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Note, The Sudden Emergency Doctrine in Florida

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THE SUDDEN EMERGENCY DOCTRINE IN FLORIDA

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.

W. Prosser[1]

The "emergency doctrine" alluded to above is a part of general negligence law, but it is utilized most frequently in the area of motor vehicle accidents. The growth of American case law involving emergencies fairly well parallels the numerical increase of automobiles in the twentieth century.[2] This note will focus on the application of the emergency doctrine to motor vehicle accident cases in Florida, but the principles to be considered are also applicable to other emergencies.

For Whom the Doctrine?

The emergency doctrine is available for use (1) by a civil defendant on the issue of his primary negligence[3] and (2) by the plaintiff on the issue of his contributory negligence,[4] provided the facts support the application of the doctrine with respect to the party seeking to have his conduct justified due to the emergency.[5] The term "actor," as used herein, designates the party seeking to invoke the emergency doctrine. Thus, the actor, be he plaintiff or defendant, is one who seeks to have his conduct, at the time of an actual or apparent emergency, evaluated by a standard of conduct somewhat less stringent than the standard applicable to "normal," less pressing circumstances.

Why the Doctrine?

Why should the standard of conduct be lowered in an emergency? Even in the early cases,[6] courts were attempting to answer this question. A New York case[7] in 1874 held that the plaintiff "instinctively" jumped without looking to avoid being struck by defendant's horse and wagon, thereby hitting her head against a building. Because she had no time to look around before jumping, the court deemed plaintiff's "instinctive effort" to avoid the peril not to be contributory negligence. Going beyond the language of instinctive

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1. W. Prosser, Law of Torts §33, at 171 (3d ed. 1964).
2. Even as late as 1943, it was noted that the problem of care in emergencies had not yet captured much attention from legal writers. Evans, *The Standard of Care in Emergencies*, 31 Ky. L.J. 207, 208 (1943).
3. *E.g.*, Klepper v. Breslin, 83 So. 2d 587 (Fla. 1955).
4. *E.g.*, Hull v. Laine, 127 Fla. 433, 173 So. 701 (1937).
5. The factual requisites are discussed in the text accompanying notes 19-48 *infra*.
6. *See* Evans, *supra* note 2, for a survey of the earlier emergency cases.
7. Coulter v. American Merchants' Union Express Co., 56 N.Y. 585 (1874).

effort is a subsequent New York decision, *Filippone v. Reisenburger*.[8] While working at an excavation, the defendant-employer lost his balance and grabbed the plaintiff-employee's feet to prevent himself from falling, thereby injuring the plaintiff. The court stated: "The law presumes that an act or omission done or neglected under the influence of pressing danger, was done or neglected *involuntarily*."[9]

The use by courts of such concepts as "instinctive effort" and "involuntary action" may seem to represent a kind of amateur expedition into a complex and poorly understood area of human psychology. There are untested assumptions and outright fictions in the use of such rationales for reducing the required standard of conduct. One would be hard-pressed to ascertain the extent to which jumping to avoid a horse and wagon consists of instinct as opposed to reasoned volition. Even more difficult would be an effort to show that behavior in pressing danger is constituted by acts and omissions "done or neglected involuntarily."

Though the careless use of psychological jargon may trouble the purist, it appears that the effect is harmless. As the emergency doctrine has developed in motor vehicle cases, legal-psychological speculations concerning "instinct," "impulse," and "involuntary action" probably have not been the real basis for employing the emergency doctrine. This does not mean that these terms no longer appear; they still do. For example, in *Hormovitis v. Mutual Lumber Co.*,[10] having considered the short period of time in which defendant could have taken evasive action to avoid an accident, the court stated that he "had opportunity only for *instinctive action*. . . ."[11] In such situations, said the court, "the speedy decision which is made is based very largely upon impulse or instinct."[12]

The court went a step further and attempted to define what it meant by action based chiefly on "impulse or instinct":[13]

> Thus in a true emergency or sudden peril situation, the actor apprehends danger and stimulates a muscular response to avert it. This is purposeful action, precipitated by a mental operation, though not on the plane of conscious deliberation.

Such attempts to analyze the innermost workings of the human organism are unnecessary to justify a court's use of the emergency doctrine. There is other reasoning in the *Hormovitis* opinion that is sufficient to justify the use of the emergency doctrine in relieving a defendant of liability, namely, "that the circumstances call for sudden action and that the excitement and *lack of time to think* naturally affect the normal action of judgment. . . ."[14] That the actor has "no time for [unhurried] thought or the weighing of

8. 135 App. Div. 707, 119 N.Y.S. 632 (1909).
9. *Id.* at 709, 119 N.Y.S. at 634 (emphasis added).
10. 120 So. 2d 42 (2d D.C.A. Fla. 1960).
11. *Id.* at 45 (emphasis added).
12. *Id.*
13. *Id.*
14. *Id.* (emphasis added).

alternative courses of action"[15] is sufficient justification for reducing the legal expectation of his standard of conduct.[16] We need not speculate about the nature of impulse, instinctive action, involuntary action, or similar concepts to reach this conclusion.[17]

The contention that shortness of time is itself sufficient basis for justifying the emergency doctrine is rendered more acceptable in view of the following: The emergency doctrine is not an exception to the holding of persons to the "reasonable man" standard of care. Rather, it is a consistent application of the reasonable man criterion, namely: What would a reasonable man of ordinary prudence do under the *same or similar circumstances?*[18] Under the circumstances of a sudden and unexpected emergency, the *reason-able* man is not going to be *able to reason* as thoroughly as he otherwise would, due to the lack of time.

WHEN THE EMERGENCY DOCTRINE?

The Four Requisites

Dupree v. Pitts[19] enumerated the factual requisites necessary to support a jury instruction on the sudden emergency doctrine. The court stated:[20]

> [T]he evidence should be sufficient to support a finding (1) that the claimed emergency actually or apparently existed; (2) that the perilous situation was not created or contributed to by the person confronted, or, as held or stated in many cases, by the tortious act or conduct of such person; (3) that alternative courses of action in meeting the emergency were open to such person, or that there was an opportunity to take some action to avert the threatened casualty; and (4) that the action or course taken was such as would or might have been taken by a person of reasonable prudence in the same or a similar situation. Where there is evidence sufficient to support a finding as to the existence of such requisites, and procedural requirements have been complied with, the instruction should, of course, be given.

This statement appears to represent the existing law of most states on the matter[21] and has been quoted and utilized by the First and Second District Courts of Appeal of Florida.[22]

The four enumerated requisites form an excellent guide to a consideration of the emergency doctrine. Each merits specific discussion.

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15. *Id.*

16. *See* W. PROSSER, *supra* note 1, at 171-72.

17. *Hormovitis* correctly suggests that such "psychological subtleties" would not be helpful in instructing the jury. 120 So. 2d at 45.

18. *See* W. PROSSER, *supra* note 1, §32, at 154 & n.21, 172.

19. 159 So. 2d 904 (3d D.C.A. Fla. 1964).

20. *Id.* at 907, *quoting* Annot., 80 A.L.R.2d 5, 15-17 (1961).

21. *See* Annot., 80 A.L.R.2d 5, 14-22 (1961) (including notes).

22. Ellwood v. Peters, 182 So. 2d 281, 287-88 (1st D.C.A. Fla. 1966); Kreiger v. Crowley, 182 So. 2d 20, 21-22 (2d D.C.A. Fla. 1966).

First Requisite: *That the Claimed Emergency Actually or Apparently Existed.* There is no exact definition of an emergency situation beyond saying that there must exist only a very short time for decision and action to avoid or minimize injury to self or others. Thus, in *Hormovitis* "the defendant's driver would have had between 1.8 and 2 seconds to take any evasive action in an attempt to avoid a collision."[23] It is not possible to quantify the shortness of time necessary to deem an event an emergency. The implication is clear, however, that the period must be too brief to allow "ample time for reflection and intelligent choice of means."[24]

Since the lack of time must apply to the actor's decisionmaking as well as to his physical actions, it follows that the emergency, by definition, must be sudden and unexpected.[25] Therefore, it is understandable that the courts use such terms as "sudden emergency" and "unexpected emergency" interchangeably with the unmodified noun "emergency."[26] Florida adheres to the position that an *apparent* emergency is sufficient to invoke the emergency doctrine. In addition to the retention of the apparent emergency situation in the enumeration of the factual requisites by the First, Second, and Third District Courts of Appeal, the Florida supreme court had earlier suggested that "apparent imminent danger" is sufficient to justify a jury instruction.[27] It seems unlikely that acceptance of an apparent emergency as grounds for reducing the standard of conduct will be revoked in Florida. This is so both because of its acceptance in other states[28] and, more importantly, because it is fully consistent with the reasonable man standard of care, provided that the situation would have appeared to be an emergency to a reasonable person.

Second Requisite: *That the Perilous Situation Was not Created or Contributed to by the Person Confronted, or, as Stated in Many Cases, by the Tortious Act or Conduct of Such Person.* (a) *Tortious Causation by Actor.* This second requisite is the most crucial of the four. Without it, the emergency doctrine would be an undeserved legal escape for the negligent or otherwise tortious defendant.[29] Since most casualties are apt to involve an emergency situation just prior to the catastrophe, it would hardly make sense

23. 120 So. 2d at 45. Likewise, in applying the emergency doctrine, the Supreme Court of Wisconsin noted that "there [were] only two seconds . . . in which Greutzmacher could decide what, if anything, he had better do, and to do it." Roberts v. Knorr, 260 Wis. 288, 291, 50 N.W.2d 374, 376 (1951).

24. Cook v. Lewis K. Liggett Co., 127 Fla. 369, 374, 173 So. 159, 161 (1937).

25. "The 'emergency doctrine' is applied only where the situation which arises is sudden and unexpected, and such as to deprive the actor of reasonable opportunity for deliberation and considered decision." W. PROSSER, *supra* note 1, at 172; *accord*, Ellwood v. Peters, 182 So. 2d 281, 284, 288 (1st D.C.A. Fla. 1966).

26. *E.g.*, 120 So. 2d at 45-46. The interchangeability of "peril" and "emergency" is also prevalent. *But see infra* note 74 concerning the Texas doctrine of "imminent peril."

27. Hainlin v. Budge, 56 Fla. 342, 360, 47 So. 825, 831 (1908). This is the earliest Florida opinion that deals with the emergency doctrine.

28. *See* Annot., 80 A.L.R. 2d 5, 15 n.5 (1961).

29. This reasoning applies to the contributorily negligent plaintiff as well. For simplicity, this discussion on the second requisite focuses solely on the defendant's use of the doctrine.

to allow one who negligently or otherwise wrongfully caused the emergency to invoke the emergency doctrine. Even if the actor's conduct in response to the emergency is blameless, his prior tortious conduct in creating or contributing to the peril is still a substantial causal factor in the resulting injury.

If the facts are sufficiently plausible to support the emergency doctrine, a defendant in an automobile negligence case may be benefited in either of two ways: first, if the facts are particularly favorable, the defendant may persuade the court to rule as a matter of law (1) that the defendant's conduct prior to the emergency was blameless and (2) that his response to the emergency was up to that of a reasonable man acting under the same or a similar situation.[30] Second, and more likely, the defendant, though unable to be exonerated as a matter of law, may receive the benefit of an instruction to the jury, which informs the jury that if an actual or apparent emergency is found to exist the defendant is not to be held to the same quality of conduct after the onset of the emergency as under normal circumstances.[31] The troublesome issue that so often arises is whether the defendant's prior conduct was tortious and created or contributed to the emergency. If the answer is "yes" as a matter of law, the defendant is clearly not entitled to an instruction on the altered standard of conduct due to the emergency because he tortiously created or helped to create the peril.[32] Thus, in *Bellere v. Madsen*[33] the Supreme Court of Florida held that it was reversible error for the trial court to charge the jury on sudden emergency[34] when the only reasonable inference from the evidence was that the defendant's own negligence created or contributed to the emergency.

The full import of this second factual requisite, concerning the conduct of the actor prior to the emergency, is better appreciated when one considers this additional language of the Florida supreme court in *Bellere*:[35]

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30. *See* Hormovitis v. Mutual Lumber Co., 120 So. 2d 42 (2d D.C.A. Fla. 1960).

31. The matter of instructing the jury on the emergency doctrine is considered in the text accompanying notes 49-74 *infra*. In the event of a trial without jury, the defendant is similarly benefited. The factfinder's evaluation of defendant's conduct is to be guided by the reduced "emergency" criterion, provided that the first three factual requisites exist. *See* King v. Griner, 60 So. 2d 177 (Fla. 1952) (jury waived and defendant held liable because driver's prior negligence caused alleged emergency).

32. *See* text accompanying notes 52-61, 72, *infra*, concerning the situation in which it is factually disputable whether defendant's prior conduct was tortious and contributed to the peril.

33. 114 So. 2d 619 (Fla. 1959).

34. The charge was identified in the opinion, *id* at 620-21, as being that approved in Klepper v. Breslin, 83 So. 2d 587 (Fla. 1955). The sudden emergency portion of the charge in *Klepper* was as follows: "Where the operator of an automobile by a sudden emergency, not due to her own negligence, is placed in a position of imminent danger and has insufficient time to determine with certainty the best course to pursue, she is not held to the same accuracy of judgment as is required under ordinary circumstances, and if she pursues a course of action to avoid an accident such as a person of ordinary prudence placed in a like position might choose, she is not guilty of negligence, even though she did not adopt the wisest choice." 83 So. 2d at 589.

35. 114 So. 2d at 621 (emphasis added). Nelson v. Ziegler, 89 So. 2d 780, 783 (Fla. 1956), *cited in Bellere*, contains virtually the same statement.

> It is equally well settled that the driver of an automobile – a "dangerous instrumentality" – is charged with the responsibility of having his vehicle under control at all times, commensurate with the circumstances and the locale, *and to maintain a sharp and attentive lookout in order to keep himself prepared to meet the exigencies of an emergency within reason and consistent with reasonable care and caution.*

This duty of motorists to "be prepared," to the extent it is honored by the courts, must result in reducing the force of the emergency doctrine in instances relating to the fault of the driver. The more fully a driver is held to anticipate possible emergencies, the less likely a particular emergency is apt to be deemed "sudden" and "unexpected" as to him, and thus less consideration would be given to the driver's need for quick judgment. If a driver is properly anticipating the likelihood of emergencies as a normal part of modern traffic conditions and is adjusting his driving thereby (that is, he is driving "defensively"), it would seem that he is to this extent less likely to be overwhelmed with panic when a situation of sudden peril does occur. In other words, with respect to the attempt of anyone to invoke the sudden emergency doctrine, the question is not merely: Was there an actual or apparent emergency with respect to this person's subjective situation? One must also ask: Would there have been an actual or apparent emergency with respect to the subjective situation of one who had used reasonable care in this situation prior to the alleged emergency? If this latter question cannot be answered affirmatively, the second factual requisite for invoking the emergency doctrine has not been met.[36] This interpretation of the second factual requisite would seem to apply to all actors, drivers or otherwise, but in the case of a driver a special emphasis, according to language in *Bellere*, is put upon the duty to anticipate emergencies due to the "dangerous instrumentality" involved.[37]

The basic policy question with respect to the doctrine of sudden emergency would therefore seem to be this: To what extent should one expect persons, whether driving motor vehicles or acting otherwise, to be prepared to anticipate the "exigencies of an emergency"? Perhaps this is but another way of asking the fruitless question: "How much care is reasonable care?" with respect to fault liability in general. Even so, such a question must be answered and necessarily *is* answered by the decisions of juries and trial judges, subject to the limits and guidelines of appellate courts and legislatures. This basic question implicitly underlines the subsequent discussion on the appropriateness of giving an instruction on sudden emergency.

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36. *See* Ellwood v. Peters, 182 So. 2d 281, 288 (1st D.C.A. Fla. 1966): "The defendant . . . testified he first discovered the plaintiff and realized the existence of an emergency when he was approximately 35 feet from the point of impact. There is ample evidence to support a finding that he could *and by the use of due diligence should* have seen her sooner." (emphasis added).

37. This is *not* to say that the language of *Bellere* indicates a higher standard of care for motorists. It is to say that the court was suggesting that *reasonable care* by a motorist may involve a special amount of caution because of the actual danger involved.

(*b*) *Nontortious Causation by Actor.* The wording of the second requisite raises the problem of whether the creation of or contribution to the perilous situation must be by the *tortious* conduct of the person invoking the emergency doctrine. What if the person did in fact create or contribute to the peril, but his conduct in doing so was not tortious? Should he be allowed to have the emergency he created or contributed to be taken into account to lessen the standard of conduct expected of him in responding to it?

Although apparently no reported Florida decision explicitly concerns itself with this question, it does appear that it is necessary in Florida that one's prior conduct in creating or contributing to an emergency doctrine be *tortious* in order to preclude him from the benefit of the emergency doctrine. This conclusion may be inferred from such Florida decisions as *Midstate Hauling Co. v. Fowler,*[38] *Klepper v. Breslin,*[39] *Nabelski v. Turner,*[40] and *Dupree v. Pitts.*[41] Each of these cases involved the death or injury of a child from being struck by a motor vehicle. In each case the driver's negligence was at issue, and the jury was given a sudden emergency instruction concerning his conduct. It cannot be denied that the driver in each of these cases created or materially contributed to the emergency, for the crisis in each case would not even have existed in the absence of the vehicle that struck the child. Nevertheless, giving the sudden emergency instruction was approved in each case. This strongly implies that it is necessary for the creation of or contribution to the emergency to be by the *tortious* conduct of the person seeking to invoke the emergency doctrine in order for the doctrine to be denied him. This conclusion is in harmony with the language, typically employed by the Florida courts, which speaks of the actor not being entitled to the benefit of a sudden emergency instruction "when his own *negligent* action creates or contributes to the creation of the emergency."[42]

Third Requisite: That Alternative Courses of Action in Meeting the Emergency Were Open to Such Person, or That There Was an Opportunity To Take Some Action To Avert the Threatened Casualty. Earlier, it was observed that a sudden emergency existed only when there was too little time for deliberate decision and action. Now it should also be noted that the time must not be so short as to preclude any response at all to the emergency after it has been perceived. When time is too short for a response to the peril, the emergency doctrine is not applicable. This does *not* mean that the actor who sought the emergency instruction is necessarily culpable. It

38. 176 So. 2d 87 (Fla. 1965).
39. 83 So. 2d 587 (Fla. 1955).
40. 173 So. 2d 729 (1st D.C.A. Fla. 1965).
41. 159 So. 2d 904 (3d D.C.A. Fla. 1964).
42. Bellere v. Madsen, 114 So. 2d 619, 621 (Fla. 1959) (emphasis added). Also, "One cannot defend on a theory of sudden emergency when his own *negligent* action brings it into existence." Seitner v. Clevenger, 68 So. 2d 396 (Fla. 1953) (emphasis added). *See* Ellwood v. Peters, 182 So. 2d 281, 284 (1st D.C.A. Fla. 1966). It is understandable why the courts normally use the narrower term "negligent" rather than the term "tortious" due to the prevalence of the issue of the actor's prior negligence in most emergency doctrine cases.

simply means that there is no conduct after the apprehension of the peril that needs to be evaluated by using the reduced criterion that the emergency doctrine provides.

Two Florida cases are most helpful in illustrating this third factual requisite. The first, *Kreiger v. Crowley*,[43] involved a two-car collision. Plaintiff, driving south on a clear, dark night suddenly saw defendant's headlighted car in plaintiff's southbound lane. The collision occurred "a fragment of a second later."[44] Plaintiff, obtaining an instruction to the jury on sudden emergency concerning the issue of his contributory negligence, prevailed at trial. On appeal, the giving of this instruction was held to be erroneous. Though the court stated that the evidence did not show the existence of an actual or apparent emergency (the first factual requisite) or that plaintiff did not wrongfully contribute to the perilous situation (the second requisite), it appears that the holding was most strongly based on the fact that "there was not an opportunity for him [plaintiff] between the instant he saw defendant's car and the impact to do anything, even to apply his brakes, so there can be no question of alternative courses."[45] In other words, the third factual requisite was clearly lacking.

The second case, *Ellwood v. Peters*,[46] involved defendant's automobile striking the plaintiff, a pedestrian who was crossing at an intersection. In addition to noting that there was substantial evidence to support the conclusion that defendant's negligent conduct prior to the alleged emergency caused or contributed to the injury, the court upheld the trial judge's refusal to charge the jury on sudden emergency on the additional ground that the third factual requisite was not met:[47]

> The facts in the case sub judice do not require the [emergency] charge to be given for the reason that there was no triable issue with respect to the standard of defendant's conduct during the brief period which separated the onset and termination of the alleged emergency situation. . . .
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> It does not appear that defendant had an opportunity to take any alternative course of action to avert the accident. . . . [I]t is obvious he had no opportunity after discovering the emergency situation to avert the collision.

These two cases properly applied the third factual requisite for invoking the emergency doctrine and, although there were additional grounds for both holdings, they are sufficient to show that the third factual requisite is being applied in Florida.

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43. 182 So. 2d 20 (2d D.C.A. Fla. 1965).
44. *Id.* at 21.
45. *Id.*
46. 182 So. 2d 281 (1st D.C.A. Fla. 1966).
47. *Id.* at 287, 288.

Fourth Requisite: *That the Action or Course Taken was Such as Would or Might Have Been Taken by a Person of Reasonable Prudence in the Same or a Similar Situation.* If the facts support the third requisite then the issue raised by the fourth requisite necessary follows: Did the actor, in responding to the peril, act with the prudence of "a reasonable man" when confronted with such an emergency? It is thus required that the actor's conduct, after he perceives the peril, measure up to an objective standard, albeit a reduced one. As applied to the motor vehicle driver by the court in *Hormovitis v. Mutual Lumber Co.*, "even where there may not be time for a conscious weighing of alternatives, the driver's behavior pattern, his responses, his skill, must be so educated as to be as good as that of a driver of ordinary competence acting under similar circumstances."[48]

It is therefore somewhat misleading to say that the emergency doctrine reduces the standard of conduct required of the actor. As was suggested earlier, the standard is the same as in any situation involving the issue of negligence, that is, what is expected of a reasonably prudent person *under these conditions.* A reduction of the quality of conduct required is attributable to the existing or apparent emergency. But the "standard" is the same whether the emergency doctrine applies or not. That the doctrine of sudden emergncy is an *exemplification* of the required standard of conduct and not an exception thereto cannot be overemphasized.

Instructing the Jury: Use and Possible Misuse of the Doctrine

Referring again to the four requisites for a sudden emergency instruction to the jury, it is quite clear that these are *factual* requisites. Therefore, "where there is evidence sufficient to support a finding as to the existence of such requisites . . . the instruction [to the jury] should, of course be given."[49] A determination that, as a matter of law, there was not sufficient evidence to support any one of the four requisites would be sufficient to make the giving of the instruction erroneous.[50] As noted earlier, the sudden emergency doctrine can be applied as a matter of law when the only reasonable inference from the evidence is the conclusion that all the factual requisites were fulfilled.[51]

The trial judge's giving (or refusing to give) a sudden emergency instruction has been most often disputed when there is a bona fide factual issue with respect to the second requisite, namely: whether the party seeking the instruction negligently created or contributed to the emergency. An excellent example of this difficulty is found in *Midstate Hauling Co. v.*

48. 120 So. 2d at 46.

49. Dupree v. Pitts, 159 So. 2d 904, 907 (3d D.C.A. Fla. 1964) *quoting* Annot., 80 A.L.R. 2d 5, 17 (1961).

50. *See* Bellere v. Madsen, 114 So. 2d 619 (Fla. 1959) holding that it was reversible error to give a sudden emergency charge to the jury when *the only reasonable inference from the evidence* was that defendant's own negligence created or contributed to the creation of the emergency, *i.e.*, sufficient evidence was not present to support the second factual requisite.

51. *See* Hormovitis v. Mutual Lumber Co., 120 So. 2d 42 (2d D.C.A. Fla. 1960).

Fowler.[52] Plaintiff sued for the wrongful death of his three-year old son, allegedly caused by the negligent driving of defendant's truck by an employee. One afternoon the defendant's 72,000 pound tractor-trailer combination was going south on a straight highway between the crests of two low hills, one north of the other. The two crests were seven-tenths of a mile apart. According to the driver, he was descending the north hill at over fifty miles per hour, his view unobstructed, when he saw a boy on a bicycle some distance ahead on the highway. Approaching within three to five hundred feet of the boy, the truck now going about forty miles per hour, the driver saw a cluster of children on each side of the road. He blew his horn, causing the children to move back. At between one hundred and two hundred feet from the children, with the driver maintaining his speed at forty miles per hour, the decedent three-year old started running across the road from the driver's right to his left. The driver claimed to be driving at no more than "28 or 30, 35 at the most" when he was eighty feet from the child and, upon impact, to be going twenty-five miles per hour. The driver claimed that he did not see the decedent child until the child started running across the road from the cluster of children on the right and thus did not apply his brakes with intent to stop until that time. When the child started across, the driver swerved left, crossing the center line. When the child continued running, the driver turned to the right to go behind him, but the child also reversed himself and ran into the left front bumper. The driver further testified that, at a speed of forty-five miles per hour, such a loaded vehicle might take 200 or more feet to stop and that "when he was back down the road he was depending on his horn to get the children out of the road."[53] At the trial, the court gave instructions on sudden emergency and "darting out." The jury's verdict was for defendants.

On appeal, the Second District Court of Appeal made much of the motorist's duty, when he knows of the presence of children, to anticipate "childish conduct," to anticipate that a child may suddenly cross the road, to maintain control of his vehicle and, under appropriate circumstances, even to stop until the children are out of danger.[54] Applying the above duties of care to the evidence, the court concluded that the negligent conduct of the defendant created or contributed to the perilous situation and, therefore, the sudden emergency and darting instruction should never have been given. The judgment for defendants was reversed and the cause remanded for a new trial.

The case was then taken to the Florida supreme court. Noting that there was sufficient evidence to support the jury's verdict absolving the defendants of negligence, the supreme court reinstated the verdict of the trial court. The basis for the decision appears to have been that (1) there was a factual conflict as to the driver's negligence leading up to the emergency that could only be resolved by the jury and (2) since the sudden emergency instruction

52. 176 So. 2d 87 (Fla. 1965), *reversing* 162 So. 2d 278 (2d D.C.A. Fla. 1964).

53. Fowler v. Midstate Hauling Co., 162 So. 2d 278, 280 (2d D.C.A. Fla. 1964). *Id.* at 279-80.

54. *Id.* at 280.

did expressly limit its applicability to "a sudden emergency not due to his [defendant-driver's] own negligence"[55] the instruction adequately protected plaintiff's interests by negating its own applicability if the jury did find that defendant's prior conduct was negligent and contributed to the emergency.[56]

The Florida supreme court's holding in *Midstate* is logically consistent with the notion that a sudden emergency instruction is proper when there is sufficient evidence to support factual findings for all four requisites. The question, though, is whether such logical consistency is functionally desirable in a case such as *Midstate* where the crucial factual issue appears not to be defendant's conduct *after* the alleged "sudden emergency" began, but rather the conduct of defendant *leading up to* the actual moment of crisis.[57]

The giving of the sudden emergency instruction in cases where the key issue is the conduct of the actor leading up to the time of crisis is an abuse of the emergency doctrine and prejudicial to the injured plaintiff's rights. This proposition is based on two grounds. First, the sudden emergency instruction focuses the jury's attention on the actor's conduct *from the time he confronts the crisis situation.*[58] Indeed, this is its purpose — to instruct the jury to judge the actor's *response* to the sudden emergency by a standard that takes the need for fast action into account. But in situations where the main factual issue is the alleged negligence of the actor *in the time leading up to the emergency,* this may have the undesirable effect of diverting the jury's consideration from the key issue: Was this actor proceeding with due care and caution so as to be prepared to meet the exigencies of possible emergency situations?

In *Midstate,* for example, the central factual question to be decided was not the driver's conduct once the child had darted out in front of him. It seems reasonably clear from the reported facts that he then performed reasonably in trying to avoid striking the child. Rather, the questions that appear to dominate this case are these: Was the driver justified in failing to bring his vehicle down to a speed at which he could control the vehicle when he first saw the children? Was it reasonable care for him originally to rely solely on his horn to keep the children out of danger? Was this driver fulfilling the motorist's duty, once the presence of children is known, to anticipate childish conduct?[59] In other words, was this driver negligent *prior to* the emergency and, if so, did his negligent conduct cause the emergency and the casualty?

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55. Midstate Hauling Co. v. Fowler, 176 So. 2d 87, 88 (Fla. 1965).

56. *See id.* at 89-90. A similar basis existed for upholding the "darting" instruction, *i.e.,* it too was conditioned upon the lack of defendant's negligence. *Id.* at 88.

57. This same question applies with equal force to Klepper v. Breslin, 83 So. 2d 587 (Fla. 1955).

58. *See* discussion in Ellwood v. Peters, 182 So. 2d 281, 284-85 (1st D.C.A. Fla. 1966). This argument does presume at least *some* positive correlation between what juries are told and what juries do.

59. *Cf.* discussion accompanying notes 35-37 *supra* on the Florida supreme court's statement of the stringent requirements upon motorists to have their vehicles "under control at all times" and to be reasonably prepared to meet emergencies. Bellere v. Madsen, 114 So. 2d 619, 621 (Fla. 1959).

When the sudden emergency instruction is allowed in such a case as *Midstate,* not only is the jury's attention turned away from the conduct of the actor prior to the emergency; the sudden emergency instruction itself, despite the qualification "not due to his own negligence,"[60] tends to imply that the peril was sudden and unexpected and thus that the actor did not breach his duty to be prepared for the unexpected.

The second reason against allowing a sudden emergency instruction in cases where the main factual issue concerns the actor's conduct leading up to the emergency is, in part, an answer to a probable objection to this writer's position. The objection is apt to be that even if, in a given situation, the central factual issue is the actor's "pre-emergency conduct," the instruction is still warranted if there is any factual issue at all as to the actor's possible negligence after the onset of the emergency. Therefore, goes this objection, the evidence in a case like *Midstate* warrants the sudden emergency instruction in order to insure that the jury does not hold the driver to a response to the emergency (after the child darted in front of him) over and above what should have been expected of a reasonably prudent person.

The fallacy of the above objection is its failure to consider that the sudden emergency doctrine is not an *exception to* but rather an *exemplification of* the care required of a reasonable man *under the same or similar circumstances.* Therefore, any acceptable charge to the jury on the general issue of defendant's negligence would include the reference to the care required *under like circumstances.*[61] In effect, the jury is being charged correctly with respect to defendant's conduct both before *and after* the onset of the emergency. Both are to be judged by reasonable conduct under "like circumstances."

If this be true, then why not completely abolish sudden emergency instructions, since the matter is taken care of by a general instruction on negligence referring to "like circumstances" or similar language? There has been some thinking and action in this direction as to sudden emergency and similar instructions such as "unavoidable accident."[62] Such charges do complicate the jury's instructions and may result in a confusion of the basic issues in a negligence case – causation of injury, violation of a legal duty of

60. Midstate Hauling Co. v. Fowler, 176 So. 2d 87, 88 (Fla. 1965) (a mere six-word qualification in a sudden emergency instruction of ninety-five words).

61. *See* W. PROSSER, *supra* note 1, §32, at 154 & n.21. The Florida standard jury instruction on negligence is as follows: "Negligence is the failure to use reasonable care. Reasonable care is that degree of care which a reasonably careful person would use *under like circumstances.* Negligence may consist either in doing something that a reasonably careful person would not do *under like circumstances* or in failing to do something that a reasonably careful person would do *under like circumstances.*" (emphasis added). THE SUPREME COURT COMMITTEE ON STANDARD JURY INSTRUCTIONS, FLORIDA STANDARD JURY INSTRUCTIONS §4.1 (1967) [hereinafter cited as FLORIDA INSTRUCTIONS].

62. *See* Green, *The Submission of Issues in Negligence Cases,* 18 U. MIAMI L. REV. 30, 43 n.42 (1963) (notes Florida's strict use of "unavoidable accident"); Thode, *Imminent Peril and Emergency in Texas,* 40 TEXAS L. REV. 441, 461 (1962); Wiehl, *Instructing a Jury in Washington,* 36 WASH. L. REV. 378, 382-83 & n.32 (1961). The articles by Green and Wiehl both refer to the ILLINOIS PATTERN JURY INSTRUCTIONS §§12.02-.03 (1961), which recommends against giving "unavoidable accident" and emergency or "imminent peril" instructions.

care, and assessment of recoverable damages. Even where it is not proposed that such charges be abolished, it is urged that they not be treated as "independent issues" and that their subordinate connection to the basic issue of negligent conduct be made clear to the jury.[63]

Criticism of sudden emergency, unavoidable accident, and similar instructions reflects a growing concern that jury instructions are unmanageably long and complicated. Efforts toward simplification in many states are taking the form of the preparation of standard instructions prepared by bar committees.[64] The Supreme Court of Florida in 1962 appointed the Supreme Court Committee on Standard Jury Instructions. Its initial work covering the trial of negligence cases, *Florida Standard Jury Instructions,*[65] well achieved its stated goal:[66]

> [T]o produce jury instructions that would express the applicable issues and guiding legal principles briefly and in simple, understandable language, without argument, without unnecessary repetition, and without reliance on negative charges.

The jury instructions in *Florida Standard Jury Instructions* are a significant step forward in greater brevity, clarity, and simplification of the submission of issues to the jury. As for the basic issue of negligence itself, the committee recommended against the use of several subordinate charges that were deemed either argumentative, negative, superfluous, overbalanced for one side, or more appropriate for argument by counsel, or were deemed to possess some combination of the above characteristics.[67] Of special interest here was the following:[68]

> The committee recommends that no charge be given on the subject of sudden emergency. In the circumstances of an emergency, as in "ordinary circumstances," the applicable standard of care is reasonable care under the circumstances.

Although this obviously represents a striking *procedural* change in the use of the sudden emergency doctrine, the following factors somewhat cushion the force of this change. In its order and opinion authorizing the *Florida Standard Jury Instructions,* the Florida supreme court provided that their adoption is without prejudice to the rights of any litigant objecting to the approved forms and that it should not intrude upon the responsibility of the trial judge to charge the jury correctly in each case.[69] It is the trial judge's responsibility to modify or even to substitute another charge for an

63. *See* Green, *supra* note 62, at 42-43. Special indebtedness exists to Green's excellent discussion of the basic negligence issues, *id.* at 33-46.

64. *See* listing of published volumes in FLORIDA INSTRUCTIONS at x, xi.

65. FLORIDA INSTRUCTIONS, *supra* note 61.

66. FLORIDA INSTRUCTIONS at ix.

67. *Id.* at §§4.1-4.14.

68. *Id.* at §4.8.

69. *In re* Standard Jury Instructions, 198 So.2d 319 (Fla. 1967).

instruction deemed not to apprise the jury accurately and adequately as to the law in the case at hand.[70] Of particular import to the doctrine of sudden emergency is the following provision:[71]

> [I]n all circumstances in which the notes accompanying the Florida Standard Jury Instructions contain a recommendation that a certain type of instruction not be given, the trial judge may follow such recommendation unless he shall determine that the giving of such an instruction is necessary accurately and sufficiently to instruct the jury, in which event he shall give such instruction as he shall deem appropriate and necessary; and, in such event, the trial judge shall state on the record or in a separate order the legal basis of his determination that such instruction is necessary.

In other words, the basic recommendation of the committee is that sudden emergency instructions not be given to juries in Florida. This is not a rejection of the sudden emergency doctrine. Rather, the committee takes the position that the sudden emergency *doctrine* is adequately applied to the facts by the general charge on negligence (and by argument by counsel). Yet, the door is left open for the trial judge to give a sudden emergency instruction if he determines that it is necessary to instruct the jury accurately and sufficiently.

The committee's recommendation against the use of the sudden emergency instruction, *with the trial judge still able to make justifiable exceptions,* is a beneficial safeguard against the misuse of the instruction. In cases such as *Midstate* and *Klepper,* where the main issue is the actor's *preemergency* conduct,[72] it is to be hoped the trial judge will not charge the jury on sudden emergency as a result of the *Florida Standard Jury Instructions* recommendation. Not giving the instruction in these cases will enhance the jury's ability to grasp the basic issues of negligence, causation, and damages.

There are two situations where a brief and understandable instruction on sudden emergency ought to be given as a corollary to the general negligence charge. The first of these is where the conclusion that the first three factual requisites have been met can be established either as a matter of law or is strongly suggested by a preponderance of the evidence and, in addition, the crucial factual issue with respect to the actor's conduct is the fourth factual requisite, whether the actor's *response* to the emergency was commensurate with the "reasonable man" standard under these circumstances. For example, while driver is proceeding cautiously, pedestrian unexpectedly darts out toward him and driver panics and hits the accelerator rather than the brake, colliding with another vehicle. It is in a situation like this that a sudden emergency instruction can be genuinely helpful in fairly posing the issue of fault liability.

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70. *Id.* at 319-20.

71. *Id.* at 320.

72. It is in this situation that controversy over the giving or not giving of the instruction has most frequently occurred in the Florida appellate cases.

The second situation calling for an emergency instruction is when there is substantial evidence to indicate that defendant's negligence caused or contributed to the peril, and there is a bona fide factual dispute as to the injured plaintiff's contributory negligence *concerning plaintiff's response to that peril.*[73] Here, in addition to the substantive justification for the emergency doctrine (that plaintiff should not be expected to respond to a sudden emergency as under normal circumstances) is the further consideration that plaintiff's conduct under stress was a consequence of defendant's negligence.[74]

Cases will arise where it will be difficult for the trial judge to decide if the facts meet the above specifications. The temptation to avoid such troublesome decisions by simply concluding that the sudden emergency instruction be abolished *in toto* is real. But to achieve uniformity at the expense of jury instructions that concretely apply the law to the particular facts at hand is to place too great a value on simplicity as an end in itself.

CONCLUSION

Whether or not a special jury instruction is used, there nevertheless exist two basic grounds of dissatisfaction from a consideration of the sudden emergency doctrine. First, the "ultimate facts"[75] are exceedingly difficult to ascertain with any degree of confidence. The always difficult task of the factfinder is made especially arduous by the speed of events in a sudden emergency situation. Thus, results of litigation are anything but predictable. Second, when successfully utilized by a defendant in a negligence suit, the emergency doctrine is one more means whereby the injured party is left without compensatory relief. It should once again be noted that the sudden emergency doctrine is an *exemplification of* rather than an *exception to* fault liability based on failure to exercise reasonable care. These two grounds of dissatisfaction with the emergency doctrine serve to exemplify the two worst aspects of the law of negligence in general — unpredictability of outcome in a given case and the lack of relief when "fault" is not present. Therefore, to

73. If the central issue regarding plaintiff's contributory negligence covers his behavior *leading up to* the peril, the sudden emergency instruction should not be given for the same reasons earlier offered for opposing its use in the like situation of defendant's primary negligence.

74. In at least one state, Texas, the courts to some extent have sought to deal with this situation as a separate doctrine, "imminent peril," which *fully exonerates* plaintiff's response, while terrorized, to the peril negligently created by defendant. *See* Thode, *supra* note 62 at 441-51, 456-61, 469-72. Without evaluating the merits of this approach, one is prone to say that, at the very least, the plaintiff in such circumstances is entitled to an instruction on the emergency doctrine.

75. Was the actor's conduct leading to the emergency negligent, and did this conduct create or contribute to the peril causing the injury? If not, was the actor's conduct negligent in response to the emergency, and did this conduct cause the injury? The ultimate facts are those of any negligence action — breach of duty, causation, damages — applied to a sudden emergency, if the emergency is found to have actually or apparently existed. Determining whether a sudden emergency existed and whether there was a chance for an alternative response (the first and third factual requisites) may be as difficult as the proof of the issue of negligence and causation.

suggest dissatisfaction with the sudden emergency doctrine is also, for identical reasons, to suggest general dissatisfaction with the concept of fault liability based on the "reasonable man" standard. At least in the area of motor vehicle casualties, the sudden emergency doctrine exemplifies the need for a more certain means of injury compensation than is afforded by the concept of fault liability.[76]

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76. *But see* Walker, *The Gathering Storm in Automobile Injury Compensation: A Workable Solution*, 22 U. MIAMI L. REV. 151 (1967), for a vigorous defense of fault liability as well as an excellent survey of the automobile injury compensation problem and some possible solutions.