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Kentucky Law Journal

Volume 62 | Issue 2 Article 4

1973

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Recommended Citation

Reynolds, Osborne M. Jr. (1973) "Put Yourself in an Emergency--How Will You Be Judged?," *Kentucky Law Journal*: Vol. 62 : Iss. 2 , Article 4.
Available at: https://uknowledge.uky.edu/klj/vol62/iss2/4

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Put Yourself in an Emergency—How Will You Be Judged?

By OSBORNE M. REYNOLDS, JR.*

In applying the standard of due care in negligence cases, courts have long recognized that one's actions in an emergency situation are to be judged by a somewhat modified rule. Professor James writes that the rule "will be applied even where the actor has put himself in the emergency because of some prior negligence. . . ."[1] Dean Prosser similarly indicates that an emergency created by an actor may be considered in judging that actor's subsequent conduct.[2] A look at the cases reveals, however, that the courts generally have neither stated nor applied the emergency rule in this way, though it may be suggested that in the majority of cases the James-Prosser formulation would not change the outcome. In those situations where the outcome might be affected, however, their characterization seems less defensible than that actually being used. Before considering the degree of acceptance and desirability of the James-Prosser rule, it is necessary briefly to consider the substance and application of the emergency doctrine.

Nature of the Emergency Doctrine in Torts

The most accepted abstract statement of the emergency doctrine is that if a person, without negligence on his part, is confronted with a sudden emergency and lacks time to judge with

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[1] James, *Nature of Negligence*, 3 UTAH L. REV. 275, 288-89 (1953). The author adds, "The exercise of due care in an emergency will not insulate an actor from liability for the consequences of the negligence that helped to bring the emergency about." *Id.* at 289.

[2] W. PROSSER, LAW OF TORTS 169-70 (4th ed. 1971). Prosser qualifies this assertion, however, by stating that "it obviously cannot serve to excuse the actor when the emergency has been created through his own negligence, since he cannot be permitted to shield himself behind a situation resulting from his own fault." *Id.* at 170.

certainty the best course to pursue, he cannot be held to the same standard of care and accuracy of choice required in a situation where there was time for deliberation.[3] A typical example of such emergency arises when the driver of a motor vehicle is confronted with the need to stop suddenly but finds that his brakes will not hold properly.[4] However, the necessary element of "suddenness" will be missing if the driver had prior knowledge of the poor condition of the brakes.[5] And the situation may be determined not to have been an emergency at all, in the sense of a true state of peril presenting limited, if any, means of escape and demanding prompt decisions, unless all braking systems on the vehicle have failed.[6]

Some cases have emphasized that the emergency rule's chief application is in situations in which there is time only for instinctive action,[7] and it is clear that the presence of time for thought

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[3] Gibson Coal Co. v. Kriebs, 275 N.E.2d 821 (Ind. 1971). The history of the emergency doctrine is traced in Note, *The Sudden Emergency Doctrine,* 36 MISS. L.J. 392 (1965).

It should be noted that in Texas an attempt has been made to distinguish imminent peril (a doctrine used by a plaintiff to show defendant's negligent conduct and defeat a charge of contributory negligence) from "emergency" (basically the same as the doctrine in other states; can be used by defendant, or by plaintiff to show a peril created by a third party). The distinction is little recognized elsewhere and not clearly maintained in the Texas cases. *See* Thode, *Imminent Peril and Emergency in Texas,* 40 TEXAS L. REV. 441 (1962).

Any emergency rule should be applicable only so long as the emergency lasts, though occasionally it may be argued that the reasonable man would suffer some after-effects. *See* Shank v. Baker, 333 F.2d 301 (4th Cir. 1964).

[4] Daigle v. Prather, 380 P.2d 670 (Colo. 1963); Lengyel v. Hecht, 242 N.E.2d 135 (Ind. App. 1968) (golf cart); Swope v. Fallen, 413 S.W.2d 82 (Ky. 1967); Minder v. Peterson, 93 N.W.2d 699 (Minn. 1958); Cohen v. Crimenti, 24 App. Div. 2d 587, 262 N.Y.S.2d 364 (1965); Grier v. Cornelius, 148 S.E.2d 338 (S.C. 1966); Cook v. Basnight, 151 S.E.2d 408 (Va. 1967). *Cf.* Spurlin v. Nardo, 114 S.E.2d 913 (W. Va. 1960) (brakes failed on steep hill; defendant panicked and jumped from moving vehicle; emergency instruction proper). *See generally* Annot., 40 A.L.R.3d 9 (1971).

[5] Houston v. Shreveport, 188 So.2d 923 (La. App. 1966). *Cf.* Hinkel v. Weyerhaeuser Co., 494 P.2d 1008 (Wash. Ct. App. 1972) (no "sudden emergency" where driver entered area of fog and smoke after being warned of the conditions).

[6] Fink v. East Mississippi Elec. Power Ass'n, 105 So.2d 548 (Miss. 1958); Moore v. Taggart, 102 So.2d 333 (Miss. 1958); Ritchie v. Davidson, 158 N.W.2d 275 (Neb. 1968). But there may be a "sudden emergency" if brakes fail without warning and there is no time to apply the emergency brakes. Cudney v. Moore, 428 P.2d 81 (Colo. 1967). *Cf.* Peters v. Rieck, 131 N.W.2d 529 (Iowa 1964). Some cases state a general rule that there may be an emergency despite failure to apply an emergency brake or take other evasive action. Cartey v. Smith, 125 S.E.2d 723 (Ga. App. 1962). *Cf.* Phillips v. Delta Motor Lines, Inc., 108 So.2d 409 (Miss. 1959) (brakes not in perfect working order).

[7] Whicher v. Phinney, 124 F.2d 929 (1st Cir. 1942). *Cf.* Tucker v. Blankenmeier, 315 S.W.2d 724 (Mo. 1958) (motorist slowed car suddenly and without warning).

and deliberation will usually render the rule inappropriate.[8] But it is also clear that the situation need not be one that reduced the actor, or would have reduced the ordinary man, to a state of panic, and there is authority that some degree of calm decision-making does not necessarily eliminate the use of the doctrine.[9] It can apply only where one party is alleging that another, after being confronted with peril, failed to take a reasonable course of conduct, and has no application to the situation in which the accused party's conduct has simply brought on some emergency, which would encompass practically all negligence cases.[10] Perhaps the least debatable uses of the rule have occurred in cases where a driver is unexpectedly faced with an animal or object in the road and reasonably makes some attempt to avoid it.[11]

What then is the procedural use and effect of the emergency doctrine? Though the alleged presence of an emergency is sometimes treated as an affirmative defense,[12] it is generally agreed that it really is tantamount to a refutation of negligence and should be allowed under a general denial.[13] Courts are not in agreement as to whether the presence of an emergency constitutes a complete defense to the charge of negligence or is merely one factor to be weighed by the trier of fact in judging the actor's conduct. Dean Prosser indicates that application of the doctrine changes the standard by which the actor's conduct is to be

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[8] *See* Cook v. Thomas, 131 N.W.2d 299 (Wis. 1964), where the court indicated that five seconds for thinking was sufficient to prevent the situation from being characterized as an emergency. The court also found, however, that the evidence would support a finding of negligence even if an emergency were considered to exist.

[9] Triestam v. Way, 281 N.W. 420 (Mich. 1938) (actor himself testified he had made perfectly calm decision).

[10] Thus there should be no emergency instruction unless it is alleged there was negligence after the crisis arose. Daugherty v. May Bros., 121 N.W.2d 594 (Minn. 1963).

[11] King v. Vico Ins. Co., 182 So.2d 135 (La. App. 1966), *writ refused*, 185 So.2d 220 (La. 1966), *cert. denied*, 385 U.S. 841 (1966), *reh. den.*, 385 U.S. 983 (1966) (sudden stop to avoid striking dog). *See generally* on liability for accidents caused by trying to avoid animal in road, Annot., 41 A.L.R.3d 1124 (1972). *See also* Davis v. Cline, 493 P.2d 362 (Colo. 1972) (emergency instruction proper where plaintiff considered himself forced to turn sharply to avoid collision with car that had been in "blind spot" behind him).

[12] Note, *Act of God, Sudden Emergency, Unavoidable Accident*, 19 OKLA. L. REV. 308 (1966).

[13] *Id.*; Note, *Pleading: Unavoidable Accident, Act of God, Sudden Emergency*, 9 OKLA. L. REV. 211 (1956) (sudden emergency must be affirmatively alleged and proven in Oklahoma, but rule criticized). *Cf.* Sannes v. Olds, 458 P.2d 729 (Wyo. 1969) (existence of emergency is not affirmative defense but one factor to be weighed).

measured,[14] and there is authority for the proposition that an automobile driver faced with a sudden crisis is liable only if he fails to make an honest exercise of judgment, but not liable for "mistakes."[15] Undoubtedly there are situations where the presence of great peril is so overwhelming that little or no judgment can be expected,[16] and a directed verdict for the defendant is clearly justified, even if hindsight shows that his actions were quite unwise.[17] The language in most such cases that the emergency excuses the conduct must thus be taken as saying there is, often as a matter of law, simply no showing of negligence under the particular, usually extreme, facts.

When pressed on the matter, the vast majority of courts agree that the emergency doctrine is not normally a defense but rather a rule of law stating that the presence of an emergency is one factor to be considered in judging an actor's conduct.[18] Thus, the doctrine is not an exception to the reasonable man standard but an application of it; it declares, and emphasizes, that the legal standard is reasonable conduct under the circumstances, and an emergency is one such circumstance.[19] The significance of the rule is chiefly that the jury may be instructed on its application in addition to the instruction on negligence.[20] This serves to spot-

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[14] W. PROSSER, LAW OF TORTS 168-69 (4th ed. 1971). "The courts have been compelled to recognize that an actor who is confronted with an emergency is not to be held to the standard of conduct normally applied to one who is in no such situation. . . ." *Id. See* Casey v. Siciliano, 165 A. 1 (Pa. 1933), where the court speaks approvingly of an instruction that in an emergency one is held only to the exercise of *his* best judgment under the circumstances.

[15] Polonofsky v. Dobrosky, 169 A. 93 (Pa. 1933). *Cf.* Houston v. Shreveport, 188 So.2d 923 (La. App. 1966), where the emergency doctrine was found inapplicable but was referred to as a "defense."

[16] Massie v. Barker, 113 N.E. 199 (Mass. 1916), where the court states that the law does not require supernatural poise or self-control. *Accord,* Burhans v. Burhans, 150 A. 795 (Md. 1930).

[17] Kopp v. Louisville Taxicab & Transfer Co., 257 S.W.2d 891 (Ky. 1953) (uncontradicted evidence showed that sudden stop was necessary to avoid hitting child who darted into road). Similar cases are those in which an actor must choose between a course of conduct that may bring injury to others and one that may cause him harm; it has been found not necessarily negligent to prefer oneself. Thurmond v. Pepper, 119 S.W.2d 900 (Tex. Civ. App. 1938). *Cf.* Noll v. Marian, 32 A.2d 18 (Pa. 1943), *noted* 18 TEMP. L.Q. 290 (1944) (teller's attempts during a bank robbery to save himself and his employer's property increased danger to customers in the bank).

[18] Luper Transp. Co. v. Barnes, 170 F.2d 880 (5th Cir. 1948); Jones v. Hughey, 283 S.W.2d 550 (Mo. 1955). *See* James, *Nature of Negligence,* 3 UTAH L. REV. 275, 288-89 (1953).

[19] Fruehauf Trailer Co. v. Gusewelle, 190 F.2d 248 (8th Cir. 1951), *cert. denied,* 342 U.S. 866 (1951).

[20] Stump v. Fitzgerald, 484 P.2d 1056 (Ariz. App. 1971).

light the possible relevance of the alleged emergency for the jury. Therefore, the grant or denial of such an instruction[21] has become a fertile breeding ground for appeals. The ultimate decision on the issue of negligence, here as elsewhere, is normally for the jury.[22] The emergency instruction is merely informational and cautionary and does not bind the trier of fact to any particular conclusion.[23] Such an instruction has been appropriately described as "only an elaboration of the basic principle, though possibly a significant one because of the potential impact on the jury of calling this point to their attention."[24]

Relevance of Actor's Conduct Prior to Emergency

Where the actor himself creates the emergency, the question becomes whether he is entitled to an instruction that his conduct be judged in light of the emergency. Clearly, the emergency cannot excuse the actor's prior conduct that created the peril.[25] It is not one of the circumstances under which he acted at that time. Similarly, if the actor's conduct presents a continuing danger, that danger cannot justify the actor's subsequent conduct.[26] But what if the emergency is created by trying to pass another

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[21] See the limitations imposed on the giving of such an instruction in Menge v. State Farm Mut. Ins. Co., 164 N.W.2d 495 (Wis. 1969): the court said that the instruction is proper only if the one seeking its benefits is free from negligence contributing to the emergency, if the time element was so short as to preclude deliberate and intelligent choice of actions, and if the alleged negligence concerns questions of management and control. Similar problems arise where instructions attempt to deal with physical handicaps of parties. *See* Otterbeck v. Lamb, 456 P.2d 855 (Nev. 1969) (holding that a deaf mute has no higher duty than the person of unimpaired faculties). *But cf.* Fletcher v. City of Aberdeen, 338 P.2d 743 (Wash. 1959) (holding it proper to refuse an instruction that *defendant-city* was under no higher duty of care to a blind person than to a person with normal vision).

[22] Thus, in Guanzon v. Kalamau, 402 P.2d 289 (Hawaii 1965), it was held that the jury should decide whether, following brake failure, the driver was negligent in his operation of the car. *Accord,* Dr. Pepper Bottling Co. v. Ricks, 376 S.W.2d 299 (Ky. 1964).

[23] *Cf.* Pokora v. Wabash Ry., 292 U.S. 98 (1934), which held that it was not necessarily negligence to fail to get out of a vehicle before crossing railroad tracks, stating that, "[i]n default of the guide of customary conduct, what is suitable for the traveler caught in a mesh where the ordinary safeguards fail him is for the judgment of a jury." *Id.* at 106. *See generally* O. HOLMES, THE COMMON LAW 110-11 (1881).

[24] P. KEETON & R. KEETON, INSTRUCTOR'S NOTES FOR TORTS 24 (1972).

[25] James, *Nature of Negligence,* 3 UTAH L. REV. 275, 289 (1953).

[26] This was the situation in Prunty v. Vandenberg, 44 N.W.2d 246 (Wis. 1950), where defendant, in addition to traveling 200 feet without attempting to apply his emergency brake after discovering that his footbrake wouldn't work, failed to see plaintiff's vehicle and thus made no attempt to avoid a collision.

car when there is too little time to do so, and the situation thus posed presents several alternatives, such as speeding up, jamming on the brakes, or driving off the road? In making a selection, is the actor who himself brought on the peril entitled to have the emergency considered in judging his subsequent conduct?

Most cases have held that an emergency instruction is improper where it favors the one who created the emergency.[27] The relatively few cases that elaborate on their reasoning indicate that one who has negligently placed himself in a position that allows only instinctive or hasty action subsequent to becoming aware of the danger is not entitled to have any advantage or consideration given him due to this self-created dilemma.[28] Thus, if a driver negligently goes off the right side of the road when being passed on the left, and loses control of the car when he tries to guide it back onto the road, he is not entitled to an emergency instruction.[29] Nor is one who attempts to drive another car off the road entitled to such an instruction when he succeeds in causing an accident.[30]

Dean Prosser cites an old Missouri case[31] in support of the

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[27] Cano v. Neill, 473 P.2d 487 (Ariz. App. 1970); Terry v. Fagan, 166 S.E.2d 254 (Va. 1969); Jacobs v. Milwaukee & Suburban Transport Corp., 165 N.W.2d 162 (Wis. 1969) (holding as matter of law that negligence caused emergency). *Cf.* Casey v. Siciliano, 165 A. 1 (Pa. 1933) (approving instructions that included the emergency rule but clearly told the jury to find for plaintiff if defendant was negligent in creating the emergency). *See generally* Note, *The Sudden Emergency Doctrine,* 36 MISS. L.J. 392, 398-99 (1965), listing various acts and omissions that have been found to preclude resort to the doctrine. *See also* 7 Am. Jur. 2d *Automobiles and Highway Traffic* § 360 (1963).

[28] Whicher v. Phinney, 124 F.2d 929 (1st Cir. 1942). *Cf.* Gambino v. Lubel, 190 So.2d 152 (La. App. 1966) (diabetic defendant continued to drive after the onset of an insulin reaction).

[29] Mitchell v. Mitchell, 428 S.W.2d 222 (Ky. 1968). *See generally* Evans, *The Standard of Care in Emergencies,* 31 KY. L.J. 207, 219-20 (1943), which discusses some older cases in which an emergency instruction was refused because the party had contributed to the emergency, though he made the best possible choice once the emergency arose.

[30] Vaughn v. Baxter, 488 P.2d 1234 (Okla. 1971). The tort committed in this case was clearly an intentional one, and on this basis the court held that the use of contributory negligence and other negligence-action defenses was inappropriate. Further, the court stated that the use of the emergency doctrine as a defense "is not available to one whose tortious acts create the emergency. . . ." *Id.* at 1237. It would seem the emergency instruction, like the contributory negligence defense, is not really appropriate in intentional tort actions. Defenses such as self-defense are, of course, available, and the rationale for allowing the self-defense privilege where there is a reasonable, even if mistaken, belief in the need for it is much the same as the rationale behind the emergency instruction: careful deliberation cannot be demanded in times of peril.

[31] Windsor v. McKee, 22 S.W.2d 65 (Mo. App. 1929).

statement that it is "not the conduct after the emergency has arisen which is not excused, but the prior negligence."[32] While the case does clearly indicate that the prior negligence which creates the emergency is not excused, it does not make plain whether *subsequent* conduct may be justified by the emergency. Plaintiff, whose contributory negligence was in question, had continued to drive despite a bad dust storm; the court noted and approved instructions stating that if he had thus brought peril on himself, he was not entitled to be excused for the emergency-creating negligence. It is true that the court approved an instruction stating that if the driver was subsequently in peril of being struck by another car, he could drive to a place in the highway where he would escape injury and would not be liable for such action if he exercised "ordinary care." But the approved instruction did not contain any reference to ordinary care *under the circumstances of an emergency.* The overall effect of the stated instructions seems to deny the benefit of the emergency doctrine to the creator of the peril, and this appears to be the present Missouri law.[33]

Even a mechanical failure such as the bursting of a brake line does not necessarily allow an actor to utilize the emergency doctrine, since he may have negligently created the emergency by acting unreasonably after he had knowledge of the defect.[34] It seems clear that an actor may be denied benefit of the rule even

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[32] W. PROSSER, LAW OF TORTS 170 (4th ed. 1971).

[33] *See* Jones v. Hughey, 283 S.W.2d 550 (Mo. 1955), which held that the emergency doctrine has no application where the emergency arises wholly or partially from the negligence of the one seeking to invoke the rule.

A plaintiff barred from use of the emergency doctrine and found negligent in creating the emergency may nonetheless sometimes recover under last clear chance. Norwood Transp. Co. v. Bickell, 92 So. 464 (Ala. 1922) (called "doctrine of subsequent negligence"); Spoeneman v. Uhri, 60 S.W.2d 9 (Mo. 1933) (called "humanitarian rule"). Indeed, a plaintiff who may have been contributorily negligent in bringing on a perilous situation may often do well to argue last clear chance rather than try to obtain the application of the emergency doctrine, since the doctrine's successful invocation often requires the person confronted with the emergency to be free from negligence. See text accompanying note 3 *supra.* On the relation between last clear chance and the emergency doctrine, *see generally* Evans, *The Standard of Care in Emergencies,* 31 KY. L.J. 207, 212, 214 (1943).

[34] Augello v. Call, 210 So.2d 129 (La. App. 1968) (defendant had experienced prior brake trouble; failed to apply brakes until he was 2 car-lengths from plaintiff's stopped vehicle). *See also* Allen v. Schultz, 181 P. 916 (Wash. 1919) (emergency rule held unavailable to one who was negligent in failing to anticipate that a streetcar would stop at its usual stopping place and in driving a car with defective brakes).

though he was not the sole cause of the peril. Thus if a driver confronted by a dog in his car's path has contributed, for example, by driving too fast, to the emergency thereby presented, he may be found negligent.[35] Although a sudden emergency instruction has often been held proper where a driver's brakes have failed without warning,[36] such instruction has been denied, or held improper, where the actor drove with knowledge of the defect,[37] though some additional fault of the actor in such cases is often found in his failure to apply the emergency brake[38] or in driving too fast.[39] In Ohio, even the failure of brakes without warning will never justify a sudden emergency instruction, the theory being that the operator of any vehicle has a statutory duty to maintain the brakes in good working condition at all times.[40]

The question of whether to give an emergency instruction often arises where a party has helped bring on the peril by his inattention. Again, the cases have consistently denied such actor any use of the emergency theory. Thus, where a driver operating his vehicle in heavy traffic focuses his attention for an unreasonable length of time on a pedestrian walking beside the road, he is not entitled to the benefit of the emergency rule when he thereafter runs into the rear of another car.[41] Similarly, a pedestrian who places himself in peril by walking back into the path of an

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[35] Sarnak v. Cehula, 142 A.2d 204 (Pa. 1958) (excessive speed could be negligence even assuming driver was confronted with sudden emergency). *Cf.* Sturdavant v. Covington, 277 P.2d 814 (Utah 1954) (a finding of contributory negligence held reasonable when the plaintiff created a situation where he would have to make an emergency stop without a chance to signal). *See also* Flynn v. Little, 141 N.E.2d 182 (Ohio L. Abs. 1957), where the court, applying Pennsylvania law, held that an emergency instruction should be qualified by saying that the rule is used only if the emergency was not of the actor's making and only if it does not appear that the actor was driving in a reckless or careless manner.

[36] *See* cases cited note 4 *supra. But see* cases cited note 6 *supra,* indicating that there is no emergency unless all braking systems fail. *See also* Giorgetti v. Wollaston, 83 Cal. App. 358, 257 P. 109 (1st D. Ct. App. 1927), holding a defendant liable under last clear chance where he failed to avoid a collision by applying both brakes and/or changing his course.

[37] *See* Jewell v. Dell, 284 S.W.2d 92 (Ky. 1955).

[38] Henthorn v. Long, 122 S.E.2d 186 (W. Va. 1961) (defendant was taking truck to have brakes repaired).

[39] Lee v. Zaske, 6 N.W.2d 793 (Minn. 1942).

[40] Bird v. Hart, 205 N.E.2d 887 (Ohio 1965) (emphasizing driver's control of car); Spalding v. Waxler, 205 N.E.2d 890 (Ohio 1965) (emphasizing violation of statutes). *Cf.* Stump v. Phillians, 207 N.E.2d 762 (Ohio 1965) (sudden brake failure no excuse for driving into plaintiff).

[41] *See* Bellere v. Madsen, 114 So.2d 619 (Fla. 1959), noting that it is well settled that a defendant is not entitled to the benefit of an emergency charge if his own action contributed to the emergency.

oncoming car, when another step forward would have brought him to safety, cannot avail himself of the doctrine.[42]

Effect of Differing Rules Concerning Actor's Prior Negligence

Considering the above discussion, it may be reasonably asked whether the tendency to deny the emergency-creating actor the benefit of the emergency rule is effectively any different from the rule suggested by James and Prosser. In most cases, the result will be the same. When a party's negligence—driving too fast, for instance—has brought on an emergency, it is usually not necessary to base liability on conduct subsequent to the appearance of the peril, such as not swerving to avoid the person or object with which he collides. A chain of both actual and proximate causation may normally be found from the unreasonable rate of speed, *i.e.*, the emergency-creating conduct. Even assuming that the driver did all that was humanly possible to prevent the collision once it appeared imminent (or even possible), his prior negligence remains both cause-in-fact and cause-in-law of the accident. It is thus immaterial whether the emergency standard can be used to judge his *subsequent* conduct, since that conduct is not the basis of liability; everyone agrees the peril cannot be used to justify his prior conduct.

Occasionally, however, a superseding or intervening cause might be found to interrupt the trail of proximate causation from original negligence, such as driving too fast, to the accident. The highly unexpected and unforeseeable actions of another driver could constitute an intervening factor, as could an unforeseeable road condition or weather development. Indeed, such occurrences might so substantially modify the situation that a driver's original negligent conduct of driving too fast could no longer be considered an actual cause, let alone a proximate one, of the ultimate disaster. Then the only possibility of recovery against the allegedly negligent actor would be a tort action based on his conduct *after* the emergency had arisen, alleging negligent choices of conduct and/or negligent methods of action. In such instances, should the actor's conduct be judged in light of the emergency? According to statements in the cases, it should not

[42] Lindberg v. Goode, 108 S.E.2d 364 (Va. 1959). It seems this might have been treated as a situation where, even conceding the presence of an emergency, the pedestrian was himself negligent.

be if his negligence contributed *even partially* to the creation of the emergency; some courts indicate that "fault" less than negligence might also deprive the actor of the benefit of the emergency rule.[43]

However, the standard for determining negligence is always basically the same: reasonable care under the circumstances. All courts which have seriously considered the matter have agreed that the emergency doctrine is not an exception to this rule. Therefore, the emergency, if truly present, should clearly be considered, for if it is not, the actor's conduct is judged in a vacuum, and some vague concept of "reasonable" or "ordinary" care is applied without reference to the totality of the situation.[44] There seems no reason to depart from the general custom of instructing the jury to consider *all* circumstances and to determine whether an actor's conduct was reasonable in light of such facts.

Professor James' statement on the use of the emergency rule in such cases is, however, broad enough to allow not only the use of the customary negligence instruction, which refers to "all the circumstances," but also of the instruction emphasizing the existence of an emergency. It is submitted that the courts have often reached a more workable compromise by denying the negligent actor this benefit. Even assuming the proximate cause test is not met by the actor's original emergency-creating conduct, if his negligence contributed substantially to the situation of peril, it would clearly give him the benefit of his own misconduct to specifically call the jury's attention to the difficulty of decision in the face of that peril. Where the *actual* causation test is not met—that is, where the actor's conduct cannot in light of other events be considered a substantial factor in producing the peril—

[43] *See* Bellere v. Madsen, 114 So.2d 619 (Fla. 1959); Terry v. Fagan, 166 S.E.2d 254 (Va. 1969). But, unless there is some reason for imposing a higher duty on a party, it is doubtful that anyone should be deprived of the emergency doctrine's benefit if his conduct does not violate the usual standard of reasonableness; it seems no other standard is legally relevant or accepted. Note, *The Sudden Emergency Doctrine in Florida,* 21 U. FLA. L. REV. 667, 673 (1969), discusses whether the actor's conduct must be tortious or need only contribute to the peril in order to preclude an emergency instruction. The author concludes that, at least in Florida, the conduct probably must be tortious.

[44] *See* the vague reference to "ordinary care" in the instructions discussed in Windsor v. McKee, 22 S.W.2d 65 (Mo. App. 1929). *Cf.* Flynn v. Little, 141 N.E.2d 182 (Ohio App. 1957), stating that a defendant should not be allowed the emergency instruction if he drove in a "careless" manner. Such instructions fail to bring home to the jurors that the standard must be reasonableness under the circumstances. *Compare,* emphasizing the need to consider *all* circumstances, Levi v. Ashland Oil & Ref. Co., 496 P.2d 370 (Okla. 1972), *with Windsor* and *Flynn.*

it is much more difficult to deny giving an emergency instruction. If the actor's fault is thus truly "fault in the air," it would seem to be irrelevant.

Cases may be rare in which fault is cited without meeting the substantial factor requirement. But if as a matter of law the alleged negligence of the actor was not an actual cause of the emergency, there seems no reason to deny the instruction which emphasizes the perilous situation. Where the trier of fact must evaluate conduct in an emergency which was brought on by the actor himself, the courts have generally done a better job than the writers in balancing the need for a comprehensible standard with the desire to prevent the actor from benefitting from his negligence. The general rule in these cases appears to deny a specific instruction on emergency, but to give an instruction on the normal negligence standard which includes a reference to *all* surrounding events. The alternative, which is useful where a jury question is presented on fault and/or actual causation, is to give an emergency instruction but qualify it by warning the jury to consider it only if it is determined that the actor did not cause the peril.[45] This instruction would be appropriate only where there is a real possibility of finding no liability for the original conduct that allegedly contributed to the peril, but finding liability for conduct after the peril had occurred. Where the trier of fact could reasonably so conclude, the plaintiff deserves the same consideration he would receive if no question of his role in creating the emergency were raised—an instruction specifically calling attention to the emergency.

The rules on emergency instructions can then become definite: (1) If as a matter of law the actor's prior conduct was not the actual and proximate cause of emergency, give the emergency instruction; (2) If as a matter of law the actor's prior conduct contributed to the emergency, deny the instruction but allow subsequent conduct to be judged "under all the circumstances"; (3) If there are jury questions as to whether the actor's conduct created the emergency, give the instruction, but qualify it with directions that it be used only if the questions are resolved favorably to the actor.

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[45] *See* Casey v. Siciliano, 165 A. 1 (Pa. 1933).