
CANADA / JUDGMENT

Falconer v. BC Transit Corporation

2013 BCSC 715

COURT

Supreme Court of British Columbia

DECIDED

25 April 2013

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2013 BCSC 715 Falconer v. BC Transit Corporation

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Falconer v. BC Transit Corporation,

2013 BCSC 715

Date: 20130425

Docket: S093193

Registry: Vancouver

Between:

William Watt Falconer

Plaintiff

And

BC Transit Corporation, Kamloops Transit System,

City of Kamloops, Sheridan Management now known as

Gateway Property Management Corporation

Defendants

Before: The Honourable Mr. Justice Abrioux

Reasons for Judgment

Counsel for the Plaintiff:

E. J. McNeney Q.C.

and M. Spieker

Counsel for the Defendants:

J. Horne Q.C.

Place and Date of Trial:

Vancouver, B.C.

May 9 & 10, 2012

and February 12, 2013

Supplementary Submissions:

February 22 & 27, 2013

Place and Date of Judgment:

Vancouver, B.C.

April 25, 2013

I: INTRODUCTION

- [1] William Falconer seeks damages for the injuries he sustained when exiting from a transit bus on January 29, 2008 (the "Accident").
- [2] The Accident occurred at or near the intersection of Third Avenue and Columbia Street in Kamloops, British Columbia. The plaintiff, while attempting to exit through the rear doors of the bus, slipped and fell, thereby causing an injury to his right ankle.
- [3] The parties have agreed as to the amount of damages. The only issues in the trial were whether the defendant BC Transit Corporation was negligent and if the plaintiff was contributorily negligent. The action against the remaining defendants has been discontinued, as have the third party proceedings.

II: LIABILITY

- [4] For the reasons that follow I have concluded the defendant was negligent and its negligence caused the plaintiff's injuries. I have also concluded the plaintiff was contributorily negligent and liability ought to be apportioned 75% against the defendant and 25% against the plaintiff.

III: THE EVIDENCE

- [5] There are no credibility issues to be resolved. Counsel for the defendant described Mr. Falconer as "one of the most honest and direct people I have ever come across". I reached the same conclusion.

- [6] It appears from the evidence that the operator of the bus at the time of the Accident was Mr. Robert Rogers. He did not testify at the trial. He apparently has no knowledge of the circumstances that gave rise to the Accident.
- [7] By way of brief background, Mr. Falconer was born in June 1920 in Aberdeen, Scotland. He came to Canada, unescorted, at age eight, to locate relatives in Saskatchewan. He returned to Scotland, once again alone, a few months later. When he was 15 years old he misrepresented his age in order to join the Royal Air Force. In 1938 he qualified as a pilot. He flew as a fighter pilot in the Battle of Britain, about which he said "I had one or two successes". He then flew Hurricane and Halifax bombers for the remainder of the Second World War.
- [8] Following the War, Mr. Falconer returned to Canada. His principal occupation for many years was as a flight engineer, first for Canadian Pacific Airlines and then the federal Department of Transport. He continued flying until he was a septuagenarian.
- [9] Mr. Falconer is an accomplished athlete. At the time of the Accident, although he was 87 years old, he would perform in track and field activities on a regular basis. His specialties were the discus and hammer. He often cycled for a half hour and did 300 to 400 "crunches" a day. He also, in his own words, "did a bit of running".
- [10] Mr. Falconer had sufficiently recovered from the injuries sustained in the Accident that when Kamloops hosted the World Masters Games in 2010, he was what was described as the "poster boy" for the promotional materials. At age 90 he participated in certain of the track and field events at the Games, including the javelin.
- [11] On January 29, 2008, the day of the Accident, the plaintiff was living at Fourth Avenue and Nicola Street in Kamloops. He took a bus to the Sahali Mall, which is located approximately two miles from his apartment. He intended to go shopping and to see his daughter who worked at a bank located in the mall. He does not own a car. He regularly uses public transport.
- [12] He described the weather conditions that day as "pretty wintry". Upon leaving the mall he took the number seven bus in order to return home. He recalls there being a drift of snow over which he had to step in order to get onto the bus.
- [13] When the bus approached Mr. Falconer's destination, he rang the bell. The driver stopped the bus approximately one bus length from the bus stop sign.
- [14] In direct examination the plaintiff testified that in exiting the rear door he saw there was a "skiff of snow and ice". The road was uneven. The area where he was exiting the bus led to the driveway of a coffee shop. In the process of leaving the bus, he grabbed the handle and stepped down. It felt as if he slipped. He heard a snap and his right ankle twisted.
- [15] A woman who was in the vicinity came over to assist him. She obtained a blanket, covered him and called an ambulance. By this time, the bus had left.

[16] The plaintiff stated he was wearing boots with a heavy tread. He did not believe his footwear was a factor in the incident occurring.

[17] On cross-examination, the plaintiff acknowledged he had to walk approximately one block from his apartment to get to the bus stop where he got on the bus to the mall. He agreed there was snow and ice where he walked earlier that day. It was a typical winter day in Kamloops.

[18] He stated the bus stopped approximately a bus length "and a bit" from the bus stop. He did not believe there was a bus in front of the one he was riding.

[19] The plaintiff was referred to his evidence given at an examination for discovery, which occurred in March 2010. He agreed the evidence he gave at that time was true. His evidence included:

- snow and ice on the sidewalks and roads are not unexpected in Kamloops in the winter;
- when he looked down prior to leaving the bus he saw "mostly snow. There were tire tracks there too. It looked like ice shining through";
- he stepped off the bus "like I normally do";
- when asked if he had any reason to be worried about stepping off the bus he responded "not really, but I held onto the door handle any way when I stepped off, and my foot just shot off, I heard this awful crack ";
- when asked if it struck him that this was an unsafe place to get off the bus he responded "not really". He also agreed there was ice and snow to be seen. He saw pavement and stepped down;
- the place where he did step down was four or five inches lower than it normally would be since there was no curb;
- he took the step anyway because "it looked safe enough to me";
- the difference in height did not really bother him;
- from what he could tell it was not the pavement that made him trip but the "difference between the roadway and the entrance to the coffee shop";
- he did not observe any difference in height between the driveway and the roadway before he stepped off. He went on to say "well I didn't notice anything. I would think I knew there was a difference because I was in a driveway and the pavement is higher";
- he did not believe it was the edge of the pavement that caused him to fall;
- when asked if his observations caused him to believe the situation was dangerous and it would be better to get off at the front of the bus, he responded he "never gave it a thought";

- he was well aware of how far down it was before he stepped off the bus. He did not have to let go of the handle in order to do so. His foot was on the ground when it snapped;
- he did not know what caused him to fall. All he knew was that his ankle twisted and snapped;
- before the Accident occurred the bus had not moved. Its rear door was still open.

[20] As part of the plaintiff's case, certain questions and answers from Mr. Rogers' examination for discovery were read into evidence. These included:

- he did not know who was operating the bus at the time of the incident;
- the bus stop in question was across from the hospital. He had a policy when dealing with elderly people in snow and ice situations to be very cautious and to keep them in mind as much as possible to facilitate their safe departure from the bus;
- he had encountered ice and snow situations at this particular stop on prior occasions. What he did would depend on the situation, the amount of snow and ice, and whether there was another bus in front of him. "It's a very busy stop, so from one trip to the next everything changes, conditions change";
- when asked if he would drive away if an elderly person fell to the ground while exiting from his bus, he answered "I don't know".

[21] The documents produced by the defendant, which were entered into evidence, have Mr. Rogers named as the driver at the time of the Accident.

[22] The plaintiff also sought to have admitted into evidence the report of Genevieve Heckman. Ms. Heckman is a "human performance and human factors" expert who operates her business in Los Angeles, California.

[23] It was the plaintiff's position that Ms. Heckman's report would be of assistance to me in that:

- it would establish there is no other explanation for the Accident occurring apart from the defendant's negligence;
- it would establish there were other alternatives available to the driver apart from stopping where he did;
- it would opine as to what constitutes a "misstep";
- it would establish the relevance of the uniform stepped-down height. A small decrease in step height would increase the likelihood of an accident occurring.

[24] The defendant's objections to the admissibility of the report included the following:

- the report did not constitute expert evidence and the expert was essentially taking the court's place;

· in any event, the plaintiff had agreed the opinion portion of the report should be withdrawn. That being the case, there was no basis for the report being admitted into evidence.

[25] Following submissions, I advised counsel I would rule on the admissibility of the report in these reasons for judgment.

[26] I have concluded the report is of no assistance to me. That is because:

- the redacted report contains no opinion;
- what remains are Ms. Heckman's purported findings of fact.

[27] Exercising my "gatekeeper function" which flows from R. v. Mohan, [1994] 2 S.C.R. 9, and subsequent authorities, the report is not admitted into evidence.

[28] The manager of Kamloops Transit, Ralph Vanderheide testified. His evidence included:

- he had never spoken to Mr. Rogers about the Accident;
- in so far as the bus stop in question was concerned, this stop could accommodate more than one bus;
- the standard procedure was that if there was already a bus at the stop in question, the second bus to arrive would pull up right behind the first;
- the bus in question was a "kneeling bus". At the time of the Accident, this function would occur automatically. It was designed to assist passengers getting onto a bus. It did not change the height of the step for the rear exit;
- drivers receive sensitivity training in order to deal with elderly passengers;
- the bus in question was equipped with a right side mirror. Drivers were instructed to ensure that the zone of safety next to the bus was clear prior to departing from the bus stop;
- it was not acceptable practice for the bus driver to drive away if a person had slipped or fallen when getting off the bus;
- he was aware Mr. Rogers had indicated he had no knowledge of the Accident. That being the case, there was no investigation;
- had there been a new snowfall it would not be out of the ordinary at the stop in question for passengers to be dropped off near the driveway where there was no flat sidewalk;
- if the bus in question had stopped behind another bus, the driver had the option of waiting for the first bus to leave before opening the doors on the bus;
- he was made aware of the Accident by the assistant manager, Mr. Bruce Cameron.

[29] A transcript of an interview of Bruce Cameron given under oath was entered as an exhibit at the trial. Mr. Cameron's evidence included the following:

- at the time of the Accident, he was an on-road supervisor. He had also been involved in making changes and updates to the operator's policy manual;
- most of the buses in the fleet were of the "kneeling" variety. This function, however, only affected the front of the bus;
- under circumstances where there was an obstruction preventing the operator from using a bus stop in an ideal way, the procedure would be that if the bus was at an unsafe position, then the operator would clear the obstruction prior to allowing passengers to alight;
- operators are encouraged to communicate with their passengers as to anything unusual that may be going on since "safety is first in the bus";
- an operator does not necessarily always communicate with passengers. It would only be in situations where he foresaw something, that is a safety issue, that he would probably speak up and advise the passengers;
- there was no direct training with respect to where a driver could or could not allow passengers off near a bus stop. "Basically we tell the drivers to take every precaution to let the passengers off in a safe place. There is going to be many places in town where you can have three or four buses at one bus stop";
- it would be a "pretty common practice" for a driver to advise an elderly person to watch his step, although this would not constitute part of the formal training;
- it would not be common practice for a driver to advise passengers to watch their step if they were stepping down onto the street. That is because "half the city has no curb. So it's just not done. Unless there is an obstruction or some safety issue, the height is never really isn't an issue unless you have a physical problem";
- it would not generally be the case for a driver to advise an elderly person to exit out the front of the bus if there were icy conditions. That is because "some seniors get very upset when you treat them in a different way than other people". The appropriate thing to do would be to announce "watch your step, folks";
- after passengers have exited the doors and the doors are shut, the driver should check the right mirror to make sure everyone is clear of the bus;
- in so far as Mr. Cameron's own practice was concerned, he would generally yell "watch your step as you are leaving the bus". He would do so if he felt there was a safety issue. "If it was just a normal situation where there was no curb, I wouldn't bother saying anything";
- after the Accident was reported, a driver's sheet was reviewed in order to determine who was driving the bus in question. This revealed Mr. Rogers to be the operator. Although Mr. Rogers had no knowledge of the Accident, "at no time did he deny that he was on that bus";

· on the assumption that Mr. Falconer took a step out of the bus and fell immediately, "I don't see how a person can drive away in a bus without checking the right mirror to see that they are clear. . . You could have a kid reaching in there for a ball under the tires or whatever".

[30] Several versions of different policy manuals were entered into evidence. In addition, the plaintiff called a supervisor at BC Transit, Ms. Lorna Cohoe, to give rebuttal evidence with respect to policy manuals. None of this evidence was of any real assistance to me. That is because it did not relate to the policy manual in place in Kamloops in January 2008. Accordingly, I have concluded that the best evidence on the standard of care is Mr. Cameron's.

IV: FINDINGS OF FACT

[31] I make the following findings of fact after a consideration of the evidence as a whole:

- (a) Mr. Rogers was the driver of the bus involved in the Accident;
- (b) there were wintry conditions, including fresh snow lying on top of ice at the bus stop area in question. Portions of the ice were visible to passengers exiting the rear door;
- (c) the bus was not brought to a stop at the bus stop where there was a curb upon which passengers could exit from both the front and rear doors;
- (d) due to the lack of a curb, Mr. Falconer had a greater distance to step down from the bus than if the bus been brought to a halt right at the bus stop;
- (e) Mr. Rogers did not issue any form of warning to the passengers who were exiting the bus at this particular stop;
- (f) Mr. Falconer believed he could step down safely from the rear exit. He was mistaken in that regard;
- (g) Mr. Falconer's injuries occurred when his right ankle "snapped" shortly after he placed it on an icy surface directly outside the rear exit of the bus;
- (h) Mr. Rogers drove away from the bus stop without checking in his right side mirror to see if the area was clear.

V: THE APPLICABLE LEGAL PRINCIPLES

[32] The principles that apply to the issues in this case are well known and were summarized this way by Madam Justice Dardi in *Prempeh v. Boisvert*, 2012 BCSC 304:

[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.

- [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.
- [17] *Day v. Toronto Transportation Commission*, [1940] S.C.R. 433, is the seminal case dealing with the liability of public carriers. The plaintiff, a passenger in a street car owned by the defendant, while standing and picking up a parcel in preparation to disembark, was thrown to the floor and injured by the sudden application of the emergency brake. The articulation of the standard of care was stated as follows by Hudson J. at 441:

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., p. 60, paras. 92 and 95. In an old case of *Jackson v. Tollett* (1817) 2 Starkie 37, the rule was stated by Lord Ellenborough, at p. 38, as follows:

Every person who contracts for 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.

- [18] The principles articulated in *Day* have been interpreted by the courts in this province as endorsing 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: *Planidin v. Dykes*, [1984] B.C.J. No. 907 (Q.L.)(S.C.); *Visanji v. Eaton and Coast Mountain Bus Co. Ltd.*, 2006 BCSC 656 at para. 26.
- [19] However it must be noted that in *Fontaine v. British Columbia (Official Administrator)*, [1998] 1 S.C.R. 424, 46 B.C.L.R. (3d) 1, Major J. in discussing the doctrine of *res ipsa loquitur* in the context of a single car accident, observed as follows:

27 It would appear that the law would be better served if the maxim was treated as expired and no longer used as a separate component in negligence actions. After all, it was nothing more than an attempt to deal with circumstantial evidence. 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.

- [20] In *Visanji*, the court after canvassing the pertinent authorities provides the following helpful formulation of the principles which govern the determination of negligence against a public carrier:
- [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. Calgary (City)* (2000), 83 Alta. L.R. (3d) 1, 2000 A.B.C.A. 221, at ¶46, leave to appeal to S.C.C. ref'd, [2000] S.C.C.A. No. 483 (S.C.C. Mar. 29, 2001).
- [33] In *Visanji v. Eaton and Coast Mountain Bus Co. Ltd.*, 2006 BCSC 656, Madam Justice Arnold-Bailey made the following comments 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. Calgary (City)* (2000), 83 Alta. L.R. (3d) 1, 2000 A.B.C.A. 221, at ¶46, leave to appeal to S.C.C. ref'd, [2000] S.C.C.A. No. 483 (S.C.C. Mar. 29, 2001).
- [30] In *Kean v. British Columbia Transit*, (December 11, 1998), Vancouver B920195 (B.C.S.C.), the plaintiff established a *prima facie* case against the defendant driver. The plaintiff, standing in the aisle to get off, was thrown forward by the sudden braking of the bus. In that case, Cohen, J. quoted a number of cases dealing with this concept. At ¶13 Cohen, J. quoted the decision of *Lawrie v. British Columbia Hydro & Power Authority*, [1976] W.W.D. 137 (B.C.S.C.) at ¶31, which in turn referred to an earlier case, *Winder v. Garrett and Jay*, [1957] O.W.N. 101, 7 D.L.R. (2d) 462, where at p. 463 Laidlaw, J.A. is quoted as follows:

I prefer, for my part, to say that at the trial the plaintiff established a *prima facie* case as against the defendant. The onus of proof shifted to the defendant to answer that *prima facie* case, and that onus could be discharged by showing that there was no negligence or breach of duty on the part of the defendant or that the accident was attributable to some specific cause that was consistent only with the absence of negligence on the part of the defendant.

- [31] The rationale for the shifting of the burden of proof to the defendant to show it exercised all due, proper and reasonable care and skill to prevent accident or injury, in cases of accident and injury to a passenger, has been explained variously. One such articulation of the rationale for the application of this principle, relevant to the case at bar, is found in the *Nice* decision, at ¶28-31:

We accept that 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 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.

First, 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. See: Day

Secondly, the driver of the carrier is the person who knows whether the vehicle was being driven in a safe, proper and prudent manner. The passenger cannot be expected to know what happened. For example, in this case, the passenger was still proceeding down the aisle and could have no knowledge of why the bus, having left the stop, suddenly jerked to a stop.

Thirdly, 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.

[34] Part of a public carrier's duty is 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*, 63 SCR 361 at p. 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.

VI: THE PARTIES' POSITIONS

[35] The plaintiff's position is that he has established a *prima facie* case of negligence against the defendant. He was dropped off at a driveway, not the curb, on the edge of an uneven surface. This occurred under wintry conditions. Essentially he was "led to a trap". He fell on his first step onto the ground. This is directly related to the position of the stopped vehicle.

[36] In addition, the plaintiff submits the fact the driver left the scene contrary to his duty to observe the safe passage of passengers away from the side of the bus provides an inference that he was not paying attention to important duties relating to his driving. These duties included the icy conditions in which he should not have allowed the passengers to disembark onto the driveway.

[37] The plaintiff argues that there were other options available to the bus driver. These included pulling ahead or to another location where passengers could step directly onto the sidewalk. In addition, it was open to the driver to ask the plaintiff to leave from the front of the bus where he would be able to see whether the conditions posed a hazard and caution was required.

[38] The plaintiff also submits that an adverse inference should be drawn from the fact Mr. Rogers did not testify. He relies on *Parsons and Sons Transportation Ltd. v. Whelan*, 2005 NLCA 52:

[46] In summary,

- (1) It is not helpful to speak of shifting the onus of proof to require a common carrier to prove that it was not negligent. The ordinary principles of proof are sufficient to the task. However, given the high standard of care the common carrier must meet, the carrier may be under a heightened need to adduce evidence in response, either to prevent the drawing of adverse inferences or to negate a prima facie case, because the threshold the plaintiff must clear is lower.
- (2) In this case, the passenger, Ms. Whelan, established on a balance of probabilities that she was injured in the very manner which the Company conceded was foreseeable. She has, therefore, established a prima facie case of negligence.
- (3) The Company submitted, correctly, that there was evidence regarding precautions that it had taken. Failing to consider this evidence was a palpable and overriding error by the trial judge. However, the nature of the evidence on this point does not require an assessment of credibility of witnesses, and it is appropriate for this Court to determine whether there was sufficient evidence to negate the prima facie case of negligence established by Ms. Whelan.
- (4) Given the high standard of care imposed on a common carrier, the evidence adduced by the Company is insufficient to negate the prima facie case established by Ms. Whelan. In the result, I conclude that the Company was negligent in the provision of its transportation service, and is liable for the damages resulting from Ms. Whelan's injury.

[Emphasis added.]

[39] The defendant's position is that no prima facie case of negligence has been established by the plaintiff. Specifically, "nothing done or not done by the defendant caused or contributed to the plaintiff's fall".

[40] The defendant submits this was simply an unfortunate accident and points to the following:

- the plaintiff was a physically fit individual who had no vision problems;
- he was completely aware of the weather and walking conditions;
- the plaintiff knew the sidewalks and roads were icy and snowy;
- he was not worried about stepping off the bus, was aware of how far he had to step down and did not believe it was the pavement which caused him to fall;
- he did not know what made him fall.

- [41] The defendant submits it is relevant that the plaintiff discontinued his action against all the other defendants, including those who were responsible for cleaning the street and sidewalks.
- [42] The defendant submits no adverse inference should be drawn. The defendant does not dispute any portion of the plaintiff's evidence. Since there was no case to be met, there was no requirement to call Mr. Rogers.

VII: DISCUSSION

- [43] As was stated in Prempeh, the legal principles have been interpreted in this province to mean that once a passenger on a public carrier has been injured in an accident, it is for the public carrier to establish that the passenger's injuries were occasioned without negligence on its part or that they resulted from a cause for which it was not responsible.
- [44] In my view, a prima facie case of negligence has been established by the plaintiff. Although Mr. Falconer may not have been able to say what caused him to fall, I have found it was the lower level, icy surface upon which he stepped off the bus due to where the bus driver chose to stop the bus.
- [45] The issue then becomes whether the defendant has presented evidence negating the prima facie case of negligence that has been established. In my view it has not. The reasons for this include:
- it has led no evidence as to why the bus stopped where it did. Perhaps there was another bus which had pulled up at the stop sign in front of it, but there was no evidence to that effect;
 - it has led no evidence from which I could conclude that the location where the rear doors opened was a "reasonably safe place for [Mr. Falconer] to debark". See: *Grand Trunk Pacific Coast Steamship Co. v. Simpson*;
 - viewed within the context of the "very high degree of care" required of a public carrier, the fact Mr. Falconer erroneously believed it was safe for him to debark cannot be interpreted to mean it was in fact reasonably safe for him to do so;
 - the defendant has led no evidence as to whether a warning to passengers was not required under the circumstances.
- [46] In my view, there was a "heightened need to adduce evidence in response, either to prevent the drawing of adverse inferences or to negate a prima facie case". See: *Parsons and Sons Transportation Ltd.*
- [47] In addition, Mr. Rogers breached the standard of care expected of a bus driver by leaving the bus stop. An elderly passenger had slipped and fallen in the immediate vicinity of the rear door of the bus. The fact Mr. Rogers left the scene can only mean he did not perform the appropriate check in his right mirror. To quote Mr. Cameron, "I don't see how a person can drive away in a bus without checking the right mirror to see that they are clear. You could

have a kid reaching in there for a ball under the tires or whatever". Although this breach of the standard of care did not cause the plaintiff's injury, it indicates to me a "general lack of care and inattention" by Mr. Rogers in so far as his responsibilities to passengers were concerned. See: *Donald v. Huntley Service Centre Ltd.*, (1987) 61 O.R. (2d) 257 (S.C.J.) at para. 9.

[48] I will now turn to whether the plaintiff was contributorily negligent. During submissions, his counsel conceded there was "some potential for contributory negligence". This included:

- deciding to leave from the rear door of the bus and not the front;
- failing to look carefully and see the edge of the pavement and the driveway.

[49] Mr. Falconer's counsel submitted the appropriate range for contributory negligence would be 15 to 20%.

[50] In addition to what was stated by counsel, I would add Mr. Falconer's evidence that before he stepped down from the bus, he saw some ice shining through the snow. In my view, this should have prompted him to debark utilizing the utmost of caution. In the alternative, he should have exited from the front of the bus if it was more appropriate to do so.

[51] The issue then becomes how liability should be apportioned. In considering this question from the perspective of relative blameworthiness, some of the criteria referred to in *Aberdeen v. Township of Langley*, *Zanatta, Cassels*, 2007 BCSC 993, varied on other grounds, 2008 BCCA 420, are germane. These are summarized at para. 62 and 63:

[62] Thus, fault is to be determined by assessing the nature and extent of the departure from the standard of care of each of the parties. Relevant factors that courts have considered in assessing relative degrees of fault were summarized by the Alberta Court of Appeal in *Heller v. Martens*, *supra*, at ¶ 34 as follows:

1. The nature of the duty owed by the tortfeasor to the injured person
2. The number of acts of fault or negligence committed by a person at fault
3. The timing of the various negligent acts. For example, the party who first commits a negligent act will usually be more at fault than the party whose negligence comes as a result of the initial fault
4. The nature of the conduct held to amount to fault. For example, indifference to the results of the conduct may be more blameworthy. Similarly, a deliberate departure from safety rules may be more blameworthy than an imperfect reaction to a crisis
5. The extent to which the conduct breaches statutory requirements. For example, in a motor vehicle collision, the driver of the vehicle with the right of way may be less blameworthy

[Authorities omitted.]

See also Vigoren v. Nystuen, supra, at ¶ 90 (summarizing these same factors).

[63] Many of the above-noted factors are discussed in Chiefetz, Apportionment of Fault in Tort, supra, at pp. 102-104. Considering that, I conclude it would be appropriate to add the following as relevant factors:

6. the gravity of the risk created;
7. the extent of the opportunity to avoid or prevent the accident or the damage;
8. whether the conduct in question was deliberate, or unusual or unexpected; and
9. the knowledge one person had or should have had of the conduct of another person at fault.

[52] In Aberdeen, it was stated that, "[a]nother important factor in assessing the relative degree of blameworthiness of the parties is the magnitude of the departure from the standard of care" (at para. 66).

[53] I conclude the defendant's degree of fault is greater than the plaintiff's.

[54] The defendant owed a high standard of care to the plaintiff, which included providing a reasonably safe place for him to alight. The defendant controlled where the bus was brought to a stop. Its negligence occurred before the plaintiff's.

[55] The plaintiff, for his part, believed it "was safe enough" to exit from the rear. He at least addressed his mind to safety issues. It turned out he was wrong.

[56] In my opinion liability should be apportioned 75% against the defendant and 25% against the plaintiff.

VIII: COSTS

[57] The plaintiff is entitled to 75% of his costs at Schedule B unless there are other factors pertaining to this issue 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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