

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

PAUL McKEE

PLAINTIFF

AND:

JOSEPH SEBASTIEN  
POTY

DEFENDANT

PRINCE GEORGE  
REASONS FOR JUDGMENT  
MAY 21 1986  
OF REGISTRY

THE HONOURABLE JUDGE CURTIS

Dick Byl, Esq. ✓

Peter Rogers, Esq.

Date and Place of trial:

for the Plaintiff

for the Defendant

Prince George, B.C.  
April 8, 1986

On the 21st of June 1984 Paul McKee was riding his motorcycle on Blackburn Road in Prince George when the defendant backed a pickup truck into his path. The plaintiff struck the rear bumper of the truck and was injured.

The parties have agreed that the defendant is 75% at fault and the plaintiff 25%. The amount of general damages, past and future wage loss are in issue.

The plaintiff was 18 at the time of the accident. He quit school in November 1982, having partially completed grade 9, because he didn't feel he was getting any where. He took a job working at Hercules Tire where he earned \$6/hr. changing tires until he was laid off in January

1983. His subsequent employment included pulling and planting tree seedlings at Ruff's Greenhouse and lift operator at Tabor Mountain Ski area.

As a result of the accident the plaintiff suffered the following major injuries:

- (a) Compound comminuted fracture of the right femur just above the knee.
- (b) Compound comminuted fracture of the right tibia just below the knee.
- (c) Fracture of the right fibula.
- (d) Grade I to Grade II rupture of the posterior cruciate ligament of the right knee.
- (e) Fracture dislocation of the joints of his dominant right hand including damage to the tendon used to extend the right index finger.

The treatment the plaintiff received included:

- (a) 17 days hospitalization in the Prince George Regional Hospital with
  - (i) an operation to debride the wounds and remove embedded grass and dirt particularly from the knuckles of the right hand, plus the placing of a Steinman pin and splint below the right knee for traction.
  - (ii) open reduction and plating of the tibial fracture, open reduction plating and bone grafting of the fractured femur, closing and splinting of the right hand June 27, 1984.
  - (iii) closure and skin grafting of the thigh and tibia wounds and skin grafting of the right index finger. July 5, 1984.
- (b) Hospitalization in the Prince George Regional Hospital, August 22nd - August 31st, 1984 with surgery to drain the tibia wound which had become infected, including drilling of the tibia.
- (c) Hospitalization in the Prince George Regional Hospital, November 19th - 21st for continuing problems with infection of the right leg.

1  
2  
3  
4 (d) Hospitalization, November 28, 1984 to December  
5 14th, 1984 in Vancouver General Hospital including  
6 an operation November 30th to remove the tibial  
7 plate, in the hopes of reducing the infection  
8 problem, at which time the wound was left open  
9 to promote proper healing.

10 (e) X-ray investigation December 25/84 at Prince  
11 George Regional Hospital to investigate possible  
12 refracture of the right fibula and tibia.

13 (f) Day surgery in Prince George November 27,  
14 1985 for a tendon graft on the right index finger  
15 using a tendon removed from the wrist, with a  
16 pin placed in the knuckle to prevent movement of  
17 the finger.

18 (g) Removal of the pin in the index finger  
19 January 15, 1986.

20 The plaintiff experienced a great deal of pain from  
21 the bone and skin grafting operations. In August of 1984  
22 infection produced a swelling and discolouration of the  
23 right ankle and leg. The treatment used to try and eradicate  
24 this infection was extremely painful as it involved leaving  
25 the wound open and repacking it every 3 or 4 hours. The  
26 pain was bad enough to require shots of morphine  $\frac{1}{2}$  hour  
27 before each repacking.

28 When hospitalized in Prince George on the 19th of  
29 November 1984 the plaintiff became impatient with what  
30 he perceived as a lack of appropriate treatment and checked  
himself out of the hospital. He went to Vancouver where  
he received the treatment required from Dr. Meek. I find  
nothing wrong with the plaintiff's action in doing so,  
and in any event no suggestion has been made that his  
recovery was retarded by this action.

Early on Christmas Day 1984 the plaintiff slipped

1  
2  
3 and fell while attempting to negotiate icy stairs at a  
4 friends home where he was attending a party. The defence  
5 has suggested that the fall was the plaintiff's fault as  
6 a result of his use of alcohol or drugs at the party.  
7 That has not been proven and accordingly the quantum is  
8 assessed on the basis that the defendant is responsible  
9 for the full extent of the plaintiff's injuries.

10 Following the fall in December 1984 the plaintiff  
11 wore a cast until February 1985, and a brace until May  
12 1985. In May he began walking with a cane which he used  
13 until about August 1985. During the time he was experiencing  
14 considerable pain the plaintiff was taking up to 2 Tylenol  
15 # 3's every 3 hours. Around May of 1985 the pain had reduced  
16 to the extent that he was able to stop taking the pain  
17 killers. The plaintiff testified that about August of  
18 1985 his health was generally good except for the residual  
19 limitations arising from his leg and right index finger.

20 It was not until November of 1985 that the extensor  
21 tendon of the index finger was repaired, at which time  
22 the knuckle of that finger was pinned to keep it immobile  
23 until January 15th, 1986. Prior to the operation the finger  
24 had been without useful mobility.

25 Since Christmas of 1984 the plaintiff has suffered  
26 repeated outbreaks of osteomyelitis (infection) in his  
27 right leg. When an outbreak occurs a hole will develop  
28 in his skin and puss will drain out, occasionally accompanied  
29 by bone chips. An outbreak will last anywhere from 1 week  
30

1  
2  
3 to 1 ½ months and requires clean dressings and bandaging.  
4 This has occurred 6 times or more.

5 Prior to the accident the plaintiff was in good  
6 health. He took a martial arts course for 1 year and enjoyed  
7 skiing, hockey, tennis and raquet ball. His evidence was  
8 that he skied frequently and aggressively. He tried skiing  
9 2 weeks prior to the trial and enjoyed himself although  
10 he had to ski more slowly and rest his leg at lunch time  
11 as his quadriceps were sore. He plans to ski more and  
12 says he will try to get back to his previous level although  
13 he is not sure he can. He has tried jogging since the  
14 accident but could go only half a mile.

15 With respect to the future prospects of the  
16 plaintiff's injuries the medical evidence is:

17 KNEE

18 Dr. Crous February 15, 1985

19 There is little doubt that the instability  
20 of the knee will lead to some degree of  
21 disability in the future and early  
22 degenerative change in the knee in the  
23 long term.

24 Dr. Mackenzie March 13, 1986

25 . . . major ligamentous injury to the  
26 knee. . .  
27 He may have further problems with giving  
28 way and is certainly a candidate for  
29 degenerative change happening in the knee  
30 . . . may require operative intervention. . .

31 TIBIA

32 Dr. Konowalchuck March 3, 1986

33 Although the X-rays are not suggestive of  
34 chronic osleomyelitis the history of this  
35 wound certainly is, with its recurring healing

1  
2  
3 and breaking down. I would suspect that this  
4 recurring infection might well be chronic,  
5 and that it might recur over the course of  
6 many years. Accepted treatment for this type  
7 of problem consists of excising the scar  
8 tissue with poor blood supply, removal of any  
9 unhealthy bone, and coverage of the wound  
10 with well vascularized soft tissue. . . .  
11 which are major undertakings. Even this  
12 surgery would not be guaranteed to eradicate  
13 the on going recurrent infection process  
14 present in the leg.

15 It is likely that this will require further  
16 surgical intervention.

17 Dr. Mackenzie March 13, 1986

18 I don't think there is any question that this  
19 man has chronic osleomyelitis present in the  
20 tibia. This may give him very few problems  
21 in the future but certainly he is at risk for  
22 chronic continued drainage from the tibia  
23 and this may in the future, require further  
24 operations. . . Once a bone is infected like  
25 this you can never be sure that the infection  
26 is completely cleared up and this will be a  
27 possible source of problem for this man for  
28 the rest of his life.

29 RIGHT INDEX FINGER

30 Dr. Konowalchuk March 3, 1986

Tendon grafts of the extensor tendon in  
the region of the proximal interphalangeal  
joint are notorious for having poor results.  
There is often a complete failure of the  
graft with recurrence of the original  
deformity and inability to extend the digit.  
Even if the grafts are successful it would  
be extremely unusual to have normal motion  
in the finger. One could expect that the  
ability to flex the finger at the proximal  
interphalangeal joint would be quite limited.  
Maximal motion of the finger will probably  
not be realized until about a year and a  
half after surgery. An accurate prediction  
of outcome is impossible to make at this time.  
. . . it is unlikely that the motions of this  
finger will ever approximate those of the  
normal left index finger. . . . there is a  
slight chance of traumatic arthritis in the  
joint.

Dr. Mackenzie March 13, 1986

I don't think this man will have a completely normal index finger with regard to flexion and this will get in the way somewhat with his activities which require a completely closed fist over small objects.

The plaintiff is booked to have Dr. Mackenzie remove the plate from his femur in the summer of 1986. This operation involves the usual risks of general anaesthetic and infection. The Plaintiff has stated that if his index finger does not improve he wants an amputation.

PAST WAGE LOSS:

The plaintiff's employment prior to the accident was:

November 1982 - January 1983 Hercules Tire	\$6/hr.	Not stated
--	---------	------------

1983	Ruff Holdings Co. Ltd. - pulling and planting trees (3 days in June plus time in July and August \$5/hr)	1127.50
------	--	---------

1984	Ruff Holdings Ltd.: 7 days approx. in April	280.00
------	---	--------

	Tabor Mountain Ski & Recreation (lift attendant \$5/hr)	882.25
--	---	--------

	2 weeks employment to gas station in Alberta immediately prior to accident	Not stated
--	--	------------

Since the accident the plaintiff's earnings have been:

1984	Ruff Holdings Co. Ltd.	432.00
------	------------------------	--------

1985	Ruff Holdings: 5 days in summer 16 days Oct/Nov.	830.00
------	--	--------

Peeling logs for friend in fall approx. 300.00

The medical evidence does not specifically state the period of the plaintiff's disability. On the evidence I find the Plaintiff to have been disabled from the date of the accident to the end of August 1985 when he stopped using his cane, a period of 14 months with respect to the leg. The right index finger was not restored to use until after January 1986, however, I do not find that the finger alone prevented the plaintiff from working, particularly as the work he usually did during the relevant period of time was lift attendant which he probably could have done. It is true that the plaintiff worked in the fall of 1984 at Ruffs when he was still on crutches however the work available for his abilities at that time was limited and he had significant problems after that.

Anna Ruff testified that there was 4 months of work per year available at 5-6 days/week, 8-10 hours per day. In addition to this work the plaintiff missed a season's work at the ski hill which paid 4.50/hr. 8hrs/day, 5-6 days per week. Using these figures I find a wage loss as follows:

Ruff's Greenhouse - fall 84, spring 85. 4 months, 24 days/month 8 hrs/day \$5/hr.	3840.00
Tabor Mountain - winter 84/85 8 hrs/day, 24 days/month, 2.5 months, 4.50/hr.	2160.00
Less actually earned:	(432.00)
Net Loss	5568.00



Rounded to

5600.00

It is not possible to be precise with these figures as there is no real certainty as to how many hours of work would actually have been available, particularly for the ski area from which no evidence was called. I consider that the figure of \$5600 fairly covers the plaintiff's loss during the 14 month period plus any loss that may have been caused thereafter by his finger disability. I suspect that the hours used in calculating the loss are on the generous side of what might actually have been worked.

FUTURE WAGE LOSS

The plaintiff has presented a case for future wage loss based upon an opinion dated March 6, 1986 of Barrie Mowat a Registered Psychologist, and the opinion of M. L. Stickley an actuary .

Mr. Mowat is a registered psychologist qualified to give opinion evidence concerning vocational testing, aptitudes and employability. Mr. Mowat based his assessment on tests done on the plaintiff March 3 and 4th, 1986 and medical opinions he had received. The results of the testing showed that the plaintiff had an I.Q. of 80-95 and scored poorly in general learning ability, numerical aptitude, spatial aptitude and finger and manual dexterity. Mr. Mowat's opinion was that as a result of the accident the job opportunities available to the plaintiff have been reduced 50%. He found Mr. McKee to be poorly prepared for finding or retaining employment. He concluded that

1  
2  
3 Mr. McKee would tend to work best in an outdoor job with  
4 highly structured and repetitive work where the results  
5 were readily apparent and he could work independently of  
6 others. It was his opinion that where the plaintiff prior  
7 to the accident could have obtained sporadic or temporary  
8 employment in a number of manual and unskilled activities  
9 on an as needs basis he can no longer rely on this style  
10 of employment.

11 The defence called William Kelley, also a registered  
12 psychologist qualified to give opinion evidence concerning  
13 vocational testing, aptitudes and employability. He agreed  
14 that Mr. Mowat had prepared his report on the basis of  
15 proper materials but disagreed with his conclusion as to  
16 the percentage of opportunities closed to the plaintiff  
17 by the accident. He also disagreed with the selection  
18 of jobs which Mr. Mowat listed in appendix A and B to his  
19 report. It was Mr. Kelley's opinion that that Mr. McKee  
20 was not likely to work as plasterer, pipe fitter, floor  
21 layer, lineman, sheet metal worker or painter prior to  
22 his injuries because of the limiting factors imposed by  
23 McKee's low general aptitude and I.Q. scores.

24 Mr. Kelly did agree that any heavy laboring job  
25 involving a lot of standing with heavy lifting was excluded,  
26 and that the number of jobs now available to the plaintiff  
27 were reduced.

28  
29 The actuarial report capitalized the value of loses  
30

1  
2  
3 of 1.62/hr to 1.89 per hour for 1500 to 2000 hours per  
4 year over the plaintiff's working life expectancy of 40  
5 years and 2 months. A loss of 1.62 per hour on 1500 hours  
6 per year for example has a capitalized value at the date  
7 of trial of \$61,000. Alternatively a loss of \$1000 per  
8 year over the plaintiff's working life expectancy has a  
9 value of \$25,120 at the trial date.

10 The plaintiff's evidence was that before his injuries  
11 he thought about working in the bush or trying to get a  
12 mill job. Now he does not think he could work in the bush.  
13 He doesn't think his hand can take the vibration from a  
14 chainsaw or his leg the walking. He also feels his right  
15 hand will not have the strength to work with wrenches.  
16 He says he can now walk a mile or so but doesn't think  
17 he can walk 20. As far as the future is concerned the  
18 plaintiff now plans to complete his grade 12, then look  
19 for a job that does not involve heavy labor.

20 The medical opinions do not state that the plaintiff  
21 is prevented from doing heavy labor as a result of his  
22 leg injury, however it is reasonable to conclude that  
23 particularly in the long term the plaintiff will be  
24 restricted by possible knee problems.

25 The plaintiff was just beginning his working career  
26 and it would not be fair to conclude from his prior work  
27 history that the type of work or the amount would be limited  
28 to his experience to date. I find it is probable that  
29 the plaintiff would have at some time obtained regular  
30

1  
2  
3 employment of some type.

4           The evidence does not indicate what improvement  
5 there will be in the plaintiff's job outlook if he completes  
6 grade 12, nor does it indicate the effect that amputation  
7 of the plaintiff's right index finger would have. It could  
8 well be that he will, as a result of completing his  
9 education, earn more than he would have if he had not been  
10 injured. I find that, in view of the many uncertainties  
11 necessarily involved in assessing the plaintiff's future  
12 loss it is not reasonable to attempt to calculate his loss  
13 on the basis of a reduction of hourly pay rates, or an  
14 attempt to guess at annual loss. What the plaintiff has  
15 lost is the capacity to do certain jobs - whether he will  
16 actually suffer a loss because of this will depend to a  
17 considerable degree upon the plaintiff's own ability to  
18 adapt to the limitations now facing him. To do this the  
19 plaintiff needs time and training. Additionally the  
20 plaintiff also faces probable loss of income at some time  
21 in the future as a result of further operations. Taking  
22 these factors into account I fix sum of \$40,000 as a  
23 reasonable sum to compensate the plaintiff for potential  
24 loss of earnings, the cost of retraining, and the reduction  
25 in the jobs now available to him; keeping in mind the  
26 plaintiff's duty to do what he can to mitigate this loss.

27                           GENERAL DAMAGES

28           The plaintiff has undergone numerous operations  
29 and medical procedures involving significant pain. He  
30

1  
2  
3 faces more in the future with respect to his knee and  
4 recurring osteomyelitis in the right tibia. The dexterity  
5 of his dominant right hand is significantly limited by  
6 a stiff index finger, the flexion of which is presently  
7 limited to grasping objects of approximately the size of  
8 a drink can or larger. This may improve. The plaintiff  
9 has extensive scarring on his right leg above and below  
10 the knee, which, although not repulsive is certainly  
11 disfiguring. Most significantly as a result of injury  
12 to the cruciate ligaments in the right knee he may develop  
13 arthritis problems which could lead to pain and disability.  
14 Nonetheless at the moment the plaintiff can participate  
15 in the activities he enjoyed prior to his injuries such  
16 as skiing and tennis. Whether he will be able to reach  
17 his level of performance before the accident is uncertain.  
18 There is no medical evidence of muscle atrophy in the right  
19 leg and indeed in observing the plaintiff's leg in court  
20 the muscle development appeared to be normal. I find that  
21 it is probable that the plaintiff will be able to resume  
22 his prior activities at or close to his previous level  
23 in the near future, but probable that in the long run knee  
24 problems will hamper him.

25 I assess the quantum of general damages at 55,000.

26 SUMMARY

27 In summary the quantum of the plaintiff's claim  
28 is as follows:

29 (a) General Damages 55,000  
30

1  
2  
3 (b) Wage Loss to Date 5,600  
4 (c) Future Loss 40,000

5 The plaintiff, in accordance with the agreed division  
6 of liability in the case shall recover 75% of the quantum  
7 assessed plus prejudgment interest at the Registrar's rates  
8 from time to time on the general damage and wage loss to  
9 date, calculated as prescribed by the Court Order Interest  
10 Act R.S.B.C. 1979 c 76.

11 The plaintiff shall recover the costs of this action.  
12

13  
14   
15 Victor Curtis  
16 Judge V. R. Curtis

17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
Prince George, B. C.  
May 20, 1986