

Court of Appeal for British Columbia

ORAL REASONS FOR JUDGMENT:

Before

The Honourable Mr. Justice Legg
The Honourable Mr. Justice Wood
The Honourable Mr. Justice Gibbs

October 29, 1990
Vancouver, B.C.

BETWEEN:

SULTANALI HUSSAIN SOMJEE
and ALFRED SPURR

DEFENDANTS
(APPELLANTS)

AND:

BERNARD JOHN SEMKIW

PLAINTIFF
(RESPONDENT)

P.W. Walker
D. Byle

appearing for the Appellant
appearing for the Respondent

LEGG, J.A.:

This is an appeal from the judgment of the Honourable Judge Preston, now Mr. Justice Preston, who held the defendants Somjee and Spurr liable for injuries suffered by Mr. Semkiw when a sundeck at the duplex home which Mr. Semkiw rented from the defendants, collapsed.

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3 The ground of appeal advanced by the appellants is that
4 the trial judge erred in failing to find contributory negligence on
5 the part of Mr. Semkiw in leaning against a railing surrounding the
6 sundeck when he knew that the corners of the railing were starting
7 to rot and that the railing was unsafe.
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9 Mr. Semkiw, as I have noted, was a tenant in the duplex
10 situated in Prince George. This was owned by the appellants. Mr.
11 Spurr managed the duplex for both appellants.
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13 In May of 1986 Mr. Spurr became aware from inspections
14 carried out by three different contractors that the sundeck of Mr.
15 Semkiw's residence had to be repaired or replaced. In October,
16 1986 a report made by a C.M.H.C. inspector provided to Mr. Spurr,
17 referred to the sundeck of Mr. Semkiw's unit as a safety hazard.
18 In spite of this Mr. Spurr decided to proceed with other repairs
19 before replacing the sundeck.
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21 On July 12, 1986 Mr. Semkiw and two friends were cooking
22 dinner on a barberque on the sundeck. Mr. Semkiw was standing at
23 the front of the sundeck resting his elbow against the railing of
24 the sundeck, or as he said in his testimony, leaning against the
25 railing of the sundeck. One of the other men coming out of the
26 duplex stepped onto the sundeck and at that moment the front of the
27 sundeck collapsed dropping some 30 inches to ground level. Mr.
28 Semkiw and the barberque were thrown against the railing which also
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3 collapsed. Mr. Semkiw fell to the ground and landed with the small
4 of his back on the edge of the railing which was beneath him and
5 suffered an injury to a disc in his back.
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8 The evidence of an engineer called at trial was that the
9 primary cause of the sundeck collapse was that the supporting legs
10 or columns of the sundeck had not been attached to the concrete
11 base upon which they rested. As result, one of the columns had
12 gradually moved out of its original position and become unstable.
13 The engineer also stated in his report that the effects of the
14 collapse were compounded by the inadequate handrail which collapsed
15 when fallen upon. The railing was not the primary cause of the
16 collapse.

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18 Mr. Semkiw had been advised in the fall of 1986 that the
19 sundeck was to be repaired. He knew that the decks needed painting
20 and the railing was beginning to rot at the corners. He was also
21 aware that there was some dry rot under the steps.

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23 The learned trial judge held that the defendant Spurr
24 knew about the dangerous condition of the sundeck but he did not
25 warn the plaintiff of the danger and that he elected to proceed
26 with other repairs and allowed the dangerous condition to continue
27 to exist. The judge held that the plaintiff did not know that the
28 sundeck posed a safety hazard.
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3 In dealing with the issue of contributory negligence the
4 learned judge said this:
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6 Defence counsel submitted that the
7 plaintiff was contributorily negligent because
8 he leaned on the railing which he knew to be
9 weakened by rot. I cannot give effect to this
10 submission. The plaintiff was unaware of the
11 dangerous nature of the sundeck. He could not
12 anticipate its collapse. In the absence of
13 any knowledge of the dangerous nature of the
14 sundeck there was nothing unreasonable about
15 the plaintiff's use of the deck. I cannot
16 find that he was negligent in leaning lightly
17 on the railing at the time of the collapse.

18 Counsel for the appellants submitted that the learned
19 judge erred in his findings in this part of his reasons. He
20 submitted there was evidence which showed that the plaintiff was
21 aware of the dangerous nature of the sundeck and that the trial
22 judge erred in his finding that the plaintiff was leaning lightly
23 on the railing at the time of the collapse. He directed our
24 attention to parts of the plaintiff's evidence which indicated that
25 the plaintiff was aware that the stairs needed to be repaired and
26 were unsafe and that the railings were unsafe and had to be
27 replaced because the corners were starting to rot. He also
28 referred us to evidence that the plaintiff was leaning on his elbow
29 on the railing with his upper body weight leaning on his elbow.
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31 Counsel submitted that the plaintiff was aware of the
32 unsafe condition of the railing and the steps and that it was
33 within the foreseeable are of risk of harm to the plaintiff that
34 the deck would collapse and that he would injure himself by

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3 learning on the railing by leaning on his elbow. He referred in
4 support of his submission to the decision in *Hughes v. Lord Advocate*
5 (1963) 2 W.L.R. 779 [1963] 1 All E.R. 705 and *Spagnolo v. Margesson's*
6 *Sports Ltd.* (1981), 127 D.L.R. (3d) 339 a decision of the Ontario
7 County Court. With deference to counsel I cannot accede to that
8 submission.
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11 The evidence before the trial judge is that the cause of
12 the collapse was the condition of the supports and the lack of
13 proper connections to the short columns under the deck and that
14 these columns moved and a slight movement would cause them to kick
15 out. There was no evidence that the cause of the collapse of the
16 deck was the rotting in the railings or the unsafe condition of the
17 steps.

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19 There was accordingly ample evidence upon which the trial
20 judge was entitled to conclude that the plaintiff did not know that
21 the sundeck posed a hazard.

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23 This Court should not disturb a finding of fact or an
24 apportionment of negligence made by a trial judge when those
25 findings are supported by the evidence.

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27 For those reasons I would dismiss the appeal.

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29 WOOD, J.A.: I agree.
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3 GIBBS, J.A.:

I agree.

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5 LEGG, J.A.:

The appeal is dismissed.

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7 *H.P.L. J.A.*
8 H.P.L.
9 J.A.