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Torts - Unavoidable Accident - Automobiles

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COMMENT

Torts—Unavoidable Accident—Automobiles*

Sixteen cases involving the question of unavoidable accident have been decided by the New Mexico Supreme Court.[1] All but three of these cases were decided between 1960 and 1965. The greatly increased number of decisions on the defense of unavoidable accident may be attributed partly to the increased number of automobile accidents; it is contended, however, that a more substantial reason for the greater number of cases being appealed in this area of the law is the confusion surrounding the doctrine of unavoidable accident in New Mexico.

The doctrine of unavoidable accident had its origin in the early history of the common law. Originally, at common law, an injured plaintiff was entitled to recovery when he could show that the act of the defendant was the cause of his injury. The law then progressed to where the defendant would be absolved of liability if he could show that the injury was the result of an "accident," "unavoidable accident," or "inevitable accident." Subsequent to this development, the common law courts began to hold that a defendant would be liable to a plaintiff who was injured by the defendant's act only if the defendant had intentionally injured the plaintiff or had acted in a negligent manner toward the plaintiff—that is, the courts came to apply the "fault" principle of liability.[2] Even with the establishment of the doctrine of fault liability, the courts in England and the United States still recognize the doctrine of unavoidable accident. New Mexico recognizes the doctrine of unavoidable accident.[3]

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* Worrick v. Alarid, 75 N.M. 67, 400 P.2d 627 (1965).

1. Baca v. Baca, 71 N.M. 468, 379 P.2d 765 (1963); Baros v. Kazmierczwk, 68 N.M. 421, 362 P.2d 798 (1961); Elder v. Marvel Roofing Co., 74 N.M. 357, 393 P.2d 463 (1964); Falkner v. Martin, 74 N.M. 159, 391 P.2d 660 (1964); Frei v. Brownlee, 56 N.M. 677, 248 P.2d 671 (1952); Gallegos v. McKee, 69 N.M. 443, 367 P.2d 934 (1962); Gould v. Brown Construction Co., 75 N.M. 103, 401 P.2d 100 (1965); Horrocks v. Rounds, 70 N.M. 73, 370 P.2d 799 (1962); Jontz v. Alderete, 64 N.M. 163, 326 P.2d 95 (1958); Lucero v. Torres, 67 N.M. 10, 350 P.2d 1028 (1960); Martin v. Gomez, 69 N.M. 1, 363 P.2d 365 (1961); Pitner v. Loya, 67 N.M. 1, 350 P.2d 230 (1960); Stambaugh v. Hayes, 44 N.M. 443, 103 P.2d 640 (1940); Williams v. Burke, 68 N.M. 35, 357 P.2d 1087 (1960); Worrick v. Alarid, 75 N.M. 67, 400 P.2d 627 (1965); Zamora v. Smalley, 68 N.M. 45, 358 P.2d 362 (1961).

2. See 2 Harper & James, Law of Torts § 12.2, at 747 (1956); Prosser, Torts § 29, at 143 (3d ed. 1964).

3. See cases cited in note 1 *supra*.

The New Mexico cases on this defense make the definition of unavoidable accident clear:

> It is an accident which is not occasioned in any degree, either directly or remotely, by want of such care or prudence as the law holds every man bound to exercise; and if the accident complained of could have been prevented by either party by means suggested by common prudence, it is not unavoidable.[4]

The confusion in the cases concerned with unavoidable accident has arisen from difficulties in applying the preceding definition to various fact patterns. It is the purpose of this Comment to analyze the New Mexico cases and attempt to arrive at the applicability and status of the unavoidable accident doctrine in automobile cases. Furthermore, the value of this doctrine to the New Mexico courts, under contemporary negligence law, will be investigated.

In *Worrick v. Alarid*,[5] the minor plaintiff, a pedestrian who was crossing the street at an intersection, was struck by an automobile driven by the defendant. The evidence was conflicting regarding whether or not the plaintiff was walking within a crosswalk.[6] At the time, the defendant was partially blinded by bright sunlight so that he did not see the plaintiff before striking him.[7] The trial court, at the request of the defendant, gave an instruction to the jury on unavoidable accident. The jury returned a verdict for the defendant and judgment was entered upon the verdict. The plaintiff appealed, and asserted as one ground relied upon for reversal, that the giving of the instruction on unavoidable accident constituted reversible error. On appeal, the New Mexico Supreme Court, *held,* Reversed and remanded for a new trial.[8]

The supreme court reversed the trial court because it could not "see how reasonable men could conclude that the accident in question could occur without the presence of negligence, either of the defendant or of the minor plaintiff, or both."[9] In support of its conclusion, the court said,

4. Stambaugh v. Hayes, 44 N.M. 443, 447, 103 P.2d 640, 643 (1940).
5. Worrick v. Alarid, 75 N.M. 67, 400 P.2d 627 (1965).
6. *Ibid.*
7. *Ibid.*
8. 75 N.M. at 69, 400 P.2d at 628.
9. 75 N.M. at 68-69, 400 P.2d at 628. Two interesting questions, not within the scope of this Comment, might also be considered in connection with this case: (1) Was the court correct in permitting a jury to determine the negligence of a driver who proceeds when his vision is impaired? (2) Was the court correct in stating that if the minor plaintiff were not within the crosswalk, he was guilty of contributory negligence as a matter of law?

> We might observe that intersectional accidents such as the instant one do not ordinarily happen without negligence on someone's part. . . . [Citations omitted.] Such accidents are inconsistent with a total absence of negligence.[10]

"A party is entitled to an instruction on the theory of his case upon which there is evidence."[11] In none of the New Mexico unavoidable accident cases has the supreme court indicated how much evidence is needed to obtain, or sustain on appeal, an instruction on unavoidable accident. The language quoted above appears to indicate that an instruction can be refused only when there is no evidence on the theory for which a party seeks an instruction. In not one New Mexico case, however, has it been held error for the trial court to *refuse* to give an unavoidable accident instruction when requested by a party. Only three of the sixteen unavoidable accident cases in New Mexico have even considered the question;[12] the remaining thirteen cases have dealt with the contention that it was error for the trial court to instruct the jury on the issue of unavoidable accident. This situation could be explained by saying that the appellate court has never found that the defendant was prejudiced by the refusal of the trial court to give the instruction. By failing to find prejudice, however, the New Mexico court is being most restrictive in its application of the standard for determining whether or not a trial court may give an instruction on unavoidable accident.

In New Mexico the doctrine of unavoidable accident can be pleaded as an affirmative defense.[13] The test in New Mexico for giving an instruction on this theory of the case is

> whether there is evidence from which the jury could conclude that the accident occurred without the negligence of anyone being the proximate cause.[14]

A later declaration by the New Mexico court sets forth the various situations in which it would be proper for a trial court to give an instruction to the jury on unavoidable accident:

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10. 75 N.M. at 69, 400 P.2d at 628.

11. Lucero v. Torres, 67 N.M. 10, 14, 350 P.2d 1028, 1030 (1960).

12. Baros v. Kazmierczwk, 68 N.M. 421, 362 P.2d 798 (1961); Elder v. Marvel Roofing Co., 74 N.M. 357, 393 P.2d 463 (1964); Stambaugh v. Hayes, 44 N.M. 443, 103 P.2d 640 (1940).

13. *E.g.*, Zamora v. Smalley, 68 N.M. 45, 358 P.2d 362 (1961).

14. *Id.* at 47, 358 P.2d 362, 363.

> [I]t is not every motor vehicle accident case that warrants the giving of an unavoidable accident instruction. There should be a genuine basis for the giving of the instruction such as some reasonably unexpected surprise or road condition, unpreventable mechanical failure, sudden appearance and reasonably unanticipated presence of a pedestrian or other object in the road; and such must be coupled with circumstances which present a fair issue of whether the failure of the driver to anticipate or sooner guard against this danger, or to avoid it, is consistent with a conclusion of the exercise of his due care. In such cases the trial courts are inclined to grant the instruction and their action in so doing is generally approved by the appellate courts.[15]

The two preceding quotations present the basis upon which the New Mexico Supreme Court assertedly determines whether or not an instruction on unavoidable accident should be given. Because most of the defendants in automobile accident cases tend to plead both unavoidable accident and contributory negligence, it would appear that the two theories are inconsistent. This anomaly of pleading no negligence of either party and contributory negligence is sanctioned by a statute permitting a party to make inconsistent defenses.[16]

The New Mexico Supreme Court has held that the instruction on unavoidable accident cannot be given unless there is evidence that neither party was negligent. Thus, the unavoidable accident instruction cannot be given when the defendant is negligent as a matter of law or when the plaintiff is contributorily negligent as a matter of law—such negligence or contributory negligence being the proximate cause of the injury.[17] In applying its test, the New Mexico court has also held it reversible error to give an unavoidable accident instruction in a fact situation in which the court cannot comprehend how such an accident could occur without the negligence of at least one of the parties being the proximate cause of the injury.[18] In other cases the instruction has not been permitted because there was no evidence that neither of the parties was not negligent.[19] Therefore, because of the varying tests, all based upon the quoted language forming the New Mexico standard, the doctrine of unavoidable accident in New Mexico is very confusing.

15. Horrocks v. Rounds, 70 N.M. 73, 80, 370 P.2d 799, 804 (1962).

16. N.M. Stat. Ann. § 21-1-1(8)(e)(2) (1953). See also Comment, 3 Natural Resources J. 204 (1963).

17. Baros v. Kazmierczwk, 68 N.M. 421, 362 P.2d 798 (1961).

18. *E.g.*, Worrick v. Alarid, 75 N.M. 67, 69, 400 P.2d 627, 628 (1965).

19. *E.g.*, Elder v. Marvel Roofing Co., 74 N.M. 357, 393 P.2d 463 (1964).

The basic premise upon which the New Mexico court appears to decide the principal case of *Worrick v. Alarid* is the lack of evidence upon which a jury could conclude that the accident occurred without the negligence of either party being its proximate cause. One must sympathize with the New Mexico Supreme Court in its attempts to render decisions under a doctrine that has become little more than a synonym for confusion. The following questions regarding the holding in *Worrick* tend to cast some doubt upon it. Was there really no evidence from which the jury could conclude that the plaintiff was not contributorily negligent? It should be remembered that the testimony and evidence conflicted as to whether or not the plaintiff was within the crosswalk. If he was within the crosswalk, could not the jury have found that he acted reasonably? As for the conduct of the defendant, the court admits that it is a question for the jury as to whether or not a reasonably prudent motorist must stop his automobile when his vision becomes impaired by sunlight. Could not a jury, on being given the question of the reasonableness of the conduct of the defendant, have found that he, too, was not negligent? Supposedly, the test is not whether there is evidence that either of the parties was negligent, but rather is there evidence from which the jury could conclude that neither of the parties was negligent. It is not also arguable that the accident in *Worrick* resulted from "some reasonably unexpected surprise" or the "sudden appearance and reasonably unanticipated presence of a pedestrian"? If this question is answered affirmatively, or even if this question *could* be answered affirmatively, it would seem that the fact pattern in *Worrick* warranted giving an instruction on unavoidable accident. These questions tend to indicate that the supreme court did not correctly apply the test it had established for giving an instruction on unavoidable accident. Although it may stretch the imagination to conclude that reasonable men on a jury could find that some evidence in *Worrick* tended to prove that this accident occurred without negligence, the preceding questions show that the proposition is arguable. If the proposition is arguable upon the evidence, the instruction should have been given under the New Mexico standard.

In *Worrick*, to support its conclusion, the court also stated that

> We might observe that intersectional accidents such as the instant one do not ordinarily happen without negligence on someone's part. . . .

> [Citations omitted.] Such accidents are inconsistent with a total absence of negligence.[20]

A similar test has also been applied in a specially concurring opinion by Justice McGhee in *Jontz v. Alderete*,[21] and by Justice Moise, dissenting in *Falkner v. Martin*.[22] Surely a test like this is less sure and more ambiguous than any of the others used by the New Mexico court. This type of test is similar to the test used under the doctrine of res ipsa loquitur. It might be said that the ambiguity arising in the unavoidable accident case is no different than that arising in the res ipsa loquitur case. But the opinions in res ipsa loquitur cases are supported by the court's extensive reasoning. In the unavoidable accident cases, however, the ambiguous test is made, no reasoning is proposed, and the court holds that the result necessarily follows. But the results following such ambiguous declarations are arguably not within the strict test supported by precedent. For these reasons, the ancillary judicial notice test is not analogous to decisions involving the doctrine of res ipsa loquitur inasmuch as the res ipsa loquitur opinions are based on a definitive doctrine, but the judicial notice opinions of the New Mexico Supreme Court in unavoidable accident cases are often arguably contrary to the previously defined standards of unavoidable accident. Thus, each automobile accident decision involving an instruction on unavoidable accident must be appealed to determine whether or not, in the opinion of the New Mexico Supreme Court, such an accident ordinarily does not happen without the negligence of anyone being the proximate cause, or whether such accidents are inconsistent with a total absence of negligence. Such a test breeds litigation, both at the trial level, where parties will be less willing to settle out of court than if a more concrete test were used, and at the appellate level for the same reasons. This judicial notice type of test used in *Worrick* does not follow the test announced in all of the decisions and which is assertedly made the basis of all such decisions—is there evidence upon which a jury could conclude that the accident occurred without the negligence of either party being its proximate cause?

The New Mexico Supreme Court has been very restrictive in its application of the unavoidable accident doctrine in automobile ac-

20. 75 N.M. at 69, 400 P.2d at 628.
21. 64 N.M. 163, 167, 326 P.2d 95, 98 (1958).
22. 74 N.M. 159, 164, 391 P.2d 660, 663 (1964).

cident cases. As mentioned earlier, the court has never held it error for a trial court to refuse to give an instruction on unavoidable accident when it was requested by a party. The New Mexico court has explicitly refused to abolish the doctrine of unavoidable accident and contends that it will continue to apply its test as previously formulated.[23] But even with its explicit refusal, restrictiveness in the application of the doctrine prevails. It will be seen later that the doctrine of unavoidable accident is useless and confusing. If the doctrine is to be restricted by the New Mexico court, it should be consistently applied or abolished entirely. In the nine cases where the instruction on unavoidable accident has been permitted, six cases have involved an automobile striking a pedestrian.[24] Of the remaining three cases where the instruction was permitted, one case involved a collision in a severe dust storm, with conflicting evidence as to whether or not the plaintiff, who had stopped because of lack of visibility, had parked entirely off the highway;[25] another case involved a rear end collision, with conflicting evidence as to whether or not the defendant's lights were visible to the plaintiff;[26] and the third case involved a collision in which the defendant's car struck a parked car and veered into the path of an oncoming vehicle in which plaintiff was riding. This latter case might be explained because the plaintiff was the prevailing party in the trial court and his judgment was affirmed on appeal.[27] Thus, with these few exceptions, it would appear that the New Mexico court believes that an unavoidable accident instruction is permissible only in the case of an automobile striking a pedestrian. This type of case usually has the sudden element of surprise and unexpectedness required in New Mexico, but other types of automobile collision cases also have the same elements of surprise and unexpectedness. Nevertheless, the doctrine of unavoidable accident in New Mexico has been confined almost exclusively to those cases involving pedestrians and automobiles. Yet, the trial court in *Worrick* was held to have erred in giving an instruction to the jury on unavoidable accident.

Considering the supreme court's refusal to reverse when a trial

23. Lucero v. Torres, 67 N.M. 10, 16, 350 P.2d 1028, 1032 (1960).

24. Baca v. Baca, 71 N.M. 468, 379 P.2d 765 (1963); Falkner v. Martin, 74 N.M. 159, 391 P.2d 660 (1964); Gallegos v. McKee, 69 N.M. 443, 367 P.2d 934 (1962); Lucero v. Torres, 67 N.M. 10, 350 P.2d 1028 (1960); Martin v. Gomez, 69 N.M. 1, 363 P.2d 365 (1961); Williams v. Burke, 68 N.M. 35, 357 P.2d 1087 (1960).

25. Gould v. Brown Constr. Co., 75 N.M. 103, 401 P.2d 100 (1965).

26. Zamora v. Smalley, 68 N.M. 43, 358 P.2d 362 (1961).

27. Frei v. Brownlee, 56 N.M. 677, 248 P.2d 671 (1952).

court does not give an instruction on unavoidable accident; its strict application of the doctrine to predominantly pedestrian cases; and its explicit refusal to abrogate the doctrine of unavoidable accident in New Mexico, what is the current status of the doctrine in New Mexico? When will the New Mexico Supreme Court reverse a trial court for giving the instruction? Under what circumstances should counsel request the instruction? In requesting the instruction, will counsel be risking reversal when he could have had a jury verdict in his favor without the instruction but sought such for assurance? The cases do not present a clear answer because the doctrine is interpreted restrictively and its application is uncertain. Not until the case is appealed can a party know whether or not the court will take judicial notice that the accident involved could not have happened without the negligence of one of the parties being its proximate cause. Only two answers seem to follow with some certainty from the foregoing discussion as to whether or not an instruction on unavoidable accident will be permitted: (1) Where one of the parties is negligent as a matter of law, an instruction on unavoidable accident will be inappropriate and will require reversal if given. (2) A case that involves an automobile striking a pedestrian has a better chance than any other type fact pattern in obtaining an affirmance of the giving of an unavoidable accident instruction. But if the evidence is conflicting concerning whether or not one or both of the parties were negligent, it would appear that counsel must gamble in seeking an instruction on unavoidable accident. In every case where there is not negligence as a matter of law, there seems to be *some* evidence that the accident was not caused by the negligence of one of the parties. Nevertheless, the supreme court might reverse because in its opinion there is not the *necessary* evidence to show that neither party was negligent.

In view of the confusion surrounding the doctrine of unavoidable accident in automobile cases, is there any reason for retaining the doctrine in New Mexico? It is submitted that the doctrine should be abrogated as a step toward aiding juries in understanding how they should determine liability in automobile accident cases, and as a step toward clarification and simplification of the law in these cases.

California was the first state to abrogate the doctrine of unavoidable accident. This step was taken by its court in 1958 in the case of *Butigan v. Yellow Cab Co.*[28] The plaintiff was a passenger in the defendant's cab. The cab was attempting to reverse its direction and,

28. 49 Cal. 2d 652, 320 P.2d 500 (1958).

according to the testimony of the driver of the cab, he attempted to make a left turn into a driveway from which he intended to back out and reverse his direction. As he turned left and crossed the middle of the road his engine stalled, and he was struck by the car of the other defendant travelling in the same lane into which the cab was projecting. The testimony of the other driver-defendant was that the cab suddenly pulled into the lane in which the second car had been travelling; that the cab had made this move when the second defendant was approximately two car lengths from the cab. The trial court instructed the jury on unavoidable accident and the jury returned a verdict for the cabdriver, the Yellow Cab Co., and the driver of the vehicle that had struck the cab. Judgment was entered on the verdict and the plaintiff appealed. On appeal the California Supreme Court reversed the trial court and ordered a new trial. In the course of its opinion, the court held that giving an unavoidable accident instruction was reversible error. California thus became the first state to completely abandon the unavoidable accident instruction in negligence cases. (California courts may still recognize the defense of unavoidable accident in certain cases arising under a statute prohibiting driving longer than a prescribed number of hours, except in those cases of "casualty, or unavoidable accident or an act of God."[29])

In rendering its historic decision in *Butigan*, the California court found that neither of the defendants were negligent as a matter of law. Obviously, the plaintiff-passenger was not contributorily negligent. However, under the New Mexico test one could argue that none of the parties were negligent. That is, the cab stalled through no negligence of the defendant cabdriver or cab company, and the driver of the second vehicle was exercising reasonable care. Nevertheless, the court held that the instruction on unavoidable accident constituted reversible error in *Butigan* and all future cases, except those arising under the statute. The court found it particularly significant that there were no prior decisions holding that refusal to give the instruction was reversible error.[30]

Many reasons were given by the California court for the complete abolition of the instruction on unavoidable accident. The court recognized that the so-called defense had no place in modern pleadings because it was an obsolete remnant from earlier days when the defendant had to show that the injury was occasioned by an unavoidable accident to escape liability. The fault principles of liability pre-

29. Cal. Vehicle Code § 21702 (formerly § 602).
30. 49 Cal. 2d 652, 320 P.2d 500, 504 (1958).

vailing in negligence actions today make the doctrine of unavoidable accident an historical ghost.

Under modern views of negligence, the plaintiff must prove that the injury was proximately caused by the defendant's negligence. By a general denial, a defendant may show any circumstances that may defeat the plaintiff's claim of 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. . . . 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 on unavoidable accident serves no useful purpose.[31]

Under this view of the defense of unavoidable accident, it seems that the doctrine is nothing more than "doubletalk," adding nothing to a case except confusion at trial and on appeal.

The California court also believed that the defense of unavoidable accident served to overemphasize the defendant's case. If proper and encompassing instructions on negligence, contributory negligence, causation, and proximate cause were sought by counsel, he would be in no need of seeking an instruction on unavoidable accident.

The final reason given by the California court for abrogating the doctrine of unavoidable accident was the confusion that it caused in the minds of the jurors who must determine liability:

> When the jurors are told that 'in law we recognize what is termed an unavoidable or inevitable accident' they may get the impression that unavoidability is an issue to be decided and that, if proved, it constitutes a separate ground of nonliability of the defendant. Thus, they may be misled as to the proper manner of determining liability, that is, solely on the basis of negligence and proximate causation. [Footnote omitted.] The rules concerning negligence and proximate causation which must be explained to the jury are in themselves complicated and difficult to understand. The further complication resulting from the unnecessary concept of unavoidability or inevitability and its problematic relation to negligence and proximate cause can lead only to misunderstanding.[32]

The California court explained what it meant by the preceding

31. *Ibid.*
32. 320 P.2d at 505.

language. The jury could find in *Butigan* that the accident occurred because the cab stalled; it would determine that such an accident was then unavoidable and return a verdict for all three defendants. If, however, the jury considered all elements of fault (negligence, proximate cause, etc.) upon which the suit was being tried, it could have found that the cab was negligently maintained causing it to stall, or that the sudden turn by the cabdriver caused it to stall. In the latter two examples, the defendant cabdriver and/or cab company would be negligent. Nevertheless, under an unavoidable accident instruction, the jury might believe that having found that the stalled cab made the accident unavoidable, it should return a verdict for the defendants.

The *Restatement of Torts* does not consider the defense of unavoidable accident as a separate entity of the law.[33] Beyond the objectionable facets of an instruction on unavoidable accident stressed by the California court in *Butigan*, the instruction obviously emphasizes the abstract. Rather than encouraging the jury to give strict attention to matters of specific fact in issue—*i.e.*, those facts concerned with negligence, contributory negligence, and proximate cause, an instruction on unavoidable accident invites the jury to turn away from the matters under consideration and take refuge in generalities. When the jury has an alternative like unavoidability for deciding a case, would it not decide it on that ground rather than telling a completely paralyzed plaintiff that it had found that the plaintiff had been contributorily negligent? Certainly, the same result would be reached—*i.e.*, a verdict and judgment for the defense; but it seems that the processes of settlement, trial and appeal would be expedited by the jury giving its actual conclusion rather than phrasing it in an attractive manner, making the result somehow less harsh. Even if the appellate court were to permit such an instruction in a case where it was clearly not applicable because the court believed the instruction was not prejudicial, the value of precedent in this area would be undermined unless the court clearly stated that the instruction was not prejudicial.

The modern trend in many jurisdictions is toward the abolition of the doctrine of unavoidable accident. In addition to California, Colorado[34] and New Jersey[35] have stated that trial courts should not give

33. Rees, *Unavoidable Accident—A Misunderstood Concept*, 5 Ariz. L. Rev. 225, 228 n.9 (1964).

34. Lewis v. Buckskin Joe's, Inc., 396 P.2d 933 (Colo. 1964).

35. Vespe v. Dimarco, 43 N.J. 430, 204 A.2d 874 (1964).

instructions on unavoidable accidents. The courts of Arizona[36] and Oregon[37] have declared that the instruction should not be given; but if a trial court should give the instruction, a judgment will be reversed only if the instruction has been prejudicial. The courts of Alaska,[38] Arkansas,[39] Hawaii,[40] Missouri,[41] and Wisconsin[42] have stated that it is the rare negligence case in which an instruction on unavoidable accident should be given; these courts do not foreclose the exceptional set of circumstances in which they would approve the giving of an instruction on unavoidable accident. By its restrictive application of the doctrine, New Mexico may be said to be included within the last category even though there is no language to this effect in any of the New Mexico opinions. Furthermore, according to an exhaustive annotation, the states of Alabama, Illinois, Indiana, Kentucky, Nebraska, New Hampshire, Vermont, Virginia, and West Virginia regard the instruction on unavoidable accident with comparative indifference or with distrust.[43]

Since 1958, many states have done away with or severely limited the doctrine of unavoidable accident. It is very difficult to envision an automobile accident that occurs without the negligence of someone. Those cases involving a seizure or death of the driver are an exception to this generality. These cases could be decided without the doctrine of unavoidable accident. If it were shown that the driver did not know or have reason to know that he was subject to seizure, the defendant could plead lack of negligence, or possibly even act of God. Only in those states where the defenses of "emergency" and "act of God" have been abrogated (research discloses no state that has) should some limited form of the unavoidable accident defense and instruction be permitted. If defendants have available the defenses of emergency and act of God, the defense and instruction of unavoidability should not be permitted for the reasons suggested earlier.

Professor Warren A. Seavey has said of the doctrine of unavoidable accident:

36. City of Phoenix v. Camfield, 97 Ariz. 316, 400 P.2d 115 (1965).
37. Fenton v. Aleshire, 238 Ore. 24, 393 P.2d 217 (1964).
38. Alaska Brick Co. v. McCoy, 400 P.2d 454, (Alaska 1965).
39. Houston v. Adams, 389 S.W.2d 872 (Ark. 1965).
40. Guanzon v. Kalamau, 48 Hawaii 330, 402 P.2d 289 (1965).
41. Glowczwski v. Foster, 359 S.W.2d 406 (Mo. 1962).
42. Van Matre v. Milwaukee Elec. Ry. & Transp. Co., 268 Wis. 399, 67 N.W.2d 831 (1955).
43. Annot., 65 A.L.R.2d 12, 30-31 (1959).

> May I suggest that the phrase, perhaps a holdover from the prenegligence days, serves no useful purpose. Certainly the defendant who pleads neither he nor anyone else was negligent is guilty only of pleading more than was necessary; the 'anyone else' is surplusage. . . . [T]he phrase merely clutters up or obscures the issues.[44]

The doctrine of unavoidable accident in New Mexico is not clear; it is applied very restrictively. The defendant does not know when he is entitled to an instruction on unavoidable accident. The doctrine has been criticized on many grounds, many of the criticisms appearing valid upon analysis. The current trend is away from permitting the defense and instruction of unavoidable accident and toward permitting only defenses and instructions on non-negligence in most ordinary negligence cases. It has been argued that the defense and instruction on non-negligence are certainly sufficient to meet almost all cases in which an automobile is involved. It is therefore recommended that New Mexico, even though it has explicitly refused to do so in the past,[45] abandon its doctrine of unavoidable accident. Although this doctrine is embedded in the precedents of the New Mexico Supreme Court, the court's present strict application is a step toward abrogation. If the court believes that it cannot overrule the doctrine, it is recommended that the legislature modernize the laws of New Mexico by enacting a statute abolishing the defense of unavoidable accident.

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44. Seavey, *Torts*, 34 N.Y.U.L. Rev. 517, 539 (1959).
45. Lucero v. Torres, 67 N.M. 10, 16, 350 P.2d 1028, 1032 (1960).