CITATION: Seyom v. TTC, 2018 ONSC 6848
COURT FILE NO.: CV-14-503699
DATE: 20181120

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
ALMAZ ALEMU SEYOM Plaintiff	*Z. Tsimerman* and *V. Essipova*, for the Plaintiff
– and –	
TORONTO TRANSIT COMMISSION Defendant	*N. Groen* and *A. Vaiay*, for the Defendant
	HEARD: October 9-17, 2018

JUSTICE S. NAKATSURU

[1] Ms. Almaz Seyom was a hard-working woman. Since coming to Canada in 1991 as an Ethiopian refugee, a single mother with her then young son, she has made a life for herself and her family in this country. With only a Grade 8 education, basic facility in English, and little job skills to offer, she found long-term and fulfilling work as a cook and a server with Jimmy the Greek restaurant in the food court of the Eaton Center in downtown Toronto. This was until May 8, 2012, when she fell on a Toronto Transit Commission ("TTC") bus and hurt herself. Her life has not been the same since.

[2] She has sued the TTC for negligence. She claims damages for pain and suffering, loss of income, loss of competitive advantage, and past and future treatment arising from her injuries caused by this fall.

[3] I sympathize greatly with Ms. Seyom's life circumstances. It is hard not to. But of course, I must decide this case based not on sympathy, but on reason. I must make impartial findings of fact and must properly apply the law to those facts the best that I can.

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[4] In this case, a number of issues are in contention. However, it will be fair to say that the main issue is whether the defendant breached the standard of care owed. Therefore, my reasons will mainly focus on this. I will go on to address the other issues in briefer compass on the chance that I am wrong regarding the issue of liability.

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A. NEGLIGENCE: WAS THE STANDARD OF CARE MET?

[5] There is no question that the TTC owed Ms. Seyom, a passenger on its bus, a duty of care. The parties agree this is so. The pivotal issue in this case is whether the TTC was negligent on May 8, 2012, in that it breached the standard of care owed to Ms. Seyom. Mr. Glenford Nembhard was the bus driver on that day. It is his actions or omissions that must be scrutinized in order to determine whether Ms. Seyom has discharged her onus of proof. Aside from his driving, the plaintiff does not allege that the TTC was negligent in any other way, such as a design defect, the maintenance of its vehicles, or the training of its employees.

i. The Law on the Standard of Care

[6] Generally speaking, negligence is the doing of something which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do, under circumstances similar to that found in a case. Negligence is relative to the circumstances. Negligent conduct gives rise, through an act or omission, to an unreasonable risk of harm.

[7] Because Mr. Nembhard was a bus driver of a public transit vehicle, the standard of care in this case is not measured by the conduct of the average person of reasonable and ordinary prudence; rather the standard is that of a reasonable bus driver in similar circumstances. To meet the standard, the bus driver must use all due, proper, and reasonable care and skill in the circumstances: *Meady v. Greyhound Canada Transportation Corporation*, 2015 ONCA 6 at para. 65. This is an objective test that takes into account both the experience of the average bus driver and anything the driver knew or should have known: *Wang v. Harrod*, (1998), B.C.L.R. (3d) 199 at para. 39 (C.A.).

[8] At the trial level in *Meady v. Greyhound Canada Transportation Corporation*, 2012 ONSC 657, Platana J. addressed the standard of care for a bus driver. On appeal by the plaintiffs, the Court of Appeal found no fault with his articulation of the standard. Platana J. stated it to be as follows at paras. 170-171:

> ***Standard of Care***
>
> The conventional standard of care that is applied in an action for negligence is that of the ordinary, reasonable, cautious and prudent person in the position and circumstances of the defendant: *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201, at 222. The reasonable person is neither exceptional nor extraordinary. He or she is a person of normal intelligence who makes prudence a guide to conduct, doing nothing that a prudent person would not do and not avoiding doing anything that a prudent person would do: see *Canada (Attorney General) v. Dingle Estate*, 2000 NSCA 5 (CanLII), [2000] N.S.J. No 4, at para. 31; *Burbank v. B*

> *(R.T.)*, 2007 BCCA 215 (CanLII), [2007] B.C.J. No. 752, at para. 60; Fridman et al., at 366. What is reasonable will depend on the facts of each case, and includes a consideration of the likelihood (or foreseeability) of the harm, the gravity of the harm, and the costs that would have to be incurred in order to prevent the harm: *Ryan,* at 526. These factors are to be assessed as of the time of the alleged breach and not in light of subsequent developments: see *Desautels v. Katimavik* (2003), 2003 CanLII 39372 (ON CA), 175 O.A.C. 201(C.A.); *Nattrass v. Weber*, 2010 ABCA 64 (CanLII),[2010] A.J. No. 424, leave to appeal dismissed, 2010 S.C.C.A. No. 159.
>
> ***(a) Standard of Care for Bus Drivers***
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> I accept the Greyhound Defendants' submission that for a bus driver, the standard of care is that of the reasonable bus driver in like circumstances. To determine whether the standard of care for a bus driver is met, I must ask whether the bus driver used all due, proper and reasonable care and skill in the circumstances: see *Day*, at 441; *Rances*, [2008] A.J. No. 1323 at para. 349.

[9] Before addressing the factual question of the content of that standard of care in this case and whether Mr. Nembhard met it, I must deal with a submission made initially by the plaintiff about the onus of proof. Relying on the well-established authority of *Day v. Toronto Transit Commission,* [1940] SCR 433, a leading authority on the standard of care owed by common carriers, the plaintiff argued that the onus is on the defendant to prove it has met the standard of care when bus drivers are involved; in essence, a reverse onus: see cases such as *Bideci v. Neuhold*, 2014 BCSC 542 at para. 57; *Nice v. Doe,* 2000 ABCA 221. However, as explained by Fenlon J.A. in *Benavides v. Insurance Corp. of British Columbia,* 2017 BCCA 15 at paras. 10-17, this is a misreading of *Day*. The defendant is not required to disprove negligence merely because an injury by a passenger creates a *prima facie* case of negligence; see also *Whey v. Halifax (Regional Municipality)*, 2005 NSSC 348 at para. 24, affirmed 2006 NSCA 107. In fairness, counsel for the plaintiff effectively resiled from this position once his attention was brought to *Benavides*.

[10] Regardless, the law in Ontario is that the plaintiff has the onus to prove, on a balance of probabilities, all aspects of negligence. There is no doubt that the standard of care on common carriers like the TTC is a high one. However, all that the law recognizes is that an evidentiary burden may shift to the defendant common carrier. It does not create a reverse onus or a legal presumption against the defendants. I find that the analysis on this was well expressed by Platana J. in *Meady* where he said at paras. 171-181:

> In *The Law of Torts in Canada*, Andrew Botterell makes the following comments on the onus of proof in a negligence action:
>
>> "The general rule is that the plaintiff must prove all of the elements of the tort of negligence ... The plaintiff's obligation is to convince the court on the balance of probabilities that it is more likely than not that his or her loss was caused by negligence on the part of the defendant. If this is

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> done, the defendant then has the task of calling into question the *prima facie* inference of negligence. By establishing a *prima facie* case, the plaintiff succeeds in *shifting* the evidentiary ... burden onto the defendant ... Should the plaintiff fail to adduce evidence that proves negligence, or fail to produce evidence for which a reasonable inference may be drawn that the defendant acted negligently, the plaintiff will not succeed" (Fridman et al., at 384-385).

In a negligence action, the onus of proof rests with the Plaintiff. The Plaintiff must prove all elements of the tort of negligence. If the Plaintiff convinces the court on a balance of probabilities that the Defendant's negligence caused his or her injuries, then he or she has established a *prima facie* case against the Defendant. This shifts the evidentiary burden to the Defendant, who can discharge that burden by providing evidence of non-negligence.

The Plaintiffs have raised the question of whether a reverse onus exists for a common carrier in a negligence action. In *Whelan v. Parsons & Sons Transportation Ltd*., 2005 Carswell Nfld 229, [2005] N.J. No. 264 (C.A.), at paras. 21-22, the Newfoundland Court of Appeal considered whether a reverse onus exists for common carriers in a negligence action. The court made the following comments with respect to the onus of proof for common carriers:

> "Once the plaintiff has established a *prima facie* case, which may be based on the drawing of inferences from circumstantial evidence, the carrier will be found liable for negligence unless it presents evidence to negate that conclusion.
>
> What makes the case of a common carrier different relates, in fact, to the high standard of care imposed on the carrier. As a result of this high standard, the court may draw inferences adverse to the carrier, or conclude that a *prima facie* case has been established, based on evidence adduced by the plaintiff that would not, in other circumstances, have been sufficient. In other words, the carrier may be under a heightened need to adduce evidence in response because the threshold the plaintiff must clear is lower."

The onus is *not* on the common carrier to prove that it was not negligent. Instead, the threshold that the Plaintiff must meet to establish a *prima facie* case is lower than it normally would be. This is so because the standard of care imposed on the common carrier is higher than that which is placed on the average person. This is not a reverse onus situation; the Plaintiff must still adduce some evidence to establish a *prima facie* case before the burden can shift to the Defendant.

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[11] The plaintiffs in *Meady* appealed the dismissal of their action against the police and Greyhound bus lines to the Ontario Court of Appeal. On the appeal most of Strathy C.J.O.'s decision dealt with the admissibility of expert evidence. However, the Chief Justice made short work of the ground of appeal that Platana J. failed to properly articulate the content of the applicable standard of care. He stated at para. 69: "The onus was on the appellants to adduce evidence of the content of the standard of care. They did so. The trial judge correctly identified the standard of care applicable to each defendant and applied it to the circumstances of the case… He was entitled to find, as he did, that the respondents' conduct did not fall below the standards identified by the appellants." Given that this is the current state of the law in this province, the plaintiff's eventual concession was fitting.

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ii. <u>Position of the Parties</u>

[12] The plaintiff does not take issue with the fact that buses can move when passengers are standing or walking. However, Ms. Seyom submits that Mr. Nembhard failed to meet the high standard of care required of him in the circumstances of her case. In particular she relies on the TTC bus operator's manual that Mr. Nembhard must follow in the operation of his bus. The manual, under section F7-2 about how a driver should leave a bus stop, requires a driver not to begin moving the bus until passengers with "unsteady footing" are seated or holding a stanchion (a pole). Ms. Seyom relies upon the dictionary definitions of "unsteady" and "steady" and argues that she had "unsteady footing" because the bus was moving and the floor was wet. She submits that the overall purpose of this section of the manual is make sure passengers are safe. In this case, it is argued, Mr. Nembhard did not use all the skill, care, and attention that were reasonably required in the circumstances. He could not have observed that Ms. Seyom's footing was steady due to the brief chance he got to see her board the bus and because he was pre-occupied with seeing her bus pass and closing the doors. It is submitted that the appropriate standard of care was for him to wait until he could see her footing was steady. He was aware or ought to have been aware of the risk posed by the wet floor and how a moving bus would create difficulties for passenger footing. The cost of ensuring she was safe was minimal; all he had to do was check.

[13] The TTC submits that objectively Mr. Nembhard met the standard of care. Passengers are allowed to stand or move while the bus is in motion. Ms. Seyom herself knew this. The portion of the manual relied upon by the plaintiff, as testified to by Mr. Nembhard, applies to the elderly, those who have assistive devices, or have trouble walking. Here, Ms. Seyom boarded normally and there was nothing in her appearance, behavior, and manner of boarding that should have alerted Mr. Nembhard to depart from the acceptable practice of setting the bus in motion without checking that she was seated or holding on to a stanchion. The appropriate standard of care was met in this case even having regard to the fact the flooring was wet. In the submission of the TTC, sometimes an accident is just an accident. Ms. Seyom's fall was just that; an accident.

iii. **Summary of the Evidence on this Issue**

[14] In determining the question of whether Mr. Nembhard met that standard of care, I must assess the credibility and reliability of the key witnesses. The credibility of Ms. Seyom and Mr. Nembhard in particular are important. In addition, I am mindful that these events took place now more than 6 years ago. Therefore, the reliability of the evidence is important. I will summarize and assess some of the key witnesses on this issue. Of course, I have considered the whole of the evidence including other witnesses called by the parties.

The Evidence of Ms. Almaz Seyom

[15] Ms. Almaz Seyom is 55 years old and lives with her common law spouse, Alex Baey, and her son, Thomas Kenene. She came to Canada in 1991 from Sudan with her son. She has a Grade 8 education. She can read and write a little. She has been in a 17 year relationship with Mr. Baey.

[16] Before the fall of May 8, 2012, she testified that she had no serious health issues, no falls, no back pain or complaints. Nothing prevented her from working.

[17] Ms. Seyom testified that May 8, 2012, was a Tuesday and she was going to work. She left her home at 7 a.m. She woke up 6:15 or 6:30 a.m. Work was to start at 8 a.m. It was raining and she had an umbrella. She was the last one to catch the bus at Tretheway Drive and Martha Eaton Way. The doors closed right away after she got on. In chief, she could not recall if the floor of the bus was wet.

[18] The TTC video of the interior of the bus that day was shown to her. It shows her getting on the bus. When asked why she walked to the back of the bus, she replied that the TTC says “go back, go back”, and she always sits in the back. In her left hand was a purse. In her right hand, there were her keys and umbrella. She was switching the keys and umbrella to her other hand, to allow herself to hold onto something. However, she could not get a hold of the pole in time, the bus driver drove off, and she fell.

[19] After the fall, she felt pain in her neck, back, and knee. An ambulance came and she was taken to Humber River Hospital. She did not go to work that day. She went home. Her back, neck, and knee continued to cause her pain.

[20] Dr. Kenneth Chen has been her doctor for more than 20 years. She went to see him after the fall. She did some physiotherapy on Dr. Chen’s advice. She did it in the same building as Dr. Chen. Omsai is the therapy place she went to but it has since closed. She did physiotherapy three times a week for three months. Her treatment included massages and for her back there was a machine. She promised to pay them but she did not. She owed Omsai $4,700 before they closed. The treatment helped her. She could stand, cook, and walk a little bit as a result. The treatment helped for two or three days each time. However, she stopped going because she could not afford to pay. She thought each session costed $60. She testified that she would be better if she had more physiotherapy. She has had no further treatment for her injuries after this. She saw

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a specialist, Dr. Mewa, a rheumatologist just one time. She got a MRI for her lower back on March 2, 2014.

[21] Ms. Seyom was cross-examined on the fall. She admitted to riding the TTC bus for 20 years. She has taken the bus thousands of times. She was cross-examined on her trips to and from work. Before May 8, 2012, she testified that she had never fallen on a TTC bus before. She agreed that she had ridden on the bus when standing.

[22] She also testified she always sits before the bus moves. At discovery she said the bus sometimes moves before she takes a seat. She agreed that this answer was true.

[23] On May 8, 2012, Ms. Seyom agreed it was raining, and she got on the bus with her umbrella and purse with no difficulty. When she got on the bus, she did not recall getting on with any problem. The video of the front door view when she got on was played for her. She said she could not remember if she had any difficulty getting on the bus. She did not know if the video showed any difficulty of her getting on the bus.

[24] She agreed that she did not say anything to the bus driver and the driver did not say anything to her. The TTC always say go to the back though. On May 8, 2012, the driver said to everybody and to her to go to the back of the bus.

[25] On May 8, 2012, she agreed that she did not need the driver to wait for her to be seated. She never does. She moved to the back. She expected the bus to move as she walked down the aisle. She agreed that she knew the bus was moving but she did not expect to fall. She has never fallen before.

[26] Ms. Seyom testified about the vertical poles in the bus. Before the accident, she did not recall ever holding onto poles. She always sits down and never holds onto the pole. If she had time to hold a pole she would, but she did not get a chance to hold a pole that day. She agreed that holding a pole makes it less likely to fall. She was walking and not in the process of sitting when she fell. She agreed that she took several steps while the bus was moving before she fell. She said she did not pay attention to open seats when asked if she had sat down in a free seat she would not have fallen. When asked if she had held on to the poles she would not have fallen, she said she did not know.

[27] When the video was played, Ms. Seyom agreed that all five passengers who entered the bus before her found seats and had time to do so. None fell. When she got on, she did not remember if there were available seats for her. Looking at the video, she agreed there were available seats. She agreed there were six available seats that she walked by as she went to the rear of the bus. As she walked down the aisle of the bus, she did not recall looking at the floor or if the floor was wet. Discovery transcripts were put to her where she said she noticed that the bus floor was wet when she fell down, her clothes were wet and dirty, and that was when she first noticed it was wet. Ms. Seyom did not recall being asked those questions and giving those

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answers. She then agreed and she adopted the answers. But she also testified that she did not recall if the floor was wet.

[28] The police came but she could not remember if she spoke to a police officer. The ambulance attendants came too. The video was played of the paramedics attending. She walked off the bus on her own. She was not on a stretcher and could put weight on her right leg.

[29] Having laid out some of her evidence relating to the fall let me address the issue of reliability and credibility of her evidence. Generally, I found Ms. Seyom to be at times internally inconsistent. Sometimes she did not directly answer questions put to her. The flavor of this comes out in some of the cross-examination I have set out. This did not enhance her credibility. Yet at the same time I recognize that Ms. Seyom is unsophisticated and she is not the most articulate of witnesses. It was also very apparent to me that although she did her best to answer questions, she struggled with her comprehension of some of the questions put to her. This may come from an incomplete understanding of English. In addition to this, I find that her recollection of the events was far from being the best. This too may explain the inconsistencies that she gave in her answers, especially where it conflicted with answers she gave at discovery. Given all the circumstances, I am loathed to attribute her poor performance as a witness to dishonesty. But she was a poor witness.

[30] Furthermore, there was one inconsistency that diminished her credibility. When she left the stand, she was clear that prior to May 8, 2012, she had no serious health problems, previous injuries to her back, or falls. After Ms. Seyom left the witness stand, her family physician, Dr. Chen gave evidence and was cross-examined on her medical records. During his testimony, he brought his complete medical records of Ms. Seyom. The records from 1995-2009 had not been previously disclosed to the defendant. Once they were disclosed and reviewed by counsel, it was abundantly clear to me that Ms. Seyom's testimony was not accurate. Dr. Chen testified to the following:

- September 19/95: Ms. Seyom states that she slipped on the floor at Metro Housing, hurt her right knee and pain low back.
- September 22/95: Right knee is very painful. A crutch is being used.
- September 27/95: Right knee pain and lower and upper back pain.
- October 10/95: Right knee and back pain was still severe.
- October 18/95: Right knee pain. Contusion, rule out a meniscus pain. Referred to Dr. Mewa, the rheumatologist.
- October 20/95: Still complaining of right knee and lower back pain. Rule out meniscus tear.

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- April 25/96: Still complaining of back pain and right knee pain. Dr. Chen noted no changes.

- August 25/97: Ms. Seyom states she fell at home/apartment building. (This was a new fall.)

- November 28/01: Ms. Seyom states she had an accident on November 19, 2001, while a passenger on TTC transit. It stopped suddenly, she was thrown from her seat, and she landed on the floor. (Dr. Chen could not recall if she said a bus or a streetcar). The assessment was low back strain.

- July 29/02: Ms. Seyom reported that on July 26 she found she had low back pain. (She was still complaining of low back pain. This was 8 months later, but Dr. Chen could not be sure whether this was a continuous pain from her fall because there was gap in time where she did not complain of back pain in intervening visits.)

- February 18/03: Lower back pain is noted. Dr. Chen's assessment was that it was mechanical (soft tissue tension type of pain) and degenerative disc disease.

- July 30/03: Ms. Seyom states she fell at work while mopping and she slipped and fell on her buttock. Painful at upper buttock, pain in the lower spine.

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[31] It is true that none of this was ever presented to Ms. Seyom in her questioning. She did not have an opportunity to respond to it. She could well have had a good explanation for why she did not mention all of this before. These events took place years before. I do not criticize counsel for the TTC for failing to do this because they were not aware of these specific records. Keeping this context in mind and being as fair as I can to Ms. Seyom, nonetheless, it is difficult for me to believe that she may have forgotten all about this or have a plausible explanation for the inconsistent testimony that she gave in chief on this issue. The records reveal she had gone to Dr. Chen for four previous falls; some which should have been memorable. Also, there were a number of visits where she complained of low back pain.

[32] That being said, I find, based upon the evidence of her co-worker, Ms. Truong, her son, Mr. Kenene, and her employer at Jimmy the Greek, Mr. Zervas, that Ms. Seyom was a diligent and hardworking employee for a number of years prior to her fall in May of 2012. She worked long hours. She was a friendly and happy worker. She also used her talents as a cook in her social activities.

[33] At the end of the day, Ms. Seyom's evidence is such that I cannot accept her testimony about the events of May 8, 2012. I also have difficulties accepting her evidence on other issues. Ms. Seyom's evidence is not such that I can base my findings regarding her fall upon her testimony.

The Evidence of Glenford Nembhard

[34] Mr. Nembhard started working as a transit operator with the TTC in 1988. He described his training to become a bus driver, which involved on-the-road instruction as well as class room work. He has to be re-certified by the TTC every five years. Prior to the accident, he had been re-certified in 2010. Mr. Nembhard described his general duties as a TTC bus operator and the routes that he drove, including the route he drove the day Ms. Seyom fell. The bus he drove had 36 passenger seats. It also had stanchions or poles that people could hold on to. He described his view point from the driver's seat and the mirrors he could see including a mirror whereby he could see the interior of the bus. There is a white safety line painted on the floor of the bus by his driver's seat. Once a passenger moves past this line, Mr. Nembhard is allowed to move the bus.

[35] Mr. Nembhard testified that a bus driver can move the bus while passengers are standing or walking within the bus. He was taken to the TTC Bus Operator's Manual. He must and he does follow what is contained in the manual. Mr. Nembhard agreed that customer safety was number one. The manual has a portion titled "F7-2: Leaving Stops". A procedure is described whereby it outlines how to leave a stop safely while watching for TTC customers, pedestrians, and other vehicles. Eight steps are outlined. The first two steps require that a bus driver check that all customers are clear of the front and center doors and then to close the doors. Step 3 states: "Check that all customers with unsteady footing are sitting or holding onto a stanchion." The driver then turns on the left signal, scans the area and his mirrors, and pulls out of the bus stop. When asked what "unsteady footing" in step 3 meant, Mr. Nembhard testified that someone with "unsteady footing" is a person who is walking with an impediment like a limp, with a cane or a walker, or someone who is moving in an abnormal way. In cross-examination, he agreed he would look for elderly or senior passengers. He agreed his view of "unsteady" was not in the manual but he was talking from his experience and common sense.

[36] Mr. Nembhard described the events of May 8, 2012. He was the first person to drive the bus that day. He checked the bus from the night before and did a circle check. He would check that the interior was safe and clean and that the bus was functioning properly. If something was not, he would get a mechanic to look at it.

[37] Mr. Nembhard testified that it was very common for the bus floors to get wet when it is raining or snowing. The bus has a heater, but depending on the number of people one picks up, there are spots of moisture here and there. If there was a lot of water, like a puddle of water, the bus would go out of service because someone could get hurt. The bus does not carry a mop since if that was required then a bus would be out of service. If there was a small amount of water, he keeps driving as a driver cannot take the bus out of service for a little thing like that.

[38] On May 8, 2012, he was sober, not tired, and undistracted as he drove the bus. It was a very normal working day. It was slightly raining that day. There was some traffic as it was still early. He was just going into service from the end of the line and there were not that many people in the bus. It was around 7 a.m. when he stopped at the bus stop of Tretheway Drive and

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Martha Eaton Way. Mr. Nembhard said Ms. Seyom was not waiting at the bus stop but he recalled her coming after the other passengers. She was the last person on the bus after the other people got on.

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[39] Mr. Nembhard testified that he had no concerns about her mobility and she looked like a normal passenger. They never said anything to each other. He usually only says good morning or good afternoon to passengers. He never told her to go to the back as the bus was still basically empty. If a passenger was in front of the white safety line in an accident, a driver could be charged and the passenger fined. Ms. Seyom definitely passed the front white line. Mr. Nembhard said she walked past him and did not look like a person with unsteady footing. She came on the bus with no visible impediment to her walking, nor did she look like she needed any assistance. After she showed her pass and crossed the white line, he closed the doors, checked his mirrors, and began to pull out like his normal procedure. There was nothing unusual about the way he left the stop or the acceleration of the bus. He could not recall specifically what he was looking at since the events took place 6 years ago. He did not see Ms. Seyom fall but only heard her fall. Someone said she had fallen. The bus was just at the front of the bus bay and basically at the light. The operation of the bus was very smooth from leaving the stop to the time of the fall.

[40] Mr. Nembhard testified that he walked to help Ms. Seyom. When he did, Mr. Nembhard did not find the floor slippery. He did not feel unsafe walking to the back of the bus. He agreed the floors were wet; damp here and there but not a lot of water, just foot prints. He agreed that people walking in with wet clothes, shoes, and carrying umbrellas could result in a wet floor. Mr. Nembhard agreed that wet floors could be slippery depending on the material/surface of the floor. He also agreed that when a bus moves it is harder to stand on one's feet than when a bus is not moving.

[41] Later that day, Mr. Nembhard filled out an occurrence report. In court, he reviewed the report. Mr. Nembhard testified that Ms. Seyom said to him at the time that her feet slid and came out from under her. Mr. Nembhard recalled her saying she wanted to get to work, but Mr. Nembhard was not going to take a chance so he called for an ambulance.

The videos inside the bus on May 8, 2012

[42] I have been assisted in making my factual determinations by the TTC videos. They are of very good quality. They are taken from various angles from the inside of the bus. In particular, the one from the rear towards the front of the bus is important. It shows Ms. Seyom getting on the bus, walking towards the rear, and falling. They also provide a view through the exterior windows of the bus to its immediate surroundings. From that, I can discern when the bus is in motion. These videos do not suffer from the same potential frailties that affect witnesses such as dishonesty or inaccuracies in memory. In this case, regardless of my credibility concerns about Ms. Seyom, this video gives me a true record of how she came to fall on May 8, 2012.

[43] Despite the primacy of the video evidence, I am mindful that I must consider the whole of the evidence. This includes the evidence of those who were there that day. I will more specifically address the video evidence when I make my findings on whether the TTC breached the standard of care.

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Other witnesses

[44] Ms. Ilona Pruchnicki was the ambulance attendant who came to treat Ms. Seyom. She testified that she had no independent recollection of the incident. The video captures her attending to Ms. Seyom along with her partner. It also shows the police officer who came on the scene. Ms. Pruchnicki filled out an Ambulance Call Report. This was admitted as an exhibit on consent. In that report, Ms. Pruchnicki notes that Ms. Seyom told her the following: "Pt states she was on the bus, fell backwards while bus in motion, floor wet, raining. Pt states that she fell backwards on her rt side w rt leg twisted under her body. Pt denies loss of consciousness. No central back or neck pain. Pt c/o pain in rt buttock, back area, and pain in rt lower leg. No bruising or swelling noted in either area, no deformity. Pt says she did not feel a pop in the ankle. Pt able to put weight on rt leg. PC on scene 55575. No vomiting."

[45] Ms. Veronica Small boarded the bus just before Ms. Seyom. She was sitting at the rear of the bus and could see Ms. Seyom come aboard. She also saw her fall. In chief, she said there was a little turn on the route but that was a natural part of the bus ride. She could not say if there was any sudden acceleration or braking. She described it as a normal bus ride. When asked to describe the operation of the bus she stated everything was fine with the driver.

iv. <u>Factual Findings</u>

[46] There are some key factual findings that need to be made in determining the issue of the standard of care. This is the conduct of the TTC driver at the time of the fall and how Ms. Seyom fell. The former is important in determining whether Mr. Nembhard was driving the bus reasonably and prudently given the circumstances that existed at the time. The second is important both in determining whether Mr. Nembhard was negligent and also for determining causation. Regarding the latter, it is the TTC's position that even if there was any negligence, which is denied, it did not cause to her fall which led to her injuries.

[47] First of all, I find that Mr. Nembhard was driving normally and carefully at the time. In this, I have carefully scrutinized the whole record including Mr. Nembhard's testimony. I find that Mr. Nembhard was leaving the bus stop in the normal and usual fashion a bus leaves such a bus stop. There was no sudden or dramatic acceleration, braking, or unexpected movement of the bus. All of the evidence supports this. I fully appreciate the limitations of the two dimensional video that is in evidence. But it does show the exterior surroundings of the bus through the windows as it moves away from the bus stop. While it cannot be definitive, nothing seen through the windows would support anything but normal bus movement. Mr. Nembhard testified that he was not distracted at the time. He testified that there was nothing unusual about how he left and that he left with normal acceleration. Ms. Small, who is an independent witness,

also testified in support of this. I found Ms. Small's recollection with respect to details of that day not the best - she was not shown the video in court to refresh her memory - but I find that if there was something significantly different or dramatic in the driving, she would have remembered it. Finally, Ms. Seyom in her testimony does not suggest otherwise. I therefore accept Mr. Nembhard's testimony in this regard. There is no reason to doubt it and it is well-supported by other evidence. In other words, focusing solely on the manner of driving at this point, Mr. Nembhard drove in a reasonable and prudent manner.

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[48] Of course, Mr. Nembhard began leaving the bus stop while Ms. Seyom was still walking in the bus. I find that he began to drive away after Ms. Seyom walked past the white safety line at the front entranceway of the bus. Mr. Nembhard testified that it was his training and obligation not to move the bus until the passenger(s) had moved past this line. The TTC operator's manual marked as Exhibit 19 directs this to be a "Caution: do not move the bus unless you can see clearly through the front doors and all customers are behind the white line." Mr. Nembhard testified that Ms. Seyom walked past the line before he started moving the bus. I accept that. The video confirms that Ms. Seyom was past the white safety line when the bus began to move.

[49] Other important factors are weather related. It is clear it was raining that day. There is a dispute about how wet the floor of the bus was. There is some conflicting evidence on this but the conflict is relatively minor. The video shows the imprints of people's feet that, because of their wet footwear, were left on the floor of the bus. This makes sense given the climatic conditions. However, I agree with Mr. Nembhard that there were no puddles or pooling of water on the bus. The video supports Mr. Nembhard's testimony. Ms. Small agreed the floor was wet. Ms. Seyom testified to the same. It is an easy conclusion to draw that the floor of the bus was wet, to a degree. Of course, the degree of wetness does not equate to slipperiness since that will depend very much on the nature of the surface of the flooring of the bus. Of that, I have little evidence and will not speculate. However, using common sense, a wet surface is generally more likely to be slippery than the same surface when dry.

[50] Regarding how wet the floor was, I conclude that there was moisture being brought into the bus. However, I find that this was nothing more than the tracking of moisture on the flooring. From what I can make out from the video, the area where Ms. Seyom fell had no observable pool of water nor did it look unusually wet or slippery.

[51] Let me now address the mechanism of Ms. Seyom's fall. I have carefully watched the videos numerous times. Collectively, in summary, the videos show the following. On May 8, 2012, it is raining outside. The bus's wipers are going. It is wet outside. Some passengers are carrying umbrellas but others are not. It does not appear that it is raining so hard that people's clothing are soaked. Mr. Nembhard pulls into the bus stop. Five passengers who appear to be waiting at the stop enter the bus. Ms. Seyom, who is walking towards the bus from a distance away, is the last passenger on. She takes out her pass and shows it. The doors of the bus close. Ms. Seyom takes a couple of steps past the white safety line on the floor of the bus before the bus begins to move. Everyone else in the bus is seated and there are empty seats in the front of the bus. Ms. Seyom walks about five steps towards the rear of the bus as the bus is pulling away

from the stop. She does not grab or attempt to grab any pole or other support along the way. As she walks she carries her purse on her left arm. She has an umbrella that she shifts from her right to her left hand. She also shifts her keys to her left hand. After about the fifth step, as she reaches for a pole with her right hand, her left foot suddenly moves forward, and she falls backwards onto her buttocks, with her right leg appearing to fall beneath her. Some passengers move to assist her. The bus stops. The bus has not gone very far, perhaps a few meters based upon my viewing of the exterior streetscape. Ms. Seyom remains in a seated position on the floor of the bus. Mr. Nembhard calls control for assistance. Eventually, ambulance attendants arrive with a police officer. The paramedics assess her. She is helped to her feet but she gets off the bus without help, though gingerly.

[52] As I have indicated, I find the videos to be the most probative evidence. Mr. Nembhard was a credible witness generally but he has little direct evidence to give about Ms. Seyom's fall, as he did not see it. He heard the thud of her falling but did not see it happen. Ms. Seyom could only give a basic description of what happened. As I said, she was not a very articulate or descriptive witness. Ms. Small could not contribute much of value. The prior statements made by Ms. Seyom, as cryptic as they are, essentially say not much more than she fell because the floor was wet and the bus was moving.

[53] I have carefully considered the whole of the evidence. I find that Ms. Seyom fell because she slipped. Exactly how that occurred, I cannot be 100% sure. Ms. Seyom herself probably is not sure. In her evidence, she does not do a good job of explaining how she fell. My finding that her left foot slipped straight out from under her as she was in the process of reaching for a pole after moving items in her hand. The video does not show her stumbling or tripping on anything on the floor. It does not show her being knocked off balance by any sudden movement of the bus or something occurring within the bus. Indeed, the bus was moving very slowly at the time. It looks like it was moving at a speed just above walking speed. It had not accelerated very much at all by the time she fell. There were no sharp turns, jerks, or bumps; nothing. The bus did not move for any great distance. Mr. Nembhard stopped it immediately when Ms. Seyom fell.

[54] When I look at the whole of the circumstances, especially given the fact that it was wet inside the bus, I find that she fell because the bus floor was wet. She did not simply fall for no reason. I find that the wet state of the flooring caused her fall. Just using my common sense and how it appears she fell, her left foot just seems to slide quickly in front and out from under her, as if she slipped on the wet floor, and she fell on her buttock and right leg.

[55] Now, if I posed the question would she have fallen if the bus was standing still rather than moving, of this I am not as definitive. The way she fell, it could well be that her foot would have slid out from under her whether the bus was in motion or not. I have no evidence as to the type of footwear Ms. Seyom was wearing except what was on the video, from which I cannot make any reasonable inference. As a result, it would be speculative to conclude her footwear contributed to her fall.

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[56] I have also considered whether it could be some personal physical trait that could have been a factor, i.e., a lack of coordination (clumsiness) or a lack of attention. I mention this given the medical records that indicate a number of past falls. However, I draw no such inference on the evidence since I know scant about the circumstances of those falls and there is no other evidence supporting such inferences.

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[57] Finally, I find that if Ms. Seyom had been seated or holding onto a pole or other support at the time the bus was moving, she would not have fallen. Of this, there is no doubt.

v. Analysis on the Standard of Care

[58] Given these factual findings, it is my view that even taking into account the high standard of care required of the TTC; Mr. Nembhard met the appropriate objective standard of care.

[59] The plaintiff has relied heavily on the TTC bus operator's manual. To repeat, Step 3 of F7-2 states: "Check that all customers with unsteady footing are sitting or holding onto a stanchion." There is no doubt that the TTC bus operator's manual in general and Step 3 significantly inform the appropriate standard of care. However, I conclude that Mr. Nembhard was not in breach of this provision by pulling out on that day without waiting for Ms. Seyom to sit down or to hold onto something.

[60] While the words used in Step 3 are to be given their plain and ordinary meaning, I do not agree with the approach of the plaintiff who simply relies upon dictionary definitions of "steady" and "unsteady." The focus of Step 3 is not merely whether a passenger is steady or unsteady, but is also on the "footing" of the passenger. A rigid adherence to general dictionary meanings of isolated words in the section, as proposed by the plaintiff, is not reasonable. On the other hand, a reasonable interpretation of the manual may not be as restrictive as that suggested by Mr. Nembhard, although I do not believe he was being exhaustive of the scenarios. A vulnerable elderly person or a person with a crutch or cane is simply obvious examples of individuals who may have unsteady footing and require extra attention and care. A person need not be afflicted with a physical disability or age-related impairment before a TTC bus operator should check to make sure a person is sitting or holding onto a stanchion.

[61] A more useful interpretation is one gained by looking at the purpose of the manual as well as the meaning of the words used in the section. The purpose of this section, like other sections of the manual, is to ensure that a TTC bus is operated lawfully, effectively, and safely. With respect to Step 3 of F7-2, this step is clearly designed to protect the safety of the passengers who are in the process of boarding the bus. What a reasonable and prudent driver will do will depend upon the situation encountered. For instance, if due to intoxication, physical impairment, illness, or some other reason like being unduly burdened by bags/packages, a passenger exhibits unsteady footing that might put them at foreseeable risk if they are not seated or holding onto something for support before the bus is placed into motion, a driver should not start driving. However, the focus is on the passenger who is boarding the bus. It does not deal other times while the bus is in motion. It does not speak to passengers who may already be riding the bus.

[62] In other words, Step 3 does not speak to what a reasonable driver should do regarding passengers who are already onboard and how their footing may be affected by factors existing at the time as the bus travels its route. Factors such as whether the bus is in motion or in the process of stopping or if the floor is wet or dry. For instance, a person standing on a moving bus will always be less steady than if a bus is stopped. Or a person standing on a bus with a wet floor is always potentially less steady than when standing on a dry floor. Or if a bus is making a sharp turn, this may lead to greater unsteadiness in the footing.

[63] But these external circumstances are not the focus of the provision. What Step 3 is concerned with are the passengers who board the bus appearing, behaving, or exhibiting a characteristic(s) that affects their footing such that a reasonable and prudent driver knows or ought to know that moving from the bus stop without ensuring that passenger is seated or holding a support may create a risk to that person's safety. It does not require a driver to wait for all passengers to be seated or holding onto a stanchion before moving; only those with such unsteady footing who might be vulnerable to being hurt if the bus is put into motion.

[64] The plaintiff's argument that because it was wet outside and inside the bus meant that all passengers had "unsteady footing" goes beyond the parameters of any reasonable interpretation of Step 3 of F7-2. It is not necessary for the safety of the passengers. Mere wetness on the floor of a bus does not require that a bus driver check that all passengers are seated or holding onto a stanchion before leaving a bus stop in order to ensure the safety of those within. Mere wetness on the floor does not make any boarding passenger have "unsteady footing." This would be unrealistic interpretation and would significantly hamper the operation of bus routes across this city. This is not required by Step 3 of F7-2.

[65] Based upon the whole of the evidence, I find that Mr. Nembhard complied with Step 3 of F7-2. There was no objective reason to believe that Ms. Seyom had unsteady footing as she boarded the bus. Indeed, Ms. Seyom herself does not suggest that there was something wrong or unsteady with her footing when she boarded the bus. Looking at the video, it is plain and obvious to me that she got on the bus without any difficulty like any other passenger. From the video, she walked up to the bus to catch it. I find from the video and Mr. Nembhard's testimony that Mr. Nembhard was able to and did see some of this. He testified that he did not believe her to be waiting at the stop. She then showed her pass and boarded. While the opportunity to see her was brief, there was no objective basis to believe that she had unsteady footing and that it would be prudent, in accordance with Step 3, to check further to make sure she was seated or holding a stanchion. Thus, Mr. Nembhard started to move the bus and did so without violating the TTC operator's manual.

[66] That said, whether Mr. Nembhard complied with this aspect of the operator's manual, is but a part, albeit an important part, of my assessment of whether the plaintiff has proven negligence. All the circumstances must still be considered. In other words, even if he complied with the provision in the manual, this does not relieve him of meeting the high standard of care that he owed to his passengers to operate the bus in a reasonable and prudent fashion relative to all the circumstances that existed at the time.

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[67] So let me then address this question: When should a reasonable and prudent bus driver have moved the bus in these circumstances? In my opinion, even having regard to the high standard of care on bus drivers, there is no breach of the standard of care proven on these facts.

[68] In terms of the gravity of the harm, falls on buses can lead to injuries that can be both minor and also quite serious. It is in that context that the law demands much of common carrier operators in whose hands the safety of fee paying passengers is placed. However, in this case, when I look at the factors of the reasonable foreseeability of harm and the costs that would have to be incurred to prevent the harm, I find that that the plaintiff has failed to prove her case. In the circumstances, Mr. Nembhard used all due, proper and reasonable skill and care required of him.

[69] First of all, Mr. Nembhard pulled away from the bus stop in a normal fashion. His driving *per se* was reasonably prudent. Indeed, he was pulling away slowly at the time. Given the manner in which he drove, it was not reasonable for him to have foreseen that a recently boarded passenger would fall if not seated or holding onto something. This is especially so given Ms. Seyom was not elderly, frail, sick, moving with difficulty, or somehow burdened by what she was wearing or bringing onto the bus: see as an example of such a sick and elderly passenger who fell, *Wang v. Horrod and B.C. Transit,* [1998] B.C.J. No. 1288 (B.C.C.A.).

[70] Secondly, I find it is not negligent to move the bus from a bus stop when a passenger boards when it is raining and is yet to be seated or supported by holding onto something inside the bus. To require that would not be reasonable. Reasonable prudence does not require it. Buses and other forms of public transit operate in all sorts of weather conditions, rain, snow, and ice. Passengers invariably will track moisture, snow, dirt/mud, and even ice onto the bus. I do not say that it would be reasonably prudent for a driver to move the bus regardless of the prevailing weather conditions and how that might affect the interior safety of the bus when put into motion. For instance in *Visanj v. Eaton,* [2006] B.C.J. No. 952 (B.C.S.C.) the bus service was found negligent when there was a pooling of water in the bus that the passenger slipped on. But each case must be assessed on its facts.

[71] Here there were no puddles or pools of water. Indeed, Mr. Nembhard testified that if there was that amount of water, the bus would go out of service. In this case, it was raining and the passengers were bringing in moisture. The floor was wet, but no more than what is demonstrated on the video. In general, in rain, snow, or sun, TTC bus drivers have moved their vehicles even while people are walking within the bus. This too is reasonable and prudent. It is a near necessity given that people must make their way to the exits when getting off and circumstances may be such, for instance in a crowded bus, whereby they may need to get to a position close to the exit while the bus is still in motion. Equally, when entering a bus, the individual responses upon entry are highly variable: some may immediately seek a seat, others may grab a pole, others may decide to walk further to the end of the vehicle, and some may even prefer to stand without seeking out a pole or something to hold onto. It would not be reasonable to require a bus driver to wait until every individual either takes a seat or holds onto something before the driver can, without being held negligent if something should happen to a passenger, be permitted to move the bus. It may dictate a TTC bus driver to exercise suitable caution in

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driving but it does not require him *not* to drive until all passengers are, at a time of their choosing, secured in that fashion. The costs of requiring a driver to stop and wait for every individual to sit or hold on at all times before moving the bus when it is wet outside would be a significant impediment to the functioning of the public transit system.

[72] I find that Ms. Seyom's fall was not reasonably foreseeable in the circumstances of this case. Ms. Seyom entered the bus with no difficulty and appeared to be an alert, physically mobile, and able-bodied middle-aged adult. None of the other passengers who boarded immediately before Ms. Seyom had any apparent difficulty with their traction. I also note that throughout the video evidence, no one but Ms. Seyom displayed any problem with the condition of the floor. Nothing could reasonably alert the driver to the possibility that the rain outside or the amount of moisture inside could create a foreseeable hazard for a slip and fall. There was no reason for Mr. Nembhard to depart from his usual and responsible practice of operating his vehicle. Of course, a fall is always a remote possibility in any circumstance and just logically, a slip and fall is more likely when the surface of a flooring is wet rather than dry, other things being the same. However, this slip and fall was not reasonably foreseeable given how little moisture was being tracked in, how slowly and prudently Mr. Nembhard was leaving the bus stop, and how commonly passengers walk safely within a moving bus in all kinds of weather conditions.

[73] While every case is factually unique, I note that in other cases where a plaintiff has fallen on wet floors of a bus have not led the courts to find negligence: *Rehemtulla v. B.C. Transit*, [1995] B.C.J. No. 3043 (S.C.); *Mauro v. Romanica,* [1988] 1 W.W.R. 684 (Man. Q.B.); *Orlov v. Halifax Regional Municipality (Halifax Transit)*, 2018 NSSC 152; *Brinacomb v. B.C. Transit,* [2000] B.C. J. No. 389 (S.C.).

[74] The plaintiff further submits that Mr. Nembhard should have checked in his mirror to make sure Ms. Seyom was "steady" before pulling out. It is submitted that to do so would not take that much effort and only a few seconds. However, in this case, based on the video, I find that it would have made no difference. If Mr. Nembhard had checked in his rear view mirror, he would have seen Ms. Seyom, just like she was when she entered the bus, walking to the rear without any difficulty or problem. A bus driver operating his bus with all due, proper, and reasonable care and skill would still have moved the bus. It would not have been reasonably foreseeable that given how she was walking normally, she would have fallen.

[75] In conclusion, I find that the defendant is not liable for any injury suffered by Ms. Seyom in her fall of May 8, 2012, as the TTC met the standard of care owed to her. The action is dismissed.

B. CAUSATION

[76] If my conclusion that the plaintiff has not proven the defendant to have breached the standard of care is wrong, I would have concluded that the plaintiff has proven causation. It is only damages for injuries that were caused by the accident that should be included in the

assessment of damages. The essential purpose and most basic principle of negligence law is to restore the plaintiff to the position they would have enjoyed "*but for*" the defendant's negligence. An injury is said to be caused by an accident if there is a new injury or the worsening of a pre-existing injury that was brought about by the accident.

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[77] For the TTC to be liable, the plaintiff must prove that Mr. Nembhard's actions caused Ms. Seyom's injuries. In other words, the plaintiff must prove that her injuries would not have occurred or been exacerbated "but for" the negligence of the TTC. On the other hand, if the conduct of the defendant was unrelated to any alleged injury by the plaintiff, the defendant is not liable for the loss. The defendant does not have to be the sole cause of the injury. As long as the defendant's act is "a" cause of the injury the defendant is said to have caused it: *Hanke v. Resurface Corp*., 2007 SCC 7at paras. 21-23.

[78] In this case, the TTC argued that causation has not been shown in two ways: 1) the plaintiff has not proven on a balance of probabilities that the negligence of Mr. Nembhard caused Ms. Seyom to fall; 2) the injuries that Ms. Seyom suffers from were not caused by the fall given her pre-existing conditions.

[79] As noted, I am satisfied that the plaintiff has proven causation. First, while I do have a lingering doubt in my mind as to whether Ms. Seyom may have slipped and fallen regardless of Mr. Nembhard's conduct, when the issue is assessed on the balance of probabilities, I find it more likely than not she would not have fallen but for his negligence. In other words, as the negligence involved putting the bus in motion before he ensured Ms. Seyom was seated or holding a stanchion, it is more likely than not that Ms. Seyom would not have fallen had the bus remained stopped after she got on. While the video does not show anything but a slow smooth departure from the bus stop, I am satisfied that Ms. Seyom may not have slipped if the bus was standing still. This goes beyond correlation and satisfies the test for causation.

[80] Regarding the injuries, while I appreciate the TTC's position, I find that the "but for" test has been satisfied. Ms. Seyom may have had physical problems in the past; however, she was able to work for a number of years before the fall and was essentially asymptomatic during that time. It was only after the fall that she has suffered from these constant physical ailments. She may have been more vulnerable to the injuries, but the TTC must take their victim as they find them.

C. CONTRIBUTORY NEGLIGENCE

[81] In this case, the defendant TTC has raised the defence of contributory negligence against Ms. Seyom. On this issue it is up to the TTC to prove, on the balance of probabilities, that Ms. Seyom failed to take reasonable care while on the bus, and that the extent to which she failed to take reasonable care somehow contributed to her injuries. What I must decide is whether a reasonably prudent person should have exercised more care for her own safety in the circumstances.

[82] If I am wrong about my conclusion that the TTC was not negligent in this case, I would have held that they have proven that Ms. Seyom was contributorily negligent. She failed to take reasonable care and this contributed to her injuries. Ms. Seyom does not dispute this.

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[83] Ms. Small who witnessed the fall stated the obvious when she opined in her testimony that she was surprised that Ms. Seyom did not sit or hold on to something, given that it was not safe for her not to. Of course, as a trier of fact, I expressly ignore that opinion. It may have been admissible for narrative purposes, but her opinion has no probative value. That said, based upon the evidence and the law applicable to contributory negligence, Ms. Seyom fell because she failed to take reasonable care and this contributed to her injuries. She knew that the bus had started to move. She was walking and had taken a number of steps as she headed towards the back of the bus. She walked by a number of empty seats. She walked by a number of poles. The bus was not at all crowded. I accept Mr. Nembhard's evidence that he never told her to move to the back of the bus. Given there was so much room on the bus, it makes no sense that he would.

[84] Ms. Seyom does not specifically recall the driver telling her to move back. She was inconsistent about this in her evidence, and at the end of the day, I find she has no real recollection one way or another. While it may have been laudable for her to move to the back on her own initiative even though it was not necessary, she could have made her way in a safer and more prudent fashion. A reasonable person in those circumstances would have held onto some of the supports such as the poles as they walked back to the rear. When she finally reached out for a pole for support, it was too late. Her feet slipped out from under her, she fell, and she injured herself. A similar conclusion was reached on similar facts in *Orlov v. Halifax Regional Municipality (Halifax Transit)* at paras. 140-143.

[85] In assessing the issue of apportioning liability, I must consider the relative blameworthiness of the parties: *Bidecci v. Neuhold,* 2014 BCSC 542 at paras. 86-87. The plaintiff suggests that liability be apportioned 50/50. The TTC submits that Ms. Seyom be held 80% responsible. In my opinion, given how readily her injuries could have been avoided had she simply sat down or held on to something, an equal apportionment of liability is not right. Ms. Seyom was an experienced TTC bus rider. Even if she had wanted to sit at the back of the bus, there were plenty of opportunities for her to hold a pole or other support as she made her way back. She did not do so until she was at the rear doors when she finally reached for a pole. Furthermore, the most one can say about Mr. Nembhard's conduct was that he started moving his bus on a rainy day without waiting for Ms. Seyom to sit down or hold on to something. I would have apportioned the degree of negligence in this case, 75% against Ms. Seyom and 25% against the TTC.

D. DAMAGES

[86] The plaintiff seeks both non-pecuniary and pecuniary damages. The evidence about damages comes from Ms. Seyom herself as corroborated by her son, her co-worker, Ms. Truong, and her boss at Jimmy the Greek, Mr. Zervas. They have testified to how Ms. Seyom felt,

worked, and functioned at home and at work. Except for Ms. Seyom, the defendant does not challenge that evidence to any significant degree. The medical evidence comes from her treating physicians, Dr. Kenneth Chen, her family physician, and Dr. Amirdain Mewa, her treating rheumatologist who saw her once after the accident. No litigation expert evidence was led by either party.

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[87] I do not intend to get into any great detail about this evidence. I will merely set out my analysis in brief.

[88] In terms of non-pecuniary damages, the plaintiff submits that a range of $75,000 to $85,000 is appropriate based upon the two cases he relies upon: *Hunt (Litigation Guardian of) v. Martin*, [2002] O.J. No. 3227 (S.C.J.) and *Vagliardo v. Arnaiz,* [2004] O.J. No. 2742 (S.C.J.). The defendant submits that if Ms. Seyom suffered any injuries at all, they were soft tissue injuries that resolved quickly and certainly no later than the six months that Dr. Chen felt it would take before she could return to work. The TTC submits *de minimis* damages in the range of $1,000 to $1,500 are appropriate. Again the defendant challenges Ms. Seyom's credibility. They argue that Ms. Seyom suffered from pre-existing back and right knee problems and submits that her problems after the fall were not that different from before.

[89] Prior to her fall, the evidence is that Ms. Seyom worked long hours at a relatively demanding job, cooking and serving. She worked as much as 60 hours a week on occasion. She enjoyed her work and the company of her co-workers and boss. At home, while she was not involved in a great many social activities, she did enjoy cooking for her friends and her church. She did pretty much all of the household chores aside from shopping for food, which her common law spouse did. This included cooking, cleaning, and doing laundry, even for her adult son when he was living in her home.

[90] After her fall she is able to do some housekeeping, but not as much as before. Her son helps. She stands and cooks a little bit. She cannot do these things like she could before due to her back injury. Her common law spouse helps by doing the shopping. She has never paid anyone to help with her housekeeping. The physiotherapy helped a little bit. She claims that the fall changed her relationship with her son and spouse. However, the details of this were relatively vague.

[91] Ms. Seyom is now working in a restaurant at King and Dufferin. She serves customers. She is not cooking. When asked if she is able to do it, she said she has no choice. She serves souvlaki and other food. She liked Jimmy the Greek better but said she cannot go back there.

[92] Her son, Mr. Kenene, testified and confirmed much of this. However, his testimony is that his relationship with his mother is actually better now since they are much closer.

[93] There is the medical evidence. The records of Dr. Chen and Dr. Mewa were presented and reviewed. I find that both witnesses were credible and reliable to the extent their testimony was confirmed by their clinical notes and records. In my view, given the nature of their medical

evidence and their sporadic treatment of Ms. Seyom, where their testimony is not confirmed by contemporaneous records it has significantly less weight.

[94] Ms. Seyom testified about the pain and suffering that resulted from the accident. It was sufficiently painful that she could no longer continue working. She testified the pain sometimes goes down into her leg. It is very painful, and she cannot sleep in bed. When asked how it changed her life, she testified that managing the pain is a struggle and she can't do the same things she did before. She takes Tylenol every few hours for the pain and it helps. Standing makes her back pain worse.

[95] In assessing this evidence, I have no doubt that Ms. Seyom was in genuine pain and suffered from the injuries she sustained in the fall. While the TTC challenges her credibility, I find that she was honest about this. She complained immediately to the ambulance attendant about her back and knee, and consistently sought medical attention from Dr. Chen. Her complaints were verified by the medical records, medical investigations were conducted, and medical treatment was recommended. While there are some inconsistencies pointed out by the TTC about her reporting of her complaints, this does not affect her credibility since they can be explained by communications difficulties, differing recollections, and the fact her knee pain may have masked her back pain, which became more of a focus as time passed.

[96] As for the pre-existing conditions, while I was satisfied causation was proven, I find that it is more likely than not that her pre-existing conditions have contributed to her pain and suffering. While she was asymptomatic the years before her accident, the medical records, especially the scans and her medical history of right knee and back complaints, make it more likely than not these pre-existing conditions have played an ongoing role in her disability. Therefore, her damages should be reduced somewhat to account for the contribution of her pre-existing conditions. That said, I agree with the plaintiff that the annular tear at L5-S1 and the tear in the right knee as shown on the MRI scan were more likely a result of the accident rather than the natural aging process that Dr. Mewa opined was a possibility.

[97] I agree with the TTC that her main problems were soft-tissue injuries. These became chronic over time. They likely aggravated her pre-existing conditions and became symptomatic. No surgery was required for her injuries and aside from Tylenol, she takes no other pain killers. For quite a while after the medical investigations were completed, the only treatment recommended for her has been re-conditioning.

[98] There was also a limited failure to mitigate her injuries. While I accept that she did go to some physiotherapy, she failed to see Dr. Bhanga, the physiatrist, or make other appointments despite Dr. Chen's repeated recommendations.

[99] I find the cases relied upon by the plaintiff is unhelpful in setting the quantum. In both cases, the injuries suffered were significantly more severe than what Ms. Seyom suffered from. In addition, the amount of medical investigation and evidence corroborating the injuries were far

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more extensive in those cases than in the instant case. Finally, there were no pre-existing injuries in *Vagliardo v. Arnaiz*.

[100] In my view, an award for non-pecuniary damages in the amount is $35,000 is appropriate: *Bideci v. Neuhold; Patoma v. Clarke,* 2009 BCSC 1069.

[101] As for pecuniary damages, the plaintiff claims loss of income, loss of competitive advantage, and past and future treatment, which is confined to physiotherapy.

[102] In terms of loss of income, while Ms. Seyom did not work again for approximately three years, the plaintiff only seeks one year of loss income given the lack of documentary evidence supporting these damages. The TTC argues that no damages should be awarded since Ms. Seyom never asked for modified duties, which would have been available to her if she had asked. Further, the new owners who purchased Jimmy the Greek in May or June of 2012 were willing to keep on all the old employees.

[103] Ms. Seyom started working in Canada in about 1993. Her first job was cooking in an Ethiopian restaurant for two years at $8 an hour. Her next job was in a coffee shop in the TD Tower as a server, where she was paid $10 an hour. Then she started at Jimmy the Greek at the Eaton Center in 2003. She chopped salad, prepared the meats, cooked the food, prepared full trays of food, put the trays in the oven, and served customers. It was a very demanding job. This was confirmed by her co-worker, Ms. Truong, and her boss. She testified she could do everything at work that she had to. She started at $8 an hour. She was paid $14 an hour by time she left. It was full time and she sometimes worked on the weekend. She never took long periods of time away. She liked her boss and coworkers. She had friends there. Sometimes she spoke with customers. There were no pension or health benefits.

[104] After the accident, she went back to work for three weeks. She felt very bad. She could not bend or lift. She could not stand as it was too painful. She told her boss about her injuries. She was informed that the job could not be changed for her. She gave up after three weeks. Exhibit 6 was her Record of Employment from Jimmy the Greek. Box 11 says her last day worked was May 31, 2012.

[105] On July 11, 2012, she applied for Employment Insurance and received it sometime after. Dr. Chen filled out a medical report for EI. After her benefits ended, she did not work again. She did not collect any disability benefits or social assistance. When asked if having physiotherapy treatment would have allowed her to go back to work sooner than she did, she agreed that it would have.

[106] Income tax summaries were presented. In 2007 her T4 income was $20,137. Ms. Seyom testified she had other income in 2007. In 2008, she testified that the money she made was not from Jimmy the Greek. However, she also testified that she worked there from 2003 to 2012. Eventually, she agreed she was working at Jimmy the Greek in those years. There is a tax return for 2009. There is no tax return for 2010. She could not explain why there was no return for that

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year. In 2011, she made $31,312 from Jimmy the Greek. In 2012 she made $19,895 from Jimmy the Greek and EI benefits. In 2013 she made no money.

[107] Ms. Seyom is now working. She is working at King and Dufferin at a restaurant. She only serves customers. In this new job she works as a server but not as a cook. As a server, she scoops food onto plates. She does not chop or peel. She stands and serves. Her rate is $14 an hour. She works 8 hours a day and 5 days a week for a total of 40 hours a week, and no overtime. She does not work on weekends. This job is less demanding than the one she did at Jimmy the Greek. There she cooked and cleaned. There she lifted trays of food of 3 or 4 kilos into the oven around 4 times a day. She had to bend over to do this. Now she can no longer do such work.

[108] In my view, the appropriate award of damages for lost income would be $31,000, as claimed by Ms. Seyom. I do not accept that Ms. Seyom would have been able to continue to work at Jimmy the Greek given her limitations. While it is true that Ms. Seyom could have asked for modified work, such an arrangement would not have been satisfactory for long. Jimmy the Greek is a small fast food outlet. It can get very busy. The work involved preparing, bending, and lifting. It is not feasible in my view to have an employee simply serve or use the cash register. That arrangement could not have lasted more than a short period of time. In addition, at the beginning, after the accident, Ms. Seyom could not stand for long periods of time, and there was no place at Jimmy the Greek for her to sit down. Given her level of education, skill, and experience she would not have been able to mitigate her damages by working somewhere else while in her physical state. I find the amount requested by the plaintiff in these circumstances to be reasonable.

[109] When it comes to loss of competitive advantage, Ms. Seyom claims $25,000. She relies on Dr. Chen's opinion that her injuries are now permanent. Ms. Seyom continues to struggle with standing for long periods of time and heavy lifting. Her injuries continue to make her less able to do jobs that she could do before. The TTC relies upon the same arguments they made regarding why Ms. Seyom should not be compensated for past lost income. Further, the TTC stresses the lack of evidence supporting any loss of competitive advantage, particularly the lack of expert evidence such as actuarial or vocational experts. In addition, they submit that the plaintiff has failed to present adequate evidence about her past and present employment and income levels which was particularly important given her lack of credibility regarding her history of employment.

[110] The concept of loss of competitive advantage is well-expressed by Wilton-Siegel J. in *Re Conforti*, 2012 ONSC 199 at paras. 33-35:

> The Trustee refers to six cases in which courts have awarded damages for a loss of competitive advantage. Most of these cases address the situation in which, while currently earning income at the plaintiff's pre-accident level, the plaintiff has a higher risk of being unemployed in the future as a result of the accident. The award for loss of competitive advantage is expressed as damages in

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> recognition of the fact that the plaintiff's competitive position in the open labour market has been compromised as a result of the plaintiff's injuries in the accident [cites omitted]. In other decisions, where the plaintiff had not yet established an income record, the loss of competitive advantage is expressed as a diminution in the capacity to earn income in the future [cites omitted]
>
> The essential elements comprising the concept of a loss of competitive advantage are expressed in *Pallos*, at para. 24, citing an excerpt from *Kwei v. Boisclair* (1991), 60 B.C.L.R. (2d) 393 (C.A.), at p. 399, where in turn Mr. Justice Taggart quoted with approval from *Brown v. Golaiy*, [1985] B.C.J. No. 31, at para. 8:
>
>> The means by which the value of the lost, or impaired, asset is to be assessed varies of course from case to case. Some of the considerations to take into account in making that assessment include whether:
>>
>>> 1. The plaintiff has been rendered less capable overall from earning income from all types of employment;
>>>
>>> 2. The plaintiff is less marketable or attractive as an employee to potential employers;
>>>
>>> 3. The plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and
>>>
>>> 4. The plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.
>
> Substantially similar statements appear in most of the cases cited above.
>
> The important point to be taken from these cases is that the loss of competitive advantage relates to a contingency that is additional to the customarily recognized contingencies that might affect an injured party's future earnings, such as those set out by Dickson J. in *Andrews*, at p. 232: unemployment, illness, accidents and business depression, to which should be added mortality. The concept is directed toward the contingent loss of an individual's future marketability - it may never occur but, if it does, it will do so in a manner that results in diminished income in the future. This raises the question of the relationship of the two concepts: loss of future earnings and loss of competitive advantage.

[111] On the evidence in this case, Ms. Seyom is now working at a comparable job with wages that are at the same hourly rate. However, she is working less hours. Further, the hourly rate now is the same as it was eight years ago when she had her accident. In addition, the job that she is working is significantly less demanding than what she was used to. I find it to be established that this was caused by the injuries she suffered. It must be emphasized that before the accident,

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she was a very hard worker. She would work up to and even more than 60 hours per week. She was valued. She was happy. Dr. Chen's view is that her injuries are permanent. Given the chronic nature of them, I would agree. While it is possible that re-conditioning and physiotherapy may help her, it will not likely do so in any significant way. Thus, Ms. Seyom is less capable overall from earning income from all types of employment. She is a chronically partially disabled worker with limitations that render her less likely to earn comparable pre-accident income. Given her experience she would likely only be able to be employed in the food service industry. She is less likely to be able to obtain work as a cook or a chef given the more labour intensive requirements of that job. In short, due to her disability, she is less valuable and less competitive in the market place. Even on the TTC's position, she is suitable to performing only modified work. Such modified work will not always be available to her. I find that there is a loss of competitive advantage in her case caused by the accident.

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[112] The more difficult question is how to quantify these damages. Very little evidence has been presented on this. That said, I recognize that expert evidence is not required. As stated by LaForme J.A. in *Fiddler v. Chiavetti*, 2010 ONCA 210 at paras. 63-65:

> There is no rule governing when actuarial evidence is required to establish a loss of income claim. For example, in *MacNeil Estate v. Gillis* (1995), 138 N.S.R. (2d) 1 (C.A.), the court held that actuarial calculations are necessary, whereas in *McKee v. Gergely*, [1986] B.C.J. No. 854 (C.A.), the court rejected the submission that the lack of actuarial evidence was fatal to a claim for future loss of earning capacity.
>
> There is no question that actuarial evidence is valuable in cases involving complex calculations, such as claims for future lost income or medical care which must be discounted for various contingencies. Nonetheless, the jurisprudence suggests that there is no requirement *per se* that a plaintiff obtain an actuarial assessment in every such case. Indeed, one could easily conceive of a situation in which the plaintiff did not have the resources to retain an expert, but had other persuasive documentary or testimonial evidence at their disposal. As a practical matter, I agree with the view expressed by J. Barry in "Actuarial evidence and the role of the actuary in personal injury actions" (Canada Bar Association: 1989) at p. 6 and 14-15:
>
>> A practitioner should give consideration to retaining an actuary in cases involving personal injuries of a serious nature; in other words, whenever a plaintiff has suffered physical injuries where there has been or will likely be some fairly serious permanent impairment which will affect either earning capacity or will require the plaintiff to purchase replacement services which they ordinarily did not need before the injury. Obviously a practitioner will have to use his or her own judgment vis-a-vis the seriousness of the impairment and the impact it will have on his or her client.

> Obviously, in cases of total or near total impairment or incapacity, the use of actuarial evidence will be crucial. However, in cases where the physical impairment is only partial, the decision of whether or not to retain an actuary becomes difficult.
>
> As with personal injury claims, an actuary may not be necessary in all fatal accident claims. It is my practice, however, to always retain an actuary in those cases in which the deceased was an income earner and survived by dependents. ... For other situations, a practitioner will have to determine on the facts whether or not an actuary is necessary.

Thus, Debbie Fiddler's failure to provide expert evidence in connection with her wage loss claim is not fatal. While it was open to Ms. Fiddler to adduce expert evidence, she chose to prove her loss of income without doing so and left it to the jury to make its own calculations. Although it is customary that expert evidence is called in this regard, I can find no reason to conclude that it is a legal requirement to do so. I would adopt the position expressed by Ferguson J. in *Buksa v. Brunskill*, [1999] O.J. No. 3401 (S.C.J.) at para. 5:

> The usual instruction to the jury is to suggest that if it finds that there will be a future loss of income it should determine the average annual loss and then consider the present value and then consider the various contingencies. These calculations are customarily explained by an expert witness but in my view the jury must make its own calculations whether or not there is expert evidence.

[113] On this issue, I have considered the amount of the average annual loss, which I will find to be $1,800 based on $31,000 (her last year worked) less approximate present salary of $29,200 ($14 an hour averaged to an average work year). If this is adjusted for likely increases she may have received if she had stayed in her job at Jimmy the Greek over the past eight years, this would have led to an increase in the amount of the annual loss. There are various contingencies that I must consider as well including the likelihood of the effect of her injuries on her hours of employment, the chances of staying in full employment, advancement and competitiveness, the contingencies of life, and likely retirement. When I consider all of this, while I admit it is difficult to come to any specific amount, I find that the plaintiff’s request for $25,000 to be reasonable.

[114] Finally, regarding physiotherapy, the plaintiff claims damages for past physiotherapy that she received and six further months thereof, relying on Dr. Chen’s evidence. I accept that Ms. Seyom received physiotherapy in the past. She testified she owed $4,700 to the clinic she went to. She believed each session cost $60. However, she has no invoices or other evidence to confirm this. It is explained that the physiotherapy clinic she went to has since shut down. No further efforts have gone into securing invoices or confirmation of the cost of the physiotherapy. I find, given my views on her testimony, that the specific amount she says she has paid is not very reliable. Further, in terms of future physiotherapy, the plaintiff has presented no evidence

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as to the cost of such sessions. The plaintiff claims a total amount of $10,940.00. While there is a lack of evidence to support a specific quantum of damages, I find the fair resolution of this head of damages would have been to award Ms. Seyom $7,000.

[115] The total damages suffered by Ms. Seyom are therefore $98,000. Of course, the final amount of damages awarded would have to take into account my finding of contributory negligence. Thus, the TTC would have been liable for 25% of the total damages: $24,500.

[116] If the issues of costs cannot be resolved between the parties, I will entertain written submissions, each one limited to two pages excluding any attachments (any Bill of Costs, Costs Outline, and authorities). The defendant shall file within 20 days of the release of these reasons. The plaintiff shall file within 10 days thereafter. There will be no reply submissions without leave of the court.

[117] Before I finish my decision, I want to say a few words directly to you, Ms. Seyom. I know your English is not good. Because of this, it will not be easy for you to understand many parts of my decision. So let me say this.

[118] You have been a good worker for Jimmy the Greek for many years. You fell on the bus on your way to work that day. It was wet and rainy. The bus driver moved his bus as you were walking to the back of the bus. You hurt yourself. Your life changed. But the TTC does not owe you money for what happened to you.

[119] I know you blame them. But the driver drove like he always does. In fact, he left the bus stop pretty slowly. The floors in the bus may have been wet, but the floors of a bus in Toronto, for many days of the year, are wet. The buses still have to run. Passengers can still move or walk in the bus. It is not reasonable that bus drivers have to wait on rainy days for all passengers to sit or hold onto a pole before moving. The TTC, or any other public bus system, cannot work like that.

[120] You falling the way you did, as the driver slowly pulled out, was not a harm that he could have seen happening. Even with the high standards we expect of bus drivers. There was nothing in the way you walked. The way you got on the bus. Nothing that should have told him that as a careful bus driver he should wait until you sat down or held onto something before he should move.

[121] I have looked closely at the video. Many times. I have carefully thought about all the evidence. I find that your foot just slipped out from under you. It was an accident. But an accident that no one is to blame for in the eyes of the law.

[122] I am sorry, Ms. Seyom, that your life changed so much that day. But doing what I must do as a judge, I must dismiss your claim against the TTC.

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Justice s. Nakatsuru

Released: November 20, 2018

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ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

ALMAZ ALEMU SEYOM

Plaintiff

– and –

TORONTO TRANSIT COMMISSION

Defendant

REASONS FOR JUDGMENT

NAKATSURU J.

Released: November 20, 2018