
CANADA / JUDGMENT

Bideci v. Neuhold

2014 BCSC 542

COURT

Supreme Court of British Columbia

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2014 BCSC 542 Bideci v. Neuhold

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Bideci v. Neuhold,

2014 BCSC 542

Date: 20140307

Docket: M135387

Registry: Vancouver

Between:

Ishan Bideci

Plaintiff

And

Carl Neuhold, South Coast BC Transportation

Authority and The Corporation of the District

of West Vancouver

Defendants

Before: The Honourable Mr. Justice Abrioux

Oral Reasons for Judgment

Counsel for the Plaintiff:

D. Grunder and

M. Sporer

Counsel for the Defendants:

K. Naish and

S. Leung

Place and Date of Trial/Hearing:

Vancouver, B.C.

February 26 - 28, 2014

Place and Date of Judgment:

Vancouver, B.C.

March 7, 2014

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I: INTRODUCTION

- [1] The following constitute my oral reasons for judgment with respect to the trial of this proceeding which took place on February 26-28, 2014.
- [2] The reasons for judgment will be released in written form in due course and may contain certain grammatical or stylistic changes. The substance of what follows, however, will remain.
- [3] Ishan Bideci seeks damages for the injuries he sustained when he was involved in an unfortunate incident whilst a passenger aboard a West Vancouver "Blue Bus" (the "bus") on September 29, 2012 (the "Accident").
- [4] The Accident occurred at approximately 1:45 p.m. on Marine Drive in West Vancouver at the Park Royal Towers bus stop, which is located one bus stop west of the Park Royal Shopping Centre. The plaintiff fell while in the process of standing up from the seat he had been occupying on the bus. He intended to exit the bus at this stop, which is close to where he lives.
- [5] Mr. Bideci alleges he sustained various injuries, the most severe of which was to his right shoulder.
- [6] Both liability and quantum of damages are in issue.
- [7] For the reasons that follow, I have concluded that both the bus driver defendant, Carl Neuhold, and the plaintiff were negligent. Liability will be apportioned two thirds as against the defendant Mr. Neuhold and one third as against the plaintiff.

II: BACKGROUND

- [8] By way of brief background, Mr. Bideci was born in December 1918 in what was then Constantinople. He was 93 years old at the time of the Accident, 95 years old at the time of the trial.
- [9] The plaintiff is a retired businessman and former textile engineer. At the time of the Accident, he resided on Marine Drive in West Vancouver in one of the apartment blocks which form part of the Part Royal Towers complex. He lived alone; his nearest relatives reside in Québec.
- [10] Mr. Bideci led an active life. Prior to the Accident, he did aerobic and stretching exercises at home for approximately an hour and a half every day. He played the banjo and the piano. He also traveled to Europe, where he continued to pursue some business activities. He did have the assistance of a housekeeper, but was fully independent in his activities of daily living.
- [11] As one would expect for a gentleman his age, Mr. Bideci did have a relevant medical history prior to the Accident. Dr. Kabiri, who was the plaintiff's family physician from November 2010 to May 2013, testified that the plaintiff's medical history included:

- frailty, limited in terms of activities and on a gradual systemic decline in keeping with his age;
- severe osteoporosis and osteoarthritis;
- neck and back pain due to a motor vehicle accident which occurred in August 2010;
- bilateral shoulder pain; and
- difficulties with balance and dizziness going back to the time when the plaintiff first became her patient. Dr. Kabiri stated that she attributed complaints of light-headedness and dizziness in 2012 prior to the Accident as being part of the osteoarthritis and osteoporosis referred to in her medical/legal report of June 17, 2013.

- [12] In April 2012, less than six months before the Accident, Dr. Kabiri approved the plaintiff's application to receive HandyDart service. It was her opinion at that time and confirmed by her evidence at trial, that Mr. Bideci could not use the conventional transit system, such as buses, unassisted and that this was a permanent condition. As she noted on the plaintiff's HandyDart application form, this was due to "severe osteoarthritis with uneven balance that increases his risk of fall and fracture, also due to cardiac problem history of dizziness". She testified that she reviewed her comments on the application form with the plaintiff at that time.
- [13] Dr. Kabiri had also referred Mr. Bideci for physiotherapy treatments prior to the Accident. He attended on one occasion, refusing further treatment because he did not believe it to be beneficial.
- [14] I would describe the plaintiff, meaning absolutely no disrespect whatsoever, as a "feisty" individual. He was frequently argumentative on cross-examination. He denied much of his medical history before the Accident as outlined by Dr. Kabiri, with the exception of the osteoarthritis and osteoporosis.
- [15] In particular, he denied difficulties with balance or dizziness or that Dr. Kabiri advised him in April 2012 that he should not take public transit unassisted. Mr. Bideci seemed to bear a bit of a grudge against Dr. Kabiri (who is no longer his physician due to a change in focus of her practice) in that he appeared to hold her responsible for the fact that he was no longer authorized to drive a motor vehicle.
- [16] Once he was approved for HandyDart, the plaintiff utilized both that service and public transportation until the day of the Accident. When riding the bus, he did so unassisted.

III: THE ACCIDENT

- [17] A disc containing video recorded by five cameras in operation on the bus at the time of the Accident was entered into evidence at trial. The parties agree that it accurately depicts what occurred at the time of the Accident and the timeframes immediately before and after Mr. Bideci fell.

- [18] As will be detailed below, the defendants' position is that passengers in the immediate vicinity of where the plaintiff was seated and Mr. Neuhold himself had a different perspective or perception of what was occurring than as depicted on the video.
- [19] The Accident occurred at approximately 1:45 p.m. It was a bright and sunny afternoon. Mr. Bideci had taken the bus from his home to the Capilano Mall in North Vancouver to shop for groceries. He boarded the bus at the Capilano Mall, intending to return home.
- [20] Mr. Neuhold testified that he had driven this particular bus route hundreds if not thousands of times. Part of the route is on Marine Drive in North Vancouver westbound to West Vancouver. He stated that senior citizens travel this route frequently. He was well aware that the safety of all his passengers was his primary concern and that he had to be particularly attentive to those who were elderly or disabled.
- [21] Mr. Bideci testified that when he boarded the bus he had his cane in his right hand and a bag of groceries in his left. He sat down on one of the bench seats closest to the driver on the passenger side of the bus.
- [22] The bus proceeded uneventfully to the Park Royal Shopping Centre which is where Ms. Cherida Trott and Mr. Kenneth Johnson boarded. The next stop after Park Royal Shopping Centre is at Park Royal Towers, the stop at which the Accident occurred.
- [23] Mr. Bideci testified that prior to the bus leaving the Park Royal Shopping Centre stop, he told the driver that he was getting off at the next stop. In cross-examination, he was referred to his evidence at his examination for discovery where he testified that he did not speak at all to the bus driver. He stated that he was referring to having a conversation with the bus driver, which he did not believe is appropriate for passengers to do. He maintained that he had told the bus driver he was getting off at the next stop. He later stated that he could not recall if he spoke to the bus driver or not.
- [24] Mr. Neuhold was very clear in his evidence that he had no conversation with the plaintiff. In particular, he was not told by him that he intended to get off the bus at the next stop, that being Park Royal Towers. He stated he had absolutely no idea that the plaintiff was intending to leave the bus until after the Accident occurred.
- [25] Ms. Trott was seated two places down from Mr. Bideci. She was very familiar with this bus route having taken it many times before. She had seen Mr. Bideci on the bus in the past.
- [26] Ms. Trott testified that she first observed the plaintiff when she boarded the bus. She had to walk past him to get to her seat. She noticed there was a plastic shopping bag, perhaps two, at his feet. They had plastic handles.
- [27] She described the timeframe between the shopping centre and the next stop at Park Royal Towers to be "unremarkable". She stated the bus usually stopped at Park Royal Towers to let people off.

- [28] She stated things were "pretty quiet" and there was "nothing untoward" as the bus pulled into the parking bay at Park Royal Towers. It was not jerking.
- [29] She recalled at least one person getting out of the rear door and that the doors to the bus then closed. Everyone remaining on the bus was seated. She noticed that the bus driver looked in his rear-view mirror and then his side mirror to check for traffic.
- [30] She stated that the bus driver then started to pull out from the stop. That is when the elderly gentleman started to move in his seat. She said she was surprised that he was still there since she knew from her past observations of him that he normally got off at that stop. Ms. Trott testified: "It looked like he was shifting in his seat The bus was already starting to pull out of the bay".
- [31] She said that the plaintiff was starting to stand up and was not fully standing when he fell. She saw he had his hand on the top of his cane. She observed him to fall onto his left side and onto the floor. Things happened very quickly. She stated that his left shoulder fell onto her shoe.
- [32] With help from some other passengers, she assisted the plaintiff. He had a gash on his hand. She heard Mr. Bideci tell the bus driver that he was going to "press charges", or words to that effect. She gave the bus driver her phone number so that she could be contacted if need be.
- [33] On cross-examination, it was suggested to her that the bus driver "glanced at the interior mirror" before putting the bus in operation. She responded, "it looked like a pretty significant look to me".
- [34] Ms. Trott was also directed to the video evidence. She agreed that Mr. Bideci was in the process of standing within approximately three seconds of the bus coming to a stop and was standing when the bus started to move.
- [35] Kenneth Johnson also testified. He was seated on one of the pull-down bus seats directly across the aisle from where the plaintiff was seated. He said he had not seen the plaintiff before that day.
- [36] Mr. Johnson was looking at his telephone during the timeframe when the bus proceeded from the shopping centre to the Park Royal Towers bus stop.
- [37] He stated that he first observed the plaintiff when he looked up from his phone. He saw him reaching for what he believed were at least two grocery bags, missing them several times. The plaintiff was leaning forward. Mr. Johnson observed the plaintiff's hand to have swept across the top of the grocery bags and described this manoeuver as if the plaintiff's field of vision were poor.
- [38] Mr. Johnson estimated that five or six seconds were lost while this was occurring. He said that the "bus was moving just at about the same time he stood up" and that the "bus starting to move and his standing were almost simultaneous".

- [39] Mr. Johnson stated that it was "a traditional take off by the bus, it was not jerking or anything". He estimated that the bus moved 20 feet or less before the plaintiff fell.
- [40] In cross-examination, Mr. Johnson was also referred to the video. He agreed that the bus doors were open when the plaintiff started to reach for his bag(s) and was in the process of standing when the bus started to move. "When he got horizontal the bus is moving". He later corrected "horizontal" to "vertical". He also acknowledged that the plaintiff may only have had one shopping bag with him and not more, as he had initially believed.
- [41] The plaintiff testified that he had no difficulty getting on the bus that day. He placed his grocery bag on the floor beside him. He said the bag was heavy in that it was "enough" for him and the limit of what he could carry in one hand.
- [42] Mr. Bideci stated that there was no problem with the way the bus stopped at the Park Royal Towers bus stop and that there was no indication it would be stopped for an extended period of time. After the bus stopped, he stood and had to pick up his bag with his left hand. His intention was to exit through the front door.
- [43] The plaintiff said that while the bus was stopped he did not look at Mr. Neuhold, nor did he know whether anyone left the bus through the front or back doors. He also stated that he did not know whether the driver saw him before he put the bus into operation.
- [44] Mr. Bideci described the bus "shaking". He testified that he was not close to the door when this occurred, having taken perhaps one or two steps. He confirmed that everything happened quickly. When he opened his eyes, he was on the ground. He does not know how he fell.
- [45] The plaintiff was an experienced bus rider. He testified he was comfortable on the bus and knew that they often stopped and started along bus routes for traffic lights, bus stops and pedestrians. He also said that, generally, bus movement is not as smooth as being a passenger in a car or on HandyDart.
- [46] Mr. Neuhold is a very well-qualified and experienced transit operator. During his evidence, he described his common practice with respect to arriving and departing at bus stops as well as dealing with passengers. This includes usually opening both doors at a stop and observing passengers getting on and off the bus out of both doors. He appreciates that it takes longer for elderly passengers to get on and get a seat.
- [47] Mr. Neuhold described the practice which he follows in relation to the mirrors available to him prior to departing from a stop. He first looks at the convex mirror to his right on the outside of the bus in order to see if there are individuals who are running to catch the bus. He then looks in his rear-view mirror in order to make sure that everyone is seated. He will then look out his left side view mirror and through his windshield. This is so that he can safely pull out into traffic. He confirmed that these mirrors were in place and operational on the bus he was driving at the time of the Accident.

- [48] Mr. Neuhold testified that the rear doors of the bus take longer to close than the front doors, which take more than a second to close.
- [49] Mr. Neuhold recalled seeing Mr. Bideci get on the bus at the Capilano Mall stop. That is because he was a very elderly, slow-moving man who appeared to be frail. He was carrying a shopping bag that appeared to be heavy. Mr. Neuhold had never seen him before. He placed the bus in a "kneeling" position to assist Mr. Bideci to board.
- [50] When the bus arrived at the Park Royal Towers bus stop, Mr. Neuhold opened the front and back doors. Two passengers exited from the rear. He then closed the doors. He testified that he then looked in all his mirrors as per his usual practice. In his rear-view mirror, he observed everyone on the bus to be seated and nothing appeared to be out of the ordinary. He completed his safety checks and then started to pull out of the bay.
- [51] It was Mr. Neuhold's evidence that he spends at least one second looking at each of the right outside and inside mirrors prior to looking to the left outside mirror. On cross-examination, he stated this had to take "at least one to two seconds".
- [52] He first became aware of the incident when he heard it taking place behind him. He estimated the speed of the bus at this time to be 2-5 kph. He immediately stopped the bus and was only 10 to 20 feet from its original stopped position. He was still in the bus bay at this time.
- [53] The video shows Mr. Neuhold proceeding quickly to be with the plaintiff. He was clearly concerned for him. He called the dispatcher and waited with Mr. Bideci until the ambulance arrived.

IV: APPLICABLE LEGAL PRINCIPLES

- [54] The principles that apply to the issues in this case are well known and were summarized by Madam Justice Dardi in *Prempeh v. Boisvert*, 2012 BCSC 304 at paras. 15-20. She stated at para. 15:
- [15] The principles that govern the disposition of this case are uncontroversial. The reasonable foreseeability test informs the analysis of liability. The standard of care owed to a plaintiff passenger by a defendant bus driver is the conduct or behaviour that would be expected of a reasonably prudent bus driver in the circumstances. This is an objective test that takes into consideration both the experience of the average bus driver and anything the defendant driver knew or should have known: *Wang v. Horrod* (1998), 48 B.C.L.R. (3d) 199 at para. 39 (C.A.); *Patoma v. Clarke*, 2009 BCSC 1069 at para. 6.
- [55] Dardi J. went on to note that although the standard of care imposed on public carriers is a high one, it is not one of perfection. Further, a bus driver is not an insurer for every fall or mishap that occurs on a bus.

[56] *Day v. Toronto Transportation Commission*, [1940] S.C.R. 433, is the seminal case respecting the liability of public carriers. In *Day*, a passenger fell to the floor and was injured when the streetcar operator applied the emergency brake. The standard of care was stated by Hudson J. at 441 as "a heavy burden on the defendant carrier to establish that he had used all due, proper and reasonable care and skill to avoid or prevent injury to the passenger."

[57] The principles of liability arising from *Day* have been articulated into the following analytical approach:

- once a passenger on a public carrier has been injured in an accident, a *prima facie* case of negligence is raised; and
- it is for the public carrier to establish that the passenger's injuries were occasioned without negligence on the part of the defendant or that it resulted from a cause for which the carrier was not responsible.

See: *Visanji v. Eaton and Coast Mountain Bus Co. Ltd.*, 2006 BCSC 656 at para. 26.

[58] *Fontaine v. British Columbia (Official Administrator)*, [1998] 1 S.C.R. 424 is also germane. There, the Supreme Court of Canada held that the law would be better served if the doctrine of *res ipsa loquitur*, i.e. the burden shifting to the defendant in a case of *prima facie* negligence, was treated as expired. At 435, Major J. stated:

That evidence is more sensibly dealt with by the trier of fact, who should weigh the circumstantial evidence with the direct evidence, if any, to determine whether the plaintiff has established on a balance of probabilities a *prima facie* case of negligence against the defendant. Once the plaintiff has done so, the defendant must present evidence negating that of the plaintiff or necessarily the plaintiff will succeed.

[59] At para. 29 of *Visanji*, Madam Justice Arnold-Bailey made the following comment after reviewing the leading authorities:

[29] Whether the burden upon a public carrier in cases of injury or accident sustained by a passenger can be referred to as the shifting of the burden as in *Day*, or a matter of inferences to be drawn from the evidence once the plaintiff has established a *prima facie* case of negligence against the defendant carrier as articulated in *Fontaine*, it is for the defendant to present evidence to answer, or be found negligent: [*Nice v. Doe*, 2000 ABCA 221 at para. 46, leave to appeal to SCC refused, 28161 (March 29, 2001)].

[Emphasis added.]

[60] Arnold-Bailey J. went on to discuss the rationale for shifting the burden to the defendant in public carrier cases. The following principles are summarized from the Alberta Court of Appeal's decision in *Nice v. Doe*, 2000 ABCA 221 at paras. 28-32:

- Day remains the law in the public carrier cases. Where there is an accident and an injury, a public carrier has the burden of showing that it exercised all due, proper and reasonable care and skill to avoid or prevent injury to its passengers. This shift is justified for a number of reasons:
- passengers on a public carrier are entitled to expect that they will be carried to their destinations in safety and thus, the standard of care for public carriers is high;
- the driver of the carrier is the person who knows whether the vehicle was being driven in a safe, proper and prudent manner. The passengers cannot be expected to know what happened;
- a shifting of the burden will encourage public carriers to adopt proper reporting procedures so that facts are ascertainable after an incident occurs. If the party with the knowledge were not called on to answer, the incentive to keep proper records from which the truth can be ascertained disappears. Even worse, there might be an incentive not to keep records; and
- drivers of all vehicles have a high duty of care and responsibility.

[61] Although not an issue in this case, part of a public carrier's duty is also to provide passengers with a reasonably safe place to disembark. This duty was expressed as early as 1922 by Anglin J. in *Grand Trunk Pacific Coast Steamship Co. v. Simpson* (1922), 63 S.C.R. 361 at 370:

The duty of a carrier of passengers to provide a reasonably safe place for them to debark admits of no dispute. It is part of the obligation ordinarily undertaken in the contract of carriage.

V: DEFENDANTS' LIABILITY

A: Introduction

- [62] The defendants agree that the plaintiff has established a *prima facie* case of negligence. Accordingly, the issue then becomes whether the defendants have met the "heavy burden" of establishing that Mr. Neuhold used all due, proper and reasonable care and skill to avoid or prevent injury to Mr. Bideci.
- [63] The standard of care is the conduct expected of a reasonably prudent bus driver in the circumstances. The court must consider the experience of an average bus driver as well as anything which a particular driver knew or should have known about the passenger. The standard of care required is higher when the driver knew or ought to have known that the passenger was handicapped or elderly: *Wong v. South Coast British Columbia Transportation Authority*, 2013 BCSC 1118 at para. 39.

B: Parties' Positions

[64] The defendants submit that there is evidence before the court which should be accepted and which demonstrates that Mr. Neuhold has satisfied the admittedly high burden of establishing that he met the requisite standard of care in these circumstances. In any event, this was simply an unfortunate accident and the evidence is equally consistent with no negligence as with negligence.

[65] They point to the following:

- they submit the issue is what ought Mr. Neuhold to have known prior to putting the bus in operation. This involves a consideration of the "human elements" and their comparison to what the video indicates;
- two passengers who were seated close to the plaintiff did not appreciate that he was trying to get up prior to the bus moving. Ms. Trott thought Mr. Bideci was perhaps trying to move in his seat. Mr. Johnson noted that several seconds elapsed as the plaintiff had difficulty reaching for his grocery bag(s). It was not apparent to Mr. Johnson that Mr. Bideci was trying to get up from his seated position;
- Ms. Trott and Mr. Johnson were not challenged on cross-examination regarding their perceptions;
- the video indicates that it took the plaintiff two to three seconds to try and get his bag. Mr. Neuhold looked in his rear-view mirror for one to two seconds and did not appreciate from his vantage point that Mr. Bideci was trying to get up;
- the evidence, including the video, does not permit the conclusion to be drawn that Mr. Neuhold should have appreciated that the plaintiff was trying to get up as opposed to trying to pick up his bag. The events should not be looked at with hindsight. Mr. Neuhold is not subject to a standard of perfection;
- neither Mr. Johnson nor Ms. Trott perceived that the plaintiff was about to stand until the timeframe when the bus started to move;
- although camera number three on the video depicts the plaintiff starting to rise to a standing position several seconds before the bus started to move, this does not take into account the "human factors" involved such as reaction time;
- Mr. Neuhold's evidence that he glanced for one to two seconds in his rear-view mirror prior to checking the outside driver's side mirror is the only evidence as to the standard of reasonable care and skill expected of a prudent bus driver in the circumstances. Ms. Trott testified that Mr. Neuhold had a "pretty significant look" in the rear-view mirror before the bus started to move; and

· given the timing of the plaintiff's actions as compared to the timing of Mr. Neuhold's visual inspection inside the bus, Mr. Neuhold would have completed his visual inspection of the interior of the bus via the rear-view mirror before the plaintiff became fully erect and began to take a step forward on the bus.

[66] The plaintiff responds by saying:

- the best evidence as to what occurred is the video, particularly camera number three;
- the bus was stopped at the Park Royal Towers bus stop for approximately eight seconds;
- the video depicts Mr. Bideci starting to rise from his seat moments after the bus came to a stop;
- Ms. Trott and Mr. Johnson were attempting to be accurate in their evidence, but the passage of time has affected their recollection. They were clearly in error with respect to portions of their evidence;
- for Ms. Trott, this included her evidence in direct examination that Mr. Bideci started to move in his seat as the bus was leaving the stop. Upon being directed to the video on cross-examination, she agreed that the plaintiff started to get up while the bus was still stopped and was standing by the time it left the bus stop;
- this is a classic case of the unreliability of eyewitnesses, even those who are doing their best to give accurate evidence. The video is the most valuable tool and it is "undeniable" that Mr. Bideci was in the process of rising from his seat several seconds before the bus was put into motion;
- Mr. Johnson's evidence was that he boarded the bus outside The Bay store in downtown Vancouver. He was clearly in error in that the bus' route was entirely on the North Shore. In addition, it was not until he saw the video during his cross-examination that he recalled Mr. Bideci having a cane;
- Mr. Johnson, who was seated directly across from the plaintiff, testified that the plaintiff was trying to pick up his bag(s) in order to get off the bus. He was wrong when he testified that Mr. Bideci spent several seconds attempting to grasp the handles of the grocery bag(s) prior to starting to get out of his seat. The video clearly shows otherwise;
- in any event, on Mr. Johnson's evidence, the plaintiff was "vertical" at the time the bus started to move;
- Mr. Neuhold knew that passengers who were senior citizens take longer to get on and off a bus. He had observed the plaintiff when he boarded the bus to be elderly and frail with a hunched posture. He had the bus "kneel" in order to assist the plaintiff to get on the bus; and
- the combination of the video evidence and the fact that Mr. Bideci fell demonstrates that Mr. Neuhold did not look carefully enough in his rear-view mirror prior to setting the bus in motion. Had he done so, he would have seen that the plaintiff was in the process of getting up from his seat.

C: Findings of Fact

[67] I make the following findings of fact:

- (a) at the Park Royal Shopping Centre bus stop, the plaintiff did not advise Mr. Neuhold that he wished to get off at the next stop, that being Park Royal Towers;
- (b) Mr. Neuhold put the bus in motion in an entirely appropriate manner. Specifically, there was no jerking movement;
- (c) the video is the best evidence as to what occurred. As Mr. Neuhold stated during cross-examination, "the video does not lie";
- (d) the video demonstrates that Mr. Bideci commenced the process of attempting to stand in order to exit the bus within two to three seconds of it coming to a stop. In particular, this occurred before Mr. Neuhold closed the front doors of the bus;
- (e) certain of Mr. Johnson's and Ms. Trott's perceptions, which the defendants ask me to accept in considering whether Mr. Neuhold's actions satisfied the requisite standard of care, were wrong. Mr. Bideci in fact spent several seconds in the process of attempting to rise from his seat before Mr. Neuhold put the bus in motion;
- (f) I do not accept Ms. Trott's evidence that Mr. Neuhold took "one long look" or a "pretty significant look" in his rear-view mirror prior to putting the bus in motion. Had he in fact done so, he would have appreciated that his elderly and frail passenger who walked with a hunched posture was in the process of slowly attempting to stand; and
- (g) had Mr. Neuhold appreciated that the plaintiff was in the process of standing, he would not have put the bus into motion.

D: Analysis

[68] The defendants point to the "perceptions" of Ms. Trott and Mr. Johnson and, in particular, that they did not appear to appreciate - as is shown on the video - that the plaintiff was in the process of standing before the bus was put into motion.

[69] This submission, in my view, delineates the difference between the roles of the passengers and that of the bus driver in a situation such as this. Mr. Johnson and Ms. Trott were not subject to the same heavy burden vis-à-vis the plaintiff as was Mr. Neuhold. Their evidence, particularly that of Mr. Johnson, demonstrates that they were not watching the plaintiff as closely as they may have believed to be the case.

[70] The defendants referred me to several cases which considered the issue of a bus driver's use of the rear-view mirror, including: *Wang v. Horrod* (1998), 48 B.C.L.R. (3d) 199 (C.A.); *Lawson v. B.C. Transit*, 2002 BCSC 1438; and *Pohl v. Greater Vancouver Transportation Authority*, 2007 BCSC 1201. All of these cases are distinguishable on the facts from what I conclude occurred in this case. They involve situations where:

- the passenger decided to stand either at the time the bus was being put into motion or afterwards, or
- the passenger decided to stand after the driver's rear-view safety check had occurred, or
- the bus driver did not perform a safety check in the rear-view mirror at all.

- [71] But that is not what happened in this case. As the video demonstrates, Mr. Bideci commenced his slow process of standing moments after the bus came to a stop and while the front door was still open. I accept the plaintiff's submission that it would have been irresponsible on his part to commence standing prior to the bus coming to a stop.
- [72] The standard of care to which Mr. Neuhold was subject included taking a careful enough look into the rear-view mirror as was appropriate under the circumstances in existence at the time. As he candidly admitted in his evidence, he was under no specific time constraints: "If you're late, you're late". Safety of his passengers was his primary consideration.
- [73] Mr. Neuhold's evidence was that photograph 8 of Exhibit 7 was the most accurate approximation of what he would have seen as he looked in his rear-view mirror, with a caveat being that he would not have been able to see the wheel well on the passenger side of the bus.
- [74] Mr. Bideci's seat is clearly visible in this photograph and there were no obstructions such as someone standing or moving which would have obscured Mr. Neuhold's view of this area.
- [75] I appreciate that Mr. Neuhold is not subject to a standard of perfection nor is he the plaintiff's insurer. But when I apply the legal principles to which I have referred above to my findings of fact, I conclude that the defendants have not satisfied the burden on them to establish that Mr. Neuhold used all due, proper and reasonable care and skill to avoid or prevent injury to the plaintiff.
- [76] Based on my review of the video, I am of the view that Mr. Neuhold did not look carefully enough in his rear-view mirror before deciding to perform his final outside mirror check, which preceded his putting the bus in motion. Had he in fact taken a "long hard look" or a "pretty significant look" in his rear-view mirror as Ms. Trott stated that he did, he would have seen his elderly, frail and "hunched" passenger in the process of slowly rising from his seat.
- [77] Accordingly, I conclude the defendants have not satisfied the burden on them to answer the prima facie case of negligence and I find them liable for the Accident.

VI: CONTRIBUTORY NEGLIGENCE

- [78] The defendants, relying on *Bradley v. Bath*, 2010 BCCA 10 at para. 27, take the position that the plaintiff should be found contributorily negligent for having failed to take reasonable steps for his own safety and that these failures were one of the causes of the Accident.

- [79] They say he failed to advise the bus driver that he would be disembarking at the Park Royal Towers stop. In addition, he placed himself in a position in which he could not hold onto something in order to be in a stable position should the bus start to move.
- [80] They argue the plaintiff's acts were significant and that he should be found 25% to 50% contributorily negligent.
- [81] The plaintiff submits he should not be held liable. The video shows he started to get up as soon as the bus came to a stop. He was standing when the bus started to move. On a worst case scenario, he should not be found contributorily negligent for more than 15%.
- [82] In my view, the plaintiff should be found contributorily negligent.
- [83] Simply put, Mr. Bideci had known since April 2012, several months prior to the Accident, that he should not take public transit unassisted. This was due to his physical condition, which included uneven balance that increased his risk of falling.
- [84] The need for assistance would cover situations such as:
- if he forgot to tell the driver where he was getting off or needed extra time to disembark, someone could do that for him;
 - someone could assist him to grab his shopping bag, which slowed his ability to stand, or, better still, carry the bag for Mr. Bideci such that he did not have both hands occupied; and
 - someone could provide the plaintiff with something to hold onto, by the arm for example, which likely would have given him the necessary stability when the bus started to move.
- [85] I have already found that the Accident would not have occurred had Mr. Neuhold taken a proper look in his rear-view mirror. In my view, the Accident would also not have occurred had Mr. Bideci not ignored Dr. Kabiri's advice and travelled unassisted on the bus that day.
- [86] The issue then becomes how liability should be apportioned as between the parties. As I noted in *Falconer v. BC Transit Corporation*, 2013 BCSC 715, commencing at para. 51, this involves a consideration of the relative blameworthiness of the parties and the criteria referred to in *Aberdeen v. Township of Langley*, 2007 BCSC 993, varied on other grounds, 2008 BCCA 420.
- [87] While these criteria do not constitute an exhaustive list, they are of assistance in apportioning liability in this case. In particular, I note:
- the nature of the duty owed by the tortfeasor to the injured person;
 - the nature of the conduct held to amount to fault;
 - the gravity of the risk created;
 - the extent of the opportunity to avoid or prevent the accident or damage;

- the knowledge one person had or should have had of the conduct of another person at fault; and
- the magnitude of the departure from the standard of care.

[88] I conclude that Mr. Neuhold's degree of fault to be greater than that of Mr. Bideci. Mr. Neuhold owed a high standard of care to the plaintiff, which included taking a sufficiently long look in his rear-view mirror to see if any passengers were in the process of attempting to leave the bus at that stop. This is particularly the case given his observations of the plaintiff that day and the nature of the route, specially the fact that he knew senior citizens travelled this route frequently.

[89] A longer look in the rear-view mirror would have added at most a few seconds to the 8 seconds the bus was actually stopped.

[90] In addition, as between the parties, Mr. Neuhold had the last opportunity to avoid the Accident from occurring.

[91] Mr. Bideci's degree of fault is not, however, in the modest range submitted on his behalf. In my view, it is greater than was the case in Falconer. There, I found the plaintiff 25% responsible in circumstances where he at least turned his mind to safety issues, but proceeded to exit the bus on what he knew to be a slippery surface.

[92] Here, Mr. Bideci completely ignored the medical advice that he not travel on public transportation unassisted. He also did not advise Mr. Neuhold as to which stop he was planning to disembark.

[93] Accordingly, I apportion liability two thirds as against the defendants and one third as against the plaintiff.

VII: DAMAGES

A: Plaintiff's Injuries

[94] Following the Accident, the plaintiff was taken by ambulance to Lions Gate Hospital. There, he had complaints to his left temple, bilateral shoulder pain, abrasions on his left elbow and hand and a bump on the left posterior side of his head. He was discharged later that day, despite still having pain in his right shoulder and left hand.

[95] Mr. Bideci flew to Germany the next day. He testified that he had some business to conduct. He was there for approximately a week.

[96] His first visit with Dr. Kabiri was on October 9, 2012, being the date after his return from Europe. At that time, he was complaining of right shoulder pain and the fact that during his trip he had difficulty raising his right hand. He still had wounds on his left hand and elbow and was complaining of left knee pain.

- [97] Dr. Kabiri suspected a rotator cuff tear and ordered ultrasound imaging of the plaintiff's right shoulder
- [98] By early November 2012, Mr. Bideci was exercising every day. Generally, his pain was somewhat improved, but the range of motion in the shoulder was still restricted.
- [99] On November 28, 2012, Dr. Kabiri recommended therapeutic options for the ongoing complaints of right shoulder pain and restricted range of motion. It should be noted that at this time Mr. Bideci was also complaining of right wrist pain with radiation to his right elbow and arm which manifested itself when he played the piano or worked on his computer.
- [100] Dr. Kabiri referred Mr. Bideci for physiotherapy, but he refused to attend. She also referred him to a sports medicine specialist regarding the right shoulder pain, advised him to use a wrist brace, and referred him to a geriatric medicine specialist in that she suspected the early onset of Parkinson's disease.
- [101] During her testimony at trial, Dr. Kabiri stated that the difficulties with the right wrist were not related to the Accident, but it was possible that they could relate to the rotator cuff.
- [102] The geriatric specialist, Dr. Alimoradi, recommended low-dose medication for the early onset of Parkinson's disease, which Mr. Bideci refused to take. She also suggested homecare physiotherapy with emphasis on balance exercise and his right shoulder. Dr. Kabiri agreed with these recommendations.
- [103] Mr. Bideci was assessed by a sports medicine specialist, Dr. Bovard, who made a diagnosis of tear of the muscles of the right rotator cuff with an impingement syndrome. He recommended exercise and a cortisone injection. Dr. Kabiri agreed with this diagnosis and treatment plan.
- [104] Mr. Bideci ceased being Dr. Kabiri's patient in mid-2013 and her report of June 17, 2013, was the extent of the medical evidence presented at the trial.
- [105] Dr. Kabiri's opinions included:
- for many years prior to the Accident and due to his osteoporosis and osteoarthritis, Mr. Bideci had signs and symptoms in his neck, which included the shoulder area, upper and lower back, and his joints;
 - the Accident "very likely" contributed to the full thickness of the tear of the supraspinatus tendon in his right shoulder. This, combined with the partial tear of the infraspinatus tendon and calcification of his other tendons, are responsible for the restrictions in Mr. Bideci's right shoulder and for the pain when he moves his shoulder. This has had the effect of decreasing his ability to carry out his daily activities; and
 - his pain and range of motion may improve with medication, steroid injections, massage therapy and physiotherapy.

- [106] She "strongly recommended" continuing with physiotherapy and, since it is difficult for him to go out of his home, homecare physiotherapy can be a "great option".
- [107] Dr. Kabiri stated that as at the time Mr. Bideci ceased to be her patient, he was independent with his activities of daily living but there had been some decline. She agreed that such a decline would have occurred in any event due to his advancing age, but was of the opinion that this was accelerated by the injuries sustained in the Accident.
- [108] Mr. Bideci's evidence was to the effect that all of his injuries, but for the difficulty to the upper right arm and shoulder, had resolved by the time of trial. He is right-handed and continues to have difficulties with pain and mobility of his right arm. As a result, he uses his left hand to compensate for the fact that he has pain whenever his right arm is moved away from his body, an example being when he combs his hair.
- [109] With respect to his quality of life since the Accident and ability to participate in activities of daily living as of the time of trial, Mr. Bideci stated:
- in addition to his trip to Europe immediately after the Accident, he traveled to Fort Lauderdale in the autumn of 2013. From there, he took a cruise back to Vancouver;
 - Dr. Kabiri stated she had a note in her records to the effect that Mr. Bideci travelled to Europe in the spring of 2013. The plaintiff could not remember whether this had occurred but did not dispute that it did;
 - he continues to exercise for 90 minutes daily as was the case prior to the Accident. This consists of 60 minutes of aerobic activity and 30 minutes of strength exercises;
 - he lives independently, cooks and shops for himself and, for the most part, takes care of himself. He has a housekeeper who attends his apartment. This was also the case prior to the Accident. He bathes himself;
 - he still takes the bus unassisted and uses HandyDart for transportation;
 - he continues to make travel plans and intends on traveling to London later this year; and
 - the inability to use his right arm has meant that he can no longer play the banjo, which was an activity which he performed for about an hour a day prior to the Accident. He has given his banjo to his nephew in Montréal. He is now unable to play the piano to the extent that he did prior to the Accident.

B: Non-Pecuniary Damages

- [110] The plaintiff's position is that non-pecuniary damages should be assessed in the range of \$50,000 to \$60,000. He points to the "golden years doctrine", which is to the effect that when an older person is injured and suffers impairment to their mobility, the negative change in their physical abilities must be considered "with all due seriousness": *Dent v. Young*, 2013 BCSC 1603 at para. 110.

- [111] The plaintiff relies on several authorities, including: *Raponi v. Phagura*, 2005 BCSC 567, *Ufimzeff v. Brown*, 2008 BCSC 1188, *Larlee v. Shier*, 2008 BCSC 1610, and *Dent v. Young*, *supra*, as being indicative of this range.
- [112] The defendants submit that a fair assessment of non-pecuniary damages should be in the range of \$15,000 to \$25,000, prior to a deduction for failure to mitigate. They acknowledge they have the burden of proof on this issue. They say that in light of Dr. Kabiri's opinion regarding the likely benefits of physiotherapy and Mr. Bideci's refusal to pursue this treatment, there has been a clear failure by the plaintiff to mitigate his damages, particularly in light of the fact that his principal ongoing complaint relates to pain and restriction of movement in his upper right arm and shoulder.
- [113] The defendants rely on several authorities involving soft tissue injuries, including: *Kenny v. Levenson-Gower*, 2005 BCSC 447, *Gabrilo v. Greater Vancouver Transportation Authority*, 2008 BCSC 1333, and *Khodadoost v. Wittkamper*, 2013 BCSC 1717, to establish the range of non-pecuniary damages which they submit is appropriate.
- [114] When I consider the non-exhaustive list of factors set out in *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, one of the key considerations, in my view and taking into account Mr. Bideci's age, is his level of functioning after the Accident compared to before.
- [115] In that regard, the plaintiff's level of functioning has not been significantly affected by the Accident. He continues to exercise for approximately 90 minutes a day and is independent in his activities of daily living. He continues to travel by bus and HandyDart service as he did prior to the Accident. His travel plans do not appear to been affected by his injuries.
- [116] Mr. Bideci's inability to play the banjo has been a real loss to him. This was an activity he performed regularly prior to the Accident. He became noticeably emotional when describing the loss of this activity during his testimony.
- [117] I am satisfied, however, that the defendants have established that the plaintiff has failed to mitigate his damages, in particular, by not pursuing the recommendation to undergo physiotherapy treatments.
- [118] I note that although Dr. Kabiri commented that it was her understanding it was difficult for Mr. Bideci to go out of his home, that was contrary to the plaintiff's own evidence.
- [119] When I take the above considerations into account within the context of the injuries at issue in the various authorities to which I was referred, I conclude that an award of \$35,000 for non-pecuniary damages is appropriate, after a deduction is made for failing to mitigate.

C: Loss of Housekeeping Capacity and Cost of Future Care

- [120] During submissions, Mr. Bideci's counsel stated that the claims for these heads of damages were "tenuous" in light of the evidence at trial.

[121] I would go further and say there is a completely insufficient body of evidence from which I could conclude that the legal requirements for loss of housekeeping capacity as set out, for example, in *McTavish v. MacGillivray*, 2000 BCCA 164, have been established.

[122] The same is also true of the claim for damages for cost of future care. The applicable principles were summarized in *Dent v. Young*, supra, at paras. 117-18. The plaintiff has not established a medical justification for his claim for cost of future care and that the claims are reasonable. In addition, the evidence does not establish the reasonableness of any future care costs to preserve the plaintiff's health.

[123] Accordingly, the claims under both of these heads of damages are dismissed.

D: Special Damages

[124] The plaintiff claims \$366.48 for a portable shaver which was lost on the bus at the time of the Accident. He acknowledges that any amount awarded should be significantly discounted to reflect the fact that it had been purchased and regularly used for over three years prior to the Accident.

[125] I award the plaintiff \$100 for the loss of the shaver.

VIII: CONCLUSION

[126] Liability is apportioned two thirds as against the defendants and one third as against the plaintiff.

[127] The plaintiff will recover judgment from the defendants for two thirds of his damages, which I have assessed at \$35,100, being \$23,376.66.

[128] The plaintiff is entitled to two thirds of his assessed costs in accordance with Rule 15-1(15), unless there are other factors pertaining to this issue of which I should be made aware. If that is the case, either party has leave to apply to speak to the matter of costs.

"Abrioux J."

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