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Abstracts of Recent Cases

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deal with damages. Perhaps in later cases some acceptable guidelines will be established.

There is an inconsistency in recognizing a wrong but not providing a remedy. It has been suggested that living with this dilemma will do less harm to society than providing a solution in the courts. 18 STAN. L. REV. 530 (1966). Nevertheless, the court in the principal case seems to have provided a realistic remedy in that particular factual situation.

David Ray Rexroad

Torts—Unavoidable Accident

P was a passenger in an automobile driven by his brother which was involved in a collision with an automobile driven by *D*. Evidence indicated that both automobiles entered an intersection on a green light. *P* brought an action against *D* for personal injuries. The trial court entered a "take nothing" judgment. *Held*, affirmed. The evidence, including testimony that both drivers properly entered the intersection on a green light, supported a jury finding that neither driver was negligent and justified giving an instruction concerning unavoidable accident. *Bolling v. Clay*, 144 S.E.2d 682 (W. Va. 1965).

The question of when an instruction of unavoidable accident is proper in this jurisdiction is one that has not been easy to answer in the past. The court in the principal case has taken a step toward clarifying the position of West Virginia in an area which has been frustrating and confusing to the most experienced lawyer. An unavoidable accident as defined by the court in the principal case, "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." The principal case, *Bolling v. Clay*, *supra* at 688.

There is much confusion as to when an instruction concerning an unavoidable accident may be given. In the majority of jurisdictions, the basic rules applicable to instructions apply. Most jurisdictions require that there be evidence in the record which

would support a finding that an occurrence complained of was of the nature indicated by the instruction, and it must be shown by the record that the jury would be justified in finding that there was no negligence on the part of either the plaintiff or the defendant. See, *e.g.*, *Rowton v. Kempf*, 190 Okla. 558, 125 P.2d 103 (1942).

The majority of jurisdictions justify the instruction by the need to call to the jury's attention the fact that they are under no obligation to find that someone was at fault and must respond in damages. Jurors may need to be reminded that accidents sometimes happen through the fault of no one and that not all accidents are caused by negligence. *Schapiro v. Meyers*, 160 Md. 208, 153 Atl. 27 (1931); *Wheeler v. Glazer*, 137 Tex. 341, 153 S.W.2d 449 (1941).

In a substantial number of jurisdictions, the courts will refuse an instruction on unavoidable accident. Several important issues are raised by refusing the instruction. Perhaps the leading case on this question is *Butigan v. Yellow Cab Co.*, 49 Cal. App. 2d 652, 320 P.2d 500 (1958), in which the court did not allow the instruction and declared that since it merely restates a feature of the law of negligence which in substance is necessarily covered by proper instructions on negligence, burden of proof and proximate cause, it is not needed. It was submitted that the instruction served no useful purpose, operated to over-emphasize the defendant's case and was apt to confuse and mislead the jury.

In the ordinary negligence case the plaintiff must show by a preponderance of the evidence that the defendant was negligent and that this negligence was the proximate cause of the injury. Since an unavoidable accident is simply an accident in which the defendant was not negligent, it may be argued that adequate instructions on negligence, proximate cause and the respective burdens of proof should fully inform the jury of the law in regard to any accident which was unavoidable. A separate instruction concerning unavoidable accident might tend to confuse the jury. Such an instruction is merely a repetition of the defendant's argument of non-liability which should not be permitted by the court. This is the position of the minority of jurisdictions. *Annot.*, 65 A.L.R.2d 12 (1959).

Another objection concerns the question of the burden of proof when unavoidable accident is used as an affirmative defense. Some

courts state that if the defendant pleads an unavoidable accident, he has the burden of showing that everything was done within human power to avoid the accident. See, e.g., *Tyree v. Dunn*, 315 P.2d 782 (Okla. 1957). The objection to this rests on a fundamental legal concept. In an action to recover damages for negligence, the burden of proving the defendant's negligence rests with the plaintiff. *Kay v. Metropolitan St. Ry.*, 163 N.Y. 447, 57 N.E. 751 (1900).

If a defendant admits the facts alleged by the plaintiff but sets up new facts as a defense, the burden of proof is on the defendant to sustain his defense. This type of defense is commonly known as "confession and avoidance." However, a plea of unavoidable accident would appear not to admit the facts alleged by the plaintiff but in essence to deny negligence since an unavoidable accident is one that occurs through the negligence of neither party.

West Virginia has recognized a distinction as to the "burden of proof" when the plaintiff has established a prima facie case against the defendant. In a recent case, *Lester v. Flanagan*, 145 W. Va. 166, 113 S.E.2d 87 (1960), the West Virginia court stated that the term "burden of proof" has two distinct meanings which should not be confused. The obligation is on the plaintiff throughout the trial to establish proof of his allegations by a preponderance of the evidence. This burden to persuade never shifts. However, the term "burden of proof" may denote the obligation devolving on the defendant, and perhaps passing from one party to the other as the case progresses, to meet a prima facie case made by the other party. The latter meaning is perhaps more accurately symbolized as the necessity of going forward with the evidence or the burden to produce.

Recognizing this distinction, a problem arises where the plaintiff has not established a prima facie case of negligence. Must the defendant still prove himself free from negligence? If so, this would violate the basic principle that in a negligence case the plaintiff bears the burden of proving negligence on the part of the defendant. This would involve an actual shift of the burden to persuade.

Going one step further, if it rests on the defendant to establish facts showing an unavoidable accident, must the defendant prove that the plaintiff also was free from negligence? This would appear to be necessary if unavoidable accident is regarded as an affirmative

defense, as the defendant has the burden of proving all issues raised as a matter of affirmative defense. *Pittman v. Downing*, 209 N.C. 219, 183 S.E. 362 (1936).

In the principal case, the evidence clearly showed that the jury would be justified in finding that there was no negligence on the part of either the plaintiff or defendant. The court approved the giving of an instruction on unavoidable accident. Although the court did not go into a detailed discussion of the issues outlined above, it seems that West Virginia is in accord with the majority of jurisdictions.

William Jack Stevens