IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Patoma v. Clarke***,
2009 BCSC 1069

Date: 20090529
Docket: M107615
Registry: New Westminster

Between:

Mike John Patoma

Plaintiff

And

Samuel Clarke, The Greater Vancouver Transit Authority doing business as TransLink, Coast Mountain Bus Company Ltd., Claudia Wang and Jane Doe

Defendants

Before: The Honourable Madam Justice Fenlon

Oral Reasons for Judgment

Counsel for the Plaintiff:	D. Brown
Counsel for the Defendants:	K. Floe
Place and Date of Trial:	New Westminster, B.C. March 26-27, 2009 Vancouver, B.C. May 28, 2009
Place and Date of Judgment:	Vancouver, B.C. May 29, 2009

BACKGROUND

[1] **THE COURT:** Late one evening in August 2005, the 68-year-old plaintiff, Mr. Patoma, boarded a bus driven by the defendant, Samuel Clarke, at the bus stop at 6th Avenue and 8th Street in New Westminster. It was approximately 10:15 p.m., and it was dark.

[2] As the defendant Mr. Clarke put his bus in motion to leave the stop, two young women, the defendants Claudia Wang and Jane Doe, who were running across the street mid-block to catch the bus, suddenly appeared in front of the bus. Mr. Clarke braked to avoid hitting the young women.

[3] As a result of the sudden braking, Mr. Patoma was thrown to the floor of the bus, and fractured his left wrist. Mr. Patoma claims his injuries were caused by the negligence of the defendant bus driver, and vicariously by the owners of the bus, Greater Vancouver Transit Authority, doing business as TransLink, and Coast Mountain Bus Company. The two pedestrians, Claudia Wang and Jane Doe, were also named in the action, but took no part in the trial.

ISSUES

[4] The issues to be determined are four: First, the central issue is whether the defendant bus driver, or the defendant pedestrians, or all three, were negligent thereby causing the plaintiff's injuries. The second issue is whether the plaintiff was contributorily negligent. The third, if negligence is found, is to what degree each party is at fault. And finally, the fourth issue is the assessment of damages.

ANALYSIS

I. WERE THE DEFENDANTS NEGLIGENT?

[5] Negligence is found where there is a duty of care owed by the defendant, the defendant fails to meet that duty, and the plaintiff suffers damages as a result. I am going to consider this tort in relation to each defendant.

1. Is the bus driver negligent?

[6] It is clear that bus drivers owe a duty of care to their passengers based on the reasonable foreseeability test. The standard of care is the conduct or behaviour that would be expected of the 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 what the driver knew or should have known: *Wang v. Horrod* (1998), 48 B.C.L.R. (3d) 199 (C.A.).

[7] I note that the standard to be applied to the bus driver is not one of perfection. Nor is the transit company in effect to be an insurer for any fall or mishap that occurs on a bus.

[8] The first question I must address is whether Samuel Clarke met the standard of care he owed to his passengers as he pulled his bus away from the bus stop that August night. The plaintiff says he did not, for two reasons: First, he began to roll away from the bus stop before Mr. Patoma took his seat, and without warning him that the bus was about to move. Second, the plaintiff says the bus driver did not perform an adequate visual check before beginning to pull out, and therefore did not see the two pedestrians crossing in front of the bus until it was too late to avoid a sudden stop.

[9] I will deal with each of the alleged breaches of the standard of care in turn. The first is whether Mr. Clarke should have waited for Mr. Patoma to take his seat before pulling out, or at least warned him that the bus was about to move.

(a) Did the bus driver breach the standard of care by pulling out before the plaintiff was seated?

[10] The Coast Mountain Bus Company Operators Policy and Procedure Manual provides, at Article 9:

> Normally, buses are not required to wait for customers to be seated before proceeding, as sufficient handholds, straps, and stanchions have been provided to allow secure standing.

> However, upon boarding, customers who are obviously in the following categories should be allowed the opportunity to find seating: Mobility impaired by either age or disability; visually impaired/blind; carrying a child or otherwise restricted from holding on; obviously impaired.

Article 10 says:

> Advise persons in these categories to hold on as they proceed through the vehicle, and take and retain the first available seating until the vehicle stops at the intended destination.

[11] A transit supervisor, Bill Koen, testified that drivers have a duty to wait for people mentioned in the policy to take the first available seat, or to warn them, before moving the bus, to take a seat if they have passed the first available seat.

[12] The plaintiff says he was covered by this impairment policy because he was elderly, and because he was carrying two shopping bags that made it hard for him to hold on. Mr. Patoma was 68 years old at the time of the accident, and 71 years old at trial. When he boarded the bus, he showed his senior's bus pass which put Mr. Clarke on notice that Mr. Patoma was 65 years or older.

[13] There is no dispute on the evidence that Mr. Patoma was carrying two white plastic bags with handles. One contained two hard-cover books, the other, a few groceries. Mr. Patoma carried one bag in each hand as he boarded the bus. In his right hand, he also held out his bus pass for the driver to see. After passing the driver, he transferred the bag in his right hand to his left hand, to put his pass into his pocket. Mr. Patoma then took three or four steps down the aisle to the first forward-facing seats on the left side of the bus.

[14] He was in front of the side-facing courtesy seats located immediately behind the driver when Mr. Clarke hit the brake hard, causing Mr. Patoma to fall. He fell backwards onto the floor. He braced himself with his wrist; his left wrist struck the ground first, and that is the wrist that fractured.

[15] Mr. Patoma is a remarkably young-looking man for his age. He said that people often think he is younger than his actual age. His hair is dark. He is a tall, fit-

looking man who plays tennis regularly. Ms. Abdul, a passenger on the bus, described Mr. Patoma in her witness statement as "in his mid or late 50s". She also said "he looked to be a fit, able-bodied fellow".

[16] There is no magic portal one passes through at age 65 that transforms a person from able-bodied to frail elderly. Mr. Patoma is one of those fortunate people who remains fit and healthy well past 65. As noted by Mr. Justice Barrow in *McNaught v. Alblas*, 2006 BCSC 535, [2006] B.C.J. No. 764, in addressing a similar case involving a fall on a bus of a 77-year-old plaintiff at para. 30:

> ...[T]here was nothing about the plaintiff that would put a reasonable bus operator on notice that it was necessary to take any particular cautions other than those extended to every passenger prior to putting the bus in motion. The mere fact that she was elderly is not determinative of the issue. Many elderly people are able to manage safely on a bus without assistance, or without the driver being required, in order to exercise reasonable care, to allow them to be seated before putting the bus in motion.

He went on at paragraph 35:

> There was nothing to draw the attention of the driver to the need to take any particular precautions in relation to the plaintiff. I come to that conclusion recognizing that she was obviously elderly. She was, however, obviously, also spry and reasonably fit.

[17] The policy that requires bus drivers to refrain from setting the bus in motion until a passenger is seated, or until they have been given a warning, is directed at passengers whose ability to hold on and remain upright is impaired by physical disability, which can include the frail elderly, or people who are inebriated, or carrying burdens, such as children or parcels. It is the degree of impairment which is determinative, not simply the age of the passenger.

[18] In this case, Mr. Patoma was carrying two plastic shopping bags weighing about four pounds each. He easily transferred the bags to one hand as he put his bus pass away.

[19] I have no hesitation in finding that there was nothing about Mr. Patoma's appearance or movements that would put a reasonable bus operator on notice that it

was necessary to take particular caution, that is, to either wait until Mr. Patoma was seated before putting the bus in motion, or to warn him to hang on because the bus was about to move.

[20] I therefore find there was nothing negligent about Mr. Clarke starting the bus before Mr. Patoma was seated. Nor is there anything negligent about his failure to warn Mr. Patoma that the bus was about to start.

(b) Did the bus driver fail to perform an adequate visual check?

[21] I turn now to the second reason the plaintiff submits the defendant bus driver failed to meet the standard of care: did Mr. Clarke fail to perform an adequate visual check before beginning to pull out of the bus stop, thereby failing to see the two pedestrians who were moving across the street from his left?

[22] Mr. Clarke said that, as a professional driver, he is trained to be aware of what is happening around his bus, both as far away as he can see, and as close to the bus as he can see. He described his standard procedure before pulling away from the curb in this way:

> I check over my right shoulder for anything there, up the right side of the bus, and I check the right side mirror. I look to the front window, and the rear view mirror. I check on the left side, check traffic oncoming, too. I check the left mirror. Further check to the right side. Then I check the blind spots. I rock back and forth. I might do a third check back. I focus to the left, look over the shoulder to pull out.

[23] He said that these were the common procedures he followed. These were the steps he had been taught to take before pulling out. He did this every time he pulled out, and he did this that night.

[24] When asked about what happened just before he hit the brakes that night, Mr. Clarke said he was focusing on the left mirror as he took his foot off the brake. The bus had just begun to move and had rolled about two or three feet. Mr. Clarke said that the speedometer had not even begun to climb. He said he moved to look forward and saw the defendant Wang. As he put it: "Her eyes were in front of the

bus at the left corner." He described her being “like a deer in the headlights”, and he hit the brake hard. Mr. Clarke also said, "She came from out of my blind spot."

[25] Transit supervisor Bill Koen said a driver must clear all blind spots before moving. He said that blind spots exist at the front area of the bus outside of the mirror to the left, at the front of the bus, and the same on the right side of the bus. There was evidence that a post and phone located to the left of the driver also create a blind spot. Mr. Koen said that before pulling out, a driver must signal, do a sweep and check of the left mirror, looking for gaps in traffic, a right mirror check for runners, (that is, people running up to the bus from the curb side, trying to catch it before it leaves), and then another sweep and check to the left, again to check the blind spot.

[26] He stated that the driver must rock back and forth in order to cover the blind spot and to check it properly; and only then should the driver permit the bus to move. Mr. Koen said a driver has to check all the blind spots to ensure there are no pedestrians in and around the bus posing a danger.

[27] From Mr. Clarke's description, I find that he was looking in his left side mirror as he took his foot off the brake, and that he permitted the bus to move albeit ever so slightly, before looking forward and without checking through his left blind spot. That is why he did not see the pedestrians, who must have been in that blind spot, as he lifted his foot from the brake and the bus started to move.

[28] In my view, the driver either failed to check that blind spot as he started to lift his foot off the brake, or failed to sweep the area to the left of the bus far enough out to detect the two young women as he moved to check his left mirror before he pulled out. The two pedestrians were, at that time, crossing the street in some fashion from his left.

[29] Mr. Clarke in all respects struck me as a careful and prudent driver who takes his responsibilities as a bus driver seriously, but I find that Mr. Clarke in this instance, however fleetingly, breached the standard of care owed to Mr. Patoma,

and the other passengers. It was dark, but the area was relatively well lit, according to the testimony of most of the witnesses. I note that there was no evidence that Mr. Clarke was rushing or pulling out too quickly because he was behind schedule.

[30] In finding that Mr. Clarke was negligent in failing to check properly to his left before pulling out, I distinguish this case from *Fung v. British Columbia Transit*, (8 April 1994), Vancouver Registry No. B922434 (B.C.S.C.) a 1994 decision; and *Shishvan v. Wood*, 2005 BCSC 1304. In those cases, the bus was already in motion and travelling along when a pedestrian jumped or stepped out into traffic unexpectedly from the curb, leaving the driver no option but to stop suddenly to avoid hitting the pedestrian.

[31] In the case at bar, the driver set the bus in motion, albeit ever so slightly, without noticing two pedestrians already in the street and moving to cross in front of the bus, causing him to have to brake suddenly.

2. Are the pedestrians negligent?

[32] I turn now to the pedestrians. The two defendants, Wang and Doe, in my view, also owed a duty of care to passengers on the bus based on a foreseeability test. They could foresee that, if they ran across the street mid-block, (a contravention of Section 180 of the *Motor Vehicle Act*, R.S.B.C. 1996, c. 318) in front of a bus that was signalling and about to pull out, the driver might have to stop suddenly to avoid hitting them.

[33] Their awareness of the riskiness of their behaviour is borne out by evidence of the driver, of Mr. Patoma, and of Ms. Abdul who all said that the two young women repeatedly stated how sorry they were, and that it was their fault that Mr. Patoma got hurt. This is not, of course, determinative of the legal issue of fault at law; but I refer to it in relation to foreseeabilty, and their own understanding of their duty of care.

[34] I find that the conduct of Ms. Wang and her companion, who is only identified as Jane Doe, fell below the standard of care to be expected of a reasonable person approaching a bus in these circumstances.

II. WAS THE PLAINTIFF CONTRIBUTORILY NEGLIGENT?

[35] I come now to the second issue, which is whether Mr. Patoma was contributorily negligent. The plaintiff had just shown his bus pass and taken three or four steps before he fell. I find, based on the evidence of Ms. Abdul and Mr. Patoma, that he was past the first side-facing seat, and was reaching up to hold the strap when the bus came to a sudden stop.

[36] The defendants argue that Mr. Patoma was contributorily negligent because he did not take the first seat available, and did not immediately, after showing his pass, hold onto a bar, strap, or stanchion in anticipation of sudden movement of the bus.

[37] Given the force of the braking which everyone agreed was very sudden and jarring, and Mr. Patoma's description that it felt like the bus hit a solid object, I find it improbable that holding onto a strap would have prevented Mr. Patoma from falling in any event. Also, Mr. Patoma was well able to stay upright through the start-up lurch of a bus, and was fit and able-bodied enough to proceed past the side-facing courtesy seats reserved for those with disabilities.

[38] I find nothing in his behaviour which was a departure from the behaviour of a reasonably prudent, able-bodied person. Unlike many of the cases referred to in argument, this was not a case of a passenger falling due to a lurch as the bus started up, or the usual braking of a driver as he moves through traffic. The movement of the bus that caused Mr. Patoma to fall was not within the normal range of movement that passengers ought to expect on buses.

[39] Accordingly, I do not find that Mr. Patoma was contributorily negligent.

III. APPORTIONMENT OF FAULT

[40] The third issue is the degree of fault of each defendant. I have found both the defendant driver and the pedestrians to be negligent. Both contributed to Mr. Patoma's fall and injury. Mr. Clarke I find to be responsible to a lesser degree than the defendants Wang and Doe. Mr. Clarke I find to be 40-percent responsible for the incident: I apportion fault to defendants Wang and Doe at 60 percent since it was their imprudent behaviour which set the stage for the accident which occurred.

IV. DAMAGES

[41] The final issue is the quantum of damages. The parties agree on special damages of $170 to cover physiotherapy, and the ambulance charge. The plaintiff seeks $54,000 in non-pecuniary damages. The defendants say that the fractured wrist should be compensated at closer to $25,000 - $30,000.

[42] The fracture Mr. Patoma sustained could not be set despite two attempts. He was required to undergo surgery with external pins to set bones in place. The surgery occurred eight days after the accident. The external fixator was removed on September 29, 2005, approximately five weeks after the surgery. Mr. Patoma underwent physiotherapy, beginning mid-October, attending four times and then two sessions in the months following until February 2006. He engaged in daily exercises to strengthen his wrist.

[43] I find Mr. Patoma worked hard at his rehabilitation. By 2007, about two years after the accident, he was fully recovered except for occasional cramping or tightness in the muscles of his left hand. It is unlikely that Mr. Patoma will develop arthritis in his wrist or need further surgery, according to the medical report of Dr. Perry.

[44] During the healing process, Mr. Patoma could not garden during part of 2006. He is an avid tennis player, and he could not play tennis or badminton in the fall of 2005. But the biggest impact by far of the injury was on Mr. Patoma's ability to play the bagpipes. He told the court that he engaged in competitions in his youth. At one

point, he took lessons from the personal piper to Queen Elizabeth. He said that classical Highland piping requires considerable dexterity in the fingers.

[45] There was evidence that playing the bagpipes was an important part of Mr. Patoma’s daily life. He is a bachelor and lives alone, and he said that he played in the morning and the evening, and it brought him great comfort. It was a cause of real concern that his fingers were too stiff for him to play without slurring, and for him to play with the kind of skill and at the level he was accustomed to. He said that, when he found he could not play, he was gripped by worry and anxiety.

[46] Mr. Patoma happily reported at trial that, by 2007, he had made a “terrific recovery”. He said that at 71, he still has the dexterity in his fingers that he had as a teenager.

[47] Turning to the appropriate quantum, the upper range of $54,000 proposed by the plaintiff is based on the 2009 equivalent of a 1992 decision in which $30,000 was awarded to a much younger man. I note, in reading that case, that there was permanent injury to the wrist and loss of strength and mobility, which is not the case in Mr. Patoma's situation. However, I do take into account that Mr. Patoma was very upset by the injury and the accident, and that it caused him a great deal of concern and discomfort including undergoing surgery.

[48] I find that an appropriate quantum of damages to compensate Mr. Patoma for his pain and suffering and temporary loss of enjoyment of life is $38,000.

[49] The costs to the plaintiff will be as set out under Rule 66, unless there are further submissions that I should hear in this regard.

The Honourable Madam Justice L. A. Fenlon