

1960

# Leo Porter and Nora Porter v. Hyrum Price : Brief of Respondent

Utah Supreme Court

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Carman E. Kipp; Kipp & Charlier; Attorney for Respondent;

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**IN THE SUPREME COURT  
of the  
STATE OF UTAH**

**FILED**

MAR 22 1960

**LEO PORTER and NORA PORTER,**

*Plaintiffs and Appellants,*

State Supreme Court, Utah

—vs.—

**Case No. 9151**

**HYRUM PRICE,**

*Defendant and Respondent.*

**RESPONDENT'S BRIEF**

**CARMAN E. KIPP  
KIPP & CHARLIER**

*Attorney for Respondent*

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IN THE SUPREME COURT  
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STATE OF UTAH

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LEO PORTER and NORA PORTER,  
*Plaintiffs and Appellants,*

—vs.—

HYRUM PRICE,  
*Defendant and Respondent.*

Case No. 9151

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RESPONDENT'S BRIEF

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ADMISSION OF FACTS

Respondent agrees with the facts as stated by the appellants except in the particulars and details set forth in respondent's statement of facts hereafter.

## STATEMENT OF FACTS

Mr. Price, the respondent, has no recollection of the route which he followed from Lincoln Avenue and Twenty-Fourth Street, and while it is agreed that he drove fifteen or sixteen blocks through traffic and negotiated an undetermined number of traffic control devices, the exact route he followed and exact number of semaphore signals is unknown. (Transcript 91, 92, 93). It is also agreed that Mr. Price had had insulin reactions prior to the time of the accident, however, none of them were severe and none were of such a nature or in such a degree as to incapacitate him or make him unable to operate an automobile. (Tr. 166, 167, 174, 208, 155, 156) Further, he had always experienced warning symptoms at the onset of the relatively minor insulin reactions which he had experienced in the past, and had controlled them by candy or food. He had no warnings at the onset of the insulin reaction from which this accident resulted, although he did have either candy or an orange available in his automobile. (Tr. 93, 94, 167, 170, 173, 174) The evidence is further clear from the medical experts who were called, that it is possible for a diabetic at the onset of an insulin reaction to lose voluntary control and thus be unable to control the reaction even though means to do so might be at hand, and it is possible for a diabetic to have a reaction even though he follows medical directions and cares for himself in every respect. (Tr. 139, 146, 147, 158, 128, 129) Mr. Price did not testify that he had a clear recollection of taking 65 or 70 units of insulin on

the morning of the accident, but to the contrary testified that he had a clear recollection of taking the prescribed dosage, although he could not recall at the time of the deposition the exact amount of such dosage, since his dosage had been changed from time to time as his condition varied over the seventeen years during which he had suffered from diabetes. The fact that the dosage was subject to change was confirmed by the doctor who cared for his diabetic condition over the past three years, Dr. Drew Petersen. (Tr. 161, 165, 168, 169, 175)

His story with respect to driving the automobile without a conscious recollection through the traffic situation described was said to be a reasonable thing to expect a diabetic to do in an insulin reaction by both of the medical experts called. (Tr. 122, 123, 139, 140) Dr. Petersen also testified that Mr. Price was well regulated at the time of the accident and that it was possible for a well regulated diabetic to undergo an insulin reaction which might not have warning symptoms and which might not be subject to voluntary control, however, that such a reaction as described here would be unusual or rare. (Tr. 156, 158) He further testified that the same thing could happen to a person having a fainting spell, such as a woman might experience during her menstrual period. (Tr. 160)

Contrary to counsel's statement of facts in appellant's brief, Dr. O. N. Lewis (Tr. 120) did not diagnose defendant's condition as resulting from more insulin than was needed on the day in question. He merely indicated that this might be a cause of such a condition.

It must be conceded by appellant that Dr. O. N. Lewis, at no time, treated or examined defendant, and while he said it was unlikely defendant would not have premonitory symptoms of the reaction, he certainly did not say that it was impossible for this to be the case. (Tr. 121).

Both medical experts called, testified that their diabetic patients drive automobiles. (Tr. 125, 141) It is important to further note that there was absolutely no evidence to the effect that defendant had anything but a normal, usual days activities as to eating habits, working and taking of medication. The evidence on this point is supplied by Mr. Price and his wife, Bonnie Price, both of whom testify that he followed his normal routine for an average day. (Tr. 169-172, 205). It is to be further noted that Mr. Price took a daily test of his urine to ascertain whether his condition was well regulated and that he performed this test on the day of the accident as was his usual practice (Tr. 168) and found nothing out of the ordinary.

The evidence is also uncontradicted on the point that all persons who observed him on the day of the accident found him to be normal in appearance prior to the time he drove his car into Ogden. These include Kenneth W. McClannon (Tr. 191) and Tony Ledesma (Tr. 197, 198), who rode in the car pool with him. However, immediately prior to the accident an acquaintance, Robert A. Call, observed him driving his automobile in an erratic manner and testified that he appeared to be in a stupor. (Tr. 11)



All the witnesses who observed him at the scene gave similar testimony. (Tr. 32, 38, 66, 68, 75, 76) And all of the symptoms described were stated by the medical experts to be consistant with a diagnosis of insulin reaction. (Tr. 126, 136, 137)

## STATEMENT OF POINTS TO BE ARGUED

### POINT I.

THAT THERE IS SUFFICIENT EVIDENCE TO SUPPORT THE VERDICT OF THE JURY.

### POINT II.

THAT THE COURT PROPERLY INSTRUCTED THE JURY AS TO THE APPLICABLE LAW, INCLUDING INSTRUCTIONS ON UNAVOIDABLE ACCIDENTS.

### POINT III.

THAT THE COURT PROPERLY REFUSED TO GIVE PLAINTIFFS' REQUESTED INSTRUCTION NO. 5.

### POINT IV.

THAT THE COURT PROPERLY REFUSED TO GIVE PLAINTIFFS' REQUESTED INSTRUCTION NO. 9.

### POINT V.

THAT THE COURT PROPERLY REFUSED TO GIVE PLAINTIFFS' REQUESTED INSTRUCTION NO. 10.

## ARGUMENT

### POINT I.

THAT THERE IS SUFFICIENT EVIDENCE TO SUPPORT THE VERDICT OF THE JURY.

The law has been clearly stated on numerous occasions by this Court with respect to the province of this Court in reviewing the verdict of a jury. A typical holding is found in the case of *Coombs v. Perry*, 2 Utah 2nd, 381, 275 Pac. 2nd 680, the Court saying:

“The plaintiff having won a judgment below, the verdict is protected by bulwark of rules firmly established in our law. First, by the general proposition that the judgment and proceedings in the lower court are presumptively correct with the burden upon defendant to show error. Second, where a trial judge has passed upon a question and a jury presumably fair and impartial has made a finding, while such is not controlling, it is at least entitled to some consideration and should not be wholly ignored in reviewing the situation and attempting to see as objectively as possible whether reasonable minds might so conclude. Third, that the Court must review the evidence together with every inference fairly arising therefrom in the light most favorable to the plaintiff, and similarly must consider any lack or failure of evidence in the same light, which we do in reviewing the facts here.”

Cited in support of this position are the following cases: *Burton v. Z.C.M.I.*, Utah, 249 Pac. 2nd 514; *Toomer's Estate v. Union Pacific Railroad Company*, Utah, 239 Pac. 2nd 163; *Great American Indemnity Company v. Berryessa*, Utah, 248 Pac. 2nd 367; *McCollum v. Clothier*, Utah, 241 Pac. 2nd 468. If, therefore, it is found that the jury in this case concluded as reasonable minds might conclude, based upon the evidence viewed in the light most favorable to defendant, and thus arrived at

its verdict, such verdict should not be reversed by this Court. The jury, as the triers of fact, are best able to observe the witnesses and their demeanor and to view the trial proceedings first hand so that they are in a much more advantageous position to determine the facts than is this Appellate Court.

While it is true that Mr. Price had been a diabetic for seventeen years, appellant makes an incorrect assertion in the statement that he had suffered several insulin reactions which if not checked would have caused him to lose consciousness. This conclusion appears nowhere in the record, the only evidence being that Mr. Price had suffered prior reactions of mild or moderate degree, all of which had been preceded by warning or premonitory symptoms and none of which had incapacitated him. This testimony was elicited from Mr. Price, his wife, Mrs. Bonnie Price, and his physician, Dr. Drew Petersen. (Tr. 155, 156, 166, 208) It is further testified that he was a conscientious and well regulated diabetic. (Tr. 135, 136, 140, 167, 168, 170, 203, 204, 211) He had no reason to think that he might have such a reaction, having had none in the past, and such an occurrence being rare according to all medical evidence in this case. (Tr. 121, 123, 156) Dr. Drew Petersen, his physician and a specialist in internal medicine and diabetes, testified that a diabetic can, however, have such a reaction even though he is careful and conscientious in the care of his condition. (Tr. 158) However, as the doctor testified, a similar loss of control of an automobile could come from any of a number of reasons, including occurrences such as faint-

ing during a menstrual period by a woman driver. (Tr. 159, 160) Counsel's statement that Mr. Price admitted to taking an overdose is incorrect and has been discussed in the statement of facts. In fact, Mr. Price testified clearly and unequivocally that he took on the day of the accident and, in fact, always took the prescribed amount of insulin on which he was regulated and that he did not change the amount of his dosage without first consulting his doctor. This was born out by Dr. Petersen. (Tr. 135, 136, 140, 141, 169, 175) Mr. Price testified further that he could not recall the exact amount of insulin on which he was regulated at the time of the accident, as his dosage had varied over the many years which he had suffered from the disease, but that he did take the prescribed amount. (Tr. 163, 169, 175)

The evidence is further clear that in the absence of some unusual activity of eating, working or medication there would be no reason to anticipate such a reaction, and Mr. Price had no such variance on the day of the accident. (Tr. 169-172, 205, 145) There is nothing to indicate that Mr. Price's story was either inaccurate or false, and, in fact, both medical experts testified that his story, including the negotiating of traffic and traffic controls, was reasonable and could well have happened if he were suffering from an insulin reaction. (Tr. 122, 139, 140) There is no prohibition in Utah Law against a sufferer from the disease of diabetes operating an automobile. The only applicable code section is found at 41-6-64 (C) Utah Code Annotated 1953.

“It is unlawful and punishable as provided in subdivision D of this section for any person who is an habitual user of or under the influence of an narcotic drug, or who is under the influence of any other drug, to a degree which renders him incapable of safely driving a vehicle, to drive a vehicle within this State.”

The application for operators' license in the State of Utah specifically asks the question :

“Have you ever suffered from epilepsy, heart trouble, paralysis, fainting or dizzy spells. Have you ever been addicted to narcotic drugs or intoxicating liquors?”

It makes absolutely no reference to diabetes, the clear inference being that a controlled diabetic is a fit and proper person to operate an automobile. Appellant argues that defendant might, because of his diabetic condition undergo an insulin reaction at any time. However, respondent contends this line of argument is fallacious. Followed to its ultimate conclusion it would prohibit anyone from driving an automobile on the basis that everyone knows that they will some day die, and that because it is impossible to predict exactly where or in what manner this unfortunate event will take place it thus is conceivable that it could happen while operating an automobile and, therefore, it is unsafe for anyone to drive. Defendant and respondent in this case was clearly a fit and able person to drive an automobile, having experienced no difficulties with his disease which would give him any warning or indication that he might not be able to properly operate an automobile. Further, even

when he had undergone mild reactions in the past he had had warning symptoms which would have allowed him ample opportunity to pull an automobile off of the road, to eat the orange which he always carried in his lunch bucket on the way home from work (Tr. 167, 170), to eat candy which he customarily carried with him, or to take other action which would avoid any mishap. The insulin reaction which caused the accident in this case was entirely unforeseeable and unforeseen and could have in no way been guarded against by defendant in the exercise of reasonable care.

Counsel cites several cases almost all of which deal with the subject of epilepsy. It is to be noted that plaintiffs' own medical expert, Dr. Marvin O. Lewis, testified that epilepsy was not controllable to the same extent as diabetes. (Tr. 126) It is also noted that epilepsy is one of the diseases specifically referred to in the application for Utah Driver's License. The text authorities and cases supporting defendant's position that the accident under the evidence in this case was unavoidable are numerous. Under the heading, "Negligence as a Basis of Liability for Injury — Liability for Unavoidable Accident," 5A Am. Jur. Autos, Section 193, p. 346-347, is found the following statement:

"It is essential to the existence of liability for injuries caused by an automobile that there be some negligence, some fault on the part of the person sought to be held liable."

The subject is also covered in Article Two of the Restatement of Torts which sets out the general propo-

sition that a person can only be liable for his conscious acts.

A current and exhaustive treatment of the subject is found at 28 ALR 2nd, under the section cited below:

“Fainting or momentary loss of consciousness while driving is a complete defense to an action based on negligence . . . if such loss of consciousness was not foreseeable.”

28 A.L.R. 2d, 35, § 15.

Under this annotation are cited numerous cases covering fainting spells, heart attacks, menstrual fainting, coughing spells, etc.

“According to the great weight of authority, an operator of a motor vehicle who becomes suddenly stricken by a fainting spell or otherwise loses consciousness while driving, and for this reason is unable to control the vehicle, is not chargeable with negligence or gross negligence if his loss of consciousness is due to an unforeseen cause.”

“Of course no fixed rule can be established to determine when or under what circumstances the driver must desist from driving a vehicle because of the danger of his losing consciousness, but it seems that the courts are rather lenient in this respect and *it can certainly not be stated as a general rule that a person who knows that he is suffering from a heart condition or another illness which may cause his loss of consciousness at some future time is automatically at fault if he drives an automobile and, while doing so, loses consciousness, thereby causing an accident.*” (Emphasis added.)

28 A.L.R. 2d 22, § 3

Also in accord is 60 C.J.S. Motor Vehicle § 264.

A similar rule is stated in Blashfield, Cyclopedia of Automobile Law.

“ . . . a motorist stricken by paralysis, overcome by poisonous gas, seized by a fit, or falling asleep, who still continues to drive and, while unconscious, causes injury to another, cannot be held therefor unless he was reasonably aware that he was about to lose consciousness to the extent that a person of ordinary prudence would not attempt to continue driving.”

Blashfield, Cyclopedia of Automobile Law § 656 (1948)

While many of the authorities would seem to include the epileptic under the general classification thereby allowing him the same defense as asserted by defendant and respondent in this case, it is clear that epilepsy presents a much more difficult problem because of its greater difficulty to control than diabetes. Countless numbers of diabetics drive automobiles on the streets of our cities every day, as do countless numbers of sufferers from heart disease and other ailments which might possibly result in unconsciousness. Doctors do not advise them to desist from driving. (Tr. 125, 141)

The case of *State v. Olson*, 160 Pac. 2nd 427, cited by appellant is clearly distinguishable on two grounds. First, that the defendant in this case felt drowsy but continued to drive, thereby having the warning symptoms referred



to above, and second, that it was through a voluntary act of defendant that she allowed herself to become overly tired and from this her sleep and the accident resulted, the conclusion being that by getting proper rest she could have avoided this occurrence. It is, therefore, respondent's position that this holding has no application to the case at bar.

In conclusion it is therefore argued that it is clear that a proper jury question of fact was raised under the applicable authorities as to the law, that the jury found the facts in favor of defendant, and properly returned a verdict of no cause of action in favor of defendant.

## POINT II.

THAT THE COURT PROPERLY INSTRUCTED THE JURY AS TO THE APPLICABLE LAW, INCLUDING INSTRUCTIONS ON UNAVOIDABLE ACCIDENTS.

Appellant challenges the instruction which is quoted in appellant's brief and which was given as instruction No. 8 by the Court. In order to properly evaluate this instruction it must be construed as are all instructions in context with all the other instructions given by the Court in this case. In fact, this specific instruction was given to the jury as part of instruction No. 22 given by the Court.

“ . . . you are not to single out any sentence or any individual point or instruction and ignore the others, but you are to consider all the instructions, as a whole, and to regard each in the light of all the others.”

Instructions which bear directly or indirectly on instruction No. 8 as given include instructions No. 3, 5, 7,

9, 10, 11 and 12, and the Court's attention is respectfully directed to these instructions as transmitted in the Record from the District Court. Instructions No. 9 and 10 bear most directly on the problem at hand and we, therefore, set forth hereafter instruction No. 8 on which error is assigned, instruction No. 9 and instruction No. 10.

Instruction No. 8:

"The law recognizes unavoidable accidents. An unavoidable accident is one which occurs in such a manner that it cannot justly be said to have been proximately caused by negligence as those terms are herein defined. In the event a party is damaged by an unavoidable accident, he has no right to recover, since the law requires that a person be injured by the fault or negligence of another as a prerequisite to any right to recover damages."

Instruction No. 9:

"A driver of an automobile who is stricken by paralysis, seized by a fit or otherwise rendered unconscious and who still continues to drive while unconscious and causes damages or injury to another cannot be held responsible therefore unless he was reasonably aware that he was about to lose consciousness to the extent that a person of ordinary prudence would not attempt to continue driving."

Instruction No. 10:

"You are instructed that fainting or loss of consciousness while driving is a complete defense to an action based on negligence if such loss of consciousness was not foreseeable. If you find that defendant Hyrum Price was suffering from

an unforeseen insulin reaction, resulting in a fainting spell or loss of consciousness at the time of this accident, then you must return a verdict in favor of the defendant and against the plaintiffs.

“On the other hand, if the insulin shock that defendant suffered was foreseeable and he could have done something about it, and thereby avoided the accident, then and in that event he would be charged with negligence proximately causing the accident.”

While appellant summarily disposes of *Nelson v. Lott*, 17 Pac. 2nd, 272, with the statement that it is not substantial authority for the instruction, we respectfully invite the Court’s attention to page 275 of this case. In the *Nelson v. Lott* case appellant assigned as error the court’s instruction No. 10 which read as follows:

“You are instructed that if you believe from the evidence that the injury to plaintiff was a result of unavoidable accident and that the defendant’s negligence was not the cause thereof your verdict should be in favor of defendant, no cause of action.”

The Court stated as follows:

“Appellant contends that the instruction is contrary to law and misleading in that it assumes that an unavoidable accident could be caused by defendant’s negligence. The instruction would have been sufficient without the words, ‘and that the defendant’s negligence was not the cause thereof.’

“However, the writer is inclined to think the jury would interpret the instruction to mean that

if they should believe the injury to the plaintiff was a result of unavoidable accident and not of negligence on the part of defendant, then verdict should be in favor of defendant. We think the word 'thereof' refers to the word 'injury' and not the word 'accident.' While the instruction is open to criticism we are of the opinion that it was not prejudicial."

The case, therefore, seems to clearly sanction the words "unavoidable accident" and the instruction with relation to unavoidable accident as being a defense.

The subject is treated under the general heading "inevitable accident" in Blashfield, Cyclopedia of Automobile Law and Practice 1 Part II, § 635. Numerous cases are cited in support of the unavoidable accident theory and the words "unavoidable accident" and "inevitable accident" are used throughout the cases and the text. It is further noted that the Court spelled out in great detail the applicable law in Instructions No. 9 and 10 as well as in Instruction No. 8 on which appellant assigns error.

The cases of *Karlborg v. Wesley Hospital and Nurse Training School* 323 Pac. 2nd 638 (Kansas); *Paskil v. Leigh Rich Corp.*, 340 Pac. 2nd 741, (Cal.), are both clearly distinguishable on the grounds of concurrent negligence together with the circumstance claimed to give rise to the unavoidable accident and the question of foreseeability which was obviously decided in this case in favor of defendant based on the evidence to which the Court has been referred in preceeding sections of this brief.

California has adopted the general rule with respect to unavoidable accidents and non-liability of a non-negligent defendant in the case of *Ford v. Carew and English*, 200 Pac. 2d 828. Other cases in accord include *Cohen v. Petty*, 65 F. 2d 820 (D.C. Circuit) 1955; *Armstrong v. Cook*, 227 N.W. 433, 138 A.L.R. 1396; *Bridges v. Speer*, (Fla.) 79 So. 2d 679; *Lehman v. Haynam*, (Ohio) 133 N.E. 2d 97; *LaVigne v. LaVigne* (Oregon) 158 P. 2d 557.

In Prosser's generally recognized work on Torts, the following statement is found:

"An unavoidable accident is an unintended occurrence which could not have been prevented by the exercise of reasonable care. In general, under modern law there is no liability for unavoidable accident."

Prosser Torts, page 117.

"On the other hand a transitory unconsciousness or delirium due to illness commonly is regarded as a circumstance depriving the actor of control over his conduct which will absolve him from liability."

Prosser Torts, page 127 (2nd Edition 1955)

Appellant therefore urges that the instructions of the Court considered as a whole were a clear and proper statement of the law and that no error exists in this regard.

### POINT III.

THAT THE COURT PROPERLY REFUSED TO GIVE PLAINTIFFS' REQUESTED INSTRUCTION NO. 5.

Plaintiff claims error on the basis of the Court's failure to instruct the jury in accordance with plaintiffs'

requested instruction No. 5 which is set forth hereafter.

“If the defendant, Hyrum Price, knew that because of his diabetic condition he was subject to attacks in the course of which he was likely to lose consciousness but nevertheless operated a motor vehicle on a public highway and while in a state of unconsciousness caused by his diabetic condition, drove his automobile onto the wrong side of the road and into the automobile in which plaintiff Nora Porter was seated, causing damage to the motor vehicle owned by Leo Porter and injury to Nora Porter, you will find the defendant, Hyrum Price, was negligent in causing the said collision and will award judgment to the plaintiffs for such damages and injuries as you find were caused by and are the proximate result of defendant’s negligence.”

This general subject matter including the essential elements of unavoidable accident, and foreseeability of the occurrence were covered in the Court’s instructions No. 8, 9 and 10 which are quoted in the immediately preceding section of this brief.

It is further noted that this instruction is faulty in two respects. First, there is absolutely no evidence that Hyrum Price knew “he was subject to attacks in the course of which he was likely to lose consciousness” as no such attacks had occurred in the past and, in fact, medical evidence indicates that an occurrence of the type which resulted in the accident in this case is unusual or rare, particularly where the diabetic was conscientious in his care of himself and was well regulated as was the defendant, Mr. Price. Second, the requested instruction com-

pletely omits the necessary element of foreseeability. All of the authorities seem to be in accord on the proposition that the unconsciousness must be reasonably foreseeable or must be subject to being guarded against by the exercise of reasonable care.

“Fainting or momentary loss of consciousness while driving is a complete defense to an action based on negligence . . . if such loss of consciousness was not foreseeable.”

28 A.L.R. 2d 35 §15

In accord with this rule of law are authorities found at:

5A Am. Jur. Prud. Auto § 193 p. 346, 347

28 A.L.R. 2d 22 § 3

60 C.J.S. Motor Veh. § 264

Blashfield, *Cyclopedia of Automobile Law* § 656 (1948)

Prosser, *Torts*, p. 117, 127 (2d ed. 1955)

*Cohen v. Petty*, 65 F 2d 820

*Armstrong v. Cook*, 227 N.W. 433, 138 ALR 1396

*Ford v. Carew & English*, (Cal.) 200 P. 2d 828

The Court's attention is drawn to the distinction pointed out by respondent on appellant's claimed authority under *State v. Olson* (Utah) 160 P. 2d 427, under Point I of this brief on the grounds of foreseeability and that it was based on an at least partially voluntary act of Defendant. With respect to *Eleason v. Western Casualty and Surety Co.*, 35 N.W. 2d p. 301, it is noted that at page 7 of appellant's brief where this case is also quoted appellant makes the following statement with respect to the facts of the case:

“It further appeared that the driver knew he was subject to spells or seizures rendering him unconscious although he did not know he had epilepsy.”

This is entirely contrary to the facts of the instant case as the evidence is uncontradicted to the effect that defendant had no knowledge he was subject to unconsciousness as a result of his diabetic condition, and even in the instances where he had undergone a mild insulin reaction in the past he had experienced warning symptoms which would have been ample to allow him to avoid the accident as it occurred in this case.

#### POINT IV.

THAT THE COURT PROPERLY REFUSED TO GIVE PLAINTIFFS' REQUESTED INSTRUCTION NO. 9.

Respondent again contends that the instructions of the Court as given were a proper, clear and understandable statement of the law with respect to the issues of this case. The essential elements of plaintiff's requested Instruction No. 9 as they comply with the applicable law were covered by the instructions of the Court. The instruction as requested was faulty in two respects, both of which relate to its non-conformance to the evidence in this case.

First, the instruction includes the words “if he (defendant) allows himself to get into a condition where an accident could happen without his being aware of it or able to avoid it.” There is no evidence that defendant in any way failed to care for himself as he should have,



and in fact, the evidence is overwhelming on the point that defendant was conscientious and careful in his care of his diabetic condition, that he exercised all usual and reasonable precautions and that he carefully followed the advice and instructions of his physician.

Second, the instruction went on to state as follows:

“and if you find the defendant suffered from diabetes, and in any manner did not properly care for himself so as to allow himself to get into a physical condition where he could lose control of his automobile while operating said automobile . . .”

There is no evidence that defendant did not properly care for himself and it is further to be noted that this portion of the instruction is thoroughly covered by the second paragraph of Instruction No. 10 as given by the Court which reads as follows:

“on the other hand, if the insulin shock that defendant suffered was foreseeable and he could have done something about it, and thereby avoided the accident, then and in that event he would be charged with negligence proximately causing the accident.”

The distinction drawn between the only authority cited by appellant in support of this position, that being *State v. Olson* (Utah) 160 P. 2d 427 is again to be noted.

#### POINT V.

THAT THE COURT PROPERLY REFUSED TO GIVE PLAINTIFFS' REQUESTED INSTRUCTION NO. 10.

The respondent contends that this instruction does not state the law in that it contains words to the effect that if it is found that defendant is suffering from dia-

betes, a fact which is admitted, it is improper for him to operate an automobile and that he must be held liable in this case. In support of his contention that this instruction should have been given appellant, refers to and cites *Williams v. Frohock* (Florida) 114 So. 2d 221, and the recited facts of this case include the following: "The defendant had suffered loss of consciousness several times before, but never while driving." For this reason, that case does not conform to the case at bar and must be distinguished. The transcript in this case discloses that the evidence is uncontradicted to the effect that defendant and respondent had suffered minor reactions in the past, all of which had been readily controlled and none of which had resulted in unconsciousness. (Tr. 135, 136, 140, 141, 155, 156, 166, 208) It is further to be noted that defendant had driven extensively and had held a chauffeurs license for a considerable period of time and had never had any prior difficulty driving. (Tr. 167, 174, 189, 190, 195, 208)

Authorities cited by appellant must be distinguished on the grounds that prior occurrences of a similar nature were found to be sufficient as a matter of fact to have given warning to defendant on the basis of which he should have known he was, or might be, an unsafe person to operate an automobile. The subject of foreseeability was specifically covered in the Court's instructions, particularly instructions No. 9 and 10, and, at the very least, the facts in this case were certainly sufficient to justify a jury finding that the accident was unavoidable on the part of defendant.

## CONCLUSION

Viewing the facts in light most favorable to defendant, the prevailing party in the lower Court, it seems clear that this court must conclude that the jury properly returned a verdict of no cause of action in favor of defendant on the basis of the accident being unavoidable on his part and not in any way caused by or resulting from his negligence. The Court carefully and properly instructed the jury on the applicable law, setting it forth in clear and concise fashion, and certainly including the basic elements of negligence and unavoidable accident on the basis of which the jury made its determination.

The essential elements of appellant's requested instructions as they properly stated the law were incorporated and embodied in the instructions of the Court. Certainly it cannot be reasonably argued that this Court should reverse the findings of fact made by the jury and, based upon what appellant claims to be preponderance of the evidence, award a verdict to appellant.

The facts are more than adequate to support the jury's verdict based upon the law as properly recited by the court in its instructions.

Respondent therefore contends that the verdict of the jury in the lower Court must be affirmed.

Respectfully submitted,

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