SUDDEN EMERGENCY AND LAST CLEAR CHANCE:
Whose fault is it?

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In any negligence case, the plaintiff has the burden of proving: (1) that the defendant owed a duty of care to the plaintiff; (2) that the defendant breached the duty of care; (3) that the plaintiff suffered harm; and, (4) that the plaintiff's harm was the proximate result of the defendant's breach of duty.

An emergency can sometimes excuse a defendant's negligence, that is, whether the defendant breached the duty of care that she owed to the plaintiff. In these situations, the sudden emergency doctrine, the sudden medical emergency doctrine or the last clear chance doctrine may apply. The sudden emergency doctrine is generally applicable when the plaintiff was not the cause of the emergency. For the doctrine to apply, the defendant must not have been the cause of the emergency. When a defendant is confronted with a sudden medical emergency, her negligence can be excused.

The last clear chance doctrine applies when the plaintiff, or both the plaintiff and the defendant, caused the emergency or position of peril. The sudden emergency doctrine and the last clear chance doctrine may simply be one factor to be considered in determining the overall negligence of the parties under a comparative negligence

analysis.[1] What follows is a general summary of both the sudden emergency doctrine and the last clear chance doctrine. At the end of the day, it is important to understand the law of the relevant jurisdiction and determine whether these doctrines apply as a complete defense or whether they are merely factors to consider in apportioning fault between the plaintiff and the defendant.[2]

An individual will not be held to the usual degree of care, or be required to exercise his or her best judgment, when confronted with a sudden and unexpected position of peril created in whole or in part by someone other than the person claiming protection under the sudden emergency doctrine.[3] The sudden emergency doctrine, however, does not relieve an individual of all responsibility to act with reasonable, or ordinary, care to avoid an accident.[4]

The sudden emergency doctrine merely relates to the standard of conduct (i.e. standard of care) applied to a driver who, although driving in a prudent manner, is confronted with a sudden or unexpected event which leaves little or no time to apprehend the situation and act accordingly; this driver should not be subject to liability because another perhaps more prudent course of action was available.[5] In other words, a person confronted with a sudden and unforeseeable occurrence, because of the shortness of time in which to react, should not be held to the same standard of care as someone confronted with a foreseeable occurrence.[6] The sudden emergency

[1] *Estate of Haley v. Brown,* 370 S.C. 240 (South Carolina Court of Appeals 2006).
[2] *See Deas v. State,* 2004 Tenn. App. LEXIS 801 (Tennessee Court of Appeals Jul. 22, 2004 (the contributory negligence doctrine, sudden emergency doctrine and the last clear chance doctrine have been merged into the comparative fault scheme and are simply factors to consider when apportioning fault among the parties).
[3] *Shriner v. Ralston,* 2013 PA Super 33 (Superior Court of Pennsylvania Feb. 22, 2013).
[4] *Shriner, supra.*
[5] *Shriner, supra.*
[6] *Shriner, supra.*

doctrine modifies the standard of reasonable conduct ordinarily expected of reasonable men and women by allowing the occurrence of a sudden or unexpected event to be taken into account as one of the circumstances determining what conduct is reasonable.[7]

The traditional elements of the sudden emergency doctrine are as follows:

1. An emergency situation arose suddenly and unexpectedly;
2. The emergency situation was not proximately caused by the negligent act or omission of the person whose conduct is under inquiry; and,
3. After an emergency situation arose that to a reasonable person would have required immediate action without time for deliberation, the person acted as a person of ordinary prudence would have acted under the same or similar circumstances.[8]

The sudden emergency doctrine provides that whenever the driver of an automobile, without prior negligence on his part, is confronted with a sudden emergency and acts as an ordinarily prudent person would have acted under the same or similar circumstances, he is not guilty of negligence.[9] In some instances, a defendant may avoid liability for negligence in violating a traffic safety statute with a sudden emergency is found to have been the proximate cause of the accident.[10] The doctrine only applies where there is a sudden and unexpected occurrence of a transitory nature which

[7] *Abramova v. Huang,* 2005 Conn. Super. LEXIS 2477 (Superior Court of Connecticut Sep. 12, 2005).
[8] *Jordan v. Sava,* 222 S.W.3d 840 (Texas Court of Appeals 1st Dist. 2007).
[9] *Vahdat v. Holland,* 274 Va. 417 (Supreme Court of Virginia 2007).
[10] *Hatala v. Craft,* 165 Ohio App.3d 602 (Ohio Court of Appeals 1st Dist. 2006).

demanded immediate action without time for reflection or deliberation and does not comprehend a static condition which lasted over a period of time.[11]

Other courts have defined a sudden emergency as:

1. An unforeseen combination of circumstances which calls for immediate action;
2. A perplexing contingency or complication of circumstances;
3. A sudden or unexpected occasion for action, exigency, pressing necessity.[12]

A sudden emergency may exist when a child darts into the roadway between parked cars, a load from a truck bounces across the highway, or something else that is unforeseeable occurs. A sudden medical emergency is something different. Under the sudden medical emergency doctrine, "[w]here the driver of an automobile is suddenly stricken by a period of unconsciousness which he has no reason to anticipate and which renders it impossible for him to control the car he is driving, he is not chargeable with negligence as to such lack of control."[13]

Some examples that may apply would be an unforeseen cardiac event, seizure, or stroke. Again, the individual asserting a defense under the sudden medical emergency doctrine must have had no reason to anticipate the medical emergency.

Under the last clear chance doctrine, the plaintiff placed himself in a position of peril and, therefore, created the emergency. The last clear chance doctrine has been defined as follows:

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[11] *Hatala, supra.*
[12] *Mosell v. Estate of Marks,* 526 N.W.2d 179 (Iowa Court of Appeals 1994); *see also Weiss v. Bal,* 501 N.W.2d 478 (Supreme Court of Iowa 1993).
[13] *Roman v. Gobbo,* 99 Ohio St.3d 260 (2003).

> "Where a plaintiff, by his own fault, has caused himself to be placed in a perilous situation, he may recover under the rule of the last clear chance, notwithstanding his negligence, if the defendant did not, after becoming aware of [the] plaintiff's perilous situation, exercise ordinary care to avoid injuring him."[14]

The doctrine only applies when the defendant had actual knowledge of the plaintiff's peril in time to prevent injury by the diligent use of the means at hand.[15] In most jurisdictions, the last clear chance doctrine has merged into the doctrine of comparative negligence.[16] Some states have abolished the last clear chance doctrine by statute.[17] The doctrine of last clear chance was originated to ameliorate the harsh results that would occur under the concept of contributory fault, which barred any recovery by the plaintiff if he were negligent in any way.[18]

In the world of comparative fault, where the relative fault of the plaintiff and the defendant are assessed, the last clear chance doctrine has been much less at issue.[19] Regardless, the doctrine applies when the jury apportions fault between a plaintiff and a defendant in response to a comparative negligence instruction.[20]

In some jurisdictions, the last clear chance doctrine applies when the plaintiff *and* the defendant caused the position of danger:

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[14] *Leahy v. Richardson,* 2011 Ohio 3214 (Ohio Court of Appeals 5th Dist. Jun. 27, 2011).
[15] *Leahy, supra.*
[16] *Leahy, supra; see also Israfil v. Warren Corr. Inst.,* 2011 Ohio 2546 (Ohio Court of Appeals 10th Dist. May 26, 2011) (with the adoption of comparative negligence, the last clear chance doctrine is a nullity).
[17] *See, e.g., Tyrrell v. Marine Propulsion Servs.,* 178 Ore. App. 392 (Oregon Court of Appeals 2001).
[18] *Dolese v. Transit Mgt. of Southeast La., Inc.,* 881 So.2d 746 (Louisiana Court of Appeals 4th Cir. 2004).
[19] *Penn Harris Madison Sch. Corp. v. Howard,* 861 N.E.2d 1190 (Supreme Court of Indiana 2007).
[20] *Dolese, supra* (courts still invoke the doctrine of last clear chance to apportion fault when a plaintiff is negligent).

1. The plaintiff was in a position of danger caused by the negligence of both the plaintiff and the defendant;
2. The plaintiff was oblivious to the danger or unable to extricate himself from the position of danger;
3. The defendant was aware, or by the exercise of reasonable care should have been aware, of the plaintiff's danger and of his obliviousness to it, or his inability to extricate himself from it; and,
4. The defendant, with means available to him, could have avoided injuring the plaintiff after becoming aware of the danger and of the plaintiff's inability to extricate himself from it, but failed to do so.[21]

The last clear chance doctrine contemplates a last *clear* chance as opposed to a last *possible* chance.[22] There must be an appreciable interval of time between the plaintiff's negligence and her injury during which the defendant, by the exercise of ordinary care, could or should have avoided the effect of the plaintiff's prior negligence.[23]

In order for the last clear chance doctrine to apply, the acts of the respective parties must be sequential and not concurrent.[24] The last clear chance doctrine is only applicable when the defendants' negligence in not avoiding the consequences of the plaintiff's negligence is the last negligent act; and, cannot be invoked when the plaintiff's own act is the final negligent act, or is concurrent with the defendant's negligence.[25]

[21] *Juvenalis v. District of Columbia,* 955 A.2d 187 (District of Columbia Court of Appeals 2007).
[22] *Addison v. Kye,* 2004 N.C. App. LEXIS 1327 (Court of Appeals of North Carolina May 19, 2004).
[23] *Addison, supra.*
[24] *Nationwide Mut. Ins. Co. v. Anderson,* 160 Md. App. 348 (Maryland Court of Appeals 2004).
[25] *Anderson, supra.*

The defendant must have a fresh opportunity to avoid the harm that ultimately occurred.[26]

When relying upon the sudden emergency doctrine or the last clear chance doctrine to defend a claim, discovery becomes very important, as does the retention of appropriate experts. An investigation of the crash scene and of the vehicles involved in the accident should be accomplished at the earliest time possible. The retention of a crash reconstructionist may be considered.

The collection of potential evidence is also important. Are maintenance records for the involved vehicles available? Are the medical records of a driver seeking to avoid liability under the sudden medical emergency doctrine available? For the driver who is asserting the sudden medical emergency defense, an appropriate medical expert (i.e. the driver's treating physician or physicians) must be able to testify that it was impossible for the driver to anticipate her medical emergency and resulting period of unconsciousness.

With the prevalence of comparative negligence, these defenses tend to not lend themselves to case dispositive motions. The apportionment of fault has been traditionally left for the jury to decide. Regardless, there may be some rare instances where a case dispositive motion would be appropriate. Otherwise, let the jury decide, "whose fault is it?"

[26] *Anderson, supra.*

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