Jason Doucette
NGUYEN THEAM LLP

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
December 2022

Preventing the abuse of the Sudden Emergency Doctrine

IT IS CRITICAL TO ESTABLISH THE UNSAFE CHOICES THAT THE DEFENDANT MADE BOTH BEFORE AND AFTER THE PURPORTED EMERGENCY AROSE

The Sudden Emergency Doctrine ("SED") can excuse a party from what would otherwise be culpable conduct. The SED can even excuse negligence per se if the party proves she acted reasonably under the circumstances. (*Alarid v. Vanier* (1958) 50 Cal.2d 617, 624.) It is thus a highly attractive doctrine to defendants, even though it is often not applicable. If not properly addressed, the SED can result in the granting of a dispositive motion or in a defense verdict. If approached thoughtfully, plaintiffs can use the SED to polarize the case through discovery and motion practice. The SED can also be used offensively by plaintiffs to prevent unfair findings of comparative negligence. This article sets forth the approach for plaintiffs to harness the power of the SED and to prevent the defense's abuse of it.

The doctrine's requirements

The sudden emergency doctrine, also known as the doctrine of imminent peril, is enumerated in California Civil Jury Instructions 452 (CACI) (2022) as follows:

> [Name of plaintiff/defendant] claims that [he/she] was not negligent because [he/she] acted with reasonable care in an emergency situation. [Name of plaintiff/defendant] was not negligent if [he/she] proves all of the following:
> 1. That there was a sudden and unexpected emergency situation in which someone was in actual or apparent danger of immediate injury;
> 2. That [name of plaintiff/defendant] did not cause the emergency; and
> 3. That [name of plaintiff/defendant] acted as a reasonably careful person would have acted in similar circumstances, even if it appears later that a different course of action would have been safer.

In short, "[t]he test is whether the actor took one of the courses of action which a standard man in that emergency might have taken, and such a course is not negligent even though it led to an injury which might have been prevented by adopting an alternative course of action." (*Schultz v, Mathias* (1970) 3 Cal. App.3d 904, 912-913.) The emergency is when a person perceives – real or apparent – danger to herself or to others. (*Damele v. Mack Trucks, Inc.* (1990) 219 Cal.App.3d 29, 36.)

"The doctrine of imminent peril is properly applied only in cases where an unexpected physical danger is presented so suddenly as to deprive the driver of his power of using reasonable judgment." (*Pittman v. Boiven* (1967) 249 Cal.App.2d 207, 217.) This means certain conditions must be satisfied before the instructions can be submitted to the jury. (*Carley v. Zeigler* (1958) 156 Cal.App.2d 643, 645). The first requirement is that the party claiming the defense must have been in a situation where he or she faced a choice between at least two different options and chose the less-safe option. (*Skoglie v. Crumley*, (1972) 26 Cal.App.3d 294, 296). The requesting party's negligence, if any, must also not have contributed to the emergency. (*McDevitt v. Welch* (1962) 202 Cal.App.2d 816, 822.)

The two-option requirement

The two-option requirement generally negates a defendant from being entitled to the SED. Under Directions for Use for CACI 452, it states: "[t]he instruction should not be given unless at least two courses of action are available to the party after the danger is perceived." (*Ibid.*, citing *Anderson v. Latimer* (1985) 166 Cal.App.3d 667, 675 [holding that the instruction should not have been given because the evidence did not support a finding that the defendant had two courses of action once she perceived any peril].) The reason for the requirement is that the doctrine "[i]s only applicable when the actor involved had the choice of at least one other course of conduct which, in the light of after events, would have been better or safer, but failed to exercise that choice because of his sudden and unexpected confrontation with peril." (*Skoglie v. Crumley* (1972) 26 Cal.App.3d 294 [affirming denial of SED because there was no evidence that a better and safer course of action was available once the plaintiff perceived the peril].)

Additionally, the rule only applies to persons who, without fault, find themselves suddenly confronted with imminent peril. (*Pittman v. Boiven* (1967) 249 Cal.App.2d 207, 218.) Thus, the doctrine is not available if the requesting party's conduct caused or contributed to the emergency. (*Trowbridge v. Briggs* (1934) 140 Cal.App. 554, 562 [holding SED did not apply because defendant was on wrong side of road].) The requesting party's negligence is irrelevant, on the other hand, if it did not contribute to the peril, (*Abdulkadhim v. Wu* (2020) 53 Cal.App.5th 636, 639,) or the requesting party's negligence occurred after the peril was perceived, (*Damele v. Mack Trucks, Inc.* (1990) 219 Cal.App.3d 29, 36.) If the requesting party did contribute to the emergency, on the other hand, it is improper to give the instruction. (*Carley v. Zeigler* (1958) 156 Cal.App.2d 643, 645.)

Discovery

During discovery, the goal should be to make the defendants take a position:

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
December 2022

Admit they either engaged in unsafe conduct or claim that they did not. If they admit to engaging in unsafe conduct, you have a partial admission. Defendants generally claim, however, that the harm was inevitable, and they had no choice once the purported emergency arose. Such testimony is binding (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 21-22,) and negates the two-option requirement of the SED.

Deposition

During the defendant's deposition, the following types of questions should be asked:

Two-option requirement

Once you perceived [the purported emergency] did you have any other options besides [defendant's action that caused harm (e.g., rear end Ms. _____]?

[If yes] What other options did you have?

Do you believe you chose the safer option?

Why/Why not?

[If no] Once you perceived the [the purported emergency], was there anything you could have done to avoid the collision?

What, if anything, do you think would have prevented this collision?

In hindsight, was there anything that you would have done differently?

Did the [insert purported emergency] deprive you of your power to use judgment?

Establish negligence before purported emergency

How closely were you following [the plaintiff's car]?

How fast were you going?

Where were you looking?

Not unexpected

When you got onto the 405, did you expect traffic never to slow down?

Did you expect to see children in the parking lot of Costco?

Why/Why not?

The first line of questioning is particular to the SED, and your client should be prepared to answer these questions if you intend to request CACI 452. The last two categories apply in all negligence cases. For example: "Did you expect to see children in the parking lot of Costco?" is a catch-22. The defendant either has to answer "yes," in which case, why was he going 15 miles per hour in a parking lot when he claims the sun was in his eye? Or, he answers "no," in which case, why wouldn't he expect children at Costco?

Written discovery

In situations in which SED may be alleged, the following types of special interrogatories and similarly worded request for admissions may be propounded:

- Do you contend you were faced with a sudden, unexpected emergency before the incident?
- If you contend you were faced with a sudden, unexpected emergency, please specify the exact moment you perceived said purported emergency?
- Do you contend that you had at least two courses of action available to you after you perceived what you contend was a sudden, unexpected emergency?
- If you contend that you had at least two courses of action available to you after you perceived what you contend was a sudden, unexpected emergency, please specify the options you had once you perceived the purported emergency?
- Do you contend your behavior in reaction to what you contend was a sudden, unexpected emergency was the safest course of conduct?
- If you contend your behavior in reaction to what you contend was a sudden, unexpected emergency was the safest course of conduct, please state all facts that you claim support your contention.
- Do you contend you failed to perform the safest choice of behavior in response to what you contend was a sudden, unexpected emergency?

Defendants are unlikely to admit their actions were not the safest choice available. If they do, it is a great opportunity to follow up with requests for admissions, and, if applicable, a dispositive motion. Defendants will almost invariably contend they had no option once the purported emergency arose, chose the safest of their options, or both. This itself eliminates their use of the SED under the two-option requirement.

Opposing a motion to leave to amend

The Sudden Emergency Doctrine is an affirmative defense. (*Shiver v. Laramee* (2018) 261 Cal.App.5th 395, 399.) It, therefore, must be pled and proven. (*A.F. Arnold & Co. v. Pacific Professional Ins., Inc.* (1972) 27 Cal.App.3d 710, 714-15.) Boilerplate answers often plead the SED. Thus, it is important to review the answer and ask SED questions at the defendant's deposition. Occasionally, defendants will fail to allege it in their answer and then file a motion to leave to amend. Upon receipt of the motion's notice, the defendant's deposition should be noticed immediately. If the deposition has already occurred, and the SED questions were not asked, a meet-and-confer letter should be sent requesting a second deposition limited to the scope of the newly requested defense.

The just-mentioned requirements of the SED are not always known or appreciated. Because motions to leave are liberally granted, it is generally ill-advised to educate the defense attorney before the defendant's deposition. Thus, if the opposition is due before the deposition, the opposition should focus on the unreasonable delay of the proposed amendment (e.g., that defendant knew all the facts it relies upon in its motion when it answered and was obligated to plead the defense initially), the prejudice of permitting a party to allege a defense after she has already been deposed, or both. A showing of an inexcusable delay and probable prejudice justifies a denial of a motion to amend. (*Magpali v. Farmers Group, Inc.* (1996) 48 Cal.App.4th 471, 486-87.) The opposition should also request a second deposition be ordered as to the SED. Even if the motion is granted, the court should permit a second

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
December 2022

deposition limited to the newly alleged defense.

If there is already binding testimony that negates the defense, an opposition should be filed based upon the defense itself being meritless. The liberal policy of granting leave does not apply if the defense is meritless. (*Atkinson v. Elk Corporation* (2003) 109 Cal.App.4th 739, 760.) The motion being meritless also means an amendment is improper. (Code Civ. Proc., § 473, subd. (a)(1) (states courts have discretion to grant leave when proper).) In opposition, particular attention should be spent on the two-option requirement, because the negligence-free requirement is often deemed a factual matter. If leave is not granted, the defendant has no right to request the instruction at trial.

Motion for summary adjudication

I say this as much to myself as anyone reading this: Plaintiffs' attorneys should file more dispositive motions. A motion for summary adjudication provides the court a full opportunity to consider the appropriateness of the defendant's affirmative defenses. Whether the conditions for application of the SED exist is a question of fact. (*Damele v. Mack Trucks, Inc.* (1990) 219 Cal.App.3d 29, 37.) Because of this, it is imperative to obtain binding testimony and responses before filing any dispositive motion on the SED. As already discussed, the emergency is when the requesting party perceives the real or apparent danger. (*Id.* at 36.)

Thus, when the defendant perceived the real or apparent danger should be uncontested. Otherwise, the defense may be able to create a triable issue of fact by asserting a different situation constituted the emergency than the one alleged in the moving papers. (*Leo v. Dunham* (1953) 41 Cal.2d 712, 715 [holding the defendant was entitled to the SED, because he was not required to anticipate a truck would fail to yield the right of way]; *contra, Fraser v. Stellinger* (1942) 52 Cal.App.2d 564, 567 [upholding the trial court's denial of the instruction based upon the defendant's own testimony that he had the plaintiff in his view for 1,000 feet].) It is also critical to obtain binding testimony from the defendant that he or she did not have two options once the emergency arose. Otherwise, the defendant will likely file a declaration stating that there were two options, to defeat the motion. If the defendant admitted to not having two options, summary adjudication should be granted as to the SED.

Opposing a motion for summary judgment

There is caselaw that suggests that the SED is a complete defense. Such language is more misleading than illuminating. As already discussed, the SED merely lowers the standard of care, excusing conduct that would otherwise be negligent. Breach remains a jury question. (E.g., *Pitman v. Boiven* (1967) 249 Cal.App.2d 207, 216.) Thus, a motion for summary judgment can only be granted if no reasonable juror could find a breach under the applicable standard of proof. (*Abdulkadhim v. Wu* (2020) 53 Cal.App.5th 636, 639.)

But because the SED lowers the standard of care, its application makes the granting of summary adjudication more likely. As a result, it is crucial to establish and prove in opposition that the SED did not apply, because the defendant was not negligence-free before encountering the emergency, or, more importantly, did not have two options after the emergency arose, or both. Otherwise, a court may incorrectly apply the lower SED standard and grant the motion when it otherwise would have been denied.

In *Shiver*, the court applied the SED. The two-option requirement, however, was never considered by the trial or appellate court. Consequently, the trial court applying the lower SED standard concluded, which was later affirmed on appeal, no reasonable jury could conclude that the defendant acted unreasonably. Defendants now use *Shiver* to avoid satisfying the SED's two-option requirement. Thus, it is critical to point out that the requirement was never considered in that case. Further, caselaw and the CACI 452's Direction for Use firmly establish that there must be at least two options once the emergency arose before the SED applies.

Motion in limine

A motion in limine may be required to prevent defendants from introducing nondisclosed evidence or attempting to contradict binding discovery responses. If SED information/documents were requested in discovery, the willful failure to disclose the information can justify its exclusion at trial. (*Thoren v. Johnston & Washer* (1972) 29 Cal.App.3d 270, 274.) Further, any answer to an interrogatory "immediately and conclusively binds the answering party to the facts set forth in his reply." (*Coy v. Superior Court* (1962) 58 Cal.2d 210, 219; see also *Universal Underwriters Ins. Co. v. Superior Court* (1967) 20 Cal.App.2d 722, 730.) In the absence of any evidence disclosing a situation of sudden peril, it has been held error to give the SED instruction. (*Groat v. Walkup Drayage & Warehouse Co.* (1936) 14 Cal.App.2d 350, 353).) A motion in limine, therefore, can often preclude a defendant from claiming the SED.

Trial brief

CACI 452 is a powerful framing tool for trial which can help defeat an unfair finding of comparative fault. A party is entitled to the instruction "which advises the jury as to the amount of care which he was required to exercise while acting under its stress." (*Groat v. Walkup Drayage & Warehouse Co.* (1936) 14 Cal.App.2d 350, 354.) The failure to provide the instruction when the facts support it has repeatedly been held to constitute reversible error. (*Harris v. Oaks Shopping Center* (1999) 70 Cal.App.4th 523, 525.) The instruction being provided when it is inapplicable, on the other hand, has often been held to constitute harmless error. (E.g., *Damele v. Mack Trucks, Inc.* (1990) 219 Cal.App.3d 29, 37; *contra, Stealey v. Chessum* (1932) 123 Cal.App. 446, 431.) Because it is generally only used by the

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
December 2022

defense and is often misunderstood, filing a trial brief is beneficial whenever requesting CACI 452. (*Smith v. Johe* (1957) 154 Cal.App.2d 508, 511 [declaring that the doctrine "is available to either plaintiff or defendant, or, in a proper case, to both"].)

If applicable, the SED should be discussed during voir dire. Prospective jurors, especially defense-biased ones, will expect the person asking for money to exercise perfect judgment, even in a sudden emergency. Such a panelist cannot follow the law and should be excused for cause. (See *People v. Williams* (2001) 25 Cal.4th 441, 461 [holding that a juror may be removed for his refusal to follow the law].) The SED theme should be carried throughout trial from opening to closing. Otherwise, jurors will view the evidence of the plaintiff's conduct through the incorrect standard of care.

Motion for directed verdict on third-party liability

Although outside the scope of this article, a claim of a sudden emergency is often accompanied with a defendant seeking to have an unknown third party, who allegedly caused the purported emergency, placed on the verdict form. Thus, unless it will unnecessarily educate the defense, proper discovery should be propounded, and appropriate motions and briefs filed to combat this. In short, a defendant seeking to place a third party on the verdict form has the same burden as the plaintiff does to prove the defendant's negligence. (*Wilson v. Ritto* (2003) 105 Cal.App.4th 361, 370.) A party must prove by substantial evidence breach of the duty of care, (*Edwards v. California Sports, Inc.* (1988) 206 Cal.App.3d 1284, 1287) and causation, (*McGarry v. Sax* (2008) 158 Cal.App.4th 983, 994).) Speculative possibilities are not substantial evidence. (*Griffin v. The Haunted Hotel, Inc.* (2015) 242 Cal.App.4th 490, 507.) And "[n]o suggestion of negligence arises from the mere happening of an accident." (*Edwards*, 206 Cal.App.3d at p. 1287.) After all parties have rested, a motion for directed motion should be made if there is not substantial evidence of third-party liability. (Code Civ. Proc., § 630.)

Concluding thoughts

Motion practice can provide a false sense of security. With or without the SED, there is nothing to stop the defense from claiming that the defendant acted reasonably under the circumstances. There is also nothing to stop jurors from thinking of reasons to excuse a defendant's conduct. And even if the third party is not on the verdict form, a jury can still, in effect, blame the third party by issuing a compromise or defense verdict.

Thus, regardless of whether motions are successful or not, the case must be framed as a violation of safety rules. So-called emergencies are generally defendants failing to follow safety rules. It is critical to establish the unsafe choices that the defendant made both before and after the purported emergency arose. We have safety rules because the future is unpredictable. Instead of excusing safety-rule violations, life's unpredictability requires all of us to follow them.

Jason Doucette practices at Nguyen Theam LLP. *Jason's practice focuses on catastrophic personal injury and wrongful death. He graduated cum laude from the University of Arizona College of Law. He is licensed in California and Idaho.*