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Uncommon Defenses

Retooling classic strategies to win your case

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**Uncommon Defenses**

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Uncommon Defenses

- Intoxication issues
- Assumption of risk
- Wrongful conduct
- Sudden emergency

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Intoxication Issues

- Statute MCL 600.2955a provides the reason why intoxication is such a serious issue:
 - Sec. 2955a. (1) It is an absolute defense in an action for the death of an individual or for injury to a person or property that the individual upon whose death or injury the action is based had an impaired ability to function due to the influence of intoxicating liquor or a controlled substance, and as a result of that impaired ability, the individual was 50% or more the cause of the accident or event that resulted in the death or injury.

Continued



Intoxication Issues

- If the individual described in this subsection was less than 50% the cause of the accident or event, an award of damages shall be reduced by that percentage.



Intoxicating Liquor

- You know it when you see it



What is a “Controlled Substance?”

- (a) “Controlled substance” means that term as defined in Section 7104 of the public health code.



As Defined by Michigan Health Code

- “Controlled substance” means a drug, substance, or immediate precursor included in Schedules 1 to 5.



Health Code Definition

- “Controlled substance analogue” means a substance the chemical structure of which is substantially similar to that of a controlled substance in schedule 1 or 2 and that has a narcotic, stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to or greater than the narcotic, stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance included in schedule 1 or 2 or, with respect to a particular individual, that the individual represents or intends to have a narcotic, stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to or greater than the narcotic, stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance included in schedule 1 or 2.



Examples of Scheduled Drug Classification in Michigan

- Schedule 1 controlled substances include LSD, Peyote, ecstasy (MDMA), mushrooms and heroin.
- Schedule 2 controlled substances include cocaine, Opium, high potency Morphine, Oxycodone and Methamphetamines.
- Schedule 3 controlled substances include lower potency Morphine, anabolic steroids such as Ketamine, and some Codeine mixtures.

Continued



Examples of Scheduled Drug Classification in Michigan

- Schedule 4 controlled substances include Rohypnol, Valium and Xanax.
- Schedule 5 controlled substances include mixtures or medicines containing codeine, medicine with ephedrine and mixtures with opium.



MCL 600.2955a

- Now that we have defined a controlled substance...back to MCL 600.2955a from earlier:
 - (b) “Impaired ability to function due to the influence of intoxicating liquor or a controlled substance” means that, as a result of an individual drinking, ingesting, smoking, or otherwise consuming intoxicating liquor or a controlled substance, the individual’s senses are impaired to the point that the ability to react is diminished from what it would be had the individual not consumed liquor or a controlled substance.

Continued



MCL 600.2955a

- An individual is presumed under this section to have an impaired ability to function due to the influence of intoxicating liquor or a controlled substance if, under a standard prescribed by section 625a of the Michigan vehicle code, Act No. 300 of the Public Acts of 1949, being section 257.625a of the Michigan Compiled Laws, a presumption would arise that the individual's ability to operate a vehicle was impaired.



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Michigan Civil Jury Instructions on Intoxication

- **M Civ JI 13.02 Intoxication as Affecting Negligence:**
 - It has been claimed that [name] had been drinking [alcoholic beverage]. According to the law, one who voluntarily impairs his or her abilities by drinking is held to the same standard of care as a person whose abilities have not been impaired by drinking. It is for you to decide whether [name]'s conduct was, in fact, affected by drinking and whether, as a result, [he/she] failed to exercise the care of a reasonably careful person under the circumstances which you find existed in this case.



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M Civ JI 12.01 Violation of Statute—Negligence

- We have a state statute which provides that [here quote or paraphrase the applicable part of the statute as construed by the courts]. If you find that the [defendant/plaintiff] violated this statute before or at the time of the occurrence, you may infer that the [defendant/plaintiff] was negligent. *(You must then decide whether such negligence was a proximate cause of the occurrence.)
- Using intoxicating liquor or a controlled substance as violation of statute?



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Alcohol Use

- Witness statements
- Police reports (PBT/DataMaster)
- Medical records (ETOH)
 - Drug screen
 - Blood testing



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Breathalyzer For Detection of Marijuana Intoxication

- Interdisciplinary team from University of Pittsburgh Department of Chemistry and Swanson School of Engineering has developed a breathalyzer device that can measure amount of tetrahydrocannabinol (THC), the psychoactive compound in marijuana, in user's breath. Current drug testing methods rely on blood, urine or hair samples and, therefore, cannot be done in the field. They also only reveal that user recently inhaled drugs, not that they are currently under the influence.

Continued



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Breathalyzer For Detection of Marijuana Intoxication

- It was tested in lab and shown to be able to detect THC in a breath sample that also contained components like carbon dioxide, water, ethanol, methanol, and acetone.
- Device detects THC levels in a person's breath, but it has not been tested for edibles, pills or tinctures containing marijuana or for detecting metabolites.
- Researchers will continue to test prototype but hope it will soon move to manufacturing and be available for use.

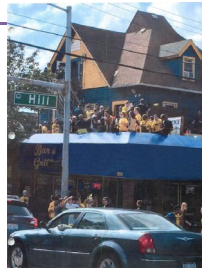


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College Town U.S.A.

- Sunny football weekend
- 2nd story roof top pregame party
- Freshman tenant sits on canopy at edge of roof over street
- Falls 12 feet, lands on sidewalk



Continued

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College Town U.S.A.

- Freshman sustains massive brain and spinal injuries—ultimately more than \$800,000 in medical bills
- Blood alcohol .18—tox screen at hospital
- Freshman underage – wrongful conduct
- No code compliant guardrail protecting second story
- And only \$1 million in coverage —building was worth \$3 million
- So, collectible defendant with exposure in excess of policy limits



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But What About Legalized Cannabis/Marijuana?

- Look for that in hospital drug screens
- Part of deposition script ask about marijuana use
- Other prescription drugs
- Michigan Automated Prescription System (MAPS) – Tracks prescribed and filled controlled substances
- Opioid crisis
- Retain toxicologist for an opinion



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Assumption of Risk

- Doctrine – Assume risk of injury by engaging in activity
 - Since 1965, not applied in most ordinary negligence actions
- *volenti non fit injuria* – Translated literally, this Latin phrase means “to a willing person a wrong is not done.” Garner, Dictionary of Modern Legal Usage (2d ed.) (New York: Oxford Univ Press, 1995), p. 921.

Continued



Assumption of Risk

- Example: Mixed martial artist has no claim for injuries inflicted during a match.
- Now, line of liability for recreational activities is drawn at recklessness.
- But what about inherently dangerous activities like skiing?
- Get a waiver!

Continued



Assumption of Risk

- Zip line — Not a contact sport but an inherently dangerous activity.
- Indoor Rock Climbing — Doctrine of primary assumption of risk may be asserted as a defense if plaintiff has expressly contracted to assume the risk. *Felgner v Anderson*, 375 Mich. 23, 55-56; 133 NW2d 136 (1965).
 - Plaintiff expressly assumed risks of indoor rock climbing, including that he would incur injury due to negligence of his belayer.



Open Wheel Car Racing on Dirt Tracks



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Assumption of Risk

- Obvious risks
- Crash resulted in broken axle from one vehicle, penetrating the engine compartment and then passenger compartment of second vehicle, spearing its driver at the knee through the length of thigh to the hip.
- Waiver was supposed to be signed but was never located
- Injured driver was totally disabled from his truck driving job because he could no longer climb into cab
- Risks are obvious but not contractually accepted /waived

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Can A Waiver Change Standard of Care?

- Often, we see these cases involving recreational activities in terms of releases and waivers in writing, but the common law provides, in this variation on assumption of risk, a potentially complete defense.

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Assumption of the Risk

- Carelessness versus recklessness
 - Participants in recreational activities do not expect to sue or be sued for mere carelessness. A recklessness standard also encourages vigorous participation in recreational activities, while still providing protection from egregious conduct. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 94, 597 N.W.2d 517 (1999)



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Reckless Defined

- “Reckless” is defined as “utterly unconcerned about consequences; rash; careless.” Random House Webster’s Dictionary (2000) *Tibble v Am Physicians Capital, Inc*, No 306964, 2014 WL 5462573 (Mich. Ct. App. Oct. 28, 2014)



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Certain Inherent Risks

- When people engage in a recreational activity, they have voluntarily subjected themselves to certain risks inherent in that activity.
- As a result, co-participants in a recreational activity owe each other a duty not to act recklessly.



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Recklessness Standard of Care

- Recklessness standard of care, however, extends only to "injuries that arise from risks inherent to the activity."
Bertin v Mann, 502 Mich. 603, 609, 918 N.W.2d 707 (2018)
- Trial court, therefore, erred in finding that reckless misconduct standard of care did not apply because parties were not engaged in precisely the same activity.



Element of Wrongful Conduct Rule

- Elements of the wrongful conduct rule, (1) the plaintiff's conduct must be not merely illegal but prohibited or almost entirely prohibited under a penal or criminal statute; (2) the plaintiff's conduct must be a cause of his or her damages; (3) the defendant and the plaintiff must be about equally culpable; and (4) the statute on which the plaintiff bases his or her claim must not expressly or impliedly authorize a claim by persons similarly situated.



Two Exceptions

- First is culpability exception, which may apply where both plaintiff and defendant have engaged in illegal conduct, but parties do not stand in *pari delicti*. Plaintiff engaged in serious illegal conduct that proximately caused plaintiff's injuries, may still seek recovery against defendant if defendant's culpability is greater than plaintiff's culpability for injuries, plaintiff has acted under circumstances of oppression, imposition, hardship, undue influence, or great inequality of condition or age.

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Two Exceptions

- Second exception is statutory-basis exception, which may be implicated where statute that plaintiff alleges the defendant violated allows plaintiff to recover for injuries suffered because of violations.



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Related Additional Defense

- Doctrine of "*in pari delicto*"
 - As between parties *in pari delicto*, that is equally in the wrong, the law will not lend itself to afford relief to one as against the other, but will leave them as it finds them.



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1 Mich. Pl. & Pr. § 6:3 (2d ed.)

- Michigan recognizes a wrongful conduct rule premised on a fundamental common-law principle, which operates to bar a plaintiff's claim when action is based on illegal conduct.
- Maxim states that a party may not maintain an action if, in order to establish the cause of action, one must rely, in whole or in part, on an illegal or immoral act or transaction to which he or she is a party.



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Orzel by Orzel v Scott Drug Co.,

449 Mich. 550, 537 N.W.2d 208 (1995)

- Wife, as guardian of her husband, brought suit against pharmacy for allegedly negligently supplying Desoxyn, Schedule II controlled substance, to her husband, which caused his physical and psychological addiction to drug and mental illness.
- Circuit Court entered judgment on jury verdict in favor of plaintiffs, but found drug user to be 50% negligent, and then entered judgment, notwithstanding verdict, under wrongful conduct doctrine.

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Orzel by Orzel v Scott Drug Co.,

449 Mich. 550, 537 N.W.2d 208 (1995)

- Michigan Court of Appeals reversed.
- Michigan Supreme Court granted appeal.
 - Supreme Court held that drug user's claim against pharmacy for allegedly negligently and illegally filling drug user's purportedly valid prescriptions was barred since it was based, at least in part, on drug user's illegal conduct.

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Chorazyczewski v Costco Wholesale Corp.,

627 F. App'x 515 (6th Cir. 2015)

- Customer brought action against retail store, alleging assault and battery and negligence, based on employee's use of force in attempt to prevent him from fleeing with a stolen seven-inch television.
- U.S. District Court for the Eastern District of Michigan granted summary judgment in favor of defendant.

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Chorazyczewski v Costco Wholesale

Corp., 627 F. App'x 515 (6th Cir. 2015)

- Upon plaintiff's appeal, Michigan Court of Appeals held that:
 - District court erred by not engaging in complete analysis of wrongful conduct doctrine.
 - District court must make reasonableness determination in first instance.



Related Additional Defense

- MCL 600.2955b codifies the rule in part by providing that a plaintiff may not sue for bodily injury or death suffered during the commission or flight from the commission of a felony.



Sudden Emergency Doctrine

- Sudden-emergency doctrine is a judicially created principle that was defined in *Socony Vacuum Oil Co. v Marvin* in 1946.



What is it?

- One who suddenly finds himself in place of danger, and is required to act without time to consider best means that may be adopted to avoid the impending danger, is not guilty of negligence if he fails to adopt what subsequently and upon reflection may appear to have been a better method, unless emergency in which he finds himself is brought about by his own negligence.



Sudden Emergency Doctrine

- Michigan Supreme Court decided that a sudden emergency doctrine instruction is appropriate where party is confronted with "unusual" or "unsuspected" situation.



Unsuspected Facts

- "Unsuspected facts are those which may appear in the everyday movement of traffic, but which take place so suddenly that the normal expectations of due and ordinary care are gain modified by the attenuating factual conditions." *Amick v Baller*, 102 Mich App 339, 341-342, 301 N.W. 2d 530 (1980)



Presumption of Negligence

- In Michigan, there is an presumption of negligence in rear-end accidents.
- However, even in a rear-end accident, comparative negligence applies.



Sudden Emergency— By Any Other Name

- Plaintiff's motorcycle collided with rear bumper of a vehicle, which fled the scene of the accident. Plaintiff hit rear bumper of vehicle after vehicle suddenly braked.
- Accident occurred during rush hour on freeway. Plaintiff and a witness to incident testified at trial that plaintiff could not have done anything different to avoid accident and that vehicle's driver, known as the uninsured motorist, was entirely at fault.

Continued



Sudden Emergency— By Any Other Name

- Michigan Law does not require anticipation of erratic driving.
- Plaintiff's violation of statute – rear end collision triggering a presumption of negligence – was excused for reasons other than sudden emergency and the focus was the uninsured motorist was at fault because he braked for no reason and braked in an attempt to harass plaintiff.

Continued



Sudden Emergency— By Any Other Name

- It was role of trier of fact to determine whether plaintiff was negligent and to apportion fault between parties. See *White v Taylor Distrib. Co., Inc.*, 275 Mich. App. 615, 739 N.W.2d 132 (2007), aff'd 482 Mich. 136, 753 N.W.2d 591 (2008)). 275 Mich. App. at 621–622, 739 N.W.2d 132.
- In effect, limits impact of presumption in rear-end cases.



Excuse

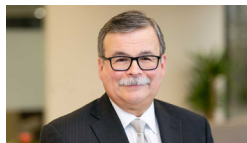
- M Civ II 12.02. Excused Violation of Statute – However, if you find that [defendant/plaintiff] used ordinary care and was still unable to avoid the violation because of [state here the excuse claimed], then [his/her] violation is excused. If you find that [defendant/plaintiff] violated this statute and that the violation was not excused, then you must decide whether such violation was a proximate cause of the occurrence.



Questions?



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New Supreme Court Discovery Rule Places Emphasis on Proportionality Over Relevance

POSTED BY ALAN BERNSTEIN, RUTHLESS ATTORNEYS

09/21/2019

Discovery will change dramatically under a new Michigan Supreme

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