

CANADA / JUDGMENT

Brinacomb v. BC Transit

2000 BCSC 331

COURT

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Brinacomb v B.C. Transit et al

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Docket:

96 2549

Registry: Victoria

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

DEBORAH MAY BRINACOMB

PLAINTIFF

AND:

BRITISH COLUMBIA TRANSIT, RON SWINNEY AND
INSURANCE CORPORATION OF BRITISH COLUMBIA
DEFENDANTS

REASONS FOR JUDGMENT

OF THE

HONOURABLE mADAM JUSTICE BAKER

(IN CHAMBERS)

Counsel for the Plaintiff:

Diane E. Tourell

Counsel for the Defendants:

Carolyn P. Bouck

Date and Place of Hearing/Trial:

February 10 2000

Victoria, BC

- [1] On January 30, 1995, Deborah Brinacomb fell in the aisle of B. C. Transit bus 975, driven by the defendant Ron Swinney, on Esquimalt Road in Victoria, British Columbia. Ms. Brinacomb says her fall, and resulting injuries, were caused by the negligence of the defendants. On this summary trial the defendants seek a dismissal of the plaintiff's claim. The plaintiff says the action cannot fairly be disposed of by summary trial.

FACTS

- [2] At around 8:10 a.m. on January 30, 1995, Ms. Brinacomb, who was 32 years old at the time, boarded the No. 975 bus at a bus stop on Esquimalt Road, heading to her job at the Canadian Armed Forces Base in Esquimalt.
- [3] Ms. Brinacomb waited for the bus at a stop on Esquimalt Road just east of a T-intersection where Dominion Road joins Esquimalt Road from the north. She had walked to the bus stop from her home on Connaught Street, a walk of about ten to fifteen minutes.
- [4] A copy of a Scale Scene Plan was obtained from the Municipal Hall in Esquimalt, showing this portion of Esquimalt Road. A short distance west of the bus stop Esquimalt Road curves, at a slight upward incline, in a west/north/westerly direction and then continues in a west/south/westerly direction.
- [5] After the stop at which Ms. Brinacomb boarded the bus, Esquimalt Road is joined by Dominion Road on the north, as I have said, and further west, just before the top of the curve, by Dunsmuir Street on the south.
- [6] An engineering expert retained by the plaintiff described the site as follows in his report:
- In this area, Esquimalt Road is a four lane road with two lanes of travel in each direction. There is a bus stop located about 16 m east of the east curb of Dominion Road...This bus stop is for westbound buses. West of the bus stop, Esquimalt Road ascends slightly and curves to the left about 43 degrees.....Based on the scene plan, the minimum radius of the curve in Esquimalt Road, determined at the westbound curb, is between 74 and 82 m.
- [7] The area of Esquimalt Road relevant to this lawsuit has a posted speed limit of 30 kph, although most of the rest of Esquimalt Road is posted 50 kph. There is no evidence about why the lower speed limit applies in this area, but it seems likely that the reduced speed limit is because of the curve.
- [8] Mr. Beatson, the manager of accident prevention and security for B.C. Transit was examined for discovery by counsel for the plaintiff on January 18, 2000. He testified that although the Esquimalt Road route was considered to be a busy route during rush hour in 1995, rush hour on that route was usually over by about 7:45 a.m.

- [9] On January 30, 1995, it had been raining heavily earlier, but it was not raining when Ms. Brinacomb walked from her home to the bus stop, or during the five minutes she waited for the bus. Ms. Brinacomb was wearing jeans, a sweater, ski jacket, and "relatively new hiking boots". She had a knapsack over her shoulder and was carrying a compact umbrella in her hand.
- [10] Ms. Brinacomb is, according to her doctor, 5 feet, 4 inches tall. She estimates her weight at the time to be about 240 pounds. Ms. Brinacomb's weight has been fairly stable at around that figure for the past seven years. There is no evidence that her weight was disabling in 1995; that she was in poor health; unsteady on her feet; or had any problems with balance.
- [11] Ms. Brinacomb had been on the bus before, but was not a frequent passenger. On January 30, she boarded the bus at the front, said hello to the driver and proceeded to walk towards the back of the bus, intending to take a seat located behind the rear entrance.
- [12] From photographs taken by the plaintiff's expert, it appears that the bus can seat about 44 passengers. Ms. Brinacomb believes there were about twenty people on board when she got on the bus. No passengers were standing. Ms. Brinacomb testified that most of the passengers were seated towards the front of the bus, but agreed on discovery that there probably were seats available at the front.

Photographs of bus 975 illustrate that to reach a seat behind the rear entrance, Ms. Brinacomb would pass the "courtesy seats", which face each other across the aisle of the bus, and, according to the photograph, accommodate two passengers on one side, and four on the other. As well, she would proceed past four rows of front-facing seats and then the rear doorway on her left; and five rows of front facing seats on her right, before reaching the sixth row of front-facing seats, which is immediately behind the rear doorway.

- [13] There are two sets of vertical poles, called "vertical stanchions" directly across from each other, adjacent to the courtesy seats, and another vertical stanchion on the left side immediately adjacent to the steps to the rear doorway. There is a horizontal bar running along the top of the bus above the seats on each side. In addition, each front-facing seat back has a horizontal metal grip bar attached to the top of the seat back, referred to as a horizontal stanchion. The rows of front-facing seats are staggered.
- [14] The aisle of the bus is covered by a rubber mat, with grooves in it. Ms. Brinacomb says that on the morning in question the mat was wet the entire length of the aisle.
- [15] In her affidavit Ms. Brinacomb deposed that she had taken approximately three to four steps down the aisle before the bus driver closed the doors and the bus started to move. Based on Ms. Brinacomb's description, by the time the bus driver closed the bus doors and started to pull away from the bus stop, she had passed by the courtesy seats and was walking between the rows of front-facing seats. Although she had her umbrella in one hand, she was still able to grasp the horizontal stanchions with that hand, and with her other hand, which was free.

[16] Ms. Brinacomb described her fall somewhat differently in her affidavit and during her examination for discovery. In her affidavit, sworn December 8, 1999, she says:

The whole aisle of the bus was wet. I grabbed onto the rail at the back of the seat beside me. I then took hold of the rail on the back of another seat on the other side of the aisle in order to stagger my way to my seat by holding the rails on each side of the aisle as I walked. I had my umbrella in my hand but I was able to grab the seat rail and hold on with my fingers. I then reached for the next seat rail on the other side with my free hand. Suddenly the bus went around a sharp turn and before I could grab the seat rail I was thrown backwards. Both my feet came up in front of me.

[17] On her examination for discovery, the following questions and answers were recorded:

179 Q As you started walking towards the back of the bus, did you hang on to any of those rails?

A When the bus driver took off, started to move, I grabbed a hold of it -- of the back of the seat, and then I grabbed another one with my fingers. I remember grabbing it with my fingers because I had my umbrella in my hand. Then I went to grab again with my other free hand. Just as I was going to grab, he went around the corner, and my feet just came right out from under me.

183 Q So it was really when the bus went around the corner that caused you to slip?

A No. I think it was just before the corner.

184 Q What do you think caused that slip?

A The wet on the rubber mat.

195 Q So your feet basically came out from under you? Is that what occurred?

A Yes.

[18] Ms. Brinacomb's fall was observed by another passenger, Larry Miller, who provided a statement on February 29, 1995, and swore an affidavit attaching his statement, which was filed by the plaintiff. Mr. Miller's statement says:

On the morning of January 30, 1995, I was travelling on a bus proceeding along Esquimalt Road, when I witnessed another bus passenger slip and fall while walking down the aisle.

It was raining that day and I was seated on the driver's side of the bus, about mid-way down the aisle, near the rear exit.

I noticed a woman board the bus near Dominion Street and as she began to walk down the aisle to an empty seat, the bus driver accelerated and approximately one metre from where I was seated, the woman fell backwards, landing hard on her backside and sliding a further couple of feet down the aisle.

- [19] Ron Swinney had been driving the route for many years prior to January 30, 1995. Ms. Brinacomb did not report her fall to him at the time it occurred and he was unaware of the incident. She made a report to B.C. Transit later that day. The matter was brought to Mr. Swinney's attention at the end of his shift. Mr. Swinney has deposed that to the best of his recollection, there was nothing abnormal about traffic or his driving on that day.

SUITABILITY FOR SUMMARY TRIAL

- [20] Counsel for Ms. Brinacomb submits that it is not possible for the court to find the facts necessary to decide this case on a summary trial, or, alternatively, that it would be unjust to do so. Both counsel rely on *Inspiration Mgmt. Ltd. v. McDermid St. Lawrence Ltd.*, (1989) 36 B.C.L.R. (2d) 202 (C.A.).

- [21] In that case the learned Chief Justice said:

The test for R. 18A, in my view, is the same as on a trial. Upon the facts being found the chambers judge must apply the law and all appropriate legal principles. If then satisfied that the claim or defence has been established according to the appropriate onus of proof he must give judgment unless he has the opinion that it will be unjust to give such judgment. p.215.

- [22] An earlier summary trial application brought by the defendants on January 24, 2000 was dismissed by Justice Wilson, with leave to reapply. Counsel for the plaintiff provided the court with a copy of the transcript of the hearing before Justice Wilson. The evidence before me has been supplemented in several ways. Since the January 24, 2000 hearing, the defendant has filed the affidavit of Mr. Leroux concerning his observations during a re-enactment utilizing bus 975 on the Esquimalt route on January 25, 2000. The transcripts of the examinations for discovery of Mr. Swinney and Mr. Beatson, representatives of the defendants, are now before the court. In addition, I have considered and taken into account the engineering opinion evidence put forward by the plaintiff, which Justice Wilson declined to consider, because the defendant objected to its admission without adequate notice. The plaintiff has also received additional information and documents requested on the examinations for discovery of the defendants.

- [23] This application is being heard only a month before the scheduled trial date of March 13, 2000. The date for service of expert opinion evidence has passed. The trial is expected to take five days. Although it is to be a jury trial, the defendants filed the jury notice, and counsel for the plaintiff expressed a preference for a trial without jury.

- [24] Counsel for the plaintiff says that there are credibility issues, and that the court cannot resolve the credibility issues on a summary trial. I do not agree. In *Inspiration Management*, cited earlier, Chief Justice McEachern pointed out that a judge is not obliged to remit a case to the trial list just because there are conflicting affidavits if other admissible evidence makes it possible to find the facts necessary for judgment to be given.

- [25] To the extent that there are conflicts in the evidence in this case, they arise from the plaintiff's own testimony, and not from conflicting affidavits filed by the opposing parties. The plaintiff has given different descriptions of the incident on examination for discovery and in her affidavit.
- [26] Plaintiff's counsel argued, and Justice Wilson made reference to the fact that Mr. Miller might have something more to say about what he meant when he used the word "accelerated" to describe the action of the bus in his statement. However, it is plaintiff's counsel who obtained an affidavit from Mr. Miller, in response to the defendant's application to dismiss the plaintiff's claim. He is a witness for the plaintiff. Presumably if Mr. Miller has any present recollection of the events in question, the plaintiff should have included further details in Mr. Miller's affidavit.
- [27] No explanation was given for the failure to clarify Mr. Miller's statement in response to the defendants' renewed application for judgment.
- [28] Counsel for the plaintiff argued that some documents, having to do with maintenance records for the bus, requested from the defendant's representatives when they were examined for discovery on January 18, 2000 have recently been delivered, and that the plaintiff's engineer, who has yet to inspect the documents, might have something to say about them at trial, but this is merely speculation, and, as I have said, the date for service of notice of opinion evidence has passed.
- [29] I am satisfied that the court can find the facts necessary to resolve the issues of fact and law presented by this action, and that it would not be unjust to dispose of this matter on a summary trial. I am not satisfied there are issues of credibility that can only fairly be decided by allowing the trier of fact to observe the witnesses in cross-examination.

THE LAW

- [30] Counsel agree that the relevant authorities begin with the decision of the Supreme Court of Canada in *Day v. Toronto Transportation Commission*, [1940] 4 D.L.R. 484. At the trial a jury had held, on conflicting evidence involving the credibility of witnesses, that a street car passenger's injuries occurred because the street car driver suddenly applied his emergency brake to avoid an imminent collision caused by the driver's own failure to keep a proper look out. The Ontario Court of Appeal set aside the jury verdict. The Supreme Court of Canada held that the Court of Appeal's interference with the jury's findings was not warranted, and restored the jury verdict.
- [31] The appeal was heard by five justices and the decision was unanimous. Justice Rinfret gave no reasons. Justices Crocket, Davis, Kerwin, and Hudson all wrote separate opinions.

- [32] Crocket, J. held that the Court of Appeal had completely reversed the findings of the jury upon the principal issue tried before them, and said that while the evidence might produce a contrary impression on the mind of a trained judge, that did not warrant the Court of Appeal interfering with the decision of the jury who had the advantage of observing the demeanour of the witnesses.
- [33] Justice Davis held that the duty of the street car operator was to carry the passenger safely as far as reasonable care and forethought could attain that end, and that there was evidence upon which the jury could come to their conclusion that the street car driver had failed to exercise reasonable care and forethought.
- [34] Justice Kerwin pointed out that so far as the operator was concerned, the case was left to the jury as one in which the onus of establishing negligence would be upon the passenger. He concluded that it was impossible to say that there was no evidence upon which a jury doing their duty could find the operator was negligent in not looking or observing the road ahead of him, thereby necessitating the application of the emergency brakes.
- [35] Justice Hudson also found that there was evidence on which the jury could have found negligence, and therefore, that the Court of Appeal ought not to have interfered with the verdict. However, he stated the burden resting on the defendant carrier somewhat differently from his colleagues. He said this:

Although the carrier of passengers is not an insurer, yet if an accident occurs and the passenger is injured, there is 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. The care required is of a very high degree: 4 Hals. (2nd ed.), p.60 paras. 92 and 95. In an old case of *Jackson v. Tollette*, 2 Stark. 37, 171 E.R. 564, the rule was stated by Lord Ellenborough, at p. 38, as follows:

"Every person who contracts for the conveyance of others, is bound to use the utmost care and skill, and if, through any erroneous judgment on his part, any mischief is occasioned, he must answer for the consequences."

The question then for the jury was whether the motorman had used in a high degree all due, proper and reasonable care and skill under the circumstances. On conflicting evidence the jury chose to accept that part which was favorable to the plaintiff. I am of opinion that there was some evidence on which they could properly decide that the motorman had failed in his duty.

- [36] The British Columbia Court of Appeal considered the standard of care required of a public carrier in *Wang v. Horrod*, [1998] B.C.J. No. 1288. In addition to quoting the passage from Hudson J. in *Day*, the trial judge had also relied on the oral Reasons of McLachlin, J., as she then was, in *Planidin v. Dykes*, unreported, Vancouver Registry No. C822911, March 2, 1984, in which the court said, in reference to the decision in *Day*:

These, and other cases, establish that once an accident occurs, and a passenger is injured, a prima facie case in negligence is raised and the onus shifts to the public carrier to establish that the passenger's injuries were occasioned without negligence on the company's part.

[37] While noting these references in the trial judge's Reasons, the Court of Appeal stated its own view of the applicable standard of care. At page 8 of the decision in *Wang v. Horrod*, Justice Rowles said:

The standard of care, unlike the duty of care and remoteness of damages, does not refer to what is reasonably foreseeable. Instead, it is based on what the reasonably prudent person would do in the circumstances.

In this case, the standard of care imposed on the bus driver is the conduct or behaviour that would be expected of the reasonably prudent bus driver in these circumstances. The test is an objective one and takes into consideration both the experience of the average bus driver and anything the driver knew or should have known. In this case, the driver knew or should have known that he had elderly and infirm passengers on his bus. The question is whether a reasonably prudent bus driver, aware that he has elderly and infirm passengers on his bus, would check his mirror immediately before starting forward after having stopped at a red light?

The basis for determining that question is whether there is a real risk of harm that could reasonably be avoided. The "real risk" test involves balancing the seriousness of the potential risk and the likelihood of its occurrence on one side with the ease and consequences of avoiding the risk on the other side.

[38] Although British Columbia courts have recognized the "reverse onus" applicable to a public carrier, these courts have also emphasized that the doctrine of *res ipsa loquitur* does not apply, and have noted Justice Hudson's prefacing statement that a public carrier is not an insurer.

[39] In *Exshaw v. British Columbia Transit Authority*, (1997), 38 B.C.L.R. (3d) 61, the Court of Appeal overturned the trial judge's finding of negligence in a case where an elderly plaintiff who had been seated on a forward-facing bus seat slid across the vinyl seat and fell into the aisle when the bus driver made a left turn. Although the trial judge found that the driver had not been speeding or driving in an unusual manner when he rounded the corner, and found that the use of vinyl on the bus seats did not create a risk of foreseeable injury, the bus driver was found to be negligent in failing to drive more cautiously than usual when he knew that some of his passengers were elderly.

[40] Justice Newbury, speaking for the Court of Appeal, said the trial judge had set the standard too high:

Given the findings, it seems to me that the defendants had indeed met the onus on them to prove the accident occurred without negligence on their part. To require that in the course of driving a bus, the driver must keep his eye on a passenger who is sitting reading a paper and somehow foresee that she will slide off her seat as a result of a turn executed in a reasonably careful manner does, it seems to me, amount to imposing the standard of an insurer.

[41] In *Lalani v. British Columbia Transit*, unreported, Lysyk, J., Vancouver Registry No. B870113, May 5, 1986, the court pointed out that while there is a heavy responsibility on the operator of a bus to exercise due care, transit drivers and operators are not insurers, the situation is not one of *res ipsa loquitur*, and the court is not bound to infer negligence when to do so would involve mere speculation. At pages 8 and 9 of his Reasons, after referring to *Day v. Toronto Transportation Committee*, and the "reverse onus", he said:

But some meaning must be attributed to the recognition in those judgements that the carrier is not an insurer. Further, in circumstances such as those here present, where the possibility of injury was not self-evident and no attention was drawn to such possibility at the time, the difficulties involved in imposing a legal obligation upon the carrier to disprove negligence are obvious. While expressed in positive terms of proving due care, in effect the carrier is being called upon after the event to prove a negative, that is, that the driver was not driving at an excessive rate of speed or had not failed to keep a proper look out or was not otherwise careless.

[42] Ms. Brinacomb's counsel submits that Mr. Swinney was negligent in setting the bus in motion before Ms. Brinacomb had seated herself, but several British Columbia authorities establish that the fact that a bus driver starts up before all passengers are seated is not in itself a breach of the required standard of care, unless it is apparent to the driver that the passenger is disabled, or heavily burdened. *Fisher v. British Columbia Hydro and Power Authority*, unreported, Taylor, J., Vancouver Registry No. B781146, February 19, 1980; *Sawatsky v. Romanchuk & B.C. Hydro and Power Authority*, unreported, Berger, J., Vancouver Registry No. C771580, September 14, 1979; *Calderwood v. B.C. Hydro and Power Authority*, unreported, Macfarlane, J., Vancouver Registry No. 8509/71, May 13, 1974; and *Lawrie v. B.C. Hydro and Power Authority*, Toy, J., Vancouver Registry No. 32708/78, May 31, 1976.

[43] In *Rehemtulla v. B.C. Transit*, unreported, Edwards, J., Vancouver Registry No. B936381, November 16, 1995, the plaintiff alleged that the driver was negligent in not waiting for her to reach the seat of her choice before pulling out into traffic. The trial judge found that the plaintiff fell as the bus driver shifted the bus from first to second gear, which typically causes the bus to lurch, but was, the trial judge found, a normal movement of the bus. Justice Edwards concluded that it is not negligent for a driver to start the bus before a passenger is seated, and that there was nothing abnormal about his driving, and that he was therefore unable to find negligence. His decision was upheld on appeal, unreported, Docket CA021233, October 15, 1997.

- [44] A similar conclusion had been reached in *Mauro v. Romanica*, [1988] 1 W.W.R. 684 (Man. Q.B.). In that case, the plaintiff, a sixty-three year old woman, boarded the bus on a rainy day. Before she was seated, the driver pulled out into traffic at a slow speed and the plaintiff, who was not holding onto the handrails, fell. The court held that a bus driver is not negligent in failing to wait until all passengers are seated before moving the bus, because to require a driver to do so would require extraordinary precautions and impose too high a standard on the driver. The trial judge also concluded that the defendants were not liable because of the wet floor in the bus, because the transit operator is only obliged to keep the floor in such a condition that a person using ordinary care would not slip and a wet floor is not an unusual hazard.

ANALYSIS AND CONCLUSION

- [45] The evidence in this case establishes that Ms. Brinacomb slipped and fell when bus 975 went around the curve in Esquimalt Road as she was making her way down the aisle of the bus to the seat of her choice.
- [46] Ms. Brinacomb has two different theories about how and why she fell. On her examination for discovery on September 17, 1998, she said that she fell just before the bus went around the curve and that she believes that her fall was caused by her feet slipping on the wet rubber mat. This theory of causation is supported by the affidavit of Larry Miller, the passenger who observed Ms. Brinacomb fall. In his February 28, 1995 statement he said:
- I do not recall seeing any type of mat in the aisle at the time of the incident and believe that when the bus accelerated, the woman slipped in some water which had collected on the floor.
- [47] Although Mr. Miller did not recall seeing a mat, bus 975 is and was equipped with rubber matting, which is standard for virtually all conventional transit vehicles operating in North America. The matting is grooved, and allows any water to move towards the front of the bus and out the doors. The buses are swept and/or mopped for debris every night after completion of the day's run. Ms. Brinacomb's fall occurred around 8:10 in the morning.
- [48] The defendant's maintenance records show that bus 975 was the subject of a major inspection, which included an inspection for worn or loose flooring, on June 29, 1994; and on February 17, 1995, less than three weeks after the plaintiff's fall. No loose or worn flooring was reported in either of these major inspections.
- [49] There are no reports of loose or worn matting in any road call/driver report maintenance records for the bus during the relevant period, and no problems with the matting were identified in the course of routine pre-trip inspections.
- [50] On November 23, 1999, the defendant conducted a test by flooding the floor of bus 975 with a hose, and then having the bus driven for ten minutes in city traffic, around corners, braking and accelerating. The matting, which is the same matting that was in bus 975 on January 30, 1995, was observed to work effectively in draining the excess water from the bus.

- [51] The expert opinion evidence provided by the plaintiff also negatives any defect in the matting, and, in fact, indicates that it is improbable that Ms. Brinacomb fell because of a lack of friction caused by a wet mat. Although Ms. Brinacomb has not retained the hiking boots she was wearing at the time, the plaintiff's engineering expert conducted friction tests of the rubber flooring of bus 975 on January 10, 2000, utilizing two shoes with different soles under both dry and wet conditions. At the time the tests were conducted, the floor of the bus was contaminated with sand and very small rock fragments, as well as some organic material. The engineer found that the friction between the floormat and the soles of both test shoes under wet conditions was good, and concluded that slipping, even on a wet floor with some debris, was unlikely to have occurred.
- [52] Although the engineer believes that the presence of unusual contaminants on the floor could reduce the friction and increase the chance of slipping, there is no evidence that there were any unusual contaminants on the floor on the morning in question. Ms. Brinacomb recalls that the mat was wet. She did not testify to the presence of any mud, leaves, or other debris.
- [53] I am satisfied that the defendants were not negligent in the design or maintenance of the rubber matting on the floor of the bus.
- [54] The plaintiff's second and more recent theory of causation - that she lost her balance because the bus went too quickly around a sharp curve - is found in paragraphs 7 and 8 of her affidavit sworn December 5, 1999. One of the difficulties with this evidence is that it conflicts with her earlier testimony at her examination for discovery. On discovery she agreed that the movement of the bus was a normal movement.
- [55] In addition, while Ms. Brinacomb now says she fell as the bus went around the curve, on her examination for discovery she said she fell before the bus went around the curve.
- [56] In her affidavit, Ms. Brinacomb describes the bus making a "sharp turn", and says that "the bus went around a very sharp corner". This description is disputed by the driver, Mr. Swinney, but it is also contradicted by other independent evidence, including the scale plan supplied by the City, and the evidence of the plaintiff's own expert witness. The curve is narrow, but it is not a "sharp turn". In any event, buses must go around curves, and I am satisfied that there is nothing so unusual about this curve that the driver had a duty to warn, or wait for, passengers to be seated.
- [57] The evidence does not establish that the bus was travelling at an unsafe or excessive speed as it entered and rounded the curve on January 30, 1995. The only evidence of actual speed is Ms. Brinacomb's opinion that the bus pulled away from the bus stop at a speed faster than she would have driven her own car. As an infrequent bus passenger, it is unlikely that Ms. Brinacomb is a capable estimator of bus speed, and there is no evidence about how slowly or quickly she drives her own car. Mr. Miller says that when Ms. Brinacomb fell the bus was accelerating, but since it had been stopped and was re-entering traffic, it would have to be accelerating. Mr. Miller's statement does not indicate the bus was travelling at a fast or

excessive rate of speed.

- [58] Ms. Brinacomb did not report her fall to the driver at the time, and he was unaware that she had fallen. The incident was brought to his attention after he completed his shift that day. He has deposed that to the best of his recollection, there was nothing abnormal about traffic, or about his driving that day, and he does not recall any unexpected or abnormal motions on the bus. Mr. Swinney says that there is no need to apply brakes as you round the curve.
- [59] The engineering firm retained by the plaintiff conducted a speed survey of B.C. Transit buses travelling this portion of the route on January 10, 2000. A radar operator observed 39 buses travelling the route over a period of several hours. Of these, 26 stopped at the bus stop where Ms. Brinacomb got on the bus on January 30, 1995. He observed that all of the buses that stopped at the bus stop remained in the curb, or outside lane, as they went around the curve. The speed of the buses through the corner varied between 30 and 38 kph, with a mean speed of 33.2 kph.
- [60] Mike Leroux, an operational training and safety officer employed by B.C. Transit was present during testing conducted of bus 975 on November 24, 1999. Mr. Leroux was a bus driver for fourteen years before obtaining his current position, and he is very familiar with the route in issue. Mr. Leroux drove bus 975 over the route on January 25, 2000, in order to attempt to re-enact the circumstances alleged by the plaintiff. He stopped at the bus stop just before Dominion Road, accelerated to re-enter traffic in the curb lane and proceeded around the curve. He testified that his speed reached 30 kilometres per hour as he reached the end of this narrow curve. He conducted a further test by stopping at the bus stop and accelerating full throttle from the stop. Again, his speed reached 30 kph as he reached the end of the curve. He was not required to apply the brakes on the bus in driving around the curve in either instance.
- [61] The speed of acceleration from the bus stop was not measured, but the plaintiff's engineer calculated that to reach a speed of between 30 and 38 kph by the time the bus was rounding the curve, the bus' "lateral acceleration is sufficiently high that handholds are needed to maintain one's balance".
- [62] Bus 975 is equipped with the various handholds described earlier - vertical stanchions, an upper horizontal bar, and horizontal handgrips or stanchions on the back of each front-facing seat, which are staggered to allow for easy use. The evidence is that this is conventional equipment. Although other configurations are no doubt possible, I find no basis to conclude that the design or equipping of the bus fails to meet the standard of care.
- [63] The plaintiff's expert deposed that because of Ms. Brinacomb's height and weight, it is unlikely that she could have made good use of the upper horizontal bar, but the evidence indicates that bus 975 is equipped in a manner that offers passengers of Ms. Brinacomb's height suitable handholds to maintain balance. Ms. Brinacomb's discovery evidence does not indicate that she had any difficulty making use of the handholds on the top of the seats.

She had one hand free, and was able to grip with the fingers of the other hand, although she was carrying a compact umbrella in that hand.

- [64] Although the plaintiff weighed considerably more than the recommended weight for her height at the time, she does not claim to be disabled, and there is no evidence that Ms. Brinacomb's weight made her more likely to lose her balance. The evidence does not establish that a reasonably prudent bus driver would or should have perceived her to have a disability, or to be a person requiring any extraordinary precautions to be taken to ensure her safety. Nothing said by Ms. Brinacomb, nothing about the way she was dressed - her outfit included a knapsack and hiking boots - would have led a bus driver to believe that it would be prudent to wait until she had selected a seat and seated herself, before putting the bus in motion. In any event, based on her own evidence, Ms. Brinacomb did not fall as a result of the motion of the bus leaving the stop.
- [65] In summary, the evidence in this case does not demonstrate that the bus was improperly or negligently equipped, either in relation to the matting on the floor, or the location and availability of hand grips. The evidence does not establish that the action or movement of the bus fell outside the normal and expected range of movements passengers ought to expect on buses travelling in city traffic; or that the bus was travelling at an excessive rate of speed. The evidence does not establish that Ms. Brinacomb is a person with a disability by virtue of her weight, or that the driver should have perceived her to have a disability, or that the driver was negligent in failing to wait until Ms. Brinacomb had reached the seat of her choice before putting the bus into motion.
- [66] I conclude that Ms. Brinacomb was injured when she let go of one horizontal stanchion before she was able to place her hand on another, and lost her balance as the bus rounded a narrow curve in the road in a normal fashion. In my view, no negligence on the part of the defendants has been demonstrated, and the defendants have met the onus of establishing that they used all due, proper and reasonable care and skill to avoid or prevent injury to Ms. Brinacomb. As Justice Berger said in *Sawatsky*, cited earlier, at page 2:

Accidents do happen. And there are bound to be some accidents on the bus system. And some of them, like this accident, will not give rise to a right to damages.

- [67] The plaintiff's action is dismissed. I am aware of no reason why costs should not follow the event. If there are reasons, counsel should notify the Victoria Registry within 14 days of the date of these Reasons that she or they intend to make further oral or written submissions on costs. Otherwise, the defendants are entitled to one set of costs, to be taxed on Scale 3.

"W.G. Baker, J."

The Honourable Madam Justice W.G. Baker

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