

Date: 20140814
Docket: 12/03
Citation: *Noftall v. Evely*, 2014 NLCA 30

**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL**

BETWEEN:

DOUGLAS NOFTALL

APPELLANT

AND:

MELISSA EVELY

FIRST RESPONDENT

AND:

JODI OLIVER

SECOND RESPONDENT

AND:

ST. JOHN'S TRANSPORTATION
COMMISSION

THIRD RESPONDENT

AND:

THE CITY OF ST. JOHN'S

FOURTH RESPONDENT

AND:

VICTOR FLEMING

FIFTH RESPONDENT

Coram: Rowe, White and Hoegg JJ.A.

Court Appealed from: Supreme Court of Newfoundland and Labrador
Trial Division (G) 201401T1518 (2011 NLTD(G) 164)

Appeal Heard: February 10 and 11, 2014
Judgment Rendered: August 14, 2014

Reasons for Judgment by Hoegg J.A.
Concurred in by White J.A.
Separate Concurring reasons by Rowe J.A.

Counsel for the Appellant: Dana Lenehan Q.C.
Counsel for the First and Second Respondents: Natalie S. O'Donnell
Counsel for the Third, Fourth and Fifth Respondents: Gerry R. Fleming

Hoegg J.:

INTRODUCTION

[1] This case concerns liability for a motor vehicle accident which occurred on March 26, 2002, at St. John's. Shortly before 9 a.m. on that date, Douglas Noftall dropped off his wife for work at an office building located at 251 Empire Avenue. Mr. Noftall exited the building parking lot and attempted to make a left turn to drive west on Empire Avenue (Empire). As he was attempting to execute his turn, the driver's side of his minivan collided with the front driver's side of a Metrobus, which was being driven by Victor Fleming in an easterly direction on Empire. Upon impact, Mr. Noftall's minivan spun backwards and collided with a red Toyota which had also been travelling east on Empire. Melissa Evely and Jodi Oliver were Metrobus passengers who were injured in the collision. The trial judge found Mr. Noftall 100% liable for the collision.

[2] Mr. Noftall appeals to this Court alleging that the trial judge made legal error in his assessment of the evidence and palpable and overriding errors of fact which caused him to wrongly decide liability for the accident.

Facts and Trial Evidence

[3] The trial took seven days and ten witnesses gave evidence.

[4] It is not disputed that when Mr. Noftall exited the parking lot to turn left onto Empire, he had to drive across the eastbound traffic lane to do so. There is also no dispute that the eastbound traffic lane adjacent to 251 Empire was wide enough for two lanes of eastbound traffic despite not being so marked. Just east of the entrance/exit of 251 Empire, the eastbound lane divides into two marked lanes – one for traffic turning left onto Freshwater Road and one for traffic continuing east through the intersection of Empire with Freshwater Road. On March 26, 2002, the markings on Empire were faint to non-existent due to their having been worn by winter weather conditions.

[5] At trial Mr. Noftall testified that in exiting the parking lot, he stopped at the stop sign and a burgundy van in the eastbound lane stopped and waved him to proceed onto Empire. He said he drove across the path of the burgundy van and when he was in the process of executing a left turn to go west on Empire he collided with the Metrobus. Mr. Noftall says that the Metrobus was on the left side of the eastbound lane passing traffic which was backed up to proceed straight through the Empire/Freshwater Road intersection. Mr. Noftall contended that the eastbound Metrobus was in a lane “of its own creation” when the collision occurred. According to Mr. Noftall, he had no obligation be on the lookout for it because it was not supposed to be there. He further maintained that the Metrobus driver ought to have seen and yielded to him as he exited the parking lot and crossed in front of the eastbound van that had stopped for him, and that therefore Metrobus is liable for the accident.

[6] Mr. Fleming testified that as he approached the entrance/exit to 251 Empire, he began to pull to the left side of the eastbound lane in preparation for entering the left-turn lane to turn onto Freshwater Road. He denied that traffic was backed up in the eastbound lane and that he was passing it at the time of the collision. He said his focus was on driving his bus safely along Empire as he approached the intersection and that he was not looking for vehicles that might be exiting from the parking lot at 251 Empire. He said he did not see Mr. Noftall’s vehicle until just before impact – in time to shout a warning to his passengers.

[7] Mr. Fleming gave several statements shortly after the accident. (A party’s proved admissions are admissible against him or her for the truth of their content in both civil and criminal matters (*R. v. Evans*, [1993] 3 S.C.R. 653-664)).

[8] In Mr. Fleming’s statement to Constable Foley of the Royal Newfoundland Constabulary on April 2, 2002 at 1:07 p.m., he said:

I was driving east on Empire Ave. Traffic was backed up in the right hand lane when I reached the left turn lane for Freshwater Rd. I entered it as I continued east a blue van came out of the parking lot of the Ford Motor Credit Building and entered my path. I collided with the van.

[9] Mr. Fleming gave two more statements on April 3, 2002. In the one given to insurance adjuster Marilyn Pike, he said:

I was travelling east on Empire Avenue in the left-turning lane to turn left onto Freshwater Road. The left-turning lane starts about 8-10 feet before the intersection of 251 Empire Avenue parking lot. I was going about 15 km an hour. The weather was good and the roads were dry. A blue van pulled out from parking lot of 251 Empire Avenue across two lanes of traffic and it collided with the bus. I didn't have a chance to stop. I braked but it was too late.

In the one given to insurance adjuster Bev Parsons on April 3, 2002 he said:

I was proceeding east on Empire Ave. I had just about a full load aboard – 60 people. I stopped at the bus stop across from the Taxation Centre and let off some students. I pulled back into the traffic which was heavy at the time. There was a lineup of traffic on the inside lane, just past O'Dea Pl. I went into the intersection where the p. lot of 251 Empire Ave exits onto Empire Ave. heading east towards the left turn lane and traffic lights at Freshwater Rd. I was going about 15 to 20 km when a vehicle just came out in front of me. I slammed on the brakes and braced myself against the wheel. The left front of the bus collided with the driver's side of this vehicle.

[10] Karen Webber, who was a passenger standing at the front of the Metrobus at the time of the collision, testified that she saw Mr. Noftall's vehicle pull quickly away from the building and drive out of the parking lot of 251 Empire without stopping at the stop sign and into the path of the Metrobus in an attempt to turn left on Empire. She could not recall seeing a burgundy van or another vehicle beside the Metrobus at the time of impact. Ms. Webber had no connection to any of the parties involved in the collision.

[11] Constable Paul Didham was one of the Royal Newfoundland Constabulary officers who investigated the accident. He attended at the scene. He testified that the front driver's side corner of the Metrobus struck Mr. Noftall's van along its left side from the driver's door forward. The point of impact on the respective vehicles was not disputed, and in any event, speaks for itself.

[12] Joseph Correia gave expert evidence respecting the speeds and locations of the Metrobus and Mr. Noftall's van at the time of the collision, the trajectory of Mr. Noftall's vehicle on impact and the time Mr. Fleming had to react to and avoid

colliding with Mr. Noftall's vehicle. Mr. Correia's evidence was based on, among other things, measurements and material that police and insurance companies had generated from their investigations of the accident, maps and drawings provided by city officials respecting Empire Avenue, and statements given by Mr. Fleming and Mr. Noftall shortly after the accident.

The Trial Decision

[13] The trial judge found that Mr. Noftall exited from 251 Empire without stopping at the stop sign and that he collided with the Metrobus in the manner described in paragraph 1, above. The trial judge found that Mr. Fleming was driving the Metrobus in the eastbound lane and that it had not been overtaking a burgundy van or any other traffic. In fact, the trial judge found that there had never been a burgundy van which had waved Mr. Noftall out onto Empire. The trial judge found that Mr. Noftall was in breach of his statutory duties to yield the right of way to oncoming traffic and to proceed cautiously from the exit of 251 Empire. The trial judge found that the Metrobus was lawfully proceeding east on Empire and that Mr. Fleming was keeping a proper look-out at all times despite not seeing Mr. Noftall's vehicle until just prior to the collision. The trial judge concluded that the driver of the Metrobus did not have sufficient opportunity to avoid the collision, and that the collision was "a product only of the negligence of Mr. Noftall". Consequently, he found Mr. Noftall 100% liable for the accident.

The Appeal

[14] Mr. Noftall alleges that the trial judge erred in law in his approach to and treatment of Mr. Fleming's evidence. Specifically, he argues that the trial judge failed to address the differences between Mr. Fleming's testimony and his previous statements, to assess all of Mr. Fleming's evidence in the context of the other trial evidence, and to explain why he accepted Mr. Fleming's trial testimony and rejected Mr. Noftall's evidence. Mr. Noftall also argues that the trial judge made palpable and overriding factual errors respecting the evidence of witnesses Ms. Karen Webber and Mr. Joseph Correia. Mr. Noftall maintains that all of the trial judge's errors caused him to err in his determination of liability for the accident.

Standard of Review

[15] Mr. Noftall argues that the trial judge's incorrect analytical approach to assessing Mr. Fleming's evidence was an error in law subject to the correctness standard of review, and he relies on *Performance Factory Inc. v. Atlantic Insurance Co.*, 2013 NLCA 11, 333 Nfld. & P.E.I.R. 191, to support his position.

Performance Factory involved the assessment of prior statement evidence given by the plaintiffs which was denied by them at trial and also at odds with some other trial evidence. In *Performance Factory*, this Court stated that in such circumstances, a trial judge must weigh the statement evidence in the whole of the remaining evidence to determine whether the statements had in fact been made and if so, to assess their truthfulness in the context of the evidence as a whole. The Court found that the trial judge had assessed the truthfulness of the statement evidence in that case independently from and without considering other relevant evidence, and determined this approach to be wrong in principle which attracted a correctness standard of review (paragraph 2). Mr. Nofall argues that the alleged errors of fact made by the trial judge respecting the evidence of other witnesses are subject to review on a standard of palpable and overriding error.

[16] Metrobus argues that all of the errors alleged by Mr. Nofall amount to errors of fact which are reviewable on a standard of palpable and overriding error. Metrobus also asserts that the trial judge's perceptions as to the credibility of witnesses and the reliability of their evidence ought to be accorded deference.

[17] The standard of review for questions of law is correctness and for findings and inferences of fact is palpable and overriding error (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235). Errors of principle extricable from questions of mixed fact and law amount to errors of law which are reviewed on a correctness standard (*Courtney v. Cleary*, 2010 NLCA 46, 299 Nfld. & P.E.I.R. 85, para. 15; and *Midnight Marine Limited v. Underwriters, Lloyd's, London*, 2010 NLCA 64, 302 Nfld. & P.E.I.R. 85, at paras. 26 and 28). On a question of law, the basic rule with respect to the review of a trial judge's findings is that an appellate court is free to replace the opinion of the trial judge with its own (*Housen*, paragraph 8).

Analysis

[18] Mr. Nofall argues that if the trial judge had properly assessed the truthfulness of Mr. Fleming's statements in the context of the totality of the trial evidence as mandated in *Performance Factory*, he could not have concluded there was no burgundy van and that Mr. Fleming was not passing other eastbound traffic when the collision occurred.

[19] The main differences between what Mr. Fleming said in his statements and what he said in his trial testimony concern the location of the Metrobus on Empire and whether it was passing other eastbound traffic when the collision occurred. Mr. Fleming's statement evidence indicates that the Metrobus was on the left side of the eastbound lane when the collision occurred. In two of his statements he

stated that he was already in the left-turning lane, and in the third he said that he was heading toward the left-turning lane when the collision occurred. In all of the statements he either specifically stated or it can be reasonably inferred from what he said that he was passing eastbound traffic which was backed up in the eastbound lane adjacent to 251 Empire when the collision occurred. Mr. Fleming's statement evidence accords with most of Mr. Nofall's trial evidence and also with the evidence of the police witnesses and Mr. Correia respecting the location of the vehicles on Empire at the time of impact. I note that Mr. Nofall's statements given shortly after the accident to insurance adjusters Marilyn Pike and Beverly Parsons reference the backed-up traffic, his being waved onto Empire by the driver of another eastbound vehicle (in one of his statements he describes the vehicle this driver was driving as a burgundy van) and that the Metrobus was proceeding eastward to the left of other eastbound traffic. I note that Mr. Nofall's trial testimony was entirely consistent with the statements he gave shortly after the accident.

[20] I agree with Mr. Nofall's argument that the trial judge's approach to the assessment of Mr. Fleming's evidence was not in accordance with the approach stipulated in *Performance Factory*. The trial judge accepted Mr. Fleming's trial testimony without attempting to reconcile it with his statement evidence or consider it in the context of the whole of the remaining evidence. While Mr. Fleming did not specifically reference a burgundy van in his evidence, in his statement evidence he clearly indicated that the Metrobus was on the left side of the eastbound lane passing backed-up eastbound traffic at the time of the collision. The trial judge's conclusions that there never had been a burgundy van (because Ms. Webber would have seen it if it had been there) and that the Metrobus was not passing any other eastbound traffic at the time of the collision are difficult to reconcile with both Mr. Fleming's and Mr. Nofall's statement evidence and with the whole of the remaining evidence, including the material generated by the police and insurance investigators. I also note that Ms. Webber's evidence was not necessarily inconsistent with eastbound traffic being situated to the right of the Metrobus. While she initially stated that the bus was not passing other traffic, she clarified her evidence saying that she could not say that there was no traffic, only that she did not see it.

[21] Other evidence also points to the Metrobus being located on the far left of the eastbound lane and passing traffic when the collision occurred.

[22] When Mr. Nofall's vehicle collided with the Metrobus, the impact spun it backwards causing it to collide with the front driver's side of the red Toyota. If the Metrobus were merely beginning to pull to the left side of the eastbound lane from

a single lane of traffic as Mr. Fleming testified and Ms. Webber suggested, the red Toyota would have had to have been behind it and would have been protected from being struck by Mr. Noftall's vehicle. The collision of Mr. Noftall's vehicle with the red Toyota tends to suggest that the Metrobus was fully located on the far left side of the lane and passing eastbound traffic on its right at the time of the collision. As well, the point of impact between the Metrobus and Mr. Noftall's vehicle indicates that the Metrobus was in a straight position on the far left side of the eastbound lane. If the Metrobus were just beginning to pull to the left side it would have been somewhat angled and Mr. Noftall's minivan would have collided with the passenger side of the Metrobus, not the driver's side.

[23] Accordingly, I conclude that the trial judge erroneously concluded that the Metrobus was not passing other traffic at the time of the collision and that there was no burgundy van which waved Mr. Noftall onto Empire. To my mind these findings are plainly not "in harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable" (*Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.)).

[24] Mr. Noftall also argues that the trial judge erred in accepting Ms. Webber's evidence that Mr. Noftall darted out of the parking lot onto Empire without stopping and in rejecting Mr. Correia's avoidance analysis evidence. The time Mr. Fleming had to react and avoid the collision was material to Mr. Noftall's argument that Mr. Fleming failed in his duty to drive with due care and attention. In this regard, the trial judge was not satisfied "that the opinion evidence of Mr. Correia regarding times and distances and his avoidance analysis for the bus can be accepted or be given any significant weight" because it rested on the assumption that Mr. Noftall had stopped at the stop sign before entering Empire. The trial judge, on the basis of Ms. Webber's evidence, found that Mr. Noftall did not stop at the stop sign on exiting the parking lot.

[25] Ms. Webber was a standing passenger at the front of the Metrobus and had a clear view of Mr. Noftall's vehicle exiting the parking lot and of the collision. She was not constrained in her ability to see Mr. Noftall's vehicle, for unlike Mr. Fleming, she did not have to focus her attention on driving. While Ms. Webber was shown to have been mistaken about some of the circumstances of the accident, which she readily admitted, her evidence that the Noftall vehicle did not stop on exiting the parking lot was not shaken. Her evidence on this point was also arguably consistent with Mr. Fleming's evidence, both his statement evidence and his testimony, that he did not see Mr. Noftall's vehicle until it appeared in front of the Metrobus. The trial judge was therefore entitled to accept Ms. Webber's evidence that Mr. Noftall did not stop on exiting the parking lot and to reject Mr.

Correia's evidence that Mr. Fleming had sufficient time to react to Mr. Noftall's advancing vehicle and avoid the collision.

[26] The remainder of Mr. Correia's evidence did not rely on the assumption that Mr. Noftall stopped, and was not undermined by any other evidence. While it may have been preferable for the trial judge to clearly explain which parts of Mr. Correia's evidence he accepted and which he rejected and why, he is not required to address every argument made by a party nor to give precise and detailed reasons respecting the acceptance and rejection of each piece of evidence (*R. v. R.E.M.*, 2008 SCC 51, [2008] 2 S.C.R. 3 and *R. v. J.M.H.* [2011] 3 S.C.R. 197 (para. 32)).

[27] In the result, I cannot conclude that the trial judge erred in accepting Ms. Webber's evidence respecting the failure of the Noftall vehicle to stop on exiting the parking lot and in rejecting Mr. Correia's avoidance analysis evidence, or that his reasons for doing so were so deficient as to constitute error.

Liability

[28] While I agree with Mr. Noftall that the trial judge erred in his approach to assessing Mr. Fleming's evidence and in reaching some of his factual findings, I do not agree that the trial judge's errors are material to his finding that Mr. Noftall is liable for the accident. In this regard, I am of the view that whether the judge's error with respect to evaluation of Mr. Fleming's evidence is characterized as legal or factual, the same result obtains. If his error was legal, it is immaterial to the result. If his error was factual, it was palpable but not overriding.

[29] The trial judge himself acknowledged that the location of the Metrobus on Empire and whether it was passing backed up traffic was insignificant, saying at paragraph 8 of his decision:

I have to say that a good deal of time was spent at trial reviewing prior alleged statements provided by Victor Fleming in particular and, to a lesser degree, Mr. Noftall. For Mr. Fleming, emphasis was placed on his take on the configuration of Empire Avenue near or at the scene of the collision as well as his knowledge at the time of the collision as to whether there were one or two lanes in the eastbound lane in which he was travelling. I have concluded that this evidence is, in the end, really not all that significant considering the totality of the evidence ...

and again at paragraph 36, where he stated:

... it is my view that the position of the bus in its lane of traffic at the time of the collision is of little relevance to the question of liability in these circumstances.

Analysis

[30] Sections 99, 110 and 120 of the *Highway Traffic Act*, RSNL 1990, c. H-3, (the Act) are relevant:

99. (1) A driver shall not drive a vehicle to or upon the left side of the centre line of a roadway in overtaking and passing another vehicle unless the left side is clearly visible and is free of oncoming and overtaking traffic for a sufficient distance to permit overtaking and passing to be completely made without interfering with the safe operation of another vehicle.

...

(3) The driver of a vehicle shall not overtake and pass other traffic in circumstances where the driver cannot see sufficiently far ahead to overtake and pass with safety.

[31] Section 110 states:

(1) Notwithstanding subsection (2), a person shall not drive a vehicle on a highway or in another place

...

(b) without due care and attention; or

(c) without reasonable consideration for other persons;

...

[32] Section 120 states:

Where a driver is about to enter or cross a highway from a private road, alley, building, driveway or lane, he or she shall yield the right-of-way to traffic approaching on the highway and, having yielded, he or she may proceed with caution.

[33] Mr. Nofall has submitted the following cases in support of his position on liability:

- 1) *Young v. Williams* (1997), 183 Nfld. & P.E.I.R. 333 (NFTD), which involved liability for a collision which ensued when a tractor trailer crossed a double line on a highway to pass a vehicle ahead of it which had stopped to make a left turn without signaling. The tractor trailer was found 80% liable for the accident;

- 2) *Daigle v. Turrett*, 2001 NBCA 38, 244 N.B.R. (2d) 148, which involved liability for an accident involving a motorcycle which stopped on a highway to make a left turn and was waved through the intersection by a truck which was coming from the opposite direction on the same highway. A third vehicle drove around the truck *to the right* and struck the motorcycle. The driver of the third vehicle was found liable for the accident; and
- 3) *Earle v. Fournier*, 2004 NBQB 248, which involved a similar situation to that of *Daigle*. A driver had commenced a left turn after being waved on to do so by a stopped vehicle coming from the opposite direction on the same highway. A third vehicle passed the stopped vehicle *on the right-hand side* and collided with the turning vehicle. The driver of the third vehicle was found liable.

[34] Regardless of whether Mr. Nofall stopped at the stop sign or was waved onto Empire by the driver of a burgundy van, and regardless of his speed in doing so, there is no dispute that he exited the parking lot at 251 Empire Avenue and attempted to turn left onto Empire. The parking lot he exited is that of a private building situated on land adjacent to Empire. Vehicular access to it is gained by turning directly into the parking lot from Empire and egress from it is governed by a stop sign. As Mr. Nofall was exiting from a private building (see section 120 of the *Act*) onto Empire, he had an obligation to yield to the approaching traffic and to proceed to turn onto Empire with caution.

[35] The Metrobus was approaching the exit from 251 Empire on the left side of the eastbound lane. There was no legal impediment to it being there and there was plenty of room for it to pass traffic backed up in the eastbound lane in order to advance to the turning lane, provided that if it strayed into the westbound lane there was no westbound traffic coming toward it and Mr. Fleming could see sufficiently far ahead to overtake and pass with safety (paragraphs 99(1) and (3) of the *Act*). The actual length of the turning lane for traffic turning onto Freshwater Road from Empire was very short – approximately 100 feet – making it understandable that eastbound traffic intending to turn from Empire onto Freshwater would begin to move to the left side of the eastbound lane prior to actually entering the turning lane. Such traffic cannot always make perfect lateral moves into a short turning lane at the precise point where the road is delineated into two lanes. Accordingly, the Metrobus was an approaching vehicle on Empire within the meaning of section 10 of the *Act*.

[36] Regardless of whether Mr. Noftall was waved onto Empire by the driver of a burgundy van, he was emerging from a private building onto a roadway and had a duty to yield to approaching traffic. He must be taken to have known that the invitation to proceed was only an invitation to pass in front of the burgundy van, for the driver of the burgundy van was in no position to guarantee to Mr. Noftall that he could proceed in front of other lawfully approaching traffic or execute his turn safely.

[37] Mr. Noftall testified that he did not look to his left for other eastbound traffic, but looked only to his right to be sure there was no approaching westbound traffic. Mr. Noftall was familiar with that section of Empire, having dropped off his wife at 251 Empire on many occasions before March 26, 2002. He must be taken to have been aware of the width of that eastbound section of Empire, and it ought to have been within his contemplation to look for traffic beyond the burgundy van to be sure he could drive across the full width of the eastbound lane on Empire before turning to drive west. Moreover, the Metrobus is a large vehicle, and it would not have been difficult for Mr. Noftall to see it if he had been proceeding with caution as he ought to have been.

[38] None of the authorities submitted by Mr. Noftall are akin to the factual situation of this case, and they are not of assistance to him. The entrance/exit of 251 Empire does not intersect with Empire in the way two roadways do. A vehicle emerging from a private building is not a contender for the right-of-way in the way that the two vehicles involved in *Young*, or the motorcycle and truck in *Daigle*, or the defendant and the stopped vehicle in *Earle* were. Moreover, there is a difference between passing stopped traffic on the right than on the left. When a vehicle passes stopped traffic on the right, the passing vehicle does not have a clear view-plane, and neither does any vehicle which might be making a legal turn from an opposite direction.

[39] This case is more akin to the circumstances of the accident in *Pond v. Lethbridge*, 2005 NLTD 60, 246 Nfld. & P.E.I.R. 189, upheld by this Court in 2006 NLCA 50, 259 Nfld. & P.E.I.R. 246. In that case, the plaintiff, who emerged from a hidden driveway onto a highway, alleged that the defendant was driving too fast into a blind curve on the highway, and that his speed contributed to the accident. It could not be proved the defendant was speeding, although driving conditions may have suggested lower than legal speeds. Nevertheless, the Court found that the plaintiff, although driving cautiously out of the driveway, failed to yield the right-of-way to approaching traffic and should not have moved until she was sure that no traffic was approaching. She was found fully liable for the accident.

[40] The bottom line in this case, as the trial judge found, is that the Metrobus had the right of way on Empire and Mr. Noftall, in exiting from a private building, did not. Not having the right of way, Mr. Noftall failed to yield to approaching traffic and failed to proceed onto Empire to execute his turn with caution as he was required to do.

Mr. Fleming's Driving

[41] Mr. Noftall argued that Mr. Fleming was in breach of his statutory duty to drive with due care and attention and with reasonable care for other persons (paragraphs 110(1) (b) and (c) of the Act). In the circumstances of this case, there is no indication that Mr. Fleming was driving without due care and attention or not taking care for other persons. Because Mr. Fleming did not avoid the accident does not mean that he was driving without due care and attention. He was confronted with a situation of imminent peril caused by Mr. Noftall coming out from 251 Empire and passing directly across his path. It is not reasonable to expect that Mr. Fleming, in the circumstances of this case and while in the agony of collision, would have been able to brake and stop his bus in the couple of seconds between when he first saw the Noftall vehicle and impact, and consequently avoid the collision. This is not to say that Mr. Fleming had no obligation to avoid a collision if he could reasonably do so (*Walker v. Brownlee and Harmon*, [1952] 2 D.L.R. 450 (S.C.C.)). Rather, it is to say that in the circumstances of this case, Mr. Fleming could not be expected to have been able to see and react to Mr. Noftall's vehicle in time to be able to take evasive action to avoid the collision. To say otherwise would require drivers to divert their attention from their own safe driving so as to be on constant alert for vehicles entering the highways unlawfully.

Conclusion

[42] In the result, while the trial judge's errors in his handling of the evidence were not material to his determination that Mr. Noftall was fully liable for the accident. Accordingly, I would uphold his decision and dismiss the appeal.

[43] I would order Mr. Noftall to pay costs to Metrobus and Ms. Oliver and Ms. Evelyn on column 3 of the scale of costs.

L. R. Hoegg J A.

I Concur: _____

C. W. White J.A.

Rowe J.A.:

[44] I agree with the result set out by my sister Hoegg. As to her reasons, I agree in part and disagree in part.

[45] I disagree with her conclusion at paragraph 18 that, having regard to this Court’s decision in *Performance Factory Inc. v. Atlantic Insurance Co.*, *supra*, the judge in this case made a reviewable error in his assessment of Mr. Fleming’s evidence.

[46] In argument, counsel for Mr. Nofall invited us to treat *Performance Factory* as an open door to characterize issues relating to the assessment of credibility as “legal” and, therefore, subject to review on the standard of correctness. If we accept his invitation and step through that door, the Court would readily and regularly engage in substituting our assessment of the credibility of witnesses for that of the trial judge. That is not our role.

[47] The standard to be applied concerning findings of fact is palpable and overriding error. This includes the assessment of credibility. Deschamps J. in *R. v. R.P.*, 2012 SCC 22, [2012] 1 S.C.R. 746 stated at para. 10:

Whereas the question whether a verdict is reasonable is one of law, whether a witness is credible is a question of fact. A court of appeal that reviews a trial court’s assessments of credibility in order to determine, for example, whether the verdict is reasonable cannot interfere with those assessments unless it is established that they “cannot be supported on any reasonable view of the evidence” (*R. v. Burke*, [1996] 1 S.C.R. 474, at para. 7).

(Emphasis added.)

Counsel for Mr. Nofall has demonstrated no palpable and overriding error by the trial judge in his assessment of Mr. Fleming’s evidence.

[48] Beyond this, what must be borne in mind is that the pivotal testimony in this case was not that given by Mr. Nofall or Mr. Fleming, both of whom are

interested parties. Rather, it is the testimony given by an independent witness, Ms. Webber, who had an unobstructed view of what occurred. The key passage is paragraph 20 of the decision, which reads:

Obviously, Ms. Webber's description of the driving of the Noftall van is much different from the testimony of Mr. Noftall has set out above. While Ms. Webber was not able to recall the color of the Noftall van and admitted that she incorrectly recalled the placement of the van after it came to rest subsequent to impact, I am completely satisfied that she is a credible and important witness who has described her observations of what transpired as she recalled them. Ms. Webber was unable to confirm the presence of the burgundy van referred to by Mr. Noftall and stated that the bus was not passing another vehicle at the time of the collision. I am satisfied that had there been a burgundy van operating as described by Mr. Noftall, Ms. Webber would have seen this. She had an unobstructed view of the events as they occurred and I find myself unable to discount or ignore the testimony of Ms. Webber in reaching my conclusions here as to what transpired.

[49] The foregoing would be sufficient for me to dismiss the appeal. However, I would add that I agree with Justice Hoegg's analysis that even if Mr. Noftall had entered Empire Avenue when beckoned to do so by the driver of a van, he would still be liable as it was his responsibility under the *Highway Traffic Act* to ensure that he was entering the roadway safely. Put simply, Mr. Noftall failed to keep a good lookout and drove into the path of the bus, causing the collision. For this, he bears full liability.

[50] I would dismiss the appeal, with costs to Mr. Fleming.

M. H. Rowe J.A.