UNAVOIDABLE ACCIDENT-- A MISUNDERSTOOD CONCEPT

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In common with most jurisdictions which follow the common law, Arizona has since 1933 recognized the principle of the inevitable or unavoidable accident.[1] A composite instruction on this topic recently published[2] reads as follows:

> A. UNAVOIDABLE ACCIDENT — REASONABLE PRUDENCE
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> The law as to drivers of motor vehicles is not different from that which governs other persons. The standard required is that of a reasonably prudent person under all circumstances. If some unforeseen emergency occurs, which naturally would overpower the judgment of the ordinary careful driver of a motor vehicle so that momentarily or for a time he is not capable of intelligent action, and as a result injuries are inflicted upon a third person, the driver is not negligent.
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> If the accident in which the plaintiff was injured was an unavoidable accident, that is, one which under all the circumstances shown by the evidence, was not the fault of either party, the plaintiff cannot recover.
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> B. UNAVOIDABLE ACCIDENT — ABSENCE OF FAULT
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> In law we recognize what is termed an unavoidable accident. An unavoidable accident is one which occurs while all persons concerned are exercising ordinary care; that is, one not caused by the fault of any of the persons. If the accident producing the injury could have been prevented by either person by means suggested by common prudence it is not deemed unavoidable. If you find that the accident in question was unavoidable, no one may be held liable for injuries resulting from it.

On its face such an instruction might seem to be of widespread application and general use. Its repeated presence as a point on appeal, particularly in automobile accident cases, suggests that a reexamination of the entire doctrine is in order. It is submitted this type of instruction is really of very narrow application.

The purpose of this article is to develop this thesis, relying upon the historical background of the concept; to discuss the common misconceptions concerning its applicability to various sets of facts; and to suggest some basic guides for evaluating cases — particularly automobile accident cases — to determine whether the facts warrant the giving of such an instruction.

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[1] Noel v. Ostlie, 42 Ariz. 113, 119, 22 P.2d 831, 833 (1933).

[2] WILSON, ARIZONA AUTOMOBILE NEGLIGENCE § 186 (1962).

I.

The most complex of concepts may be in fact simple in basic explanation. An unavoidable accident is sometimes defined as an accident which is inevitable — that is, an unforeseeable occurrence, one which under the particular circumstances could not have been avoided in the exercise of ordinary care by either the plaintiff or defendant.[3] The obvious result of this definition is to raise the question whether it does not apply to *every* personal-injury accident case. Certainly, if the facts are such that the jury could find plaintiff was not negligent and defendant was not negligent, then perhaps this means the jury might find that no one was negligent and the accident was thus unavoidable. Would it not then logically follow in *every* case that an unavoidable accident instruction should be given?

The answer lies in distinguishing lack of negligence or failure to prove negligence in fact from the far more limited concept of unavoidability. Professor James Barr Ames, writing on *Law and Morals*,[4] discusses the early English rules in the situation where one person may have injured another without fault on either side, by a pure accident. As late as 1681 it was forcibly stated that an action lay for the injury, ". . . because he that is damaged ought to be recompensed." However, this "absolute liability" rule gradually gave way to a more moralistic concept, requiring something more than injury to sustain liability. Where injury followed a voluntary act, the early common law would not concern itself with whether the consequences were intended, since the trespass which occasioned the injury was caused by (or perhaps the "fault" of) the voluntary actor. The early progenitor of the idea that there might be defenses based upon lack of fault was *Weaver v. Ward*.[5] There the court stated the defendant would be liable for accidentally wounding another when firing a gun unless he could establish the accident was inevitable (burden on defendant). Finally, in 1891, a case was brought to Queen's Bench[6] wherein defendant, a member of a hunting party, fired at a pheasant and the shot glanced from a tree limb, injuring plaintiff. A defense verdict based on inevitability was there sustained.

In this country as early as 1850 the Massachusetts court in an historic case had held an instruction placing the burden of proving inevitability upon the defendant to be error, where defendant, in separating two fighting dogs, raised a stick and accidentally struck plaintiff in the eye.[7] Following these common-law landmark cases the ethical quality of the defendant's act ("was the act blameworthy?")

[3] Town & Country Sec. Co. v. Place, 79 Ariz. 122, 285 P.2d 165 (1955).

[4] Ames, *Law and Morals*, 22 HARV. L. REV. 97 (1908), cited in POUND, SELECTED ESSAYS ON THE LAW OF TORTS 1-17 (1924).

[5] Hobart 135, 80 Eng. Rep. 284 (K.B. 1616); and see Jensen v. Minard, 44 Cal. 2d 289, 282 P.2d 7 (1955), a modern gunshot case.

[6] Stanley v. Powell, [1891] 1 Q.B. 86.

[7] Brown v. Kendall, 60 Mass. 292, 6 Cush. 292 (1850).

began to play as much a part in determining liability as did the responsibility for the act itself.

Thus the pendulum of the common law swung from a viewpoint which focused on the fact of injury to a view which focused on the culpability of the actor who in fact was the cause of the loss. The familiar maxim that the burden of loss from injury would not be shifted unless the actor demonstrated fault based upon a "reasonable man" standard of conduct became the universal rule. It has thus become fashionable to instruct juries that the first consideration in the sanctity of the jury room is to evaluate the liability issues before considering any damages issues.[8]

Opposed to fault are the non-fault concepts of "mistake" or "accident." A two-car collision occurs; if neither of the two drivers was at fault — if the collision was not the result of foreseeable error — then perhaps logically the result may have been inevitable. But a jury evaluating the factual situation, might conclude (a) plaintiff has failed to sustain the burden of proof that the fault was defendant's; or (b) plaintiff's proof has shown that defendant's act was not the true cause of the collision; or (c) though defendant was at fault, plaintiff shared in this fault, or was contributorily negligent. All three of these conclusions leading to a defense verdict are covered by instructions, usually in stock form, which cover burden of proof, proximate cause, and contributory negligence. With these several barriers thrown up in the path of the plaintiff, and with the concept of fault fully explained,[9] it is submitted that rare indeed would be the occasion for an additional instruction raising the concept of inevitability or absence of human error. Nevertheless, the early writers linked inevitability to non-negligence.

> The plea of inevitable accident is that the consequences complained of as a wrong were not intended by the defendant and could not have been foreseen and avoided by the exercise of reasonable care.[10]

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[8] ARIZ. UNIFORM JURY INSTRUCTION No. 1.

[9] For example, ARIZ. UNIFORM JURY INSTRUCTION No. 3 provides:

> There are a few general principles which may be helpful to you in your determination of the negligence issues. In the first place, you cannot assume that either party was negligent simply because the other party has raised this issue in his pleadings.
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> Secondly, the mere fact that an accident took place considered alone will not support any inference or conclusion that either party was guilty of negligence.
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> Third, you should not decide the issue of negligence on the basis of guesswork, speculation or your personal hunches unsupported by the evidence. A finding of negligence, like any other fact, must be based on actual evidence admitted into the case.
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> Further, the fact that a party might have avoided an accident by some conduct other than that used is not sufficient, considered alone, to prove that he was negligent. Different individuals, all exercising ordinary care, might behave differently under the same circumstances.

[10] SALMOND, LAW OF TORTS 16 (4th ed. 1904).

Since the evolution of fault (measured by negligence) has now been firmly established, there seems little need, barring unusual facts, to hearken back to a definition of inevitability by way of an instruction. This type of negative definition adds nothing to a jury's deliberation which is not already covered by the stock instructions on negligence and causation. The conclusion then reached is that *in the absence of proof of some extrinsic factor of fortuitous circumstances, unavoidable accident has no place in the determination of a negligence case.*

Stating this premise in another manner, it does not follow that every non-negligent accident is therefore unavoidable. It is easy to conceive of cases where defendant may be found to have done everything a reasonable actor would do, and yet, by exercising a higher degree of care, he might have prevented the accident. The law requires only a reasonable or ordinary standard of care, and the defendant escapes liability by measuring up to this standard. The refusal of the law to charge defendant with responsibility is not an admission that the accident was inevitable.

Those courts which equate inevitability with non-negligence most frequently allow unavoidable-accident instructions in ordinary traffic accidents. It is submitted that the equation is unjustified. Fault, or its absence, may be determined by the trier of fact without the hypothesis of inevitable accident. Furthermore, the injection of this extraneous theorum tends to confuse the liability issue. The prejudice of giving the instruction generally far outweighs the refusal so to instruct.[11]

II.

One draws a fine line of reasoning when attempting to distinguish between inevitability and non-negligence in application of these concepts to a given set of facts. If a hypothetical intersection collision involves two cars colliding at an open intersection, each traveling on a different street, it appears rather clear that without the intervention of an outside force an accident is not inevitable. Defendant may escape liability on any one of the other bases indicated above, but should not be allowed to suggest to the jury, through an instruction thereon, that the real explanation of the accident is inevitability. The leading case on this point and a landmark case for the philosophy of the limited applicability of unavoidable acci-

[11] It seems worth noting that the Restatement of Torts does not treat unavoidable accident as an entity of the law. Simplified, the Restatement approach states that creation of a foreseeable, unreasonable risk, voluntarily created by a knowledgeable actor, is negligence. This embodies the corollary that the unforeseen (thus unavoidable) risk creates no liability. In defining negligence it is the foreseeable external force which creates liability. But if the act of defendant creates a situation involving an unreasonable risk to another because of the expectable force, then the act creates liability. RESTATEMENT, TORTS § 302, at 814 (1934).

dent instructions in general, is *Butigan v. Yellow Cab Co.*[12] Mrs. Butigan was a passenger in a Yellow Cab proceeding north when it was struck by co-defendant's automobile proceeding south as the taxicab attempted a left turn into the southbound lane. On appeal from a verdict in favor of the co-defendants, the California Supreme Court, en banc, by a four-to-three decision, reversed the defense verdict for the giving of an instruction on unavoidable accident. In doing so, the California court expressly overruled *Parker v. Womack,*[13] and a long line of California cases following the rule of *Parker v. Womack.* The latter case had stated that the defense of unavoidable accident is not limited to cases where there is evidence of causation by a superior or irresistible force, or by an absence of exceptional care, but that a determination that an accident is unavoidable is also proper where the evidence merely shows that the plaintiff has failed in his proof.[14] Subsequent California cases prior to *Butigan* had interpreted that the giving of an instruction on unavoidable accident is proper "unless the defendant is negligent as a matter of law."

The California court in *Butigan* reconsidered the so-called defense of unavoidable accident, pointing out that under the early action of trespass this was an affirmative defense to be pleaded and proved by the defendant. The court then went on to state:

> In the modern negligence action, the plaintiff must prove that the injury complained of was proximately caused by the defendant's negligence, and the defendant, under a general denial, may show any circumstance which militates against his negligence or its causal effect. The so-called defense of inevitable accident is nothing more than a denial by the defendant of negligence, or a contention that his negligence, if any, was not the proximate cause of the injury.
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> Since the ordinary instructions on negligence and proximate cause sufficiently show that the plaintiff must sustain his burden of proof on these issues in order to recover, the instruction of unavoidable accident serves no useful purpose.[15]

The court noted as significant that no decision in California has ever held that *refusal* to give the instruction was reversible error. It went on to point out that the instruction is not only unnecessary but also confusing, since the jurors may get the impression that unavoidability is a separate issue to be decided. It sounded a caveat that situations could exist where it might be necessary to explain the meaning of the words "unavoidable accident" — where, for example, the words

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[12] 49 Cal. 2d 652, 320 P.2d 500, 65 A.L.R.2d 1 (1958); Annot., 65 A.L.R.2d 12 (1959).
[13] 37 Cal. 2d 116, 230 P.2d 823 (1951).
[14] 230 P.2d at 827.
[15] 49 Cal. 2d 652, 320 P.2d 500, 504 (1958).

themselves form a part of a vehicle code. It further left available the applicability of the instruction to unusual circumstances:

> The determination whether, in a specific instance, the probable effect of the instruction has been to mislead the jury and whether the error had been prejudicial so as to require a reversal depends on all the circumstances of the case, including the evidence and the other instructions given. No precise formula can be drawn.[16]

Thus in effect the court was substantially destroying the use of unavoidable accident instructions in California, but at the same time indicating that where such an instruction has been given, no automatic reversal would be required, unless it further appeared that a probability of prejudice exists. Subsequent decisions in California have shown the validity of this caveat, for the court has, since *Butigan*, sometimes refused to reverse a decision where an unavoidable accident instruction was given, for lack of actual prejudice.[17] But a host of other cases have found reversible prejudice where the evidence discloses no condition or action apart from the conduct of the parties which would sustain acquitting both of negligence.[18]

A strong dissent in *Butigan* found the term ". . . affirmatively, completely, and yet briefly, descriptive of that which had actually happened (the accident, with ensuing injury, without actionable fault). . . ." It treats the unavoidable-accident instruction as a means of simplifying and explaining the rules of negligence to a jury, arguing that it is an expression of the concept of negligence in affirmative rather than negative terms. It points out that the defense of unavoidable accident embraces the concept of "an Act of God" which classically has been held to be the basis for a defense that the accident was inevitable.

The defect in the dissent's argument, it is submitted, lies in applying the abstraction to a set of facts where reasonable minds should not differ that inevitability is absent. It can hardly be suggested that whenever two intersecting streets are created by a municipality, inevitably an accident will occur at the intersection. As one California appellate court has said:

> Each driver could have seen the other in time to slow down or stop and thus avoid a collision. The accident could not have happened if neither driver had been negligent. It is sheer nonsense to say that both drivers could be found free of negligence. If it was a common practice to drive into intersections blindly, taking a chance that they would be found clear, there

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[16] 320 P.2d at 505.
[17] See Alarid v. Vanier, 50 Cal. 2d 617, 327 P.2d 897 (1958).
[18] See Hildebrand v. Atchison, T. & S.F. Ry., 343 P.2d 114 (Cal. 1959), and cases cited therein.

> would be thousands of collisions at intersections, where now there is but one.[19]

California and Missouri are generally considered to have disapproved the doctrine in full, and several other states (notably Washington) have indicated lack of confidence or distrust in the instruction.[20] For example, the New Jersey court in *Wilcox v. Christian & Missionary Alliance*[21] agreed with the California majority in *Butigan*, stating that ". . . It is not the duty of a trial judge to entertain a request to charge abstract legal principles . . . which are more likely to perplex than to assist the jury." In *Piper v. Mayer*,[22] it is stated that the doctrine of unavoidable accident is possessed of only "limited usefulness." Recently the Colorado Supreme Court[23] reversed a case for the giving of an unavoidable-accident instruction with respect to a rear-end collision, distinguishing this type of case from those in which an instruction on unavoidable accident had been held proper.[24]

In *Raz v. Mills*[25] the Oregon Supreme Court reiterated that the instruction is not one that should be given in the ordinary case, but affirmed its use on the facts. It should be noted, however, that an earlier companion case[26] had allowed a recovery for the wife of the same plaintiff against the same defendant.

The Supreme Court of Utah in *Wellman v. Noble*[27] discussed the failure of the trial court to instruct on unavoidable accident, reiterating the rule of *Porter v. Price*[28] that where the facts warrant such an instruction it is not error to give same. The court then states:

> However, actually such an instruction in most cases is superfluous, in view of the other instructions which are given covering the basic issues in accident cases, and serves no useful purpose except to add to the length of the instructions and to

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[19] Halleck v. Brown, 64 Cal. App. 2d 586, 330 P.2d 852, 854 (1958).

[20] 65 A.L.R.2d 27-31 (1959).

[21] 124 N.J.L. 527, 12 A.2d 709 (1940).

[22] 145 Colo. 391, 360 P.2d 433 (1961).

[23] Sullivan v. Laman, 375 P.2d 92 (Colo. 1962).

[24] The Colorado court reiterated the statement made in *Piper v. Mayer* that such an instruction has "been restricted in its application to a particular type of case." Illustrative of the "particular type" of case in which an instruction on unavoidable accident has been held proper are Parker v. Couch, 145 Colo. 209, 358 P.2d 609 (1960) (evidence of a severe dust storm); Ridley v. Young, 127 Colo. 46, 253 P.2d 433 (1953) (evidence of a locked front wheel); and Iacino v. Brown, 121 Colo. 450, 217 P.2d 266 (1950) (evidence of a mechanical defect in steering wheel).

[25] 378 P.2d 959 (Ore. 1963).

[26] 231 Ore. 220, 372 P.2d 955 (1962).

[27] 12 Utah 2d 350, 366 P.2d 701 (1961).

[28] 11 Utah 2d 80, 355 P.2d 66 (1960).

> that extent detracts from their effectiveness. We know of no case where this court has ever held the failure to give an instruction on unavoidable accident to be prejudicial error.[29]

This case involved a situation where plaintiff's car had stopped due to a breakdown ahead, near the crest of a hill. Defendant had been following for some five miles, came over a crest and rammed the plaintiff, stating that he didn't realize that plaintiff was stopped until he was about 100 feet away and too close to stop. One judge, concurring only in the result, made the following succinct statement:

> Courts too frequently assume that:
> 1) In every personal injury case one of the litigants was or must have been negligent; or that
> 2) There is no such thing as an unavoidable accident. I consider such assumptions to have been employed all too frequently. To their dignity we pay tribute by flouting bothersome points on appeal with the convenient method of generalizing non-prejudice.[30]

A case from the Kansas Supreme Court[31] involved a left-turning plaintiff who had signaled, then was struck in an intersection by an oncoming defendant. The court held (on appeal from a defense verdict) in reversing same, that it was error to give an instruction on unavoidable accident or submit a special question on the issue to the jury. This has been affirmed in *Employers' Mut. Cas. Co. v. Martin*,[32] wherein the several Kansas cases which have discussed unavoidable accident are cited. The latter case presented a novel argument favoring the instruction. Defendant sought to support the giving of the instruction by pointing out that throughout the trial plaintiff had sought to avoid his own misconduct by showing that its consequences were unavoidable so far as his actions were concerned. The court re-voiced the proposition that ". . . when an accident is caused by negligence there is no room for application of the doctrine. . . ."

Montana has followed this same line of reasoning, in *Leach v. Great No. Ry.*,[33] citing earlier decisions to the same effect and the annotation, discussed above, in 65 *A.L.R.* In that case, decedent had fallen from a turning truck, directly in the path of a following transport. The court held that no theory which excluded negligence on someone's part was supported by the evidence.

Justice Weaver of the Washington Supreme Court has fully summarized the attitude of that state in a comprehensive decision en-

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[29] Wellman v. Noble, 12 Utah 2d 350, 366 P.2d 701, 702 (1961).
[30] *Id.* at 705.
[31] Kreh v. Trinkle, 185 Kan. 329, 343 P.2d 213 (1959).
[32] 189 Kan. 498, 370 P.2d 110 (1962).
[33] 139 Mont. 84, 360 P.2d 94, 97 (1961).

titled *Cooper v. Pay-N-Save Drugs, Inc.*[34] Plaintiff was a customer of defendant's department store when she caught her foot on the leg of a barbecue grill and fell. A defense verdict was reversed for the giving of an instruction on unavoidable accident. The court states that the Washington rule was never so broad as the California rule prior to *Butigan*, and then classifies the Washington decisions under six headings, as follows:

> I. (a) Instruction given; defendant verdict; instruction approved; judgment affirmed.
> I. (b) Instruction given; defendant verdict; instruction approved; judgment reversed on other grounds.
> I. (c) Instruction given; defendant verdict; error to give instruction; judgment reversed.
> I. (d) Instruction given; plaintiff verdict.
> II. (a) Instruction requested; refused; plaintiff verdict; judgment affirmed.
> II. (b) Instruction requested; refused; plaintiff verdict; judgment reversed.[35]

The court then concludes:

> This court has never reversed a trial court for refusing to give a defendant's requested instruction on unavoidable accident. Since this court has not, to this date, regarded a refusal to give the unavoidable-accident instruction as reversible error and has on at least three occasions . . . held it error to give the instructiton, it would appear better practice to omit it except in those instances in which, quite plainly, it is peculiarly appropriate.[36]

Perhaps no clearer warning to the trial bar on the dangers of toying with this concept could be penned.

III.

The attempts of counsel to frame an issue in terms of unavoidable accident may be significant as a matter of pleading, of proof or of instruction to a jury. Actually the last situation has provided the greatest area of disagreement among the cases. The obvious incentive for these attempts by the defense is to set up an explanation or justification for what has occurred. It is not enough sometimes for defense counsel merely to contend that defendant was not negligent, since the jury will want an explanation to rationalize how the particular event happened. The question is really negligence vel non, but the tendency of defense counsel is to bemoan an

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[34] 59 Wash. 2d 829, 371 P.2d 43 (Wash. 1962).

[35] *Id.* at 45-47.

[36] *Id.* at 47.

"unfortunate accident" and hope that the jury will then sympathize with the defendant, who is himself a victim of fate.

Must defendant affirmatively plead unavoidable accident? Rule 8(c) of the Federal Rules of Civil Procedure[37] does not expressly answer the question. If the concept is really nothing more than the equivalent of non-negligence, it would seem to be put in issue by a general denial.[38] However, if the concept is more restrictive, as suggested herein, then it should be affirmatively pled, as ". . . any other matter constituting an avoidance or affirmative defense." Thus the defense counsel who has a peculiar set of facts adapted to instruction on a specific issue of unavoidability should so state in his answer.[39]

Clearly, in order to give foundation for any sort of "accident" instruction (that is, an "accident," "mere accident," "pure accident," "unavoidable accident" or "inevitable accident" instruction) there must be in the record evidence which would give legal support to a finding that the occurrence complained of was of the nature indicated by the instruction.

The Arizona courts have held it is error to give an "accident" instruction where there is no evidence that the collision was inevitable or unavoidable.[40] Saying this another way, the courts have stated it is error to give an unavoidable-accident or inevitable-accident instruction where there is no evidence that the accident resulted other than from negligence.[41]

> The great weight of authority, with which we agree, is that an instruction upon the subject of "unavoidable accident" is improper and tends to mislead and confuse the jury unless there is sufficient evidence to make at least a prima facie case that the casualty in question was in fact the result of an unavoidable accident; an accident resulting from circumstances affording a reasonable basis on which to conclude that neither party was guilty of actionable negligence. A party is not entitled to an instruction on the theory of an unavoidable accident in the absence of any evidence on which to base it, or upon pleadings not raising the issue, such as where both parties

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[37] ARIZ. R. CIVIL P. 8(d).

[38] 2 HARPER & JAMES, THE LAW OF TORTS § 12.2 (1956) points out that at common law inevitability could be shown under the general issue, citing Gibbons v. Pepper, 1 Ld. Raym. 38, 91 Eng. Rep. 922 (K.B. 1695); see Jolley v. Clemens, 28 Cal. App. 2d 55, 82 P.2d 51 (1938).

[39] *But see* Webb v. Hardin, 53 Ariz. 310, 315, 89 P.2d 30 (1939).

[40] Noel v. Ostlie, 42 Ariz. 113, 22 P.2d 831 (1933).

[41] Gray v. Woods, 84 Ariz. 87, 324 P.2d 220 (1958); Town & Country Sec. Co. v. Place, 79 Ariz. 122, 285 P.2d 165 (1955); Emerton v. Acres, 160 Cal. App. 2d 742, 325 P.2d 685 (1958); Brenner v. Beardsley, 159 Cal. App. 2d 304, 323 P.2d 841(1958); Martz v. Ruiz, 158 Cal. App. 2d 590, 322 P.2d 981 (1958).

charge negligence in their pleadings.[42]

During 1962-1963, the Arizona Supreme Court wrestled seriously with the problems of an instruction on unavoidable accident. In *McKeever v. Phoenix Jewish Community Center*,[43] plaintiff appealed a defense verdict in a suit for wrongful death of his minor daughter who was drowned by jumping into the deep end of a swimming pool with other small children. On appeal plaintiff contended the court's instruction on unavoidable accident was erroneous. The court cited 65 *C.J.S.* Negligence § 21 (1950), as follows:

> Unavoidable accident does not necessarily mean one which it is physically impossible in the nature of things for defendant to have prevented, but one in which ordinary care and diligence could not have prevented the happening of the thing that did happen. . . .

The court's analysis is that the jury reasonably could conclude that the defendant was exercising ordinary care and there was some cause of death other than an act or omission by defendant. It concluded: "The theory of unavoidable accident is a very plausible explanation for the death of the child. The evidence justifies the court instructing the jury accordingly." (Citing cases.)[44] In *Johnson v. Orcutt*,[45] plaintiffs again appealed a defense verdict, attacking the giving of an instruction reading as follows:

> You are instructed that if you find that the accident and injuries to plaintiff occurred without having been proximately caused by negligence on the part of the defendant, Orcutt, the plaintiffs may not recover in this case. A plaintiff may not recover for injuries caused by an accident which was not proximately caused by negligence. And this is true notwithstanding you may find further that the accident could have been avoided by the exercise of exceptional foresight, skill or caution on the part of the defendant, Orcutt.[46]

At the trial when plaintiff objected, the trial judge indicated that this was not intended to be an unavoidable-accident instruction and that he would not give such an instruction, specifically prohibiting defense counsel from arguing from this instruction that the accident was unavoidable. The court states:

> The second sentence of the instruction ostensibly appears to express the substance of an unavoidable accident as laid down

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[42] 10c BLASHFIELD, CYCLOPEDIA OF AUTOMOBILE LAW AND PRACTICE § 6698 (1957); cited in Sirmons v. Pittman, 138 So. 2d 765, 774 (Fla. 1962).

[43] 92 Ariz. 121, 374 P.2d 875 (1962).

[44] *Id.* at 125, 374 P.2d at 878.

[45] 92 Ariz. 295, 376 P.2d 557 (1962).

[46] *Id.* at 298, 376 P.2d at 559.

> in *Town & Country Securities Co. v. Place*, 79 Ariz. 122, 126, 285 P.2d 165, and in *Gray v. Woods*, 84 Ariz. 87, 324 P.2d 220. Plainly the sentence is taken out of context. When read with the preceding sentence and the following sentence as being addressed to the defendant's negligence it does not bear the connotation sought to be imported to it by plaintiffs.[47]

Of course, what the appellate court has overlooked is that even if this is not an unavoidable accident instruction, it could well be criticized as a "negative instruction." No useful purpose is served in telling a jury the effect of a finding of "non-causation."

A leading Arizona case on this doctrine is *Town & Country Sec. Co. v. Place*.[48] This was a rear-end collision in which plaintiff sustained a "whiplash" injury (to use the terminology of the court). The testimony was that while operating the car defendant's foot slipped from the brake and the car rolled three feet forward, hitting plaintiff's car. The Arizona court adopted a definition from *McBride v. Woods*,[49] holding that this evidence would not justify a finding that the accident was unavoidable.[50] Generally, the defendant driver of an overtaking vehicle is not entitled to an unavoidable-accident instruction unless some unusual fact situation exists.[51]

In *Stewart v. Castro*,[52] plaintiff sued defendant for striking a herd of cattle on the highway and killing six head of dairy cattle. On appeal from a defense verdict the Supreme Court reversed for a new trial, holding there was sufficient evidence to avoid a directed verdict in defendant's favor. The evidence indicated that forty-five or fifty head of dairy cattle strayed onto a road due to a lot of shooting in the neighborhood in celebration of New Year's Eve. Defendant's car, traveling at about fifty miles per hour, plowed into the herd of dairy cattle blocking the highway, but defendant admitted that he "did not see the cattle until he was right on top of them." The court stated:

> The defendant cannot invoke the rule of unavoidable accident, which applies in cases where animals suddenly dodge in front of an automobile traveling at a reasonable rate of speed on a highway and are struck before the driver can avoid the accident. See 60 *C.J.S.*, Motor Vehicles, § 409, and *Holmes v.*

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[47] *Id.* at 298, 376 P.2d at 560.

[48] 79 Ariz. 122, 125, 285 P.2d 165, 167 (1955).

[49] 124 Colo. 384, 238 P.2d 183, 29 A.L.R.2d 101 (1951).

[50] Compare Stephenson v. Wallis, 181 Kan. 254, 311 P.2d 355 (1957), holding under similar facts that defendant is not guilty of negligence as a matter of law, and an unavoidable-accident instruction is permissible.

[51] Van Ry v. Montgomery, 58 Wash. 2d 46, 360 P.2d 573 (1961). This type case must be distinguished from sudden-brake-failure situations, discussed under the topic of mechanical malfunctions, *supra*.

[52] 76 Ariz. 147, 261 P.2d 371 (1953).

Lindsey, La. App., 15 So. 2d 89. The sluggish movement of a herd of dairy cattle is a matter of common knowledge.[53]

Gray v. Woods[54] was an appeal from a defense verdict in a wrongful death action for the death of a passenger of an automobile struck by a truck at night while it was stopped, without lights, on a highway due to a mechanical failure. The court stated that there was no evidence in the case tending to show that the death resulted from any cause other than negligence on the part of someone; therefore the issue of unavoidable accident was not present, and the instruction (in the absence of such evidence raising a genuine issue upon the question) was held reversible error.[55]

In *Beliak v. Plants*,[56] defendant backed his car out of the driveway without observing plaintiff, an infant of 5½ years in a small red wagon. The Supreme Court suggests that the instruction on unavoidable accident would have been appropriate had it not suggested contributory negligence on the part of the 5½ year old, which the Court held was reversible error. Upon the retrial of the case, an unavoidable-accident instruction was again given and again a defense verdict resulted. On appeal, plaintitff again complained that to instruct on this issue was error,[57] but the Court held that approval of such an instruction was the "law of the case." Plaintiff then pointed out that there had been a "change in facts" since the first trial and appeal. Examining this new evidence, the Court found nothing new to suggest that the giving of the instruction was prejudicial.

Definitions of the concept have not been uniform.[58] These have included a negative approach ("An accident which under all the circumstances could not have been foreseen, anticipated or avoided in the exercise of ordinary care");[59] statements reminiscent of liability

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[53] *Id.* at 151, 261 P.2d at 373.

[54] 84 Ariz. 87, 324 P.2d 220 (1958).

[55] The opinion cites as authority for reversal McBride v. Woods, 124 Colo. 384, 238 P.2d 183 (1951); Brewer v. Berner, 15 Wash. 2d 644, 131 P.2d 940 (1942); Schmid v. Eslick, 181 Kan. 997, 317 P.2d 459 (1957); Tyree v. Dunn, 315 P.2d 782 (Okla. 1957), all discussed hereafter. *But see* Beliak v. Plants, 93 Ariz. 266, 379 P.2d 976, 977 (1963) [second case], wherein our court "interprets" what it had said in *Gray v. Woods* as if the latter were authority for "giving" such an instruction.

[56] 84 Ariz. 211, 326 P.2d 36 (1958).

[57] Beliak v. Plants, 93 Ariz. 266, 379 P.2d 976 (1963). The earlier opinion also illustrates the point that an incomplete or misleading unavoidable-accident instruction is likewise defective. Thus, in *Martin v. Gomez*, 69 N.M. 1, 363 P.2d 365 (1961), a "darting child" case, the New Mexico court approved the use of the concept, but reversed for defect in form. The instruction used merely stated that plaintiff could not recover if her injury ". . . was the result of an unavoidable accident." The court held that this phrase alone is not sufficient to apprise the jury of its import, and is misleading without definition, citing Stambaugh v. Hayes, 44 N.M. 443, 103 P.2d 640, 643 (1940).

[58] See Annot., 65 A.L.R.2d 124 (1959).

[59] Gray v. Woods, 84 Ariz. 87, 324 P.2d 220 (1958).

issues (". . . an occurrence for which there is no legal liability");[60] exclusionary statements, ("[an event] for which fate alone is responsible . . . Something other than the negligence of one of the parties caused the injuries. . . . ");[61] (". . . an unexpected catastrophe occurs . . ."), and statements of proximate causation (". . . one not proximately caused by negligence").[63]

We may summarize by concluding that, for purposes of instructions to the jury, an unavoidable accident is one which is more than merely unexpected and less than humanly inevitable or unpreventable. At the least it must be a situation where the accident which occurred was not caused, in any degree, by acts or omissions of any of the parties. But there should be more involved. Merely to test whether there is evidence of negligence on either or both sides, as a determinant of the applicability of the concept, must be discarded as fuzzy and obscure. After all, this is the negligence issue basic to the case. Perhaps a more complete test would be to ask:

> Is there any evidence that the accident might have occurred:
> a. To *anyone* in the same situation — e.g., removing these particular actors?
> b. Excluding completely any idea of negligence on the part of any party?[64]
> c. Even if both parties had exercised all the care a reasonable man would exercise under similar circumstances?
> d. Without warning or notice — such as by an "Act of God"?[65]

Having thus described a formula, it may readily be seen that this formula is no better and no worse than any other used by the courts. The utter confusion of the courts seems to stem basically

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[60] Lewis Pizitz Dry Goods Co. v. Cusimano, 201 Ala. 689, 91 So. 779 (1921).

[61] Hicks v. Brown, 136 Tex. 399, 151 S.W.2d 790 (1941).

[62] Owen v. Moore, 166 Neb. 226, 88 N.W.2d 759 (1958).

[63] Parker v. Womack, 37 Cal. 2d 116, 230 P.2d 823 (1951).

[64] Or, as succinctly stated by one authority, ". . . an occurrence to which human fault does not contribute." 65 C.J.S. *Negligence* § 21 (1950).

[65] *Id.* at 432. However, as one court has stated: "Every wind is not an Act of God." Swanson v. LaFontaine, 238 Minn. 460, 57 N.W.2d 262 (1953). Thus a defense of Act of God lies only where injury is due directly and exclusively to unforeseen and unpreventable natural causes, without human intervention. For example, in Fairbrother v. Wiley's, 183 Kan. 579, 331 P.2d 330, 81 A.L.R.2d 888 (1958), plaintiff was injured when defendant store's plate glass window blew out during a gusty windstorm. The court said:

> It may generally be stated that the defendant is not relieved of liability for negligence on the excuse that the "proximate cause" was some "Act of God," such as gusty wind in the instant case, where the so-called "Act of God" would not have wrought the injury but for the human negligence which contributed thereto.

The court therefore held that defendant could have foreseen the effects of gusty wind on its windows.

from a lack of adequate evaluation of the basic purpose of the concept or the necessity of giving it as an instruction. Once the court instructs on the basic rules of negligence, then rare indeed should be the case requiring an unavoidable-accident instruction. There are of course some situations which raise the issue of application of the instruction. Some of these follow.

IV.

Courts which otherwise show liberality in giving the unavoidable-accident instruction have shown no hesitation in refusing to reverse a case where the instruction was alleged to be improperly refused, for the reason that the substance of the instruction has been stressed in other instructions or because the other instructions have substantially covered the subject.[66] In the Arizona set of uniform instructions, the subject would seem to be rather fully and adequately covered, at least from the non-negligence concept, by the stock instructions on negligence plus Uniform Instruction No. 3.[67] Refusal to instruct on unavoidability can thus be justified generally, if the entire set of instructions is considered as a whole.

The question whether error in the giving or refusing of the instruction is reversible error has been somewhat confused. Arizona, like California, has held that giving the instruction where inapplicable is ground for reversal.[68] New Hampshire has gone so far as to indicate that the discretionary action of the trial judge in giving or refusing the instruction will ordinarily not be disturbed.[69] Arizona, however, has not been totally consistent, since in *Noel v. Ostlie*[70] the giving of the instruction, though held erroneous, was not made a basis for reversal.

Some courts have held that where the defendant has introduced evidence of a *specific* theory of how the accident happened without negligence of any of the parties, a proper groundwork for the giving of an instruction is presented.[71] This is particularly applicable to the pedestrian cases. Generally the defendant may anticipate pedestrians at an intersection or a crosswalk and should have his car under sufficient control to avoid collision with such a pedestrian.[72] Where a person darts between parked cars on a busy street in close proximity

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[66] See Annot., 65 A.L.R.2d at 50-51 (1959).

[67] See note 9 *supra.*

[68] Gray v. Woods, 84 Ariz. 87, 324 P.2d 220 (1958).

[69] LaDuke v. Lord, 97 N.H. 122, 83 A.2d 138 (1951).

[70] 42 Ariz. 113, 22 P.2d 831 (1933).

[71] Johnson v. Hodges, 121 S.W.2d 371 (Tex. Civ. App. 1938).

[72] Murphy v. Read, 157 Ore. 487, 72 P.2d 935 (1937) (failure to instruct not error).

to the approaching defendant's car, such an accident has sometimes been described as unavoidable, since the defendant could be found not to have anticipated the suddent event.[73]

Where the accident involves a pedestrian struck while the defendant is backing slowly into a street, the opinions are divided. It was held error to submit the question of unavoidable accident to the jury in *McBride v. Woods*,[74] and *McBride* has beeen cited with approval in Arizona.[75] Yet on similar facts use of the instruction was approved in Arizona in *Beliak v. Plants*. Again the determinant seems to be in most cases whether the particular jurisdiction historically has broadly used and approved the unavoidable-accident instruction, or whether the jurisdiction has adopted a limiting philosophy as to the concept.

The question of the child pedestrian raises an interesting problem in analysis. Since a child of tender years is generally, at law, incapable of contributory negligence, should not the defense be allowed to set up the hypothesis that the accident involving a small child is unavoidable? Logically, unless the "non-negligence" concept of unavoidability is followed, there is no more reason to raise unavoidable accident as to a child than as to an adult. The courts have not so held, however. In Arizona, for example, a sort of "tit-for-tat" exchange often takes place in settling instruction in a child-pedestrian case: The plaintiff gets an instruction on the foreseeability that a child of tender years may dart into the street,[76] and the defendant gets an instruction that the accident may have been unavoidable.[77] Where there is some evidence that the driver is not aware of the presence of children and could not reasonably have been put on notice, an instruction on the subject of unavoidable accident is perhaps justifiable.[78] Where a clear issue of fact has been defined by testimony that plaintiff was walking across the street in a crosswalk and opposing testimony that plaintiff was running diagonally or outside the lines, the instruction has been rejected.[79] This line of authority may be compared with that approving an unavoidable-accident instruction

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[73] Rainwater v. Boatwright, 61 So. 2d 212 (La. App. 1952); Snabel v. Barber, 137 Ore. 88, 300 Pac. 331 (1931); see Baca v. Baca, 71 N.M. 468, 379 P.2d 765 (1963) (child darting from behind weeds or shrubs); Martin v. Gomez, 69 N.M. 1, 363 P.2d 365 (1961).

[74] 124 Colo. 384, 238 P.2d 183, 29 A.L.R.2d 101 (1951); Hart v. Jackson, 142 So. 2d 326 (Fla. 1962).

[75] Town & Country Sec. Co. v. Place, 79 Ariz. 122, 285 P.2d 165 (1955).

[76] Womack v. Banner Bakery, 80 Ariz. 353, 297 P.2d 936 (1956).

[77] Beliak v. Plants, 93 Ariz. 266, 379 P.2d 976 (1963).

[78] See Rettig v. Coca Cola Bottling Co., 22 Wash. 2d 572, 156 P.2d 914 (1945).

[79] York Ice Mach. Corp. v. Sachs, 167 Md. 113, 173 Atl. 240, 246 (1934); Harrison v. Smith, 167 Md. 1, 172 Atl. 273 (1934); Schapiro v. Meyers, 160 Md. 208, 153 Atl. 27 (1931); Wright v. Quattrochi, 330 Mo. 173, 49 S.W.2d 3 (1932); American Nat'l Ins. Co. v. Shepherd, 91 S.W.2d 439 (Tex. Civ. App. 1935).

when more than one child is playing in a group and the jury might find that the plaintiff was jostled, pushed or otherwise propelled into defendant's path.[80]

Rear-end cases are not proper for the use of the doctrine if the only evidence is that defendant failed to stop in time;[81] and no issue of unavoidability is raised if defendant could have stopped in *some* manner, even if there is some evidence of inadequate brakes.[82] However, cases of mechanical malfunction often have been held to be proper subject for an unavoidable-accident instruction, at least in jurisdictions not otherwise opposed to the concept.[83]

A contrary opinion was found in *Klesath v. McQueen*,[84] where it was held reversible error to give an unavoidable-accident instruction notwithstanding the claim, supported by evidence, that the accident occurred when part of the car frame broke loose, putting the car out of control and rendering the brakes useless. This case can be explained under the Missouri authority which rejects the instruction in almost all cases.[85]

These defective-vehicle cases may be contrasted with those involving a suit against a manufacturer of goods on a theory of products liability, wherein it has been held that the doctrine of *res ipsa loquitur* applies. This latter doctrine, of course, should not apply unless "in the ordinary course of human affairs such an accident would not have occurred without negligence."[86] It would seem that unavoidable accident and *res ipsa loquitur* are mutually exclusive doctrines. However, the driver defendant should be able to make the argu-

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[80] Oliver v. Kelley, 300 Ill. App. 487, 21 N.E.2d 649 (1939); Webb v. Seattle, 22 Wash. 2d 596, 157 P.2d 312, 158 A.L.R. 810 (1945).

[81] Tyree v. Dunn, 315 P.2d 782 (Okla. 1957).

[82] See note 19 *supra*.

[83] Alarid v. Vanier, 50 Cal. 2d 617, 327 P.2d 897 (1958) (rearend collision after sudden, unexpected brake failure — a post-*Butigan* case); Daigle v. Prather, 380 P.2d 670 (Colo. 1943) (unaccountable, sudden brake failure); Eddy v. McAninch, 141 Colo. 223, 347 P.2d 499 (1959); Lestico v. Kuehner, 204 Minn. 125, 283 N.W. 122 (1938) (blowout, new car, heavy wood screw tore gash in tube); Kelly v. Gagnon, 121 Neb. 113, 236 N.W. 160 (1931) (a blowout is an "accident" creating no liability); Baxley v. Cavenaugh, 243 N.C. 677, 92 S.E.2d 68 (1956) (left door of car flew open, throwing defendant out, and car collided with plaintiffs — court suggests that unavoidable accident would apply if defendant proved a defective door latch); Reuter v. Olson, 79 N.D. 834, 59 N.W.2d 830 (1953); White v. Akers, 125 S.W.2d 388 (Tex. Civ. App. 1939) (portion of steering device broke); Thurman v. Chandler, 125 Tex. 34, 81 S.W.2d 489 (1935) (wheel came off four-day-old car); Lauber v. Lyon, 188 Wash. 644, 63 P.2d 389 (1936) (broken king pin); Murray v. Yellow Cab Co., 180 Wis. 314, 192 N.W. 1021 (1923) (spindle pin on steering gear suddenly broke).

[84] 312 S.W.2d 122 (Mo. 1958).

[85] See also Sirmons v. Pittman, 138 So. 2d 765 (Fla. App. 1962) (head-on collision — brakes "pulled" defendant to the left).

[86] See Capps v. American Airlines, Inc., 81 Ariz. 232, 303 P.2d 717 (1956).

ment that he was not at fault in the accident because of the defect in his car, and point the finger of guilt at the negligent manufacturer or dealer to exculpate himself. This alone does not mean the accident was unavoidable as to the driver, but rather that there was no fault on his part. In other words, these are not unavoidable-accident cases so much as they are cases involving the argument that the wrong party has been sued.[87]

Fog or other conditions of weather which obscure vision have been held to sustain an instruction on unavoidable accident.[88] These cases must be distinguished from those wherein the defendant by choice is moving into or through atmospheric obstructions to visibility. In such cases the instruction is disapproved.[89] Again it is submitted, the defense of responsibility of a third party should be adequate to resolve these cases without introducing the extra concept of unavoidable accident.

As with children, horses or other livestock running into the street have justified the giving of an unavoidable accident instruction.[90] However, suddenly stopping to avoid a dog is not unavoidable.[91] Again, the concept of an intervening act as the sole cause of the accident more adequately expresses proper defense posture without getting into unavoidability.[92] Thus, in *Raz v. Mills*,[93] the defendant on appeal

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[87] Rather than an unavoidable-accident instruction, defendant could rely on ARIZ. UNIFORM JURY INSTRUCTION 5-C, which states:

> When the negligent acts or omissions of two or more persons, whether committed independently or in the course of jointly directed conduct, contribute concurrently and as proximate causes to the injury of another, each of such persons is liable, regardless of the relative degree of the contribution. It is no defense for a defendant, whose negligence has been one of the proximate causes of an injury, to assert that some other person not joined as a defendant in this action also participated in causing the injury. This would be true even if it should appear to you that the negligence of that other person was greater in either its wrongful nature or its effect.

[88] Webb v. Hardin, 53 Ariz. 310, 89 P.2d 30 (1939) (dust raised by passing car obscured defendant's view); In re Erwin's Estate, 170 Kan. 728, 228 P.2d 739 (1951) (same); Winn v. Taylor, 111 S.W.2d 1149 (Tex. Civ. App. 1938) (same).

[89] Brenner v. Beardsley, 159 Cal. App. 2d 304, 323 P.2d 841 (1958) (fog with only 75-foot visibility); Jacobsen v. McGinnes, 135 Colo. 375, 311 P.2d 696 (1957); People's Drug Stores v. Windham, 178 Md. 172, 12 A.2d 532 (1940) (truck on grade enters dense cloud of smoke at high speed); Jones v. Rogers, 108 Pa. Super. 517, 165 Atl. 509 (1933) (fog—about 20-foot visibility); *but compare* Roadway Express v. Gaston, 91 S.W.2d 883 (Tex. 1936) (third party burning weeds, smoke obscured highway, plaintiff entered at high speed); Biladeau v. Pomerenke, 33 Wash. 2d 145, 204 P.2d 518 (1949) (snow hurled into air by highway machine obstructed view).

[90] Hester v. Hall, 17 Ala. App. 25, 81 So. 361 (1919); Elmore v. Dillard, 227 Ark. 260, 298 S.W.2d 338 (1957); Anderson v. Bendily, 66 So. 2d 355 (La. 1953); Craig v. Barret, 202 S.W.2d 257 (Tex. 1947).

[91] Williams v. Matlin, 328 Ill. App. 645, 66 N.E.2d 719 (1946) (reversed on other grounds).

[92] See Massie v. Salmon, 277 S.W.2d 49 (Ky. 1955).

[93] 378 P.2d 959 (Ore. 1963).

successfully justified a defense verdict where a jaywalking pedestrian had allegedly caused her to veer over the center-line, into plaintiff's path. The trial court had instructed on both unavoidable accident and sudden emergency. The Oregon Supreme Court affirmed the lower court's "discretion" in giving both instructions.[94]

An interesting issue is raised where co-defendants are involved. In theory at least, one of the defendants involved in an accident could be entitled to an instruction of the defense doctrine, though the other would not. For example, in *Wofford v. Lewis*,[95] driver *A* collided with driver *B* in the course of passing *B* and after passing another vehicle, as *B* made a sudden left turn. *B* driver was partially deaf and was thus not aware that he was being passed when he made his left turn. The jury was instructed on unavoidable accident and expressly found that the accident was unavoidable. On appeal this was affirmed, the court citing a long line of Oklahoma authority and stating:

> In its literal sense, an unavoidable accident is one that could not have been prevented by any means at all, and it may be argued as an abstract proposition that there is no such thing as an unavoidable accident. However, the literal meaning has never been ascribed to the phrase "unavoidable accident" in this jurisdiction.[96]

The court pointed out that Oklahoma had variously defined an accident as unavoidable when ". . . all means which common prudence suggests have been used to prevent it," or ". . . while all persons concerned were exercising ordinary care, being one not caused by the fault of any of the persons. . . ." Following this concept, it would be difficult to say that the happening of this particular accident was inevitable. The confusion in the Oklahoma case law has been aptly described in a comment, *Unavoidable Accident in Oklahoma*.[97] The author there points out that the Oklahoma court has even recognized unavoidable accident as an affirmative defense, therefore shifting the burden of proof to the defendant.[98]

The problems involved in an intersection collision can be compared to those encountered in a head-on collision. It seems logically next to impossible to conceive an unavoidable head-on collision,[99] without the interference of some outside force such as unusual weather conditions, a defective highway, or mechanical malfunction of the

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[94] Though the latter instruction may be rationalized, the former hardly seems appropriate to the facts.

[95] 377 P.2d 37 (Okla. 1962).

[96] *Id.* at 39.

[97] 14 OKLA. L. REV. 227 (1961).

[98] Tyree v. Dunn, 315 P.2d 782, 785 (Okla. 1957).

[99] Younger Bros. v. Power, 118 S.W.2d 954 (Tex. Civ. App. 1938).

vehicles, or an unavoidable physical malfunction of the driver such as a sudden heart attack or fainting spell. A driver who suddenly faints is not liable for damage done by his car.[100] The Arizona Court has held that there is no negligence in the case of a sudden, unforeseen death of a driver.[101] Of course, fault may lie if the sudden malfunction is in itself foreseeable.

> The very nature of a head-on or near head-on collission between motor vehicles when occurring on a comparatively straight street or highway, and under conditions of good or fair visibility seems to preclude all reasonable claim that the misadventure was an "unavoidable accident" or an event of similar description, except of course as the sudden and unpredictable act of a third person, or of an animal, or the sudden occurrence of mechanical or tire failure, or an equivalent, or of sickness or comparable misfortune, may ground an exception.[102]

Thus one court has refused an unavoidable-accident instruction on the grounds that defendant knew he was subject to epileptic seizures.[103] A leading case on the point that the unconscious driver cannot be liable in tort for unintentionally causing an injury is *Slattery v. Haley*.[104] Defendant "blacked out" while driving, without any history of such illness or preliminary symptoms, and struck a pedestrian. The court reiterated the idea of "no liability without fault" and pointed out that responsibility in tort must be bottomed upon either a willful or negligent act or omission.[105] Note that an evalution of such a situation requires no exploiting of an unavoidability theory. Nevertheless, some courts have approved the instruction.[106] In *Noel v. Ostlie*,[107] a collision occurred between cars proceeding in opposite directions. The Court pointed out that such a collision could not occur without fault, negligence or misconduct of someone, ". . . or, at least, there was no evidence that it was inevitable or unavoidable. . . ." The Court however affirmed, despite the giving of the erroneous unavoidable-accident instruction.

Suppose a party seeks to excuse an intersection collision because his view has been obstructed? Texas has allowed the issue to be

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[100] Cohen v. Petty, 65 F.2d 820 (D.C. Cir. 1933); McClean v. Chicago G.W.R.R., 3 Ill. App. 235, 121 N.E.2d 337 (1954).

[101] Pacific Employer Ins. Co. v. Morris, 78 Ariz. 24, 275 P.2d 389 (1954).

[102] 65 A.L.R.2d at 63 (1959).

[103] Eleason v. Western Cas. & Sur. Co., 54 Wis. 134, 35 N.W.2d 301 (1948).

[104] 52 Ont. L.R. 95, 3 D.L.R. 156 (1922).

[105] A contrary case, Leary v. Oates, 84 S.W.2d 486 (Tex. Civ. App. 1935).

[106] Moore v. Capital Transit Co., 226 F.2d 57 (D.C. Cir. 1955) (unanticipated convulsive seizure of motorman; instruction approved).

[107] 42 Ariz. 113, 22 P.2d 831 (1933).

submitted with an unavoidable-accident instruction,[108] and the instruction was sustained as against a passenger in one vehicle where the view of both drivers was obscured by high ground.[109] Actually, *Parker v. Womack*,[110] the earlier California case, was an obstructed-view case. (The dissenters therein became the majority in the *Butigan* decision.) However, in Texas in the case of *Ynsfran v. Burkhart*,[111] where defendant sought to excuse her failure to stop at a stop sign because it was not readily visible due to shrubbery, refusal to instruct on the doctrine was affirmed.[112] In *Mitchell v. Colquette*,[113] the Arizona Court stated:

> Plaintiff complained that the issue of an unavoidable accident should not have been submitted to the jury because there was not sufficient evidence to support it. On this issue we agree with the plaintiff. The defendants urge that their evidence shows that they were as cautious and careful as possible and that defendant Chance relied upon the actions of a third person who waved him into the intersection. Whether defendant Chance's conduct in entering the interesection, upon a signal from a third person, was negligence, was certainly a question for the jury. Whether defendant Colquette was negligent in his conduct was also a jury question. Even if the third person could be considered negligent, there is no indication in any of the evidence that the collision was caused by other than negligence on the part of one of the defendants in the case. It could not have been an unavoidable accident, and the giving of an instruction covering such an accident, in the absence of evidence raising a genuine issue upon that question was error. *Gray v. Woods*, 84 Ariz. 87, 324 P.2d 220 (1958).

Where a passenger or guest in the car sues his own driver, the rules applicable to two-car collisions would obtain; but suppose the facts show only a one-car accident, such as a rollover or a collision with an inanimate object? Generally, the driver or owner-defendant will not be entitled to an instruction on unavoidable accident with-

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[108] Vergauwen v. Parsons, 294 S.W.2d 863 (Tex. Civ. App. 1956).

[109] Fuller v. Neundorf, 293 P.2d 317 (Okla. 1956).

[110] 37 Cal. 2d 116, 230 P.2d 823 (1951).

[111] 247 S.W.2d 907 (Tex. Civ. App. 1952).

[112] Other intersection collision cases holding it error to give an unavoidable-accident instruction are: Halleck v. Brown, 164 Cal. App. 2d 586, 330 P.2d 852 (1958); Herdt v. Darbin, 126 Colo. 355, 249 P.2d 822 (1952); Royal Cab Co. v. Hendrix, 96 Ga. App. 44, 99 S.E.2d 355 (1957); Schmid v. Eslick, 181 Kan. 997, 317 P.2d 459 (1957); Paolini v. Western Mill & Lumber Corp., 165 Md. 45, 166 Atl. 609 (1933); McClarren v. Buck, 343 Mich. 300, 72 N.W.2d 31 (1955); Owen v. Moore, 166 Neb. 226, 88 N.W.2d 759 (1958); Hodgson v. Pohl, 9 N.J. 488, 89 A.2d 24 (1952); Frazier v. Conner, 191 Va. 481, 61 S.E.2d 880 (1950). This is particularly sound where the plaintiff is a passenger in the vehicle.

[113] 93 Ariz. 211, 379 P.2d 757 (1963).

out some peculiar external force intervening.[114]

Several cases have involved vehicles or persons stopped or standing on the highway.[115] Where plaintiff stops on the highway at night because of motor trouble, gets out on driver's side and is struck by an overtaking automobile, the giving of an instruction on unavoidable accident is error.[116] Where plaintiff's automobile was parked partly on the highway and defendant crashed into it, such giving of an instrution was held reversible error.[117] In that case even though there was some evidence of skidding due to rain, this was held not enough evidence to validate the giving of the instruction.

Slip-and-fall cases are particularly suited to an argument that nobody was at fault, inviting the defendant to request an instruction on unavoidable accident. A leading case in Kansas[118] discards the doctrine in a case where the defendant obtained an instruction in a slip-and-fall matter. The court's reasoning is as follows:

> Generally speaking, as applied to negligence cases, the term "unavoidable accident" excludes and repels the idea of negligence, and refers to one which is not occasioned in any degree, either directly or remotely, by the want of such care or prudence as the law holds every person bound to exercise — that is, an occurrence which is not contributed to by the negligent act or omission of either party. In one sense, the term is synonymous with "mere accident" or "pure accident," which imply that the accident was caused by some unforeseen and unavoidable event over which neither party had control. Following *Knox v. Barnard,* 181 Kan. 943, 317 P.2d 452; *Schmid v. Eslick,* 181 Kan. 997, 317 P.2d 459; *Carlburg v. Wesley Hospital & Nurse Training School,* 182 Kan. 634, 323 P.2d 638; *Kreh v. Trinkle,* 185 Kan. 329, 343 P.2d 213.
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> Generally speaking, when an accident is caused by negligence there is no room for application of the doctrine of "unavoidable accident," even though the accident may have been "inevitable" or "unavoidable" at the time of its occurrence, and one is not entitled to the protection of the doctrine if his negligence has created, brought about, or failed to remedy a dangerous condition resulting in a situation where the accident is thus

[114] Fulton v. Shaw, 321 F.2d 545 (5th Cir. 1963); Kelly v. Hanwick, 228 Ala. 336, 153 So. 269 (1934); Burns v. Storchak, 331 Ill. App. 347, 73 N.E.2d 168 (1947); Kaley v. Huntley, 333 Mo. 771, 63 S.W.2d 21, subsequent opinion 88 S.W.2d 200 (1933); Smith v. Tatum, 199 Va. 85, 97 S.E.2d 820 (1957). However, compare Daly v. Springer, 244 Minn. 108, 69 N.W.2d 98 (1955), where the car traveling at a moderate speed struck a slippery gravel spot, skidded and left the road. It was held not error to instruct on unavoidable accident. See also Lane v. Varner, 89 Ga. App. 47, 78 S.E.2d 528 (1953), where the evidence indicated a dog in the car had jumped at the defendant driver, momentarily causing him to remove his eyes from the road. A "bumble-bee" case holding inevitable accident not applicable is Sharp v. Kahn, 143 So. 514 (La. App. 1932).

[115] Employers' Mut. Cas. Co. v. Martin, 189 Kan. 498, 370 P.2d 110 (1962).

[116] Hidden v. Malinoff, 174 Cal. App. 2d 845, 345 P.2d 499 (1959) (following *Butigan*).

[117] Horrocks v. Rounds, 70 N.M. 73, 370 P.2d 799 (1962).

[118] Paph v. Tri-State Hotel Co., 188 Kan. 76, 360 P.2d 1055 (1961).

> "inevitable" or "unavoidable" at the time of its occurrence. In other words, a person is liable for the combined consequences of an "inevitable" or "unavoidable" accident and his own negligence.[119]

The *Carlburg* case held that unavoidable accident did not apply where plaintiff had fallen out of bed in the hospital recovery room, because defendant had failed to place side boards on the bed. The Arizona Court has also discarded unavoidable-accident instructions in slippery-floor cases.[120] This is also true in California.[121]

In setting out the several situations where courts have permitted use of the doctrine of unavoidable accident the basic growing disapproval of the theory in "ordinary" situations should not be obscured. It would appear that statistically several times more cases uphold refusal to instruct or reverse for improperly instructing than uphold the giving of the instruction. This is as it should be. Redundant, technical, misleading or inappropriate instructions have no place in the trial of tort claims.[122]

Conclusion:

In approaching the issue of the propriety of giving an unavoidable-accident instruction, two well-defined areas of thought — which we may oversimplify by defining as the narrow and broad views — have emerged in the jurisprudence of this country. If the philosophical approach of the court is defined, then it becomes a much easier task to predict the probable outcome of such an instruction on an appeal in a particular case.

Here in Arizona, it is submitted, the philosophical approach has been too broad, so that, consequently, unavoidable accident instructions are used in many cases where the evidence does not readily sustain an adequate foundation for the use of the doctrine. It would seem appropriate for our court now to re-examine its approach to this doctrine.

We may conclude further that the doctrine of unavoidable accident is becoming generally disfavored in the law. One can conceive of some isolated instances where it might be appropriate; but in 90% of the cases it is distorting, misleading and unduly emphasizes but one issue in the negligence picture. Absent some *deux ex machina* in the form of a human or nonhuman interference with probability, the added instruction is unnecessary. It is submitted that the noticeable trend in the courts to discard the instruction except in "special" cases is most consisent with modern negligence theory and practice.

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[119] See Cagel Limestone Co. v. Kansas Power & Light Co., 190 Kan. 544, 376 P.2d 809 (1962).

[120] Glowacki v. A. J. Bayless Markets, 76 Ariz. 295, 305, 263 P.2d 799 (1953).

[121] Levin v. Union Oil Co., 174 Cal. App. 2d 402, 345 P.2d 14 (Cal. 1959).

[122] Of note is the approach contended by some, that the entire instruction ritual is inappropriate. On the declining use of the defense of unavoidable accident, see 29 NACCA L.J. 51, at 57-8.