Maguire et al. v. Padt et al.

Pyman et al. v. Padt et al.

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[Indexed as: Maguire v. Padt]

2014 ONSC 6099

Superior Court of Justice, Lederer J. November 4, 2014

Torts — Negligence — Duty of care — Foreseeability — Defendant's vehicle going into ditch during white-out due to her own negligence — Plaintiffs rescuing defendant and retrieving her belongings from her vehicle — Defendant sitting safely in police car when another driver lost control of his vehicle and struck plaintiffs — Both continued presence of rescuers at scene to provide information to police and other driver's loss of control in white-out conditions being reasonably foreseeable — Rescue ongoing at time of second accident — Defendant's motion for summary judgment dismissing plaintiffs' actions dismissed.

During a white-out, the defendant lost control of her vehicle, which rolled over into a ditch. Four civilians and a police officer stopped to help her. The defendant and her young daughter were removed from her vehicle and placed in the police car, and the defendant's belongings were retrieved from the vehicle and returned to her. While the rescuers were standing to the rear of the police car, another driver lost control of his vehicle and struck the police car, killing two of the rescuers and catastrophically injuring the third. The rescuers sued the defendant for damages. The defendant brought a motion for summary judgment dismissing the actions. It was conceded for the purposes of the motion that the defendant's negligence was the cause of the first accident.

Held, the motion should be dismissed.

The injuries suffered by the plaintiffs as a result of the second accident were a reasonably foreseeable consequence of the defendant's negligence. It was reasonably foreseeable that the plaintiffs would remain at the scene of the first accident after the defendant and her daughter were safely in the police car to provide information to the police. It was also reasonably foreseeable that another driver would lose control of his or her vehicle in white-out conditions. The duty of care owed by the defendant to her rescuers continued even as the police officer undertook his investigation. Moreover, the rescue was ongoing at the time of the second accident.

Hryniak v. Mauldin, [2014] 1 S.C.R. 87, [2014] S.C.J. No. 7, 2014 SCC 7, 314 O.A.C. 1, 453 N.R. 51, 2014EXP-319, J.E. 2014-162, EYB 2014-231951, 95 E.T.R. (3d) 1, 12 C.C.E.L. (4th) 1, 27 C.L.R. (4th) 1, 21 B.L.R. (5th) 248, 46 C.P.C. (7th) 217, 37 R.P.R. (5th) 1, 366 D.L.R. (4th) 641, 2014 CarswellOnt 640, **apld**

Corothers v. Slobodian, [1975] 2 S.C.R. 633, [1974] S.C.J. No. 119, 51 D.L.R. (3d) 1, 3 N.R. 184, [1975] 3 W.W.R. 142, **consd**

Cases referred to

Baker v. T.E. Hopkins & Son Ltd., [1959] 1 W.L.R. 966, [1959] 3 All E.R. 225 (C.A.); *Bechard v. Haliburton Estate*(1991), 5 O.R. (3d) 512, [1991] O.J. No. 1969, 84 D.L.R. (4th) 668, 51 O.A.C. 247, 10 C.C.L.T. (2d) 156, 34 M.V.R. (2d) 140, 30 A.C.W.S. (3d) 669 (C.A.), affg 1988 CarswellOnt 393 (H.C.J.); *Bridge v. Jo*, [1998] B.C.J. No. 633, [1999] 3 W.W.R. 167, 53 B.C.L.R. (3d) 338, 78 A.C.W.S. (3d) 419 (S.C.); *Clyke v. Clyke*, [1988] N.S.J. No. 55, 83 N.S.R. (2d) 79, 8 A.C.W.S. (3d) 347 (S.C. (A.D.)), affg [1987] N.S.J. No. 602, 80 N.S.R. (2d) 149, 200 A.P.R. 149, 6 A.C.W.S. (3d) 142 (S.C. (T.D.)); *Horsley v. MacLaren*, [1972] S.C.R. 441, [1971] S.C.J. No. 123, 22 D.L.R. (3d) 545; *Jones v. Wabigwan*, [1970] 1 O.R. 366, [1969] O.J. No. 1465, 8 D.L.R. (3d) 424, 1969 CarswellOnt 266 (C.A.); *Martin v. American International Assurance Life Co*., [2003] 1 S.C.R. 158, [2003] S.C.J. No. 14, 2003 SCC 16, 223 D.L.R. (4th) 1, 301 N.R. 127, [2003] 6 W.W.R. 1, J.E. 2003-600, 12 B.C.L.R. (4th) 201, 48 C.C.L.I. (3d) 1, [2003] I.L.R. I-4171, 120 A.C.W.S. (3d) 869; *Moddejonge v. Huron County Board of Education*, [1972] 2 O.R. 437, [1972] O.J. No. 1731, 25 D.L.R. (3d) 661, 1972 CarswellOnt 476 (H.C.J.); *Morana v. Roberts* (1997), 34 O.R. (3d) 647, [1997] O.J. No. 3089, 38 O.T.C. 171, 38 C.C.L.T. (2d) 1, 1997 CanLII 12257, 72 A.C.W.S. (3d) 1044 (Gen. Div.);*Ontario (Attorney General) v. Crompton* (1976), 14 O.R. (2d) 659, [1976] O.J. No. 2363, 74 D.L.R. (3d) 345, 1 C.C.L.T. 81, 1976 CarswellOnt 393 (H.C.J.); *Videan v. British Transport Commission*, [1963] 2 Q.B. 650, [1963] 2 All E.R. 860, [1963] 3 W.L.R. 374 (C.A. (Civ. Div.)); *Villoch v. Lindgren*, 200 N.Y. App. Div. LEXIS 2021; *Wagner v. International Railway Co*., 232 N.Y. 176, 133 N.E. 437 (C.A. 1921)

Rules and regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rules 20.02(1), 20.04, (2)(a), (b), 39.01(1)(4)

Authorities referred to

Sandel, Michael J., *Justice* (New York: Farrar, Straus and Giroux, 2010) Sappideen, Carolyn, and Prue Vines,*Fleming's The law of Torts*, 10th ed. (Pyrmont, N.S.W.: Lawbook Co., 2011)

MOTION by the defendants for summary judgment dismissing actions.

Nigel G. Gilby, for plaintiffs.

David Zarek, for Suzane Padt and Robert Padt, defendants/moving parties.

Douglas Smith, for Regional Municipality of Halton, Halton Regional Police Service Board and Bernard Verrette, defendants.

Charles M. Loopstra, for Corporation of the Town of Halton Hills, defendant.

Chris T. Blom, for Mervin Boyko, defendant.

Richard Shekter, for plaintiffs.

Jill Edwards, for plaintiffs.

No one appearing for Her Majesty the Queen in Right of Ontario, as represented by the Ministry of Transportation, defendant, and Wawanesa Mutual Insurance Company, defendant.

No one appeared for Trafalgar Insurance Company of Canada, the Nordic Insurance Company of Canada, Certas Direct Insurance Company, Halwell Mutual Insurance Company and ING Insurance Company of Canada, defendants.

LEDERER J.: —

Introduction

[1] This is a motion for summary judgment. It asks whether, in the aftermath of a motor vehicle accident, a woman sitting in a police cruiser can remain liable for injuries suffered by people who stopped to help her and were struck by another car in a subsequent accident.

[2] Rule 20.04(2)(b)[1] is the applicable rule:

20.04(2) The court shall grant summary judgment if,

(b) the parties agree to have all or part of the claim determined by a summary judgment and the court is satisfied that it is appropriate to grant summary judgment.

[3] For the most part, the parties agree as to the facts. There is a dispute as to whether the evidence provided on behalf of the moving parties (Suzanne Padt and Robert Padt) can be or should be relied on. Nonetheless, both sides believe the motion should resolve the issue at hand; each in its own favour. In the end, nothing turns on the objection to the evidence. This is a case where summary judgment is appropriate.

Background

[4] Suzanne Padt was driving with her daughter on Trafalgar Road. She was going north. There was a white-out, which is to say that suddenly, as a result of blowing snow, Suzanne Padt was unable to see where she was going. In the course of attempting to maintain control, the vehicle she was driving went off the road and turned over into a ditch. Suzanne Padt and the child were both unharmed. Within short order, four cars and a police officer all stopped to provide assistance. Two of the rescuers (the individuals who had pulled over to provide assistance) extracted Suzanne Padt and her daughter from the vehicle. They were placed in the police cruiser. Someone handed Suzanne Padt, who was by then in the police car, a bag and other property that had been retrieved from the car she had been driving.

[5] The police officer was standing near the cruiser. Three of the original four rescuers were standing to the rear of the police car. The fourth had returned to his car. He was preparing to leave. Another vehicle proceeding north came upon the scene. The driver lost control and struck the police cruiser and three people standing behind it. Two of them died (Elyse Schultz and Rick Pyman). The third has been catastrophically injured (Jennifer Maguire).

[6] The question is whether Suzanne Padt, assuming her negligence was the cause of the first accident, bears liability to the victims of the second accident even though, by then, she was sitting quietly in the police car.

[7] This case can be seen as raising issues concerning our collective concept of justice. In his book *Justice*, Michael Sandel[2] suggests there are three values which engage the idea of justice as a broad concept:

— cultivate virtue: visions of justice drawn from moral ideals;

— maximize welfare: the promotion of prosperity;

— protect freedom: respecting individual rights.[3]

[8] This case requires us to consider and balance these three fundamental values. I shall return to this idea later in these reasons.

Hyrniak v. Mauldin

[9] Our understanding of the principles that govern summary judgment is going through another stage in its evolution. It is no longer a question of whether, on such a motion, the court can be placed in the same position as it would have been following a trial but, rather, whether such a motion can place the court in a position where the case can be decided without requiring all that a trial can provide.

Increasingly, there is recognition that a culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system. This shift entails simplifying pre-trial procedures and moving the emphasis away from the

conventional trial in favour of proportional procedures tailored to the needs of the particular case.[4]

[10] In *Hryniak v. Mauldin*,[5] the Supreme Court of Canada provided guidance as to how this approach can lead to an appropriate answer. It directed a sequence of questions which could lead to a trial unless the case can be decided, at an intervening stage, without the need to go that far.

[11] First,

. . . the judge should first determine if there is a genuine issue requiring trial based only on the evidence before her,*without* using the new fact-finding powers.[6]

[Emphasis in original]

[12] If, based on the evidence provided on the motion, there is no genuine issue requiring a trial, there is no need for a trial and the case will be decided on the motion. If it appears that there is an issue which requires a trial, the judge proceeds to the next question.

[13] Second,

. . . determine if the need for a trial can be avoided by using the new powers under Rules 20.04(2.1) and (2.2).[7]

[14] If the need for a trial can be avoided, the judge must apply his or her discretion and use the "new" fact-finding powers provided that their use "will lead to a fair and just result and will serve the goals of timeliness, affordability and proportionality in light of the litigation as a whole".[8]Only if the issue cannot be resolved in this way will the motion fail and a trial be required. This is so under rule 20.04(2)(b),[9] as it is under rule 20.04(2)(a),[10] because, although under the former the parties have agreed that it is appropriate that the case be determined on a motion for summary judgment, it still requires the court to be satisfied that this is appropriate. In this case, summary judgment is appropriate without resort to the fact-finding powers found in the present rules.

Rescuers and the Law

[15] There is no general duty to assist those in peril. It has been said that "[i]t is a great reproach to our legal institutions"[11] that, for many years, rescuers, injured as a result of a rescue attempt, were denied recovery. The denial was based on either the concept of the voluntary assumption of risk[12] or the acceptance that there was a further and intervening cause.[13] "Eventually justice comes to live with men rather than with books."[14] Tort law has evolved. Rescuers are compensated if they are injured. The seminal moment in this change was the delivery of the following observation by Justice Cardozo, at the time a member of the Court of Appeals of New York:

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 state that leaves an opening in a bridge is liable to the child that falls into the stream, but liable also to the parent who plunges to its aid. The railroad company whose train approaches without signal is a wrongdoer toward the traveler surprised between the rails, but a wrongdoer also to the bystander who drags him from the path. . . . 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.[15]

(Citations omitted)

[16] This language was expressly adopted in the English authorities by Willmer L.J., in *Baker v. T.E. Hopkins & Son Ltd.*[16]

[17] The law now recognizes that a duty of care is owed, not only to the person put in peril, but also to the rescuer. In *Moddejonge v. Huron County Board of Education*,[17] a teacher allowed the students under his care to go swimming without proper supervision. Two of them drowned; one because she could not swim and the second in her effort to rescue the first. The teacher was responsible for the death of both. “When a person by his negligence exposes another to danger it is a foreseeable consequence that a third person will attempt to rescue the one in danger, and the attempted rescue is part of the chain of causation started by the negligent act.”[18]

[18] This case and the different perspective of the parties reflect on the standing, impact and effect of the “rescue doctrine”.

[19] I return to the book, *Justice*. The three competing values it refers to are a touchstone to an appreciation of the evolution of the doctrine. The change that has occurred can be seen as an adjustment to the balance between them. It can be seen as enhancing a sense of virtue, the moral correctness many will see in encouraging selfless acts of rescue. The change may also be interpreted as benefitting the general welfare and prosperity by encouraging us to look out for one another. It could be said to detract from personal freedom in that it may pressure some to act who, left to themselves, would not wish to be involved.

This Case

[20] Suzanne Padt and her husband, Robert Padt, the owner of the car his wife was driving, are the moving parties. They seek summary judgment dismissing the claims made against them. They join the other parties and ask that, for the purpose of the motion, I accept that it was the negligence of Suzanne Padt that caused the motor vehicle she was driving to go off the road and turn over in the ditch. Suzanne Padt and Robert Padt acknowledge that a duty of care was owed to her rescuers but say that, by

the time of the second accident, the peril had passed, the rescue was complete and the duty of care had expired. The individuals killed and injured had lost their character as rescuers and were, by then, bystanders in the wrong place when the second accident occurred.

[21] In agreeing that there is a duty of care that is owed to rescuers, counsel for Suzanne Padt and Robert Padt referred to *Corothers v. Slobodian*,[19] a decision of the Supreme Court of Canada. Bonnie Jo-Anne Corothers was following another vehicle when it collided head-on with an oncoming car which was being driven on the wrong side of the road. The oncoming car broke in two, scattering the bodies of its three occupants. Bonnie Jo-Anne Corothers avoided the wreckage and stopped on the shoulder beyond the car she had been following. She went back to it, helped the driver and saw that his wife was also seriously injured. She was running "up the highway to seek help"[20] when she saw a semi-trailer tank truck coming towards her. She waved her arms signalling the truck to stop. The driver jammed on the brakes, the truck jackknifed and went into a ditch. In the process, it struck Bonnie Jo-Anne Corothers, seriously injuring her.

[22] The trial judge's decision amounted "to a finding that [Bonnie Jo-Anne] Corothers' actions constituted a *novus actus interveniens*[21] breaking down the chain of causation activated by [the driver of the oncoming car]".[22] The subsequent appeal was dismissed by the Court of Appeal.

[23] At the Supreme Court of Canada, Chief Justice Laskin, in a judgment only one paragraph long, recognized that the rescue doctrine was, by then, "a well-accepted principle in this Court"[23] and that the liability of the driver of the oncoming car to Bonnie Jo-Anne Corothers should be assessed on that basis. Mr. Justice Ritchie described Bonnie Jo-Anne Corothers as a true "rescuer" as that role had been described by Justice Cardozo.[24] All nine judges held that the action brought by Bonnie Jo-Anne Corothers against the driver of the oncoming car should be allowed. She was engaged in an attempt at rescue when she was struck by the transport truck.

[24] The actions of Bonnie Jo-Anne Corothers were "more than justified by the imminent peril in which she found [the occupants of the car she had been following]".[25] However, her status as a rescuer would not go on indefinitely. Mr. Justice de Grandpré left "to some other occasion the determination of the wrongdoer's liability should the factors of time and space be different".[26] Mr. Justice Ritchie was unable to agree that "the situation of peril . . . had ended".[27]Mr. Justice Pigeon observed: "[I]t appears to me that it could not correctly be said that the situation of peril created by [the driver of the oncoming car] had ended."[28] The court was unprepared to find that Bonnie Jo-Anne Corothers was no longer engaged in her attempt at rescue.

[25] In *Morana v. Roberts*,[29] a driver lost control of the vehicle he was driving. It hit a guardrail. Penny Roberts pulled over to help. While she was standing on the side of the road, she was hit by another vehicle. She suffered catastrophic injuries. It was argued that, by the time of the accident injuring Penny Roberts, she had ceased to be a

rescuer. Referring to *Corothers v. Slobodian*, the judge noted that, like Bonnie Jo-Anne Corothers, Penny Roberts “was still starting into her rescue attempt”.[30]

[26] It is with this as a foundation that counsel for Suzanne Padt and Robert Padt submitted that, in this case, by the time of the second accident, the rescue had ended and that fact should be determinative of the motion for summary judgment.

[27] On what basis is it proposed that the rescue was over?

[28] It is said, on behalf of Suzanne Padt and Robert Padt, that, by the time of the second accident, the activity at the scene was directed to a different purpose. It had become an investigation into the cause of the accident and the accompanying property damage.

[29] Suzanne Padt and her daughter, the individuals put at risk by the first accident, were not injured and were no longer in any danger. They were sitting safely in the police cruiser. The police officer had returned to the vehicle that Suzanne Padt had been driving. There is some disagreement about his reason for going back. On behalf of Suzanne Padt and Robert Padt, it is said that the police officer was beginning his investigation. He took down the licence plate number and inspected the vehicle for property damage. Counsel for the respondents say that the main focus of the officer was to confirm that there was no one else in the vehicle who needed assistance.

[30] One of the rescuers, Michael MacLennan, was cold; he had no coat. He felt the officer had the situation under control. He provided his contact information to the officer and went back to his own car. At the time of the second accident, he was preparing to leave.

[31] Mark Burger was the fifth rescuer, the one who arrived after the rescue was underway. He had been driving south on Trafalgar Road. He saw the vehicle in a ditch and pulled over to see if he could be of assistance. As he approached the accident, he saw the police officer. They had met before. The officer told Mark Burger that no one remained in the vehicle that was in the ditch and that everyone was fine. It should be said that the police officer did not recall this conversation.

[32] The other three rescuers were standing behind the police cruiser. Michael MacLennan recalls that the police officer spoke, not only with him, but also with the other three original rescuers. The officer asked them for their contact information or a brief statement as to what they had seen. The police officer was uncertain as to whether these discussions had taken place.

[33] As counsel for Suzanne Padt and Robert Padt see it,

— the fact that Suzanne Padt and her daughter were safely in the back of the police cruiser with her bag separately returned to her;

— the examination of the vehicle by the police officer for property damage (assuming acceptance that this was the purpose of the officer's return to the vehicle);

— the "casual" conversation Mark Burger had with the police officer, where they renewed their acquaintance, and the officer advised that everyone was fine;

— the observation of Mike MacLennan that all was under control, his preparation to leave; and

— the police officer taking of information and statements from the four original rescuers

are all demonstrative of the fact that the rescue was over, the investigation had begun, and any duty of care owed by Suzanne Padt and Robert Padt to the rescuers was spent.

[34] Counsel for Suzanne Padt and Robert Padt submitted that the end of the rescue is signalled by the absence of any continuing "imminent peril".[31] The rescue was over. Counsel for Suzanne Padt and Robert Padt reviewed what is meant by "imminent peril". The factum relied on reviews [of] dictionary definitions as a way of confirming the risk was gone and the rescue over. This misses the point. Having someone in peril or having reason to believe someone is at peril may be the catalyst for a rescue but this does not mean that any duty owed to a rescuer necessarily expires when the danger ends.

[35] In *Clyke v. Clyke*,[32] through negligence, the defendant drove her car into a ditch. There was no suggestion of any injury. Sometime later, the plaintiff, in the company of his son and a friend, came along. He offered to help. With his son driving the defendant's vehicle, the plaintiff and his friend attempted to push it back towards the roadway. The spinning wheels threw up a rock which struck and injured the plaintiff. He sued, claiming that the cause of his injury was the negligent driving of the plaintiff which had taken her into the ditch.

[36] The action and, in turn, an appeal were both dismissed. There was no causal connection between the "so-called" negligence of the defendant (the respondent on the appeal) and the injuries suffered by the plaintiff (the appellant on the appeal). The Court of Appeal could "see no imminent peril present . . . which caused the appellant to undertake a perilous rescue operation".[33]

[37] This demonstrates that, in the absence of a peril (real or reasonably believed to be present),[34] there is no rescue. In the absence of a rescue, there is no rescuer. In such circumstance, the third party liability on which an injured rescuer may rely is not available. This does not help with the issue of, once liability is raised by the presence of a rescue, when that liability comes to an end.

[38] Counsel for Suzanne Padt and Robert Padt picked two points in *Corothers v. Slobodian* as the source of the proposition that, when the "imminent peril" ends, the

rescuer can no longer look to the party whose negligence created that peril. Counsel suggested that, “In *Corothers*, [the Supreme Court of Canada] focused on the duty owed to a rescuer in a situation of imminent peril.”[35] The two statements do not go that far. In the first, Mr. Justice Ritchie noted:

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.[36]

[39] This does nothing more than confirm that the situation was appropriate for a rescue. It does not say when the duty of care the person responsible for the peril owed to the rescuer would end.

[40] In the second, the same judge commented:

With the greatest respect for the views thus expressed I am unable to agree that “the situation of peril . . . had ended” so long as Mr. Hammerschmid was seriously injured and apparently helpless and his wife near to death on the floor of the car due to [oncoming car driver’s] negligence.[37]

[41] This was said in response to the finding of the trial judge that, in leaving the scene of the accident and running down the road, Bonnie Jo-Anne Corothers had reached a new stage in her involvement. Mr. Justice Ritchie rejected the idea that her actions constituted an intervening cause breaking the chain of causation which went back to the driver whose negligence caused the accident. This underscores the now fundamental proposition that the actions of the rescuer, in carrying out a rescue, are not an intervening cause that relieves the negligent party of his responsibilities to the rescuer.[38] This comment does not address the issue of when the duty of care the person responsible for the peril owes to the rescuer would end.

[42] There is a practical problem associated with the position adopted on behalf of Suzanne Padt and Robert Padt. It suggests that there will be an identifiable moment when the peril is removed and the rescue is over. From that point on, rescuers will no longer be able to rely on the negligence that created the need for the rescue to compensate them for any damage or harm they may have suffered. How is the rescuer to know when this has happened? It is one thing looking back from the relative tranquility of a courtroom to assess the situation and pinpoint the time. It is quite another for the rescuer, in the midst of the anxiety, upset, activity and tumult of an accident, to see that the moment has arrived. It is an invitation to the rescuer to watch out for the time when his or her actions will be governed by his or her personal interest and not the generosity to others the rescue doctrine is intended to encourage. It is not difficult to see that the likelihood of people seeking to disengage when their help is still needed or, for their own protection, deciding not to get involved at all. This would impinge on Justice Cardozo’s powerful recognition that the law does not ignore the natural reaction to a cry of distress.[39]

[43] The approach proposed by counsel for Suzanne Padt and Robert Padt would return responsibility for any ensuing harm that may be suffered by a rescuer to the rescuer and, at the appointed moment, would remove it from the person who, through his or her negligence, created the peril. Why should the rescuer bear any of the risk that arises as a result of the negligence that caused the peril?

[44] There is a simpler way of looking at this. It relies not on special considerations introduced by the presence of a rescue, but the fundamental premises of tort liability. Contrary to the assertions of counsel for Suzanne Padt and Robert Padt, *Corothers v. Slobodian* did not focus or rely on the presence of imminent peril as the source of the negligent party's liability to a rescuer. The case demonstrated reliance on the general tort principle that liability depends on foreseeability:

It should be observed that even if there was something wrongful about the conduct of Slobodian when faced with the gesticulating figure of Mrs. Corothers approaching on the edge of his right side of the highway, his actions were in any event such as to be a reasonably foreseeable consequence of the prior negligence of [the driver of the oncoming vehicle].[40]

[45] "Foreseeability" was recognized as the key to appreciating the extent of any liability owed by a negligent party to a rescuer by Justice Cardozo in his seminal comment that is the source of the rescue doctrine. The comment ends with the observation that "[t]he wrongdoer may not have foreseen the coming of a deliverer. He is accountable as if he had."[41] In other words, it is the foreseeability of the actions of a rescuer that are the source of the liability owed to the rescuer by the party creating the peril. Liability does not depend on the passing of a moment (the end of the imminent peril) the rescuer, in his or her own interest, must discover or divine in the moments immediate following the rescue.

[46] In *Jones v. Wabigwan*,[42] the defendant took one of the plaintiff's two cars without permission. The plaintiff, seeing the car and believing it to be driven by the defendant, gave chase. The plaintiff lost sight of the defendant. He came over a hill and saw the lights of a car in a field. He stopped. He ran into the field where he came in contact with a hydro wire and was injured. The trial judge found that the defendant was negligent, but did not accept that the plaintiff had entered the field out of concern for the defendant. He was not satisfied that the plaintiff had "changed his intent from avenger to rescuer". The trial judge was not satisfied that the defendant should have foreseen that injury might result to the plaintiff. As he saw it, "The negligence of the defendant was spent long before the plaintiff arrived at the scene."[43] He dismissed the claim.

[47] The subsequent appeal was granted. The trial judge had mistakenly directed himself to the actions of the plaintiff and not to foreseeability in a broader context:

With much deference to the view expressed by the learned trial Judge we are respectfully of the opinion that in determining the test of foreseeability he confined his consideration within too narrow a compass. He would appear to have directed his mind

to the plaintiff and his actions and as to what might have been anticipated by the defendant vis-à-vis the plaintiff, and the plaintiff only, rather than to anyone who might be in the immediate neighbourhood when the danger was created and continued to exist.[44]

[48] The Court of Appeal found that it was foreseeability in this broader context that applied. It applies to rescuers as it does to the curious passerby:

In our view a reasonable man in the position of the defendant should have anticipated that if he negligently collided with the hydro pole it was a probable consequence that the pole and the live electric wires would fall to the ground; that persons travelling along the highway in proximity to this point might be attracted to the field where the damaged vehicle, with its lights burning, was visible, and that they might reasonably be expected to come in contact with the live wires attached to the broken hydro pole and sustain serious personal injury. If this conclusion be valid as to any person who might pass along that highway at the time that the danger created by the defendant materialized, whether that person entered the field moved by a natural curiosity or a desire to render needed assistance, then the defendant's conduct was a proximate cause of the plaintiff's injuries and damages in the sense that they were reasonably foreseeable and not too remote.[45]

[49] In *Ontario (Attorney General) v. Crompton*,[46] the negligence of a driver caused a serious accident on a provincial highway. Fire broke out in each of the three vehicles involved. The fireman and firefighting equipment from the local municipality put out the fire and freed one of the parties from the vehicle he was driving. He subsequently died. Both the Crown (the province) and the municipality sued for the costs of the attendance of the municipality's firefighting facilities. The municipality's claim was dismissed. Its firefighters were present as a result of a contract it had with the Crown to provide emergency services for payment. The municipality was paid. Its rights depended, not on tort, but on contract. The circumstances of the Crown were different. It was entitled to judgment based on the foreseeability of the call to rescue both persons and property:

Little can be gained from couching the Crown's claim in terms of the rescue doctrine. It is fair to say that the law has developed to the stage where it is clear that one who negligently creates the situation of danger which invites rescue of person or property owes an original duty to the rescuer, as one whose intervention is a foreseeable consequence of that negligence: Denning, M.R., as he then was, in *Videan et al. v. British Transport Com'n*, [1963] 2 Q.B. 650, [1963] 2 All E.R. 860, and *Fleming, Law of Torts, 4th ed*. (1971), p. 158. As such, the doctrine is perhaps better viewed as an example of the general rules prompting recovery for negligent tort rather than the exception it at first appeared to be to the defences of *novus actus interveniens* and *volenti non fit injuria*.[47]

[50] It is foreseeability, not the end of the peril, that sets the limits of the liability:

The familiar calculus of negligence requires that the plaintiff to succeed establish a duty of care owed the plaintiff, breach by the defendant of that duty, and injury consequent to that breach. In each of these stages, the test of reasonable foresight is applied ultimately to define and delimit the permissible scope of recovery.[48]

[51] The question that remains, the issue that will determine the motion, is whether the injuries suffered by the rescuers as a result of the second motor vehicle accident were a reasonably foreseeable consequence of the negligence of Suzanne Padt.

[52] It is reasonably foreseeable that when, through negligence or otherwise, a motor vehicle rolls over in a ditch, passersby will come and render assistance. This response is encouraged by the rescue doctrine and is accepted to be instinctive and taken without regard for personal safety:

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. . . . Rescue is born of the occasion: it is a natural human response to peril.[49]

[53] It is reasonably foreseeable that the police will attend at the scene of the accident. It is similarly foreseeable that the arrival of the police will not vitiate the desire and instinct of the rescuer to continue to help. While not binding, the decision of the Appellate Division of the Supreme Court of New York, in *Villoch v. Lindgren*,[50]demonstrates the point. The factum of the responding parties accurately summarizes the case:

Villoch, driving southbound, saw a car stopped in the left lane facing northbound. It had severe damage to its front end. The road was poorly lit and wet, and there was reduced visibility. Villoch parked his car in the left lane with its headlights and hazard lights on, and approached the car. The driver was unresponsive, although he finally mumbled that he was all right. A police car arrived and pulled over on the right shoulder or in the right lane. The officer waved Villoch over to him. The driver got out of the car and stood with Villoch and the officer in the roadway. Then another car slammed into the police car and hit Villoch and the driver. . . . The court held that there was an "unbroken continuity" between Villoch's discovery of the disabled car, his efforts to avert further injury and the ultimate consequences to him.[51]

[54] The court did not find the involvement of the police officer to be an intervening cause or to bring to an end the duty of care the driver of the vehicle that had stopped owed to Villoch. The continued involvement of Villoch was foreseeable even after the police officer arrived. In the context of the present case, it is reasonably foreseeable that rescuers will remain at the scene to provide information, as required by the police. This

is a natural outgrowth and part of any accident to which the police are called and is part of one's civic duty.

[55] Finally, with respect to foreseeability, in the case I am asked to decide, the second accident was reasonably foreseeable. There had already been a white-out. There could easily be another. It has been said:

It was foreseeable to the reasonably prudent person, that if he caused an accident in a situation such as this, that someone might come along and not exercise reasonable care. Every day we know that after there has been one accident, unless care by oncoming drivers is exercised there are likely to be other accidents.[52]

[56] Without going further, this would be sufficient to demonstrate that the duty of care owed by Suzanne Padt to her rescuers continued even as the police officer undertook his investigation and that, as a result, liability for their injuries caused by the second accident would attach to her.

[57] As it is, the rescue was not over.

[58] In *Bridge v. Jo*,[53] a woman was called to assist after a motor vehicle accident. She left the scene and, on her way home to telephone the emergency number (911), fell and broke her leg. What transpired was reasonably foreseeable and the driver of the car at fault in the collision was responsible for the woman's injuries. "That the Honda driver was later found to be not grievously harmed [was] immaterial".[54] Thus, it was the belief of the rescuer, not the actual condition of the party involved in the accident, that governs whether what takes place qualifies as a rescue. "No scene of carnage, no heroic act is necessary to establish the Plaintiff's case."[55] In *Horsley v. MacLaren*,[56]the object of the rescue had already died. A rescue is ongoing if a rescuer reasonably believes that a victim is in need of assistance.

[59] In this case, the police officer placed Suzanne Padt and her daughter in the police cruiser. He returned to the vehicle in the ditch. The three rescuers were standing beside it. "They appeared to be waiting to see if there was anything else they needed to do to assist with the situation."[57] The police officer testified at his examination-for-discovery and deposed in an affidavit that one of the rescuers handed him a purse, diaper bag and blankets along with other personal effects from the Padt vehicle. He believed it was important to get this property to Suzanne Padt in order to assist her in calming her child.[58] The police officer deposed and testified that it was he who handed the diaper bag and other belongings to Suzanne Padt as she sat in the rear of the police cruiser. Mark Burger, the individual who arrived after the others, deposed in an affidavit that, as he jogged from his vehicle to the accident scene, he noticed a man climbing out of the vehicle in the ditch.[59] While he did not make the connection, the timing would be consistent with a man recovering the diaper bag. Suzanne Padt testified at her examination-for-discovery and deposed in an affidavit that it was a lady who gave her the bag and the other possessions.[60] For the purposes of these reasons, it does not matter who retrieved the diaper bag or who gave it to Suzanne Padt. What is clear is

that at least one of the rescuers was involved in its recovery either by delivering the property to the police officer or to Suzanne Padt. This represents a continuing involvement in the rescue.

[60] It is also clear that very little time passed from the moment the diaper bag was given to Suzanne Padt and the second accident. The police officer first noticed the vehicle that hit the police cruiser when it was 200 to 300 metres away. He did not pay much attention to it at that time. He said that, on his arrival at the police cruiser, he opened its rear door to give the diaper bag and other property to Suzanne Padt. As he opened the door, he observed the three rescuers standing on the shoulder of the road near the rear of the police cruiser. Although he had not seen them walk up the hill from the ditch, it was obvious to him that they had done so while he was on his way to deliver the diaper bag. It was as he closed the car of the police cruiser that he saw the northbound vehicle moving out of control towards the rescuers and the cruiser. He attempted to warn them.[61] Mark Burger deposed in an affidavit that it took 35 seconds from the time he saw the man exiting the vehicle in the ditch to the second accident.[62] Either way, there was not enough time between the delivery of the diaper bag and the collision to find that the rescue had ended and the character of the rescuers changed to witnesses or true bystanders. At the time of the second accident, the rescue was ongoing.

[61] The police officer deposed that, as he approached the police cruiser with the diaper bag, it was his impression that the three individuals were waiting for traffic to clear so they could cross the road and return to their vehicles.[63] He does not know. This is just an impression. This underscores the point made earlier in these reasons. It is not appropriate to leave to the rescuers the decision as to when the duty of care owed to them by the negligent party expires. This does not happen when the peril ends. The appropriate principle that applies is foreseeability as it applies to the negligent party, the person who created the peril.

[62] I will not dismiss the case as against Suzanne Padt and Robert Padt. They continue to bear liability for the injuries suffered by the three individuals that were struck by the vehicle involved in the second accident, being Elyse Schultz, Rick Pyman and Jennifer Maguire.

[63] The joint factum of the responding parties complains that there is evidence put forward on behalf of Suzanne Padt and Robert Padt that should be disregarded. Little, if anything, was said about this objection. This material includes

— an M.V.C. statement of Paul Cornect;

— an M.V.C. statement, a Halton Regional Police Service statement of witness and a summary of a telephone interview, each by or with Tim Kirk;

— an M.V.C. statement of Patrick Roy.

[64] None of these statements were read, reviewed or relied on by me in preparation of these reasons. No reference was made to them during the course of the submissions made by counsel.

[65] Objection was also taken to the reliance on the transcript of the examination-for-discovery of Suzanne Padt. I am unclear as to be basis for the concern. An examination-for-discovery is evidence which is made subject to oath or affirmation. In any event, the only reference to this transcript is the statement by Suzanne Padt that the diaper bag and other property was delivered to her by a “lady”. This statement is also found in the affidavit she swore on November 28, 2013, in support of her motion for summary judgment. Moreover, as noted in the body of these reasons, it does not matter to the decision whether the diaper bag and the property that came with it was delivered by a “lady” or the police officer, who said he was the person who gave it all to Suzanne Padt.[64]

[66] The responding parties object to the inclusion of two unsworn statements made by Mike MacLennan in an affidavit sworn by a lawyer with the law firm acting for Suzanne Padt and Robert Padt. As exhibits to the affidavit of the lawyer, they are hearsay. An affidavit to be used on a motion for summary judgment may be made on information and belief subject to the court’s authority to draw an adverse inference from the failure of a person with direct knowledge of contested facts to provide evidence (rule 20.02(1) of the Rules of Civil Procedure).[65] On the summary judgment motion, they were referred to but are relied on for facts that, for the most part, are not controversial. The exception may be information that is particular to Mike MacLennan. He was cold; asked to be the first to speak to the police officer; felt everything was under control and went to his car to leave. So far as I can recall, no objection was taken to this evidence but, in any event, little, if anything, turns on it. It was used to support the proposition that the rescue had ended. I have found it had not.

[67] In the circumstances, I see no purpose in addressing these objections beyond what I have said here. As said at the outset, nothing turns on this objection.[66]

[68] Finally, I return to the idea that this case should be understood in the context of the three competing values said to inform our sense of justice. The foundation of the rescue doctrine as expressed by Justice Cardozo depends on an appropriate balancing of those values. Generally, the doctrine promotes selfless conduct. To my mind, the position taken on behalf of Suzanne Padt and Robert Padt would sensitize rescuers to the risk they are taking, detract from the intuitive desire to respond to cries of distress and return us to a time when people were less inclined to help. It would change the balance.

[69] For the reasons reviewed herein, I dismiss the motion brought on behalf of Suzanne Padt and Robert Padt.

[70] On the assumption that Suzanne Padt was negligent when her vehicle went off Trafalgar Road and turned over in the ditch, I grant partial summary judgment to the

responding parties. I find that Suzanne Padt and Robert Padt are liable for damages suffered by Elyse Schultz, Rick Pyman and Jennifer Maguire.

[71] No submissions were made as to costs. If the parties are unable to agree, I may be spoken to.

Motion dismissed.

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[1] Rules of Civil Procedure, R.R.O. 1990, Reg. 194.

[2] Michael Sandel, *Justice* (New York: Farrar, Straus and Giroux, 2010).

[3] *Ibid.*, at pp. 19-20.

[4] *Hryniak v. Mauldin*, [2014] 1 S.C.R. 87, [2014] S.C.J. No. 7, 2014 SCC 7, 366 D.L.R. (4th) 641, 2014 CarswellOnt 640, 27 C.L.R. (4th) 1, 314 O.A.C. 1, at para. 2.

[5] *Ibid.*

[6] *Ibid.*, at para. 66; the fact-finding powers referred are found in rule 20.04:

20.04(2.1) In determining under clause (2)(a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:

1. Weighing the evidence.

2. Evaluating the credibility of a deponent.

3. Drawing any reasonable inference from the evidence.

(2.2) A judge may, for the purposes of exercising any of the powers set out in subrule (2.1), order that oral evidence be presented by one or more parties, with or without time limits on its presentation.

[7] *Ibid.*, at para. 66; for the powers referred to, see footnote 5.

[8] *Ibid.*, at para. 66.

[9] See para. 2, above.

[10] Rule 20.04(2)(a) states:

20.04(2) The court shall grant summary judgment if,

(a) the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence[.]

[11] *Moddejonge v. Huron County Board of Education*, [1972] 2 O.R. 437, [1972] O.J. No. 1731, 25 D.L.R. (3d) 661, 1972 CarswellOnt 476 (H.C.J.), at para. 30.

[12] *Volenti non fit injuria.*

[13] *Novus actus interveniens.*

[14] *Moddejonge v. Huron County Board of Education*, *supra*(footnote 11), at para. 30.

[15] *Wagner v. International Railway Co.*, 133 N.E. 437, 232 N.Y. 176 (C.A. 1921), at p. 180 N.Y. referenced and quoted, in part, in *Moddejonge v. Huron County Board of Education*, *supra* (footnote 11), at para. 30; and in*Corothers v. Slobodian*, [1975] 2 S.C.R. 633, [1974] S.C.J. No. 119, at pp. 638-39 S.C.R.

[16] [1959] 1 W.L.R. 966, [1959] 3 All E.R. 225 (C.A.), at p. 981 W.L.R., referred to in *Corothers v. Slobodian*, *ibid.*, at p. 639 S.C.R.

[17] *Supra* (footnote 11).

[18] *Ibid.,* headnote.

[19] *Supra* (footnote 15).

[20] *Corothers v. Slobodian*, *supra* (footnote 15), at p. 638 S.C.R.

[21] An intervening cause.

[22] *Corothers v. Slobodian*, *supra* (footnote 15), at p. 641 S.C.R.

[23] *Ibid.*, at p. 636 S.C.R.

[24] *Ibid.*, at p. 638 S.C.R.

[25] *Ibid.*, at p. 638 S.C.R.

[26] *Ibid*., at p. 637 S.C.R.

[27] *Ibid.*, at p. 641 S.C.R.

[28] *Ibid.*, at p. 656 S.C.R.

[29] (1997), 34 O.R. (3d) 647, [1997] O.J. No. 3089, 1997 CanLII 12257 (Gen. Div.).

[30] *Ibid.*, at p. 93 CanLII.

[31] See para. 24, above; and *Corothers v. Slobodian*, *supra*(foonote 15), at pp. 638 and 641 S.C.R. (referred to at footnote 25 and footnote 27 of these reasons).

[32] [1988] N.S.J. No. 55, 83 N.S.R. (2d) 79 (S.C. (A.D.)) dismissing an appeal of the decision at [1987] N.S.J. No. 602, 80 N.S.R. (2d) 149 (S.C. (T.D.)).

[33] *Ibid.* (S.C. (A.D.)), at p. 2 of 2 (QL) (the penultimate paragraph).

[34] *Fleming's The law of Torts*, 10th ed. (Pyrmont, N.S.W.: Lawbook Co., 2011), at p. 197; and, for example, see*Horsley v. MacLaren*, [1972] S.C.R. 441, [1971] S.C.J. No. 123, where the victim was dead in the water by the time the rescuers tried to save him.

[35] Factum of the moving party (defendants, Suzanne Padt and Robert Padt), at para. 71.

[36] *Corothers v. Slobodian*, *supra* (footnote 15), at p. 638 S.C.R. (referred to at footnote 25).

[37] *Ibid.*, at p. 641 S.C.R. (referred to at footnote 27).

[38] The paramount responsibility the person whose fault creates the peril owes the rescuer was restated by Lord Denning in *Videan v. British Transport Commission*, [1963] 2 Q.B. 650, [1963] 2 All E.R. 860 (C.A. (Civ. Div.)), at p. 669 Q.B., and relied on by the Supreme Court of Canada in*Horsley v. MacLaren*, *supra* (footnote 34), at p. 444 S.C.R.:

It seems to me that, if a person *by his fault* creates a situation of peril, he must answer for it to any person who attempts to rescue the person who is in danger. He owes a duty to such a person above all others. The rescuer may act instinctively out of humanity or deliberately out of courage. But whichever it is, so long as it is not wanton interference, if the rescuer is killed or injured in the attempt, he can recover damages *from the one whose fault has been the cause of it.*

(Emphasis added by Supreme Court of Canada)

[39] See para. 15, above.

[40] *Corothers v. Slobodian*, *supra* (footnote 15), at p. 642 S.C.R.

[41] See para. 15, above; and footnote 15, at p. 180 N.Y.

[42] [1970] 1 O.R. 366, [1969] O.J. No. 1465 (C.A.). This judgment also appears with the paragraphs numbered at 1969 CarswellOnt 266.

[43] *Ibid.*, in the reports where the paragraphs are numbered, this quotation appears at para. 2. In [1970] 1 O.R. 366, it is on p. 368 O.R.

[44] *Ibid.*, in the reports where the paragraphs are numbered, this quotation appears at para. 5. In [1970] 1 O.R. 366, it is on p. 369 O.R.

[45] *Ibid.*, in the reports where the paragraphs are numbered, this quotation appears at para. 7. In [1970] 1 O.R. 366, it is on pp. 369-70 O.R.

[46] (1976), 14 O.R. (2d) 659, [1976] O.J. No. 2363 (H.C.J.). This judgment also appears in a slightly different form and with the paragraphs numbered at 1976 CarswellOnt 393.

[47] *Ibid.*, in the reports where the paragraphs are numbered, this quotation appears at para. 31. In (1976), 14 O.R. (2d) 659, it is on p. 665 O.R.

[48] *Ibid.*, in the reports where the paragraphs are numbered, this quotation appears at para. 22. In (1976), 14 O.R. (2d) 659, it is on p. 663 O.R.

[49] *Martin v. American International Assurance Life Co.*, [2003] 1 S.C.R. 158, [2003] S.C.J. No. 14, 2003 SCC 16, at para. 28.

[50] 200 N.Y. App. Div. LEXIS 2021.

[51] Factum of the responding parties, at para. 59.

[52] *Bechard v. Haliburton Estate*, 1988 CarswellOnt 393 (H.C.J.), at para. 40, affd (1991), 5 O.R. (3d) 512, [1991] O.J. No. 1969 (C.A.).

[53] [1998] B.C.J. No. 633, [1999] 3 W.W.R. 167 (S.C.).

[54] *Ibid.*, at para. 47.

[55] *Ibid.*, at para. 44.

[56] *Supra*, footnote 34; also referred to at para. 37.

[57] Affidavit of Bernard Verette (the police officer), at para. 21.

[58] *Ibid.*, at para. 23.

[59] Affidavit of Mark Burger, sworn February 13, 2014, at para. 14.

[60] Examination-of-discovery of Suzanne Padt, June 7, 2010, at p. 58; affidavit of Suzanne Padt, sworn November 28, 2013, at para. 11, bullet 4; examination-of-discovery of Bernard Verette (the police officer), June 8, 2010, at pp. 74-78; affidavit of Bernard Verette (the police officer), sworn February 11, 2014, at paras. 22-25; affidavit of Kate MacLeod, sworn November 29, 2013, at para. 30.

[61] Affidavit of Bernard Verette (the police officer), sworn February 11, 2014, at paras. 24-27.

[62] Affidavit of Mark Burger, sworn February 13, 2014, at para. 19.

[63] Affidavit of Bernard Verette (the police officer), sworn February 11, 2014, at para. 25.

[64] See para. 59, above.

[65] Information provided in an affidavit on information and belief are to include the source of the information and the fact of the belief (rule 39.01(1)(4)). In this case, the statements come from Mike MacLennan, he is the source. The lawyer does depose as to her belief in their truthfulness (affidavit of Kate MacLeod, sworn November 29, 2013, at para. 1).

[66] See para. 3, above.