TRIAL TALK

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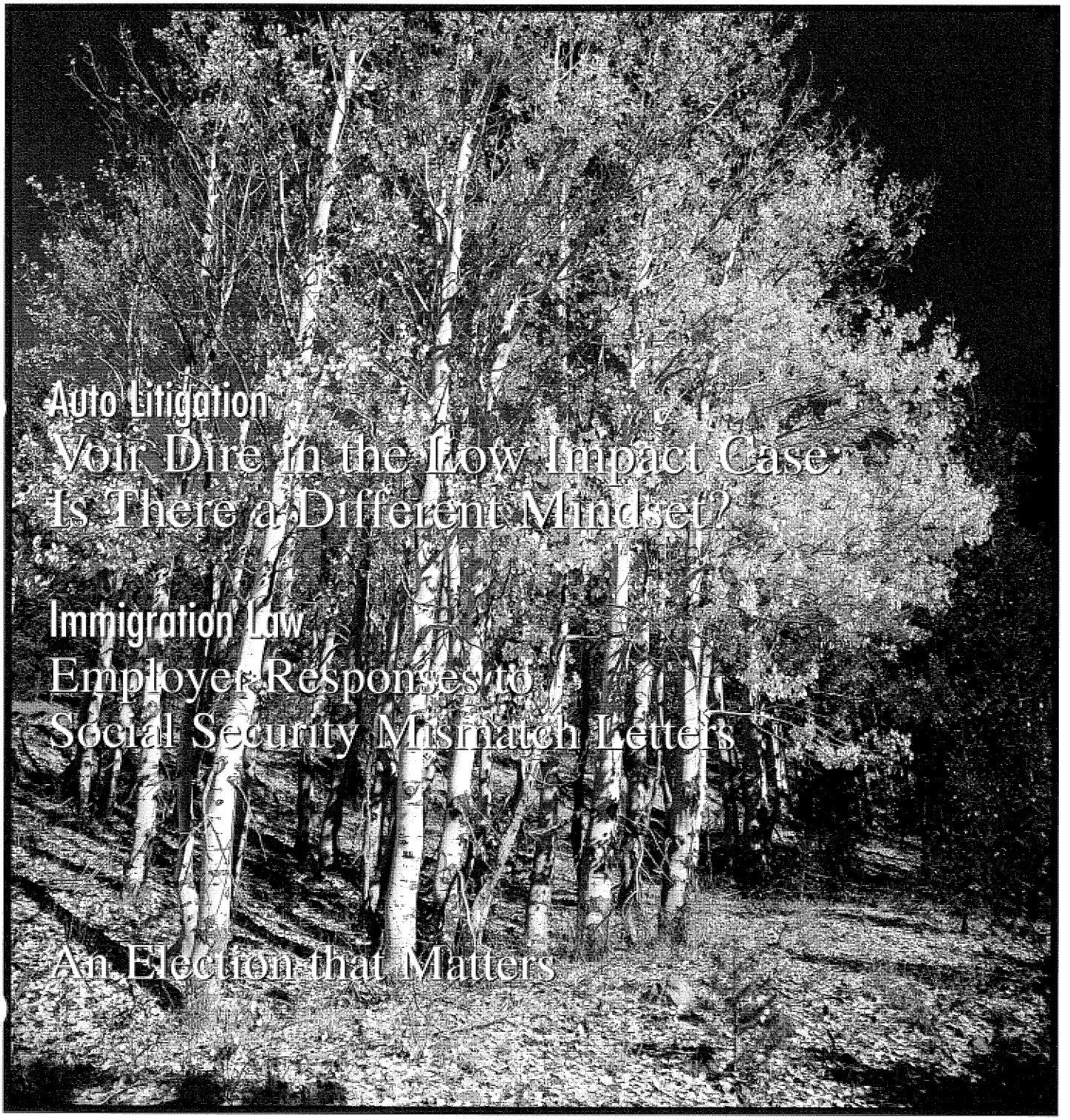

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There Is No Such Thing as a Sudden Emergency Defense

By Mac Hester, Esq.

The Concept Of Sudden Emergency: What It Is; What It Is Not

The sudden emergency "defense" does not exist. Despite the plain, simple language in published Colorado court decisions that the sudden emergency doctrine is not a defense, most judges and attorneys continue to believe and act as if it actually is a defense. It is not.

Consider *Davis v. Cline,* which examines the doctrine: "From our study of this doctrine, we view it merely as an evidentiary guideline by which a trier of fact may properly apply the prudent man rule evaluating the evidence of negligence being considered. It need not be stated in the complaint as an affirmative basis for relief, nor in the answer as a basis of defense."[1] If it is not required to be pled in the answer, then it obviously is not an affirmative defense.

What is it then? It is a jury instruction. Period.

Read the following sentence out loud three times and commit it to memory: "There is no such thing as a sudden emergency defense; there is only a sudden emergency jury instruction."

The Sudden Emergency Jury Instruction

Colorado Jury Instruction - Civil 4th 9:10 provides:

> A person who, through no fault of his or her own, is placed in a sudden emergency, is not chargeable with negligence if the person exercises that degree of care which a reasonable person would have exercised under the same or similar circumstances.[2]

It sounds simple enough, doesn't it? Yes and no. It is simply a statement of the normal reasonable person standard - which is set forth in Colorado Jury Instructions - Civil. 4th 9:6 ("Reasonable care is that degree of care which a reasonably careful person would use under the same or similar circumstances").[3] Were it only that simple. If it were that simple, then judges, juries and attorneys would not be so confused about it.

Judges and attorneys mistakenly believe that the existence of an "emergency" can excuse or lessen negligence. However, an "emergency" does not, and cannot, *ever* excuse or lessen negligence.

If the person did not exercise the degree of care that a reasonably careful person would have used before, during and after the "emergency," then that person is chargeable with negligence. If that person is chargeable with any iota of negligence in creating the "emergency," then that person is not entitled to the sudden emergency instruction. Thus, a person who caused or contributed to the creation of an emergency can *never* have his negligence excused or lessened by the emergency.

The concept of sudden emergency is simply an "evidentiary guideline"[4] or an "explanatory instruction"[5] which is intended to assist the jury in applying the reasonable person standard of care. Unfortunately, however, it usually has the opposite and unintended effect of confusing and misleading the jury.

The Colorado Supreme Court has had the opportunity to eliminate the confusion, but has declined to do so.

The Colorado Supreme Court's Refusal to Eliminate the Sudden Emergency Jury Instruction

In *Young v. Clark,*[6] the Colorado Supreme Court, en banc, expressly addressed the "sudden emergency doctrine" and unfortunately refused to abolish it. The Court, however, did correctly characterize the sudden emergency concept as simply an "explanatory instruction"[7] for the jury.

The Court noted that the sudden emergency doctrine was developed by the courts to recognize that a person confronted with sudden or unexpected circumstances calling for immediate action is not expected to exercise the judgment of one acting under normal conditions. But the Court further explained that:

> The doctrine does not, however, impose a lesser standard of care on a person caught in an emergency situation; the individual is still expected to respond to the situation as a reasonably prudent person under the circum-

stances. The emergency is merely a circumstance to be considered in determining whether the actor's conduct was reasonable.[8]

The pattern instruction used by Colorado courts[9] is a clear statement of the doctrine and obligates the finder of fact to do nothing more than apply the objective "reasonable person" standard to an actor in the specific context of an emergency situation. It thus does not operate to excuse fault but merely serves as an explanatory instruction, offered for purposes of clarification for the jury's benefit.[10]

While the majority was certainly entitled to its opinion, the dissent, however, had the more cogent analysis of the sudden emergency instruction.

Criticisms of the Sudden Emergency Jury Instruction

Justices Lohr and Erickson dissented in *Young v. Clark* and advocated the elimination of the sudden emergency instruction.[11] They noted that several other jurisdictions had eliminated the instruction, and they advanced the following criticisms:

1. The sudden emergency instruction merely restates the reasonably careful person standard; thus, it is redundant.
2. The sudden emergency instruction is simply a specific application of the reasonably careful person standard; thus, it has minimal utility.
3. The instruction provides little guidance beyond that offered by other standard jury instructions.
4. The giving of a separate instruction regarding sudden emergencies implies that there is a different standard of care for emergencies.
5. The instruction fails to apprize the jury that the jury must resolve certain factual prerequisites before applying the normal standard of care; i.e., that the jury must first find that an emergency situation existed and second, that the actor did not cause the emergency.
6. The instruction overly emphasizes the "emergency" portion of the actor's entire conduct. The actor's conduct before, during, and after the "emergency" must be considered.
7. The instruction implies that the existence of a sudden emergency excuses negligence.
8. Because of the above factors, the sudden emergency instruction is confusing, misleading, and potentially prejudicial

The Lingering, Erroneous Belief that Sudden Emergencies Excuse or Lessen Negligence.

Despite the clear, plain and simple language of *Young v. Clark* that sudden emergencies do not excuse or lessen the standard of care, many judges and attorneys still believe otherwise.

Why? Ignorance, laziness, and inertia. Ignorance meaning simply not knowing better. Laziness meaning not going to the trouble to read the cases. Laziness meaning not going to the trouble to analyze the cases. Inertia meaning an inability or unwillingness to change long held erroneous beliefs.

The Source of the Lingering Erroneous Beliefs about Sudden Emergency: Sloppy Reading and Lack of Analysis of "Old" Cases.

It is possible that defense attorneys know that sudden emergency is not really a defense and that they are perpetrating a fraud upon the bench and bar, but that is probably not the case. Why? Because most plaintiffs' attorneys also believe that sudden emergency is a defense. How did this incredible state of affairs come about?

It came about because defense attorneys pled and used sudden emergency as a defense, plaintiffs' attorneys did not do anything about it, and judges do things as they have always done them. Thus, sudden emergency has essentially become a defense de facto although it is certainly not a defense de jure.

The source of the problem is old cases that are **read** to hold or imply that sudden emergencies do, in fact, excuse or lessen the standard of care.

However, old cases are not necessarily dubious authority - an examination of the oldest sudden emergency cases will demonstrate that the purpose of the doctrine was limited to instructing the jury about the application of the reasonable person standard in cases involving "emergency" circumstances in order to ameliorate the harsh consequences of contributory negligence.

A Little Bit of History about Sudden Emergency

The sudden emergency doctrine appears to have been adopted in Colorado in 1890 in *Silver Cord Combination Mining Co. v. McDonald*,[12] a case in which the plaintiff was injured when he jumped off mining car tracks to escape a mining car negligently allowed to roll down the tracks. The Colorado Supreme Court approved jury instructions to the effect that "[I]t is not negligence to commit an error under the influence of fear produced by the appearance of sudden danger..." and that "[I]f the defendant, through its negligence, put the plaintiff in a position of immediate danger, real or apparent, and that plaintiff, through a sudden impulse of fear, attempted to escape the danger, and in so doing actually received the injury he was attempting to escape, then he may recover."[13] Thus, the sudden emergency doctrine was adopted in Colorado to ameliorate the harsh consequences of contributory negligence.

In 1894, *Denver & B.P. Rapid-Transit Co. v. Dwyer*[14] expressly married the sudden emergency doctrine to contributory negligence. "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." *Dwyer* cites *Stokes v. Saltonstall*[15] as authority. *Stokes* appears to be the genesis of the sudden emergency doctrine in the United States. In *Stokes*, the plaintiff was injured when she jumped out of a stagecoach that was negligently overturned by the defendant. The U.S. Supreme Court approved a jury instruction that stated:

> If the jury find there was no want of proper skill, or care, or caution on the part of the driver, and that the stage was upset by the act of the plaintiff or his wife, in rashly and improperly springing from it, then the defendant is not liable to this action: but if the want of proper skill or care of the driver placed the passengers in a state of peril, and they had at that time a reasonable ground for supposing that the stage would upset, or that the driver was incapable of managing his

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horses, the plaintiff is entitled to recover; although the jury may believe from the position in which the stage was placed by the negligence of the driver, the attempt of the plaintiff or his wife to escape, may have increased the peril, or even caused the stage to upset; and although they may also find that the plaintiff and his wife would probably have sustained little or no injury if they had remained in the stage.[16]

Thus, the original formulation of the sudden emergency doctrine in the United States required these elements:

1. Negligence of the defendant,
2. Defense of contributory negligence,
3. The defendant's negligence places the plaintiff in peril, and
4. The plaintiff is injured in reacting to the peril.

If these four elements were present, then the plaintiff was entitled to the sudden emergency jury instruction.

Silver Cord and *Dwyer* essentially adopted the *Stokes* elements. Thus, the original Colorado formulation of the sudden emergency doctrine was limited to the right of the **plaintiff** to have a **jury instruction** regarding sudden emergency in order to combat the defense of **contributory negligence**.

Defendants, also confronted with "sudden emergencies" (and obviously jealous of plaintiffs' use of the doctrine to combat contributory negligence), wisely decided to also request the sudden emergency jury instruction in order to combat claims of negligence against them in "emergency" situations.

The courts then began giving sudden emergency instructions in both negligence and contributory negligence claims where warranted. This seemed, and probably was, only fair.

However, the seemingly balanced application of the sudden emergency doctrine got out of balance with the adoption of CJI 9:10, the defense bar's increased pleading of the doctrine as a "defense," the trial courts' complicity in allowing the jury instruction to morph into a de facto defense, occasional sloppy language in appellate court opinions which was misinterpreted as suggesting that the doctrine may be used as a defense, and the plaintiff bar's lethargy and failure to counter-act the transmogrification of the doctrine.

The Bastardization of the Sudden Emergency Doctrine and What to Do about It.

It is ironic, but perhaps sadly inevitable, that a doctrine created to help plaintiffs is now used almost exclusively by defendants to defeat plaintiffs' claims. The biggest contributor to this problem has been sloppy analysis - or the total lack of analysis - of sudden emergency cases by the trial bench and bar.

The sudden emergency "defense" is often characterized by defense attorneys along the lines of: "A person confronted by a sudden emergency is not chargeable with negligence;" or "A party, suddenly realizing that he is in danger, is not to be charged with negligence for errors of judgment when instantaneous action is required."

This is utter hogwash[17]. However, the trial bench and bar routinely swallows this hogwash - as defense attorneys often mischaracterize the language and/or holdings of old cases and plaintiffs' attorneys don't call them on it.[18]

The hogwash is the assertion or implication that a sudden emergency *modifies* the reasonable person standard of care. It does not. The standard remains exactly the same. The standard is what a reasonable person would do *before, during and after* the emergency situation. Note well: The standard of care is ***not*** what a reasonable person would do just *during* the emergency.

Unfortunately, the ongoing, pervasive, mistaken belief that sudden emergencies do modify the standard of care has created an invalid, *de facto* "sudden emergency defense." That is, it's a defense simply because it is mistakenly believed to be a defense.

So what do you do about it?

First, you educate yourself about it. Second, you educate the judges in your cases about it. Third, you educate the plaintiffs' bar about it. Fourth, you educate the defense bar about it. Fifth, you educate the legal community about it. Sixth, you educate juries about it.

What Else You Need to Know About Sudden Emergency

The requester of the sudden emergency instruction must not have caused or contributed to the "emergency" in order to be entitled to the instruction.[19]

The existence of an emergency is a question of fact for the trier of fact.[20] Whether the requester of the instruction caused or contributed to the creation of the emergency is a question of fact for the trier of fact.[21]

A trial court has a duty to instruct the jury on sudden emergency when a party requests it and when the request is supported by competent evidence of the existence of a sudden emergency.[22] However, it is not error for a trial court to refuse an instruction on a particular issue if other instructions adequately inform the jury of the applicable law.[23]

The requester of the instruction must offer sufficient factual support for the instruction in order to survive a motion for summary judgment on liability.[24] The sudden emergency doctrine is consistent with comparative fault.[25] The sudden emergency doctrine is consistent with the designation of non-parties who may be at fault.[26]

Conclusion

The sudden emergency doctrine will continue to be a de facto defense, rather than just an explanatory jury instruction, as long as the plaintiffs' bar remains ignorant, lazy and lethargic about it. However, the doctrine is still dangerous as a jury instruction because it focuses the jury's attention on the "emergency," implying a different (lesser) standard of care rather than emphasizing the defendant's choices and actions leading up to the "emergency." Plaintiffs' attorneys must educate judges about the instruction **and** draft other instructions in order to ensure the proper application of the reasonable person standard to the defendant's conduct before, during and after the "emergency" - especially **before** the "emergency." Plaintiffs' attorneys should also move for summary judgment on liability or for a directed verdict on liability in order to pre-empt the defendant's use of the instruction. Finally, Plaintiffs' attorneys should consider the offensive use of the instruction in appropriate cases to eliminate or reduce comparative negligence.

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ENDNOTES

1 *Davis v. Cline,* 493 P.2d 362, 364 (Colo. 1972).

2 CJI - Civ. 4th 9:10 (2000).

3 CJI - Civ. 4th 9:6 (2000).

4 *Mladjan v. Public Service Company,* 797 P.2d 1299 (Colo. App. 1990).

5 *Young v. Clark,* 814 P. 2d 364 (Colo. 1991).

6 *Id.*

7 *Id.* at page 368.

8 *Id.* at page 365.

9 CJI - Civ.2d 9:10

10 *Id.* at page 368.

11 *Id.* at pages 369 - 72.

12 *Silver Cord Combination Mining Co. v. McDonald,* 23 P. 346 (Colo. 1890).

13 *Id.*

14 *Denver & B.P. Rapid-Transit Co. v. Dwyer,* 36 P. 1106 (Colo. 1894).

15 *Stokes v. Saltonstall,* 13 Pet. 181, 10 L.Ed. 115, 38 U.S. 181 (U.S. 1839).

16 *Stokes,* 38 U.S. 181 at page 191.

17 Hogwash (*n.*) 1. Worthless, false or ridiculous speech or writing; nonsense. 2. Garbage fed to hogs; swill. Source: *The American Heritage Dictionary of the English Language, Fourth Edition.* Copyright 2000 by Houghton Mifflin Company.

18 Defense attorneys cite lots of old cases to support this. The list of usual suspects - the language of which is often mischaracterized, includes: *Lebsack v. Moore,* 177 P. 137 (Colo. 1919) (improper passing on hill); *Grunsfeld v. Yenter,* 69 P.2d 309 (Colo. 1937) (car stalled in road); *Denver-Los Angeles Trucking Co. v. Ward,* 164 P.2d 730 (Colo. 1945) (truck/trailer jackknife on icy road); *Ankeny v. Talbot,* 250 P.2d 1019 (Colo. 1952) (driving on wrong side);*Bird v. Richardson,* 344 P.2d 957 (Colo. 1959) (driving on wrong side); *Cudney v. Moore,* 428 P.2d 81 (Colo. 1967) (brake failure); *Pence v. Chaudet,* 428 P.2d 705 (Colo. 1967) (child "dart out"); *Vigil v. Kinney,* 441 P.2d 7 (Colo. 1968). (bike runs stop sign); *Bartlett v. Bryant,* 442 P.2d 425 (Colo. 1968). (brake failure).

19 *Young v. Clark,* 814 P.2d 364, 366.

20 *Davis v. Cline,* 493 P.2d 362, 364; *Vu v. Fouts,* 924 P.2d 1129, 1132.

21 *Davis v. Cline,* 493 P.2d 362, 364; *Vu v. Fouts,* 924 P.2d 1129, 1132.

22 *Vu v. Fouts,* 924 P.2d 1129, 1132.

23 *Id.*

24 *Schultz v. Wells,* 13 P.3d 846, 848 (Colo. App. 2000).

25 *Young v. Clark,* 814 P.2d 364, 368.

26 *Id.* at page 368-9.