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THE SUDDEN EMERGENCY DOCTRINE IN COLORADO

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The defendant was driving his automobile upon a road with which he was well-acquainted. He ascended a hill from the south, the slope on the other side being hidden from view. Although he knew travelers might be expected to be ascending the hill from the north, he passed another car at great speed shortly after commencing his descent. He failed to see the plaintiff ascending from the north upon a motor cycle, and collided with him, causing serious injury.

Under the foregoing fact situation, should plaintiff be denied relief because he was contributorily negligent in that he possibly might have escaped injury by taking the edge of the road? This question, presented in *Lebsack v. Moore*,[1] is typical of the sudden emergency cases which arise today and which must be solved by our modern tribunals. Should the plaintiff be held to the same degree of care as any participant in such an accident, or are there distinguishing circumstances which must be given special consideration and merit a different legal application?

We can quite readily see from the facts presented that the plaintiff was suddenly confronted with an unexpected imminent danger and had to make an immediate choice between alternative courses of conduct. Before continuing into a discussion of the application of this *sudden emergency doctrine*, we should first try to form some general definition of what an emergency is.

A broad definition of an emergency was followed by our Colorado Supreme Court, where it was said that an emergency is *some sudden or unexpected necessity requiring immediate or at least quick action.*[2] Another definition is: *An unforeseen occurrence of circumstances which calls for immediate action or remedy.*

Although these definitions are quite broad, they would not suffice in the presentation of an emergency instruction to the jury. In viewing the emergency doctrine in its broader scope, the following factors enter into all of the emergency cases and are briefly discussed by Dean Prosser [3] in his short analysis of the theory:

> (a) The actor who is confronted with a sudden emergency may be left no time for thought, or may be reasonably disturbed or excited, and so cannot weigh alternative courses of action.[4]
>
> (b) While he cannot weigh alternative courses of action, he must, nevertheless, make a speedy decision, which will be based very largely upon impulse or instinct.

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[1] 65 Colo. 315, 177 P. 137 (1918).

[2] First State Bank v. Becker, 78 Colo. 436, 242 P. 678 (1925).

[3] PROSSER ON TORTS, p. 242 (1941).

[4] See, Sherman v. Ross, 99 Colo. 354, 62 P. 2d 1151 (1936).

(c) The emergency must not have been created through the actor's own negligence.

There are two other elements which the cases seem to require, but which Dean Prosser does not mention. These are: Where an injury results from the choice made, and where the actor is aware of the emergency.[5]

Most writers very glibly pass over the doctrine as another application of the reasonably prudent man test and don't go into its ramifications. The practical uses of the doctrine to the lawyer practicing in the field of torts are thus seldom discussed.

From the above elements, we reach the conclusion that the practicing lawyer should look at his fact situtation to see if the doctrine is applicable before he requests an emergency instruction. Illustrative of the instructions accepted by our courts in such instances are the following:

> If one uses bad judgment in the excitement of the moment of danger, this of itself does not prove negligence, and in such cases plaintiff is only required to use ordinary care to prevent injury.[6]
>
> A party suddenly realizing that he is in danger from the negligence of another is not to be charged with contributory negligence for every error of judgment when practically instantaneous action is required.[7]

There are many other Colorado cases wherein similar instructions which include the above elments have been approved.

Colorado Follows Majority Doctrine

From a digest of the cases, it is clearly ascertained that Colorado upholds the emergency doctrine and uses the majority elements stated. The doctrine was applied as early as 1894 in our court decisions which hold that where an instantaneous decision is demanded from a person dazed by danger, an error of judgment is not in law to be imputed to him as contributory negligence. Rather, it is for the jury to determine whether or not the conduct of one so situated amounts to contributory negligence.[8]

A summary list of the emergency cases from 1918 to 1944 is set out by Richard Hall in his new book,[9] which includes the leading cases in Colorado on the topic. Through these and numerous other cases the doctrine is firmly established in this state.

A review of these cases makes it apparent that, as is generally true in tort actions, the burden of proof rests upon the one who seeks to benefit from the emergency. It also appears that there may be special circumstances requiring a different test for

[5] Hanson v. Matas, 212 Wis. 275, 249 N.W. 505 (1933). An exceedingly deaf pedestrian on a highway had his clothing brushed by the front of a truck approaching him from behind. He turned toward it instead of jumping away from it, and in consequence he was struck by the projecting box of the truck. Held not entitled to an instruction on the emergency rule since he acted before he was aware of his danger.

[6] Colo. Midland Ry. Co. v. Robbin, 30 Colo. 449, 71 P. 371 (1902).

[7] Grunsfield v. Yetter, 100 Colo. 570, 69 P. 2d 309 (1937).

[8] Union Pacific Ry. Co. v. Kelly, 4 Colo. App. 325 (1894).

[9] Hall, Colorado Accident Law Digest (1951).

the judgment of the actor who seeks the benefit of the doctrine. For example, if by reason of special training or natural aptitude the actor has greater ability to cope with possible dangerous situations, a better judgment will be required of him. An illustration given in the *Restatement of Torts* suggests that a driver of a high speed interurban omnibus would not be reasonably competent to drive unless by constant training and practice he had become capable of almost automatic reaction to the numerous situations which are likely to arise and which, when they do arise, require prompt and proper action.[10]

The problems of whether an emergency existed and whether the actor has been reasonably prudent are usually left to the determination of a jury, with the court being very reluctant to direct a verdict in such instances. The jury is given the situation of the reasonably prudent man acting under similar circumstances.[11] In other words even in an emergency, the question of whether an automobile driver is or is not negligent must be determined by the standard of reasonableness under the particular circumstances, considering the emergency as one of the circumstances.[12] A good illustration of this rule is the action for damages to the plaintiff's horse sustained in a collision with the defendant's automobile.[13] The court held that the defendant could not complain of an instruction such as this:

> What is negligence? The law says that it is want of due care. It is what a man of ordinary prudence, under the circumstances would do. There is the question of sudden peril; something happens all at once. The law is, what would a reasonable man do under the circumstances? What would a man of reasonable prudence do? The law sets up as the ideal a man of reasonable prudence.

It was held not a valid objection to the above instruction that it in effect charged the jury that one in a position of sudden peril is held to the standard of ordinary prudence.

Application Where Children Involved

Another application of the doctrine occurs when children are involved. It was stated in *Hunt v. Los Angeles Ry. Corporation,* in reversing a judgment for the defendant in an action for the death of a boy eleven years old, who, while riding a bicycle, was struck by a motor bus:

> Conduct which might otherwise constitute negligence on the part of a child may not be so considered where its acts or omissions were done or omitted in an emergency calculated to produce fright, bewilderment, or confusion. As has been held with respect to the conduct of adults under similar circumstances, if the negligence of the defendant causes fear and loss of presence of mind on the part of the injured person, so as to impel him to rush into danger, his

[10] Restatement on Torts, Sec. 296 (c).
[11] Denver-Los Angeles Trucking Co. v. Ward, 114 Colo. 348, 164 P. 2d 730 (1945).
[12] Dillon v. Sterling Rendering Works, 106 Colo. 407, 106 P. 2d 358 (1940).
[13] Barkshadt v. Gresham, 120 S. C. 219, 112 S. E. 923 (1922).

mere error or mistake of judgment does not necessarily constitute contributory negligence, as a matter of law.[14]

When applying the reasonably prudent rule to children, the usual analogy is that of a child of the same age under similar circumstances.

When considering the *emergency doctrine* and the *last clear chance doctrine* together I find the criteria which distinguishes them is usually the test of deliberation. In many cases both theories are presented, and a determination must be made as to whether the actor had sufficient time to weigh the factors which occurred to him at the time of the accident. Most courts advocate that when the actor had a chance to deliberate he will be entitled to an instruction on last clear chance, and an emergency instruction will not be given. The trouble with this is that most of the fact situations lend to a confusion on the point of deliberation and the question is a close one.

AN INSTRUCTION ON BOTH THEORIES?

A view which some courts have adopted is that when the evidence shows such a divergence, an instruction on each theory should be given. On many occasions both parties ask for an emergency instruction. The plaintiff wishes to avoid the implication of contributory negligence, while the defendant seeks to prove that his actions under the conditions were not negligent. A survey of the judgments shows that where an emergency case is decided we have more directed verdicts for the defendant than the plaintiff. More judgments for the plaintiff are reversed than are reversed for the defendant and the jury finds for the plaintiff much more frequently than for the defendant.[15]

In Dean Evans' study of the doctrine, he points out the cases where the actor has acted precipitately in order to avoid an immediate danger to himself. It is hard to conceive that in these cases even an instant's reflection would not have foretold danger to others. This fact of immediate personal danger is held adequate to create a privilege in the interest of self-preservation, unless the actor's conduct in coming into the emergency was blameworthy. Where personal safety is involved, one may put the immediate loss upon another, at least if that other person is unidentified at the time. So far no method has been found of weighing the advantage to him and the harm to the other by giving damages, measured either by the value of the advantage to the defendant or the harm to the plaintiff. If, however, a party by his own negligence created the emergency, he cannot have the benefit of an emergency instruction to excuse his negligence.[16]

[14] Hunt v. Los Angeles Ry. Co., 110 Cal. App. 456, 294 p. 745 (1930); Ottertail v. Duncan, 137 F. 2d 157 (CCA 8th S. D.) (1943).

[15] Evans, *The Standard of Care in Emergencies*, 31 KENTUCKY LAW JOURNAL 229 (1943).

[16] *Ibid.*