2-1-1955

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1. Although mutual options may be given the partners to purchase or to liquidate upon the death of a partner, preferably the agreement should bind the decedent's estate to sell, and the survivor to purchase.

2. The agreement should provide a clear and definite basis for evaluating the decedent's interest.

3. The sale of the decedent's business interest should be restricted to the other partners during life as well as at death.

4. The agreement must preclude the sale of any partner's interest during lifetime at a price higher than that payable at death. It should not be a substitute for testamentary disposition.

5. The agreement should reflect a "business purpose."

6. The wills of the partners should be consistent with the agreement and should direct the executors to carry out its terms.

John J. Dortch.

Torts—Application of Emergency Doctrine in North Carolina

The following charge by the trial court as it related to the application of the doctrine of "sudden emergency" was approved by the North Carolina Supreme Court in a recent case:¹

"The Court instructs you that a person confronted with a sudden emergency is not held by law to the same degree of care as in ordinary circumstances, but only to that degree of care which an ordinarily prudent person would use under similar circumstances. The standard of conduct required in an emergency, as elsewhere, is that of a prudent person.

The Court further instructs you that this principle is not available to one who by his own negligence, brought about or contributed to the emergency. That means, in simple language, that a person who creates an emergency, or contributes to it, cannot take advantage of the principle.

The Court further instructs you that one who is required to act in an emergency is not held by law to the wisest choice of conduct, but only to such choice as a person of ordinary care and prudence similarly situated would have made."

The purpose of the doctrine of sudden emergency has been well stated by the West Virginia court:²

"The general principles which require one to act in such a manner as to avoid injury to himself, and to take such steps to

² Oldfield v. Woodall, 113 W. Va. 35, 37, 166 S. E. 691, 692 (1932).
avoid accidents as would be taken by a reasonably prudent person under like circumstances, are not enforced in all their rigor as to situations of sudden danger. This is a recognition of the fallibility of human nature in sudden crises and the greater probability of errors of judgment occurring when a danger is eminent and where a person is compelled instantly, without delaying for deliberation, to adopt some course of conduct to avoid injury."

The purpose of this note is to discuss the application of the doctrine of emergency in North Carolina from three aspects, namely:

(1) What is the nature of the peril necessary to invoke the doctrine?

(2) Is the availability of the doctrine affected by how or by whom the emergency was created?

(3) Is it a question of law for the court or fact for the jury as to whether the doctrine of emergency is available, and as to whether the person invoking the doctrine acted so as to free himself of negligence?

**Nature of the Peril**

Authorities seem to be split on the question of whether the danger necessary to invoke the doctrine of emergency be real or only apparent to the person so imperiled. The North Carolina Supreme Court has never decided the question directly. However, in two cases, the court quoted with approval a Massachusetts case which applied the apparent peril test in determining whether the doctrine of emergency was available. As thus applied, the test is:


4 Palma v. Moren, 44 F. Supp. 704 (M. D. Pa. 1942); Hooper v. Bronson, 123 Cal. App. 2d 243, 266 P. 2d 590 (1954); Budds v. Kessin Motor Express Co., 326 Ill. App. 59, 61 N. E. 2d 579 (1945). The above cases apply the subjective test in determining whether there was an apparent danger. The following cases apply the objective test and hold that the apparent danger must be reasonable:

- Southwestern Freight Lines v. Floyd, 58 Ariz. 249, 119 P. 2d 120 (1941);
- Hedgecock v. Orlosky, 220 Ind. 390, 44 N. E. 2d 93 (1942) (reasonably well founded);
- Allen v. Pearce Dental Supply Co., 149 Kan. 549, 88 P. 2d 1057 (1939) (reasonable to a person ordinarily prudent);
- Higgins v. Terminal Ry. Association of St. Louis, 231 Mo. App. 837, 97 S. W. 2d 892 (1936) (reasonably well founded);

5 In Jernigan v. Jernigan, 207 N. C. 831, 838, 178 S. E. 587, 591 (1935), the court approved a charge in which the trial court charged the jury using the term "apparent peril." It is noted, however, that this point in the charge was not the one to which exception was taken on appeal, so the case is probably not authority for saying that North Carolina recognizes the apparent peril doctrine.
"If the peril seemed imminent, more hasty and violent action was to be expected than would be natural at quieter moments, and such conduct is to be judged with reference to the stress of appearances at the time, and not by the cool estimate of the actual danger formed by outsiders after the event."\(^6\)

It would seem, therefore, that if the question were ever squarely up for decision, the North Carolina Supreme Court would probably decide that apparent danger is sufficient to allow the invoking of the doctrine. It also seems that the court would require that this apparent peril must be a reasonable one. It is not enough if the person attempting to invoke the doctrine of emergency thought he was in an emergency when a reasonably prudent person so situated would not have thought so. The requirement that the apprehension be a reasonable one has been applied in North Carolina in the field of assault.\(^7\)

It should be equally applicable here, for it would prevent false claims of emergency by one attempting to overcome the charge of negligence.

**Cause of the Emergency**

There is also a split of authority as to the origin of the emergency necessary to allow the doctrine to be invoked. Some jurisdictions hold that in order for the plaintiff to take advantage of the doctrine, the emergency must be created by the wrongful conduct of the defendant.\(^8\) Other jurisdictions hold that the doctrine is not available to one who creates the emergency,\(^9\) whereas the majority hold that it is available unless the emergency is negligently or willfully created by the one invoking it.\(^10\)

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\(^7\) State v. Williams, 186 N. C. 627, 120 S. E. 224 (1923). The test as applied is that if a person, by a display of force, causes another to reasonably apprehend imminent danger, and thereby forces him to do otherwise than he would have done, he commits an assault.

\(^8\) Hedgecock v. Orlosky, 220 Ind. 390, 44 N. E. 2d 93 (1942); Lee v. City Ice Co., 64 S. W. 2d 736 (Mo. App. 1933); Helvich v. George A. Rutherford Co., 114 N. E. 2d 514 (Ohio App. 1953) appeal dismissed 160 Ohio St. 571, 117 N. E. 2d 439 (1954). The above cases hold that the emergency must be created by the negligence of the defendant in order for the plaintiff to invoke the doctrine; but the doctrine should be even more applicable if the conduct creating the emergency was willful.


The last view seems to adopt the better reasoning, since the purpose of the doctrine is to make allowances for one who is momentarily incapable of deliberation. Therefore, it is only the incapacity to deliberate which should be considered, not its origin, unless this incapacity was negligently or willfully produced in whole or in part by the person attempting to profit by it. North Carolina, in applying the doctrine, takes the majority view, for it has prohibited the application of the doctrine only in those cases where the party who seeks to invoke it has negligently or willfully contributed in bringing it about. In Atlantic Coast Line R. R. v. McLean Trucking Co., the court held that the benefit of sudden emergency is available to the defendant unless the emergency is produced or contributed to by his negligence. It seems to follow that the doctrine would be available if the emergency were created by some outside force, or by a third party. North Carolina so held in Goode v. Barton.

It is noted that the charge of the trial judge in the principal case first correctly stated the law to be that the doctrine of emergency is not available to one who negligently contributed to it. He then, in attempting to explain, further said:

"That means, in simple language, that a person who creates an emergency or contributes to it, cannot take advantage of the principle."

The latter part of this charge seems to be in error, for one may create an emergency and still avail himself of the doctrine if the creation were not negligent or willful. The North Carolina Supreme Court apparently concluded that the jury was not misled by the latter phrase, and that the doctrine had been sufficiently explained to them.

Fact or Law

The majority view in this country is that whether an emergency existed is ordinarily a question of fact for the jury, but if the facts

The court cited several cases illustrating the application of the doctrine of sudden emergency:

- DePonce v. System Freight Service, 66 Cal. App. 2d 295, 152 P. 2d 234 (1941);
- Pollard v. Weeks, 60 Ga. App. 644, 4 S. E. 2d 722 (1939);
- DePonce v. System Freight Service, 227 N. C. 422, 42 S. E. 2d 398 (1947);
- In Powell v. Lloyd, supra at 488, 67 S. E. 2d at 668, the dissenting justice said: "The rule of sudden emergency cannot be invoked by one who has brought that emergency upon himself by his own wrong or who has not used due care to avoid it."
are not in dispute, it becomes a question of law for the court. Whether a person acting in the emergency was acting as a reasonably prudent person would have acted under the same or similar circumstances is likewise for the jury. The North Carolina Supreme Court early applied the doctrine that the question of negligence in an emergency is one for the jury. It would appear that such a rule might be applied with reasonable consistency, but a brief review of several cases will show the inconsistency with which the doctrine has been applied in North Carolina.

In Ingle v. Cassiday, the court, in upholding an involuntary non-suit, held as a matter of law that an emergency faced the defendant, and that he acted as a person of ordinary care and prudence, similarly situated, would have acted. This case was decided over the vigorous dissent of Mr. Justice Clarkson. The case marked the beginning of decisions in which the court has seemingly abandoned the principle that the determination of the existence of an emergency, and the determination of whether there was negligence under the doctrine, are questions for the jury.

In Mills v. Waters, the court upheld a nonsuit by holding, as a matter of law, that the defendant was faced with an emergency and that he acted prudently thereunder. It seems that in this case there was sufficient evidence to go to the jury had the court not entered


18 Bullock v. Williams, 212 N. C. 113, 193 S. E. 170 (1937); Jernigan v. Jernigan, 207 N. C. 831, 178 S. E. 587 (1935); Smith v. Atlantic and Yadkin Ry. Co., 200 N. C. 177, 156 S. E. 508 (1931); Luttrell v. Hardin, 193 N. C. 266, 136 S. E. 726 (1927); Clark v. Wilmington and Weldon R. R. Co., 109 N. C. 430, 14 S. E. 43 (1891). In Bullock v. Williams, supra at 117, 193 S. E. at 172, the court approved the charge of the trial judge that the determination is ordinarily one for the jury.

19288 N. C. 497, 181 S. E. 562 (1935).
20 Mr. Justice Clarkson in his dissent in Ingle v. Cassiday, supra note 19, at page 500, 181 S. E. at 504, stated that "the defense of sudden emergency is one for the jury. This is the universal holding among American courts.

21235 N. C. 424, 70 S. E. 2d 11 (1952).
a nonsuit under the emergency doctrine. Here the court said that it gave due consideration to the cases holding that weight and sufficiency of the evidence are for the jury.

In Henderson v. Henderson, the court said:

"Viewing the circumstances in the light most favorable to the plaintiff, as required in passing upon a motion for judgment of involuntary nonsuit, the defendant was confronted suddenly by an emergency caused solely by the gross negligence of (third party). . . .

... and his failure to anticipate the unforeseeable when confronted by a sudden emergency caused by no fault of his own cannot be deemed a basis of actionable negligence."

In this case, the court affirmed a dismissal of the suit at the conclusion of the plaintiff's evidence.

The practice of upholding nonsuits on the ground that the defendant was under an emergency and acted prudently thereunder as a matter of law is not unusual in North Carolina. The cases in which the court has applied the majority view and allowed the jury alone to decide these issues seem to be in the minority. The court has also reversed nonsuits against the plaintiff on the ground that the evidence indicated the plaintiff to be acting in an emergency.

In spite of the apparent failure of the North Carolina Supreme Court to follow consistently any rule as to whether the questions relating to an emergency should go to the jury, it is still possible to make several observations which may be of some help to attorneys in unravelling this dilemma.

(1) It seems evident that if the person attempting to invoke the doctrine wins a jury verdict, this verdict will probably not be disturbed on appeal on the ground either that he was not faced with an emergency, or if an emergency, that he was negligent. In other words,

22 In this case the defendant attempted to sweep spilled gasoline out of a service station. During the sweeping motion, some of the gasoline came in contact with an open stove, whereby the plaintiff was burned.

23 Henderson v. Henderson, supra note 23; Morgan v. Saunders, 236 N. C. 162, 72 S. E. 2d 411 (1952); Mills v. Waters, 235 N. C. 424, 70 S. E. 2d 11 (1952); Ingle v. Cassiday, 208 N. C. 497, 181 S. E. 562 (1935). In Patterson v. Ritchie, 202 N. C. 725, 164 S. E. 117 (1932), the court went to the extreme by reversing a jury verdict for the plaintiff on the ground that the defendant was confronted by a situation in which he had to act quickly, and under the circumstances he was not negligent, but rather acted prudently.


the court probably would not reverse a jury verdict by holding as a matter of law that there was no emergency, or that the party did not act prudently in the emergency.

(2) If the defendant invokes the doctrine as a defense to a charge of negligence, and the trial court nonsuits the plaintiff on the ground that there was an emergency, and that the defendant was not negligent under the emergency as a matter of law, the chances are very strong that the nonsuit will be affirmed on appeal.

(3) If the defendant invokes the doctrine, and the case goes to the jury which decides for the plaintiff, the supreme court may sustain or reverse, depending on whether it thinks, as a matter of law, that the defendant's actions were prudent under the emergency.

Conclusion

It would seem that the most logical way to apply the doctrine of emergency would be:

(1) If there is any evidence that would support a finding that an emergency existed, then the question of the existence of the emergency should be determined by the jury.

(2) If it is determined that an emergency did exist, the question of whether a person acted during the emergency as a reasonably prudent person similarly situated would act should always be submitted to the jury. It is submitted that the amount of care required in an emergency is never a question of law. To determine the amount of care required to find one free of negligence, it is first necessary to determine how great an emergency existed, and to what extent the emergency destroyed the prudence which would otherwise be displayed by the person involved or by the reasonably prudent person. The determination of these questions in themselves, under any conditions, is a determination as to which reasonable men may differ, therefore requiring submission to the jury.

Thus, under the above, a nonsuit could never be predicated or sustained on the ground that the defendant was faced with an emergency and acted prudently thereunder. Nor could a jury verdict be upset on the basis of an emergency, because it would have to be assumed that the jury considered the emergency question in reaching its verdict.

It is submitted that the application of the above conclusions would help to alleviate the inconsistencies which are now present in the application of this phase of the law of negligence in North Carolina.

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