BETWEEN:

OTTAWA PRE-MIXED CONCRETE LIMITED ..... SUPPLIANT;

1964
Mar. 9, 23
Oct. 21

AND

HER MAJESTY THE QUEEN ..... RESPONDENT.

Crown—Petition of Right—Action for damages—Negligence—Apportionment of negligence—Assessment of damages—Crown Liability Act, S. of C. 1952-53, c. 30, s. 3(1)(a).

The suppliant claims compensation for damages suffered by it when one of its cement mixer trucks was damaged because of the collapse of a wooden ramp up which the truck was being driven during delivery of a load of cement to the "Garden of the Provinces", a public work being built by the National Capital Commission on Wellington

[1] [1948] Ex.C.R. 288.

1964

OTTAWA PRE-MIXED CONCRETE LTD. v. THE QUEEN

Street in the City of Ottawa. The National Capital Commission was at all material times an agent of Her Majesty the Queen in right of Canada.

Held: That since the ramp was not meant or built for the use of cement mixer trucks, it became the duty of the respondent's employees to prevent such use.

2. That the driver of suppliant's truck assumed the risk of driving his truck up the ramp without first inspecting it and despite the fact that he did not trust the ramp.

3. That the respondent is responsible for two-thirds of the damages and the suppliant for one-third.

PETITION OF RIGHT for compensation for damages caused through the alleged negligence of a servant of the Crown.

The action was tried by the Honourable Mr. Justice Dumoulin at Ottawa.

K. E. Eaton and *A. B. Doran* for suppliant.

D. H. Aylen and *Peter Sorokan* for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

DUMOULIN J. now (October 21, 1964) delivered the following judgment:

The suppliant, a company incorporated under the laws of the Province of Ontario, carries on a pre-mixed concrete business from its premises on Russell Road in the City of Ottawa.

It is alleged that, on August 9, 1962, at approximately 9:45 in the forenoon, one of the suppliant's cement mixer trucks "was damaged when a ramp onto which it had been backed on instructions of a servant of the Crown, acting in the scope of his employment, collapsed causing the said truck to roll over and come to rest on its side" (cf. exhibits 1, 2 and 3, photos).

Paragraph 4 of the Petition of Right states that "said ramp was located on property owned and occupied by the Crown known as the 'Garden of the Provinces' on Wellington Street in the City of Ottawa, and had been constructed by servants of the Crown with the authority of the Crown to enable trucks to back over some steps when making deliveries of concrete being used for construction purposes on the said property."

The petitioner represents that the Crown should be liable, under s. 3(1)(*a*) of the *Crown Liability Act*, 1-2 Elizabeth II, c. 30, for the damages suffered by suppliant resulting from the negligence of servants of the Crown acting in the scope of their employment, particulars of which negligence consist in:

(*a*) constructing a defective ramp unsafe for the purposes intended;

(*b*) directing the driver of the truck to back on to the ramp when the respondent's servant so acting knew or ought to have known that the ramp could not withstand the weight of a cement loaded truck.

It is further alleged that those servants of the Crown referred to in the petition of right "were all employed under the administration of the National Capital Commission, which, at all material times, was for all purposes an agent of the Crown by virtue of section 4 of the *National Capital Act*."

The damages claimed included the repairs to the truck and its cement mixing mechanism, the major portion of that particular item applying to the water tank shell, the charging hopper and the drum assembly, a total, labour included, of $7,766.81. In addition, a sum of $2,000 is sought for loss of use of the cement mixer while undergoing repairs, plus $39 for concrete spoiled in the accident.

The Statement of Defence admits the occurrence of the aforesaid accident on the day, time and at the spot mentioned in the petition and also agrees "that the National Capital Commission was at all material times an agent of Her Majesty the Queen in right of Canada", but denies the other allegations.

The Reply to the petition of right assigns the entire blame for the mishap to negligence on the part of suppliant's driver in that:

(*a*) he drove the truck on to the ramp without first ascertaining that it was safe to do so;

(b) ...

(c) he drove the truck to the point where the accident occurred without permission from any person authorized to give permission on behalf of the respondent;

(d) . . . when he knew or ought to have known that the weight of the truck and its load would be likely to cause the collapse of the ramp;

. . .

Additionally, it is said "that the suppliant was not invited to enter this part of the property owned by Her

1964

OTTAWA PRE-MIXED CONCRETE LTD. v. THE QUEEN

Dumoulin J.

Majesty, nor was the suppliant or its servants permitted to enter this part of the property...".

A counter-claim in a sum of $863.35 concludes the Statement of Defence for damages caused to a flight of granite steps forming part of the Garden of the Provinces, the property of Her Majesty. At the opening of trial, Mr. Aylen, counsel for respondent, withdrew this counter-claim, with costs up to March 4, 1964, going to suppliant.

The material facts are uncontradicted. Ottawa Pre-Mixed Concrete Ltd., in July and the early part of August, 1962, pursuant to requests from the respondent's servant, delivered several loads of concrete required for the building of a public work, called the Garden of the Provinces, in the City of Ottawa.

A full load of concrete stored in the truck consists of six cubic yards weighing 2 tons a yard, and the truck itself weighs 12 tons, in all, 48,000 pounds.

Mr. Winston Askwith, senior construction engineer for the National Capital Commission, hereinafter abbreviated to NCC, described at some length this ramp, in an Examination on Discovery held October 16, 1963. No special design was prepared and it had been constructed by "a small gang allocated to that particular work" (p. 5) "it had an intermediate crib support for it half-way up the ramp. It was continuous except for that" (p. 6). On the crib work the planking was applied and some long board stringers added "to put the planking on in a transverse manner" (p. 7). The timber utilized consisted in planks 10 inches wide and 3 inches thick, with a maximum length of 15 feet. "There were 3 or 4 stringers going up" upon which the planks were laid. The witness sums up the design of the ramp as follows: "In the transverse length it would be supported in three places but across the width we had at least three stringers, possibly four stringers going across". Necessarily, those stringers had the same measurements as the boards, a length of 10 to 15 feet and a width of 10 inches.

Next, Mr. Askwith, questioned about the breaking point of this wooden gradient, replies "approximately half way up the ramp". The timber had been obtained from a dismantled bridge erected "in the early 1900's" but maintained in good condition up to 1962. When asked whether any test was applied to find out if these timbers would support

the weight of a truck, Askwith answers: "No, it was not intended for the weight of a truck so no test was carried out" and explains that this ramp was destined "primarily to support material by the use of a wheelbarrow".

Several witnesses were called upon to relate the circumstances of the mishap. As might be expected in a case of this kind, the evidence adduced is somewhat contradictory.

Arvin Firobin, 27 years old, drove the truck on the day of the accident. Firobin has, since, left the suppliant's employ to take up a similar job with Saco Fuel Oil Co. He started truck driving for Ottawa Pre-Mixed Concrete Ltd. some two months before the accident of August 9. This man's story is that a month or so before the ill-fated August day, he delivered some loads of cement at the Garden of the Provinces. On the morning of August 9, Firobin brought his truck at the foot of the ramp where an unidentified watchman of NCC would have directed him to back his load up to the ramp to its upper extremity, and dump the concrete at a point indicated on ex. 1 by a wheelbarrow. This first delivery comprised only one-half load of cement, the other half being previously unloaded at the west end of the Garden of the Provinces. Half an hour later, at 9:45 or thereabouts, Firobin returned with a full charge of six cubic yards, a total weight, as already mentioned, of 48,000 pounds. The witness persists in his former statement that, on this second instance also, an NCC handyman directed the backing up of his truck. Unfortunately, as the crushing weight reached half way up, the ramp broke; the timbers becoming completely dislocated, the cement mixer turned upside down at the right of the slope. (cf. exhibits 1, 2, 3).

The driver's cross examination brought out certain facts which are not in complete agreement with the preceding statements. Firobin acknowledged that his employers warned him to use caution. He also says that he never left his truck to inspect the ramp because he figured his employers had examined it; neither did he enquire from the NCC people if it was fit to support so great a weight.

This witness does not recall whether or not one Séguin, an NCC employee, told him to unload close to the foot of the ramp at the time of his first delivery, August 9. As to the second load, the same day, Firobin testifies that "presumably, an NCC employee waved me up the ramp so as to

1964

OTTAWA PRE-MIXED CONCRETE LTD. v. THE QUEEN

Dumoulin J.

keep the truck in line". It is also possible, continues the witness, that he said to some NCC journeyman on his first August 9 trip "of having been there all summer", meaning that the ramp's solidity was assured.

The next witness, Roger Allaire, during July and August 1962, drove cement mixer trucks for Ottawa Pre-Mixed Concrete Ltd. Allaire, so he says, unloaded cement, in July and August, 1962, at the Wellington Street ramp and once or twice "backed his truck all the way up, somebody directing my movements". This unknown person, according to the witness, worked for NCC.

Apparently, Allaire displayed more prudence than his fellow driver, Firobin, and "looked at the planking before backing up. It seemed safe to me. If it had not I would not have backed up. The man directing my movements wore a brown shirt on which the initials P.W. appeared". After each delivery, Allaire obtained a signature on his receipt slips.

The evidence of Roland Maisonneuve, presently truck driver for Ottawa Transportation Commission, and similarly employed by the suppliant in the summer of 1962, is to the same effect. Maisonneuve, who possessed seven years' experience as conductor, made one delivery late in June, 1962, moving back his vehicle up to four feet from the top extremity of the gradient to discharge the cement in wheelbarrows. He examined the ramp but derived a sense of security from the impression that others had used it for identical purposes. The deponent concludes with this assertion: "There was a guy there who directed us the whole way up to where we had to stop and handed us the delivery receipt slips". Maisonneuve's use of the ramp probably occurred a week or four days before the incident.

Next, in the witness box, came Brian Martin Lock, a construction engineer domiciled in Ottawa. Mr. Lock, who obtained his engineering degree in England, possesses a long experience of construction jobs. He is asked how he would have attended to these deliveries of concrete had he been entrusted with the task in 1962. The witness eliminates as too expensive for a small job the method of hoisting cement with a crane and recommends facilitating the access to the point of unloading by means of a wooden slope. A proper construction would consist of guide

1964

OTTAWA PRE-MIXED CONCRETE LTD. v. THE QUEEN

Dumoulin J.

boards on either side, to center the wheels of trucks over the supporting beams and prevent them from rearing to one side. "This ramp", pursues Mr. Lock, "should be designed by somebody with an engineering background". The trucks should, when going up the ramp, be brought as close as possible to the ultimate point of delivery. A stopping plank at the rear end of the gradient was necessary to prevent backing beyond the rear end. The inference, here, must be that Mr. Lock disapproved of the ramp due to the irrefutable fact that it broke.

This much, then, for the suppliant's proof regarding the material circumstances of the mishap.

The recital of facts was completed by evidence adduced on respondent's behalf.

Emile Victor, in the summer of 1962, was the foreman entrusted by the National Capital Commission with the supervision of the work in course of execution on Wellington Street. Victor explains that concrete was ordered by him from Ottawa Pre-Mixed and also obtained elsewhere from a contractor, whose name he ignores and over whom he exercised no control. On account of what follows, it seems strange that this employee felt he could waive all responsibility for the use of the ramp by concrete mixer trucks other than those of the petitioner. It is admitted that the ramp served for the needs of the independent contractor before August 9. Yet, Emile Victor had been warned by the engineer in charge, Mr. Brooks, "not to use the ramp, because it was not made for my purposes". As this interdiction appeared too absolute, Victor suggested a compromise, or, in his own words: "I made arrangements with my boss I would tell Séguin (a subforeman) not to allow backing up on the ramp more than three feet."

On the morning of August 9, Emile Victor called for two loads of cement, the first was brought at the west end of the "Garden", the other and ill-fated one, where the trouble occurred. Victor did not observe the concrete mixer entering the wooden slope; a sound of cracking timbers made him turn around and he saw the truck slip sidewise and overturn.

This witness, the chief foreman, knew of the unsuitability of this slope for cement deliveries; his superior, Engineer Brooks, had told him so. Still, he maintained complete

1964

OTTAWA PRE-MIXED CONCRETE LTD. v. THE QUEEN

Dumoulin J.

aloofness save for suppliant's vehicles, not realizing this occasional indifference might soon fritter away the prohibition in all cases, or be interpreted as a tacit invitation.

Lucien Séguin, for 11 years in the employ of NCC, an assistant to the preceding witness, offers another instance of a quickly changing mind, one who forbids and then allows. His testimony being the most revealing of all, since he stood at the foot of the ramp, I will quote its essential passages as they appear in my notes. Séguin says that "two loads of concrete were delivered on August 9, the first at the western extremity of the 'Garden', where half was dumped out, and the remainder brought over to the ramp. I had orders to forbid the use of that ramp to cement delivery trucks." Séguin swears he imparted these instructions to Firobin, suppliant's driver, but ineffectually, the witness adding: "That driver, far from heeding my orders, started backing up the ramp; seeing that, I yelled to Macraw, a labourer, to guide the truck's movements." One might expect Séguin to have more energetically striven to prevent this brazen defiance. However, it could happen that he simply did not have time to do anything else. Such an excuse could not be invoked when, a few minutes later, Firobin returned with his truck, this time bearing a full 6 cubic yard load. Lucien Séguin then had ample opportunity to block access to the wooden plank, and obtain due compliance with his instructions. Instead, he proved fully acquiescent, offered no opposition, and cooperated to the extent of ordering Albert Macraw to guide the mixer's backing movements.

This change of conduct, at the crucial moment, seems a positive authorization on Séguin's part to use a ramp he knew "was not intended for those purposes" and to which he was ordered to refuse admittance.

A last witness called by the respondent imparted to the Court some significant information. Bernard Gagnon, a young R.C.M.P. constable, reached the scene of the accident shortly after its occurrence and saw the disordered planking and capsized mixer. This Police officer requested the driver's explanation of the matter. Firobin told constable Gagnon the load his truck carried when the ramp broke was heavier than a preceding one delivered the same morning, adding "he did not trust that ramp too much but

had to use it due to the rush of cement deliveries elsewhere that day."

1964

OTTAWA PRE-MIXED CONCRETE LTD. v. THE QUEEN

Dumoulin J.

Suppliant's objection to this statement on the ground of hearsay is manifestly unwarranted.

The Court, having carefully reviewed the evidence, believes that each party should bear its share of responsibility. Both are at fault. Since there can be no doubt that this ramp was not meant nor built for the use of cement mixer trucks, engineer Brooks' cautioning directions to Victor, the chief foreman, prove it, then it became the duty of respondent's employees, Emile Victor and Lucien Séguin, to carry out these orders by taking the necessary steps. This obligation was not discharged properly, as we have seen.

On the other hand, a person entrusted with the care and control of a cement mixer truck weighing, when loaded, 48,000 pounds, cannot reasonably ignore the risks inherent to such a tremendous charge. Before engaging his vehicle on the ramp, especially after Séguin's warning, Firobin, at the very least, should have attentively inspected it and realized it was unsafe. Furthermore, Firobin told the R.C.M.P. constable "he did not trust the ramp too much", but assumed the risk in order to meet the daily pressure of jobs. Nevertheless, the fact remains that the intervening period between the two deliveries, on the forenoon of August 9, afforded Lucien Séguin ample time to devise the ways and means of preventing any further disregard of his instructions. Instead, suppliant's truck was complacently waved up the ramp.

I would hold the respondent responsible for two thirds of the damages to be assessed and the suppliant for the one third remaining.

The apportionment of those amounts also requires attentive consideration.

The damaged concrete mixer was shipped to Montreal for repairs on August 10, 1962, at the shops of Mount Royal Paving and Supply Ltd., the suppliant's parent company, and returned to Ottawa 25 days later, on September 6.

Mr. Frederick C. Dalton, vice president and manager of Mount Royal Paving and Supply Co., testified that the concrete mixer was purchased in 1954 at a price of $6,000, and the truck chassis in 1956 for $10,145; a total of $16,145. According to this witness, the cost of a mixer and truck

1964

OTTAWA PRE-MIXED CONCRETE LTD. v. THE QUEEN

Dumoulin J

chassis in 1964 would amount approximately to $30,000. In 1962, the value of the truck chassis, subsequent to the mishap, would have shrunk to $5,075 and that of the damaged mixer to $2,000 in all, $7,075. Mr. Dalton specifies that these depreciated entries in the company's books bear no relation to the real worth of a cement mixer truck in proper condition. We are also told that the duration or life of a concrete mixer, with proper maintenance, could extend to 15 or even 20 years.

Mr. James MacDonald, general superintendent of equipment for Mount Royal Paving and Supply, declares he inspected the truck upon its arrival in Montreal, August 10, and files exhibit 4 as a detailed list of the material and labour required for the repairs. This exhibit shows a sum of $8,099.69 for parts, tax included, and $416 for labour, totalizing $8,515.69. Mr. MacDonald singles out three components of the mechanical assembly as having sustained the major injuries, namely, as listed on exhibit 5, the drum assembly priced at $5,016, the water tank shell $756.80, and the charging hopper $528.53. The three renewal parts were taken out of a 1956 concrete mixer which had previously undergone a complete renovation so that replacement could be considered as brand new material. Frederick Dalton and MacDonald felt a certain amount of depreciation on those major parts, put in the damaged truck, existed and would have attributed a reduction of 25% for this reason. However, no trace of this appears in exhibits 4, 5 or 8. Possibly it had already been deducted from the price mentioned on those exhibits.

A competitor, Mussens Canada Limited, was asked to quote prices for material and labour required to restore the unit to pre-accident operating conditions. Their figures, in exhibit 7, are: $7,641.22 for material and $557.50 for labour; in all $8,198.72. The preceding estimate was prepared by Mussens' Montreal buyer, Michael Finnerty, who previously obtained the cost prices from the Milwaukee firm of Rex Chainbell Co. Mr. Finnerty notes that the prices given on exhibit 7 are selling prices, those charged to clients.

The respondent heard two witnesses on the question of damages. The first, Mr. Roy Booth, of Toronto, President of Collision Appraisal Services Ltd., a firm incorporated in 1958, testifies he deals with damages to cement mixers

and their supporting trucks three or four times each month. Mr. Booth values a 1962 mixer, in good condition, after 8 years' usage at $1,500 plus expenses recently incurred for its careful maintenance. In 1954 or 1955, the mixing apparatus cost some $6,100 or $6,300 and the truck itself about $14,000. Mr. Booth personally received from manufacturers the information contained in exhibit C, wherein brand new water tank, charging hopper and drum assembly are respectively priced at $319.58, $528.53 and $3,927; in all $4,775.11, as against $6,301.33, a difference of $1,526.22.

Mr. Michael Herman Bruce of Ottawa is manager of Moto-Mix Concrete Co., engaged in ready made concrete for building purposes. He corroborates Booth, agreeing that the price of a 4½ yard mixer in 1950 was in the order of $6,000, and $6,400 for a 6-cubic yard. The value of an 8-year-old mechanism of this description, in 1962, would range between $1,200 and $1,600 having undergone a yearly depreciation of 20%.

I need not attach much importance to the value, in 1962, of the suppliant's injured property but I am mostly concerned with finding the true and fair cost of the material and labour necessitated for the repair job. A stretch of $1,526.22 separates the estimates submitted by each party. The suppliant resorted to material already used and, according to its own expression, "cannibalized" from another unit of its trucking fleet, 50 to 55 in number, whilst the parts priced on exhibit C are brand new. It seems justified to deduct $1,000 from the amount of $7,766.81 claimed in para. 8 of the petition as the total expenditure incurred to repair the damage, which should therefore be assessed at $6,766.81.

The remaining item for which compensation is sought bears on the loss of use of a cement mixer. In his evidence, Mr. Dalton valued this loss at $8 an hour for a 10-hour day, or a total of $2,000 for 25 days. In truth, the question cannot be solved so easily because Dalton failed to bring out the margin of net profit. In order to have an acceptable notion of this, we must revert to L. W. Fransechini's examination on discovery held October 16, 1963. This gentleman is the General Manager of the suppliant company. On pages 5 and 6 of his transcribed evidence, Fransechini gives some explanation of the items making

1964

OTTAWA PRE-MIXED CONCRETE LTD. v. THE QUEEN

Dumoulin J.

up the rental price of cement mixing trucks. A closer indication is found on pages 7 and 8 from which I quote a few questions and answers:

By Mr. Aylen:

32. And then there is an indication that if the truck like the truck in question were rented the rental would be $12.00 an hour.

A That would include the operator's time and the fuel and oil and supplies.

33. That would include all the operating expenses?

A. Yes, plus a profit on the rental.

34. How much of the $12.00 would be operating expense?

A. $2 00 an hour for the driver's wages.

To this would be added $0.50 or so for gas and oil, says the witness, plus $1.50 an hour for profit. No other proof on this point was adduced to establish the loss of use, which, consequently, I must apportion at $15 a day for a period of 25 days, a total of $375.

The damages suffered will be:

For material and labour	$6,766.81
For loss of use	375 00
One load of concrete	39 00
	$7,180.81

of which two thirds (2/3), or $4,787.21, are granted.

For the reasons above, this Court doth order and adjudge that the suppliant is entitled to recover from Her Majesty the Queen the sum of $4,787.21 being part of the relief sought by his petition of right, and costs to be taxed.

Judgment accordingly.