
NATURAL RESOURCES JOURNAL

Volume 3
Issue 1 *Winter 1963*

Winter 1963

Torts—Unavoidable Accident—Instruction: Horrocks v. Rounds, 70 N.M. 73, 370 P.2d 799 (1962)

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TORTS—UNAVOIDABLE ACCIDENT—INSTRUCTION*—The availability to the defendant of the affirmative defense of unavoidable accident gives rise to such questions as the sufficiency of the evidence required to support an instruction on that theory, and the inconsistency of asserting unavoidable accident along with the defense of contributory negligence.

The New Mexico Supreme Court has given a definite legal meaning to the term unavoidable accident:

> 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.[1]

Horrocks v. Rounds[2] was an automobile collision case. Plaintiff's car was parked partly on the highway after having stopped at the scene of a previous accident. As defendant came over a hill he saw the scene of the accident and plaintiff's parked car, partly in his lane. It was as he was braking and attempting to turn around plaintiff's car that defendant skidded, and hit the rear of plaintiff's car. It had been raining intermittently during the day and the highway was wet and extremely slick.

The complaint alleged negligence; the answer denied negligence, and set up the affirmative defense of contributory negligence. After the close of the evidence, defendant was granted leave, over objection, to amend his answer so as to include the affirmative defense of unavoidable accident. There was a judgment for defendant on a jury verdict. On appeal to the New Mexico Supreme Court, plaintiff claimed that the granting of an instruction on unavoidable accident was error as unsupported by the evidence. *Held,* Reversed and Remanded on the grounds that the granting of the instruction was prejudicial error.[3]

In the course of its opinion, the supreme court said that it had "repeatedly held that a party is entitled to an instruction on the theory of his case upon which there is evidence."[4] In *Horrocks,* defendant offered the testimony of a

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

1. Stambaugh v. Hayes, 44 N.M. 443, 447, 103 P.2d 640, 643 (1940).

2. 70 N.M. 73, 370 P.2d 799 (1962).

3. *Id.* at 79, 370 P.2d at 803.

4. *Ibid.* See also, Zamora v. Smalley, 68 N.M. 45, 358 P.2d 362 (1961); Lucero v. Torres, 67 N.M. 10, 350 P.2d 1028 (1960). In Hanks v. Walker, 60 N.M. 166, 170, 288 P.2d 699, 701 (1955), the rule is stated: "In this jurisdiction, it is prejudicial error to refuse to instruct specifically on a litigant's theory of the case, providing such theory is pleaded and there being evidence to support it."

police officer as to the extremely slippery condition of the highway at the time of the accident. In the officer's opinion, the accident was caused by the surprise of defendant in seeing plaintiff's parked car as he came over the hill coupled with the skidding as defendant attempted to turn around plaintiff's car.[5] The testimony of defendant and his wife concerning how far they were from plaintiff's car when they started to turn to avoid it was inconclusive owing to their inability to judge distances by feet.[6]

After reviewing the testimony the court found that there was no evidence to support an instruction on unavoidable accident.[7] Although this was a close question, the finding seems questionable in the light of a jury verdict for defendant, a judgment on the verdict, and the denial of a motion for a new trial in the trial court. This jurisdiction consistently has held that on appeal all evidence will be viewed in the light most favorable to support the judgment,[8] and any doubt will be reconciled in favor of the judgment.[9]

Since the New Mexico rule on the evidence necessary to support an instruction is stated without an adjective such as "substantial" qualifying "evidence",[10] it would seem that granting an instruction on a theory of the case that is pleaded is prejudicial error only when there is *no* evidence to support the theory.[11]

Moreover, in *Horrocks,* the court stated that since the crest of the hill (the point at which defendant first might have seen plaintiff's car) was between 500 and 600 feet from the place of the accident, defendant did not start his passing turn as soon as he should have. The court found that his conduct before the actual skidding did not come up to the standard of due care required by law.[12] This indicates that the supreme court found defendant guilty of negligence as a matter of law. Such a finding is inconsistent with the court's own rule for granting the instruction on unavoidable accident, in which it requires evidence of some reasonably unexpected surprise or road condition coupled with evidence that merely raises a question of fact as to the

5. Horrocks v. Rounds, 70 N.M. 73, 81-82, 370 P.2d 799, 804-5 (1962).

6. *Id.* at 82-88, 370 P.2d at 805-9.

7. *Id.* at 90, 370 P.2d at 810.

8. Mountain States Aviation, Inc. v. Montgomery, 70 N.M. 129, 371 P.2d 604 (1962); Cochran v. Gordon, 69 N.M. 346, 367 P.2d 526 (1961); Tidwell v. Reeder, 56 N.M. 617, 247 P.2d 860 (1952); Southern Union Gas Co. v. Cantrell, 56 N.M. 184, 241 P.2d 1209 (1952).

9. Nally v. Texas-Arizona Motor Freight, Inc., 69 N.M. 491, 368 P.2d 806 (1962); Heine v. Reynolds, 69 N.M. 398, 367 P.2d 708 (1962).

10. Horrocks v. Rounds, 70 N.M. 73, 79, 370 P.2d 799, 803 (1962). See also cases cited note 4 *supra.*

11. Baros v. Kazmierczwk, 68 N.M. 421, 362 P.2d 798 (1961); Pitner v. Loya, 67 N.M. 1, 350 P.2d 230 (1960).

12. Horrocks v. Rounds, 70 N.M. 73, 88-89, 370 P.2d 799, 810 (1962).

driver's due care prior to the unexpected happening.[13] Here, it would seem that defendant has offered enough evidence at least to "present a fair issue" as to his due care.

The issue of inconsistency in pleading is raised in *Horrocks,* although it was not the basis for reversal. The court said that were it not for the issue of contributory negligence, it would be proper to instruct on unavoidable accident unless the defendant were found guilty of negligence as a matter of law.[14] The court seems to be saying that if the defendant's negligence is a question of fact, it is proper for him to try to show that an unavoidable accident was the proximate cause of the injury as one circumstance tending to prove his own non-liability. However, if the defendant is trying to show that the proximate cause of the injury was plaintiff's contributory negligence, it is inconsistent with a plea of unavoidable accident. The court cites Justice McGhee's concurring opinion in *Jontz v. Alderete.*[15] That was a collision case tried without a jury. The supreme court remanded the case because the trier of fact had left unanswered several factual questions raised by conflicting evidence. In a brief concurring opinion, Justice McGhee said, "The record shows the collision was caused by the negligence of one or both drivers, and there is no support in my opinion for a *finding* that this was an unavoidable accident."[16] Certainly, a conclusion that an accident was caused by the negligence of someone is inconsistent with a conclusion that the accident was unavoidable. But it would seem that Justice McGhee's opinion cannot be used as authority for the view that an instruction on unavoidable accident is improper because it is inconsistent with an instruction on contributory negligence.

It is, of course, logically inconsistent that a defendant plead non-liability on the theory of the plaintiff's contributory negligence, and also plead non-liability on the theory that no one was negligent, that the accident was unavoidable. However, inconsistent pleadings are allowed by statute.[17] The inconsistency, alone, should not deprive a defendant of both affirmative defenses if

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13. *Id.* at 80, 370 P.2d at 804:
> There should be a genuine basis for the giving of the instruction [on unavoidable accident] 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.

14. *Id.* at 79-80, 370 P.2d at 803.

15. 64 N.M. 163, 326 P.2d 95 (1958) (concurring opinion).

16. *Id.* at 167-8, 326 P.2d at 99. (Emphasis added.)

17. N.M. Stat. Ann. § 21-1-1(8)(e)(2) (1953): "A party may also state as many separate claims or defenses as he has regardless of consistency. . . ."

proof has been offered that raises a question of fact on both theories.[18] When the issue is the propriety of an instruction on unavoidable accident, the fact that the record contains evidence from which the jury *could* find one party negligent is immaterial. "The test is whether there is evidence from which the jury *could* conclude that the accident occurred without the negligence of anyone being the proximate cause."[19]

Perhaps, this case indicates a tendency of the New Mexico Supreme Court to look with disfavor on the doctrine of unavoidable accident. Its necessity has been questioned in other jurisdictions,[20] and there is room for the point of view that the doctrine is unnecessary since a defendant can offer the same proof under a general denial of negligence. An instruction on unavoidable accident also may be considered confusing or misleading to the jury, or even prejudicial in giving the jury an out when the issues of due care and proximate cause are close questions.

A discussion of the value of the doctrine is beyond the scope of this comment. But so long as the doctrine is recognized in the jurisdiction it should be available to a defendant regardless of its consistency with his other defenses.

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18. Gallegos v. McKee, 69 N.M. 443, 446, 367 P.2d 934, 936 (1962): "It is the court's duty to instruct the jury concerning the law applicable to issues of fact raised by the proof."

19. Zamora v. Smalley, 68 N.M. 45, 47, 358 P.2d 362, 363 (1961). (Emphasis added.) See also Williams v. Burke, 68 N.M. 35, 357 P.2d 1087 (1960); Lucero v. Torres, 67 N.M. 10, 14, 350 P.2d 1028, 1031 (1960):

> The court presented to the jury the issues of negligence alleged by appellant and the issue of contributory negligence and unavoidable accident asserted by appellee. All of these issues were controverted issues of fact to be passed upon by the jury. . . . There being questions present for the jury to decide as to whether appellee or appellant were negligent, or whether both or neither were negligent, we believe that in such a case, an unavoidable accident instruction is appropriate.

20. The leading case in California is *Butgian v. Yello wCab Co.*, 49 Cal.2d 652, 320 P.2d 500, 504 (1958), in which the court said:

> 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. . . . 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.

The New Mexico Supreme Court expressly refused to follow the rationale of *Butigan*. See Lucero v. Torres, 67 N.M. 10, 16, 350 P.2d 1028, 1032 (1960).