IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Isaacs v. Coast Mountain Bus Company Ltd.,* 2014 BCSC 2212

Date: 20141010
Docket: M135140
Registry: New Westminster

Between:

Rose Isaacs

Plaintiff

And:

Edward Payne, South Mountain Bus Company Ltd. and South Coast British Columbia Transportation Authority doing business as Translink

Defendants

Before: The Honourable Madam Justice Watchuk

Oral Reasons for Judgment

Counsel for the Plaintiff:	Roy Swartzberg
Counsel for the Defendants:	Gwen J. Chambers
Place and Date of Hearing:	New Westminster, B.C. October 7, 2014
Place and Date of Judgment:	New Westminster, B.C. October 10, 2014

Introduction

[1] On June 17, 2009 the plaintiff, Rose Isaacs, sustained injuries when she fell after exiting the front door of a transit bus.

[2] The issue in this trial is confined to liability. The parties have come to an agreement with regard to damages which will flow from the decision on liability.

Background

[3] The bus was driven by the defendant Edward Payne who is employed by the defendant Coast Mountain Bus Company Ltd. ("Coast Mountain"). The bus was owned by the defendant South Coast British Columbia Transportation Authority dba Translink ("Translink").

[4] The defendants deny responsibility for the incident. They say that if they have any degree of responsibility, the plaintiff was contributorily negligent.

Issues

[5] The factual and legal issues for determination in this liability matter are:

1. Whether Ms. Isaacs fell as she was getting off the bus or when she was walking away after getting off the bus;
2. Whether the bus was stopped too far from the curb; and
3. Whether the plaintiff was contributorily negligent by virtue of the manner in which she exited the bus.

The Law

[6] The law is not in issue. Counsel agree that it is thoroughly set out by Madam Justice Dardi in the case of *Prempeh v. Boisvert*, 2012 BCSC 304 at paras. 15-20 as follows:

> [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:
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> > [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).

[7] With regard to contributory negligence, the factors to be considered are summarized in the case of *Falconer v. BC Transit Corporation*, 2013 BCSC 715 at paras. 51-52:

> [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*, [2002 ABCA 122] 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.]
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> See also *Vigoren v. Nystuen*, [2006 SKCA 47] at ¶ 90 (summarizing these same factors).
>
> [63] Many of the above-noted factors are discussed in Chiefetz, *Apportionment of Fault in Tort*, [(Aurora, Ont.: Canada Law Book, 1981)], at pp. 102-104. Considering that, I conclude it would be appropriate to add the following as relevant factors:
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> 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.
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> [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).

[8] The defendants' policies concerning the loading and unloading of passengers at a bus stop provide evidence of the standard of care, but are not determinative. This was well-articulated in *Nice v. John Doe* (1997), 54 Alta. L.R. (3d) 227; 207 A.R. 255 at para. 37, rev'd on other grounds, 2000 ABCA 221:

> 37 Although I have reviewed herein, in some detail, the evidence of the defendants with respect to City policy, the policy is not determinative of the standard of care owed to the plaintiff. The policy is simply one indicia of whether or not they have met that standard of care but the city can still be negligent even if they follow the policy or if there is no policy if what occurred was in fact negligent. In that case, the policy will not absolve them of liability.

The Evidence

[9] In order to resolve the factual issues upon which the finding of liability will rest, I will first review the evidence of the plaintiff and the defendant Edward Payne who were the only witnesses in the trial.

[10] On the date of the incident, June 17, 2009, Ms. Isaacs was 82 years old. At about 11:00 a.m., she took the bus from her home in Coquitlam to the Lougheed Mall. Her intention was to shop at Walmart since it had an item which was cheaper

than the Zellers closer to her home. She did not have any plans to meet anyone at the mall.

[11] As she set out to go shopping that morning, she was wearing flat shoes. She was carrying a shopping bag and her wallet, hair brush and glasses were in the shopping bag. The bag was not heavy.

[12] The bus ride was about 20 minutes during which Ms. Isaacs sat on the side bench seats which are reserved for seniors and which face the aisle. She was sitting towards the front of the bus on the opposite side of the bus driver.

[13] Ms. Isaacs intended to get off the bus at the stop before Lougheed Mall, in order to get exercise. It was a nice day and she thought she would walk the extra distance to the mall.

[14] When the bus stopped, she stood up in readiness to leave by the front door. Ms. Isaacs testified that the step on the bus was very high and far from the curb. She says that she decided that she could jump to the curb rather than going down the step to the pavement and then walking to the curb in order to get to the sidewalk.

[15] Ms. Isaacs testified that the bottom step of the bus was 12-14 inches from the curb. She jumped because she thought the step to the road was very high so she grabbed the railing and jumped. Ms. Isaacs recalled that there was only one step at the front of the bus which was the step she jumped from. She said that she landed on two feet on the sidewalk and then lost her balance and fell. As she felt she was falling, she put out her right hand which resulted in her thumb being bent when she fell. She heard something crack as she went down, and landed facing the bush and the trees on the opposite side of the sidewalk. The bus was behind her.

[16] As a result of the fall, she lost her breath and could see stars for a few minutes. A young man who had exited from the back of the bus came to help her but because she did not know what he wanted, she told him to leave her alone. For a minute after the fall, she could not speak, or get up, or get her breath. When the bus driver came to help after a couple of minutes, and asked about an ambulance,

she said yes to the ambulance because she had heard cracks as she fell. She had broken her shoulder in two places and broken her arm.

[17] Ms. Isaacs does not travel by bus frequently. When she does travel on a bus, she usually holds on to the railing. In this instance, she did not ask the driver for help to get off because she said, "it all happened so quickly".

[18] Ms. Isaacs testified that she did not trip, nor did her legs give way after she took a step. She was clear in her testimony that she lost her balance when she landed.

[19] Prior to the incident Ms. Isaacs regularly went dancing two to three times a week at the Senior Centre. She had no knee problems and had no treatment for her legs or knees. Ms. Isaacs had no previous issues with mobility in 2009.

[20] As Ms. Isaacs was waiting on the sidewalk after she fell, she observed that the back of the bus was closer to the curb than the front of the bus—the bus was at an angle with the front further away from the curb.

[21] Mr. Edward Payne has been a transit operator with Coast Mountain for 23 years. He regularly drives the route on which this incident occurred, the route from Coquitlam Centre to Lougheed SkyTrain. In the two months prior to the incident, he had driven this route five days a week and four times each day. On that day he had been on shift for 5½ hours and this was his third trip. He was driving a New Flyer High Floor Diesel bus.

[22] Mr. Payne recalls Ms. Isaacs being on his bus previously. On this day she did not have any difficulty getting on the bus; she held the railing and found a seat right across from him. There was no conversation other than his usual "good morning" to his passengers.

[23] The bus stop at which Ms. Isaacs exited is on a straight stretch of North Road with a slight downgrade. North Road had two lanes of traffic in each direction at that location.

[24] The bus that Mr. Payne was driving at that time was a “high floor bus” which had three steps to go down to the front door. The bottom step is approximately six inches above street level and if the bus is pulled into the curb, the lowest step would be two inches over the curb, which is four inches high.

[25] As the bus approached the stop, there were approximately 15 to 20 people on the bus with no one standing. Four to five people stood in preparation for exiting from the rear door.

[26] Mr. Payne testified that he always pulls into a stop at a straight angle six inches from the curb with the front wheel lined up with the sidewalk. He uses the eight inch concrete apron from the curb as a guide. He is unable to get closer than six inches to the curb because the mirror on the right side of the bus extends three inches. If a light pole is close to the curb, the bus cannot get closer than six inches without the mirror hitting the light pole.

[27] In this instance, Mr. Payne stopped a few feet before the light pole at the bus stop so that when he pulled out, his mirror would not hit the pole. Mr. Payne testified that his bus was not at an angle because he travels straight in the curb lane and the bus therefore, remains an equal distance from the curb, both at the front and back of the bus.

[28] The policy of Translink is set out in the Bus Operators Policy & Procedure Manual, which states that buses should “be stopped parallel, and within six to ten inches from the curb”. Mr. Payne prefers to stop six inches from the curb especially if there are seniors on the bus as it is easier for them to get off.

[29] On the date of the incident there was no debris, water, or construction in the area of the bus stop.

[30] Mr. Payne testified that the plaintiff who was sitting beside him was the first to stand up. She hopped down three steps and hopped off the bus. Mr. Payne said that he cringed at that point because he knew from previous occasions that she uses the bar or railing.

[31] After she hopped down and hopped off, Mr. Payne said that her first foot landed then her second foot landed and then she turned, took a step and her knee buckled and she fell. When she fell, her upper body was towards the front door.

[32] Mr. Payne did not tell her to watch her step because he feared that it would startle her because of her momentum as a result of her pace which was too brisk compared to prior occasions he had seen her on the bus. His normal practice if a passenger asks for help is to go and help. He does not offer assistance without a request.

[33] After Ms. Isaacs fell, a passenger who had exited from the back door attempted to assist her but Ms. Isaacs refused his offer. When Mr. Payne saw that she was not getting up, he put the brakes on the bus and went to help. He helped her to stand and he called an ambulance. He then waited with her for the ambulance.

[34] The Incident Report that he filled out later the same day stated:

> Around 10:47 am at the bus stop on North Road and Austin (southbound) I stop[p]ed to let some people off. At which time an elderly lady name Rose Isaacs step[p]ed out the front door. She then took one step onto the sidewalk when her legs gave out and she fell down, she used her right hand to support herself and in the process I think she hurt her right shoulder.

[35] Mr. Payne testified that while he was assisting Ms. Isaacs, he asked her where she was going and she said she was going to meet a friend.

[36] In cross-examination Mr. Payne agreed that as he brings the bus to a stop, he turns the front wheel to the left so that he is ready to pull out. He disagreed that by doing so on this occasion he angled the front of the bus away from the sidewalk.

[37] Mr. Payne also agreed in cross-examination that as he pulls in to the curb to bring the bus to a stop, he looks at the outside mirror on the right side, the outside mirror on the left side to check for cars, that he looks in the rear view mirror to observe the passengers preparing to exit from the rear door, he releases the doors, he continues to observe the back of the bus for passenger safety and observes the

front door also for the safety of the passengers exiting from the front door. He stated that there is always a lot going on when you drive a bus and that you have to be aware of what is going on.

[38] When Mr. Payne wrote the Incident Report, he believed that Ms. Isaacs fell when she was already on the street level, rather than when she was getting off the bus. As such, he gave only a basic description of the incident in that report.

Discussion

[39] The first factual issue to be resolved is whether Ms. Isaacs fell getting off the bus or whether she fell after landing on the sidewalk and taking a step. If she fell while walking on the sidewalk, there would be no negligence on the part of the defendants. However, if she fell while getting off the bus, there is potential negligence.

[40] Ms. Isaacs' testimony on how she fell was very clear. It was unshaken in cross-examination. She stated that she landed on two feet and lost her balance. She put out her right hand to break her fall and to save herself when she knew she would lose her balance.

[41] Mr. Payne's evidence is that Ms. Isaacs took a step onto the street, turned from west to south and then she fell. He described her leg buckling and her knee turning wobbly prior to the fall.

[42] I prefer the evidence of Ms. Isaacs in this regard for multiple reasons. Firstly, Mr. Payne had a restricted opportunity to observe Ms. Isaacs after she got off the bus. Although he testified that he was watching her the whole time during which she stood, went down the stairs, landed on the sidewalk and took a step, that evidence is inconsistent with his evidence about the care he takes to pay attention to the entirety of the bus and its passengers when arriving and stopping at bus stops. He must, for safety reasons, observe both left and right outside mirrors, the inside rear view mirror, the passengers exiting the rear door, and the passengers exiting the front door. Although I believe that Mr. Payne was trying to be accurate and candid in his

testimony, I cannot conclude on the evidence that he had an uninterrupted view of Ms. Isaacs after she exited the bus.

[43] The Incident Report written by Mr. Payne later that day is more consistent with the testimony of Ms. Isaacs. Mr. Payne stated that Ms. Isaacs "stepped out the front door. She then took one step onto the sidewalk when her legs gave out and she fell down". I construe the statement to mean that the one step onto the sidewalk is the step out the front door of the bus onto the sidewalk where her legs gave out as she fell.

[44] Further, the evidence with regard to where Ms. Isaacs fell indicates that her direction of motion after she jumped to the curb propelled her forward toward the trees and bushes on the opposite side of the sidewalk from the bus. She fell with her back to the bus. I accept Ms. Isaacs' evidence in this regard.

[45] I therefore find that Ms. Isaacs fell when she landed on the sidewalk after jumping from the bus. She did not fall after taking a step on the sidewalk.

[46] The second issue to be determined on the facts is why Ms. Isaacs jumped from the bus, which resulted in her falling upon her landing. Again, Ms. Isaacs testified that her reason for jumping was the distance between the bottom step at the front of the bus and the sidewalk. Therefore the distance between the curb and the front door of the bus after it stopped must be determined.

[47] If the distance of the front door of the bus from the curb was greater than ten inches, there is potential negligence on the defendants. As stated above, Translink has in place guidelines for a standard bus stop that state that buses should be stopped parallel to the curb and within six to ten inches of that curb. However, the defendants' negligence is not to be measured against a general policy, but rather must be considered in light of the circumstances that presented themselves at the time of this specific accident (*Heyman v. South Coast British Columbia Transportation Authority (c.o.b. Translink)*, 2013 BCSC 1724 at para. 68).

[48] Although the defendants' policy directive is not determinative, in light of these specific circumstances I find that the policy of stopping less than ten inches away from the curb reflects the standard of care required by a reasonably prudent bus driver. Thus, if the distance between the front door and the curb was greater than ten inches, there would be a *prima facie* case of negligence and it would be for the defendants to establish that the plaintiff's injuries occurred without negligence on their part or due to a cause for which the defendants were not responsible.

[49] Ms. Isaacs' evidence is that the bus came to a stop at an angle with the front of the bus further from the curb than the back of the bus. Her evidence was that the distance from the bottom step to the curb was 12-14 inches. In cross-examination she disagreed with the statement that the distance was only six inches from the curb, and responded, "Oh no - it was wider, quite wide". This is consistent with her evidence that when she was on the sidewalk after the fall, Ms. Isaacs observed that the rear of the bus was closer to the sidewalk than the front.

[50] I accept Ms. Isaacs' evidence in this regard. I have noted that her memory of the number of steps at the front of the bus is incorrect, as she recalled one step at the front when there are three steps on this type of bus. However, other than this point, her evidence with regard to the location of the bus when it was stopped is persuasive and is consistent with the other details of the scene at the time of her fall.

[51] The evidence of Mr. Payne is, I find, evidence of his usual good practice with regard to stopping the bus with the front and rear exits at an equal distance, and six inches from the bottom of the steps to the curb. However, his evidence with regard to this stop is internally inconsistent. He testified that he drives the bus straight in the curb lane. He also testified that he angles the wheel to the left prior to the stop so that he is ready to pull out into traffic when the bus leaves the stop. On the evidence of this stop of this bus prior to this incident, I find that Mr. Payne angled the steering wheel to the left prior to the bus coming to a complete stop. Thus the front of the bus and the front door were further from the curb than the back of the bus and the back door.

[52] I accept Ms. Isaacs' evidence that the bottom step of the front door exit was 12-14 inches from the curb, and therefore greater than ten inches from the curb. I accept her evidence that the distance is the reason that she jumped from the bottom step to the curb rather than going down the bottom step to the pavement, crossing and stepping up on the curb to the sidewalk.

[53] That the bus was parked further than ten inches from the curb is contrary to the defendants' internal policy. In these circumstances it was a breach of the defendants' standard of care owed to the plaintiff.

[54] A further breach of the defendant Mr. Payne is that, having stopped the bus further than ten inches from the curb, he did not warn Ms. Isaacs of the potential hazard being the excess distance. Although he considered a warning as he observed her moving quickly, he decided not to startle her. Given his observations, when he saw Ms. Isaacs exiting without use of the railing at more than 10 inches from the curb he should have provided a warning.

[55] The final issue is whether the plaintiff is contributorily negligent, and how liability should be apportioned.

[56] Ms. Isaacs has a duty of care to herself and to take care of herself. Her circumstances at the time were that she was 82 years old, had no mobility issues and led a relatively active and independent life.

[57] However, her observation that the sidewalk was further from the bus stop than expected should have prompted her to use the utmost caution when disembarking from the bus.

[58] Before exiting the bus and on observing the distance between the bottom step and the sidewalk, the courses of action open to Ms. Isaacs were to hold on to the railing and step down onto the pavement then walk to the sidewalk; to have requested assistance from Mr. Payne to exit safely; and to ask Mr. Payne to move the bus closer to the curb.

[59] This raises a factual issue with regard to Ms. Isaacs' exit from the bus, specifically, whether or not she held on to the railing at the time she went down the stairs and prepared to jump. Mr. Payne says that she did not hold the railing when exiting. Ms. Isaacs testified at first that she "grabbed the railing and jumped" but later in her evidence stated candidly that she does not really recall if she held on to the railing before exiting. I cannot find as a fact that Ms. Isaacs used the railing as she exited.

[60] In determining whether or not her choice of jumping from the bottom step to the curb contributed to her injuries and to what degree, I must consider the factors set out in *Falconer*.

[61] I must also consider the magnitude of the departure from the standard of care. The defendants owe a high duty to passengers. While negligent, the conduct of the defendant Payne in stopping the bus at the location further than ten inches from the curb was inadvertent.

[62] Ms. Isaacs had the last clear chance to avoid the injuries which she suffered. She made a decision to jump, and in doing so breached her duty to herself.

[63] In the end result, each party was at fault and each contributed equally. I would apportion liability 50% against the defendants, which are each jointly and severally liable to the plaintiff, and 50% against the plaintiff.

[64] The plaintiff is entitled to 50% of her costs at Scale B unless there are other matters of which I am unaware. If either party wishes to make submissions as to costs, submissions may be made in writing within 30 days of today's date with reply 15 days thereafter.

"The Honourable Madam Justice Watchuk"