

## 1000 UNAVOIDABLE ACCIDENT

### COMMENT

The Committee believes that no instruction is needed on this subject since, in most cases, there is some evidence of negligence as to a party, or else it is clear that the party is not negligent.

This comment was approved by the Committee in 1960 and updated in 1984. The comment was reviewed without change in 1989.

It is error to give an unavoidable accident instruction where there is no evidence that the accident resulted other than from negligence. Calhoun v. Lasinski, 255 Wis. 189, 191, 39 N.W.2d 353, 354 (1949); 65 A.L.R. 2d 33 (1949). In Calhoun, the Wisconsin Supreme Court said:

Defendant admitted applying his brakes hard enough to kill his engine. In view of these facts we can see no justification for submitting an instruction as to "unavoidable accident."

In Mittelstadt v. Hartford Accident & Indem. Co., 2 Wis.2d 78, 86-88, 85 N.W.2d 793, 797-98 (1957), the supreme court held that under the circumstances of this particular case, it is erroneous and prejudicial for the trial court to give an instruction on unavoidable accident.

Skidding does not necessarily warrant the giving of an unavoidable accident instruction. Paul v. Hodd, 271 Wis. 278, 282-84, 73 N.W.2d 412, 415-16 (1955); Abbott v. Truck Ins. Exch. Co., 33 Wis.2d 671, 148 N.W.2d 116 (1967).

When the instruction has been given, it has been held properly given in connection with the cause question, Murray v. Yellow Cab Co., 180 Wis. 314, 318-19, 192 N.W. 1021, 1023 (1923), but improperly in connection with the negligence questions, Mittelstadt, supra at 88.

The form of the instruction frequently approved is in the Murray and Mittelstadt cases. But note that in Linden v. Miller, 172 Wis. 20, 24, 177 N.W. 909, 910 (1920), the first paragraph of this instruction is criticized.

The common law does not impose upon anyone an absolute duty to avoid an accident, and it does not contemplate that all accidents or mishaps must arise as a consequence of fault. Millonig v. Bakken, 112 Wis. 445, 452, 334 N.W.2d 80 (1983).