SUPREME COURT OF NOVA SCOTIA
Citation: *Orlov v. Halifax Regional Municipality (Halifax Transit)*, 2018 NSSC 152

Date: 20180620
Docket: Hfx No. 386163
Registry: Halifax

Between:

Stanislav Orlov

Plaintiff

v.

The Halifax Regional Municipality, a body corporate duly incorporated pursuant to the laws of Nova Scotia c.o.b. under the name of Metro Transit and Joey Williams

Defendants

D E C I S I O N

Judge:	The Honourable Justice Christa M. Brothers
Heard:	December 13, 14, 18, 19, and 20, 2017, in Halifax, Nova Scotia
Decision:	June 20, 2018
Counsel:	Wayne Bacchus and Igor Yushchenko, for the plaintiff Guy Harfouche and Brandon Knill, Articled Clerk, for the defendants

Brothers J.:

Overview

[1] On the afternoon of May 16, 2011, the plaintiff, Mr. Orlov, boarded a Metro Transit Bus instead of walking to work at Mount Saint Vincent University ("MSVU"), where he was employed as a Librarian. It was a rainy, wet day. Metro Transit Bus No. 971 (the "bus") stopped at 357 Bedford Highway, headed towards Halifax when the plaintiff boarded. The plaintiff was an experienced bus passenger. While holding his wallet, a bag and a transfer, the plaintiff walked toward the back of the bus, fell, and broke his ankle (the "accident"). The sole issue for determination is liability. Damages have been agreed to by the parties.

[2] What caused the plaintiff to fall? The plaintiff advanced four theories of causation:

1. The speed of the bus leaving the stop was excessive;
2. The floor of the bus was worn and caused the plaintiff to slip;
3. The floor of the bus was wet and caused the plaintiff to slip;
4. The bus was set in motion before the plaintiff was seated.

[3] The plaintiff contends he has proved these circumstances on a balance of probabilities and any of those theories alone, or all collectively, demonstrate the defendants were negligent.

Issues

[4] To establish his claim in negligence, the plaintiff must prove the elements of negligence on a balance of probabilities, including the duty of care, the standard of care, whether the standard was breached and causation. The defendant accepts a duty of care is owed to the plaintiff, which means the issues for determination are:

1. Was the bus driven at a speed which was too high in the circumstances?
2. Did the defendants breach the standard of care with respect to the condition of the floor – was it worn or wet?

3. Did the driver, Mr. Williams, breach the standard of care by putting the bus in motion before the plaintiff was seated?

4. Was the defendant's conduct the proximate cause of the plaintiff's loss?

5. Does contributory negligence bar the plaintiff's entitlement to recovery?

[5] Before dealing with these issues, I will deal with the preliminary issue of the admissibility of Gregory Sypher's expert report and testimony.

Admissibility of Expert Evidence

[6] Gregory Willard Sypher testified on December 14, 2017. The parties agreed to the following qualification statement:

> Gregory W. Sypher is qualified as an expert in the field of civil engineering, specifically accident reconstruction and related force on the human body, capable of giving evidence on the accident reconstruction and on the movement of the bus relative to the movement of the Plaintiff as well as the movement of the Plaintiff and the cause thereof; the conditions present at the time of the accident; and on the law of physics at the time of the accident.

[7] Before travelling from New Brunswick and attending trial on November 14, 2017, Mr. Sypher provided a Rule 55 report dated November 30, 2012. The report was provided to the defendants on December 12, 2012, and filed with the court on December 4, 2015. Mr. Sypher was listed on the plaintiff's original witness list, dated September 22, 2016, and again on a witness list filed on March 10, 2017.

[8] At no time prior to the morning of trial of December 14, 2017, did the defendants raise an objection to the admissibility of Mr. Sypher's report, including in their trial brief filed on November 28, 2017. This is despite Civil Procedure Rule 55.13, which states:

> **Testimony by expert**
>
> 55.13(1) A party to whom an expert's, or rebuttal expert's, report is delivered must determine whether to admit or contest the proposed qualification, and the admissibility of the opinion, by no later than the finish date.

[9] The defendants were under an obligation to alert plaintiff's counsel of the objection to the admissibility of Mr. Sypher's opinion well before December 14, 2017, and before Mr. Sypher took the stand, was sworn and qualified. They were obligated to do so no later than the finish date, September 13, 2016.

[10] At a trial readiness conference held on October 21, 2016, the defendants noted that they were not ready for trial, given they were seeking an expert report. The earlier trial dates of December 12 -15 and 19 - 22, 2016, were adjourned.

[11] When the original trial did not proceed, Associate Chief Justice Deborah K. Smith presided over a conference call with counsel during which new trial dates were set for December 13 – 14 and 18 - 20, 2017, with a new finish date of March 10, 2017.

[12] If the admissibility of Mr. Sypher's evidence was at issue, the defendants had an obligation to advise no later than the new finish date.

[13] Trial by ambush has long since been done away with in Nova Scotia. The Rules are clear. The expectation of and requirement conferred on parties is that objections to the admissibility of expert reports must be raised in advance of trial.

[14] Despite this, I accept the defendant's argument that I must properly perform a trial judge's gatekeeper function and not consider any evidence that is inadmissible. However, the difficulty is that the plaintiff was afforded no opportunity to revise the report in response to a properly timed objection.

[15] After Mr. Sypher was sworn and his qualifications, consented to by the parties, were accepted by the court, the defendants then, for the first time, raised the following obligations regarding the admissibility of his evidence:

1. Portions of his report are outside of his area of expertise;
2. Any statements made by Mr. Sypher on the standard of care and references to the 2011 Operator's Handbook are inadmissible;
3. Comments by Mr. Sypher and opinions about the way the bus was driven and the applicability of procedures are inadmissible and outside his area of expertise.

[16] After discussion with counsel, it was agreed that the parties would brief the court on their positions and the court would proceed to hear from Mr. Sypher. The plaintiff did not ask for an adjournment or suggest a need to revise the expert report. In short, the plaintiff raised no prejudice and no need for additional time or an adjournment to deal with the issues raised.

[17] Mr. Sypher, in preparing his report, listed the materials he examined. Mr. Sypher neither inspected the bus nor attended the scene. He viewed three video files from three camera positions within the bus, reviewed the 2011 Metro Transit Operators Handbook and Daily Planner ("2011 Handbook"), reviewed photographs of the bus, footwear worn by Mr. Orlov, and looked at weather data.

[18] I accept the submissions of the defendants that the portions of Mr. Sypher's report that discuss the standard of care of a driver are not within his expertise and are for determination by the court.

[19] At page two of his report, Mr. Sypher postulates that two questions need to be answered:

1. What was the movement of the bus relative to the plaintiff; and
2. What were the conditions at the time of the slip and fall?

[20] I accept that Mr. Sypher can give an opinion on the first question, but given that he was not present on the day in question and never inspected the bus, the only opinion Mr. Sypher can give on the floor is based on photographs, of questionable clarity. Consequently, very little weight can be afforded to the opinion. Mr. Sypher's opinion on possible wear of the floor, or wetness of the floor, is of limited value to the court because it is based on photographs and he is in no better position to review the photographs than the court.

[21] I will consider the evidence of Mr. Sypher later in these reasons.

The Movement of the Bus

The Plaintiff

[22] On May 16, 2011, the plaintiff decided to take a bus to work at MSVU. At the time, the plaintiff lived two kilometers from MSVU. While he usually walked

to work, he sometimes took the bus. The plaintiff took the bus this day because it was raining and wet outside. The bus was a 1996 Nova Bus Classic with a four-cylinder turbo engine and a five-speed automatic transmission.

[23] The plaintiff wore boots, which he described as Vasque waterproof boots. He wore a jacket and carried a rain poncho in a bag.

[24] The plaintiff testified that he could take any bus from the stop on the Bedford Highway, as all buses travelled past MSVU. Before boarding the bus, the plaintiff took out his wallet and a bus ticket. He held his wallet and bag with his left hand and his bus ticket with his right hand. When the bus arrived, he boarded, greeted the driver and provided the bus ticket. He obtained a transfer from the driver, Joey Williams ("Williams"). The plaintiff held the transfer with his right hand. There was no explanation given for why he took the transfer, as he was only travelling a short distance to MSVU where he would remain for an eight-hour shift, and had no need of a transfer. The plaintiff admitted he did not need the transfer. After taking the transfer, the plaintiff was carrying a bag and his wallet in his left hand, and the transfer in his right.

[25] The plaintiff testified that after boarding, he walked to the back of the bus. There were two other passengers. Neither testified at trial. The plaintiff testified the floor of the bus was wet and worn in areas where there would be more foot traffic. He took five steps and reached the rear exit door when there was an abrupt movement of the bus which he described as like someone pulling a carpet out from under his feet. At that time, the bus was on an incline. The plaintiff says he was jerked and tried to grab the closest stanchion (pole) to his left. The video of the fall shows he tried to grab a stanchion as he was falling, but was unsuccessful. The plaintiff admitted, and the video shows, he was not holding onto any stanchion, handrails or seat rails prior to his fall.

[26] The plaintiff remembered feeling and hearing a crack, when he fell to the floor. He suffered a broken ankle.

[27] The plaintiff indicated he had no warning that the bus was going to move. He testified that in other cities and abroad there are warnings when a bus is about to move from a stop. However, the plaintiff admitted that these warnings do not exist on buses in this province and he did not expect to hear a warning before the

bus moved. The plaintiff admitted he knew buses left stops while passengers were still standing.

[28] As support for the argument the bus was driven too fast on the day in question, the plaintiff referred to the description of the bus, a Nova Classic. This bus is described in the 2011 Handbook as follows:

> Nova Classic style (967-985) These are the last of the step-up model before the low floor was introduced. It is quite different in features and engine. These have a 4-cylinder turbo engine and 5-speed automatic transmission. They are quick on the take off and comfortable riding bus. Some of the features that are different include the following items: It has a check engine light (wait until this light goes out before starting). It requires air on, front door shut and brake pedal depressed before bus will go into gear. It allows you to control what level of maximum gear you want. (For example, during slippery days you may want to set maximum at 3 and use arrows to go back up to 5 when conditions improve).

[29] The plaintiff tried to make much of the description of the bus as being "quick on the take off." First, the defendant's witnesses all testified to this being an inaccurate description. However, even if it were an accurate description what matters is the speed of the bus at the time in question, and how the bus was driven, not a description in a handbook.

[30] The plaintiff testified that while he did not believe he was qualified to give an opinion about what caused the fall, he has identified the worn floor, the wet floor, and the acceleration of the bus as contributing factors. However, on discovery, the plaintiff gave evidence in contrast to what he testified to at trial.

[31] At discovery, the plaintiff said the following:

> Q. So was the movement of the bus that you're saying caused you to fall as opposed to the condition of the bus floor, just so that I have an understanding of what the cause of the fall was?
>
> (Discovery Transcript, Page 75, line 10-13)
>
> --- BY THE WITNESS:

> A. I think I know this question asks whether I could determine the cause of this but I cannot. I cannot tell you what exactly the -- what exactly caused it. I know I was -- and I felt but to be able to myself give accurate testament ----
>
> (Discover Transcript, Page 76, Line 2-7)

[32] The plaintiff later admitted during testimony he could not say for certain why he fell.

Joey Williams

[33] Williams was driving the bus at the time the plaintiff fell. He did not testify at trial. There is a subpoena in the court file, issued November 23, 2017, for him. This is a mere thirteen business days before the trial. Counsel for the defendant advised that there were attempts to effect service. According to the two affidavits of Rodney Rogers, a process server and provincial civil constable, he made five unsuccessful attempts at service between November 29 and December 4. He deposed that Williams was no longer living at any of the three addresses listed.

[34] Counsel for the plaintiff says that as a result, it is necessary to admit Williams's full discovery transcript pursuant to Civil Procedure Rule 18.20(2) and 18.20(5). I am not satisfied that reasonable efforts were made by the defendant to make Williams available for trial. However, it is not the defendant seeking to admit the transcript of its own witness, but the plaintiff seeking to admit the transcript of an adverse party. Given the request, the substance of Rule 18.20(2), the consent of the defendant and the decision in *Fogo v. F.C.P.G. Securities Corp*, (1998), 172 N.S.R. (2d) 266, [1998] N.S.J. No. 4055 (S.C.), I am prepared to admit the entire transcript as requested by the plaintiff. I note that Rule 18.20(2) is broad in scope and I have the discretion to allow the discovery transcript to be introduced subject, as always, to admissibility. (*Burton v. Howlett*, 2001 NSCA 35, [2001] N.S.J. No. 65).

[35] The evidence of Williams on discovery was as a driver for Metro Transit he could not wait for all passengers to sit down at every stop. He testified a driver is always on a schedule and can move the bus before all passengers are seated if done by easing from a stop. This is consistent with the evidence of training delivered to drivers.

[36] A document admitted by consent of the parties entitled *Schedule Adherence Deviation Indications Report* supports that Williams was not in a hurry on the day in question. During the twelve stops he made on May 16, 2011, from 12:02:22 until 12:18.08, he was either on time or early for the scheduled stop.

Kevin Alexander

[37] Mr. Alexander ("Alexander") is Manager of Safety and Training for HRM, a position he has held since March 2010. He began working for the municipality in 1986 as a bus driver and then a driver trainer. Currently, Alexander's department has four bus trainers and one service trainer, who trains the new operators and assists other divisions with their transit needs. Alexander is responsible for scheduling the trainers, and for the training curriculum. In addition, Alexander is responsible for HRM's compliance with various pieces of legislation, including the *Occupational Health and Safety Act*, S.N.S. 1996, c. 7, the *Motor Carriers Act*, R.S.N.S. 1989, c. 292, and the *Motor Vehicle Act*, R.S.N.S. 1989, c. 293.

[38] Alexander gave evidence about training of drivers such as Williams, and about policies, procedures and training modules dealing with servicing bus stops. Alexander testified to a common curriculum used to train drivers at the time Williams was trained. While Alexander was not Williams' specific trainer, he testified, and I accept that the training has not changed since 1986.

[39] Alexander testified that drivers are instructed to come to a smooth stop at a bus stop. Once the passenger has paid their fare and boarded the bus, the drivers are trained to check whether the passenger is elderly, someone with their hands full, or carrying a child. If so, drivers are instructed to wait to pull from the stop until the passenger is seated. If not, once a shoulder check is done, the drivers are instructed to smoothly rejoin traffic, even if the passenger is not yet seated.

[40] Alexander testified, based on his experience in the industry for over three decades, that he is not aware of any locations in Canada that require drivers to wait for passengers to be seated before buses pull away from stops. While Alexander could not speak to Williams' specific training, he did describe common training given to drivers generally, and I accept his evidence that Williams would have received the training.

[41] Policies were introduced at trial to support the evidence concerning training. There are notice boards in the two main garages in the bus depot where notices relevant to drivers are posted, including standing notices or policy directives that signify major changes in policies or act as important reminders.

[42] Notice to Operators 06-12, dated January 31, 2006, indicates when drivers should wait for passengers to be seated before moving a bus. Alexander testified that this policy was in effect at the time of the accident and continues to be in effect. It states:

> Notice to Operators 06 -12
>
> Subject: Waiting for passengers to be seated
>
> ---
>
> Normally, Buses in service are not required to wait for passengers to be fully seated before proceeding.
>
> However, additional care should be taken with passengers in the following categories to allow sufficient time to be seated, or to be stationary and holding a stanchion in the case of a standing position, before you proceed:
>
> a.) Elderly and infirm persons
>
> b.) Persons with apparent disabilities that affect their ability to walk
>
> c.) Persons carrying a child or otherwise burdened
>
> d.) Impaired or intoxicated persons
>
> Your cooperation in this matter will be greatly appreciated.
>
> Thank you.
>
> (signed)
> H.J. Mombourquette
> Manager, Transit Operations
>
> (Standing Notice)

[43] Alexander testified that the policy was in effect prior to the notice being posted, and that the notice was to reaffirm or remind drivers of the policy.

[44] Alexander testified that if someone is carrying a child or a large parcel and consequently, is unable to hold onto a stanchion or handrail, the driver is expected to wait until the passenger is seated or holding a stanchion or handrail. Alexander stated that a driver is trained to look for "something that restricts their ability to hold on" and if that exists the driver is expected to wait.

[45] Alexander refered to the rule book for drivers that lists the major HRM policies. The rule book has since been replaced by the 2011 Handbook. While Williams did not testify at trial, his discovery evidence is that he received the 2011 Handbook.

[46] The earlier rule book, which Alexander testified is given to all drivers, sets forth rules concerning bus stops. The following is the applicable section:

> 019 BUS STOPS
>
> Care must be shown when pulling into or out of bus stops, whether for other traffic, pedestrians or standing passengers.
>
> CAUTION
>
> Operators' discretion must be used in the event of broken pavement, puddles, obstructions, snow banks, etc. Where bus stops have not been cleared of snow, the bus must stop so that disembarking passengers will have ample standing and walking space to allow a safe exit.

[47] Alexander testified that this section reflected the training that drivers are to watch for traffic and pedestrians, as well as obstructions, and to move smoothly from the stop so that if people are walking to or from seats a driver is careful not to throw them around.

[48] Alexander testified that drivers are trained to accelerate and deaccelerate at a steady pace. They are advised not to stop or start quickly because this creates a risk that passengers could fall. They are trained to pull away from a stop so as to ensure passengers can deal with the acceleration.

[49] Alexander reviewed the 2011 Handbook, and particularly section 27, dealing with smooth starts and stops.

> 27. Smooth Starts and Stops
>
> Smooth starts and stops are crucial to the safety of our passengers. Always be conscious that abrupt or sudden stops are one of the leading causes of passenger injury on a bus. When picking up the elderly person with packages, children or the disabled, please wait until they are seated before moving the bus. In the event of able-bodied persons, you may ease off the brake slightly as long as they are holding a stanchion or moving along the aisle by hold a seat. For everyone's safety do not accelerate until they are seated.

[50] Alexander agreed that his department was not involved in creating the above wording. Alexander noted that this section of the 2011 Handbook is at odds with the training and Notice to Operators, as drivers are not instructed to wait for everyone carrying a package to be seated before leaving a stop.

[51] Alexander testified that the 2011 Handbook is incorrect, as drivers are told that they can leave the bus stops when people are not seated. Drivers frequently have full buses and seats are not available. Alexander's testimony was that the plaintiff would have to be very encumbered, elderly, or infirm for an operator to be expected to wait for him to be seated. Alexander's testimony was that drivers pull away from stops regularly with passengers standing, and have to do so. I find that the discrepancy between the Notice to Operators and 2011 Handbook is not evidence of negligence.

[52] Alexander testified that this inconsistency between the Notice to Operators and the 2011 Handbook came to his attention as a result of this proceeding. He notified those responsible for the 2011 Handbook to advise them of the inconsistency. The court heard there has been a change to the Handbook reflected in the 2018 Handbook and it is now consistent. The 2018 Handbook has been changed but was not disseminated at the time of trial. Counsel for the HRM had not disclosed this change prior to trial, even though it related to the direct evidence of the defendant's witness. Counsel said the purpose of discussing the 2018 Handbook was to elicit evidence that the 2011 Handbook had an inconsistency that has now been corrected. The parties disagreed about whether the 2018 Handbook

could be entered as evidence. The testimony of Alexander was that the training had always been consistent with the 2018 Handbook.

[53] I have admitted the 2018 Handbook as evidence, in so far as it speaks to the inconsistency with the 2011 Handbook testified to by the defendant's witness.

[54] Much of this evidence about the inconsistency between the 2011 Handbook and the Notice to Operators, whether the driver should have left the stop, and what the plaintiff should have expected, is almost academic. The plaintiff candidly admitted that on May 16, 2011, he had no impairments to his mobility, he could use the stairs to board the bus and he did so (without utilizing the handrail) and had no difficulty walking.

[55] I find the fact that Williams left the stop before the plaintiff was sitting down is not a violation of any training or policy and is not, on its own, evidence of negligence.

Mr. Sypher

[56] The evidence of Mr. Sypher is of assistance with regards to the speed of the vehicle, as are the videos of the incident from cameras located on the bus.

[57] The videos that Mr. Sypher reviewed are from three onboard digital video cameras, each showing views from different angles. These three video angles taken together depict what transpired at the time of the accident.

[58] Mr. Sypher decompiled the bus videos to enable analysis of the video and time intervals. This enabled him to calculate speed and time relative to the plaintiff's movements. He testified there was a delay between the video images of the bus and the recorded vehicle speed. Given this, he reasoned that the vehicle speed recorded did not emanate from the powertrain control module of the bus, but from the GPS system. The delay between the speed values and the actual events was between two and four seconds.

[59] The video shows the movement of the bus into the stop until after the plaintiff fell. Mr. Sypher created a spreadsheet with observations such as time, bus speed, and brake application.

[60] With the video and decompilation of the video into frames, Mr. Sypher was able to calculate that the plaintiff entered the bus 1.3 seconds after the bus stopped. The plaintiff paid his fare and accepted a transfer before walking to the rear of the bus, three seconds after boarding.

[61] Using the decompiled video, Mr. Sypher calculated the plaintiff's walking speed. His opinion was that two seconds after the plaintiff boarded the bus, it began to move; 1.2 seconds elapsed after the bus began to move and the plaintiff fell. Mr. Sypher testified that the fall occurred when the bus was moving at a low speed; the precise speed being 6.7 km/h. He calculated the plaintiff's walking speed at between 2.5 and 2.7 metres per second. A person's normal speed on a flat crosswalk was compared to the plaintiff's speed to reach the location where he fell. The calculations indicate the plaintiff's walking speed was almost double the speed expected of a normal person walking in a cross walk. Mr. Sypher testified that the acceleration of the bus was peaking when the plaintiff was falling.

[62] The video analysis, which I accept, shows the bus travelled 1.2 metres before the plaintiff began to fall. Mr. Sypher reviewed acceleration research, but the sample used in the research was both heavy trucks and buses. The findings of the research as compared to the decompiled video indicates the bus accelerated faster than the heavy trucks and buses in the research. I am not persuaded this is helpful to the court in this matter as the use of the comparator vehicles was not sufficiently explained or compared to the bus. This provides no basis to conclude the bus was driven at an excessive rate of speed at the time of the accident.

[63] Mr. Sypher said the acceleration of the bus at the time in question "appears to be on the higher end of that expected for a transit bus." However, even if I accept this and place a great deal of weight on the evidence, Mr. Sypher did not say the speed was outside of expectations and norms, but only higher than that of a fully loaded bus (the comparator). This bus only had three passengers. There is no opinion that this was excessive acceleration. Furthermore, Mr. Sypher stated:

> The findings are less than definitive regarding the acceleration expected for a transit bus, given that heavy trucks were included in Mr. Muttart's sample.

[64] I accept Mr. Sypher's evidence concerning bus speed and acceleration. In particular, I accept the following evidence as summarized at p. 18 of his report:

1) The speed data recorded on the bus video is unreliable. There were several times that the bus motion was clearly inconsistent with the recorded speed. There appears to be a two to three second delay in the data. Speed changes were sometimes in large increments.

2) Based on an analysis of the bus video, when Mr. Orlov began to slip, the bus was

    - Traveling at just under 7 km/h;
    - Roughly 1.2 metres from where it had stopped;
    - Accelerating at roughly 2.0 m/s^2 or 0.21 times gravity (g).

…

4) Mr. Orlov walked swiftly toward the rear of the bus before falling. Mr. Orlov walked a distance of greater than seven metres from the front door of the bus in roughly 2.8 seconds. His average speed was calculated to be approximately 2.6 metres per second (9.3 km/h). At this speed, he could have reached the rear of the bus in about 1.2 to 1.3 more seconds – if he had not fallen if that was his intended destination.

5) Mr. Orlov's slip and fall occurred less than two seconds after the bus begins to move forward.

6) The peak acceleration of the bus coincided with Mr. Orlov beginning to slip on the floor. This acceleration occurred while the bus was travelling up a 6 percent grade. This acceleration was roughly 60 percent more than the maximum acceleration of a similar bus year make and model bus that tested while fully loaded and on a level surface.

William Cutler

[65] William Cutler ("Cutler"), an employee of HRM, was put forward by the defendant to describe the specifications of the bus, its engine, and to provide opinion evidence about its power or lack thereof. This was ostensibly intended to provide evidence concerning the ability or lack thereof of the bus to increase speed quickly. Cutler is not a bus driver, and had no first-hand knowledge about the speed of the bus at the time in question. The evidence is hearsay, based on

maintenance inspection manuals. I did not admit this evidence and have not considered it in reaching my decision.

[66] Cutler testified that he wrote sections of the 2011 Handbook. There are specifications for the Classic buses in the 2011 Handbook. The Classic bus is described as "quick on takeoff." Cutler testified that he copies the specifications from the manufacturers. He said that even though he included the quote that the Classic bus is "quick on take off" he disagrees with the statement he provided for the 2011 Handbook. Regardless of the description, the video depicts the acceleration, as does the video decompilation undertaken by Mr. Sypher. These descriptions in the 2011 Handbook are neither helpful nor particularly probative of the issues before me.

Condition of the Floor

[67] The plaintiff alleges that the floor of the bus was worn and wet and argues this contributed to his fall.

[68] The plaintiff testified that the floors of the bus were made of rubber mats with ribbed treads running parallel. He testified the steps in front of the bus driver, as well as the middle of the aisle and the area in front of the exit door looked worn, with the rubber tread appearing discolored. The plaintiff testified that the front of the bus was wet and the floor where he fell was muddy and wet.

[69] The plaintiff testified that the bottom of his boots were wet from the drizzle outside. On cross-examination, the plaintiff admitted he would have transferred water from his boots onto the bus. He admitted that he would have expected the floor of the bus to be wet that day.

[70] I accept the floor of the bus was wet, but the plaintiff provided no evidence that it was excessively so. I do not accept the plaintiff's evidence about wear of the floor. As articulated later in these reasons, his opportunity to make these observations and the lack of corroboration do not support this testimony.

Keith Alexander

[71] In response to the allegation of wear and wetness on the floor, the defendants led evidence from HRM employees concerning inspection protocols.

[72] Alexander discussed pre-trip inspections, a legislative responsibility under the *Motor Carriers Act*. Alexander also noted the repercussions for misrepresentations on any documents, including pre-trip inspection as contained in the Employee Rule Book at section G15, which provides:

> G15 MISREPRESENTATION
>
> Misrepresentation, suppression or falsification of facts in any verbal or written report to a Supervisor or other Officer of Metro Transit or repeated failure to submit a required report, will be grounds for disciplinary action up to and including dismissal.

[73] In the 2011 Handbook, which would have been given to Williams, procedures are set forth as follows:

> Bus Inspection Procedures
>
> Pre-Trip Inspection
>
> Safety is our top priority. The Pre-Trip inspection is a key responsibility that is legislated for an operator to complete prior to departure.
>
> Before Operating your bus, you should have a clear mind
>
> Prior to departing a Metro Transit facility to commence a shift. Operators are required to conduct the checks on the following pages as part of their pre-trip inspection to avoid unnecessary delays or change-offs.
>
> Pre-Trip Inspection Reports and Defects
>
> Pre-trip Inspection reports are designed to protect you and to alert maintenance of mechanical and other technological problems; ensuring that no defective equipment gets on the road. As a Professional Class 2 Operator, you fall under the following Provincial legislation. "The driver of a public passenger vehicle shall perform a trip inspection and make a certified record of the inspection prior to the vehicles first trip of the day in accordance with the regulations under the Motor Vehicle Act." Nova Scotia Motor Carrier Act. Governor in Council Regulation, Section 21. Fines can be given for not conducting a Pre-Trip.
>
> Each Operator who takes over control of a bus must ensure that the bus he or she takes over has no new defects or damage and make record of the condition of the

> bus on the 'day card' supplied. You must record your Employee #, the time you took over the bus, the bus #, license, and verification of safety must be recorded. Any defects found during the pre-trip inspection must be noted on the inspection report. If no defect is discovered by the driver, the report shall indicate as such.
>
> Defects: Any defects observed during the daily operation of the vehicle are required to be reported via the radio system to the Communications Centre when possible for the purpose of tracking defects and ensuring repairs are completed in a timely manner.
>
> NOTE: An Operator shall not operate a vehicle which has a safety related defect or deficiency prior to said defect or deficiency being corrected.
>
> As part of due diligence, the Operator shall determine whether the bus is safe or unsafe to operate.
>
> In the event a defect is found during an inspection, prior to departing the garage, the Communications Centre may request the Operator to pull the bus into the Placer stand or a mechanic may meet you at in another location for a quick repair or to provide a replacement bus.
>
> If the bus is involved in an accident, the inspection card should be annotated to reflect this. This will ensure that the maintenance department performs a follow up inspection for hidden collateral damage and gives the bus a clean bill of health.
>
> FYI. . . Employees who repair a defect must record the date of the repair on the report. A person who decides the bus is safe without needs of repair, must state that no repair is required and sign the report.

[74] Alexander described the training given to drivers who complete the pre-trip inspection card. I accept drivers are trained to do the pre-trip inspections diligently and there is no evidence Williams failed to do so.

[75] Alexander testified there is no specific section for floors listed on the inspection card, but said floors and their inspection are addressed in several sections including *Cleanliness Damage* and *Body Damage*. Alexander testified that there was no reference to wear on the floor of the bus on the Pre-Trip Inspection completed on the day in question.

[76] Neither the Bus Operator Incident Report dated May 16, 2011, nor the Mobile Service Supervisor Daily Report dated May 16, 2011, mention worn or wet

floors. A supervisor attended the scene of this incident and decided the bus would continue operating after the accident. The bus was cleared to start the next trip.

Mr. Sypher

[77] Mr. Sypher's report included comments on wear of the floor. I ascribe little weight to that opinion. His opinions about wear of the bus floor are based on photographs, not on inspection. In fact, Mr. Sypher comments:

> The images provided of the flooring are of insufficient quality to allow a definitive conclusion regarding the extent of wear in this area.

[78] Mr. Sypher commented on the presence of water on the floor. Again, Mr. Sypher was not present at the time and is drawing these conclusions from reference to photographs. While I accept his opinion that the presence of water would have lowered the traction between the plaintiff's footwear and the bus flooring, there is no evidence of how much water was present at the time of the fall. Mr. Sypher acknowledges the channelized rubber on the floor help to avoid ponding of water and improve traction.

[79] Mr. Sypher neither investigated the bus nor tested its floor. The photographs he examined were taken in January 2012, months after this accident.

[80] Mr. Sypher admits there was insufficient data for him to opine on the skid resistance of the bus flooring at the time of the slip-and-fall. He could not determine the extent of the wearing of the floor from photographs.

[81] Considering all of this, I find his evidence of little to no value on these issues.

William Cutler

[82] Cutler, the Superintendent of Bus Maintenance with Metro Transit, is an interprovincial Red Seal Mechanic. His testimony addressed the inspection regime for the Metro Transit fleet generally, and the bus on which the plaintiff fell specifically, to support the defendant's position that the bus did not have a worn floor that caused the plaintiff's fall.

[83] Cutler testified to his personal knowledge that Metro Transit's maintenance department keeps vehicles according to manufacturers' specifications. The Nova Scotia Utility and Review Board ("NSUARB") requires inspections of all buses on six-month intervals. In addition, Metro Transit has a preventative maintenance program. For example, Cutler testified that every ninety days a comprehensive detailing is done on every bus, which includes mopping the floors, removing garbage and debris, and cleaning seat upholstery and windows. This ninety-day comprehensive detailing includes a full-page checklist.

[84] Cutler testified to the pre-trip inspection for the bus. He too noted that there was no mention of the floor being worn.

[85] Cutler reviewed the Passenger Vehicle Inspection Report dated January 17, 2011. This was the last inspection report required by the NSUARB prior to the incident. There is no mention in this report of the floor being worn.

[86] The 90-day interior wash dated March 17, 2011, was the last performed prior to the plaintiff's fall. Cutler signed off on this document. He testified about the creation of the interior wash checklist.

[87] Cutler testified that when staff are trained to perform interior washes, they are advised to sweep, wash the floor, and go over mats with a mop. They start in the back of the bus and move to the front. There was no notation on either the NSUARB inspection or the interior wash checklist concerning an issue with wearing or a worn floor.

[88] Cutler identified and tendered as evidence, a piece of the centre aisle flooring for a Classic bus model. This was not taken from the bus. Cutler said that in the last seven years working with Metro Transit he has never seen flooring on a Classic bus replaced due to wear. The body shop that he supervises installs this flooring on buses.

[89] Cutler was asked to review a list of orders for the bus, including the fact there was a coolant leak. Cutler testified that the coolant leak would not have entered the floor of the bus. The plaintiff postulated that the bus floor became slippery due to the coolant leak. This was denied by Cutler. I accept Cutler's evidence that the bus floor would not have been impacted by the leak.

[90] Cutler also discussed other routine maintenance performed on buses and went through the various inspection opportunities for a worn floor to be identified. I accept the floor of this bus was never identified as worn.

Andrea Digdon

[91] Andrea Digdon is a Senior General Insurance Adjuster with Cunningham Lindsay, who worked for HRM between January and December 2014. Ms. Digdon has been an insurance adjuster since 1999. In May 2014, Ms. Digdon was asked by counsel for the HRM to attend the bus depot in Ragged Lake to inspect the bus and take treadwear depth measurements of the floor. In addition, Ms. Digdon took photographs of the bus.

[92] Ms. Digdon did not provide a report, but testified based on her recollection, photographs, and spoke to an email she authored. On the day of the inspection, she observed the outside and inside of the bus. She testified that she was looking for hazards, such as anything sticking out from the seats, or any worn or uneven floors or steps. She was also looking for unusual wear patterns on the bus floor. She testified that she did not find any wear on the floor. The measurements she took of the floor are listed in an email. Her email states:

> From: Digdon, Andrea
> Sent: May-07-14 9:35 AM
> To: Maclaurin, Roxanne
> Cc: Plater, Joel
> Subject: 000166 – Stanislav Orlov
>
> Hi Roxanne
>
> I attended the bus depot in Ragged Lake yesterday afternoon and obtained the attached photos (they are saved on my computer if you need them burned to disc).
>
> We also did a tread wear/depth measurement on the floors as follows:
>
> Front Steps: 3/32
> Top of Front Steps: 3/32
> Rear of Bus: 3/32
> Top of rear steps: 3/32
> Brand New piece of rubber floor: 3/32
>
> The bus in question is 40 feet long.

> I believe the photos are self-explanatory, but if you need clarification let me know.
>
> Andrea

[93] At the depot, Ms. Digdon was provided with what she was told was new flooring and was asked to measure the flooring and compare it to the measurements in the bus. She used a tread wear gauge, which was not in evidence.

[94] Ms. Digdon measured the front steps, an area at the top of those steps and by the rear doors. All measurements matched the new flooring. She observed the bus flooring had no visible wear, no holes, no curls, and no lips on the day of the inspection. Ms. Digdon was shown various pictures of the floor and it was put to her that these areas looked worn. She responded that these areas were not worn, but dirty. Asked whether the steps were dirty when she was taking the tread depths, Ms. Digdon testified the steps had a film of dirt over them, but no dirt built up in the grooves of the flooring.

[95] Ms. Digdon was adamant throughout her cross-examination that she did not observe any wearing of the bus floor. She also denied that there was any bowing or unevenness to the floor. She also denied that she took photographs selectively, so as to serve HRM's interest.

[96] I accept Ms. Digdon's evidence. She had no personal interest in the outcome of this matter. Her evidence was consistent with her email and the photographs. I find the measurement of the tread in the bus on the day of inspection matched the measurement of new flooring.

Joey Williams

[97] On discovery, Williams testified he would inspect the bus before his shift. He testified to checking mats to determine if they were worn, ripped, or bulging. On the day of the accident, Williams did not note any issues with the flooring of the bus on the pre-trip inspection card.

Other Evidence

[98] A document entitled *Display PM orders: List of Orders* was included in the joint exhibit book and admitted by consent. This document lists the repairs done to the bus between February 26, 2009, and May 31, 2011. There is no reference to an issue with a worn floor.

[99] Two Passenger Vehicle Inspection Reports were admitted by consent. Neither document, one dated January 2010 and the other July 2010, evidence an issue with a worn floor.

[100] All the photographs entered by consent satisfy me there was no wear on the floor that caused the plaintiff's fall on May 16, 2011. While the photographs were largely taken well after the event, at most they depict some film or dirt on the floor, but no wear.

Choice of Seat and Use of Handrails

[101] There were two other passengers on the bus the day the plaintiff fell. The plaintiff did not sit in the first available seat. He admitted there was nothing preventing him from choosing a seat closer to the front of the bus. There were plenty of empty seats and the plaintiff did not take the first available seat.

[102] The plaintiff testified there was a transit rule that passengers were required to move to the back of the bus. He relied on a photograph of a sign which reads: "Please move to the rear. Use rear door." He admitted that he was not told to go to the back of the bus that day, and was not told to do so on other days, except when the bus was full and there was standing room only.

[103] The signs the plaintiff referenced do not support his contention that he was required to move to the back of the bus by Metro Transit.

[104] The plaintiff also testified he was conditioned to move to the back because of reminders by bus drivers. While the plaintiff testified drivers had told him to move to the back, Williams did not do so on the day in question.

[105] The plaintiff admitted he was aware of the numerous supports on the bus, including stanchions, overhead railings, floor to ceiling railings, and handrails located on the back of the seats. He admitted that these options were on both sides of the bus aisle and were within his reach, but that he did not make use of them.

[106] The plaintiff was asked and agreed he could have put his wallet in the bag he was carrying, to free up his hands, and he agreed he could have. He also agreed he could have put the wallet in his pocket.

William Cutler

[107] Cutler testified to the signs placed on the bus including the sign which reads "Please move to the rear. Use rear door." Cutler testified that the purpose of these signs are to create a flow through the bus.

Video Evidence

[108] The videos show that there were only two other passengers on the bus when the plaintiff boarded the bus. Consequently, the plaintiff had many seats to chose from.

[109] I find, based on all the evidence, if the plaintiff had chosen one of these available seats he would have been seated safely when the bus started moving. In addition, if the plaintiff had been holding on to any handrail, I find he would have prevented his fall given the low speed of the bus.

Analysis

Assessment of the Evidence

[110] In this case, like so many, the assessment of the evidence depends upon findings of credibility. I refer to the statement of O'Halloran, J.A. in *Faryna v. Chorny*, [1952] 2 D.L.R. 354, [1951] B.C.J. No. 152 (C.A.):

> 9 Counsel for the appellant further argued that since Shostak remained uncontradicted by evidence when he testified that he did not know the common Ukrainian word for confinement and that he did not know that the woman referred to in the letter referred to Nancy Faryna his evidence ought to be accepted, and in that event he submitted there was in law no publication of the libel. But the validity of evidence does not depend in the final analysis on the circumstance that it remains uncontradicted or the circumstance that the Judge may have remarked favourably or unfavourably on the evidence or the demeanour of a witness; these things are elements in testing the evidence but they are subject to whether the evidence is consistent with the probabilities affecting the case as a whole and

> shown to be in existence at the time; and cf. *Brethour v. Law Society of B.C.*, [1951] 2 D.L.R. 138 at pp. 141-2.
>
> …
>
> 11 The credibility of interested witness, 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 reasonable in that place and in those conditions. Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skillful exaggeration with partial suppression of the truth. 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. In truth it may easily be self-direction of a dangerous kind.
>
> 12 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. And a Court of Appeal must be satisfied that the trial Judge's finding of credibility is based not on one element only to the exclusion of others, but is based on all the elements by which it can he tested in the particular case.

[111] For the most part, I find the plaintiff gave evidence in a candid and straightforward manner. For the most part, his evidence was consistent. However, there were occasions where the plaintiff’s evidence was strategic and illogical.

[112] I do not accept that the plaintiff believed he had to sit at the back of the bus. His explanation for this belief, that is the signs on the bus directing the flow of passengers when exiting, is neither logical nor believable. The evidence the plaintiff felt he had to sit in the back due to signs is not in harmony with what an informed person would find reasonable.

[113] The plaintiff also claimed other drivers told him to sit in the back, but he readily admitted Williams did not, as can be confirmed by the bus video.

[114] In addition, at trial the plaintiff testified to his belief that his fall was caused by a worn, wet floor and the speed of the bus. Yet, on discovery, on May 28, 2013, the plaintiff candidly admitted he could not say what caused his fall.

[115] I do not accept the plaintiff's evidence that the floor was worn. There is no corroboration for this evidence. Furthermore, the documentary evidence is inconsistent with the plaintiff's assertion.

[116] The photographs, evidence of Ms. Digdon and the inspection documents entered by the defendants do not support the plaintiff's assertion. The plaintiff's expert, who did not inspect the bus, admits the photographs he viewed lack the quality necessary to determine the extent of wear.

[117] As for the defendants' witnesses, I find they attended court without a personal interest in the outcome and gave straightforward evidence which was internally consistent with the documents. I accept the evidence given by the defendant's witnesses.

[118] Considering the *viva voce* evidence and documentary evidence, I do not accept there was any credible, or reliable evidence advanced by the plaintiff that the bus floor was worn at the time of the accident.

[119] As for the limited evidence by the plaintiff that the bus floor was wet, I find there was a lack of sufficient evidence to prove on a balance of probabilities that the floor was excessively wet.

Burden of Proof

[120] The plaintiff has the burden of proving negligence on a balance of probabilities. Only once the plaintiff has established a *prima facie* case of negligence does the burden shift to the defendant to answer the case against him

and to show that he was not negligent. The defendant has the burden of proving contributory negligence. In determining the burden rests with the plaintiff to prove negligence, I refer to the statement of Warner, J. in *Whey v. Halifax (Regional Municipality)*, 2005 NSSC 348, [2005] N.S.J. No. 536, affirmed at 2006 NSCA 107:

> 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."

[121] In the text *Tort Law, (Lewis N. Klar, et al, 5th edn, Carswell, 2012),* Professor J.C. Smith's analysis of a negligence action is discussed as follows, and the questions a court must address are set forth at pp. 165-166:

> (1) Does the law impose upon the actor a duty to take care so that the activity in question does not harm the claimant?
>
> (2) Assuming that the answer to (1) is "yes", and, therefore, there is no reason in law to refuse to apply negligence law to the actor or activity in question, do the facts of the case in dispute justify the contention that the actor ought to have taken reasonable care for the plaintiff's protection? In other words, was there "a foreseeable risk of harm" to the plaintiff?
>
> (3) How ought the defendant to have acted in the situation? In other words, did the defendant breach the duty of care by not acting reasonably?
>
> (4) Was this breach a sufficient cause of the plaintiff's injury? Would the injury have occurred even if there had been no breach?
>
> (5) For which of the plaintiff's injuries should the defendant be held liable? Stated technically, which of the injuries are sufficiently proximate in law to the breach to justify the imposition of liability?

(6) Are there any factors in the plaintiff's conduct which justify a reduction, or even an elimination, of the damages which otherwise would have been awarded?

Duty of Care

[122] The defendants do not dispute that they owed the plaintiff a duty of care.

Standard of Care

[123] The defendants deny that there was any breach of the applicable standard of care.

[124] In *Day v. Toronto Transportation Commission*, [1940] S.C.R. 433, 1940 Carswell Ont 78, Hudson, J. reviewed the standard of care owed by transit authorities:

> 10 The duty of the respondent to the appellant, its passenger, was to carry her safely as far as a reasonable care and forethought could attain that end…
>
> …
>
> 19 Although the carrier of passengers is not an insurer, yet if an accident occurs and the passenger is injured, there is a heavy burden on the defendant carrier to establish that he had used all due, proper and reasonable care and skill to avoid or prevent injury to the passenger. The care required is of a very high degree: 4 Hals., p. 60, paras. 92 and 95. In an old case of *Jackson v. Tollett* [(1817) 2 Starkie 37], the rule was stated by Lord Ellenborough, at p. 38, as follows:
>
> > Every person who contracts for 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.

[125] It is without dispute that carriers owe passengers a very high degree of care when they board a bus to ensure the bus is driven safely and the condition of the bus floor is appropriate in the circumstances: see, e.g., *Duffy v. Halifax (Regional*

Municipality), 2005 NSSC 335, and *Whelan v. Parsons & Sons Transportation Limited*, 2005 NLCA 52, 2005 Carswell Nfld 229.

[126] After hearing the *viva voce* evidence and considering all the documentary evidence, I am not satisfied that the plaintiff has proven, on a balance of probabilities, that the defendants breached the standard of care through the speed, motion, or condition of the bus.

[127] As Scanlan, J. (as he then was) noted in *Duffy, supra*, there is nothing to suggest that a bus cannot or should not move away before every passenger has taken a seat. In this case, two seconds elapsed between the plaintiff beginning to walk to his seat and the bus pulling away from the bus stop. I am satisfied from reviewing the video, the testimony of the plaintiff and Mr. Sypher, that the speed of the bus when it pulled away was not excessive.

[128] The plaintiff was an experienced transit passenger who rode the bus to work in inclement weather, using the bus frequently enough that he had bus tickets. He testified that he knew buses pull away from stops without an audible warning or announcement by the driver. I am satisfied that there was nothing negligent in the way in which the bus moved. Williams drove in a careful and prudent manner and exercised the skill that is expected of a driver of a bus. While having a high standard of care, a transit authority is neither an insurer nor guarantor of a passengers' safety.

[129] The speed of the bus was not excessive, and while the plaintiff testified the movement was abrupt, the evidence does not support this testimony. Even if I found the bus moved abruptly, the case law is clear that buses frequently jolt, and passengers ought to know this.

[130] As stated in *Robertson v. Toronto Transit Commission* (1979), 9 C.C.L.T. 338, 1979 CarswellOnt 676 (Ont. Co. Ct.):

> 11 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 (*sic*) 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.

[131] See also *Nice v. Doe,* 2000 ABCA 221, and *Sawatsky v. Romanchuk*, [1979] B.C.J. N. 964.

[132] The plaintiff's argument that it was negligent for Williams to move the bus before he was seated is not supported by the case law.

[133] In *Patoma v. Clarke*, 2009 BCSC 1069, the court held that even when a person is elderly and carrying two shopping bags weighing four pounds each, the driver did not have to wait for him to be seated. The court commented as follows:

> 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.

[134] This is in stark contrast to the plaintiff, who was simply carrying a plastic bag with a poncho and a wallet in one hand and a transfer in the other.

[135] I find that nothing about the plaintiff's appearance or movements would reasonably put Williams on notice that it was necessary to provide him with a caution, or wait until he was seated before putting the bus in motion.

[136] It was not reasonably foreseeable that the plaintiff required a special precaution, or that he was at risk for injury if attention was not paid to operating the bus in a more cautious manner than usual. There was no reason for Williams to believe that the plaintiff was ill, had mobility issues, or was not steady on his feet.

[137] The court in *Brinacombe v. B.C. Transit* et al, 2000 BCSC 331, [2000] B.C.J. No. 389, reviewed many similar fact patterns where plaintiffs had boarded a bus and were walking towards the back when the bus pulled away from the curb and the plaintiffs fell. In finding no liability, the court made the following comments:

> 42 Ms. Brinacomb's counsel submits that Mr. Swinney was negligent in setting the bus in motion before Ms. Brinacomb had seated herself, but several British Columbia authorities establish that the fact that a bus driver starts up before all passengers are seated is not in itself a breach of the required standard of care, unless it is apparent to the driver that the passenger is disabled, or heavily burdened. *Fisher v. British Columbia Hydro and Power Authority*, unreported, Taylor, J., Vancouver Registry No. B781146, February 19, 1980; *Sawatsky v. Romanchuk & B.C. Hydro and Power Authority*, [1979] B.C.J. No. 964, Berger J., Vancouver Registry No. C771580, September 14, 1979; *Calderwood v. B.C. Hydro and Power Authority*, unreported, Macfarlane, J., Vancouver Registry No. 8509/71, May 13, 1974; and *Lawrie v. B.C. Hydro and Power Authority*, Toy, J., Vancouver Registry No. 32708/78, May 31, 1976.
>
> 43 In *Rehemtulla v. British Columbia Transit*, [1995] B.C.J. No. 3043, Edwards, J., Vancouver Registry No. B936381, November 16, 1995, the plaintiff alleged that the driver was negligent in not waiting for her to reach the seat of her choice before pulling out into traffic. The trial judge found that the plaintiff fell as the bus driver shifted the bus from first to second gear, which typically causes the bus to lurch, but was, the trial judge found, a normal movement of the bus. Justice Edwards concluded that it is not negligent for a driver to start the bus before a passenger is seated, and that there was nothing abnormal about his driving, and that he was therefore unable to find negligence. His decision was upheld on appeal, [1997] B.C.J. No. 2334, Docket CA021233, October 15, 1997.
>
> 44 A similar conclusion had been reached in *Mauro v. Romanica*, [1988] 1 W.W.R. 684 (Man. Q.B.). In that case, the plaintiff, a sixty-three year old woman, boarded the bus on a rainy day. Before she was seated, the driver pulled out into traffic at a slow speed and the plaintiff, who was not holding onto the handrails, fell. The court held that a bus driver is not negligent in failing to wait until all passengers are seated before moving the bus, because to require a driver to do so would require extraordinary precautions and impose too high a standard on the driver. The trial judge also concluded that the defendants were not liable because of the wet floor in the bus, because the transit operator is only obliged to keep the floor in such a condition that a person using ordinary care would not slip and a wet floor is not an unusual hazard.

[138] Like the circumstances in *Mauro*, *supra*, there is evidence the bus floor was wet and I accept it would have been, given it was raining at the time. There is no evidence to prove, on a balance of probabilities, that there was an unusual or excessive presence of water on the floor or that it was caused by the negligence of the defendant or that it’s presence caused or contributed to the plaintiff’s fall.

[139] Bus floors will be wet when there is inclement weather, that is a reality and it is impossible for a transit authority to prevent water on bus floors. If the standard required dry floors, no bus would operate during periods of inclement weather.

Contributory Negligence

[140] If I had found that the plaintiff had established the defendant's negligence, the evidence is clear that the defendants have discharged the onus of establishing contributory negligence. The evidence of contributory negligence is so significant that I would find the plaintiff completely liable for his own injuries.

[141] The videos of the inside of the bus show that there were plenty of seats available to the plaintiff. He chose to walk towards the rear of the bus without holding on to anything, despite there being overhead handrails, stanchions running vertically down from those handrails and handrails on the back of each bus seat.

[142] The video shows that the only two other passengers on the vehicle, who were seated, were not affected when the bus accelerated to leave the bus stop.

[143] It is common sense to any experienced bus passenger that when a bus moves so will they, if they are not seated or holding onto a stanchion. In fact, counsel for the plaintiff admitted it is common sense to take the first available seat. Counsel argued the signs on the bus directing the flow of traffic changed this and required, or were reasonably read to require, passengers to sit in the back of the bus. I do not accept this. It is not a reasonable interpretation of the signage and it is not reasonable to walk to the back, to the rear doors, when only two other passengers are on the bus, all the while not holding onto the stanchions but holding onto a transfer one does not need.

Conclusion

[144] I am satisfied that there is no liability in this case. The plaintiff's claim is dismissed. If an agreement on costs cannot be reached, I will hear from the parties.

Brothers J.