IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Whey v. Halifax (Regional Municipality), 2005 NSSC 348

Date: 20051219
Docket: S.H. 166260
Registry: Halifax

Between:

Barbara Whey and Eric Whey

Plaintiffs

v.

Halifax Regional Municipality, a Body Corporate,
Cunningham Lindsey Canada Ltd, a Body Corporate, & Michael Alwyn

Defendants

Revised Decision:	The text of the decision has been corrected on January 3, 2006, incorporating the erratum issued on December 28, 2005 and the erratum issued on January 3, 2006 and replaces the previously distributed decision.
Judge:	The Honourable Justice Gregory M. Warner
Heard:	November 7, 8, 9 & 21, 2005, in Halifax, Nova Scotia
Counsel:	David W. Richey, counsel for the plaintiffs
	Jean McKenna, counsel for the defendants

By the Court:

PART 1 - BACKGROUND

[1] On Saturday, September 26, 1998, Barbara Whey and her family were riding the Route 66 Metro bus from North Dartmouth to Penhorn Mall. She had just moved to the area and was not familiar with riding Metro buses. She was seated in an aisle seat, facing forward, almost over the right rear wheels. The right rear wheels went over curbs on two occasions when making right turns. The plaintiff was thrown off the seat into the aisle when the bus went over the first curb; as a result, she was injured.

[2] By prior order, the issues have been divided. This trial was held to determine the issues of negligence and contributory negligence of the parties with respect to the accident itself. Other issues and damages are for another day.

PART 2 - THE LAW

[3] Negligence is conduct that falls below the standard required by society. The law of negligence has many purposes and is forever changing to meet new circumstances. To establish a cause of action in negligence, several elements must be present. The traditional English rule contained three elements. The American approach contained four elements. While recognizing that the categorization is somewhat artificial, in Canadian Tort Law, Sixth Edition (Butterworths: 1997), Allen M. Linden's analytical framework used six elements:

(i) the claimant must suffer damage;

(ii) the damage must be caused by the defendant's conduct;

(iii) the defendant's conduct must be negligence, that is, in breach of the standard of care established by law;

(iv) there must be a duty recognized by law to avoid the damage;

(v) the defendant's conduct must be a proximate cause of the loss, that is, not too remote;

(vi) the plaintiff's conduct should not be such as to bar recovery, such as by contributory negligence or voluntary assumption of the risk.

[4] These elements are succinctly set out with the relevant authorities in **Remedies In Tort**, (Looseleaf, Carswell), edited by Linda Rainaldi, Chapter 16, by Andrea B. Winogard.

[5] The contested elements in the case at bar are the second, third, fifth and sixth elements. The second and fifth elements will be reviewed together.

Third Element - Standard of Care

[6] The standard is an objective standard, that is, the test of what the fictional reasonable person would say. Conduct is negligent if it creates an unreasonable risk of harm. This involves a balancing of the danger created by the conduct with the utility of the conduct. This risk assessment balances the (i) likelihood and (ii) severity of potential harm against the (iii) object of the activity and the (iv) cost or burden to eliminate the risk.

[7] Setting out these four factors in risk assessment does not make it an exact science; rather it is an individualized evaluation utilizing a common sense approach. At page 117, Linden wrote:

> What must be judged is whether the conduct of this particular defendant in this singular situation was acceptable or unacceptable to the community. The responsibility rests on the instant judge or jury and authoritative guidance is

> virtually nonexistent. There is almost no law of negligence - there is merely an approach that each tribunal will utilize.

[8] In determining the characteristics of the reasonable person, the law presumes a certain level of intelligence. If people have superior knowledge, they are expected to act in accordance with that knowledge (per Linden at page 34 and the footnoted cases).

Second and Fifth Elements - Factual Causation and Proximate Cause

[9] It is trite to say that the defendant's conduct must cause the plaintiff's loss. Linden, relying primarily on the seminal Supreme Court of Canada decision **Snell v. Farnell** [1990] 2 S.C.R. 311, concludes at page 105:

> Fortunately, the courts have not been trapped into endless philosophical discourse on the concept of causation. Instead, they have adopted a common sense approach to the problems. Mr. Justice Sopinka has recently reiterated this in **Snell v. Farrell** when he declared that causation need not be proven with "scientific precision". He explained that "Causation is an expression of the relationship that must be found to exist between the tortuous act of the wrongdoer and the injury to the victim in order to justify compensation of the latter out of the pocket of the former."

At page 106:

> Historically, proof of causation has often been difficult, specific evidence of causation being required by the courts . . .

And at page 107:

> A significant breakthrough, rejecting the rigidity of the past, was achieved in **Snell v. Farrell**. Worrying about the difficulties surrounding proof of causation, especially where the defendants have superior knowledge, Mr. Justice Sopinka reworked the tools. He explained that "the dissatisfaction with the traditional approach to causation stems to a large extent from its too rigid application by the courts in many cases". He opined that causation is a "practical question of fact which can best be answered by ordinary common sense rather than abstract metaphysical theory". Mr. Justice Sopinka declared further:
>
> > In many malpractice cases, the facts lie particularly within the knowledge of the defendant. In these circumstances, very little affirmative evidence on the part of the plaintiff will justify the drawing of an inference of causation in the absence of evidence to the contrary . . . .
> >
> > The legal or ultimate burden remains with the plaintiff, but in the absence of evidence to the contrary adduced by the defendant, an inference of causation may be drawn, although positive or scientific proof of causation has not been adduced.

[10] Legal causation, about which **Snell** was primarily concerned, involves establishing a probable connection between the defendant's conduct and the plaintiff's loss, and involves a combination of factual cause and proximate cause (the latter importing a policy consideration); that is, it encompasses all factors and

issues necessary to support a conclusion that misconduct is a legal factual cause of an injury.

[11] David Cheifetz writes in "The Snell Inference and Material Contribution: Defining the Indefinable and Hunting the Causative Snark" in [2005] 30 The Advocates' Quarterly, at page 7:

> **Snell** is central to any complete analysis of factual causation in Canadian tort law, which currently includes the material contribution test. The **Snell** approach amounts to "a process of inferential reasoning".

[12] His article is a complete, if not overly analytical, attempt to reconcile the traditional "but-for" approach, with the newer (and some say alternative) "material contribution" approach, applied in the rare circumstances when the "but-for" analysis is not "workable". His review of the key post-**Snell** decisions of **Athey v. Leonati** [1996] 3 S.C.R. 458, **Walker Estate v. York-Finch General Hospital** 2001 SCC 23, **St-Jean v. Mercier** 2002 SCC 15, **Cottrelle v. Gerrard** 2003 CarswellOnt 4154 (OntCA), and **Mooney v. British Columbia (Attorney General)** 2004 BCCA 402 (most recently reaffirmed in **Trinetti v. Hunter** 2005 BCCA 549), and his statement of the law, set out in the first two paragraphs of his conclusion, at page 101, is the current state of the law in Canada. His summary of

the principles of factual causation, at page 22, and of the **Snell** common sense approach, at pages 27 to 30, are helpful.

[13] Last month the Alberta Court of Appeal in **Hanke v. Resurface Corp.** 2005 ABCA 383 set out a circumstance when the "but-for" approach was not workable and the "material contribution" approach should have been applied; the decision does not refer to **Cottrelle** and its narrower view of when the "material contribution" approach is applicable.

[14] Cheifetz noted the importance of circumstantial evidence to inferring facts, by quoting Major J. in **Fontaine v. British Columbia** [1998] 1 S.C.R. 424, the decision that abolished *res ipsa loquitur* in Canada:

> After all, it is 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...

This statement is relevant to this case.

Sixth Element - Contributory Negligence

[15] The plaintiff's claim can be affected by his or her own negligence. At one time contributory negligence was a total bar to recovery. Now it is a matter of apportionment.

[16] The standard of care required of a plaintiff is no different than that owed by a defendant. He or she must act as a reasonable person for his or her own safety. As with the defendant's negligence, it must be assessed in the circumstances that exist at the time, and must be a proximate cause of the loss.

[17] The defence of *volenti* (voluntary assumption of the risk) has no application to the facts of this case and is therefore not discussed.

Burden of Proof

[18] The burden of proving negligence, on a balance of probability, rests with the plaintiff. As noted in paragraph 14, since **Fontaine**, the principle of *res ipsa loquitur* has been abolished, and is not relevant to the determination of negligence.

[19] The onus of proving contributory negligence is on the defendant.

[20] The burden of proof in the case at bar is somewhat affected by the case law dealing with public carriers.

Public Carriers

[21] While the law applicable to the case at bar is the general law of negligence, several cases relating directly to public carriers have been cited by the parties. It is helpful to see how the courts have applied the principles of evidence (burden of proof) and negligence in these cases. The seminal decision is **Day v. Toronto Transportation Commission** [1940] S.C.R. 433. The standard of care is described at paragraph 19 and the first sentence of paragraph 20:

> 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.

> The question, then, for the jury was whether the motorman had used in a high degree all due, proper and reasonable care and skill under the circumstances.

[22] The standard has been repeated in **Kauffman v. Toronto Transit Commission** [1960] S.C.R. 251 at paragraph 6, **Harris v. Toronto Transit Commission** [1967] S.C.R. 460 at paragraph 11, and more recently in **Exshaw v. British Columbia Transit Authority,** 1997 CarswellBC 1815 (BCCA), **Nice v. Calgary (City)** 2000 ABCA 221, and **Whelan v. Parsons & Sons Transportation Ltd**, 2005 NLCA 52.

[23] The Alberta Court of Appeal in **Nice** not only recognized the **Day** decision as establishing a very high standard of care upon the carrier, but that the superior knowledge of the carrier with regards to any unusual movement by the bus imposed upon the carrier a burden of establishing that it was not negligent. This approach differed from that of the trial judge who found that the burden did not shift to the defendant, but that once she (trial judge) found that the bus stopped suddenly without a known reason, an inference of negligence could be drawn and that the “robust, pragmatic, ordinary common sense approach” to negligence and

causation described in **Snell** satisfied the burden on the plaintiff. The Alberta Court of Appeal held, at the end, that neither approach produced a different result (paragraph 51).

[24] I agree with the view expressed by Welsh, J.A., in **Whelan** at paragraphs 21 and 22 that it is not helpful to speak of shifting the onus of proof; rather the ordinary principles of proof are sufficient; that is, in establishing the elements comprising negligence, circumstantial evidence adduced by the plaintiff may lead the Court to draw an inference adverse to the common carrier unless the carrier responds to negate that inference. It follows that this Court does not agree with the statement in the defendant's memorandum that, "**Day** establishes a form of reverse onus. However, not every incident is considered to be an "accident" to reverse the burden of proof."

[25] The cases cited by the parties have applied the **Day** standard of care, and on the circumstances of each case, have come to different findings respecting liability. This highlights Linden's statement that each case depends on its own facts, or at least on its own proven facts.

[26] <u>Ten Cases Where No Negligence Found Against The Carrier</u>

1. **Robertson v. Toronto Transit Commission**, 1979 CarswellOnt 676 (Ont CtyCt). A passenger who was standing fell and broke her hip. The Court accepted the defendant's evidence that there had been no unusual movements by the bus. At paragraph 11 the Court said:

> Jerks, jolts, lurching, or movements of a streetcar, carrying passengers, are generally accepted as common incidents of travel, which a passenger, by experience, knows, and should expect. At what point a jerk, jolt, lurch or movement of a streetcar loses it character as an incident of travel, reasonably to be expected during the course of travel, and which shifts the burden to the carrier, depends on the facts and circumstances of each case. In the case I have to decide, on the evidence I accept, I find there was not a violent or unusual or extraordinary jerk which caused the plaintiff's fall.

2. **Sawatsky v. Romanchuk**, [1979] B.C.J. No. 964 (BCSC). The court found no liability on the driver because the passenger was an experienced passenger, and the lurching of the bus as it pulled away from the stop, while the passenger was still walking to her seat, was not an abnormal movement. The Court distinguished that case from one in which the bus suddenly applied the brakes when the passenger was walking to her seat and fell.

3. **Lalani v. Wilson** [1988] B.C.J. 2408 (BCSC). A passenger was seated behind the driver. The driver warned “hold on” and suddenly braked in heavy

rush-hour traffic. The passenger was thrown around and hurt her neck when she grabbed the stanchion. She did not immediately complain or report the incident to the driver and the driver never knew about it until a long time later. The reason for the sudden stop was unknown. There were inconsistencies between the evidence of the plaintiff and her friend who was a co-passenger. The Court held that there was no evidence of negligence; mere speculation was not permissible, especially as to whether a sudden stop was necessary or not. The Court confirmed that a high duty of care rested on the driver.

4. **Broccoli v. Harris**, 1991 CarswellBC 983 (BCSC). An elderly lady tripped on a strap or belt when moving down the aisle to a seat after boarding the bus. Applying the **Day** standard of care, the Court found no negligence as the manual for the transit company did not require the driver to wait for passengers to be seated except in dangerous circumstances, and furthermore the driver had no duty to prevent passengers from putting objects on the floor.

5. **Rehemtulla v. B.C. Transit**, 1995 CarswellBC 1363 (BCSC). Applying the **Day** standard of care, the Court found no negligence where the passenger who was not elderly, or handicapped, or burdened, was walking to her seat as

the bus pulled away from the stop, and she fell. The Court found that the bus made no abnormal moves.

6. **Tucker v. Thunder Bay (City),** 1996 CarswellOnt 3905 (OntCJ). A passenger had boarded a bus and was walking to a seat with one hand on the overhead bar when she fell due to the jerky motions of the bus when it was put in motion. Applying the **Day** standard of care, the Court found the driver discharged the burden of proving he used all reasonable care to avoid injury to the passenger. The driver did not have to wait for the passenger to be seated, in the absence of evidence that she required extraordinary care, such as an elderly or disabled passenger. The Court found no negligence on the facts.

7. **Exshaw v. B.C. Transit Authority**, 1997 CarswellBC 1815 (BCCA). An elderly lady slid off her seat when the bus made a sharp turn. The trial judge found the driver negligent. He found that the bus was driven in the usual manner but that the driver should have driven in a more cautious manner than usual because of the elderly passenger. The Court of Appeal reversed the trial court; it held that because the trial court did not make a specific finding that the

standard of care was breached, the driver had met the onus of proving that the accident occurred without his negligence.

8. **Gillis v. British Columbia Transit** [1999] B.C.J. No. 133 (BCSC). A seated passenger was thrown from her seat when the driver turned a tight corner too fast. The driver claimed he took the corner at his usual and reasonable speed. At paragraph 5 the Court said:

> A reasonable rate of cornering does not cause seated bus passengers to slide across the adjacent seat, fall into the aisle and injure themselves. If Ms. Gillis fell into the aisle from her seated position because of the cornering speed of the bus, the speed could not have been reasonable. Conversely, if the speed was reasonable Ms. Gillis must have fallen from some other cause. It is foreseeable that excessive speed could cause passengers to fall from their seats. Drivers of motor vehicles are aware of the effect, if not the scientific explanation of cornering force on passengers.

The Court then accepted the plaintiff's evidence that she did not fall from any other cause and the Court found the driver caused the accident by driving with excessive speed around a tight corner. The Court of Appeal ordered a new trial (2001 BCCA 248) because, contrary to the trial judge's finding, the plaintiff had not said that the driver was going too fast; this misapprehension of the evidence constituted a palpable error. This fact situation is the closest of any cited by counsel to the facts in the case at bar. It appears that if the trial judge had

expressly found, on the facts, that the driver was going too fast, the appeal would have been dismissed.

9. **Brinacomb v. British Columbia Transit,** 2000 CarswellBC 399 (BCSC). An infrequent passenger entered a bus and started to walk down the aisle to a seat. The bus started to move. She grabbed the stanchion but fell. She did not report the incident. The Court found that she gave two different versions of what happened. The Court accepted the **Day** standard of care and the reverse onus applicable to carriers. It rejected the plaintiff's submission that the carrier was negligent by putting the bus in motion before all passengers were seated or that the design and maintenance of the rubber mats on the floor constituted negligence. The Court found that the bus was not driven around a curve at an unsafe speed. The Court found no negligence on the facts.

10. **Lawson v. British Columbia Transit** 2002 Carswell BC 2326 (BCSC). The plaintiff claimed damages from two bus incidents. In the first case, the elderly plaintiff was hurt while boarding a bus when an exiting passenger rushed out and knocked her over. The driver was held not liable as he could not reasonably have prevented the accident or foreseen the incident. In the

second case, the elderly lady fell after boarding the bus. The driver did not wait for her to be seated before pulling out. Applying the high standard of care set out set out in **Day**, the Court found the driver liable because he knew or ought to have known the passenger was elderly and had difficulty moving and should have waited for her to be seated.

[27] Five Cases Where Carrier Found Liable

1. **Lanteigne v. Autobus Lavoie Limitee** [1984] N.B.J. No. 214 (NBQB). The plaintiff stood in the aisle to retrieve her lunch from her luggage. The bus (being driven on the highway) braked suddenly and without warning. The passenger fell in the aisle and was injured. She did not report the incident. The Court stated that the carrier had the duty to show that the sudden braking was not due to negligence. The Court found that the driver was negligent in driving in such a way as to require the sudden stopping, and following traffic too closely. The plaintiff was found contributorily negligent for standing in the aisle without holding onto a rail, while fumbling for her lunch.

2. **Wang v. Horrod** 1997 CarswellBC 1358 (BCSC), upheld on appeal [1998] B.C.J. 1288 (BCCA). A elderly passenger fell when the bus started up after a red light; she was standing and attempting to remove her coat. The driver did not check his mirror before moving. The Courts applied **Day**, and the Court of Appeal distinguished **Exshaw**.

3. **Matthews v. Bennett's Transportation Ltd**, [2000] N.J. 160 (NLSC). A bus was driving in windy and slippery conditions and rolled down an embankment injuring several passengers. The driver blamed the accident on a sudden gust of wind and black ice; he stated that he had driven slower than usual. The court accepted the **Day** standard of care. At paragraph 63, the Court correctly described the legal and evidential burden on the defence:

> The defence does not have to prove that Mr. Pittman was not negligent but simply to present an explanation which is equally consistent with negligence or no negligence. At that point the burden remains with the plaintiff to prove that the defendant was indeed negligent.

The Court found the carrier negligent.

4. **Nice v. Calgary, supra.** A passenger boarded and was walking down the aisle to get a seat without holding onto the railings. The bus left the curb and suddenly stopped. The practice was to start the bus moving before passengers were seated unless they were obviously elderly, frail, or disabled. The trial judge found that the sudden stop created a prima facie case of negligence in the absence of a good reason for the sudden stop, but dismissed the plaintiff's claim on the basis that the driver's operation of the bus was not negligent. The Court of Appeal overturned the trial judge and found the driver negligent. It found that **Day** required that the burden be shifted to the carrier to show it exercised reasonable care where an accident and injury occurred when it alone had knowledge of the reason for the sudden stop.

5. **Whelan v. Parsons & Sons Transportation Ltd., supra**. A bus was pelted with objects by teenagers breaking one window and injuring a passenger. The trial judge found the carrier liable, in part based on the shift in the burden. The Court of Appeal upheld the trial judge's finding of negligence.

PART 3 - EVIDENCE

[28] The defendant requested the Court to order that Ms. Whey give evidence first and that all other witnesses except the parties (effectively meaning the bus driver, Herbert Hoelke) be excluded from the courtroom until after their evidence was given. The Court granted the defendant's motion.

[29] **Barbara Ann Whey**. She has lived in Dartmouth with her husband Eric since moving from Newfoundland in or about 1992. They first resided at Lake Court Drive; but on or about September 24, 1998, they moved to an apartment on Highfield Park Drive in north Dartmouth. Ms. Whey was not familiar with public transit, having only used it two or three times before. Shortly after noon on Saturday, September 26, 1998 (two days after moving to Highfield), Ms. Whey and her eleven year old son Christopher, met with her sister Helen Baker, her niece Marina Baker, and Marina Baker's nine year old son Justin. Together they walked to the bus stop on Albro Lake Road, opposite Cedar Court, where they all boarded the Route 66 metro bus driven by Herbert Hoelke, to go Penhorn Mall for the purpose of shopping.

[30] Helen Baker sat in her usual bench seat facing the aisle behind the driver at the front of the bus. Barbara Whey and Marina Baker sat in a front-facing two seat bench over the rear passenger-side wheels - Marina next to the window and Barbara next to

the aisle. Their sons Justin and Christopher sat on the aisle-facing bench seat directly in front of them.

[31] There were no seat belts for passengers. There was no arm rest on either side of Ms. Whey's bench seat. The only nearby handgrip was the arm rest on the left side of the aisle-facing seat occupied by Christopher and Justin. This arm rest consisted of a rounded pipe; filling the space between the pipe and the seat itself was sheet metal, the effect of which was to prevent a person from putting their hand entirely around the pipe for a secure grip. This arm rest extended out the depth of the aisle-facing seat; it was directly in front of Marina Baker's window seat but not in front of Barbara Whey's aisle seat. Only by extending her right arm forward, could Ms. Whey have grabbed onto (but not around) the end of the arm rest. This description of the area where Ms. Whey was seated was confirmed by the view of the bus taken by the Court and counsel near the end of the trial.

[32] Ms. Whey testified that when she boarded the bus, the driver and a lady with three children sitting in the front of the bus were shouting at each other, so she moved to the back of the bus. This shouting match continued and shortly after the bus started, the driver actually left his seat, while the bus was still moving slowly forward.

As a result of words from passengers to the driver, he raced back to the seat and put the brakes on. The argument between the driver and the lady was about the lady's children not seating themselves properly. Both were upset.

[33] As the bus was driven down Albro Lake Road, the driver went through a stop sign, and then got on the telephone. Shortly thereafter a Metro Transit inspector arrived, spoke to the driver outside of the bus, boarded the bus, spoke to the lady with the unruly children, exited, spoke to the driver again, and left. The driver re-entered the bus and continued on his route but he and the lady with the unruly children continued to argue. Each was furious and screaming at each other the entire trip to Penhorn Mall.

[34] Ms. Whey says the driver was not paying attention and was “flicking” his hands off and on the wheel as if he was talking with his hands.

[35] She stated that the driver was upset and driving too fast as he went down Kelly Drive to Woodlawn Road. Her description of the intersection of Kelly Drive and Woodlawn Road, where the bus made a right turn onto Woodlawn Road, was consistent with other witnesses and with the photographs tendered. The four way

intersection is controlled by traffic lights. Woodlawn Road has two lanes going each direction (four lanes total). Kelly Drive has two lanes for traffic entering Woodlawn and one lane for traffic exiting Woodlawn onto Kelly. The right hand turn is very sharp.

[36] Ms. Whey could not remember ("not 100% sure") if the traffic light for vehicles turning from Kelly onto Woodlawn was red or green when their bus arrived. She states that just before the intersection the bus suddenly went up on the sidewalk at which point she fell off her seat (towards the aisle) and held on to the side of the seat on the opposite side of the aisle. When the bus came down off the curb ("the whole back came bumping down"), she could not hold on and fell on the floor.

[37] She described the bus as tipping over to the left as it went through the intersection. She described herself as being "jolted" out of her seat. She states she was seated properly in her seat and carrying nothing except her purse and that the cause of her falling out of her seat was the driver going a bit too fast around the sharp curve. She stated: "You really have to slow down to make the turn but it did not happen that way - he just made the turn. He did not slow down". She stated he was going "quite fast" and that other passengers told the driver this; in particular, she

recalled a black lady, whom she did not know, who was sitting with a baby in her arms near her on the driver's side of the bus yelling at the driver that he was going too fast and to slow down.

[38] She says her niece, Marina Baker helped her get up off the floor. She was too embarrassed and shocked to say anything to anyone immediately.

[39] A short distance further, the bus turned right into Penhorn and again hit and went over a curb; she screamed in pain from her earlier fall. When the bus stopped, Marina went towards the front of the bus to advise the driver of the fall, but the driver was still arguing with the lady with the unruly children, so they exited the bus by the back door - Ms. Whey with the help of Marina. The black lady with the baby directed them to a doctor's clinic in Penhorn Mall. The people with Ms. Whey got her a nearby shopping cart to support herself after being helped off the bus. A cab driver took them from the transit terminal to the mall itself. The people with Ms. Whey tried unsuccessfully to find her a wheelchair. Ms. Whey called her husband at work; he came, picked her up, and took her directly to the hospital.

[40] On cross-examination Ms. Whey maintained her story, adding, when asked if the bus ever swerved: "Not that I saw." She was directed to several portions of her discovery examination of January 10, 2002; the essential parts of her evidence in both direct and cross examination were consistent with her discovery evidence. The only exception was with respect to whether the bus was speeding; in discovery, she expressed more concern with the driver's lack of attention than his speed. On discovery she said:

Q. 183 You didn't notice any problems with its speed or direction?

A. Not really.

Q. 226 And how fast was he going when the wheels went up on the curb?

A. I don't know.

Q. 227 It would be pretty slow, I take it, because he's taking a very sharp turn there?

A. I don't know. The man was too upset more than anything.

Q. 393 Okay. You can't recall anything, you've indicated, about the speed of the bus one way or the other. No?

A. I know he wasn't going overly slow, but you know, I mean, he wasn't to the point he was just dragging on or anything like that.

Q. 394 Okay. There was just nothing unusual about the speed. . . . [interruption by counsel)

A. Well, no. There was times, I mean, he was going, like, some quite fast.

Q. 396 He wasn't speeding when he went around these corners where he supposedly hit the curb, was he?

A. I don't know about speeding. I wouldn't be able to say he was, like, speeding. I don't know. I mean I really can't say. I mean, I wasn't really focussing on - - -

Q. 397 You didn't have the impression that he was speeding when he went around the corner, though, did you?

A. Not really. Not like speeding. The most things were concerned about, he wasn't watching what he was doing more ---.

[41] **Marina R. Baker**. She has lived in Dartmouth for sixteen years and at 4 Cedar Court, north Dartmouth, since February 1996. She is the plaintiff's niece and the daughter of Helen Baker. She used metro buses almost daily since moving to Dartmouth. She boarded the bus with the plaintiff and sat with her in the two seat bench, facing forward, near the rear of the bus, over the passenger side rear wheels. She was in the window seat; the plaintiff was in the aisle seat next to her. She too recalled that, when they boarded the bus, the driver was upset with the passenger in the front of the bus whose unruly children refused to settle down despite several requests to do so. Shortly after leaving the bus stop the driver stopped the bus and again asked the lady to have the kids settle down. He then made a phone call. Shortly

thereafter an inspector from Metro Transit arrived. The inspector spoke to the lady in front, then left, and the bus continued on its way. The bus was held up for about ten minutes or so because of the stop for the inspector. While she did not hear all of the exchanges, she heard the driver continue to tell the kids to settle down and behave, and she observed that they did not do so.

[42] Ms. Baker thought the driver was driving a little too fast especially on turns and she had to hold on to the window ledge on her right because of his speed on turns.

[43] She described the first time the bus went over a curb: "He was going pretty fast . . . I grabbed the window and Barb went over . . . I helped her up . . . She started to cry . . . Her back was hurting and I held on to her . . . further up the road we went over a curb again . . . closer to Penhorn . . . not as bad as the first one . . . I had a hold of her". Later in her testimony she said: "When the driver did a right turn over the curb, Barb when off her seat . . . she went sideways; I held on to the ledge to keep [in place] . . . I found he was driving fast". She described the part of the bus that went over the curb as the rear wheels on the right side where they were sitting.

[44] When they arrived at the Penhorn bus stop, she went to the front of the bus to tell the driver about the incident but he was still arguing with the lady, so instead she went back and helped the plaintiff off the bus, and immediately called Metro Transit to report the incident. Her complaint to Metro Transit was entered by the defendant as a business record and confirms her reporting of the incident at 1:53 p.m. The record of the complaint says in part: "The driver was driving recklessly and went up over the curb" knocking her aunt off the seat.

[45] Like the plaintiff, she recalled the lady with the baby, sitting opposite her at the back of the bus, yell at the driver about the way he was driving. When they got off the bus, this lady gave her name and phone number to Marina but she misplaced it and it was not until the trial that she recognized the lady as being Marlene Lucas.

[46] Ms. Baker stated that she had never been on a bus that went over a curb like this time; sometimes buses would go over a curb on a sharp turn when going slow.

[47] Under cross examination she expressed sympathy and understanding for the driver in dealing with the lady in the front with the unruly children; however, she was firm in her evidence that (i) he was going a little fast on turns and too fast on the turn

where the plaintiff fell off her seat, and (ii) the curb strike that caused the plaintiff to fall was in the area of Woodlawn Road. She was confronted with her discovery evidence of January 10, 2002; her evidence on the essential issues was consistent with her discovery evidence; for example, her statement in discovery: "He was going a little too fast to go around the corner for him to go up on a curb." was consistent with her evidence at trial.

[48] **Justin Baker**. He is the son of Marina Baker and was nine years old in September, 1998. He claims to recall:

> the kids misbehaving in the front of the bus as he boarded;
>
> sitting in the bench seat facing the aisle at the back of the bus in front of his mother;
>
> being aggravated by the delays on the trip;
>
> the bus hitting the curb which he described as "fun . . . a little of a bounce . . . I lurched forward a bit"; and,
>
> not seeing his aunt fall but seeing her in pain after the curb was hit and when they were exiting the bus at the Penhorn terminal.

[49] **Helen Baker**. She is the plaintiff's sister, and has lived in Dartmouth since February, 1990. She described how the plaintiff met her at her home and they walked

to Marina Baker's home and boarded a Route 66 bus for Penhorn Mall. She is a frequent user of Metro transit and always sits in the same seat, which seat is the bench seat facing the aisle directly behind the driver at the front of the bus.

[50] Like the others, she recalled the argument between the driver and the lady with the unruly children sitting opposite her near the front of the bus. The driver spoke of a child falling a week earlier and advising the lady that she was trying to get him in trouble because her kids were being unruly. She was accusing him of being prejudice because she was black. Because of the arguing, the bus did not leave immediately. When it did, it went through a stop sign and the driver became so upset that he got up from his seat to speak to the lady while the bus was still moving. Ms. Baker said she told the driver that the bus was still moving so he immediately returned to his seat and stopped the bus. She described him as being in a rage. He made a phone call and she assumed that either the lady would be put off the bus or a relief driver would be brought for Mr. Hoelke. The inspector arrived, spoke to the lady in front who accused the driver of being prejudice. The inspector wished her a good day and left. The driver reboarded the bus and it proceeded on its way. Because of this incident she says the bus was about ten minutes late. She believed thereafter that the driver was trying to make up time when the bus went up on the curb taking the sharp turn onto

Woodlawn near the medical clinic and, and again when leaving Portland Street to enter Penhorn Mall. She says “everyone” was asking what the problem was. It was only when she was leaving the bus by the back door that she saw that her sister was crying and became aware she had been injured. She stated that the driver was driving too fast for the conditions.

[51] Ms. Baker was cross examined as to her discovery evidence of January 10, 2002. This cross examination confirmed the essential elements of her evidence including the particulars of the argument between the driver and the lady up front with the unruly children; that is, he was yelling at her and was so upset that at one point he actually got up out of his seat while the bus was still moving. Her discovery evidence did not contain as many particulars of the conversation between the inspector and the lady as was given in direct evidence; in discovery, she simply said that the inspector asked her how she was, she replied she could be better, then the inspector and her shook hands, and the inspector left the bus.

[52] Ms. Baker was not sure when the lady in front left the bus and whether it was before or after the bus went up over the curb. She further acknowledged that it was

not unusual for a bus to go over curbs when turning off Portland Street into Penhorn Mall.

[53] **Marlene Lucas**. She lives on Joseph Young Street in north Dartmouth. She was interviewed by an adjustor for the defendants in or about October, 2005. The defendants included Ms. Lucas' statement in documents disclosed to the plaintiff in mid-October, 2005, whereupon Ms. Lucas was subpoenaed by the plaintiff. The Court accepts that she came to the attention of the plaintiff only because of the disclosure of her statement by the defendants in October 2005.

[54] She was the passenger with the baby (then four months old) sitting opposite the plaintiff near the back of the bus. She stated that her seat was facing the aisle and opposite the aisle-facing seat occupied by Christopher Whey and Justin Baker. She testified that when the bus made a right corner at or near Woodlawn Road, it was going fast and hit the curb and tipped a little so that the lady in the seat across the aisle fell out of her seat. She saw the plaintiff's friend help her get back into the seat. She noted the lady was crying and could not move.

[55] Ms. Lucas had her baby in her arms. She had no problem with the bump over the curb because the direction of the force during the turn pushed her back against the back of her seat. At this point she yelled at the driver that he should slow down and stop showing off. When they arrived at Penhorn Mall she gave Marina Baker her name and phone number, and directed Ms. Whey to the doctor's clinic in Penhorn Mall. She described the driver as a maniac who was driving very fast and not paying attention.

[56] On cross examination she insisted that she had never previously met the plaintiff. She had forgotten about the incident until the defendant's adjustor interviewed her in October, 2005.

[57] She acknowledged that she has had several conflicts with Metro Transit, and, in particular, beginning in the year 2000, with bus driver Christine Purcell, and that she had complained to Metro Transit about her. Exhibit 2 was a record of a complaint from June, 2000 by Ms. Lucas. Exhibit 3 was an undertaking Ms. Lucas entered into arising from a charge of uttering threats to Ms. Purcell. Ms. Lucas stated that she had no issues with Metro Transit before the events of this case (September, 1998), and had no memory of any complaints whatsoever about Mr. Hoelke, the driver in this case.

[58] **Eric Whey**. He is the husband of the plaintiff. He testified to receiving a call from his wife after two o'clock on September 26, 1998, and attending at Penhorn Mall to pick her up and take her to the hospital. He first spoke to a police officer but was told to call Metro Transit from the hospital. His wife was hurt and crying. He called Metro Transit from the hospital and shortly thereafter an inspector showed up. The nurse would not let the inspector speak to Ms. Whey. Mr. Whey says he answered questions as to what he understood had occurred, but that he had not been on the bus and did not know much.

[59] **Christopher Whey**. He is the son of the plaintiff. He was eleven years old at the time of the accident, and on the bus with his mother. His evidence was basically consistent with that of his mother, his Aunt (Helen) and his cousin (Marina). He testified as to the bus driver's argument with the lady sitting in the front, to leaving the driver's seat momentarily, and to going over the curb where his mother fell out of her seat. He could not remember much about the speed of the bus.

[60] On cross examination, he struggled to answer questions, and at one point had what appeared to be a panic attack. After a short recess, he was uncertain about most

of the events related to the 1998 incident. While he could not remember at trial much about the speed of the bus, it appears that during his discovery examination in January, 2002, he agreed with defence counsel that the bus did not speed.

[61] **Herbert Arnold Hoelke**. He was the Metro Transit bus driver during this incident. He has sixteen years experience as a Metro driver. When asked if he recognized any of the plaintiff's witnesses, he indicated he did not, and stated that he had not driven a bus on Route 66 since September 1998. (This is inconsistent with his later evidence). He starts work before six o'clock in the morning; on weekends, he usually works until about 5:00 p.m. He described Route 66 and the six “timing points”, being stops on that route from which he was not permitted to leave early. He stated that one bus starts at each end of Route 66 and is allotted one hour to travel to the other end. It takes, depending on the traffic, about forty-five minutes to complete the route. He stated that being late at a particular stop is not looked at as closely as leaving too early.

[62] He stated that on September 26, 1998, there were two black ladies and about five children sitting near the front of the bus, and that one of them was giving him a hard time. As he entered Albro Lake Road, he turned to the children to direct them

to settle down. Their mother said that he was not to talk to them. The children did not settle down and he felt the situation was unsafe. The woman was screaming at him and it may have sounded, he says, like an argument when the plaintiff and her family boarded the bus. He drove on, in hopes that the situation would change. He denied going through a stop sign or ever getting out of his seat while the bus was moving. He said it was impossible. He did call a supervisor and pulled over and stopped to wait for him on Sea King Drive. He said confrontations with passengers were a daily event. While waiting for a supervisor he argued with the lady who said that he could call anyone and they would not do anything to her. He said this was normal and there was no sense getting worked up over it or let it affect his driving. He said the supervisor told the lady to settle down and for him to carry on. He stated that the supervisor's car was not big enough to take the lady and her children off the bus.

[63] When the bus continued, the lady told him that she knew they would do nothing and she still was on the bus and she continued to mouth off until Mic Mac Mall, after which time things got quiet and he assumed that she had left the bus.

[64] He states that the right rear (passenger side) of the bus has two wheels. After leaving the Burger King stop, he stated that one of the two rear tires went up over a

curb, and, instead of rolling over the curb, slipped off the curb and came down with a bang so that it jarred the passengers. When this happens he says he normally hears “ahhhs” and calls back asking if everyone is okay. On this day he recalls hearing no “ahhhs”.

[65] He next described the intersection of Kelly and Woodlawn and the sharp right turn. He says he went over this curb too but with both wheels in a smoother motion and at almost a dead stop because of the traffic and the very sharp corner. He identified photographs of the intersection and the curb shown in Tab 3 of Exhibit 1.

[66] Mr. Hoelke denied going too fast. He stated that he did have issues with Marlene Lucas and he believes she may have been sitting with the lady he was arguing with in the front of the bus. He states that he did not hear about Ms. Whey's fall until told by the supervisor either later that night or the next morning.

[67] When he reached the end of the Route 66 run on Gaston Road (during which this incident occurred), he completed an Incident Report with regards to his dispute with the lady who had the unruly children. That report (Exhibit 1, Tab 8) and the supervisor's daily report relating to the same incident (Exhibit 1, Tab 7) were admitted

as business records. His incident report shows the dispute arose initially over the lady not paying the proper fare, and continued because her children would not settle down. He says that she called him “stupid” and other things before the supervisor arrived and continued to “tear a strip off [him]” after the supervisor left “all the way to Mic Mac”.

[68] On cross examination, he stated: “I was upset but not so as to do something stupid”. He denied that he intentionally got out of his seat while the bus was rolling or that he went through a stop sign. He acknowledged that after his three month stint on Route 66 he never drove that route again because of all the problems and he could not take it anymore. Because of seniority he got better days and routes to drive. He denied Ms. Lucas' evidence to the effect that he had announced on the bus that it was his last shift.

[69] Mr. Hoelke acknowledged that incidents, such as his argument with the lady, were frequent because he, unlike other drivers, tried to do his job. The Court understood this statement to be a declaration that he did not ignore safety issues involving children or passengers who would not pay the proper bus fare.

[70] Mr. Hoelke described the corners, where the bus exits the K Mart parking lot onto Valleyfield Road, and the intersection from Kelly Drive onto Woodlawn Road, as being bad corners. A driver had to swing wide and if traffic prevented this, he had to crawl over the curb.

[71] He remembered giving evidence at discovery to the effect that a passenger called out for someone to get the bus moving, that he was going to be late for work, but he says that at the time of the trial he could not recall this event. He states that while he was eleven to thirteen minutes late, and this may have caused problems for people who needed to make connections, he does not speed up in order to make up time. He stated that when he testified in discovery to going back to the scene of the alleged fall with supervisor L.T. Keddie, that he was mistaken and had not gone back with Keddie to inspect the scene of the alleged incident.

[72] When directed to his evidence that it was impossible to leave the driver's seat with the bus moving, he explained that he did not mean it was physically impossible, but rather that he would notice the bus was still moving before he got out of the seat.

[73] He further acknowledged that his intention, when he called the supervisor, was to have the lady and her children taken off the bus.

[74] He repeated that even though he went up sharply and down with a slam when he went over the first curb (near K Mart), he heard no “ahhhs” from passengers. He acknowledged the two curb strikes but could not honestly remember if he looked in the mirror or asked anyone if they were hurt. He further acknowledged that at the time of his discovery examination he thought Ms. Whey had been injured at the K Mart turn, which corner he described in detail during discovery examination, as opposed to the intersection of Kelly and Woodlawn, about which intersection he gave little evidence at discovery.

[75] Ms. Hoelke was shown, as Exhibit 4, parts of “The Official Bus Handbook for Bus and School Bus Drivers” published in 1995 by the Queen's Printer for Ontario. He agreed with each of the nine statements on page 8 of that document describing how to make right turns, and with each of the eight statements on page 7 describing how to steer vehicles and about the effects of “off tracking” of the wheel base. These statements included as the second statement on page 8: “Running the rear wheels of the unit over curbs and sidewalks is dangerous and will also damage your tires.”

[76] **W.L. “Larry” Hilton**. He is the supervisor of special services with Halifax Metro Transit. He has been employed with the defendant for almost nineteen years, first as a bus driver, then as a supervisor (formerly called inspector) for routes in the old cities of Halifax and Dartmouth, later as an accident and claims investigator (which was his responsibility in 1998) and more recently in his present position. He identified the defendants' business records, including Mr. Keddie's “Supervisor's Daily Report” for September 26, 1998 (Tab 7), Mr. Hoelke's “Incident Report” of September 26, 1998 (Tab 8), the “Customer Feedback Form” which recorded Marina Baker's description of the plaintiff's accident of September 26, 1998 (Tab 9), and his own “Special Report” (Tab 10) and his report to the adjustors (Tab 11), the last two of which are dated October 8, 1998.

[77] He testified that it was the operator's duty to complete an Incident Report on the request of the supervisor, or on his own accord whenever there was an injury. Tab 8 was the report respecting the lady he argued with. The Court notes that while Mr. Hoelke was aware of the injury to the plaintiff at the end of his shift on September 26, or at the beginning of his shift the next morning, no Incident Report respecting the plaintiff's accident was apparently prepared.

[78] Mr. Hilton described Metro's busses and their equipment. He stated it was inevitable that buses drive over curbs at some places on occasion - not every day - but the frequency depended upon the route. Busses avoid curbs because it is embarrassing, it is a courtesy to provide a smooth ride, and because it damages the curb and the vehicle. He testified that there was minimal risk to passengers when buses went over curbs. He compared a bus hitting a curb to a ferry hitting the bumpers at the dock.

[79] He had known Herb Hoelke for probably fifteen years or more as a bus driver and stated that his reputation as an operator was of one who “goes by the book”.

[80] On cross-examination, he described the safety equipment on the busses including the various handrails and stanchions on bus # 936, the bus involved in the incident and viewed by the court with counsel. He stated the bus had not changed since the incident. He acknowledged that there were no seat belts for passengers. He acknowledged that the only thing available for a passenger, sitting in the seat the plaintiff claimed to occupy, to grab onto was the arm rest on the left side of the aisle-

facing seat (described in paragraph [31] of this decision). There were no arm rests on either side of the seat occupied by the plaintiff.

[81] He agreed that curb strikes are good things to avoid but repeated that there was minimal risk to passengers from curb strikes because it was difficult to "get speed on that kind of turn . . . in most cases, accelerating from a dead stop . . .".

[82] He agreed with the seventeen statements in Exhibit 4, the Ontario bus handbook, except to state that a driver will take more of the lane available on the street being exited rather than obstructing more of the lanes on the street being entered.

[83] He acknowledged that, on Route 66, passengers may be concerned about transferring to other buses at the various terminals along the route and that being ten to fifteen minutes late can make a difference on some routes.

[84] In explaining his description of Mr. Hoelke "going by the book", he said that if someone tendered less money than the proper fare, or failed to fold their stroller when boarding the bus, he would not ignore these but would raise it with the passenger. He abided by Metro Transit policies. He acknowledged that seatbelts are

not available, nor required, for Metro buses except for those special buses used for transporting wheelchair passengers.

[85] On re-direct he clarified it was not an option for the driver of a bus, in heavy traffic, who could not make the corner without going over a curb, to back up, to wait through extra light changes, or to wait for traffic to lessen.

[86] In response to a question by the Court, he acknowledged that the greatest effect on passengers, when a bus goes over the curb, is felt by the passengers over the rear passenger-side wheels that actually run over the curb.

[87] **Joel C. Plater**. He has been an insurance adjustor with Lindsay Cunningham, the adjusting agency that handles Metro Transit's accident claims, for six years. Most transit claims are handled by him. Most claims involve collisions, or slips due to weather conditions, or occasions when passengers are not seated. He only recalled one claim for injury arising from a curb strike. He had no knowledge about the plaintiff's claim.

PART 4 - ANALYSIS

Standard of care

[88] The defendants argue, through the evidence of Messrs. Hoelke and Hilton, and the cases cited that, on occasion, buses cannot avoid going over curbs when making some sharp turns; it is not clear how often it is necessary. I agree that going over a curb, per se, is not negligence. Both Messrs. Hoelke and Hilton agreed with the Ontario manual that it was dangerous. Mr Hilton stated that it involved minimal risk to passengers, but this was in the context of it being done carefully and almost at a dead stop.

[89] The standard of care on the defendant's driver is particularly informed by the facts of this case. Key factors establishing the standard in this case include:

1. The seat occupied by the plaintiff was a bench seat covered in vinyl. It had not arm rest on either side - most importantly, on the aisle side. No seatbelt was available for her use. The plaintiff argued that this fact constituted negligence by the defendant, which proposition I do not accept, but I do accept that the lack of a seatbelt increases the burden on the defendant to operate the bus in a

more careful manner than if seatbelts were available. The only part of the bus which she could grab in the event of a swerve, bump, or emergency (assuming an adequate warning), was the arm rest on the aisle-facing seat in front of Marina Baker, which arm rest could only be grabbed by reaching forward with her right hand. Even then, the design of the arm rest would prevent her from getting a secure grip. A passenger such as Ms. Whey was entirely vulnerable to any sudden movements of the bus - which bus was under the sole control of the driver.

2. Any sharp turn to the right that might require the bus to go over a curb (such as exiting Kelly onto Woodlawn),meant that the right rear wheels, located directly under the aisle-facing seat in front of Ms. Whey, would jolt up and tilt to the left as the wheels climbed the curb, and “come down with a bang” and “jar people” (to use Mr. Hoelke’s words) when it came off the curb. The extent of the jolt and tilt would depend on the height of the curb, the sharpness of the corner, and the speed of the bus at that moment. The greatest effect would be felt by passengers seated where Ms Whey and her family were seated.

3. The evidence, including the aerial photos, show the turn from Kelly onto Woodlawn to be much more than 90 degrees.

4. The photos show the curb on the Kelly Drive part of the intersection with Woodlawn to be a sharp and high rise; it is made worse by the uncovered stormwater drain (second photo, Tab 3, Exhibit 1), which is located where the wheels most likely ran up over the curb.

5. Common sense, and the physical laws of motion (that we all learned in middle or secondary school), tell us that inertia is the tendency of an object to resist any attempt to change its state of motion; that is, if something is moving along at a constant speed in a straight line, it will continue to move at the same constant speed in the same straight line; it will not, of its own accord, speed up, slow down, or change direction. In this case Ms. Whey was seated, facing forward, in a bus moving down Kelly; the bus made a sharp right turn while bumping over a rather severe curb. The laws of motion suggest that if the corner was made too quickly it would be natural for the forces on Ms. Whey to push her off her seat into the aisle - in the direction that the bus had been travelling when it went over the curb.

Factual causation and proximate cause

[90] In this case the assessment of the evidence depends upon findings of credibility. The statements of O"Halleran, J.A., in **Faryna v. Chorny** (1951) CarswellBC 133 (BCCA) is inciteful:

> 9 If a trial judge's finding of credibility is to depend solely on which person he thinks made the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and justice would then depend upon the best actors in the witness box. On reflection it becomes almost axiomatic that the appearance of telling the truth is but one of the elements that enter into the credibility of the evidence of a witness. Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors, combine to produce what is called credibility, . . .
>
> 19 The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as a reasonable in that place and in those conditions. . . . Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a trial judge to say "I believe him because I judge him to be telling the truth," is to come to a conclusion on consideration of only half the problem. . . .
>
> 11 The trial judge ought to go further and say that evidence of the witness he believes is in accordance with the preponderance of probabilities in the case and, if his view is to command confidence, also state his reasons for that conclusion. The

> law does not clothe the trial judge with a divine insight into the hearts and minds of the witnesses. . . .

[91] The plaintiff was hospitalized with injuries consistent with a fall from her seat immediately after riding Metro Transit's bus on September 26, 1998. No evidence contradicted the direct evidence of Ms. Whey, Marina Baker or Marlene Lucas to the effect that, when the bus was going over the curb on a sharp right turn onto Woodlawn Road, Ms. Whey fell off the seat to her left into the aisle, resulting in such pain that she was crying and had to be helped off the bus.

[92] The only issue is why the plaintiff fell off the seat and, in particular, whether this was caused by the driver not meeting the standard of care on him, and, if so, whether it was contributed to by the plaintiff herself.

[93] This Court accepts the evidence of Ms. Whey, Helen Baker, and Marina Baker that when they entered the bus, Mr. Hoelke was in an argument with a lady sitting in front with three unruly children. He was concerned for their safety. Despite Mr. Hoelke's statement that, while it may have looked like an argument and it was only the lady who was arguing with him, it is without doubt that he was upset and as some witnesses said, “in a rage” over the insults being heaped on him by the abusive lady

in response to his efforts to ensure that the children were safely seated. It is undisputed that because of his trouble with this abusive lady that he called for a supervisor, stopped the bus and hoped that the supervisor would take the lady and her children off the bus. This did not happen and the lady continued to berate him after the supervisor left. The Court's acceptance of this evidence is important. I accept as probable that the argument so upset the driver, a man who “goes by the book”, that he momentarily left his seat while the bus was still moving, and went through a stop sign. While these events did not directly cause the plaintiff's injury, they establish the driver's state of mind, which state of mind made him more careless in his driving than he would otherwise have been.

[94] Ms. Whey, Marina Baker, Helen Baker, and Marlene Lucas all spoke of Mr. Hoelke driving carelessly and too fast for the conditions at the time that he approached Woodlawn Road, and going over the curb when rounding the sharp right turn. Their descriptions of the essential events were detailed and generally consistent with each other, even though the event occurred seven years ago and their only prior occasion to give evidence was during Discovery examination almost four years ago. While there were minor differences on peripheral matters, and a lack of memory about some inconsequential matters, the detail of their description and the originality of their

wording was compelling and made their evidence credible. None of these witnesses (unlike Mr. Hoelke) heard each other give evidence before their own testimony, in accordance with the court's order. Where the evidence of Mr. Hoelke differs from the plaintiff's witnesses, the court rejects his evidence. The evidence of plaintiff's witnesses is more consistent with the probabilities that surrounded the conditions that all witnesses agreed existed at the relevant time, and with Mr. Hoelke's agitated state of mind.

[95] The Court was especially impressed with the evidence of Marina Baker. Recognizing the dangers in assessing credibility based on demeanor, the Court found her to be genuinely sympathetic to the plight of Mr. Hoelke in his unsuccessful efforts to get control of the dangerous situation with the children jumping in the seats in front and the abusive response from their mother. Ms. Baker's evidence was clear and straightforward and consistent with the totality of the circumstances described by all of the witnesses.

[96] The plaintiff's witnesses described the two curb strikes as occurring first at the corner of Kelly Drive and Woodlawn Road and, second, when entering the Penhorn Mall bus terminal off Portland Street. Mr. Hoelke described the first curb strike as

occurring when he left K-Mart Mall, and a second smoother bump occurring at the Woodlawn intersection. This Court accepts the evidence of the plaintiff's witnesses as to the location of the two strikes. It does, however, accept Mr. Hoelke's description of how the first curb strike could have occurred. It was his evidence that the first curb strike was quite jarring and he expected to hear “ahhhs” but did not hear any. His description of the first strike was of the wheel coming down with a bang when it slipped off the curb.

[97] The photographs in the defendant's exhibit book at Tab 3, show the relevant curb at the corner of Kelly Drive and Woodlawn Road. The second photograph clearly shows at the point where the right rear tires of the bus would likely have climbed the curb (on the Kelly Drive side of the curb) a stormwater drain that is not covered with a grate. This is in contrast to the stormwater drain on the Woodlawn Road side of the curb, shown in the eighth photograph (which drain was covered with a grate). These photographs satisfy me that the point at which the right rear wheels of the bus went up on the curb would not have been a smooth transaction for the passengers, especially those passengers, like Ms. Whey, sitting over the right rear wheels.

[98] The fact that Ms. Whey was thrown in the direction that the bus had been moving before its right turn informs the Court as to the speed of the bus. It could not have been merely "crawling" or "almost at a dead stop" when it went over the curb, or there would have been no reason for Ms. Whey to have been thrown to her left (in the direction that the bus had been moving when going down Kelly Drive).

[99] It would not make sense for passengers such as Marlene Lucas to have called out to the driver to slow down after the plaintiff fell off the seat unless they too were aware that the driver had been careless and driving too fast. With respect to Ms. Lucas, the Court accepts her evidence, despite her subsequent conflicts with Metro Transit. It was Metro Transit who first contacted her in October, 2005 and took a statement from her. It was this statement, provided by the defendant to the plaintiff, that resulted in her giving evidence for the plaintiff.

[100] Negligent conduct is conduct that creates an unreasonable risk of harm. The Court is satisfied that, because of the abuse that Mr. Hoelke took from the lady sitting in the front of the bus during much, if not all, of the trip, which abuse upset him and was not resolved by the intervention of the supervisor, that he (a person who went by the book and did not let things slide) was distracted and careless, and took the corner,

climbing over the curb, at too fast a speed for the circumstances, and that he should have known that the manner at which he took the corner would create danger for passengers who were vulnerable to sudden irregular movements of the bus.

[101] The Court accepts the evidence of the plaintiff's witnesses that Mr. Hoelke was driving too fast when he went around the curb at the corner of Kelly and Woodlawn, and that “but for” the manner in which he went over that curb, Ms. Whey would not have been thrown to the left into the aisle.

[102] The manner of driving did not constitute the normal “jerks, jolts, lurching or movements” of a transit bus.

Contributory negligence

[103] There was no direct or circumstantial evidence, or evidence from which the court could reasonably draw an inference, that Ms. Whey did anything, or failed to do anything, that would have contributed to her fall. It will be for another court to determine whether passengers on buses should have seatbelts; the fact that none were available to her affects the standard of care expected of the driver, and removes from

Ms. Whey the duty to use one. There was no evidence that she was standing, or moving. or making any unusual movements that should have contributed to her fall. In this regard her case is different from those cited by the defendants to the Court.

[104] The defendants suggest that when the bus went over the curb, if in fact it was an unusual movement, that Ms. Whey should have been able to grab on to one of the handrails or stanchions available in the bus. The Court's view of the bus and, in particular, of the seat that Ms. Whey was occupying confirmed that the only available grip of any kind was by her reaching out with her right hand to the arm rest in front of Marina Baker. Even this would not enable her to get a good grip. More importantly, it assumes that Ms. Whey was given notice or a warning about the upcoming bump; the movement over the curb was made suddenly and without warning. It would be unreasonable to place a duty on a passenger in the back of the bus to watch carefully the driver and anticipate all his moves.

[105] There is no evidence that she fell below the standard of care that applied to her - to take reasonable measures to protect herself.

PART 5 - CONCLUSION

[106] As to Linden's six elements of negligence, I conclude:

First element: The fall from the seat caused injury to the plaintiff. This was not contested. The nature and extent of the injuries, loss, and damage is for another hearing.

Second element: Factual causation. The manner of driving by the defendant's driver caused the plaintiff to fall from her seat. He was upset and distracted by the abusive passenger who he wanted removed from the bus, but who was not removed. These circumstances caused him to become careless and to take the curb, a dangerous thing to do at any time, at too high a speed for the existing circumstances. I accept the evidence of the plaintiff witnesses over that of Mr. Hoelke. Even without the direct evidence of the plaintiff witnesses as to carelessness and speed, such is the most reason inference to draw from the circumstances existing at the time. I reach this conclusion applying the "but-for" approach, even though my findings would also support the same conclusion using the "material contribution" approach.

Third element: Standard of care. The standard is informed by the control that the driver of a public carrier has over the movements of the bus, and in this case by the factors described in my analysis. I conclude that Mr. Hoelke did not meet the minimum level of performance reasonably expected of him in the circumstances.

Fourth element: Duty of care. This element was not contested. It is a question of law. The plaintiff was a paying passenger on the defendant's bus. It was reasonably forseeable that the plaintiff could be injuried if the driver did not meet the standard of care. It was not argued that policy considerations should limit the scope of the duty, per **Anns v. Merton London Borough Council**, [1978] A.C. 728, adopted in **Kamloops (City) v. Nielson**, [1984] 2 S.C.R. 2.

Fifth element: Proximate cause and remoteness of damage. This element was not seriously contested. The manner of driving was the direct cause of the plaintiff falling out of her seat. To the extent that this element adds to the second element (factual causation) an additional legal requirement (**Cheifetz** at page 14, and **Remedies in Tort** at Chapter 16, sections 156-165), the risk of injury was real, immediate and direct.

> Sixth element: Contributory negligence. There was no evidence that the plaintiff was negligent, whether by direct or circumstantial evidence, or from any inference that could reasonable be drawn from the evidence. The facts in this case are unlike any cited to the court in which contributory negligence was found.

[107] The defendants pleaded inevitable accident. An inevitable accident is an accident which is unavoidable by any precaution a reasonable person would be expected to take. The defendant must show that it had no control over the incident, or that it would not have been prevented by the exercise of reasonable care. The standard of care is not one of perfection (**Remedies in Tort**, chapter 16, sections 195-197), I have already determined that the driver fell below the standard of care he owed to the plaintiff, and that this breach led directly to the fall and injury.

[108] The plaintiff has discharged the onus of establishing the defendants' negligence. The defendants have not discharged the onus of establishing any negligence by the plaintiff.

J.