground for avoiding liability.[5] It may cause the jurors to overlook the negligence in failing to anticipate an event which causes the accident; for example, the jury may seize on the weather conditions or a mechanical failure to explain an accident without properly considering whether the defendant should have anticipated those conditions or circumstances. In the instant case, too much emphasis might have been placed on the fact that the transport truck was only 15 feet from the deceased when he fell onto the highway and too little emphasis might have been placed on the fact that the transport driver failed to see the highway truck's signal light, or to sound his horn, or to slow down when he realized he was approaching a potentially dangerous situation.

[3]See instruction 14 of the instant case, Record, Vol. 3, p. 550; see also 1 CALIFORNIA JURY INSTRUCTIONS, CIVIL (B.A.J.I.) at 237, No. 101-I (4th ed. 1956).

[4]This definition of unavoidable accident is the broadcast of all possible definitions; it includes accidents caused by anyone or anything other than the negligence of the accused. For various accepted definitions and an extended discussion of the subject, see Annot., 65 A.L.R.2d 12 (1959). The instruction given in the present case defines an unavoidable accident as "any accident that occurred without having been proximately caused by negligence"; it is narrower in scope than the above definition because it does not include accidents caused by the negligence of someone other than the accused.

[5]Bulgin v. Yellow Cab Co., 49 Cal. 2d 652, 320 P.2d 500, 65 A.L.R. 2d 1 (1958).

On the other hand it is claimed that an unavoidable accident instruction clarifies rather than confuses the situation in the minds of the jurors, that the other instructions refer to the rule for unavoidable accidents only by a negative implication, and that the jurors may need to be reminded that accidents sometimes happen through the fault of no one. It is argued that since the instruction makes the statement of the law more accurate and easier to comprehend, it is fairer to all parties. Furthermore, since some courts seem to be approaching the rule that the mere happening of an accident, without more, is evidence of negligence, it is thought particularly important for the jury to be reminded that not all accidents are caused by negligence.[6]

The effect of the instruction on the minds of the jurors is difficult to measure and its evaluation is largely a matter of personal opinion. Decisions seem to vary with the individual feelings of the judges.[7] In fact, some courts refuse to state any rule and simply say that the appropriateness of the instruction depends upon the particular facts of each case.[8]

Various courts have taken at least five different positions: First, the instruction should be given in all cases where negligence is the basis of liability.[9] Second, the instruction should be given in all cases where there is some evidence tending to absolve the defendant from negligence.[10] Third, the instruction should be given whenever there is some evidence tending to show that both the plaintiff and the defendant were exercising due care even though the evidence does not disclose an unknown cause or cause outside the control of the parties.[11] Fourth, the instruction should be given only when there is evidence indicating that the accident was caused by some unknown cause or some cause not under the control of either the plaintiff or the defendant.[12] Fifth, the instruction should never be given.[13]

[6]See *e.g.*, Butigan v. Yellow Cab Co, *supra* note 5 (dissenting opinion); Lucero v. Torres, 67 N.M. 10, 350 P.2d 1028 (1960); Rodoni v. Hoskin ..... Mont. ....., 355 P.2d 296 (1960).

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

[8]*Ibid.* Harper and James suggest that jury instructions in general provide room within which the appellate courts are relatively free to exercise their discretion in the control of jury verdicts. 2 HARPER AND JAMES, THE LAW OF TORTS 886, 889 (1956). Much of this control seems to have been exercised in the decisions on the unavoidable accident instruction.

[9]Shiya v. Reviea, 122 Cal. App. 2d 155, 264 P.2d 190 (1953); Tharp v. Mundy, 195 F.2d 987 (5th Cir. 1952).

[10]Hanks v. Norby, 152 Ore. 610, 54 P.2d 836 (1936).

[11]Hinkle v. Union Transfer Co., 229 F.2d 403, (10th Cir. 1955); Orange & N.W. R. Co. v. Harris, 127 Tex. 13, 89 S.W.2d 973 (1936); Schevers v. American Ry. Exp. Co., 195 Iowa 423, 192 N.W. 255 (1923). The dissent in the instant case, by attempting to distinguish Rodoni v Hoskins, ... Mont. ....., 355 P.2d 296 (1960), implies the exact opposite of this position; namely, that there *must* be evidence of negligence on the part of both the defendant and the plaintiff before the said instruction is proper. Instant case, at 100 and 101. However, it is difficult to see why an issue of contributory negligence is necessary to make the instruction proper.

[12]Hogan v. Kansas City Pub. Serv. Co., 322 Mo. 1103, 19 S.W.2d 707 (1929); Huey v. Stephens, 275 P.2d 254 (Okla. 1954); Hayward v. Ginn, 306 P.2d 320 (Okla. 1957); Lawrence v. Hayes, 92 Ga. App. 778, 90 S.E. 2d 102 (1955); White v. Akers, 125 S.W.2d 388 (Tex. Civ. App. 1939). This position may be subdivided into three further positions; namely, where there is evidence indicating that 1) the cause was unknown, 2) the accident was caused by an Act of God, and 3) the accident was caused by something else outside the control of the parties

[13]Many cases give general disapproval to the instruction. See, *e.g.*, Van Matre v. Milwaukee Elec. Ry. & Transp. Co., 268 Wis. 399, 67 N.W. 2d 831 (1955); Williams

Once it has been determined in which situations the instruction may properly be given, it must still be determined whether it is reversible error to deny the instruction in those situations or to give it in others. Some courts claim that, although to give the instruction may be proper or improper in a particular situation, it is never reversible error to give or deny it because it is simply superfluous and cannot cause prejudice on either side.[14] Other courts claim that when the instruction is proper it is essential for a fair trial and refusal to give it would constitute a reversible error.[15] Many courts also hold that it is reversible error to give the instruction when it is *improper,* because it is confusing and misleading.[16]

The position of the Montana Supreme Court on the unavoidable accident instruction has not been entirely clear. In none of the five earlier Montana cases which have directly dealt with the problem has the Montana Supreme Court declared that the instruction was properly given, nor has the court said that it should never be given. In three of the cases, *Tanner v. Smith,*[17] *Jewett v. Gleason,*[18] and *Stevens v. City of Butte,*[19] the court held that the trial court had not erred in denying the instruction. There was no evidence in these three cases of any intervening or outside cause and the court declared that where the accident was clearly caused by the negligence of someone, the instruction is improper. In the other two cases, *Bogovich v. Scandrett,*[20] and *Rodoni v. Hoskin,*[21] the court held that the trial courts had committed reversible error in giving the instruction. In all five of these cases the court either stated or intimated that in the right fact situation, the instruction would be proper. It was felt necessary to define an unavoidable accident in two of the cases.[22] In the *Rodoni* case, the court makes the following statement:[23]

> It is our opinion that an instruction as to "unavoidable accident" could help the jury to understand the legal concepts involved in an

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v. Matlin, 328 Ill. App. 645, 66 N.E.2d 719 (1946). Even where such a rule prevails, it would of course yield to special statute. Butigan v. Yellow Cab Co. *supra* note 5 (dictum). For an example of a statute that makes an unavoidable accident a special defense, see CAL. VEH. CODE § 21702. There is no such statute in Montana.

[14]Bahakel v. Great Southern Trucking Co., 249 Ala. 363, 31 So.2d 75 (1947); Harding v. Hoffman, 158 Neb. 86, 62 N.W.2d 333 (1954).

[15]Piggott v. Newman, 334 Ill. App. 75, 78 N.E.2d 328 (1948); Schapiro v. Meyers, 160 Md. 208, 153 Atl. 27 (1931); see also Annot., 65 A.L.R. 2d 12, 137.

[16]*Supra* note 9; Rodoni v. Hoskin, *supra* note 7; see Annot., 65 A.L.R.2d 12, 131-136.

[17]97 Mont. 229, 33 P.2d 547 (1934).

[18]104 Mont. 63, 65 P.2d 3 (1937).

[19]107 Mont. 354, 85 P.2d 339 (1938).

[20]117 Mont. 341, 158 P.2d 637 (1945).

[21]..... Mont. ....., 355 P.2d 296 (1960).

[22]In Tanner v. Smith, 97 Mont. 229, 235, 33 P.2d 547, 549 (1934) the court said in unavoidable accident is "a casualty which happens when all means which common prudence suggests have been used to prevent it." In Bogovich v. Schandrett, 117 Mont. 341, 347, 158 P.2d 637, 639 (1945), the court said, "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 every one 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." The court declared the words "mere accident" and "pure accident" to be synonymous with the term "unavoidable accident"; but it distinguished an unavoidable accident from an Act of God, which it labeled "inevitable."

[23]355 P.2d at 299.

> appropriate case and would not confuse them or hinder them in reaching a just conclusion. . . . It might be appropriate where there was "surprise, sudden appearance and reasonably unanticipated presence of a pedestrian" . . . or it might be appropriate where facts are present in the case concerning "unavoidable accident" as this court stated in the Bogovich case, supra.

A rule indicating under what facts the instruction would be proper, however, cannot be found in any of the Montana cases. The evidence in the *Bogovich* case clearly showed that at least one of the parties, if not both, were negligent. In asserting that the instruction was improper, the court appears to have rejected the first and second positions above and to have gone at least as far down the scale as the third position, *i.e.,* that the instruction should be limited to those cases where there is some evidence tending to show that *both* the plaintiff and the defendant were free from negligence. But this assumed position was rejected in the *Rodoni* case; there the evidence indicated that the plaintiff was free from contributory negligence, but the defendant's negligence was at issue. Unless the court was holding the defendant negligent as a matter of law, it appears to adopt the fourth position, *i.e.,* that the instruction should be given only when there is some evidence indicating that the accident was caused by some unknown cause or some cause that could not have been anticipated by either the plaintiff or the defendant.

The instant case expressly holds that the instruction is *never* proper if there is *any* evidence of negligence on the part of the defendant.[24] If there were no evidence of negligence on the part of the defendant, the defendant should be entitled to a directed verdict. In effect, therefore, the court appears to say that the instruction is always improper and will constitute reversible error whenever it is given. This holding is consistent only with the fifth position, *i.e.,* the instruction is absolutely disapproved. The quoted language of the *Rodoni* case seems to be overruled. If the court had taken this position expressly, much confusion with regard to the unavoidable accident instruction in Montana could have been eliminated.

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[24]The court holds further that it is *reversible* error to give the instruction. But neither in the instant case nor in the Rodoni case does the court discuss how the instruction prejudices the plaintiff.