IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Smith v. Tucker,*** 2007 BCSC 489

Date: 20070411

Docket: 35661
Registry: Vernon

Between:

Wayne Smith

Plaintiff

And

Michele Francisca Tucker

Defendant

Before: The Honourable Madam Justice Russell

Reasons for Judgment

Counsel for Plaintiff	Robert A. Clarke
Counsel for Defendant	Robert E. Ross
Date and Place of Hearing:	March 13, 2007 Vernon, B.C.

Introduction

[1] This is an application brought by the defendant pursuant to Rule 18A of the ***Rules of Court*** to have the plaintiff's claims against her dismissed. The plaintiff seeks a determination that the defendant was negligent, with quantum to be determined.

[2] The plaintiff claims damages for personal injuries suffered as a result of the defendant's negligence in permitting her truck to stall in the middle of an intersection by running out of gas, despite receiving a warning tone from the truck indicating that she had been low on fuel. The plaintiff was not directly harmed by the defendant stalling her truck. Rather, the plaintiff suffered an injury to his tendon as a result of his attempting to push the truck out of the intersection. It has since become clear that the plaintiff has suffered permanent damage to his tendon, despite undergoing corrective surgery. He, therefore, seeks damages from the defendant on the basis that she is liable to him as a rescuer, relying on authorities holding that a negligent actor is liable not only to his direct victims, but also to those who attempt to rescue those victims. The defendant denies that the circumstances created sufficient danger to classify the plaintiff as a rescuer.

Facts

[3] The facts of this matter are relatively straightforward and there is only one factual issue of real disagreement between the parties. However, I have determined that that conflict does not render me unable to decide the issues before me and that it would not be unjust to decide the issues on this application.

[4] The incident in question occurred at approximately 8:50 a.m. on September 11, 2003, at the intersection of 32nd Street and 32nd Avenue in Vernon, British Columbia. Michele Tucker, the defendant, was driving her three children to school in Vernon from their home near Armstrong. She was driving a 2003 Ford F350 truck which was equipped with a fuel gauge, a low fuel level warning tone and a "Distance to Empty" ("DTE") feature on the vehicle's trip computer. The DTE provides an estimate of how much further the vehicle may be driven before it will run out of gas.

[5] On this day, the weather was clear and the roads were dry. As she came into Vernon, near the Swan Lake Junction, the defendant heard the warning tone indicating that the vehicle was low on fuel. She called her husband on her cell phone and he indicated to her that he believed there was sufficient fuel in the vehicle to enable her to drop off the children at school before obtaining fuel. The defendant dropped her two eldest children off at their school, located at 2700 – 28th Avenue, and then proceeded west on 28th Street to 32nd Avenue. As she approached the intersection, the light was green. She felt the truck begin to stall and decided to turn right.

[6] The intersection in which the defendant's truck stalled was described as follows: the intersection has two lanes running north and two lanes running south; there are three lanes running in the east-west direction: a dedicated eastbound lane, a dedicated westbound lane and a designated left hand turn lane in either direction; the intersection is controlled by traffic lights.

[7] The defendant says that the truck stalled in the eastbound lane of 32ndAvenue and was not blocking northbound traffic. She immediately put on her hazard lights. At no time was there a collision between any vehicles. The defendant says that she then shifted the truck into neutral, got out of the truck, began pushing against the door frame with one hand and steering the truck with the other, with the door open.

[8] The plaintiff was driving a taxi westbound on 32nd Avenue and had stopped in the left hand turn lane at the intersection. He had a passenger at the time, a postal employee named Adellamae Piper. The light for the plaintiff was red. The plaintiff says that the defendant was travelling southbound on 32nd Street, turning left onto 32nd Avenue, and that she was stalled such that she was blocking the eastbound lane of 32nd Avenue, at least one northbound lane of 32nd Street and the westbound left turn lane of 32nd Avenue, such that he could not execute his left turn.

[9] On this point, I find that the defendant's evidence that she was making a right turn is consistent with her reported travel itinerary. Further, a review of the plaintiff's affidavit reveals that his inference that she was making a left turn was based on how the situation appeared from the position of her vehicle. On the view I take of the law, and in view of the fact that traffic was not moving around the truck at the time of the incident, I find that the exact position of the truck is not determinative of the outcome of this case. Therefore, a determinative finding as to the exact location of the truck is not required to enable me to resolve the issues between these parties.

[10] The plaintiff says that the positions of the truck and the taxi were such that vehicles on 32nd Avenue proceeding eastbound could pass between them. Traffic was heavy at the time because it was a weekday morning. The plaintiff said this meant both that the vehicle was in a hazardous situation and that it was creating a hazard for other vehicles to manoeuvre around it. However, the plaintiff also said in his examination for discovery that all traffic, except vehicles travelling westbound in the through lane on 32nd Avenue, were stopped outside the intersection, either because of red lights or because of the presence of

the truck.

[11] The defendant and plaintiff recognized each other on sight, as the defendant had built a swing set for the defendant's children, and they had subsequently seen each other at a hockey game. There was some conversation between the two. The defendant cannot recall what was said, but the plaintiff says that she told him she had run out of gas and she accepted his offer to help push her to safety.

[12] The plaintiff left his taxi, telling his passenger "I won't be a minute", and proceeded to stand behind the truck on the driver's side and push. He instructed the defendant to get inside the truck and steer towards a parking space along the curb. The plaintiff managed to push the truck a short distance, although the vehicle resisted. The plaintiff felt a pain in his right leg and fell to the pavement. The defendant says that she saw him roll over and that she got out of the truck to ask if he was okay. The plaintiff then got back on his feet and began pushing the truck again. A male pedestrian arrived on the scene, before the plaintiff fell according to the defendant, or after the plaintiff fell according to the plaintiff. He began pushing on the back of the truck on the passenger side.

[13] With the combined effort of the plaintiff and the pedestrian, the truck was moved to the curb. The plaintiff returned to his taxi and was visibly limping at the time. The defendant phoned roadside assistance on her cell phone and then walked her daughter to Playschool.

[14] As a result of this incident, the plaintiff suffered a severed tendon. Although the tendon was surgically repaired, the plaintiff managed only a partial recovery. As a result, he has been left with a permanent partial disability.

ANALYSIS

Negligence of the Defendant in Running out of Fuel

[15] In order to justify the imposition of liability on the defendant, it must first be shown that she was negligent in bringing about a situation which required the plaintiff to rescue her. The plaintiff submits that an inference of negligence arises because of the circumstantial evidence of the warning lights indicating low fuel. He, therefore, submits that the defendant must show that she had no prior indication that the vehicle was running low on gas. To draw this inference of negligence, the plaintiff relies on motor vehicle accident cases in which an inference or presumption of negligence has been held to arise where vehicles have left the roadway in single vehicle accidents (see ***McIntosh v. I.C.B.C. and Maurer*** (2003), 38 M.V.R. (4th) 80, 2003 BCSC 775 at paras. 44-51, aff'd 2005 BCCA 64, discussing ***Redlack v. Vekved*** (1996), 82 B.C.A.C. 313 and ***Fontaine v. British Columbia***, [1998] 1 S.C.R. 424, 46 B.C.L.R. (3d) 1). The plaintiff further submits that the defendant's reliance on her husband's estimate that she had sufficient fuel amounts to a miscalculated risk on the part of the defendant that is not sufficient to rebut the inference of negligence.

[16] The defendant counters that she must show that she could not reasonably have foreseen a significant risk that she would run out of gas, where she did, and also relies on ***McIntosh***, *supra*. The defendant quotes from ***McIntosh***, *supra*, at para. 50:

> It is my opinion that, in order to succeed in rebutting the inference of negligence in this case, the **defendant must show that she could not reasonably have foreseen a significant risk** that black ice would be present on the highway in the area where the accident occurred. I do not mean that she has to prove on a balance of probabilities that a reasonably skilled driver exercising reasonable care would not have foreseen a significant risk of black ice, in the same circumstances. However, I think the defendant must prove that fact to a 50% probability of truth. **In other words, the defendant must establish that the probabilities that an objectively reasonable driver would not have foreseen a**

> **significant risk of black ice being at the accident location, are equal to the probabilities that a reasonable driver would have foreseen such risk.**
>
> [Emphasis that of the defendant.]

[17] ***McIntosh*** dealt with a motorist skidding on black ice when she unexpectedly saw a wolf on a highway. I do not find the analogy particularly helpful in the present circumstances: it is plausible that a driver could unexpectedly encounter a patch of black ice and, skidding in such circumstances, would not necessarily be negligent. This was the case in ***McIntosh***. However, in the case at bar, the defendant had a warning from the vehicle itself that it was low on fuel. She simply cannot assert that she was unaware that there was a risk the vehicle would run out of fuel. She intentionally chose to continue driving the vehicle, despite this warning, in order to avoid making her children late for school. She passed at least two fuel stations en route. The defendant took and accepted the risk that the vehicle might run out of fuel. Having taken that risk, she should bear the consequences of it.

[18] I conclude that the reasonably prudent driver would have foreseen the risk of the vehicle running out of fuel on the basis of the warning tone and, given that gasoline stations were located en route, would have stopped to refill or top-up the vehicle to avoid an incident such as the one that did, in fact, occur. The defendant's reliance on her husband's erroneous advice does not obviate her personal responsibility as the operator of a motor vehicle to ensure that it is in proper working condition. Therefore, I conclude that the defendant was negligent in permitting the truck to run out of fuel and stall while travelling in traffic.

The Law Relating to Rescuers

[19] In this case, the plaintiff seeks damages for his personal injuries as a rescuer. The defendant argues that the "rescue cases" require that a wrongdoer has created a situation of obvious imminent peril and a risk to the rescuing party. As there was no situation of imminent peril here because traffic was stationary, the truck's hazard lights were flashing and no one had been injured or was panicked, the defendant submits the plaintiff cannot claim damages as a rescuer. The plaintiff counters that the defendant's vehicle was in a hazardous situation and was creating a hazard for other vehicles to manoeuvre around it. Further, specific foreseeability is not required in rescue situations and danger to person or property is sufficient to invite rescue.

[20] The legal position of the rescuer is an interesting one. Originally, rescuers of the victims of negligent actors were denied compensation on the basis that their actions constituted a *novus actus interveniens* (thereby breaking the chain of causation from the original act of negligence of the defendant), or on the ground of *volenti non fit injuria* (*i.e.* that they had voluntarily assumed the risks associated with their actions and, therefore, were not entitled to recover damages from the defendant): see *e.g.* Linden, *Canadian Tort Law*, 7th ed. (Markham and Vancouver: Butterworths, 2001) at 355; Fleming, *The Law of Torts*, 8th ed. (Agincourt: The Law Book Company Limited, 1992) at 172; ***Erikson v. Sallows***, [1980] B.C.J. No. 1321 at para. 25 (S.C.) (QL) (citing an earlier edition of Fleming, *supra*).

[21] However, in view of the undesirable situation thereby created, courts began to provide relief for rescuers who were themselves injured or killed as a result of their attempts to save others. Courts began to recognize that the response to an emergency situation was not truly voluntary, but rather was brought about by the exigencies of the circumstances and the call of moral duty. Cardozo J. in an often-cited passage in ***Wagner v. International Railway Co.*** (1921), 232 N.Y. 176 at 180, 133 N.E. 437 (C.A.) stated:

> Danger invites rescue. The cry of distress is the summons to relief. The law does not ignore these reactions of the mind in tracing conduct to its consequences. It recognizes them as normal. It places their effects within the range of the natural and probable. The

> wrong that imperils life is a wrong to the imperilled victim; it is a wrong also to his rescuer… The risk of rescue, if only it be not wanton, is born of the occasion. The emergency begets the man. The wrongdoer may not have foreseen the coming of a deliverer. He is accountable as if he had.

[22] Cardozo J., in that case, rejected the notion that taking time to deliberate disentitles the rescuer to compensation. However, the Court there assumed that the peril and rescue must be in substance one transaction, such that the sight of one must have aroused the impulse to the other—in other words, so that there was unbroken continuity between the commission of the wrong and the effort to avert its consequences (at 181). This passage from ***Wagner*** was endorsed by the Supreme Court of Canada in ***Corothers v. Slobodian***, [1975] 2 S.C.R. 633, 51 D.L.R. (3d) 1 at para. 5. See also ***Horsley v. MacLaren***, [1972] S.C.R. 441, 22 D.L.R. (3d) 545.

[23] The position that a rescuer is entitled to damages from the tortfeasor was adopted by the English courts in ***Haynes v. Harwood***, [1934] 2 K.B. 240, aff'd [1935] 1 K.B. 146 (C.A.). The Australian courts also adopted a similar position to the compensation of rescuers in ***Chapman v. Hearse*** (1961), 106 C.L.R. 112 (H.Ct. Aust.). Even prior to the above decisions, a Canadian court had already held that a rescuer may be entitled to compensation, if he undertakes risks in order to rescue a victim who has been placed in a situation of peril by the defendant's negligence, particularly to rescue those who are infirm or helpless, only to suffer injury himself: see ***Seymour v. Winnipeg Electric Railway Co.*** (1910), 13 W.L.R. 566, 19 Man R. 412 (C.A.).

[24] The law in British Columbia in relation to rescuers is well summarized by Boyle J. in ***Bridge v. Jo*** (1998), 53 B.C.L.R. (3d) 338, [1999] 3 W.W.R. 167 at para. 46 (S.C.), quoting from the judgment of ***Toy v. Argenti*** (1979), 17 B.C.L.R. 365, [1980] 3 W.W.R. 276 at para. 21 (S.C.):

> In ***Toy*** Esson J. (as he then was), adopted as the law in B.C. the test in ***Steel v. Glasgow Iron & Steel Co. Ltd.***, [1944] S.C. 237:
>
> (1) The intervention of human action does not necessarily *per se* break the chain of causation between the negligence and the injury sustained. (2) To entitle the sufferer to damages, such intervention must have been reasonable and such as might have been in the contemplation of the wrongdoer. (3) In determining what is reasonable in the circumstances the interests sought to be protected must be measured in comparison with the risks involved in the action taken. (4) If the action taken is reasonable, the injured person will not be debarred from recovering damages by his not having adopted the best possible course in the circumstances, or by his having made a mere error of judgment: but he will be debarred if his action is unreasonable and unwarrantable and outside the exigencies of the emergency: and (5) It is not essential that the action should have been taken on the impulse of the moment. The same result will follow if it arises from a natural response to avert danger after time for deliberation on the consequences of the risk taken.
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> To that list of points, he added a sixth [p. 268]:
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> > To these I would add that, as the instinct to save human life is greater than the instinct to save property, a hazardous intervention for the former purpose is more likely to be a natural and probable consequence of a negligent act than one for the latter, and in the reasonable contemplation of the wrongdoer.

[25] Thus, it is clear that a rescuer is entitled to claim damages from a negligent actor who creates a risky situation that invites rescue. The difficulty in the case at bar is whether the stalled truck posed a sufficient risk of danger to enable the plaintiff to invoke the rescuer doctrine, or whether he must be taken

to have freely chosen to assist the plaintiff and, therefore, to have consciously assumed any risks inherent in his course of action.

The Requirement of Imminent Peril in Rescue Cases

[26] The plaintiff cites the statement of Boyle J. in ***Bridge v. Jo***, *supra*, at ¶ 44, that "[n]o scene of carnage, no heroic act, is required to establish the Plaintiff's case" in support of his position that he was a rescuer. In that case, a car had been involved in a collision that sent a pick-up truck spinning toward the plaintiff and her family while they were clearing snow in their driveway. Although they did not see the accident, they heard someone calling for help. The plaintiff went to the car and was asked by her sister to call 911. The driver was complaining of a sore back, sore neck, and was feeling nauseous. There was no blood, there were no cuts, or apparent broken bones. In returning to her home to call 911, the plaintiff slipped and fell, injuring her leg. Boyle J. granted damages to the plaintiff as a rescuer, notwithstanding that the driver had not been badly injured, and said she had done nothing to indicate to the plaintiff that she required an ambulance. A risk that a rescuer might fall on the slippery road surface was held to be reasonably foreseeable.

[27] The fact that the driver apparently required assistance and the icy road conditions would appear to be a dangerous situation. Other authorities do seem to clearly require some sort of danger, or imminent peril to the victim, in order to classify a plaintiff as a rescuer. This requirement was explicitly stated by Esson J. in ***Toy v. Argenti***, *supra*, when quoting the decision of the Court of Session of Scotland in ***Steel v. Glasgow Iron and Steel Company***, [1944] S.C. 237 at 248, as correctly setting out the law to be applied in British Columbia (at 371 B.C.L.R.):

> Upon this view the difference between intervention to save life and intervention to save property becomes a difference in degree and not a difference in kind. <u>In both cased there must be imminent danger and sufficient justification for the risk which is assumed</u>. Neither the rescuer nor the salvor may embark with impunity upon an act of intervention which is unduly hazardous or unwarrantably extreme and beyond the exigencies of the situation. In both cases it is necessary to weigh the degree of risk to which rescuer or salvor has exposed himself against the value which the law attaches to the stake at peril, or, in the words of Lord Maugham (***Haynes v. Harwood*** at p. 162),
>
> > in deciding whether such a rescuer is justified in putting himself into a position of such great peril, the law has to measure the interests which he sought to protect and the other interests involved.
>
> Clearly a much higher degree of risk may normally be taken by a rescuer than a salvor, and in weighing the justification for the intervention of a salvor it would usually be necessary to consider not only the nature and value of the property sought to be protected and the measure of the risk run but also the salvor's antecedent relationship or duty, if any, to the property.
>
> [Emphasis added.]

[28] Likewise, the Court of Appeal in ***Schlink v. Blackburn*** (1992), 66 B.C.L.R. (2d) 246, [1992] 4 W.W.R. 251 (C.A.) concluded at para. 12:

> The Chambers judge appears to agree with my position on the issue of "proximate cause" but he avoids the foreseeability issue by incorrectly classifying Schlink as a "rescuer". This is not a "rescue case" any more than it is a "nervous shock" case. <u>There is no evidence of danger, escape from entrapment, risk of death from delayed treatment or otherwise which would support such a classification.</u> Accordingly, the "rescue case" authorities cited to us

must be distinguished along with the authorities dealing with "nervous shock" cases.

[Emphasis added.]

[29] Thus, the reasons of the Court of Appeal implicitly confirm that there must be a dangerous situation in order to classify a plaintiff as a rescuer. In ***Schlink***, the plaintiff was injured when he heard an accident occur while he was asleep in his bedroom. The accident did not cause him to get up, but shortly after he heard persons calling outside his window to the effect that his wife had been in an accident. The plaintiff panicked and ran down the stairs of his house, where he landed incorrectly on the concrete landing, and injured his foot. The Court of Appeal denied the plaintiff recovery, holding that there was no relationship of proximity that would justify the imposition of a duty of care.

[30] The requirement that there be some imminent danger is perhaps best illustrated by the discussion in ***Haynes v. Harwood***, *supra*—one of the earlier cases granting a rescuer damages. In that case, the defendants' servant had negligently left his horses and van unattended on a busy street and the horses bolted. A police officer saw the runaway horses and, eventually, stopped them. However, he sustained serious injuries in the process. The defendants pleaded *volenti non fit injuria* and *novus actus interveniens*.

[31] In the course of his reasons granting the plaintiff recovery, Finlay J. had to distinguish the earlier decision of the Court of Appeal in ***Cutler v. United Dairies (London), Ltd.***, [1933] 2 K.B. 297 (C.A.). In that case, a horse had run away, but had come to a stop in a field. The driver appeared to have been agitated, and the plaintiff responded to his cries for help by jumping over the hedge and trying to hold the horse. He was injured in the process of doing so. The Court of Appeal reversed a jury decision granting the plaintiff compensation. Slesser L.J. held that the cause of the accident was the act of the plaintiff in agreeing to the request to hold the horse's head. Scrutton L.J. similarly held that, either on the ground of *volenti non fit injuria* or as a subsequent intervening cause, there was no liability – the new cause is the action of the intervening person, and that new cause prevents liability attaching to the owner of the horse.

[32] Finlay J. distinguished ***Cutler*** on the basis that in that case there was no duty to intervene, whereas on the facts before him, the policeman was under a duty to preserve life and property. Thus, he did not agree to take a risk knowing all the circumstances. Rather, he was acting pursuant to a higher duty and, incidentally, incurred the risk. The decision was upheld on appeal for substantially the same reasons. Greer L.J. quoted from an article by Professor Goodhart as accurately setting out the law in the United States and in England (at 156-157):

> The American rule is that the doctrine of the assumption of risk does not apply where the plaintiff has, under an exigency caused by the defendant's wrongful misconduct, consciously and deliberately faced a risk, even of death, to rescue another from imminent danger of personal injury or death, whether the person endangered is one to whom he owes a duty of protection, as a member of his family, or is a mere stranger to whom he owes no such special duty.

[33] Thus, in one of the earlier decisions providing a remedy to a rescuer, the requirement that there be imminent danger was used to distinguish earlier authorities that had held there was no liability in similar circumstances.

[34] This distinction between cases involving danger and those not involving danger was noted by the Saskatchewan Court of Appeal in ***Dupuis v. New Regina Trading Co.***, [1943] 4 D.L.R. 275, [1943] 2 W.W.R. 593 (Sask C.A.), where MacDonald J.A. stated at paras. 33-34:

> In my opinion, the principle deducible from the "rescue" cases is this: When a person, in breach of duty towards another, places the latter in danger, he, as a reasonable man should foresee that anyone seeing such other in danger will react to the spectacle and attempt a

rescue. It is thus the danger, actual or apprehended to that other which brings the rescuer within the ambit of the negligent party's duty to take due care.

The contrast between *Cutler v. United Dairies (London) Ltd.*, [1933] 2 K.B. 297 and *Haynes v. Harwood*, *supra*, illustrates this principle. In the former, there was no one endangered so the plaintiff did not succeed; In the latter the people in the street were endangered, so the plaintiff did succeed.

[Emphasis added.]

[35] Similarly, in ***Corothers v. Slobodian***, *supra*, the Supreme Court of Canada affirmed the existence of a duty of a wrong-doer to the rescuer of his victim, but seemed to limit its decision to circumstances involving imminent peril. In that case, the plaintiff was injured when she left an accident scene "of the utmost gravity," running up the road to seek help and wave down oncoming traffic. She was struck and seriously injured by a truck when its driver jammed on his brakes upon seeing the plaintiff. Ritchie J. in his concurring reasons characterized the plaintiff as a true rescuer, stating at para. 4:

The appellant's action in running up the highway to seek help as she did was, in my opinion, more than justified by the imminent peril in which she found the Hammerschmids. It was indeed a question of life and death as the subsequent death of Mrs. Hammerschmid unhappily demonstrated…

[36] In disagreeing with the Court of Appeal, which had held the situation of peril ended when the plaintiff left the accident scene, Ritchie J. noted that the situation of peril had not ended so long as the accident victims were seriously injured and apparently helpless (at para. 14).

[37] The concurring words of de Grandpré J. make even more clear how much the Court's decision rested on the plaintiff's proximity to the hazardous situation created by the defendant (at para. 36):

On the facts of this case, in the light of the evidence that Mrs. Corothers was just starting on her errand of mercy at the time of the accident, I share the view that the rescuer is entitled to indemnity from the original wrong-doer. At this time, there is no need for this Court to go any further. I leave to some other occasion the determination of the wrong-doer's liability should the factors of time and space be different, e.g., if Mrs. Corothers had been injured two miles further west when approaching the farm toward which she was heading.

[38] The issue of the special treatment, given to those who take on a risk of personal injury in order to rescue the victims of tortuous actors, was also given recent mention by McLachlin, C.J.C., writing for a unanimous Court in ***Martin v. American International Assurance Life Co.***, [2003] 1 S.C.R. 158, 2003 SCC 16, in considering what constitutes death by accidental means for the purpose of a life insurance policy. She stated at para. 28:

There is a second type of risk-taking case that merits comment. This is the case of the rescuer who puts himself in the way of death -- for instance, the swimmer who dives into the ocean, knowing of the strong undertow, to help someone who has fallen overboard; or the person who lowers herself down a well to save someone overcome by gas fumes, and is herself overcome. When the rescue is viewed in the larger context of the events that trigger it, it becomes apparent that the death is unexpected. The rescue is but part of an unexpected chain of events, triggered by the danger of death to another human being. Death is not the result of the rescuer's intentional decision to court death as a response to the danger of another. If the rescuer dies, we do not say that his death was designed, intended or expected. Rather it was part of a tragic, accidental sequence of events. As

> courts have noted in the context of negligence law: "Danger invites rescue... . The risk of rescue, if only it be not wanton, is born of the occasion" (Cardozo J. in *Wagner v. International Ry. Co.*, 133 N.E. 437 (N.Y. 1921)), at pp. 437-38; see also *Horsley v. MacLaren*, [1972] S.C.R. 441, and *Corothers v. Slobodian*, [1975] 2 S.C.R. 633). Rescue is born of the occasion: it is a natural human response to peril. Moreover, because the rescuer's conduct has high redeeming social value, we can rightly demand less caution in taking on the risk of death than we would demand of the Russian Roulette player. This policy consideration, too, supports recovery.
>
> [Emphasis added.]

[39] This passage tends to confirm the view that the rationale for denying the defendant the defences of *novus actus interveniens* or *volenti non fit injuria* in rescue cases is the involuntary nature of the rescuer's response. The rescuer has not made a free and conscious choice to intervene, and the lack of choice is a direct and foreseeable result of the dangerous circumstances created by the defendant's negligence.

[40] Cases involving motor vehicle accidents, where liability has been found to a rescuer, also appear to have occurred in situations where there is clearly a high level of danger. Typically, the conditions suggesting danger include poor visibility or slippery road conditions (which generally were the cause of the original accident) and may include passing traffic which poses a threat to bystanders. An analysis of the risks posed by oncoming traffic is well set out by the High Court of Australia in ***Chapman v. Hearse***, *supra*, at para. 11:

> The degree of risk which his presence in the roadway entailed depended, of course, on the circumstances as they in fact existed and the circumstances were, in fact, such that the risk of injury from passing traffic was real and substantial and not, as would have been the case if the accident had happened in broad daylight, remote and fanciful...

[41] This passage was quoted by Ritchie J. in ***Corothers v. Slobodian***, *supra*. See also as to hazardous conditions surrounding rescuers in a motor vehicle accident situation ***Bridge v. Jo***, *supra*; ***Emerson v. Insurance Corporation of British Columbia***, 2003 BCSC 1086; ***Cleary v. Hansen*** (1981), 18 C.C.L.T. 147, 13 M.V.R. 161 (Ont. H.C.J.). See also ***C.N.R. v. Bakty*** (1977) 18 O.R. (2d) 481, 82 D.L.R. (3d) 731 (Co. Ct.) at para. 27 (awarding the plaintiff damages for back injuries sustained by reason of restraining a thrashing driver in a collision between a train and car, finding that there was a risk of danger both to the driver of the car and of the car exploding); ***Saccone v. Fandrakis*** (2002), 11 C.C.L.T. (3d) 151, 2002 BCSC 73 (denying compensation to the plaintiff, who sought to protect only his economic interests by running to the scene of an accident, in a situation in which damage to property was already complete by the time the plaintiff saw the accident).

[42] From the above discussion, it is clear that the rationale for excepting rescuers from bearing the loss occasioned by their intentional intervention in a situation, is the danger to the tortfeasor's victims and potential victims. The danger created by the tortfeasor effectively overrides the rescuer's free choice to engage in a risky activity, so that the law does not consider the rescuer to have consented to those risks, nor to have broken the chain of causation from the original act of negligence. Among the interests the courts appear to have considered, in deciding whether to shift the loss from the rescuer to the tortfeasor, is the gravity of the situation and the helplessness of the victims.

Application to the Case at Bar

[43] In this case, I have concluded that the plaintiff cannot recover damages for his personal injuries on the basis that he was a rescuer. I reach this conclusion primarily in view of the lack of danger or imminent peril associated with the defendant's predicament.

[44] As explained above, the cases granting plaintiffs damages as rescuers require that the defendant's conduct has created some hazard, danger or situation of imminent peril to a victim or potential victims. In this case, I am simply unable to conclude that the situation of risk, faced by the defendant, was sufficiently serious to consider the plaintiff a rescuer. The defendant's truck had stopped moving; there was no collision between any vehicles; no one suffered injury as a result of the truck stalling and, regardless of where the defendant's truck had come to rest, other motorists were sensibly not attempting to drive past her vehicle. The defendant was not trapped in her vehicle, nor was she rendered helpless by the incident. There was simply no situation of imminent peril that would warrant treating the plaintiff's actions as being those of a rescuer, rather than those of a free and independent actor. In this regard, the plaintiff's actions are more akin to those of the good Samaritan attempting to hold the head of a runaway horse in a field in ***Cutler***, *supra*, than those of the police officer in attempting to stop a runaway horse on a crowded street in ***Haynes v. Harwood***, *supra*.

[45] In my opinion, the effective cause of the plaintiff's injuries was his decision, freely made, to push the truck. The intervention of a rational actor, capable of making a free choice as to whether or not to accept the risks associated with pushing on the truck, severed the chain of causation from the defendant's negligence. The circumstances were not so grave as to inevitably impel the plaintiff to act as he did. The plaintiff's actions, while laudable, were the result of his own decision to intervene in the situation. They were outside of the exigencies of the situation. It was his decision not only to push on the truck to attempt to move it, but also to exert sufficient force that his leg was injured.

[46] To grant compensation, I must measure the interests sought to be protected, and the other interests involved, to determine if the plaintiff was justified in putting himself in a position of risk. In this case, the interest to be protected was really the convenience of other motorists. The truck, while posing an obstacle to the free flow of traffic, was not endangering other users of the road. There was no risk of physical injury to the defendant, or her daughter, and any risk to them could have been eliminated by having them move away from the vehicle. Indeed, the plaintiff left his passenger in his taxi without any apparent fear for her safety. There was minimal risk of damage to property, as the truck was large, its hazard lights were flashing, visibility was good, and the fact that the stall occurred in a controlled intersection meant that passing traffic would be moving slowly (and, in fact, had essentially stopped). Although rescue cases will involve various levels of danger, I have concluded that, the case at bar, falls on the side of the line where the minimal risks to the victims of the defendant's negligence do not warrant providing a remedy to the plaintiff. Although his actions were a reasonably foreseeable consequence of the defendant's negligence in running out of fuel, the injuries he suffered are too remote from the defendant's act to warrant recovery in these circumstances, by reason of his freely-made decision to push the truck, which decision severed the chain of causation.

[47] Accordingly, the defendant's application to have the action against her dismissed is granted.

[48] The defendant will have her costs.

"L. Russell, J."
The Honourable Madam Justice L. Russell