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## Collision of Negligence Theory: Does a “Blackout” Constitute an Unavoidable, Sudden Emergency in North Dakota?

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## COLLISION OF NEGLIGENCE THEORY: DOES A “BLACKOUT” CONSTITUTE AN UNAVOIDABLE, SUDDEN EMERGENCY IN NORTH DAKOTA?

### ABSTRACT

In a personal injury lawsuit, an actor is negligent if four conditions exist: the actor had a duty to the injured person; the actor breached the duty; a causal connection existed between the breach and the injury; and there was an actual injury. What is lacking from the systematic framework is the contemplation of unanticipated events. In response to this gap, courts have adopted several defenses and doctrines to protect those actors who experience an unforeseeable event and have to face the consequences. One such defense is known as the “sudden medical emergency defense,” where the driver of an automobile suffers an unexpected medical problem, but no liability for the resulting accident occurs due to the uncontrollability of the event. Similarly, the doctrines known as “sudden emergency,” when a driver is confronted with sudden peril and little time to react, and “unavoidable accident,” when a driver faces other external forces, also result in a finding of no negligence. North Dakota has recognized exculpatory doctrines and compensatory regimes, but has not yet addressed the sudden medical emergency defense. Part II of this note will discuss the trends and developments of these concepts among jurisdictions. Part III will then examine the concepts as applied in North Dakota, including application under current law and under the potential adoption of the sudden medical emergency defense. Part III will also explore the policy considerations of the defense as well as means to counter the defense.

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## I. INTRODUCTION

In its most recognized and simplest form, an automobile accident case involves one driver accusing another driver of negligently causing an accident and any injuries stemming from the accident.<sup>1</sup> In order to prevail on a claim of negligence, the accusing driver must prove the other driver owed a duty of care to him or her; the driver breached the duty; a causal connection existed between the breach and the injury; and there was an

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1. See, e.g., *Harfield v. Tate*, 1999 ND 166, ¶ 3, 598 N.W.2d 840, 842.

actual injury.<sup>2</sup> Culpability is the crux of the negligence case, and without proving each of the necessary elements, no culpability results.<sup>3</sup> However, even after establishing each of the four elements, exculpatory circumstances may exist.<sup>4</sup>

Adding a fact to the scenario above—that the driver causing the accident claimed to have suffered a sudden medical emergency while driving—complicates the otherwise basic formula. Although the driver experiencing a medical emergency was the cause of the accident and injuries, the driver may not have been able to control his or her actions.<sup>5</sup> With both an impossibility to control the automobile due to the medical event and an impossibility to anticipate the event's occurrence, the driver may not be charged as negligent.<sup>6</sup>

Cases decided under negligence theories have held a sudden medical emergency while driving “is a complete defense to an action based on negligence,” if such emergency was not foreseeable.<sup>7</sup> Part II of this note will discuss how the defense varies from state-to-state not only in name,<sup>8</sup> but also in analysis,<sup>9</sup> pleading requirements,<sup>10</sup> and burden of proof.<sup>11</sup> Part II will also examine how, despite the defense maintaining the same general

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2. Cf. *Walketzko v. Herdegen*, 226 N.W.2d 648, 652 (N.D. 1975).

3. RESTATEMENT (SECOND) OF TORTS § 282 (2010).

4. *Lutzkovitz v. Murray*, 339 A.2d 64, 67 (Del. 1975).

5. See *Cohen v. Petty*, 65 F.2d 820, 821 (D.C. 1933).

6. *Id.*

7. Timothy E. Travers, Annotation, *Liability for Automobile Accident Allegedly Caused by Driver's Blackout, Sudden Unconsciousness, or the Like*, 93 A.L.R.3d 326, 330 (1979 & Supp. 2010).

8. See, e.g., *Estate of Embry v. GEO Transp. of Ind., Inc.*, 395 F. Supp. 2d 517, 520 (E.D. Ky. 2005) (“blackout” defense); *Halligan v. Broun*, 645 S.E.2d 581, 582 (Ga. Ct. App. 2007) (“act of God”); *Parker v. Washington*, 421 P.2d 861, 866 (Okla. 1966) (“unavoidable accident by reason of sudden unconsciousness”); *McCall v. Wilder*, 913 S.W.2d 150, 154 (Tenn. 1995) (“sudden loss of physical capacity or consciousness”).

9. Compare *Cruz v. United States*, 987 F. Supp. 1299, 1303 (D. Haw. 1997) (“In determining whether a driver's incapacity to control his vehicle was foreseeable, courts generally consider a number of factors”), with *Caron v. Guiliano*, 211 A.2d 705, 706 (Conn. Super. Ct. 1965) (holding foreseeability issue is a jury question).

10. Compare *Storjohn v. Fay*, 519 N.W.2d 521, 526 (Neb. 1994) (the defense is pled as an affirmative defense), with *Tropical Exterminators, Inc. v. Murray*, 171 So. 2d 432, 434 (Fla. Dist. Ct. App. 1965) (the defense is not pled as an affirmative defense).

11. Compare *Lutzkovitz v. Murray*, 339 A.2d 64, 67 (Del. 1975) (maintaining that once the plaintiff establishes a prima facie negligence case, the burden shifts to the defendant to show a sudden medical emergency), with *Myers v. Sutton*, 189 S.E.2d 336, 338 (Va. 1972) (stating “[t]he burden of proof in a negligence case is always on the plaintiff . . .”). Compare also *Freese v. Lemmon*, 267 N.W.2d 680, 685-86 (Iowa 1978) (providing that defendants must prove unconsciousness by a preponderance of the evidence), with *Brannon v. Shelter Mut. Ins. Co.*, 507 So. 2d 194, 197 (La. 1987) (holding “the party asserting the affirmative defense of sudden unconsciousness to a negligence claim must prove the facts giving rise to the defense by clear and convincing evidence”).

elements across the jurisdictions that have adopted it,<sup>12</sup> other negligence doctrines contain similar elements, possibly resulting in confusion or overlap.<sup>13</sup>

North Dakota has endorsed doctrines allowing the defendant in an automobile collision case to escape liability, but no cases have directly addressed the sudden medical emergency defense.<sup>14</sup> Part III of this note will discuss how current controlling law in North Dakota may sufficiently cover a case presenting a sudden medical emergency in a negligence action, but explicit adoption of the defense would be in line with the majority of jurisdictions.<sup>15</sup> In order to properly consider the drastic adoption limiting the recovery of injured plaintiffs who bring suit against incapacitated drivers, Part III will also explore important policy considerations that must be taken into account,<sup>16</sup> as well as the means to attack the defense.<sup>17</sup>

## II. SUDDEN MEDICAL EMERGENCY

The sudden medical emergency defense, or its functional equivalent by another name, is found in many jurisdictions.<sup>18</sup> The development of the defense has primarily been through common law and courts' analysis of negligence elements.<sup>19</sup> Despite general acceptance of the elements, the defense varies from state-to-state in the scope of its use.<sup>20</sup> Additionally, during the development of the sudden medical emergency defense, courts

12. See, e.g., *Abreu v. F.E. Dev. Recycling, Inc.*, 35 So. 3d 968, 969 (Fla. Dist. Ct. App. 2010) (“To establish the defense of sudden and unexpected loss of capacity or unconsciousness, the defendant must prove . . . 1. The defendant suffered a loss of consciousness or capacity. 2. The loss of consciousness or capacity occurred before the defendant’s purportedly negligent conduct. 3. The loss of consciousness was sudden. 4. The loss of consciousness or capacity was neither foreseen, nor foreseeable.”) (internal citations omitted).

13. Compare 8 AM. JUR. 2D *Automobiles* § 1057 (“The defense of an unavoidable accident is . . . a claim that an accident was unavoidable . . . because of some other circumstance beyond the operator’s control . . .”), with Jeffrey F. Ghent, Annotation, *Modern Status of Sudden Emergency Doctrine*, 10 A.L.R.5th 680, 687 (1993 & Supp. 2010) (noting the sudden emergency defense occurs when a driver “is confronted with a sudden emergency and lacks time to judge with certainty the best course to pursue . . .”).

14. See *Harfield v. Tate*, 1999 ND 166, ¶ 11, 598 N.W.2d 840, 843 (describing the sudden emergency doctrine); *Reuter v. Olson*, 59 N.W.2d 830, 835-36 (N.D. 1953) (explaining the unavoidable accident doctrine).

15. See Travers, *supra* note 7, at 330 (noting majority viewpoints).

16. See *Roman v. Estate of Gobbo*, 791 N.E.2d 422, 433-34 (Ohio 2003) (Pfeifer, J., concurring).

17. David M. Kopstein, *Defeat the “Sudden Medical Emergency” Defense*, TRIAL, Feb. 2009, at 24.

18. Travers, *supra* note 7, at 330.

19. See generally *Roman*, 791 N.E.2d at 426-33 (explaining the basis, development, and majority viewpoint of the sudden medical emergency defense).

20. See *infra* Part II.A.

have adopted other similar doctrines utilized when a driver is faced with broader, unexpected circumstances.<sup>21</sup>

#### A. DEVELOPMENT OF THE SUDDEN MEDICAL EMERGENCY DEFENSE

Under common law, an actor is considered negligent if he or she owed a duty to the person who was injured; if he or she breached the duty; if a causal connection existed between the breach and the injury; and if an injury actually resulted.<sup>22</sup> Generally, a driver of a motor vehicle owes a duty to pedestrians and other drivers to exercise ordinary and reasonable care.<sup>23</sup> A driver breaches the duty of care and, consequentially, may be liable for injuries if he or she suddenly loses consciousness or suffers a medical emergency while driving, but only if the driver was aware the emergency could occur.<sup>24</sup> On the other hand, if the driver was unaware the medical emergency could occur, the driver may escape liability.<sup>25</sup>

A sudden loss of consciousness, or “sudden medical emergency” as the defense will be referred to throughout this note, has been recognized as a complete defense in many jurisdictions.<sup>26</sup> The defense has been raised for a variety of different conditions, including epileptic seizures,<sup>27</sup> diabetic shock,<sup>28</sup> heart attack,<sup>29</sup> and other conditions resulting in unconsciousness.<sup>30</sup> In order to fall under the scope of the defense, the alleged incapacitation may only need to result in a condition severe enough to suddenly lose control of the vehicle, rather than unconsciousness,<sup>31</sup> unless unconsciousness is an element of the defense.<sup>32</sup>

Typically, the sudden medical emergency defense states “an operator of a motor vehicle who, while driving, becomes suddenly stricken by a

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21. *See infra* Part II.B.

22. *See* Waletzko v. Herdegen, 226 N.W.2d 648, 652 (N.D. 1975).

23. 17 AM. JUR. 3D *Proof of Facts* § 1 (2010).

24. *Id.*

25. *Id.* § 5.

26. *See generally* Travers, *supra* note 7 (citing cases from Alabama, Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Nebraska, New Hampshire, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, and Wisconsin).

27. *Storjohn v. Fay*, 519 N.W.2d 521, 527 (Neb. 1994).

28. *Howle v. PYA/Monarch, Inc.*, 344 S.E.2d 157, 159 (S.C. Ct. App. 1986).

29. *Roman v. Estate of Gobbo*, 791 N.E.2d 422, 424 (Ohio 2003).

30. *Abreu v. F.E. Dev. Recycling, Inc.*, 35 So. 3d 968, 969 (Fla. Dist. Ct. App. 2010) (brain aneurism); *Renell v. Argonaut Liquor Co.*, 365 P.2d 239, 241 (Colo. 1961) (overexhaustion).

31. *See* Kopstein, *supra* note 17, at 24.

32. *See* *Word v. Jones ex rel. Moore*, 516 S.E.2d 144, 147 (N.C. 1999) (noting the defense as adopted, the “sudden-incapacitation defense,” does not require unconsciousness as an element).

fainting spell or loses consciousness from an unforeseen cause, and is unable to control the vehicle, is not chargeable with negligence . . . .”<sup>33</sup> As noted by most courts, the rationale of the defense is “that the driver was suddenly deprived of his senses by ‘blacking out’ so that he could not comprehend the nature and quality of his act, and thusly, is not responsible therefor.”<sup>34</sup> While the general premise maintains uniformity among jurisdictions,<sup>35</sup> several details involving the name of the defense, foreseeability analysis and extent of the defense, the burdens of proof on the plaintiff and the defendant, and the pleading requirements lack such uniformity.<sup>36</sup>

### 1. *A Defense by Different Names*

Depending on the jurisdiction, the defense of a driver experiencing an unforeseen medical event while driving has been called by different names.<sup>37</sup> Some jurisdictions have explicitly given the defense a name such as the “sudden-medical-emergency-defense,”<sup>38</sup> the “‘blackout’ defense,”<sup>39</sup> the “defense of sudden or unanticipated unconsciousness,”<sup>40</sup> or the “sudden loss of consciousness defense.”<sup>41</sup> Other jurisdictions have classified sudden unconsciousness under the “unavoidable accident defense,”<sup>42</sup> or as “an act of God.”<sup>43</sup> However, many jurisdictions merely define the defense without giving it a specific name.<sup>44</sup>

33. *Roman*, 791 N.E.2d at 427; *see also* *Bashi v. Wodarz*, 53 Cal. Rptr. 2d 635, 638 (Cal. Ct. App. 1996); *Cohen v. Petty*, 65 F.2d 820, 821 (D.C. 1933); *Tropical Exterminators, Inc. v. Murray*, 171 So. 2d 432, 433 (Fla. Dist. Ct. App. 1965).

34. *Moore v. Presnell*, 379 A.2d 1246, 1249 (Md. Ct. Spec. App. 1977) (citing 2 FOWLER HARPER & FLEMING JAMES, *THE LAW OF TORTS* § 16.7 (1956)); *see also* *Storjohn v. Fay*, 519 N.W.2d 521, 526 (Neb. 1994). The Restatements also have provided guidance to courts by stating “an automobile driver who suddenly and quite unexpectedly suffers a heart attack does not become negligent when he loses control of his car and drives it in a manner which would otherwise be unreasonable; but one who knows that he is subject to such attacks may be negligent . . . .” RESTATEMENT (SECOND) OF TORTS, *supra* note 3, § 283C, cmt. c.

35. *See* 17 AM. JUR. 3D, *supra* note 23, § 5.

36. *See infra* Parts II.A.1-3.

37. *See* *Kopstein*, *supra* note 17, at 24.

38. *Roman*, 791 N.E.2d at 427.

39. *Estate of Embry v. GEO Transp. of Ind., Inc.*, 395 F. Supp. 2d 517, 520 (E.D. Ky. 2005) (also explaining that “blackout” includes “sudden incapacity”).

40. *See* *Brannon v. Shelter Mut. Ins. Co.*, 507 So. 2d 194, 197 (La. 1987) (defense of sudden unconsciousness); *Moore v. Presnell*, 379 A.2d 1246, 1249 (Md. Ct. Spec. App. 1977) (defense of unanticipated unconsciousness).

41. *Storjohn v. Fay*, 519 N.W.2d 521, 526 (Neb. 1994); *see also* *Tropical Exterminators, Inc. v. Murray*, 171 So. 2d 432, 433 (Fla. Dist. Ct. App. 1965) (the “sudden unforeseeable loss of consciousness defense”); *McCall v. Wilder*, 913 S.W.2d 150, 154 (Tenn. 1995) (“the sudden loss of physical capacity or consciousness defense”).

42. *See* *Parker v. Washington*, 421 P.2d 861, 866 (Okla. 1966).

43. *See* *Halligan v. Broun*, 645 S.E.2d 581, 582 (Ga. Ct. App. 2007) (citing a statute defining “act of God” as “an accident produced by physical causes which are irresistible or inevitable, such as . . . illness” and such an act is the proximate cause of the accident rather than the defendant

## 2. *Foreseeability Analysis*

While the name of the defense may vary, states that have adopted the sudden medical emergency defense require the same element: the medical event allegedly causing the accident must have been sudden and unforeseeable.<sup>45</sup> With such an important emphasis on foreseeability in finding for or against liability, some courts have focused their analysis on foreseeability factors.<sup>46</sup> For instance, in *Cruz v. United States*,<sup>47</sup> a truck driver experienced a heart block while driving, causing him to lose consciousness and, subsequently, to lose control of his vehicle.<sup>48</sup> On appeal, the district court needed to determine whether his condition was foreseeable, which would have imposed a duty of care to the injured plaintiff, Cruz.<sup>49</sup> In deciding foreseeability, the court considered a variety of factors exposing the amount of knowledge the driver had with regard to possible incapacitation from past experience or medical advice.<sup>50</sup> Other courts have

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driver); *Hoggatt v. Melin*, 172 N.E.2d 389, 392 (Ill. App. Ct. 1961) (defining an act of God as “all misfortunes and actions arising from the inevitable necessity which human prudence could not foresee or prevent and . . . sudden illness, or death, rendering the driver of a motor vehicle incapable of controlling or directing his motor vehicle, if unforeseeable and beyond the power of human agency to prevent . . .”); *Travers*, *supra* note 7, at 330. *But see* *Freifield v. Hennessy*, 353 F.2d 97, 99 (3d Cir. 1965) (loss of consciousness is “not so unusual and extraordinary as to warrant its being attributed to ‘an act of God’”).

44. *See, e.g.*, *Bashi v. Wodarz*, 53 Cal. Rptr. 2d 635, 638 (Cal. Ct. App. 1996) (stating the general rule regarding a driver stricken by a sudden illness); *Caron v. Guiliano*, 211 A.2d 705, 706 (Conn. Super. Ct. 1965) (explaining a driver suddenly stricken by a fainting spell without warning cannot be negligent); *Lutzkovitz v. Murray*, 339 A.2d 64, 67 (Del. 1975) (stating a physically or mentally incapacitated driver cannot be liable if he had no warning of the incapacitation); *Keller v. Wonn*, 87 S.E.2d 453, 459 (W. Va. 1955) (explaining a driver who has no warning of physical or mental incapacity cannot be held liable for injuries occurring during incapacitation).

45. *Cf.* *Travers*, *supra* note 7, at 330.

46. *See, e.g.*, *Cruz v. United States*, 987 F. Supp. 1299, 1303 (D. Haw. 1997) (listing the factors courts generally consider to determine foreseeability of incapacitation).

47. 987 F. Supp. 1299 (D. Haw. 1997).

48. *Cruz*, 987 F. Supp. at 1301.

49. *Id.* at 1302-03.

50. *Id.* Specifically, the court inquired as to:

the extent of the driver’s awareness or knowledge of the condition that caused the sudden incapacity; whether the driver had sought medical advice or was under a physician’s care for the condition when the accident occurred; whether the driver had been prescribed, and had taken, medication for the condition; whether a sudden incapacity had previously occurred while driving; the number, frequency, extent, and duration of incapacitating episodes prior to the accident while driving and otherwise; the temporal relationship of the prior incapacitating episodes to the accident; a physician’s guidance or advice regarding driving to the driver, if any; and medical opinions regarding the nature of the driver’s condition, adherence to treatment, foreseeability of the incapacitation, and potential advance warnings which the driver would have experienced immediately prior to the accident.

*Id.*



also considered these factors when determining foreseeability of the medical emergency.<sup>51</sup>

On the other hand, other jurisdictions have explicitly left the issue of foreseeability and the consideration of foreseeability factors in the hands of the jury, or factfinder, to determine liability as a question of fact.<sup>52</sup> However, where the evidence is uncontroverted that the medical emergency was foreseeable, no fact issue is presented to the jury and the court may find the incapacitated driver liable as a matter of law.<sup>53</sup> Judgment as a matter of law may also favor the incapacitated driver “if the evidence points to only one reasonable conclusion” that the attack was unforeseeable.<sup>54</sup>

Although foreseeability plays an important role, events and factors leading up to the medical emergency and accident may impose liability on the incapacitated driver.<sup>55</sup> For example, in *Estate of Embry v. GEO Transportation of Indiana, Inc.*,<sup>56</sup> a district court in Kentucky rejected a driver’s “blackout” defense when he passed out due to choking on coffee.<sup>57</sup> Because the court determined the driver had a statutory duty to operate his truck in a safe manner and that he negligently drank the coffee, the driver could not escape liability.<sup>58</sup> In such instances, the accident would be foreseeable because the blackout would not be the sole cause of the accident.<sup>59</sup>

### 3. *Pleading the Defense*

When asserting sudden medical emergency as a defense in a motor vehicle accident case, the defendant must be aware of the pleading requirements, which vary from jurisdiction to jurisdiction.<sup>60</sup> Because liability under the sudden medical emergency defense hinges on the potentially negligent actions of the incapacitated driver, the defendant driver normally raises the defense.<sup>61</sup> As such, one issue the defendant must determine is

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51. See *McCall v. Wilder*, 913 S.W.2d 150, 156 (Tenn. 1995).

52. See *Renell v. Argonaut Liquor Co.*, 365 P.2d 239, 242 (Colo. 1961) (“It [is] exclusively within the province of the jury to determine whether [the driver] knew or should have known that he might ‘black out’ or ‘faint’ because of exhaustion.”); *Lutzkovitz v. Murray*, 339 A.2d 64, 67 (Del. 1975); *Dickinson v. Koenig*, 133 So. 2d 721, 723 (Miss. 1961) (tasking the jury with the determination of whether “the driver had been suddenly stricken by a fainting spell and had lost consciousness at a time when he had no previous warning, or reason to anticipate, that he was likely to be suddenly stricken and have a fainting spell as testified about”).

53. See 17 AM. JUR. 3D, *supra* note 23, § 3.

54. *Storjohn v. Fay*, 519 N.W.2d 521, 527 (Neb. 1994).

55. See generally 17 AM. JUR. 3D, *supra* note 23, § 5 (explaining defense considerations).

56. 395 F. Supp. 2d 517 (E.D. Ky. 2005).

57. *Estate of Embry*, 395 F. Supp. 2d at 520.

58. *Id.* at 520-21.

59. *Id.* at 520.

60. See 17 AM. JUR. 3D, *supra* note 23, § 3.

61. *Id.*

whether the jurisdiction accepts the defense as an affirmative defense.<sup>62</sup> Generally, courts have accepted a sudden medical emergency as an affirmative defense,<sup>63</sup> but other courts have held the contrary, stating a claim of incapacitation or unconsciousness is a general denial of negligence rather than an affirmative defense.<sup>64</sup>

If a sudden medical emergency is characterized as an affirmative defense, most courts agree the defendant has the burden of proving the emergency.<sup>65</sup> In other words, the burden of proving a sudden medical emergency occurred shifts to the defendant after the plaintiff proves each of the negligence elements.<sup>66</sup> However, a minority of courts have held the burden of proof never shifts in a negligence case and, thus, the plaintiff maintains the ultimate burden of proof once the defendant merely comes forward with evidence of a sudden medical emergency.<sup>67</sup>

Besides who has the burden of proof, the level of evidence sufficient to show a sudden medical emergency also differs among jurisdictions.<sup>68</sup> Some jurisdictions require proving the sudden medical emergency defense and its “elements by a preponderance of the evidence.”<sup>69</sup> Other jurisdictions require the heightened burden of proof: clear and convincing evidence.<sup>70</sup>

## B. SIMILAR DEFENSES

The sudden medical emergency defense, while narrow in context to sudden incapacitation or unconsciousness, is similar to other doctrines frequently utilized in automobile accident cases—namely, the sudden emergency doctrine and the unavoidable accident doctrine.<sup>71</sup> Due to the similarities, confusion may result among the defenses and their

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62. *See id.* § 5.

63. *Storjohn v. Fay*, 519 N.W.2d 521, 526 (Neb. 1994).

64. *See Tropical Exterminators, Inc. v. Murray*, 171 So. 2d 432, 433-34 (Fla. Dist. Ct. App. 1965).

65. *See* 17 AM. JUR. 3D, *supra* note 23, § 5; *see also* *Lutzkovitz v. Murray*, 339 A.2d 64, 67 (Del. 1975); *Moore v. Presnell*, 379 A.2d 1246, 1248 (Md. Ct. Spec. App. 1977); *Storjohn*, 519 N.W.2d at 526.

66. *Moore*, 379 A.2d at 1248; *Storjohn*, 519 N.W.2d at 526.

67. *See Myers v. Sutton*, 189 S.E.2d 336, 338 (Va. 1972).

68. *See* 17 AM. JUR. 3D, *supra* note 23, § 3.

69. *Word v. Jones ex rel. Moore*, 516 S.E.2d 144, 147 (N.C. 1999); *see Freese v. Lemmon*, 267 N.W.2d 680, 686-87 (Iowa 1978). The preponderance of the evidence standard, the standard most often applied in civil trials, is described as one party having “the stronger evidence, however slight the edge may be.” BLACK’S LAW DICTIONARY 1301 (9th ed. 2009).

70. *Brannon v. Shelter Mut. Ins. Co.*, 507 So. 2d 194, 197 (La. 1987). Clear and convincing evidence is an intermediate standard between a preponderance of the evidence and proof beyond a reasonable doubt. *Id.* “The existence of the disputed fact must be highly probable; that is, much more probable than its nonexistence.” *Id.*

71. *See generally* 8 AM. JUR. 2D, *supra* note 13 (explaining the doctrines of unavoidable accident, sudden emergency, or act of God).

applicability.<sup>72</sup> However, despite possible overlap of the concepts, a noticeable difference is the general acceptance of the sudden medical emergency defense and the declining acceptance of the sudden emergency and unavoidable accident doctrines.<sup>73</sup>

### 1. *Sudden Emergency Doctrine*

The sudden emergency doctrine recognizes a driver is not liable for negligence if he or she was confronted with a sudden emergency and “exercised the care a reasonably prudent person would under like circumstances.”<sup>74</sup> Most jurisdictions have addressed the sudden emergency doctrine and its use in automobile accident cases.<sup>75</sup> Among these jurisdictions, though, there is strong disagreement about whether the doctrine should be used in negligence cases.<sup>76</sup>

#### a. Rationale

The general principle behind the sudden emergency doctrine—that a person confronted with a sudden emergency is only expected to act as a reasonable person would in the same situation rather than under normal circumstances—is:

[t]he actor is left no time for adequate thought, or is reasonably so disturbed or excited that the actor cannot weigh alternative courses of action, and must make a speedy decision, based very largely upon impulse or guess. Under such conditions, the actor cannot reasonably be held to the same accuracy of judgment or conduct as one who has full opportunity to reflect, even though it later appears that the actor made the wrong decision, one which no

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72. See *Kappelman v. Lutz*, 217 P.3d 286, 290 (Wash. 2009) (elaborating on the sudden emergency doctrine and how it can easily blend into the unavoidable accident doctrine); see also *Giles v. Smith*, 435 S.E.2d 832, 834 (N.C. Ct. App. 1993) (“The doctrine of sudden emergency should not be confused with the defense of ‘unavoidable accident’”).

73. Compare *Roman v. Estate of Gobbo*, 791 N.E.2d 422, 430-31 (Ohio 2003) (“[r]ecent decisions in many jurisdictions clearly indicate that there is no trend away from allowing a sudden and unforeseen medical emergency to serve as a complete defense to negligence in a motor vehicle liability case.”), with *Ebach v. Ralston*, 510 N.W.2d 604, 609 (N.D. 1994) (explaining how some courts have abolished or discouraged the use of the sudden emergency instruction in negligence actions).

74. 8 AM. JUR. 2D, *supra* note 13, § 821.

75. See generally *Ghent*, *supra* note 13 (citing cases from Alabama, Arkansas, California, Colorado, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, Wisconsin, and Wyoming).

76. See *id.* at 687 (stating the doctrine has been subject to criticism by some courts).

reasonable person could possibly have made after due deliberation.<sup>77</sup>

Therefore, the key factors in determining liability in the negligence context are whether the actor made a rapid decision in light of the sudden emergency and whether that choice was what a person of reasonable character would have also made.<sup>78</sup> While a driver may not be negligent after the emergency arose, the driver may be liable for negligence or tortious actions which caused the emergency.<sup>79</sup>

Some courts have held a sudden emergency is an affirmative defense,<sup>80</sup> but others have held it is not an affirmative defense and merely precludes the plaintiff from fully establishing a negligence case.<sup>81</sup> Most commonly, the sudden emergency doctrine appears in a case as a jury instruction.<sup>82</sup> Thus, it is the task of the jury to decide whether the driver was confronted with a sudden emergency.<sup>83</sup> If the jury determines a sudden emergency occurred, the jury is then tasked with finding whether the driver acted reasonably under the circumstances, which precludes liability, or unreasonably, which imposes liability.<sup>84</sup>

#### b. Criticism

Jurisdictions questioning the sudden emergency doctrine have focused their criticism on whether an instruction confuses or misstates the law to the jury, primarily as to the proper standard of care and in conjunction with comparative negligence.<sup>85</sup> Because the sudden emergency instruction has the potential to suggest to the jury that a driver confronted with a sudden emergency is afforded a lower standard of care, some courts have abolished its use.<sup>86</sup> Other courts have eliminated the instruction because it is

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77. W.P. KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 33, at 196 (5th ed. 1984).

78. RESTATEMENT (SECOND) OF TORTS, *supra* note 3, § 296.

79. *Id.*

80. *See Lovings v. Cleary*, 799 N.E.2d 76, 78 (Ind. Ct. App. 2003).

81. *See Starns v. Jones*, 500 F.2d 1233, 1236 (8th Cir. 1974).

82. Ghent, *supra* note 13, at 687. For example, model jury instructions for Colorado provide that “[a] person who, through no fault of his or her own, is placed in a sudden emergency, is not chargeable with negligence if the person exercises that degree of care which a reasonably careful person would have exercised under the same or similar circumstances.” *Young v. Clark*, 814 P.2d 364, 365 (Colo. 1991) (quoting Colorado’s pattern jury “sudden emergency” instruction, CJI-Civ.2d 9:10).

83. RESTATEMENT (SECOND) OF TORTS, *supra* note 3, § 296(1) cmt. b.

84. KEETON ET AL., *supra* note 77, at 196-97.

85. Ghent, *supra* note 13, at 687.

86. *See, e.g., Wiles v. Webb*, 946 S.W.2d 685, 689 (Ark. 1997); *McClymont v. Morgan*, 470 N.W.2d 768, 771-72 (Neb. 1991); *see also Bjorndal v. Weitman*, 184 P.3d 1115, 1121 (Or. 2008)

subsumed within the doctrine of comparative negligence.<sup>87</sup> Still, others have merely discouraged using the instruction based on the concerns of confusion,<sup>88</sup> or have kept the instruction for use when properly requested and warranted.<sup>89</sup>

## 2. *Unavoidable Accident Doctrine*

Similar to the sudden medical emergency defense and the sudden emergency doctrine, the doctrine of unavoidable accident is self-explanatory, providing that circumstances beyond the driver's control rendered the accident unavoidable and, therefore, the driver was not personally negligent.<sup>90</sup> In other words, the doctrine states "ordinary care and diligence could not have prevented [the accident]."<sup>91</sup> Although some authority equates the unavoidable accident doctrine to a sudden incapacitating moment while driving,<sup>92</sup> other courts analogize it with the sudden emergency doctrine.<sup>93</sup> In fact, many of the criticisms of the unavoidable accident doctrine resemble those faced by the sudden emergency doctrine.<sup>94</sup>

For instance, some states have not permitted the use of the unavoidable accident instruction because it "merely restates that law of negligence, serves no useful purpose, and overemphasizes the defendant's case, and is apt to confuse and mislead the jury."<sup>95</sup> Other states have strongly criticized the instruction due to these concerns,<sup>96</sup> but others have allowed the

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("[T]he emergency instruction, at least as used in vehicle accident cases, misstates the law of negligence . . .").

87. *See, e.g.*, *Knapp v. Stanford*, 392 So. 2d 196, 198 (Miss. 1980).

88. *See, e.g.*, *Myhaver v. Knutson*, 942 P.2d 445, 450 (Ariz. 1997); *Bayer v. Shupe Bros. Co.*, 576 P.2d 1078, 1080 (Kan. 1978) (recommending the doctrine is one for argument by counsel); *Gagnon v. Crane*, 498 A.2d 718, 721 (N.H. 1985).

89. *See, e.g.*, *Young v. Clark*, 814 P.2d 364, 369 (Colo. 1991) ("The sudden emergency doctrine is a long-established principle of law . . . . We choose to leave the doctrine intact, and continue to uphold the propriety of giving the sudden emergency instruction where competent evidence is presented that a party was confronted with a sudden or unexpected occurrence not of the party's own making.").

90. 8 AM. JUR. 2D, *supra* note 13, § 1057.

91. *Hancock-Underwood v. Knight*, 670 S.E.2d 720, 722 (Va. 2009).

92. *See Tropical Exterminators, Inc. v. Murray*, 171 So. 2d 432, 434 (Fla. Dist. Ct. App. 1965); *Parker v. Washington*, 421 P.2d 861, 866 (Okla. 1966) ("unavoidable accident by reason of sudden unconsciousness").

93. *See Meyer v. Johnson*, 254 N.W.2d 107, 110 (S.D. 1977) (explaining the unavoidable accident instruction requires an element of surprise and the sudden emergency doctrine requires a sudden and unexpected danger).

94. *See generally Hancock-Underwood*, 670 S.E.2d at 723 (explaining the division of state viewpoints on the unavoidable accident instruction).

95. *Id.* (listing twenty states and the District of Columbia that have abolished the unavoidable accident instruction).

96. *Id.* (providing fifteen states that have cautiously used or limited the instruction).

instruction.<sup>97</sup> Considering the various approaches taken by jurisdictions applying the sudden medical emergency defense, the sudden emergency doctrine, and the unavoidable accident doctrine, the next section of this note will attempt to reconcile the three and apply them through North Dakota common law and statutory law.<sup>98</sup>

### III. APPLICATION IN NORTH DAKOTA

No cases in North Dakota have addressed the sudden medical emergency defense and its application to motor vehicle accident lawsuits. However, North Dakota has adopted similar doctrines that have been utilized in negligence cases.<sup>99</sup> This section will first discuss the law in North Dakota with regard to the current doctrines in force and statutory law.<sup>100</sup> Next, this section will examine the likelihood of North Dakota adopting the sudden medical emergency defense and how the state would do so.<sup>101</sup> Finally, this section will describe ways to attack the defense from the plaintiff's perspective and important policy considerations that must be addressed when adopting the defense.<sup>102</sup>

#### A. CURRENT CONTROLLING NORTH DAKOTA LAW

Several doctrines exculpating drivers from liability have been developed in North Dakota.<sup>103</sup> One doctrine is known as the sudden emergency doctrine.<sup>104</sup> Another is known as the unavoidable accident doctrine.<sup>105</sup>

##### 1. *Sudden Emergency Doctrine in North Dakota*

The history of the sudden emergency doctrine in North Dakota spans many decades.<sup>106</sup> Despite the expansive time frame, little changes have been made to the jury instruction.<sup>107</sup> Today, the model pattern jury

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97. *Id.* (noting nine states that have endorsed the instruction's use).

98. *See infra* Part III.

99. *See Haider v. Finken*, 239 N.W.2d 508, 513 (N.D. 1976) (sudden emergency instruction); *Reuter v. Olson*, 59 N.W.2d 830, 835 (N.D. 1953) (unavoidable accident).

100. *See infra* Parts III.A.1-3.

101. *See infra* Part III.B.

102. *See infra* Parts III.C-D.

103. *See* discussion *infra* Part III.A.

104. *Haider*, 239 N.W.2d at 513.

105. *Reuter v. Olson*, 59 N.W.2d 830, 835 (N.D. 1953).

106. *See, e.g., id.* at 834 (describing the sudden emergency instruction in 1953).

107. *Compare id.* ("In an emergency a driver of a vehicle is required only to act in the manner of a reasonable, prudent man, and is not to be held liable for failure to choose the wisest course of action, if the course he did choose is such as a reasonably prudent man might choose"), *with Ebach v. Ralston*, 510 N.W.2d 604, 608-09 (N.D. 1994) ("If a person is suddenly and

instruction in North Dakota for sudden emergency states, “[i]f suddenly faced with a dangerous situation the person did not create, the person is not held to the same accuracy of judgment as one would be if there were time for deliberation.”<sup>108</sup> Furthermore, the instruction states, “[t]he person is not at fault if the person acted as an ordinary prudent person would act in a similar emergency.”<sup>109</sup> The North Dakota Supreme Court has explained its acceptance of the doctrine through the principle that a driver presented with a sudden dangerous situation, whether created by another person or by an intervening, unexpected condition, “is not held to the same accuracy of judgment as would be required of him if he had time for deliberation.”<sup>110</sup> A driver is not liable so long as he or she did not cause the emergency by his or her own negligence and so long as the driver exercised care as a reasonably prudent person would have in the same situation.<sup>111</sup>

Like many other jurisdictions, the North Dakota Supreme Court has also examined the utility of the sudden emergency doctrine and questioned the doctrine’s use.<sup>112</sup> While noting concerns of misleading the jury or misstating the law, the North Dakota Supreme Court has expressly endorsed the sudden emergency instruction, granted the instructions clearly explain “[a] driver’s standard of ordinary care under the circumstances of an emergency, coupled with instructions about the driver’s standard of ordinary care before the emergency arose . . . .”<sup>113</sup> Because the court has also declared the doctrine consistent with the comparative negligence scheme of the state, the instruction is appropriate when warranted.<sup>114</sup>

Additionally, the North Dakota Supreme Court has deemed the doctrine not a defense at all, but rather “a principle of law.”<sup>115</sup> As such, the

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unexpectedly confronted with an emergency . . . he or she is not expected, nor required, to use the same judgment and prudence that is required of him or her in calmer and more deliberate moments.”).

108. N.D.J.I. Civ. No. C-2.77 (2001).

109. *Id.*

110. *Ebach*, 510 N.W.2d at 609.

111. *Id.*

112. *Id.* at 609-10.

113. *Id.* at 610.

114. *Cf. id.* at 611 (“When there is conflicting evidence about whether a person’s conduct caused the emergency situation, . . . an emergency instruction is justified.”); *Haider v. Finken*, 239 N.W.2d 508, 514-15 (N.D. 1976) (“[a]n instruction is properly refused where there is evidence that the claimed emergency was caused or contributed to by inattention or lack of vigilance on the part of the driver seeking to invoke the rule; or where there is evidence that the driver failed to anticipate the peril or to take preventive action; or where the vehicle was operated at an excessive or illegal speed at or immediately prior to the accident.”) (internal citations omitted). In North Dakota, modified comparative fault determines liability, meaning a plaintiff may only recover if the fault of others exceeds his or her own and any damages are diminished by his amount of fault. *See* N.D. CENT. CODE § 32-03.2-02 (2010).

115. *Farmers Union Grain Terminal Ass’n v. Briese*, 192 N.W.2d 170, 179 (N.D. 1971).

sudden emergency instruction is utilized as a general denial of negligence and not as a means to escape liability after the elements of negligence have been established by the plaintiff.<sup>116</sup> Therefore, when a driver is confronted with a sudden emergency, North Dakota Rules of Civil Procedure do not require the defendant to plead the sudden emergency defense.<sup>117</sup>

## 2. *Unavoidable Accident Doctrine in North Dakota*

In many respects, the unavoidable accident doctrine is analogous to the sudden emergency doctrine in North Dakota.<sup>118</sup> Although the unavoidable accident doctrine is distinct in North Dakota case law, providing “[t]he issue . . . is raised when there is evidence tending to prove that the injury resulted from some cause other than the negligence of the parties,”<sup>119</sup> the doctrine of sudden emergency has a similar definition that merely adds the element of an unexpected circumstance.<sup>120</sup> Another similarity between the doctrines is that an unavoidable accident is not a defense, but a matter of law.<sup>121</sup> Thus, as the North Dakota Supreme Court also declared with a sudden emergency instruction, the issue of unavoidable accident plays a role in initially finding a driver negligent rather than as a means to escape liability from the plaintiff’s established prima facie case of negligence.<sup>122</sup> Despite familiar criticisms of the doctrine,<sup>123</sup> the North Dakota Supreme Court has approved the use of instructions for the jury to decide the driver’s negligence.<sup>124</sup>

## 3. *No-Fault Insurance in North Dakota*

Recognizing the need to provide more compensation for innocent victims in motor vehicle accidents, the North Dakota Legislature enacted the North Dakota Auto Accident Reparations Act in 1975, providing for “no-fault” insurance in chapter 26.1-41 of the North Dakota Century

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116. *Cf. id.* (“The doctrine is . . . to be utilized in determining the issue of negligence. . .”).

117. *Id.* at 178; *see also* N.D. R. CIV. P. 8(c) (requiring affirmative defenses to be pled).

118. *See generally* Reuter v. Olson, 59 N.W.2d 830 (N.D. 1953) (providing an emergency and unavoidable accident instruction in the same case). However, other states have analogized unavoidable accident with sudden medical emergency. *See* Parker v. Washington, 421 P.2d 861, 866 (Okla. 1966) (“unavoidable accident by reason of sudden unconsciousness”).

119. *Reuter*, 59 N.W.2d at 835.

120. *See, e.g.*, Ebach v. Ralson, 510 N.W.2d 604, 609 (N.D. 1994).

121. Walketzko v. Herdegen, 226 N.W.2d 648, 653 (N.D. 1975).

122. *Id.* (stating the doctrine is “one aspect of the concept of proximate cause”).

123. *See id.* at 653 n.3 (addressing “that unavoidable accident instructions are disapproved by a strong and growing minority of jurisdictions and are particularly inappropriate in jurisdictions which have adopted the doctrine of comparative negligence”).

124. *Id.* at 653; *see also* Reuter, 59 N.W.2d at 836 (presenting a jury question).



Code.<sup>125</sup> Under no-fault insurance, the owner of a motor vehicle buys insurance that “automatically covers an individual who sustains bodily injury in that motor vehicle.”<sup>126</sup> As a result, the owner may not sue for non-economic loss unless serious bodily injury occurred.<sup>127</sup> Instead, the innocent driver collects from the insurance company and may only sue if medical bills meet a threshold of \$2500.<sup>128</sup>

An innocent driver in an automobile accident who is covered by no-fault insurance would likely be able to collect the benefits from his or her own insurance company so long as the accidental injury occurred while occupying his or her motor vehicle.<sup>129</sup> However, an incapacitated driver covered by no-fault insurance may have a more difficult task of proving the no-fault requirements.<sup>130</sup> Because the policy of no-fault insurance is “to provide coverage for injury resulting *directly from motoring accidents*,”<sup>131</sup> an accident caused by a sudden medical emergency would not result in an injury under the terms of no-fault insurance. Thus, the no-fault system falls short of providing compensation for drivers suffering “from the failure of the human body to function properly” as opposed to vehicle operation failure.<sup>132</sup>

#### B. ADOPTION OF THE SUDDEN MEDICAL EMERGENCY DEFENSE

No cases brought to the North Dakota Supreme Court have argued for the adoption of the sudden medical emergency defense in a motor vehicle case or the validity of the defense. As an initial step, however, an allegedly incapacitated driver may attempt to argue non-liability using the well-established doctrines from North Dakota common law.<sup>133</sup> For example, under the sudden emergency doctrine, an incapacitated driver could argue the “sudden emergency” of the medical event was not created by the driver and that, although an accident occurred, he or she responded to the emergency in a way that a reasonable person would have.<sup>134</sup> Presuming the

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125. *No-Fault Insurance in North Dakota – History*, N.D. LEGIS. COUNCIL (Jan. 2004), <http://www.legis.nd.gov/assembly/58-2003/docs/pdf/59152.pdf>.

126. *Id.*

127. *Id.*

128. The dollar amount is necessary in order to qualify under the definition of “serious injury.” N.D. CENT. CODE § 26.1-41-01(21) (2008).

129. *See id.* § 26.1-41-06.

130. *See generally* State Farm Mut. Auto. Ins. Co. v. LaRoque, 486 N.W.2d 235 (N.D. 1992) (noting no-fault statutes impose the requirements on the owner of the motor vehicle).

131. State Farm Mut. Auto. Ins. Co. v. Estate of Gabel, 539 N.W.2d 290, 293 (N.D. 1995) (emphasis added).

132. *Id.*

133. *See supra* Parts III.A.1-2.

134. *See* Ebach v. Ralston, 510 N.W.2d 604, 608-09 (N.D. 1994).

driver did, in fact, exercise ordinary care given the emergency, he or she essentially argues the plaintiff cannot establish a prima facie case of negligence, and the driver cannot be held liable.<sup>135</sup> A similar argument may be made under the unavoidable accident doctrine—that the sudden medical emergency rather than the driver caused the accident and resulting injuries.<sup>136</sup> Ultimately, the issue would be presented to the jury to decide whether the event occurred, whether the proper standard of care was given in light of the event, and whether the incapacitated driver was negligent.<sup>137</sup>

Although the doctrines of sudden emergency and unavoidable accident may successfully be utilized in a case of sudden incapacitation while driving, adoption of the sudden medical emergency defense in North Dakota may be more appropriate as a means to fight liability. For instance, the premise of the sudden emergency doctrine is that the driver somehow “acted as a reasonably prudent person, in view of the emergency.”<sup>138</sup> In contrast, the sudden medical emergency defense suggests no action on the part of the incapacitated driver, but rather there was no control at all.<sup>139</sup> Therefore, if the medical event was severe enough to render the driver incapable of driving, and there was no indication the medical event would occur prior to the accident, the driver would be in a more advantageous position under the sudden medical emergency defense, claiming he or she could not be liable.<sup>140</sup>

Another advantage to adopting the sudden medical emergency defense for the incapacitated driver is the defense may be an affirmative defense instead of a principle of law.<sup>141</sup> The driver benefits from the affirmative defense because, despite many cases of sudden medical emergency going to the jury to resolve factual disputes regarding foreseeability and timing of the event,<sup>142</sup> if the evidence is uncontroverted, the driver may escape liability as a matter of law. In other words, while the sudden emergency and unavoidable accident doctrines utilize instructions for the jury to decide liability, the evidence presented by the incapacitated driver may indicate undisputed unforeseeability of the medical event prior to the accident

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135. See *Farmers Union Grain Terminal Ass'n v. Briesse*, 192 N.W.2d 170, 179 (N.D. 1971).

136. See *Reuter v. Olson*, 59 N.W.2d 830, 835 (N.D. 1953).

137. *Id.* at 836.

138. *Rustin v. Smith*, 657 A.2d 412, 415 (Md. Ct. Spec. App. 1995).

139. *Cohen v. Petty*, 65 F.2d 820, 821 (D.C. 1933).

140. See *id.*

141. Compare *Storjohn v. Fay*, 519 N.W.2d 521, 526 (Neb. 1994) (explaining “courts generally hold that a loss of consciousness defense is an affirmative defense” to be proven by the defendant after the plaintiff establishes a prima facie case of negligence against him), with *Farmers Union Grain Terminal Ass'n v. Briesse*, 192 N.W.2d 170, 179 (N.D. 1971) (explaining the emergency doctrine is a principle of law, not an affirmative defense).

142. Kopstein, *supra* note 17, at 24-25.

sufficient to render judgment immediately for the incapacitated driver.<sup>143</sup> Additionally, although some authority equates arguing sudden incapacitation with unavoidable accident or sudden emergency,<sup>144</sup> precluding the plaintiff from establishing the prima facie case of negligence against the defendant, most jurisdictions accept the defense as an exculpatory use after the plaintiff has established all the elements of negligence.<sup>145</sup> If this majority viewpoint is adopted in North Dakota, the affirmative defense would need to be specifically pleaded, in accordance with the North Dakota Rules of Civil Procedure.<sup>146</sup>

More difficult issues to resolve are which elements would comprise the defense and which burden of proof would be required of the defendant to sufficiently prove the sudden medical emergency. The elements of a medical event being sudden and unforeseen are uniform.<sup>147</sup> Depending on how the other elements are defined, though, the medical event may be narrowly confined to unconsciousness,<sup>148</sup> or may be broader to include all events resulting in incapacitation.<sup>149</sup> To avoid future litigation resolving the definition of “incapacitation” and to avoid the risk of subsuming the other possible doctrines in North Dakota requiring unconsciousness as an element may be favorable.<sup>150</sup>

With regard to the issue of burden of proof, many jurisdictions require only a preponderance of the evidence standard.<sup>151</sup> However, for policy reasons explained below, a higher burden of clear and convincing evidence may be necessary.<sup>152</sup> While it is likely that the sudden medical emergency defense could be adopted in North Dakota, following in line with the majority of jurisdictions,<sup>153</sup> these important policy considerations must be examined to fully understand the defense’s implications.

### C. POLICY CONSIDERATIONS

The rationale behind invoking the sudden medical emergency defense lies in negligence theory, but the harsh consequences of the defense on a

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143. *See id.*

144. *See Tropical Exterminators, Inc. v. Murray*, 171 So. 2d 432, 434 (Fla. Dist. Ct. App. 1965).

145. *See, e.g., Storjohn*, 519 N.W.2d at 526.

146. *See* N.D. R. CIV. P. 8(c).

147. Travers, *supra* note 7, at 330.

148. *See, e.g., Roman v. Estate of Gobbo*, 791 N.E.2d 422, 432 (Ohio 2003).

149. *See, e.g., Word v. Jones ex rel. Moore*, 516 S.E.2d 144, 147 (N.C. 1999).

150. *But see id.*

151. *Freese v. Lemmon*, 267 N.W.2d 680, 685-86 (Iowa 1978).

152. *See, e.g., Brannon v. Shelter Mut. Ins. Co.*, 507 So. 2d 194, 196-97 (La. 1987).

153. *See* Travers, *supra* note 7, at 330.

plaintiff's recovery implicate several policy issues.<sup>154</sup> Some of the issues were addressed in *Roman v. Estate of Gobbo*,<sup>155</sup> where the appellee allegedly suffered an incapacitating heart attack prior to the accident.<sup>156</sup> To counter the appellee's sudden medical emergency defense, the appellants claimed the defense was contrary to motor safety laws, which were enacted not only to protect the public but also to allow recovery for innocent victims.<sup>157</sup> The Supreme Court of Ohio noted the conflict between tort law principles:

[O]n the one hand, in order to be found negligent, one must act unreasonably, i.e., only the blameworthy should be liable for the consequences of their actions; and on the other hand, injured parties should be compensated for their losses if possible, especially when they are totally innocent and could have done nothing to avoid the injuries they suffered.<sup>158</sup>

To the majority of the court, the public policy argument was unpersuasive due to the generally accepted principles of other jurisdictions.<sup>159</sup>

While the majority merely sympathized with the appellants, the remaining justices found the public policy arguments convincing.<sup>160</sup> As one justice stated, “[c]ommon sense dictates that the situation should be remedied” and the victims of the accident would be subjected to a grossly unfair result.<sup>161</sup> A practical consideration explained by the dissent was the inability of the innocent driver to collect damages or uninsured motorist coverage.<sup>162</sup> In order to further public policy, the dissent recommended a rule allowing injured or killed drivers “to pursue damages against a person whose sudden medical emergency resulted in a statutory violation and was the proximate cause of the death or injury.”<sup>163</sup> Because the innocent driver would likely recover either from the incapacitated driver's liability insurance or his or her own uninsured motorist coverage, a more equitable result would be accomplished.<sup>164</sup> Another justice, however, suggested legislative

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154. *See, e.g., Roman v. Estate of Gobbo*, 791 N.E.2d 422, 433 (Ohio 2003) (O'Connor, J., concurring).

155. 791 N.E.2d 422 (Ohio 2003).

156. *Roman*, 791 N.E.2d at 424.

157. *Id.* at 427.

158. *Id.* at 426-27.

159. *See id.* at 429 (“The significance of appellants' arguments is weakened by the paucity of truly convincing authority they have been able to cite in support of their position.”).

160. *Id.* at 433 (O'Connor, J., concurring); *id.* (Pfeifer, J., dissenting).

161. *Id.* (O'Connor, J., concurring).

162. *Id.* (Pfeifer, J., dissenting).

163. *Id.* at 434.

164. *Id.*

action, rather than judicial fiat, would be more appropriate for public policy issues.<sup>165</sup>

Other courts have briefly stated the potential unfairness in denying recovery to a plaintiff if the defendant suffered a sudden medical emergency.<sup>166</sup> Nonetheless, they have disregarded policy arguments in favor of the defense.<sup>167</sup> Taking the advice of the *Roman* concurrence, though, may lead to legislative enactment providing recovery according to the public's will.<sup>168</sup>

Without legislative involvement regarding the sudden medical emergency defense, the "no-fault" insurance system of North Dakota may provide some compensation for the innocent victim.<sup>169</sup> Although the injured plaintiff may potentially seek relief without proving the defendant driver's fault through this system, the plaintiff may not be made whole and may be more satisfied with judicial intervention.<sup>170</sup> Should the plaintiff bring the case in court and should the sudden medical emergency defense be adopted in North Dakota, knowing ways to attack the defense is crucial to an innocent plaintiff's case in finding some type of recovery.<sup>171</sup>

#### D. ATTACKING THE DEFENSE

Courts have readily adopted the sudden medical emergency defense, noting "as between an innocent injured party and an innocent fainting driver, the innocent injured party must suffer."<sup>172</sup> Due to the harsh effect of the defense on an innocent victim, a detailed analysis of the particular facts involved in an automobile case may uncover ways for the innocent victim to attack the defense, particularly by gathering medical data and testimony.<sup>173</sup>

Although a defendant does not need to produce medical data supporting the defense of sudden medical emergency so long as he or she has

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165. *Id.* at 433 (O'Connor, J., concurring).

166. *See Cruz v. United States*, 987 F. Supp. 1299, 1304 (D. Haw. 1997) ("This court sympathizes with Cruz, an innocent bystander who was truly in the wrong place at the wrong time . . . . Nevertheless, because Kameda was not negligent and the accident was unavoidable, Defendant is not liable to Cruz.").

167. *Id.*

168. *See* Letter from Robert P. Rutter to William Strubbe and Jan Saurman, Chairmen, Ohio State Bar Ass'n's Negligence & Ins. Law Comm. (Oct. 13, 2005) (on file with the author) (discussing the need for legislative action to endorse Justice O'Connor's concurrence in *Roman*).

169. *See* discussion *supra* Part III.A.3; *see also* N.D. CENT. CODE ch. 26.1-41 (2008).

170. N.D. CENT. CODE § 26.1-41-08 (an action against a driver secured under no-fault may only occur if there was a serious injury while occupying any motor vehicle).

171. *See infra* Part III.D.

172. *Bashi v. Wodarz*, 53 Cal. Rptr. 2d 635, 639 (Cal. Ct. App. 1996).

173. *See infra* Part III.D.

evidence the medical event occurred, a plaintiff should seek the defendant's medical data through the discovery process for several reasons.<sup>174</sup> One reason may be to counter the elements of the defense, especially "incapacity."<sup>175</sup> For example, some states require unconsciousness to fall within the defense,<sup>176</sup> but other states may only require an element of incapacitation severe enough for the defendant to have lost control of the vehicle.<sup>177</sup> Thus, depending on how the elements are defined, uncovering the severity of the event may be crucial in establishing whether the defense is applicable.<sup>178</sup>

Another purpose for seeking medical data plays into the elements of foreseeability and timing.<sup>179</sup> The defense requires that the medical emergency be unforeseeable and occur prior to the accident rather than afterwards.<sup>180</sup> In determining the element of timing, testimony about the defendant's behavior immediately following the accident may help a plaintiff establish the defendant was never incapacitated when the accident actually occurred.<sup>181</sup> Other testimony may also rebut the defendant's claim of incapacitation if it reflects the defendant's driving, whether it was that expected of an incapacitated person, or whether a statutory duty was breached before incapacitation occurred.<sup>182</sup>

Medical testimony about the defendant's condition may assist for the element of foreseeability, as well.<sup>183</sup> "Foreseeability focuses on what the defendant knew at the time he or she made the decision to operate a vehicle and whether that decision was reasonable under the circumstances."<sup>184</sup> Medical data may reveal sufficient information showing the driver knew or should have known a medical emergency could have occurred based on the driver's circumstances and conditions.<sup>185</sup> If nothing else, the evidence may

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174. See generally Kopstein, *supra* note 17.

175. *Id.* at 24 (noting the varying degrees between states for "incapacity").

176. See, e.g., Brannon v. Shelter Mut. Ins. Co., 507 So. 2d 194, 197 (La. 1987) (requiring the defendant to have suddenly lost consciousness).

177. See, e.g., Abreu v. F.E. Dev. Recycling, Inc., 35 So. 3d 968-69 (Fla. Dist. Ct. App. 2010) (requiring sudden loss of consciousness or incapacitation resulting in a loss of control); Word v. Jones *ex rel.* Moore, 516 S.E.2d 144, 147 (N.C. 1999) (requiring no unconsciousness for the "sudden-incapacitation" defense).

178. See Kopstein, *supra* note 17, at 24.

179. *Id.*

180. See 17 AM. JUR. 3D, *supra* note 23, § 4.

181. Kopstein, *supra* note 17, at 25.

182. *Id.*; see also Estate of Embry v. GEO Trans. of Ind., Inc., 395 F. Supp. 2d 517, 520-21 (E.D. Ky. 2005).

183. Kopstein, *supra* note 17, at 25.

184. *Id.*

185. See 17 AM. JUR. 3D, *supra* note 23, § 12.

preclude judgment as a matter of law in favor of the defendant and would allow the plaintiff to argue foreseeability to a jury.<sup>186</sup>

In addition, an insight into foreseeability may play into the plaintiff's pleading requirements. Although a sudden medical emergency is typically raised as a defense, a plaintiff may preemptively plead the defendant's sudden incapacitation was foreseeable and, thus, driving with such knowledge was negligent.<sup>187</sup> While the option is available, the allegation of a foreseeable medical emergency unnecessarily adds the burden of coming forward with evidence of this nature on the plaintiff in addition to the required negligence elements.<sup>188</sup> So long as the primary basis of liability does not require alleging foreseeable incapacitation of the defendant driver, pleading only negligence may be an easier evidentiary burden on the plaintiff and may require more evidentiary burden on the defendant in pleading the defense.<sup>189</sup>

#### IV. CONCLUSION

Finding a driver negligent in a motor vehicle accident case may be more difficult for a plaintiff if the driver alleges a sudden medical emergency occurred. Many jurisdictions have declared that a sudden medical emergency is a complete defense, leaving a plaintiff with little to no recovery if the event was unforeseeable and sudden.<sup>190</sup> In North Dakota, the sudden medical emergency defense has not yet been adopted, but similar doctrines preclude finding negligent those drivers faced with unexpected circumstances, and compensation may be available for innocent drivers through "no-fault" insurance.<sup>191</sup> Should the defense be adopted in North Dakota, the terms of the defense, including the elements and burdens of proof, must be clearly defined and policy issues must be thoroughly considered.<sup>192</sup>

*Vanessa L. Anderson\**

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186. See Kopstein, *supra* note 17, at 25.

187. 17 AM. JUR. 3D, *supra* note 23, § 3; see also Freese v. Lemmon, 267 N.W.2d 680, 685-86 (Iowa 1978).

188. 17 AM. JUR. 3D, *supra* note 23, § 3.

189. *Cf. id.*

190. See discussion *supra* Part II.

191. See discussion *supra* Part III.

192. See discussion *supra* Part III.

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