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Negligence—Defense of Unavoidable Accident: *Moats v. Lienemann*, 188 Neb. 452, 197 N.W.2d 372 (1972)

James S. Mitchell
University of Nebraska College of Law, lawman000@aol.com

Casenote

NEGLIGENCE—DEFENSE OF UNAVOIDABLE ACCIDENT
Moats v. Lienemann, 188 Neb. 452, 197 N.W.2d 372 (1972).

In *Moats v. Lienemann*[1] the Nebraska Supreme Court affirmed a district court jury's determination that the automobile collision out of which the plaintiff's negligence action arose was not an "unavoidable accident".[2] An unavoidable accident "has been defined as an inevitable accident, an event or an occurrence which could not have been prevented by any human foresight or ordinary prudence, the result occurring without fault."[3]

The case arose after the defendant's decedent, Lienemann, suffered a massive cerebral hemorrhage while driving his car.[4] The car then left the highway and continued on the shoulder of the

1. 188 Neb. 452, 197 N.W.2d 372 (1972).
2. Brief for Appellant at 3, Moats v. Lienemann, 188 Neb. 452, 197 N.W.2d 372 (1972). In answer to plaintiff's complaint, the defendant alleged that the collision was the result of an unavoidable accident caused by the defendant's decedent having suffered a sudden illness which he had no reason to expect and which rendered it impossible for him to control his automobile.
3. Kirchner, *Sudden Illness as a Defense in Auto Accidents,* 16 CLEV.-MAR. L. REV. 523 (1967) [hereinafter cited as Kirchner]; 38 AM. JUR. NEGLIGENCE § 65 (1941).
4. 188 Neb. at 454, 197 N.W.2d at 379. "The autopsy revealed that Lienemann died as a result of a ruptured aorta probably caused by broken ribs, and that he had a blood clot in the brain which had been there before the accident occurred."

> The cerebrovascular accident, often referred to by the nonmedical term 'stroke,' is another group in this complex of circulatory diseases. While one usually thinks of the 'stroke' as resulting in complete, sudden, and prolonged incapacity, or death, it should be remembered that there are many variations in the symptomotology. Although some of these may result in incapacity of a major nature which is easily recognized, the more minor and transient may go unrecognized, but they are capable of producing momentary and complete incapacity in a driver of a motor vehicle. Therefore in addition to the blood clots or hemorrhages which affect the brain and result in the pronounced disabilities, these transient attacks raise a major question in the problem of negligence. These episodes are often referred to by the person who has suffered them as 'dizzy spells' or 'blackouts.' They usually occur from a momentary decrease in circulating blood to the brain in persons with vascular disease. Though the symptoms may be short in duration, the incapacity for driving a motor vehicle may be total during this brief time. The recovery in this situation may be complete and leave no objective evidence of it having occurred.

road for three-tenths of a mile, careening into three fence posts and jumping a drainage ditch before returning to the highway. After traveling 3,800 feet[5] on the highway, Lienemann's vehicle veered into the left lane of traffic and collided head-on with a vehicle driven by the plaintiff's decedent, Moats. Lienemann as well as Moats and his wife were killed, and representatives of Moats' estate brought a wrongful death action against Lienemann's estate.

As an answer to the plaintiff's complaint, the defendant denied any negligence on the part of Lienemann by asserting the "unavoidable accident" doctrine as a defense. After hearing evidence from both parties, the trial judge denied defendant's motions for a directed verdict and a new trial. The jury was instructed on unavoidable accident. The jury returned a plaintiff's verdict for more than 46,000 dollars in damages. By returning a verdict for the plaintiff, the jury in effect found that the preponderance of the evidence indicated that Lienemann was in control of his car at the time of the collision.[6]

The purpose of this casenote is to examine the conflicting considerations that concern the trial court when a defendant attempts to employ the unavoidable accident defense. In numerous jurisdictions, there is an increasing reluctance to use the unavoidable accident instruction because of a belief that the instruction unnecessarily confuses the jury.[7] In what appears to be the majority of jurisdictions,[8] however, trial courts permit use of the unavoidable accident instruction. In these jurisdictions, it is believed the unavoidable accident instruction assists the jury in focusing deliberations and inquiries on the specific factual questions at issue. The use of the instruction in *Moats* indicates that, despite this trend of abandoning the doctrine, the Nebraska Supreme Court favors utilization of the unavoidable accident instruction when pleadings and evidence properly raise and support the issue of unavoidable accident as a defense to a complaint premised on negligence.

Examination of the historical background of the unavoidable accident doctrine helps to place these conflicting considerations in a clearer perspective. Under English common law, when one per-

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Kirchner, *supra* note 3, at 526.

5. 188 Neb. at 455, 197 N.W.2d at 380.
6. *Id.* at 454-55, 197 N.W.2d at 380. The defense of the defendant was that Lienemann was suddenly stricken by illness, which he had no reason to anticipate, while driving an automobile, which rendered it impossible for him to control the car and is, therefore, not chargeable with negligence. The defendant argued that the basis for the jury verdict was the result of speculation and conjecture.
7. *See* Berry, *The Unavoidable Accident Instruction,* 17 DEFENSE L.J. 259 (1968) [hereinafter cited as Berry]; Annot. 65 A.L.R. 2d 1 (1959).
8. 65 A.L.R.2d 1, 24 (1959).

son was injured by another, without fault attributable to either party, the injured person as a matter of right was entitled to compensation from the tort feasor. The concept of fault was irrelevant in realizing the policy of compensation.[9] This policy of imposing "absolute liability" gradually gave way to the modern principles of negligence law predicated on the issue of fault.[10]

The shift from "absolute liability" to principles of fault as the basic policy underlying the compensation of an injured person's loss was first recognized in this country in the landmark case of *Brown v. Kendall.*[11] By denying the plaintiff compensation for the injuries accidentally inflicted by the defendant, this decision causes "the pendulum of the common law [to swing] 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."[12] The injured person's loss would not be shifted without proof that the actor breached his duty of due care as defined by the "reasonable man" standard of conduct. The controlling question in modern negligence law is whether the actor's blameworthy act is the *foreseeable* legal or proximate cause of the alleged loss suffered by the complaining party.

A plaintiff's loss resulting from an *unforeseeable* accident is not compensable when a defendant cannot be held culpable. Because an unforeseeable accident is unpreventable, a defendant is not considered blameworthy. Professor William Prosser defined an unavoidable accident as follows: "An unavoidable accident is an occurrence which was not intended, and which, under all the circumstances, could not have been foreseen or prevented by the exercise of reasonable precautions."[13] By definition, an unavoidable acci-

9. *See* Ames, *Law and Morals,* 22 HARV. L. REV. 97 (1908).

10. Weaver v. Ward, 80 Eng. Rep. 284 (K.B. 1616); Stanley v. Powell, [1891] 1 Q.B. 86. As an aside beyond the scope of this casenote, one should note the current trend away from considerations of fault. In certain areas of tort law, strict liability is imposed for reasons irrespective of fault, *i.e.,* ability to pay. The current trend away from considerations of fault is of course inherent in the concept of no-fault insurance for automobile victims.

11. 60 Mass. 292, 6 Cush. 292 (1850).

12. Rees, *Unavoidable Accident—A Misunderstood Concept,* 5 ARIZ. L. REV. 224, 227 (1964).

13. *W. Prosser, Handbook of the Law of Torts* § 29 at 140 (4th ed. 1971). *See* Uncapher v. Baltimore & O.R., 127 Ohio St. 351, 188 N.E. 553 (1933); Morris v. Platt, 32 Conn. 75 (1864); Larrow v. Martel, 92 Vt. 435, 104 A. 826 (1918); "Unavoidable accident *does not apply only* where the injury is brought about by the intervention of outside forces, whether of God, nature. . . ." 65 C.J.S. *Negligence* § 21 at 649 (1966) (emphasis added); "An Act of God is a manifestation of nature so unusual and extraordinary that it could not under normal conditions have been reasonably anticipated or expected."

dent arises from circumstances in which a plaintiff suffers a loss, but *neither* the plaintiff nor the defendant is at fault. Consequently, courts have denied a plaintiff recovery against a defendant when the accident was caused by the defendant having suffered a heart attack,[14] a stroke,[15] a fainting spell,[16] an insulin reaction,[17] an epileptic seizure[18] or having fallen asleep.[19]

Snyder v. Farmers Irr. Dist., 157 Neb. 771, 61 N.W.2d 557 (1953). *See* Cover v. Platte Valley Public Power & Irr. Dist., 162 Neb. 146. 75 N.W.2d 661 (1956); NEB. JURY INSTRUCTIONS No. 3.11 (1969). In response to the plaintiff's complaint of negligence,

> the defendant may plead and offer proof of matters in excuse or justification, as that the injury complained of would have occurred in any event without the concurrence of the defendant's negligence, or that some outside, independent force, of such nature that the defendant in its duty of observing care could not reasonably have anticipated or guarded against, was the proximate cause of the injury. Such defenses, while not technically confession and avoidance, partake of the nature of such defense. While not confessing the cause of action, they seek to avoid its effect by proof of other and new matter which bars the plaintiff's right to recover, and they must be established by the defendant in order to overcome the evidence on the part of the plaintiff, which, unexplained, would establish the defendant's negligence. They are affirmative in their nature and the burden of proving them is upon the person asserting them. * * * The burden was placed upon the plaintiff by the instruction to prove the defendant's negligence of duty and his damage. After he had made his case, in order to escape the logical result of this proof, the defendant was required to show that the loss was inevitable under the circumstances.

157 Neb. at 779-80, 61 N.W.2d at 561. When a defendant alleges that the accident or occurrence was the result of an "Act of God", he assumes the burden of proving by a preponderance of the evidence that the accident or occurrence was the sole proximate cause of the accident or occurrence and the resulting injuries to the plaintiff. NEB. JURY INSTRUCTIONS 2.02B (1969). It would be conceptually inconsistent to instruct the jury on "Act of God" while also instructing on contributory negligence.

14. Ford v. Carew & English, 89 Cal. App. 2d 199, 200 P.2d 828 (1948). *See* Kraig, *Heart Attack as a Defense in Negligence Actions,* 12 CLEV.-MAR. L. REV. 59 (1963); Kirchner, *supra* note 3.
15. Baker v. Hausman, 68 So. 2d 572 (Fla. 1953); Keller v. Wonn, 140 W. Va. 860, 87 S.E.2d 453 (1955).
16. Armstrong v. Cook, 250 Mich. 180, 229 N.W. 443 (1930); Lehman v. Haynam, 164 Ohio St. 595, 133 N.E.2d 97 (1956).
17. Porter v. Price, 11 Utah 2d 80, 355 P.2d 666 (1960).
18. Shirks Motor Express v. Oxenham, 204 Md. 626, 106 A.2d 46, *cert. denied,* 350 U.S. 966 (1954); Wishone v. Yellow Cab Co., 20 Tenn. App. 229, 97 S.W.2d 452 (1936).
19. Bushnell v. Bushnell, 103 Conn. 583, 131 A. 432 (1925). However in Theisen v. Milwaukee Auto. Mut. Ins. Co., 18 Wis. 2d 91, 118 N.W.2d 140, *rehearing denied,* 18 Wis.2d 91, 119 N.W.2d 393 (1962), going to sleep while driving was held to be negligence as a matter of law.

As *Moats* illustrates, Nebraska courts have not abandoned the unavoidable accident doctrine. The Supreme Court in *Kelly v. Gagnon*[20] defined an unavoidable accident as "any casualty which could not be prevented by ordinary care and diligence."[21] The doctrine of unavoidable accident has been held to be a valid defense barring a plaintiff's recovery when evidence and circumstances surrounding the plaintiff's loss fail to disclose negligence on the part of either party.[22]

In *Moats*, the plaintiff grounded his claim for damages in principles of negligence law.[23] By alleging specific acts of negligence, the plaintiff assumed the burden of proving[24] by the preponder-

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The court said no facts can exist which will justify, excuse or exculpate falling asleep, except in cases of illness.

20. 121 Neb. 113, 236 N.W. 160 (1931) (defendant's car tire was punctured by a spike lying on the highway which was held an unavoidable accident).
21. 121 Neb. at 121, 236 N.W. at 164. *See* State Farm Mut. Auto. Ins. Co. v. Bonacci, 111 F.2d 412 (8th Cir. 1940) (accident caused by a punctured tire); Bonacci v. Cerra, 134 Neb. 476, 279 N.W. 173 (1938). In Wright v. Lincoln City Lines, Inc., 163 Neb. 679, 684, 81 N.W.2d 170, 175 (1957), unavoidable accident was defined as "when an unexpected catastrophe occurs without any of the parties thereto being to blame for it."
22. Anderson v. Moser, 169 Neb. 134, 98 N.W.2d 703 (1959) (concept of unavoidable accident applied to simple-tool doctrine); Cover v. Platte Valley Pub. Power & Irr. Dist., 162 Neb. 146, 75 N.W.2d 661 (1956) (flood); Hilzer v. Farmers Irr. Dist., 156 Neb. 398, 56 N.W.2d 457 (1953) (flood); Kuchau v. Chicago B. & Q.R., 150 Neb. 498, 34 N.W.2d 899 (1948) (flood defined as Act of God); Meyers v. Neeld, 137 Neb. 428, 289 N.W. 797 (1940) (where evidence and circumstances fail to disclose either defendant motorist or plaintiff rider was at fault and collision was unavoidable, no recovery could be had).
23. Brief for Appellant at 2.
24. NEB. JURY INSTRUCTIONS No. 2.02(I)(B) (1969):

> Before the plaintiff can recover against the defendant on his petition in this action, the burden is upon the plaintiff to prove by a preponderance of the evidence each and all of the following propositions:
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> 1. That the defendant was negligent in one or more of the particulars claimed against him by the plaintiff in his petition;
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> 2. That such negligence, if any, of the defendant was the proximate cause or a proximately-contributing cause of the collision;
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> 3. That as the direct and proximate result of said negligence and resultant collision, the plaintiff sustained damages; and
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> 4. The nature, extent, and amount of the damages thus sustained by the plaintiff.

NEB. JURY INSTRUCTIONS No. 2.02(II)(B) (1969):

> In connection with the assertion of the plaintiff's negligence, the burden is upon the defendant to prove by a pre-

ance of the evidence that the defendant's decedent Lienemann operated his vehicle in a manner that failed to meet the standard of reasonable and ordinary care. The plaintiff was required to show that Lienemann negligently operated his vehicle in a manner that would foreseeably result in the direct and proximate cause of the plaintiff's decedent's injuries.

It is important to note that the defense of unavoidable accident is not an affirmative defense.[25] By raising the defense of unavoidable accident, the defendant did not asume the burden of establishing Lienemann's incapacity to control the car. The burden was still on the plaintiff to prove the collision was not unavoidable, Lienemann was able to control his car even though certain disabilities may have existed and he negligently failed to control his vehicle.

By asserting the unavoidable accident defense, a defendant attempts to narrow and more clearly define the scope of issues raised by his general denial of the plaintiff's complaint. The defendant in effect contends that the plaintiff's loss was not legally caused by the negligence of either party, and, therefore, the plaintiff should be denied recovery.

The defendant asserted his defense of unavoidable accident on the theory that his decedent Lienemann was incapable of meeting the ordinary, reasonable standard of care because he had become incapacitated by a massive cerebral hemorrhage.[26] Since the evidence presented by both parties could have reasonably supported conflicting findings on Lienemann's capability of controlling his car, the trial court submitted an unavoidable accident instruction to the jury.[27]

The court has held that an unavoidable accident instruction is not justified unless the issue is raised in the pleadings and is reasonably supported by evidence.[28] To give an unavoidable accident instruction without supporting evidence having been presented is reversible error.[29] It is not error, however, to fail to instruct on

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ponderance of the evidence each and all of the following propositions:

1. That the plaintiff was negligent in one or more of the particulars claimed against him by the defendant; and
2. That such negligence, if any, of the plaintiff was the proximate cause or a proximately-contributing cause of the plaintiff's (injuries, damages).

25. 65 C.J.S. *Negligence* § 21 at 651 (1966).
26. 188 Neb. at 454, 197 N.W.2d at 379-80.
27. *See* note 6 *supra.*
28. Owen v. Moore, 166 Neb. 226, 88 N.W.2d 759 (1958); Wright v. Lincoln City Lines, Inc., 163 Neb. 679, 81 N.W.2d 170 (1957).
29. *See* note 28 *supra.*

unavoidable accident where other instructions describe defendant's rights.[30]

One reason for the decline of the unavoidable accident doctrine in other jurisdictions is its tendency to needlessly confuse the jury when used in conjunction with a contributory negligence defense.[31] Unnecessary jury confusion is created when a defendant argues the accident was unavoidable and could not have been prevented, while claiming that although he may have been negligent, the plaintiff was contributorily negligent. The defendant concludes he should be absolved of all liability. This inherent conceptual incompatibility, arising when the unavoidable accident doctrine and the affirmative defense of contributory negligence are combined in a defense was recently examined in the *Journal of the American Trial Lawyers Association*:[32]

> Accepting the fundamental definition of unavoidable accident as an occurrence where neither plaintiff nor defendant is to blame, and that the accident would have happened anyway, even with the exercise of ordinary care, then surely an instruction on contributory negligence should be held inconsistent and confusing. It therefore follows that in any case where there is evidence of contributory negligence, an unavoidable accident instruction should never be given. Obviously, defense counsel would like the advantage of both, but if required to elect, will choose contributory negligence. . . .

This conceptual inconsistency between the affirmative defense of contributory negligence and the defense of unavoidable accident results in appellate reversal of defendant's verdicts. The significant possibility of jury confusion is considered reversible error because the defendant's case was prejudicially favored when submitted to the jury.[33] In order to prevent this sort of confusion, numerous jurisdictions[34] have abandoned the unavoidable accident defense and jury instruction altogether.[35]

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30. Schmidt v. Johnson, 184 Neb. 643, 171 N.W.2d 64 (1969); Harding v. Hoffman, 158 Neb. 86, 62 N.W.2d 333 (1954) (not reversible error to either give or not give instructions on unavoidable accident); Peacock v. J.L. Brandeis & Sons, 157 Neb. 514, 516, 60 N.W.2d 643 (1953).
31. *See* Berry, *supra* note 8, at 265; Ware v. Olstow, 112 Ga. App. 627, 145 S.E.2d 721 (1965); Guanzon v. Kalmou, 48 Hawaii 330, 402 P.2d 289 (1965); Gould v. Brown Const. Co., 75 N.M. 103, 401 P.2d 100 (1965); Grubb v. Wolfe, 75 N.M. 601, 408 P.2d 756 (1965); Shaw v. Null, 397 S.W.2d 523 (Tex. Civ. App. 1965); Iowa v. Sodolak, 398 S.W.2d 653 (Tex. Civ. App. 1966); Bolling v. Clay, 150 W. Va. 249, 144 S.E.2d 682 (1965).
32. Comment, 31 J. AM. TRIAL LAWYERS ASS'N. 81, 82 (1965).
33. Berry, *supra* note 8, at 264.
34. Annot. 65 A.L.R.2d 1, 27 (1959).
35. *See, e.g.*, Butigan v. Yellow Cab Co., 49 Cal. 2d 652, 320 P.2d 500 (1958), which expressly overruled Parker v. Womach, 37 Cal. 2d 116, 230 P.2d 823 (1951). The *Butigan* case clearly indicated that Cal-

The Nebraska Supreme Court has attempted to overcome the problem of prejudicial jury confusion without abandoning the unavoidable accident doctrine by consistently requiring that the unavoidable accident instruction be used only when the issue is clearly supported by evidence. In these situations, the court has found the instruction useful in assisting with jury deliberations over factual issues. The instruction has the advantage of directing the jury's attention to those factual issues in dispute. The Supreme Court, however, has recognized that the instruction should not be used when a defendant also relies on a contributory negligence defense. For example in *Stocker v. Roach*,[36] the court held that it was reversible error to give the unavoidable accident instruction since the defendant had filed a cross-petition alleging plaintiff's negligence. Moreover, in retaining the unavoidable accident doctrine as a defense against a complaint of negligence, the court has properly limited the doctrine to those cases where its use is supported by evidence and is consistent with all aspects of the defense.

In conclusion, the Nebraska Supreme Court's decision in *Moats* reaffirmed the court's approval of the limited role that the unavoidable accident doctrine plays in negligence litigation. Although the court has limited the application of the doctrine in order to avoid problems of unfair jury confusion, it has refrained from joining those jurisdictions which have abandoned the doctrine completely. The court appears to have chosen the superior viewpoint which recognized both the limitations and advantages of the unavoidable accident doctrine. When appropriate as a specific aspect of a defendant's general denial of negligence, continued use of the unavoidable accident instruction allows the court to assist the jury's inquiry into the pertinent factual questions at issue.

James S. Mitchell '74

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ifornia courts would no longer use the unavoidable accident instruction since the instruction was adequately encompassed within the general negligence instructions.

36. 140 Neb. 561, 300 N.W. 627 (1941).