

“Agony Of The Moment” Explained

August 28th, 2009

Reasons for judgement were released today ([Wormell v. Hagel](#)) by the BC Supreme Court, Kamloops Registry, awarding a Plaintiff just over \$570,000 in total damages as a result of a 2003 injury.

The facts behind the injury are a little unusual. The Plaintiff was standing on top of cargo on a flat bed truck. At the same time, the Defendant was operating a crane and intended to lift the cargo. The cargo shifted while the Plaintiff was still standing on it and in the “*agony of the moment*” the Plaintiff jumped off the truck to the ground which was some 12 feet below. In jumping on the ground the Plaintiff suffered various injuries including a “*crush fracture to the left ankle and a tear to the anterior cruciate ligament of his right knee*”.

The Defendant was found at fault for this incident for operating the crane at a time when it was unsafe to do so. The Plaintiff was found faultless for jumping to the ground in the “agony of the moment” and Mr. Justice Goepel did a good job summarizing this principle of law at paragraphs 35-37 stating as follows:

[35] A party who acts negligently and creates a danger carries a heavy onus if he then seeks to cast any blame for the accident on the injured party: Haase v. Pedro (1970), 21 B.C.L.R. (2d) 273 (C.A.) at para. 16, aff'd [1971] S.C.R. 669.

[36] The standard of care applied to individuals in emergency situations is not one of perfection. The law in such circumstances was explained in Walls v. Mussens Ltd. et al(1969), 11 D.L.R. (3d) 245 at 247-48 (N.B.C.A):

... I think the plaintiff is entitled to invoke the “agony of the moment” rule as an answer to the allegation of contributory negligence made against him. The rule is stated by Mr. Glanville Williams in his work Joint Torts and Contributory Negligence at p. 360-1:

It is well settled that where a sudden emergency arises through the fault of the defendant, the plaintiff who acts reasonably in an attempt to extricate himself is not guilty of contributory negligence merely because he unintentionally aggravates the situation. Also, where the plaintiff is compelled to make a quick decision in the ‘agony of the moment’ he is not expected to take into account all the considerations that a calmer appraisal of the situation might present to the mind. Perfect foresight and presence of mind are not required. This rule, sometimes called the ‘agony of the moment’ rule, is merely a particular application of the rule that the standard of care required of both plaintiff and defendant is that of a reasonable man.

The Law of Torts, 3rd ed., by J.G. Fleming contains the following statement at p. 247:

On the other hand, a person’s conduct in the face of a sudden emergency, cannot be judged from the standpoint of what would have been reasonable behaviour in the light of hind-knowledge and in a calmer atmosphere conducive to a nice evaluation of alternatives. A certain latitude is allowed when in the agony of the moment he seeks to extricate himself from an emergency not created by his own antecedent negligence. The degree of judgment and presence of mind expected of the plaintiff is what would have been reasonable conduct in such a situation, and he will not be adjudged guilty of contributory negligence merely because, as it turns out, he unwittingly took the wrong course.

The rule although applied originally in Admiralty cases, now has general application where danger to life and limb or to property is brought about by the negligence of the defendant: see The "Bywell Castle" (1879), L.R. 4 P.D. 219 per Brett, L.J., at p. 226, and Cotton, L.J., at p. 228; Rowan v. Toronto Ry. Co. (1899) 29 S.C.R. 717, and Tatisich v. Edwards, [1931] 2 D.L.R. 521, [1931] S.C.R. 167.

The test to be applied in circumstances such as those as in the case at bar is, in my opinion, not whether the plaintiff exercised a careful and prudent judgment in doing what he did, but whether what he did was something an ordinarily prudent man might reasonably have done under the stress of the emergency.

[37] In this case, Mr. Hagen's negligent act caused the emergency situation. Mr. Wormell did not have time to determine with any certainty whether the load was going to fall or stay. He had to make a quick decision in the "agony of the moment". He chose to jump clear. As it turned out, that was the wrong decision because the load itself did not come off the truck. Matters, however, could have turned out otherwise. In deciding to jump away from the load Mr. Wormell did something an ordinary prudent man might reasonably have done under the stress of the emergency.

In assessing the Plaintiff's non-pecuniary damages (money for pain and suffering and loss of enjoyment of life) at \$95,000 Mr. Justice Goepel noted the following about his injuries and their effect on his life:

[96] Mr. Wormell's injuries are permanent and will impact him for the rest of his life. He has undergone one surgery and will have to undergo at least one more for an ankle fusion. He also possibly faces surgery to reconstruct his ACL.

[97] In the months immediately following the accident, he was in significant pain. The March 2004 surgery reduced his pain and made his injuries more manageable. He now works steadily but seldom can do more than three or four hours of physical work. As his ankle worsens during the day, more of his weight bears on his right leg which aggravates his knee problems.

[98] If the fusion surgery is successful, he will have less pain in his ankle and will be more functional at work. The fusion will, however, cause some permanent limitations.

[99] Prior to his injuries, he was active in sports but he has not been able to return to sports in any meaningful way. This will not improve...

[105] I accept Mr. Wormell's evidence as to why he has not undergone the fusion surgery. That surgery will leave him incapacitated for six months to a year. Given his ongoing financial obligations, he has not been able to afford to take the necessary time off to have the surgery.

[106] As is often the case, none of the cited cases involve the identical combination of injuries as that suffered by Mr. Wormell. That said, the cases cited by the defendant are closer to the mark. In particular, in this regard, I refer to the Graham and Nicoll cases which both involved serious leg injuries to men of an age similar to Mr. Wormell. I award \$95,000 in non-pecuniary damages.