

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:)

BERNARD JOHN SEMKIW)

PLAINTIFF)

AND:)

SULTANALI HUSSAIN SOMJEE)
AND ALFRED SPURR)

DEFENDANT)

REASONS FOR JUDGMENT PRINCE GEORGE

NOV 24 1989

OF

COURT REGISTRY

THE HONOURABLE

JUDGE PRESTON

Dick Byl, Esq.:

Counsel for the Plaintiff

Ms. C. G. Herb, Esq:

Counsel for the Defendants

Place and Date of Hearing:

Prince George, B.C.
August 30 and 31, 1989

THE FACTS:

This is an action for damages for personal injuries suffered by the plaintiff when a sundeck on which he was standing collapsed. The plaintiff was a tenant in the duplex unit to which the sundeck was attached. The defendants owned the duplex.

The plaintiff had rented the duplex unit from the defendants for some nine years before the sundeck collapse occurred on July 12, 1987. At that time the plaintiff, in the company of two of his male friends, was cooking dinner on a

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3 barbeque on the sundeck. One of the friends was coming out
4 of the duplex unit onto the sundeck with the steaks for the
5 barbeque. The plaintiff and his other friend were standing
6 on the portion of the sundeck located in front of the door and
7 at the outer edge of the deck farthest away from the door.
8 The plaintiff was resting his elbow against the railing of the
9 sundeck. When the friend carrying the steaks stepped onto the
10 sundeck the portion of the deck farthest from the duplex collapsed
11 dropping that portion of the deck about 30 inches to ground
12 level.

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14 The plaintiff and the barbeque were thrown against the
15 railing which collapsed. The plaintiff fell heavily to the
16 ground landing with the small of his back on the edge of the
17 2" x 6" railing which was beneath him. He suffered an injury
18 to a disc in his back at the L4-5 vertebrae level.

19
20 The plaintiff was employed as a faller in the logging
21 industry; a job which he had done for substantially all of
22 his adult life. He was 35 years old at the time of the injury.
23 He attempted to return to work the next day but was unable to
24 do his job. The injury caused him severe distress. It was
25 treated by conservative means by his doctors. He was admitted
26 to hospital on October 15, 1987 for rest and physiotherapy and
27 remained there until October 29, 1987. After his discharge
28 he continued with physiotherapy but his symptoms persisted.
29 After further examinations, a CT scan, and a myelogram, he had
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3 an operation on June 9, 1988. The operation was a lumbar
4 discectomy involving the removal of disc material from the L4-5
5 area. It was determined during the operation that protruding
6 disc material was pressing against the sciatic nerve.
7

8 The operation substantially relieved the symptoms which
9 had troubled the plaintiff. I am satisfied, however, that he
10 is left with a back which will not be able to withstand the
11 very heavy demands which a return to his previous employment
12 would place on it. There was ample evidence of the strenuous
13 nature of the job of a faller. The plaintiff was one of the
14 better fallers in the northern part of the province. Although
15 there was some indication in the medical evidence that a return
16 to this employment could not be ruled out, I am satisfied that
17 it is unlikely that will happen.
18

19 The plaintiff has concluded that his days as a faller
20 are over. In my view that is a reasonable conclusion.
21

22 LIABILITY

23

24 Mr. Dennis, an engineer who testified regarding the cause
25 of the collapse of the sundeck, attributed the collapse to
26 shifting of the posts which supported the deck. These posts
27 were upright 4" x 4" posts set on, but not attached to, concrete
28 pads. The posts supported a 2" x 10" beam, the edge of which
29 rested on the top of the posts. The posts were nailed to the
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3 beam. Mr. Dennis stated that the most probable reason for the
4 collapse was that the bottoms of the posts shifted because they
5 were not attached to the concrete pads and at some point the
6 angle became so great that they just folded under and the outer
7 edge of the deck collapsed. When this happened excessive force
8 was directed against the partially rotted handrail which collapsed
9 outward. The plaintiff who had been leaning against the handrail
10 was thrown outward and landed on the edge of the handrail injuring
11 his back.

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13 The defendants Somjee and Spurr had purchased the duplex
14 approximately 6 to 8 years before the collapse of the sundeck.
15 The defendant Spurr managed the rental, repair, and maintenance
16 of the duplex on behalf of both owners. In or about May of
17 1986 he obtained quotations from three contractors for renovation
18 of the duplex. This involved inspections of the duplex units
19 including inspections of the sundecks of both units. Mr. Spurr
20 was present at those inspections. All three contractors indicated
21 that both sundecks needed to be repaired or replaced. The
22 contractor whose tender was accepted indicated that the sundeck
23 on the unit rented by the plaintiff should be replaced. Mr.
24 Spurr applied for funding assistance through a government program
25 administered by the Central Mortgage and Housing Corporation.
26 This involved a further inspection by an inspector employed
27 under that program. Mr. Spurr was present at that inspection
28 on October 16th, 1986. A report was prepared as a result of
29 that inspection. This report was provided to Mr. Spurr near
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3 the end of October, 1986. The report deals with the sundeck
4 attached to the portion of the duplex rented by the plaintiff
5 as follows:

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7 To remove old sundeck and replace with
8 new. Approximate size 8' x 14' c/w railings
9 and steps. (SAFETY HAZARD) \$1,000.00.

10 The only entries on the inspector's report which had
11 the notation "SAFETY HAZARD" were the entries relating to the
12 sundecks on the two duplex units. Mr. Spurr, however, elected
13 to have the other aspects of the renovation proceed before the
14 replacement of the sundeck.

15
16 Mr. Spurr testified that he knew before the collapse
17 of the sundeck that it was dangerous. He told the plaintiff
18 to remove a wood stove he had stored on the sundeck because
19 of the condition of the deck. Mr. Spurr admitted that he didn't
20 take any steps to look after his tenants' safety after he became
21 aware of the dangerous condition of the sundeck.

22
23 Mr. Spurr agreed that he was aware from the three
24 contractors and from the inspector that the sundeck supports
25 required repair. When asked why he waited before having the
26 repairs performed he said, "I just never gave it a thought that
27 they were that seriously gone." Mr. Spurr indicated that he
28 had been on the sundeck a number of times after receiving the
29 inspector's report. On one of those occasions he was in the
30 company of his daughter.

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4 The plaintiff had replaced the decking on the sundeck
5 in the past. The decking boards had rotted. He removed the
6 boards, two or three at a time, and replaced them with new boards.
7 He said that the joists supporting the decking boards were sound.
8 The plaintiff knew that there was rot in the corners of the
9 railing surrounding the sundeck. The plaintiff said he did
10 not think that the sundeck was unsafe.
11

12 It is clear that the defendant Spurr knew of the dangerous
13 condition of the sundeck. It is also clear that he did not
14 warn the plaintiff of the danger. He elected to proceed with
15 other repairs and allow the dangerous condition to continue
16 to exist. I am satisfied that the plaintiff did not know that
17 the sundeck posed a safety hazard.
18

19 The duty of a landlord to his tenant is statutory. The
20 Residential Tenancy Act, R.S.B.C. 1979, C. 356.1 reads, in part,
21 as follows:
22

23 "tenancy agreement" means an agreement,
24 whether having a predetermined expiry
25 date or not, between a landlord and
26 tenant respecting possession of
27 residential premises.

28 3. (1) Sections 5 to 8 and 10 to 17 shall
29 be deemed to be terms of every tenancy
30 agreement.

8. (1) A landlord shall provide and
maintain residential premises and
residential property in a state of

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3 decoration and repair that

4 (a) complies with health, safety and
5 housing standards required by law,
6 and

7 (b) having regard to the age, character
8 and locality of the residential property,
9 would make it reasonably suitable for
10 occupation by a reasonable tenant who
11 would be willing to rent it.

12 (2) A landlord's duty under subsection
13 (1)(a) applies notwithstanding that a
14 tenant knew of a breach by the landlord
15 of subsection (1)(a) at the time the
16 landlord and tenant entered into the tenancy
17 agreement.

18 The Occupier's Liability Act, R.S.B.C. 1979, C.303 reads,
19 in part, as follows:
20

21 3. (1) An occupier of premises owes
22 a duty to take care that in all the
23 circumstances of the case is reasonable
24 to see that a person, and his property,
25 on the premises, and property on the
26 premises of a person, whether or not that
27 person himself enters on the premises,
28 will be reasonably safe in using the
29 premises.

30 (2) The duty of care referred to in
subsection (1) applies in relation to
the
(a) condition of the premises;
(b) activities on the premises; or
(c) conduct of third parties on the
premises.

6. (1) Where premises are occupied
or used by virtue of a tenancy under which
a landlord is responsible for the
maintenance or repair of the premises,
it is the duty of the landlord to show
toward any person who, of whose property,
may be on the premises the same care in

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3 respect of risks arising from failure
4 on his part in carrying out his
5 responsibility, as is required by this
6 Act to be shown by an occupier of premises
7 toward persons entering on or using them.

8 The effect of these sections was carefully considered
9 by Lamperson, C.C.J. in Zavaglia v. Mag Holdings Ltd., (1984)
10 50 B.C.L.R. 204; affirmed on appeal, (1986) 6 B.C.L.R. (2d),
11 286.

12 Section 8 of the Residential Tenancy Act gives rise to
13 a duty on the part of the landlord to maintain and repair the
14 premises to make them reasonably suitable for occupation. This
15 duty is owed to the tenant (and perhaps members of his immediate
16 family). Section 6 of the Occupier's Liability Act gives rise
17 to a duty on the part of the landlord where, as here, he is
18 responsible for the maintenance and repair of the premises.
19 His duty under that Act is to take care, in respect of risks
20 arising from failure to maintain or repair premises, to ensure
21 that persons using the premises will be reasonably safe in so
22 doing. The defendants were in breach of their duty under each
23 of these statutes. The plaintiff is within the classes of persons
24 to whom a duty is owed under both statutes. It was the breach
25 of duty that caused his injury.

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27 Defence counsel submitted that the plaintiff was
28 contributorily negligent because he leaned on the railing which
29 he knew to be weakened by rot. I cannot give effect to this
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3 submission. The plaintiff was unaware of the dangerous nature
4 of the sundeck. He could not anticipate its collapse. In the
5 absence of any knowledge of the dangerous nature of the sundeck
6 there was nothing unreasonable about the plaintiff's use of
7 the deck. I cannot find that he was negligent in leaning lightly
8 on the railing at the time of the collapse.
9

10 It was also submitted on behalf of the defendants that
11 the defect which resulted in the collapse of the sundeck was
12 a latent defect. I cannot give effect to this submission.
13 The dangerous condition of the sundeck was clearly known to
14 the defendant Spurr.
15

16 Accordingly, I find the defendants fully liable for the
17 injury suffered by the plaintiff.
18

19 NON-PECUNIARY GENERAL DAMAGES:
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21 Mr. Semkiw was completely disabled from the accident
22 of July 12, 1987 until his operation on June 8, 1988. From
23 June 8, 1988 until January 1, 1989 he was recovering from the
24 effects of the operation and was undergoing the adjustment
25 necessitated by his injury. After January 1, 1989 Mr. Semkiw
26 should have embarked on a process of vocational adjustment and
27 rehabilitation to facilitate his return to the labour force
28 in whatever capacity his injury allows. This process has not
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3 begun. I attribute this to the exigencies of this litigation,
4 not to any foreseeable consequences of the injury.
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6 Dr. Hugh MacNiel, an orthopedic surgeon who examined
7 Mr. Semkiw on November 30, 1988 at the request of counsel for
8 the defendants concluded:
9

10 In conclusion, this patient has made
11 substantial functional and symptomatic
12 recovery from injuries arising out of
13 a fall in July of 1986 necessitating
14 surgical excision of a lumbar disc. I
15 believe that he is fit to return to his
16 former occupation. He may well have low
17 back pain in the future. I think that
18 he has about 10% chance of having further
19 disc problems at the level that was formerly
20 involved. This would be on the basis
21 of the former insult to the disc in question
22 and the surgery required to resolve the
23 immediate continuing problem.

24 He may well develop pain in his back
25 at other levels and to some degree this
26 may be attributable to the excessive
27 mechanical stress placed upon the spine
28 as the result of the level that was injured
29 and treated surgically. On the other
30 hand environmental stresses and continuing
effects of his daily activities will play,
in my opinion, a more prominent role in
future symptoms of back pain which may,
or may not, necessitate formal treatment.

I am acquainted with some the
responsibilities of a faller and recognize
it as an arduous and physically demanding
type of work and although I think that
it is reasonable for this man to try and
resume his former occupation, I think
that if he feels that he is no longer
capable of it because of continuing back
pain he might well be able to function
as a bush foreman as you have suggested.

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3 Dr. Lake, the orthopedic surgeon who performed the
4 operation on Mr. Semkiw said in his medical-legal report dated
5 March 1, 1989:
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7 In view of his back complaints, I doubt
8 that he will be capable of performing
9 strenuous work in the future. Activities
10 which involve frequent bending, lifting
11 and prolonged standing or walking will
12 likely aggravate the back. I feel it
13 would be reasonable for him to retrain
14 for a more sedentary type job which would
15 allow him to avoid these types of
16 activities.

17 I do not feel that he is a candidate
18 for any future back operations including
19 fusions. He should be able to reasonably
20 control his back pain by watching his
21 weight and performing regular low back
22 exercises. He should not require
23 medications stronger than Aspirin.

24 Since the accident Mr. Semkiw has begun drinking alcohol
25 to excess. His relationship with his girlfriend has broken
26 up. In January of 1989 he attempted suicide because of the
27 depression brought on by these factors combined with an
28 adjournment of the trial of this action and concern over his
29 injuries.
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The injury resulted in a very substantial level of
disability and discomfort from July 12, 1987 to June 9, 1988.
There was a further period of recovery lasting until January
1, 1989. Mr. Semkiw is left with a back that will require careful
management on his part for the rest of his life. There is a
small but significant chance that he will have to have further

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3 surgery. I assess his non-pecuniary general damages at \$40,000.
4

5 PAST LOSS OF INCOME:
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7 Mr. Semkiw has not filed income tax returns for a number
8 of years. He testified that he earned \$50,000-60,000 gross
9 income in each of the three and one-half years preceding his
10 injury. He said that his expenses were approximately \$15,000
11 per year. Although there is some documentary evidence regarding
12 his earnings and expenses, it is incomplete. Witnesses who
13 had extensive experience in the industry were called and gave
14 evidence of fallers' earnings. Their evidence was of limited
15 assistance.
16

17 Mr. Semkiw could document revenue for 1984, 1985, and
18 1986. Some of his expenses had been deducted from these figures
19 but I am satisfied that Mr. Semkiw incurred expenses over and
20 above those expenses of approximately \$13,000 per year. Mr.
21 Semkiw said that he earned more than this. The difference,
22 he said, was accounted for by lost documents and by cash payments.
23 Taking the figures for 1984, 1985, and 1986 and deducting what
24 I estimate to be his additional expenses I arrived at the
25 following figures for those years.
26

27 NET INCOME

28	1984	45,553.23
29	1985	15,079.45

1986	24,815.44
Average	28,482.70

I am satisfied that this represents a minimum income figure for those years. Mr. Semkiw said that he received far in excess of this but is able only to offer estimates of the most general kind. These sorts of estimates are notoriously unreliable.

Doing the best I can with the income and expense evidence that is before me I find Mr. Semkiw's average yearly earnings, net of expenses, to be \$30,000 per year. It is likely that his income would have continued at this level to age 50 had the accident not occurred. On the basis of that level of earnings Mr. Semkiw's past loss of earnings to date of trial is \$64,032.00.

Mr. Semkiw has held 2 jobs of short duration since the accident. In both cases he acted as a forman-supervisor in small logging operations. One of these jobs was in September of 1988 and other was in August of 1989. Mr. Semkiw earned \$3,800.00 from these 2 jobs. This should be deducted from the \$64,032.00 figure to arrive at a net past loss of earnings of \$60,323.00.

FUTURE LOSS OF INCOME:

The plaintiff has only grade 8 education. He has worked

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3 in the logging industry since he was 15 year of age. It is
4 unlikely that he will ever recapture the earning ability that
5 he had before the injury.
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7 On the other hand, I am satisfied that his ability to
8 command a substantial income as a faller would not have lasted
9 too many more years. That job is a young man's job. The
10 plaintiff was already troubled with degenerative changes in
11 his neck as a result of an old neck fracture. He would have
12 been exposed to continuing possibility of injury or death in
13 his job. Considering all of the contingencies involved in his
14 continued employment as a faller, his neck injury, the resurfacing
15 of a drinking problem which had caused him to avoid alcohol
16 entirely for a period of five years, and the normal wear and
17 tear of the aging process, I am of the opinion that the plaintiff
18 would have been unable to continue his employment beyond age
19 fifty. He would, at that time, face the occupational adjustment
20 problem which he faces now.
21

22 Mr. Semkiw has suffered a serious impairment of his ability
23 to earn income. His education is limited and that will negatively
24 affect his ability to adjust to this change in circumstances.
25 The vocational reports which were tendered in evidence are of
26 limited assistance because of the nature of the problem. It
27 is difficult to predict what the economic impact of Mr. Semkiw's
28 injuries will be. This sort of situation places counsel for
29 plaintiffs in these cases in a difficult position. The trial
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3 of the action can be delayed until the employment consequences
4 are better known but this, in itself, will often have detrimental
5 effects on the adjustment process which the client must undergo.
6 There are sound policy reasons for ensuring that personal injury
7 cases are resolved at the earliest possible time. Consideration
8 has to be given as well to the defendant who is called upon
9 to meet a claim for damages which cannot be fully particularized.
10 As has frequently been observed the Court must do the best it
11 can with the available evidence to arrive at a fair estimate
12 of the plaintiff's loss.
13

14 The vocational report submitted on behalf of Mr. Semkiw
15 concludes:

16
17 On the other hand, if it becomes apparent
18 that it is not advisable for Mr. Semkiw
19 to return to this type of physically
20 demanding work [the work of a faller],
21 his occupational options and labour market
22 access become reduced. From a vocational
23 rehabilitation point of view, his low
24 educational level is a significant factor
25 in his poor residual employability
26 potential.

27 The client could mitigate his vocational
28 loss by upgrading his education, and
29 completing a short retraining program.
30 this would provide him with enhanced labour
market access, as well as earning potential
consistent with his pre-injury scenario.
Once again, the client's lack of motivation
to return to school could negatively impact
his success in a retraining program.
however, I do feel that a relatively short
"hands on" trades training program would
significantly enhance his residual
employability potential.

I think it unlikely that Mr. Semkiw will embark on a long retraining program and achieve thereby an income level equivalent to what he had before his injury. I think it more likely that after a shorter period of retraining or adjustment he will achieve employment earnings somewhat below his past earnings. I have the benefit of actuarial evidence which indicates that it would take a capital sum of \$10,770 to replace \$1,000 per year of Mr. Semkiw's earnings, assuming a retirement age of 50. On the basis of these necessarily imprecise considerations I assess Mr. Semkiw's future loss of income at \$95,000.00.

SPECIAL DAMAGES:

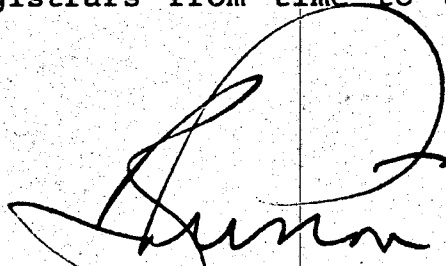
Special damages were agreed at \$312.20.

SUMMARY:

The plaintiff is entitled to judgment as follows:

Past loss of wages	\$60,323
Future loss of wages	\$95,000
Non Pecuniary general damages	\$40,000
Special damages	\$ 312.20
TOTAL:	\$195,635.20

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4 The plaintiff is also entitled to prejudgment interest
5 at the rates allowed by registrars from time to time and costs
6 of the action.
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10 Bruce M. Preston, L.J.S.C.

11 Prince George, B.C.
12 November 22, 1989
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