SUDDENLY IT'S NO LONGER THE DEFENDANT'S FAULT

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The veteran lawyers I know have been telling me that juries are not as receptive to automobile cases as they used to be. Over the last 10 years or so, juries have become more skeptical of personal injury cases and the days of juries identifying with the injured plaintiff are long gone – now more juries are identifying with the negligent defendant who has been sued and brought into court by the plaintiff.

Over the last year, this "defendant friendly" atmosphere has grown. What was once thought to be extinct and subsumed by Kentucky's comparative fault system has reared its ugly head – the *sudden emergency* defense. Currently pending in the Kentucky Supreme Court is *Regenstreif v. Phelps*, 2001-SC-000987. The Court of Appeals affirmed the Trial Court's *sudden emergency* exception to the jury instruction outlining the defendant's statutory duties which resulted in a defense verdict.

This article will revisit the *sudden emergency* line of cases and discuss the implications of allowing this instruction under Kentucky's current liability scheme.

Hall v. Ratliff, Ky., 312 S.W.2d 473 (1958) was one of the earliest cases in which the Court of Appeals determined it was reversible error for the trial court not to give an emergency instruction when requested. The Court reasoned that the defendant's proof created an issue of fact as to whether she was liable when confronted with an emergency situation that created an inevitable accident. Without this instruction, the defendant's duties were overemphasized.

Several years later, in *Sloan v. Iverson*, Ky., 385 S.W.2d 178 (1964), the defendant appealed a judgment against him when the trial court refused to give a *sudden emergency* instruction as directed by *Hall*. The *Sloan* Court affirmed the trial court reasoning that the defendant was aware of the wet pavement taking the accident out of the category of "unavoidable." The Court went on to state, "*we entertain serious doubt whether an 'unavoidable accident' instruction should ever be given in an automobile collision case*."

This brings us to *Harris v. Thompson*, Ky., 497 S.W.2d 422 (1973) which was the first case to distinguish between the *sudden emergency* doctrine and the *unavoidable accident* doctrine. An *unavoidable accident* merely negates the existence of negligence as a causative factor and does not require a specific instruction – in fact, such an instruction places undue emphasis on evidence of why the defendant was not negligent. On the other hand, a *sudden emergency* is a situation which could not have been anticipated and was not brought on by the defendant's own fault. In this circumstance, an instruction is required because the true *sudden emergency* alters the defendant's duties and without such an instruction, defendant's duties have been automatically breached without explanation. The Court concluded that the, *". . . proper criterion is whether any of the specific duties set forth in the instruction would be subject to exception by reason of the claimed emergency."* **It is important to keep in mind that up until this point, all cases addressing the *sudden emergency* instruction involved contributory negligence.**

Almost 20 years later, the Court was again faced with whether a *sudden emergency* instruction should be given; but this time it would be analyzed under the rubric of comparative fault. Kentucky had already abolished the *last clear chance*

instruction as being inconsistent with the comparative negligence concept. In *Bass v. Williams*, Ky. App., 839 S.W.2d 559 (1992) the Court examined the purpose of comparative fault and *sudden emergency* instructions. It was noted that the purpose of comparative fault as set out in *Hilen v. Hays* was premised upon the principle of fundamental fairness. The *Bass* trial court had allowed a *sudden emergency* instruction at the end of the instruction of general and specific duties of the defendant. The jury answered this question "No" finding no negligence on the defendant. On appeal, the Court determined that it was error to instruct on *sudden emergency* because it, *". . . diminishes the duty of the defendant-driver, Williams, and is in violation of the 'direct proportion to fault' concept in Hilen."*

Two months before *Bass*, the Court of Appeals issued *City of Louisville v. Maresz*, Ky. App. 835 S.W.2d 889 (1992). The Court discussed the *sudden emergency* doctrine at great length. The Court examined *Harris v. Thompson* and distinguished between *sudden emergency* and *sudden occurrence (unavoidable accident)* finding that the defendant was faced with a *sudden occurrence* because there was no evidence that in responding to this situation he chose the wrong course of action. The Court went on to hold that it was error under these circumstances to give the *sudden emergency* qualification; but the error was harmless.

To muddy the water even more, the 6th Circuit decided to jump in when they issued their "unpublished" decision of *Bentley v. Clisso*, 89 F.3d 832 (6th Cir. 1996). In *Bentley* the trial court gave a *sudden emergency* instruction due to a sudden mechanical failure in the tortfeasor's car causing him to cross the center line and strike the plaintiff. The plaintiff appealed raising that such an instruction was error. The 6th Circuit agreed;

but, as in *Maresz*, deemed the error harmless. The tortfeasor was not faced with a *sudden emergency* (i.e. having an opportunity to make a meaningful choice); but was instead faced with a *sudden occurrence* (i.e. having no choice as to how to act when confronted with the situation – mechanical failure). The Court determined that, *"There was no prejudice in instructing the jury that Clisso 'only' had to exercise ordinary care after the sudden occurrence, if it was apparent that Clisso did not have any choice in acting at all."*

This brings us to the case pending in front of the Kentucky Supreme Court, *Regenstreif v. Phelps*, 2001-SC-000987. In this case the tortfeasor, Phelps, lost control of her car on ice and slid into the plaintiff. The trial court granted a *sudden emergency* instruction for the icy conditions and the jury found no negligence. The Court of Appeals recognized that the trial court ignored *Bass v. Williams* and that the instruction given conflicts with the notion of comparative fault. However, once again the appellate court deemed the trial court's error harmless (are we beginning to see a pattern?). Specifically, the Court stated, *"If the trial court erred by disregarding Bass, its error was one of mis-emphasis. Jury instructions that mis-emphasize rather than mis-state the law are deemed harmless absent a sufficient indication that the jury was confused or misled. We are convinced that any error of mis-emphasis here was harmless."* In its opinion, the Court suggests that *Bass* did not overrule *Harris v. Thompson*; it only held that under a comparative negligence regime the need for a *sudden emergency* instruction should not arise. Then the Court stated in the very next sentence, *"If the primary instruction does not meet that standard, however, then a Harris-like accommodation is not necessarily a prejudicial error."*

Where does this leave plaintiffs? Is *sudden emergency* alive? What about *sudden emergency* vs. *sudden occurrence*? Should both of these doctrines be extinct in light of Kentucky's comparative fault scheme? Or should the Court allow qualifications, caveats and exceptions to duties of the defendant-tortfeasor? It appears that plaintiffs are losing their standing as the injured victim and the defendants are gaining more tools with which to escape liability altogether. It's one thing to allow the defense to present evidence and argue *sudden emergency* or *sudden occurrence* to the jury as a defense to liability. However, it's another thing when the courts allow defendants to amend or alter their legal duties in written instructions to the jury. Comparative fault was designed to take care of the ancient doctrines of last clear chance, assumption of risk, sudden emergency, and the like. This system does just that. Allowing qualifications, caveats and exceptions to our jury instructions goes against our jurisprudence of "bare bones" instructions and attacks the system we fought to achieve – pure comparative negligence for all parties.