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"It wasn't my fault, I swear. I was having a panic attack just before I hit him."

The medical-emergency defense

Defendants try to avoid liability by claiming a "medical emergency" caused them to lose control

By Brian Panish and David Rudorfer

As insurance companies and the lawyers that represent them search for ways to evade responsibility, the improper use of the medical-emergency defense has grown in popularity. The defense is usually raised after an alleged medical condition causes a driver to lose control of a vehicle which kills or injures many innocent people. This article explains how to make this defense tactic backfire and actually increase the plaintiff's chances of proving liability and damages.

The law does not favor this defense

California has codified that a defendant who causes injuries as a result of an unsound mind, or mental medical emergency, has no defense. Specifically, Civil Code section 41 provides that "A person of unsound mind, of whatever degree, is civilly liable for a wrong done by the person [...]." In *Bashi v. Wodarz* (1996) 45 Cal.App.4th 1314, it was clearly explained that mental illnesses of any kind are not a defense to negligence or any other civil claims. The rationale is that individuals, who hurt or kill innocent members of the public as a result of the mental medical emergencies, or the insurance companies that insure them, should be held financially responsible to those harmed.

However, a highly limited defense to negligence has been recognized for a person who is suddenly stricken by an unforeseeable physical illness while driving an automobile (as opposed to a mental illness), which the person had no reason to anticipate, if that illness renders it impossible to control the car. (See *Cohen v. Petty* (1933) 65 F.2d 820; see also *Waters v. Pac. Coast Dairy, Ltd. Mut. Comp. Ins. Co., Intervener* (1942) 55 Cal.App.2d 789, 792; *Ford v. Carew & English* (1948) 89 Cal.App.2d 199.) The doctrine of sudden emergency or imminent peril does not, however, apply to a person whose conduct causes or contributes to the imminent peril or who has any reason to expect such peril. (CACI 452; See also *Pittman v. Boiven* (1967) 249 Cal.App.2d 207, 216.)

Defendant's burden

Based on the law set forth in *Cohen*, *Waters*, *Bashi*, Civil Code section 41, and related case law, a defendant asserting the sudden physical-medical-emergency defense has the burden to affirmatively prove the following: (1) That defendant driver was telling the truth; (2) The medical cause of the alleged sudden condition the defendant driver experienced was a physical, rather than mental, medical emergency; (3) That it was a sudden condition which immediately rendered defendant unable to control the vehicle; (4) That defendant driver had no reason to anticipate or foresee this sudden physical medical condition; and (5) Whether the defense could be considered to overcome the presumptions of negligence (*res ipsa loquitur* or negligence per se). The case law specifically provides that these issues are questions of fact for the jury to decide.

This defense is somewhat controversial. Numerous jurisdictions have recognized that any form of medical-emergency defense would be inconsistent with the principles of comparative fault and arbitrarily makes victims pay for the harm caused by others' physical medical emergencies. California's approach, while maintaining a comparative-fault system, has been to limit the defense in the ways stated above so that it is almost always subject to defeat. Despite the law that limits this defense, it should come as little surprise that it is commonly asserted in cases where the medical condition cannot be proved or there is ample evidence of the defendant having reason to anticipate the sudden medical emergency.

Plead against the defense

When to begin the fight against the medical-emergency defense is generally a question of whether it appears to be a medical-emergency case from the police report or other pre-litigation investigation. If it appears clear that the collision was the result of any form of medical emergency, consider pleading allegations against the defense. The allegations should provide that the defendant knew or was reckless for not knowing of medical conditions which posed a danger of losing control of a vehicle and causing serious injury or death to innocent members of the public; and that despite such knowledge, the defendant negligently and recklessly continued to operate a vehicle while recognizing he or she was being dangerously influenced by these medical conditions. Under such circumstances, allegations of punitive damages can be alleged based on defendant acting with a conscious disregard for public safety.

If the case involves a defendant who is an agent, independent contractor or employee of another person or entity, and was operating a vehicle in the course and scope of such employment, you should consider making allegations of negligent hiring/training/retention/supervision against that employer. Such allegations would include that the employer knew or should have known its employee was unfit to drive a vehicle as part of his or her work duties but recklessly still allowed the employee to drive a vehicle for work. Again, such allegations would support claims for punitive damages against the employer if the misconduct was ratified by managerial employees and/or was carried out with the consent of the officers, directors, and/or managing agents.

Written discovery

Written discovery should be aggressively pursued against the defense. In medical-emergency cases, the issues of whether the defendant driver violated various rules of the road in causing the incident are typically not in dispute. That is because in most of these cases the defendant driver lost control of the vehicle at high speeds, resulting in massive multi-vehicle collisions that seriously injure or kill people. Defense counsel will normally concede how the collisions occurred and that such operation of a vehicle was in violation of the applicable Vehicle Code sections. Although it may not be in dispute, be sure to confirm through written discovery and depositions that defendants admit to any applicable violations of the Vehicle Code.

The focus of discovery should be on obtaining evidence that can in any way prove: (1) the defendant driver was not telling the truth; (2) there is insufficient evidence to prove that the medical cause of the alleged sudden medical condition the defendant driver experienced was physical rather than mental; (3) this sudden condition did not immediately render defendant unable to control the vehicle; (4) the defendant had reason to anticipate or foresee this sudden physical medical condition; and (5) the conduct at issue meets the elements of negligence per se and res ipsa loquitur. In other words, discovery should be focused on establishing that the defendant cannot meet the burden to affirmatively prove all the requirements of the medical-emergency defense addressed above.

Written discovery covering all subject areas at issue should be sent out early. It should generally cover any and all medical conditions that could in any way impact the ability to do what was being done at the time of the incident. As soon as the alleged medical condition responsible for causing the subject incident is identified, the written discovery should be specifically focused on any history relating to that condition. Once the defense is at issue, all such medical records of the defendant driver are relevant and subject to discovery. If it is alleged that the defendant driver lost consciousness, the written discovery should cover anything relating to medical treatment for losses of consciousness over the 10 years leading up to the incident. Similarly, emphasis should be placed on any medications defendant was taking during the years leading up to the incident. Use the medical records to establish false responses or inconsistent statements of the defendant driver.

Focus on an employer

Along the same lines, if the case involves an employee, focus the attack against the emergency defense by requesting all documents that could relate to the employer's policies or procedures on safety. In addition to what is provided in California's Vehicle Code or California's driving handbooks, it is often the case that employment hiring and/or training materials provide additional safety responsibilities. In particular, employer safety policies and procedures often provide that employees are responsible to ensure that no medical condition impacts their ability to drive safely. Be sure to obtain all employment documents on the defendant driver, including the entire personnel file, any history of problems, and any polices or procedures they were expected to follow.

This defense is also often asserted by commercial drivers who fall asleep or black out at the wheel after violating various state or federal laws or safety standards they were required to follow leading up to the incident. In cases where defendant drivers are also commercial drivers, there should be a focus on the heightened training and safety rules these drivers are supposed to follow. Get the defendant drivers to admit that they had to follow the California Commercial Handbook Rules and various federal or state motor carrier safety rules. Any safety rule violation that led up to the incident serves to eliminate the defense. In particular, for commercial drivers in the state of California, and across the U.S., it is required that a commercial driver fitness determination exam is conducted every 2 years, as a minimum. The forms themselves are entitled "Medical Examination Report for Commercial Driver Fitness Determination."

The law permits doctors as well as chiropractors to conduct these examinations and the system is one of self-reporting by the drivers. In other words, it is the duty of the commercial driver to accurately and honestly fill out the "Health History" portion of these forms prior to each examination. After the commercial driver fills out the "Health History" portion of the form, the commercial driver must acknowledge by signature that "*I certify under penalty of perjury under the laws of the State of California that I have provided true and correct information concerning my health. I understand that inaccurate, false or missing information may invalidate the examination and my Medical Examiner's Certification*." Obviously, if the defendant driver has failed to self-report on the DMV medical examination what is reflected in the defendant's medical records, there has been no medical emergency – there has been reckless conduct with a conscious disregard for public safety.

Strategies to defeat the defense

Various strategy considerations should be taken with the written discovery obtained to beat the medical-emergency defense. First, do not take the defendant driver's deposition too early. Wait until you have compiled all medical records and/or employment records. Not surprisingly, most of the defendant drivers asserting this defense have a long history of various medical problems that have been treated by doctors and/or have had similar problems identified at work. After obtaining all medical and/or employment records, consider which doctors and/or employers are worth deposing.

Defendant's treating doctors

However, a word of caution should be noted when it comes to the doctors of defendant drivers who cause catastrophic injuries or death and then assert a medical-emergency defense. These doctors can greatly assist in defeating the medical-emergency defense but may also be hesitant to cooperate. If there is evidence that the defendant driver's doctor provided negligent treatment relating to the medical advice on the ability to drive, the defendant driver's attorney may consider suing the doctor just to muddy the waters. Preferably, the defendant driver's doctor confirms reasons why the defendant driver had reasons to anticipate the medical condition in question. A phone call to the doctor's office to request that the doctor's attorney call you back to discuss the doctor's deposition may be worth trying. Explain to the doctor's attorney that his or her patient's alleged medical conditions have caused injuries or deaths to your clients.

Once the doctor's attorney understands that the doctor's patient is attempting to evade responsibility by blaming the doctor's advice or medical treatment, that doctor will be on the defensive and will normally confirm he did everything by the book and the defendant driver failed to act reasonably. On the other hand, if the defendant driver's doctor is going to bat for his patient and attempting to assist with the medical-emergency defense, it is usually best to simply undermine the doctor's credibility or knowledge. There is little to gain by suing the defendant driver's doctor in these cases and it normally just wastes time and resources.

What the employer knew

When the defendant driver has an employer, regardless of course and scope issues, a person most qualified ("PMQ") deposition notice should be sent to the employer regarding subject areas that pertain to the elements of this defense noted above. For instance, PMQ subject areas should include any person who has knowledge of the defendant driver's medical conditions and any instances of any medical emergencies in the past. The employer's PMQ will normally confirm no such efforts were taken, which creates a separate basis of opposing the defense. Also, get the PMQ to confirm the various safety rules the driver was supposed to follow but violated by failing to disclose the alleged medical condition in question.

Similarly, larger corporations with human resource departments will often produce a human-resource manager as its PMQ to confirm the company had no knowledge it was employing an unfit driver with dangerous medical conditions and had no reason to possibly know the driver was unfit. These human-resource managers normally explain that such medical information is private and protected by the American Disabilities Act ("ADA") and therefore not subject to inquiry. If the HR manager attempts to hide behind the ADA in that way, simply ask if they are aware of any exceptions to the ADA relating to asking employees if they have medical conditions that could pose a threat. If they say they are not aware of any such exceptions, then the employer is negligent for not knowing that the ADA has specific rules that permit employers to inquire if an employee has any form of medical condition that could pose a threat to themselves or others.

In fact, the Equal Employment Opportunity Commission ("EEOC") regulations implementing the ADA have provided that an employer's determination of whether an individual with a disability poses a direct threat to health and safety should be based on an evaluation of the individual's ability to safely perform the job and a consideration of the following four factors: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm. These are considerations that most employers fail to consider or ignore when putting employees behind the wheel of commercial vehicles, or any vehicles for that matter.

Friends, family and cops

Along with the doctors and employers, depositions of the defendant's family members, friends and co-workers should be considered. Some of these people can be ample sources of information which destroys the emergency defense. Husbands or wives often have critical information about the medical conditions of their spouse they observed, or medical

examinations of their spouse that they attended, which are not protected by any marital privilege.

The depositions of eyewitnesses and investigating police officers cannot be forgotten, of course. These standard depositions provide excellent opportunities to obtain evidence which confirms the defendant driver did not suffer a medical emergency. The key is to take these depositions with a focus on establishing facts which again confirm (1) the defendant driver was not telling the truth; (2) there is insufficient evidence to prove that the medical cause of the alleged sudden condition the defendant driver experienced was physical rather than mental; (3) this sudden condition did not immediately render defendant unable to control the vehicle; (4) the defendant did have reason to anticipate or foresee this sudden physical medical condition; and (5) the conduct at issue meets the elements of negligence per se and res ipsa loquitur.

The personal responsibility of the defendant driver cannot be emphasized enough during eyewitness or investigating officer depositions. Any sign of swerving in-and-out of a lane is evidence of knowledge of difficulty driving and deciding to continuing to drive. Careful examination of how much time passed from the onset of the medical condition to the time of the collision and exactly what the defendant did over each second leading up to the incident is critical. If the defendant driver failed to take immediate action to stop his or her vehicle upon recognizing any form of medical condition, that is not a medical emergency; that is negligence.

Defendant's medications

Most would agree the only reasonable course of action a driver can take when experiencing a medical emergency while driving a vehicle is to stop immediately. Also, if the defendant driver took any form of medication or did not take any form of medication he needed and a collision occurs as a result, that is not a medical emergency; that is negligence. All medication and pharmacy records should be aggressively pursued and the defendant driver should be questioned about every possible warning relating to such medications. Defendants should be cross-examined regarding their medical records the way defense attorneys cross-examine injured plaintiffs about their prior medical records, noting even the most minor inconsistencies. No stone should be left unturned relating to the defendant driver and this defense, which is why it is often best to take the driver deposition last in order.

Depositions of the EMTs, firefighter and/or any medical personnel who treated the defendant driver must also be considered. Not only are these individuals excellent sources of false statements made by defendant drivers close in time to the incident, they also can confirm the lack of proof of the alleged medical condition at issue. In many cases relating to losses of consciousness or syncope, there is insufficient evidence to prove there was a physical medical emergency.

As noted above, California law has established that defendants cannot simply claim they experienced a sudden blackout to evade responsibility. Normally, there is no proof of any medical event at all. Doctors who routinely document in medical records that the defendant driver suffered a loss of consciousness or syncopal events will almost always admit in deposition that there is no evidence of any medical condition other than the defendant's claim of allegedly blacking out. That is not proof of a physical medical emergency. That is not even proof of a mental medical emergency, which would still be insufficient under California law.

Retain experts and consider trial motions

In some cases it might be better to eliminate the medical-emergency defense by filing a motion in limine based on defendants' clear inability to meet the affirmative burden. We have filed many of those motions and the defense will normally admit fault before the judge rules on them. However, in many other cases we have determined that allowing the medical-emergency defense to go to jury actually increases the value of the case because the juries are overwhelmed by the reasons why the defense should not apply and are inflamed by the meritless attempt to evade responsibility.

Regardless of whether you decide to keep the defense out of the trial by way of motions in limine, you must be prepared for the defense to go to the jury. As such, you need to retain experts to explain the importance of the information you obtained during discovery. An accident reconstructionist can help explain the defendant's loss of control of the vehicle was not immediate. The accident reconstructionist can also evaluate the vehicle black box to determine changes in speed input which would also reflect a failure to take immediate action to stop the vehicle after the onset of the medical condition. A safety expert should be used to explain the safety violations at the time of the incident and the violations that occurred leading up to the incident. The safety expert can also address an employer's failure to follow safety practices with hiring, training, supervision and retention.

Similarly, a human-resource management expert can explain what the employer should have done to ensure the employee was fit for job duties that included driving a motor vehicle; that would include an evaluation of any medical conditions that could pose a threat.

A medical doctor should also be retained to confirm there is insufficient evidence to prove it is more likely than not that a physical, rather than mental, medical emergency occurred. Lastly, if any medications are at issue, a toxicologist should be retained to explain the medications warnings and side effects which were ignored.

In the last three years we have handled many of these cases where the defense asserted the medical-emergency defense after a defendant caused serious injuries or death to innocent members of the public. The evidence developed to

defeat the medical-emergency defense significantly increased the value of all these cases: The negligent defendant driver is exposed as a liar or as a person who is attempting to hide behind a meritless defense. The employer is exposed for putting profits ahead of safety by consciously ignoring its duties to keep unfit drivers off the road. Either way, the jury is inflamed by the failure to take responsibility and to blame the victim.

In conclusion

It should be clear that although the medical-emergency defense should be taken seriously, it can actually provide an opportunity to obtain discovery that would ordinarily not be available and that has great benefits in proving liability and damages.


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The authors will provide other plaintffs' attorneys with sample pleadings, written discovery, deposition notices and motions in limine they have used in medical-emergency-defense cases.