
CANADA / JUDGMENT

Clarkson v. Elding

2020 BCSC 72

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 72 Clarkson v. Elding

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Clarkson v. Elding,

2020 BCSC 72

Date: 20200121

Docket: M111746

Registry: Kelowna

Between:

Heather Clarkson

Plaintiff

And

Derrick Elding and Greater Vancouver Transportation Authority,
also known as South Coast British Columbia Transportation Authority,
operating as Translink

Defendants

Date: 20200121

Docket: M170095

Registry: Vancouver

Between:

Arren Stewart

Plaintiff

And

Greater Vancouver Transportation Authority, also known as
South Coast British Columbia Transportation Authority,
operating as Translink, Derrick Elding, John Doe and
Insurance Corporation of British Columbia

Defendants

- and -

Date: 20200121

Docket: -M173802

Registry: Vancouver

Between:

Shawna Lynn Peterson

Plaintiff

And

Derrick Elding, South Coast British Columbia Transportation Authority,
doing business as Translink and Coast Mountain Bus Company

Defendants

Before: The Honourable Madam Justice Horsman

Reasons for Judgment

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Place and Date of Trial:

Kelowna, B.C.

December 5-6, 2019

Place and Date of Judgment:

Kelowna, B.C.

January 21, 2020

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INTRODUCTION

- [1] In each of these three related actions the plaintiffs seek damages for injuries arising from the alleged negligence of a bus driver, the defendant Derrick Elding, who is employed by Coast Mountain Bus Company Ltd. ("Coast Mountain"). Coast Mountain is an operating company of the defendant South Coast British Columbia Transportation Authority, also known as Translink.
- [2] The incident in question occurred on September 17, 2015. All three plaintiffs were passengers on a crowded transit bus that was travelling east along East Hastings Street in Vancouver. The driver of the bus, Mr. Elding, braked suddenly to avoid a collision with a pedestrian who was jaywalking across East Hastings. The force of the braking caused many passengers on the bus, including the plaintiffs, to fall or be slammed against seats and/or other passengers (the "Accident").
- [3] This trial only addresses the issue of liability. Pursuant to the September 24, 2019 case plan order of Wilson J., the issues of liability and damages in the three actions are severed for the purpose of trial, and the three actions are to be tried together on the issue of liability. The liability question turns on whether the driver ought to have anticipated the potential hazard and slowed the bus down before encountering the pedestrian.
- [4] The defendants advance a defence of contributory negligence in all three actions. As such, the issues for me to determine are:
- i. Was the driver negligent in failing to meet the standard of care required of him in the operation of the transit bus on the day in question?
 - ii. If so, were one or more of the plaintiffs also negligent in failing to take reasonable care for their own safety as passengers on the bus?
- [5] It should be noted that the Stewart action (VLC-S-M-170095) was discontinued against the defendant Insurance Corporation of British Columbia ("ICBC"). It is common ground that ICBC is not a proper defendant to these actions. The John Doe defendant named in the Stewart action is the pedestrian responsible for the jaywalking that precipitated the Accident. He has never been identified. For ease of reference I will use the term "defendants" to refer to all remaining defendants in the three actions other than John Doe.

FACTUAL BACKGROUND

Circumstances of the Accident

- [6] The Accident occurred during rush hour on an articulated public transit bus that serviced a popular commuter route, formerly the 135 and now the 95 B-Line, between downtown Vancouver and Burnaby. The 135 was an express bus that started its route at the Burrard Skytrain Station and travelled along East Hastings Street on the way to Burnaby.
- [7] The day in question, September 17, 2015, was a Thursday. The plaintiffs had each boarded the bus driven by Mr. Elding in downtown Vancouver at the end of their workday. At approximately 5:45 pm, Mr. Elding was forced to brake sharply and suddenly when a pedestrian stepped in front of the bus as the bus travelled east on East Hastings at the intersection of Woodland Drive.
- [8] During afternoon rush hour, East Hastings has three lanes of traffic travelling east. At the time of the Accident, the bus was travelling in the curb lane which is a dedicated bus lane. The two other lanes of eastbound traffic had stopped due to congestion. The pedestrian had walked across East Hastings from north to south across the intersection of East Hastings and Woodland. Due to traffic congestion, there were vehicles stopped in the intersection. The pedestrian stepped from in front of a stopped red van in the lane next to the dedicated bus lane, and directly into the path of Mr. Elding's bus.
- [9] The intersection of East Hastings and Woodlands is an uncontrolled intersection with no marked crosswalk. I understand it to be common ground between the parties that the pedestrian was not within the area of the intersection that would be deemed to be a crosswalk within the meaning of s. 119 of the Motor Vehicle Act, R.S.B.C. 1996, c. 318 [MVA], at the time he stepped in front of Mr. Elding's bus. Rather, the pedestrian was jaywalking across East Hastings.
- [10] Mr. Elding managed to avoid hitting the pedestrian by vigorously applying his brakes. The pedestrian did not stop at the scene and he was never identified. Data recorders on the bus allowed the parties' experts to determine with relative precision that the bus was travelling at 42 km per hour immediately prior to the Accident. The speed limit in the area is 50 km per hour.

The lay witness evidence

- [11] Each of the plaintiffs testified as to their recollection of the Accident, as did Mr. Elding and one non-party passenger on the bus. In addition, there is video footage in evidence taken from cameras that were operating on the bus. The video depicts the Accident from the perspective of the driver, with the camera looking out to the street when the pedestrian appears, as well as inside the bus through cameras positioned at various angles.

The plaintiff Shawna Peterson

- [12] At the time of the Accident, Ms. Peterson was working in downtown Vancouver as an administrative assistant and living in the area of Dundas Street and Lakewood Drive in east Vancouver. The 135 bus route was her usual route home from work.
- [13] On the day in question, Ms. Peterson boarded the bus at the Burrard SkyTrain Station at the end of her work day. She managed to find a seat towards the back of the bus on a row of seats that faced the exit doors rather than the direction of travel. To Ms. Peterson's left there were two seats facing forward and to her right there were other passengers. Ms. Peterson had injured her tailbone in a previous accident and she used a pillow to alleviate the pressure on her tailbone when travelling on public transit. On the day in question, Ms. Peterson was sitting on the pillow.
- [14] As is her usual practice during her commute, Ms. Peterson was reading a book at the time of the Accident. The bus was full. She was not holding on to anything as there was nothing to hold onto that was comfortably close. The sudden braking of the bus caused her to be propelled into the back of the seats that were to her left as the passengers to her right slammed into her. Passengers who had been standing also fell on top of her. Ms. Peterson recalls hearing her ribs pop and she experienced pain radiating down her right side from her neck.
- [15] After the Accident, the bus pulled over to a stop. Passengers were instructed to stay seated if they were hurt or required medical attention. Ms. Peterson was examined by a paramedic and given an ice pack. The paramedic suggested that Ms. Peterson follow up with her family doctor the next day. Ms. Peterson's husband picked her up and took her home.
- [16] The site of the Accident was approximately four blocks from Ms. Peterson's then-residence at Dundas and Lakewood. Ms. Peterson had been living in the area for less than one year. She says that the area has a number of outreach programs, including group homes and drop-in centres, to provide services to people struggling with such issues as homelessness and substance addictions. She says it is not, in her experience, unusual in this area to see people jaywalking through traffic.

The plaintiff Heather Clarkson

- [17] Ms. Clarkson was also working in downtown Vancouver at the time of the Accident, and took the 135 bus after work on the day in question to travel to her partner's home in Burnaby. Ms. Clarkson boarded the bus at Burrard SkyTrain Station. There were no seats available so she found a spot at the back of the bus where she could comfortably stand. Ms. Clarkson was holding an overhead strap with one hand and was holding a bag and bouquet of flowers with the other.

- [18] Ms. Clarkson says that her memory of the Accident is "a little fuzzy". She recalls the bus filling up and the driver asking passengers to move to the back. She does not recall anything after that until she got off the bus after the Accident. Ms. Clarkson has viewed the available video from the bus and can identify herself being thrown to the floor at the time that the driver braked to avoid hitting the pedestrian. She could not see what was going on at the front of the bus and did not know why the driver suddenly stopped.

The plaintiff Arren Stewart

- [19] At the time of the Accident, Mr. Stewart was working at a retail electronic store on West Broadway in Vancouver. He lived in east Vancouver and routinely took the 135 bus to commute home from work.
- [20] On the day of the Accident, Mr. Stewart found a seat at the very back of the bus. He describes the bus as crowded, with passengers standing shoulder-to-shoulder. Mr. Stewart was texting or playing games on his phone. He was not holding on to anything as there was nothing in immediate reach for him to hold on to. Mr. Stewart says there was no warning of the sudden braking. He was thrown out of his seat and onto the ground.
- [21] Mr. Stewart says that after a few minutes all of the passengers got off the bus. He noticed that his arm was numb so he decided to wait for an ambulance. He was eventually taken to hospital.

The defendant Derrick Elding

- [22] Mr. Elding has been a bus driver with Coast Mountain since 2011. Mr. Elding was called as an adverse witness by the plaintiffs at trial.
- [23] Mr. Elding was trained on the "Smith System" driver guide. He agreed that one of the guiding principles in the Smith System guide is that drivers should see and react to future problems before they become unavoidable hazards. Drivers are encouraged to engage in a constant practice of scanning ahead to identify potential hazards. Mr. Elding also agreed that a bus driver must not only be concerned with avoiding collisions with others on the road, but also avoiding injury to passengers on the bus. He agreed that passengers on a bus are vulnerable because they may be standing and are not constrained by seat belts if sitting.
- [24] Mr. Elding agreed that one precaution a bus driver can take is to reduce speed where road hazards are anticipated. Mr. Elding was asked, by way of example, about that portion of Granville Street that serves as a pedestrian and transit mall and has open pedestrian walkways. Mr. Elding agreed that in that area of Granville Street, it is common for pedestrians to step in front of a bus. Because of this potential hazard, Mr. Elding drives as slow as 10 km per hour through this section of Granville Street.

- [25] Mr. Elding also agreed that pedestrians regularly step into the street in the downtown eastside of Vancouver around the intersection of Main and Hastings Streets. There is a 30 km per hour speed limit in this area.
- [26] Mr. Elding says pedestrians have stepped in front of his bus in the open pedestrian walkway area of Granville Street and in the vicinity of Main and Hastings. He was able to stop to avoid the pedestrian on these occasions without having passengers on his bus fall. Mr. Elding agreed that this was in part due to the fact that he was travelling at a reduced speed. However, he also says he has never had a pedestrian step out as close to his bus as occurred in the case of the Accident. Prior to the Accident, he had never observed a pedestrian walking across this area of East Hastings in such an unsafe manner. He has never witnessed a pedestrian cross at the intersection of East Hastings and Woodland.
- [27] Mr. Elding agreed that at the time of the Accident he would have been watching for hazards, including pedestrians walking between stopped cars and vehicles changing lanes. He also would have been aware of the need for caution as he approached the uncontrolled intersection of Woodland Drive and East Hastings. Mr. Elding says his line of vision as a driver provides a heightened vantage point that allows him to see clearly over most traffic. At the time of the Accident, there was a white van to Mr. Elding's left that blocked a portion of his view of the intersection ahead.
- [28] Mr. Elding recalls taking his foot off the accelerator as he approached the intersection of Woodland and East Hastings. He cannot recall if he had applied his brakes or simply covered his brake with his foot in anticipation of having to stop at the intersection. Mr. Elding says he first observed the pedestrian out of his peripheral vision as the pedestrian stepped out in front of a red van that was stopped in the lane to the immediate left of the bus. Mr. Elding braked as soon as the pedestrian appeared.
- [29] Mr. Elding was disciplined by his employer, Coast Mountain, as a result of the Accident. Coast Mountain determined that the Accident was preventable as Mr. Elding's speed was too fast for the conditions. Mr. Elding was required to undergo one day of re-training. On the advice of his union representative, Mr. Elding did not contest the finding because it did not otherwise affect his clean driving record. Mr. Elding does not know how Coast Mountain defines "preventable".

Samantha Christie

- [30] Ms. Christie was the only witness called by the defendants. Ms. Christie was a passenger on the bus at the time of the Accident but is not a plaintiff. She was, at the time, a student in downtown Vancouver. She commuted to her home in Burnaby via the 135 bus.

- [31] On the day of the Accident, Ms. Christie boarded the bus at the Granville Station. She believes she was the last passenger to be permitted on the bus because it was full. Ms. Christie was standing at the front of the bus and had a clear view through the front windshield.
- [32] Ms. Christie recalls the pedestrian stepping out directly into the path of the bus from the left. She did not see the pedestrian until he was already in front of the bus. Ms. Christie describes the pedestrian as "creepy". He was looking directly at the bus and moving slowly as if he wanted to be hit. This is why Ms. Christie remembers him. Ms. Christie says the incident happened in the space of a second.
- [33] At the time, Ms. Christie was living an approximate 15 minute bus ride from the scene of the Accident. She has familiarity with the area as a frequent transit user. Ms. Christie says that she had seen pedestrians jaywalking before around the area of the Accident, including walking through stopped traffic.

The expert evidence

- [34] The defendants tendered an expert engineering report by Jonathan Gough of Baker Materials Engineering Ltd. The plaintiffs tendered a collision reconstruction report by Bradley Heinrichs of MEA Forensic Engineers & Scientists Ltd. At the request of the defendants, Mr. Heinrichs was called as a witness at trial and was cross-examined. The plaintiffs did not request that Mr. Gough attend trial for the purpose of cross-examination.

The defendants' expert Jonathan Gough, Engineer

- [35] Mr. Gough was asked to opine on Mr. Elding's "likely perception-reaction time" and to compare this to the reaction time expected for a normally alert driver.
- [36] Mr. Gough examined the video footage of the accident. He determined that the elapsed time between the pedestrian's head first becoming visible on the forward-looking camera on the bus (at 17:47:42.45) and Mr. Elding's application of the brakes (at 17:47:43.25) was 0.8 seconds. The time from brake application until the bus came to a complete stop (at 17:47:46.72) was approximately 3.5 seconds.
- [37] Mr. Gough's report cites studies which indicate a reaction time of between 0.8 and 1.6 seconds is typical for drivers reacting to an unexpected hazard appearing directly in front of them. Reaction times are slightly longer for a hazard that appears laterally. Mr. Gough accordingly concludes that Mr. Elding's perception-reaction time in the Accident was "significantly faster" than would be expected for most drivers in the same situation.
- [38] Mr. Gough calculates that during the course of braking, the bus had an average deceleration rate of 0.34 g. He states:

This rate is faster than typical for drivers stopping at a stop sign but is typical of that for the first time driver stopping for an amber traffic signal.

[39] Mr. Gough concludes that if Mr. Elding had decelerated at a slightly slower rate, he would probably have struck the pedestrian.

The plaintiffs' expert Bradley Heinrichs, Engineer

[40] Like Mr. Gough, Mr. Heinrichs relied primarily on the video evidence to ground his analysis. In his final report of October 7, 2019, Mr. Heinrichs concludes that the pedestrian's hat is visible in the video before the pedestrian disappeared in front of the red van and then stepped out into Mr. Elding's direct line of vision. On Mr. Heinrich's analysis, the hat is first visible (at 17:47:40.25), over two seconds before the pedestrian stepped out in front of the red van.

[41] Mr. Heinrichs does not suggest that Mr. Elding ought to have seen the pedestrian's hat at the same time that Mr. Heinrichs can identify it on the video. Mr. Heinrichs states in his report:

The forward facing security camera is typically positioned higher and to the right of the bus driver (Figure 4). The different vantage points of the camera and driver will affect the time at which the pedestrian first became visible. The pedestrian was not necessarily visible to the driver when the hat was visible to the camera from above stopped traffic. In order to determine if the pedestrian could be seen by the driver, I would need to measure the driver's eye height, the camera height, and the pedestrian's height.

An unobstructed line of sight between the driver and the pedestrian is not sufficient to ensure detection. The hat was a small object on a background of moving (oncoming) traffic. I will calculate the potential driver action if the pedestrian could have been detected when the hat appeared in the video, but I cannot determine that the driver should have or could have detected the pedestrian at this point.

[42] Consistent with the calculations of Mr. Gough, Mr. Heinrichs estimated the average rate of deceleration of the bus once Mr. Elding began to apply the brakes was approximately 0.34 g. Mr. Heinrichs cited what he referred to as "Translink guidelines" as establishing desirable and maximum emergency decelerations rates between 0.11 g and 0.28 g, respectively.

[43] Mr. Heinrichs also measured the speed and deceleration of an empty bus being driven on its route over a 19-minute test run. The bus reached peak decelerations of 0.2 g during this test. The deceleration rates did not make Mr. Heinrichs uncomfortable as a passenger on the bus, or cause him to fall or slide off his seat.

[44] Mr. Heinrichs concludes that:

- i. If the bus had been travelling at 39 km per hour when Mr. Elding had applied the brakes, it could have stopped in the same position with a deceleration rate of 0.28 g rather than 0.34 g;

- ii. If the bus had been travelling at 34 km per hour when Mr. Elding had applied the brakes, it could have stopped in the same position with a deceleration rate of 0.2 g; and
- iii. if Mr. Elding had started to brake when the pedestrian's hat was first visible in the video, the bus could have stopped in the same position with a deceleration rate of 0.28 g even if the speed of 42 km per hour was maintained.

- [45] In cross-examination, Mr. Heinrichs agreed that his estimate of the timing of key events changed from his earlier draft report dated October 2, 2019, and his final report of October 7, 2019. Of greatest significance, in his draft report Mr. Heinrichs states that the pedestrian's hat was first visible in the video at 17:47:42.39, when the pedestrian stepped around the front of the red van that was stopped to the left of the bus. In his final report, Mr. Heinrichs states that the pedestrian's hat was first visible at 17:47:40.25, as the pedestrian walked through traffic and towards the red van. Mr. Heinrichs explained that he changed his report after plaintiffs' counsel pointed out to him that the pedestrian's hat was visible at an earlier point in time than Mr. Heinrich had originally noticed on his repeated viewings of the video.
- [46] Mr. Heinrichs also agreed in cross-examination that he could not conclude that the pedestrian's hat would have been visible to Mr. Elding at this earlier point in time given that the position of the camera differed from the perspective of the driver. Mr. Elding would have had to perform additional calculations in order to determine whether the hat could be seen by the driver. These calculations were not done.
- [47] In cross-examination, Mr. Heinrichs clarified that the "Transit guidelines" he referred to in his report to establish desirable and maximum deceleration rates were Translink's Bus Infrastructure Design Guidelines. He agreed that the Guidelines appear to be intended to guide infrastructure design rather than bus driving practices. Mr. Heinrichs agreed that passengers could fall on a bus if brakes are applied at rates of speed lower than 42 km per hour as it is the deceleration rate rather than speed that is relevant. He agreed that a passenger could fall if a bus travelling at a rate of speed of 30 km per hour made an abrupt stop.

ANALYSIS

Issue 1: Are the defendants liable in negligence?

- [48] There is no dispute that Mr. Elding owed the passengers on his bus a duty of care to take reasonable steps to protect their safety. The point of contention between the plaintiffs and the defendants is whether Mr. Elding breached the relevant standard of care.

Legal framework

- [49] The standard of care owed by the operator of a transit bus to bus passengers was concisely summarized by Madam Justice Dardi in *Prempeh v. Boisvert*, 2012 BCSC 304 at paras. 15-16:

- [15] 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.
- [16] It is well-settled on the authorities that the standard of care imposed on a public carrier is a high one. However the principle to be derived from the authorities is that the standard to be applied to the bus driver is not one of perfection nor is a defendant bus driver effectively to be an insurer for every fall or mishap that occurs on a bus: *Patoma* at para. 7.
- [50] In *Benavides v. Insurance Corporation of British Columbia*, 2017 BCCA 15 at para. 17, our Court of Appeal confirmed that the mere fact that a passenger is injured while riding on a public carrier does not establish a prima facie case of negligence. The plaintiff bears the burden of proving on a balance of probabilities that the defendant breached the standard of care owed to the plaintiff.
- [51] It is not, in itself, a breach of the standard of care for a bus driver to stop abruptly, even where an abrupt stop causes injuries to passengers. As stated by Madam Justice Ballance in *Erickson v. Sibble*, 2012 BCSC 1880 at para. 57:
- [57] Although each case turns on its own peculiar facts, the authorities inform the general principles at play. Taken together, the decisions indicate that it is not, of itself, a breach of the standard of care for a bus driver to stop abruptly, even where there is an indication that special precautions may be warranted with respect to an elderly, frail or physically compromised passenger. The issue of liability will depend not only on the manner of the stop, but the reason for its suddenness and the assessment of whether, in all the circumstances, the impugned driving conduct was substandard when measured against the standard expected of a reasonably prudent driver.
- [52] The standard of care analysis is informed both by the reasonableness of the parties' actions and the relevant rules of the road. The provisions of the MVA and other rules of the road are relevant to determining whether the standard of care has been breached, but they are not determinative: *Salaam v. Abramovic*, 2010 BCCA 212 [Salaam] at para. 21.
- [53] Evidence of the result of a prior disciplinary proceeding may be admissible in a negligence action on the issue of whether the defendant breached the standard of care. The weight to be given the finding will depend on such issues as the nature of the process that led to the finding, the evidence that was before the discipline committee, and the relevance of the finding to the matters in issue in the action: *Spectra Architectural Group Ltd. v. St. Michael's Extended Care Centre Society*, 2001 ABQB 887 at paras. 27-31; *Sparataro v. Handler*, [1988] O.J. No. 841 (Dist. Ct.); *Etienne v. McKellar General Hospital*, [1994] O.J. No. 2602 (Dist. Ct.).

Application to the facts

The prior discipline finding

- [54] The only evidence adduced at trial about Mr. Elding's discipline by his employer is Mr. Edling's oral testimony that he was required to participate in one day of re-training as a result of Coast Mountain's finding that the Accident was preventable. There is no evidence before me as to the nature of the discipline hearing process that led to this finding, the evidence that was considered by Coast Mountain, or the significance or meaning of Coast Mountain's finding that the Accident was preventable. The plaintiffs did not argue (or plead) that the finding constituted an admission of liability by any of the defendants in these actions.
- [55] The defendants did not object to the admission of evidence that Mr. Elding had been disciplined by his employer. At the same time the plaintiffs did not rely on the discipline finding in their closing submissions at trial. I am not inclined to place any weight at all on the fact that Mr. Elding was disciplined in the absence of any evidence of the process that led to the finding, or its meaning and significance in relation to the standard of care issues that I must determine in these actions.
- [56] I will therefore be guided in my determination of liability by the relevant legal principles that I have set out above at paras. 49-52.

The rules of the road

- [57] The plaintiffs argues that Mr. Elding breached s. 158 of the MVA, which prohibits motorists from passing on the right in prescribed circumstances, and s. 144 of the MVA, which prohibits careless driving. Section 158 of the MVA is alleged to have been breached when Mr. Elding continued to drive his bus down the dedicated bus lane despite the stopped traffic in the lanes to his left.
- [58] Section 158 of the MVA provides:
- Passing on right
- 158(1) The driver of a vehicle must not cause or permit the vehicle to overtake and pass on the right of another vehicle, except
- (a) when the vehicle overtaken is making a left turn or its driver has signalled his or her intention to make a left turn,
 - (b) when on a laned roadway there is one or more than one unobstructed lane on the side of the roadway on which the driver is permitted to drive, or
 - (c) on a one way street or a highway on which traffic is restricted to one direction of movement, where the roadway is free from obstructions and is of sufficient width for 2 or more lanes of moving vehicles.

(2) Despite subsection (1), a driver of a vehicle must not cause the vehicle to overtake and pass another vehicle on the right

(a) when the movement cannot be made safely, or

(b) by driving the vehicle off the roadway.

[59] It is not clear to me whether the plaintiffs argue that the circumstances of the present case fall within the general prohibition on passing on the right in s. 158(1) of the MVA, or whether they rely on the prohibition in s. 158(2) on passing on the right when the movement cannot safely be made. If the former, the plaintiffs overlook the exception in s. 158(1)(b) which permits a driver to overtake and pass on the right on a laned roadway where there is one or more unobstructed lanes on which the driver is permitted to drive. This exception would appear to apply here: see *Smeltzer v. Merrison*, 2012 BCCA 13 at para. 13, and the definition of "laned roadway" in s. 119 of the MVA.

[60] If the plaintiffs rely on s. 158(2)(a) of the MVA, this simply begs the question of whether Mr. Elding ought to have identified a jaywalking pedestrian at the intersection of East Hastings and Woodland as a potential hazard and altered his driving so as to avoid the hazard. The same observation may be made about the plaintiffs' reliance on s. 144 of the MVA; that is, whether Mr. Elding's driving was careless turns on the circumstances present at the time of the Accident and the conduct expected of a reasonable bus driver in such circumstances.

[61] The defendants, for their part, argue that Mr. Elding had the right of way over the pedestrian at the time of the Accident. The defendants rely on the following provisions of the MVA:

179(2) A pedestrian must not leave a curb or other place of safety and walk or run into the path of a vehicle that is so close it is impracticable for the driver to yield the right of way.

180 When a pedestrian is crossing a highway at a point not in a crosswalk, the pedestrian must yield the right of way to a vehicle.

[62] As I have noted, it is common ground between the parties that the pedestrian in this case did not cross East Hastings in a crosswalk. As such, Mr. Elding had the right of way. However, the defendants acknowledge that this is not the end of the liability analysis. Even if Mr. Elding had the right of way, he nevertheless owed a duty of care to the passengers on his bus to take reasonable steps to avoid apparent hazards: *Salaam* at paras. 22-29; *Shishvan v. Wood*, 2005 BCSC 1304 at para. 13.

[63] The various rules of the road cited by the parties, accordingly, lead to a single standard of care inquiry: did Mr. Elding fail to take the steps expected of a reasonably prudent bus driver in the circumstances in approaching the intersection of East Hastings Street and Woodland Drive?

Did the driver breach the standard of care?

- [64] The plaintiffs make two arguments as to how Mr. Elding breached the relevant standard of care:
- i. First, the plaintiffs say that Mr. Elding ought to have identified the possibility of a jaywalking pedestrian at the time the pedestrian's hat could first be seen on the video footage as the pedestrian approached the red van. This is over two seconds before Mr. Elding testified that he in fact saw the pedestrian when the pedestrian stepped out from the front of the red van and into Mr. Elding's line of vision.
 - ii. Second, the plaintiffs say that, in any event, Mr. Elding ought to have exercised more caution by reducing his speed in anticipation of potential hazards at the intersection, including the possibility of a jaywalking pedestrian. Either way, the plaintiffs say that Mr. Elding could have, and ought to have, stopped the bus in a safe manner without hitting the pedestrian.
- [65] The plaintiffs' first theory of liability is grounded in Mr. Heinrichs' final report and his calculation of the lapse of time between when the pedestrian's hat is first visible on the video and when Mr. Elding began to brake. I have already reviewed the circumstances of the preparation of this report. The fact is that Mr. Heinrichs did not himself notice the early sign of the hat despite repeated viewings of the video. The hat was pointed out to Mr. Heinrichs by plaintiffs' counsel.
- [66] The early sighting of the hat is exceedingly difficult to identify on the video even with the after-the-fact advantages that video, as opposed to real time, provides the viewer. The plaintiffs have placed great stress on Mr. Elding's duty as a driver to be aware of all of his surroundings, including the condition of the road and intersection ahead, the behaviour of other motorists, and activity on the adjacent sidewalks. I do not accept that in the midst of the discharge of such duties Mr. Elding could be faulted for failing to notice, in real time and conditions, the tip of someone's hat that is barely visible on repeated playing of a video.
- [67] Finally, I note that in any event Mr. Heinrichs was unable, without further investigation, to conclude whether the hat could have been visible from the vantage point of the bus driver as opposed to the vantage point of the camera. This fact alone is a basis to reject this theory of liability. If the plaintiffs cannot establish that Mr. Elding could have seen the hat in the position depicted on the video at the earlier point in time, then they have necessarily failed to establish that Mr. Elding should have seen the hat.
- [68] The plaintiffs' second theory of liability is that Mr. Elding breached his standard of care by failing to adjust his driving for the conditions. In particular, the plaintiffs argue that Mr. Elding should have reduced his speed from 42 km per hour to 34 km per hour, or lower, as he approached the intersection of East Hastings and Woodland. The lower speed, the plaintiffs say, would have reduced the rate of deceleration and permitted a safe stop. The plaintiffs rely on Mr. Heinrichs' report which estimates that Mr. Elding could have stopped within the same distance at a maximum deceleration rate of 0.2 g if his initial rate of speed had been 34 km per hour. The plaintiffs say we know this is a safe deceleration rate because on Mr. Heinrichs' test drive, he comfortably rode on an empty bus that reached deceleration

rates of 0.2 g.

- [69] The plaintiffs argue that Mr. Elding should have been alive to the need for caution because he was approaching an uncontrolled intersection, the traffic was congested, Mr. Elding's view of the intersection was at least partially obstructed by a large white van, and jaywalking pedestrians were common in the area.
- [70] The plaintiffs rely on cases in which drivers were found to be at fault in failing to proceed with caution in driving through an intersection even where they had the right of way. See for example *Clark v. Stricker*, 2001 BCSC 657; *Zaborniak v. Smerdal*, 2014 BCSC 1367; and *Kirby v. Loubert*, 2018 BCSC 498. In each of these cases, the plaintiff collided with an oncoming left turning vehicle at an intersection. In each case, the plaintiff was found to be contributorily negligent in failing to observe signs of potential danger, such as vehicles stopped at an intersection to allow a vehicle to make a left hand turn. None of these cases consider the duties of a bus driver in driving along a dedicated bus lane.
- [71] I do not consider these cases to be analogous to the present circumstances. In this case, the vehicles on East Hastings in the lanes to the left of the bus were not stopped to allow a vehicle to turn left at East Hastings and Woodland. They were stopped because traffic was congested, a common feature of rush hour on a major arterial route out of downtown Vancouver. It can be assumed that one purpose of a dedicated bus lane is to facilitate the flow of public transit vehicles during periods where such congestion is otherwise to be expected. The rush hour congestion that Mr. Elding encountered did not, in itself, amount to a potential danger in the manner that stopped traffic did in the cases relied on by the plaintiffs.
- [72] I accept that if there was some particular indication of a potential danger or hazard in the intersection, Mr. Elding could reasonably be expected to drive with appropriate caution. However, it is not clear to me what danger or hazard ought to have been apparent to Mr. Elding beyond what might be considered typical rush hour traffic conditions.
- [73] The plaintiffs placed considerable emphasis on evidence that jaywalking pedestrians are common in the area of the intersection of East Hastings and Woodland. The plaintiffs say there is the same need for driver caution in this area as in the 30 km per hour zone around Main and Hastings Streets. However, their evidence on this point is limited and anecdotal. The evidence consists of the recollections of Ms. Peterson (as a former resident of the area) and Ms. Christie (as a transit user in the area).
- [74] Importantly, Mr. Elding testified that it is not his experience that jaywalking pedestrians are common in the area of East Hastings and Woodland. He cannot recall ever seeing a pedestrian behaving in such an unsafe manner before. The fact is that the speed limit in the area is 50 km per hour, not 30 km per hour. The intersection where the Accident occurred is at least 12 blocks east of the 30 km per hour zone at Main and Hastings. Taking everything into account, I cannot infer from the evidence that Mr. Elding should have been on notice that erratic jaywalking pedestrians were a hazard he ought to account for in his driving

speed in driving this stretch of East Hastings, notwithstanding the posted speed limit.

- [75] I am also not persuaded on the evidence that Mr. Elding knew or ought to have known that 34 km per hour was a preferred travelling speed to 42 km per hour as a means of reducing the risk of injury to passengers in the event of a sudden stop. Mr. Elding testified that he was not aware of a specific speed at which a bus could be safely stopped in an emergency. The plaintiffs' own expert, Mr. Heinrichs, agreed that passengers could fall on a bus that stopped suddenly from a travelling speed of 30 km per hour.
- [76] The plaintiffs' theory, in essence, is that because Mr. Heinrichs opines that Mr. Elding could have stopped his bus at the same point at a lower deceleration rate if he had been travelling at a rate of speed of 34 km per hour rather than 42 km per hour, therefore Mr. Elding was negligent not to reduce his speed to 34 km per hour. This theory grounds liability in an ex post facto analysis of what different steps taken by a driver might have avoided the accident rather than an analysis of what steps were reasonably expected of a prudent driver in the circumstances. This is inconsistent with the principles that govern the determination of the appropriate standard of care.
- [77] I therefore conclude that the plaintiffs have not established on the evidence that Mr. Elding breached the standard of care expected of a reasonably prudent bus driver in the circumstances in failing to reduce his speed from 42 km per hour to 34 km per hour as he approached the intersection of East Hastings and Woodland.
- [78] I accept the evidence of Mr. Elding that he took his foot off the accelerator and covered his brake as he approached the intersection of East Hastings and Woodland in anticipation that he may have to stop. I also accept his evidence that he applied his brakes as soon as he saw the pedestrian step out to Mr. Elding's immediate left from the front of the red van. The plaintiffs did not challenge Mr. Elding's credibility in this respect. The evidence of both experts supports that Mr. Elding's reaction time from the moment he saw the pedestrian was exceptionally quick. While Mr. Elding was able to stop in time to avoid hitting the pedestrian, he was only able to do so by the rapid application of the brakes, causing unfortunate but unavoidable injuries to some of the bus passengers.
- [79] I find that Mr. Elding acted in accordance with the standards expected of a reasonably prudent bus driver in the circumstances. He did not breach the relevant standard of care, and therefore the plaintiffs' negligence claim against the defendants cannot succeed.

Issue 2: Were the plaintiffs contributorily negligent?

- [80] Given my findings on the issue of the defendants' liability in negligence, it is unnecessary for me to address the defence of contributory negligence.

CONCLUSION

- [81] The defendants are not liable in negligence.

[82] The John Doe defendant has never been identified. The plaintiffs referred me to no precedent that would support the court's authority to make a finding of liability against a John Doe defendant in these circumstances.

[83] Accordingly, all three actions are dismissed. The defendants are entitled to the costs of the actions at Scale B.

"Horsman J."

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