
CANADA / JUDGMENT

McCurdy v. Tung

2018 BCSC 2585

COURT

Supreme Court of British Columbia

DECIDED

12 December 2018

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2018 BCSC 2585 McCurdy v. Tung

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

McCurdy v. Tung,

2018 BCSC 2585

Date: 20181212

Docket: M158748

Registry: Vancouver

Between:

Isabel Marianne McCurdy

Plaintiff

And

Tit-Yau Donald Tung, South Coast British Columbia Transportation Authority

doing business as TransLink, and Coast Mountain Bus Company

Defendants

Docket: M158780

Registry: Vancouver

Between:

Kenneth James Linforth

Plaintiff

And

Tit-Yau Donald Tung, South Coast British Columbia Transportation Authority

doing business as TransLink, and Coast Mountain Bus Company

Defendants

Before: The Honourable Mr. Justice Bowden

Oral Reasons for Judgment Re Liability of the Defendants

Counsel for the Plaintiffs:

M. Klimo

T.C. Haaf

Counsel for the Defendants:

D. Robinson

S. McDonald, Articled Student

Place and Dates of Trial:

Vancouver, B.C.

May 14,15, and 17, 2018

December 10-12, 2018

Place and Date of Judgment:

Vancouver, B.C.

December 12, 2018

[1] THE COURT: These are my oral reasons for judgment in the trial that has just been concluded

Background

[2] The plaintiffs were passengers on a bus, owned and operated by the defendant South Coast BC Transportation Authority and driven by the defendant Donald Tung, when it stopped suddenly. They were thrown out of their seats and claim damages for personal injuries that they say they suffered as a result. The only issue to be determined in this trial is whether the defendants are liable.

[3] The plaintiffs boarded the bus while it was on a scheduled route in Surrey, BC.

- [4] Ms. McCurdy sat in a front facing seat near the front of the bus. Mr. Linforth sat in a similar front facing seat also near the front of the bus. In front of each plaintiff were folding seats that face across the aisle of the bus.
- [5] The driver testified that he turned onto 68th Avenue from King George Boulevard, and the bus was travelling at the speed limit of 50 kilometres per hour towards Hyland Road. He said that 68th Avenue becomes 138th Avenue, and the bus continued towards the intersection of 138th Avenue and Hyland Road.
- [6] As the bus approached the traffic lights at the intersection, the driver took his foot off the accelerator and covered the brakes, by which he meant that his foot was positioned to apply the brakes quickly if necessary. He noticed a man walking a dog on a leash on the grassy part of the sidewalk closest to the roadway where the bus was travelling. He then saw another dog not on a leash that he described as charging towards the dog on the leash. He said that the man appeared to be startled and then jumped out in front of the bus together with the two dogs. He said that he immediately applied the brakes of the bus very hard. He said that there was no opportunity to warn the passengers to be prepared for the sudden stop. He noticed a smell from the brakes, which he said occurs after hard braking. He said that if he had not slammed on the brakes, he would have hit and killed the man. He testified that when the bus stopped, the man and the dogs were about three to five feet away from the front of the bus. He said the man waved at him and then left the scene with his dog.
- [7] The driver then looked back into the bus and saw both plaintiffs lying on the floor in front of their seats. He said that he was in a state of shock. He asked them if they were okay or required medical help and they insisted that they were fine. He then explained to the other passengers on the bus what had happened. Concluding that there were no injuries, the driver carried on and drove the bus to the Newton Exchange a couple of minutes away.
- [8] On the way to the Newton Exchange, the plaintiff Ms. McCurdy began complaining about pain in her left knee. The driver decided to call for an ambulance and pushed the emergency button to contact a dispatcher. He explained the incident to the dispatcher and requested an ambulance. He gave a transfer slip to both of the plaintiffs and asked them to write down their name and phone number. When the bus arrived at Newton Exchange about two minutes later, Mr. Linforth got off the bus. A supervisor arrived and took photos, which are in Exhibit 2. An ambulance arrived and took Ms. McCurdy to the hospital.
- [9] The next day the driver filed an employee's incident report with his employer. That form is at Tab 6 of Exhibit 3. While he admitted that he did not describe the street names correctly in the report, the driver's narrative of the incident conforms to his testimony as to what had happened.
- [10] Mr. Linforth said that before the incident he was looking towards the traffic lights at 68th and Hyland Road and did not see any cars travelling on Hyland. Nor did she notice any pedestrians, so he turned and started talking to Ms. McCurdy. He then described what happened to him when the bus braked suddenly. He said he felt a jolt and his body was

jarred. He does not remember anything after that because he believes that he was knocked unconscious. When he became conscious, he says he was lying on the floor of the bus near the fare box. He then took hold of something to get up and says that the driver helped him up. When he asked the driver what had happened, he said the driver told him that a dog had run in front of the bus. He says he noticed a dog without a leash near the bus but did not notice any pedestrians. He said that he did not notice Ms. McCurdy lying on the floor. He said that he did not see her until she was back in her seat. He said that he was not hurt badly, and he got off the bus when it arrived at Newton Exchange.

- [11] Mr. Linforth reported the incident to Coast Mountain on December 19, 2013, the day after the incident. The report of his claim is Exhibit 5. In that report the writer says that Mr. Linforth said that the bus had stopped to avoid a dog on the street, and he fell forward off his seat. He also said that the bus driver was very nice and asked him if he needed medical assistance but told him that he was okay at the time. He said that the next day he experienced pain in some areas that he described.
- [12] Ms. McCurdy was also thrown from her seat. She was looking out the side window at the time and said she did not know what happened to cause her to fall. She said that her knee was hurting from the fall. She did not report the incident to the corporate defendant.
- [13] Keith Shorter, a transit supervisor for TransLink, testified that his job involved attending such incidents, assisting the driver and passengers and collecting information. He prepared the narrative report, which is at Tab 6 of Exhibit 3, based on what he was told by the driver. Although it is not clear when his report was made, it appears to relate to his attendance at the Newton Exchange. His description of the incident accords with the evidence of the driver and Mr. Linforth, except that Mr. Linforth did not understand from the driver that a person had stepped onto the roadway with a dog.

Analysis and Review of the Law

- [14] As stated by Justice Skolrood in *Papaspnyros v. Cox*, 2014 BCSC 1569 at paras. 44-46:
- [44] The leading case on the duty owed by public carriers is still *Day v. Toronto Transportation Commission*, [1940] S.C.R. 433, where Hudson J. stated 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*, 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.

- [45] More recently, in *Prempeh v. Boisvert*, 2012 BCSC 304, Dardi J. described the applicable standard of care in these terms:
- [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.
- [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.
- [46] While there is little dispute about these governing principles, each case turns on its own particular facts (*Visanji* at para. 25).
- [15] The principles stated by Justice Dardi in *Prempeh*, 2012 BCSC 304 have been altered somewhat by our Court of Appeal in *Benavides v. Insurance Corporation of British Columbia*, 2017 BCCA 15, where Justice Fenlon wrote that the following principles emerge from *Day v. Toronto Transportation Commission*, [1940] S.C.R. 433 and subsequent cases that she reviewed. At para. 17 she states:
- [17] I draw from this review of the law the following principles:
- 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.
 - Once the plaintiff establishes a *prima facie* case of negligence, in practical terms the burden shifts to the defendant to answer the case against him and to show that he was not negligent.

- [16] The Court of Appeal held that although the trial judge did not correctly articulate the test, his finding of fact that the bus driver breached the standard of care expected of a reasonable and prudent bus driver by braking abruptly without warning his passengers and by braking suddenly in order to stop the bus at or beyond its regular stop was sufficient to support his conclusion that the defendant was liable.
- [17] In this case, the sudden stop was made by the bus driver either because a dog ventured in front of the bus or a dog and a person. If a dog alone ventured in front of the bus, the considerations are different than when a human walks in front of a moving bus. In *Birk v. Dhaliwal* (1995), 13 B.C.L.R. (3d) 291, CanLII 1812 (C.A.), the BC Court of Appeal stated at para. 24:
- [24] After considering the English Court of Appeal decision in *Parkinson v. Liverpool Corpn.*, [1950] 1 All ER 367 and approving the following statement of principle expressed therein by Tucker L.J., "Although I think that in such circumstances as these drivers act instinctively, they are required to go through some process of reasoning.", Chief Justice Wilson had this to say at p. 117:

Similarly there are scores of cases dealing with the behaviour of drivers confronted with the sudden appearance of animals on highways. Again, the possible combinations of circumstances are innumerable and it is difficult to extract a principle of universal application. The *Parkinson* case, *supra*, does state one useful rule - that a reaction based on instinct is not enough, there must be a process of reasoning. The reaction of any driver who sees an object on a highway is to avoid striking it. Natural compassion makes him wish to avoid killing an animal, whether a squirrel or a horse. Natural caution makes him wish to avoid running over say a small carton, which may contain glass or steel. But in our world regard for human life and safety must always come first and it is not reasonable that a driver should risk human life or limb in order to preserve the life of an animal.

- [18] On the other hand if, as the driver testified, a person with a dog stepped in front of the bus, in my view the driver acted reasonably by immediately applying the brakes to avoid killing or seriously injuring the person. While the driver said that he observed the pedestrian and his dog on the grassy area near the roadway about 15 to 20 seconds before the unleashed dog appeared and the pedestrian stepped in front of the bus, I think his action in covering the brakes was reasonable and it was not necessary for him to reduce his speed. It is not uncommon for persons with or without a dog to be walking near a roadway, and a bus driver would not be required to reduce his speed below the speed limit in the circumstances. The duty of the bus driver would likely be different if the person near the roadway was a child or an elderly person.
- [19] As stated in *Ibaraki v. Bamford*, 1996 CanLII 1814 (B.C.S.C.) at para. 13:

- [13] There is no obligation on a driver to travel below the speed limit to meet unforeseeable emergencies, such as a pedestrian who is so careless as to step off a curb directly in front of an oncoming car. Mrs. Ibaraki did not present evidence to establish what speed would have avoided the accident.
- [20] In my view, it would not have been foreseeable for the driver that an unleashed dog would run towards the leashed dog resulting in the pedestrian and the dogs jumping in front of the bus. I note also that as in Ibaraki there was no evidence as to what speed might have avoided the need for an abrupt stop.
- [21] The remaining question is whether the bus driver fabricated the existence of the pedestrian and only a dog ran in front of the bus causing the driver to stop suddenly. If that were the case, then it is agreed by the defendants that the driver would have been negligent in stopping as he did. The only evidence that suggests that the driver stopped because a dog ran in front of the bus is the evidence of Mr. Linforth. He did not see what caused the driver to stop, but he testified that when he asked the driver what had happened, the driver told him that a dog had run in front of the bus.
- [22] In his report following the accident and since that time, the driver has consistently said that he stopped the bus because a person and his dog jumped onto the roadway in front of the bus when another dog ran at the dog on the leash. Mr. Linforth did not observe the incident that caused the driver to stop the bus. Mr. Linforth testified that he generally remembers what he needs to remember and does not remember everything. As a result, I have treated his evidence with some caution.
- [23] His recollection of what the bus driver told him occurred after he had been unconscious for some unknown period of time. There are also a number of inconsistencies between his evidence and that of Ms. McCurdy. For example, Mr. Linforth's evidence was that he did not see Ms. McCurdy after the bus stopped until she was back in her seat. Both the driver and Ms. McCurdy said that Mr. Linforth was back in his seat before Ms. McCurdy. In his examination for discovery Mr. Linforth said that he saw the driver help Ms. McCurdy up off the floor. Upon cross-examination he admitted that he had not seen that happen.
- [24] In the end result, I do not accept Mr. Linforth's evidence as to what the driver told him after the bus had stopped. Not because he lacks credibility but because in my view that evidence is not reliable. By his own admission, he had just awoken from being unconscious when that conversation took place, and he may well have misunderstood or been mistaken as to what the driver said to him. I do accept that he believed what the driver told him, but his belief in my view was either wrong or mistaken.
- [25] I accept the driver's description of what caused him to stop the bus. The driver's description was clear and unequivocal. While he did make some mistakes in the incident report as to the location of the accident and he did not answer all of the questions on the form, his evidence regarding what caused him to stop remained consistent throughout. It was not shaken on cross-examination. His memory of what caused him to stop the bus was firm, and he has not

modified or changed his recollection of that event since the date it occurred. There is no evidence, nor has it been suggested, that the driver had any motive not to be truthful. I have concluded that the presence of a pedestrian in front of the bus as described by the driver was real and not a fabrication.

- [26] As noted, 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 driver in the circumstances. It is a high standard, and even higher where the driver is aware that a passenger such as Ms. McCurdy is disabled. It is an objective test that takes into consideration both the experience of the average bus driver and anything the driver knew or should have known.
- [27] The defendant driver had driven buses since 2005 and had received a five-year safety award from the defendant company. There is no evidence that he has experienced an incident like this before or indeed ever been in an accident. His testimony satisfies me that the safety of his passengers was of primary concern to him. He became particularly concerned with the medical needs of Ms. McCurdy and called on an emergency basis for an ambulance to attend and assist her.
- [28] In my view, there was nothing negligent about Mr. Tung stopping the bus abruptly to avoid hitting a person who had stepped in front of his bus. While I am sympathetic to the plaintiffs and sorry for the injuries that they may have suffered as a result of the bus stopping, I am satisfied that the bus driver acted reasonably in the circumstances. He could not have anticipated what occurred, and when it did, he acted reasonably in stopping the bus to avoid hitting the person. In acting as he did, the driver met the high standard of care that he owed to his passengers, including both plaintiffs.
- [29] In the end result I find that the defendants are not liable.
- [30] Costs are awarded to the defendants at Scale B.
- [31] I would like to thank counsel on both sides for the good work that you have done on behalf of your clients.

"Bowden J."

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